

IN THE LABOUR COURT OF SOUTH AFRICA

Held in Durban

Case No : D 237/99

In the matter between :

GHULAM MURTUZA SAJID

Applicant

and

ABUBAKER MAHOMED N.O.

First respondent

ABUBAKER ISMAEL N.O.

Second Respondent

GORA ESSAY N.O.

Third Respondent

HAROUN GANIE N.O.

Fourth Respondent

MAHOMED JOOSUB N.O.

Fifth Respondent

AHMED VALLY MOHAMED N.O.

Sixth Respondent

ABDUL WAHAB N.O.

Seventh Respondent

ABDUL MALEK N.O.

Eighth Respondent

ABU THAIR KHATIB N.O.

Ninth Respondent

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Tenth Respondent

DHAYANITHIE PILLAY N.O.

Eleventh Respondent

JUDGEMENT

ZONDO J:

Introduction

[1] In this matter the applicant, an employee of a Trust known as the Juma Musjid Trust whose trustees are the first up to the ninth respondents, brought an urgent application in this Court against the first up to the ninth respondents, the Commission for Conciliation, Mediation and Arbitration (“**the CCMA**”), the 10th respondent, as well as a part-time senior commissioner of the CCMA (“**the commissioner**”) (the 11th respondent). The applicant sought in effect to have an arbitration award of the commissioner reviewed and set aside in part and to interdict the first up to the ninth respondents from continuing with what may be regarded as alleged harassment of the applicant by the first up to the ninth respondents. Landman J granted a rule nisi on the 12th March 1999 which was extended from time to time. The matter came before me on the 7th May 1999 when I heard argument. As argument could not be completed on that day, the matter was adjourned to the 13th May 1999. On that day argument was continued with. At the conclusion of argument, I reserved my judgement and extended the rule pending the handing down of my judgement. I have had the opportunity of carefully studying the more than 500 pages involved in this matter and am now in a position to give my judgement. This, therefore, is my judgement.

[2] This application relates both to a review application as well as an application for the confirmation of a rule nisi in respect of alleged harassment. The papers are very voluminous and they count more than 500 pages in total. Some of the facts are relevant to the review application. Others are only relevant to the interdict application while, furthermore, others are relevant to both the

review application as well as the interdict. In the light of this it is convenient to divide this judgement appropriately. The first part of the judgement will relate to the review application and the second part will relate to the interdict application in relation to the alleged harassment.

Factual background to the review application

[3] The applicant, an adult male, describes himself in his founding affidavit as **the Imam and Khatib of the Grey Street Mosque**, in Durban. In his answering affidavit, the first respondent, about whom more will be said later, explains that **“an Imam is the person who leads the prayer at the mosque”** and that a Khatib **“is the person who delivers the prayer on Friday”**. The first, second and up to the ninth respondents are adult males who are trustees of the Juma Musjid Trust (**“the Trust”**). The first nine respondents have been cited in their capacities as trustees of the trust. The first respondent, an advocate of many years’ experience, is the chairperson of the Trust. The Trust is charged with the responsibility of running the Mosque in Grey Street, Durban.

[4] The applicant was employed by the Trust with effect from the 1st September 1986. Initially the employment was for a fixed term. Later on he concluded with the Trust a contract of employment for an indefinite period. His position, as already stated, is that of the Imam and Khatib of the Mosque.

[5] In terms of the Deed of Trust governing the Trust, as amended, one of the objects of the Trust is **“to own and continue the control and administration of the Grey Street Juma Musjid for the benefit of the followers of the Sunni Muslim religious faith”**. The applicant’s duties include leading prayers in the Mosque, to lecturing on certain occasions as well as supervising staff at the Mosque. He is responsible to the Trustees on all matters relating to his office of

Khatib and Imam.

Factual background to the review application

[6] On the 15th January 1996 the respondent (by which term I will be referring to the Trust as the applicant's employer or the Trustees collectively representing the Trust) decided to dismiss the applicant. A letter to that effect was given to the applicant that night. The reasons given in the letter for the dismissal of the applicant included the following, namely, that :-

- (a) **“on diverse (sic) occasions you demonstrated gross insubordination to reasonable requests by members of the Trust Board to conduct yourself in a manner that is fitting the office of the Imam of the Juma Musjid”,**
- (b) **“you have breached the provisions of your contract of employment far too frequently in spite of repeated warnings from various members of the Trust Board . . .”**
- (c) **“you frequently abused your position as Imam by using the office to create factions within the congregation comprising of (sic) individuals who show no regard for the sanctity and dignity of the Mosque . . .”**

[7] Unhappy with his dismissal, the applicant brought an application to the industrial court for an order for interim reinstatement on the basis that the dismissal was (prima facie) unfair. That application was in terms of sec 43 of the Labour Relations Act, 1956. The industrial court granted the applicant the interim order of reinstatement he was seeking. The respondent was not prepared to reinstate the applicant physically but elected in terms of sec 43(7) of that Act to pay the applicant his remuneration in the interim without making use of his services.

[8] Subsequently the applicant referred the dismissal dispute to the industrial court for final determination in terms of sec 46(9) of that Act. The respondent initially sought to oppose or defend that unfair labour practice claim but withdrew its opposition before the trial date. The respondent's opposition appears to have been withdrawn unilaterally. The applicant proceeded with the

action and obtained a judgement in his favour. In terms of the judgement of the industrial court, the dismissal was found to have been unfair both substantively and procedurally and to have constituted an unfair labour practice. The industrial court ordered the respondent to reinstate the applicant and to pay him compensation for the period from the date of dismissal to the date of the order. In terms of sec 17(12)(a) of the Labour Relations Act, 1956 the industrial court only had power to make an order of costs against the losing party in matters coming before it if to do that would meet the requirements of law and fairness. In that case the industrial court ordered the respondent to pay the applicant's costs. The sec 43 order was made in June 1996. The sec 46(9) determination was made in May 1997. The applicant resumed his duties late in May 1997.

[9] By way of a letter dated the 10th October 1997 the applicant was informed by the respondent's attorneys (Deneys Reitz at the time) that he was not to conduct the Khutbah and the congregational prayer at the Mosque on that day - it being a Friday. He was told that this duty was to be performed by the Deputy Imam. He was also instructed not to deliver any lecture. He was told that he was being instructed in these terms because certain complaints had been made concerning his conduct and that such complaints were at that stage the subject of an investigation.

[10] On the 24th October 1997 the respondent addressed a letter to the applicant in terms of which the applicant was suspended from his duties. The first paragraph of the letter said that the Board of Trustees had taken a decision **“to suspend you pending a disciplinary enquiry”**. The enquiry was going to be convened to consider certain charges against the applicant. The charges listed in that letter were that :-

“1. on or about 15 August 1997 you called for a Moulood before the congregation in the Grey Street Mosque without having obtained the consent of the Trustees; alternatively you convened a Moulood on the instructions of a so-called ‘Musallie’s Committee’ when you were

aware that such committee did not have the requisite authority to do so on behalf of the Trust;

- 2. on or about 26 September 1997 you removed two copies of a notice without authority one from the wall and one from the notice board at the Grey Street Mosque knowing that this notice had been placed there by the Trustees to confirm the postponement of the AGM by the Trustees;**
- 3. on or about 26 September 1997 you misrepresented to a member of the congregation at the Grey Street Mosque that the AGM had not been postponed, despite having knowledge that the Trustees had postponed the AGM;**
- 4. on or about 27 September 1997 you, pertaining to such removal on 26 September 1997, a member of the congregation (sic) to make a false statement to another person to the effect that you had not removed this notice;**
- 5. on numerous occasions during the course of September and October 1997 you have openly and unreasonably criticised the Trustees before the congregation in the Grey Street Mosque;**
- 6. on or about 20 October 1997 you removed a further notice from the notice board in the Grey Street Mosque without authority knowing that this notice was placed there by the Trustees;**
- 7. consistent failure to attend to compulsory Fajr Congregational prayer at the Grey Street Mosque.”**

[11] The last four paragraphs of the letter read thus :-

“The Juma Musjid Trust reserves the right to supplement the charges against you, which further charges may arise from the investigation which is currently taking place. You will be given timeous notice of any further charges and you will be given a proper opportunity to prepare for your disciplinary enquiry.

The Juma Musjid Trust will be arranging for an independent person to chair the disciplinary enquiry. You will be given the opportunity at the disciplinary enquiry to call witnesses, to question any witnesses called by the Juma Musjid Trust and to lead evidence in your defence. Both the Juma Musjid Trust and yourself will be entitled to legal representation.

Please advise Mr Murray Alexander at Deneys Reitz Attorneys whether you want to make use of legal representation at the disciplinary enquiry. You will be provided with further details regarding the disciplinary enquiry shortly.

You are reminded that you are not to perform any of your normal duties pending the conclusion of the disciplinary enquiry. In particular, you are not to conduct the congregational prayer at the Grey Street Mosque on Friday or on any other day. You will receive your full pay whilst on suspension”.

[12] The disciplinary inquiry which was convened to consider the charges against the applicant commenced on the 29th January 1998. It was chaired by an independent person, one Advocate Boda from the Johannesburg Bar. Both the

applicant and the respondent were represented by legal practitioners in the disciplinary inquiry. The applicant pleaded not guilty to the charges. The disciplinary inquiry sat from time to time since 29 January 1998 until December 1998. During that period the respondent amended and added to the charges against the applicant.

[13] The respondent was the first of the parties to lead evidence in the enquiry. Among the witnesses who gave evidence for the respondent was the first respondent, the chairperson of the Trust . After the respondent had led all its witnesses, the chairperson expressed prima facie views - which were favourable to the applicant's case - and adverse to the respondent's case - and urged the parties to explore the possibility of a settlement. No settlement was reached between the parties. The applicant's attorney applied for the equivalent of what in a criminal case would be a discharge of the accused at end of the State case.

[14] The chairperson declined to deal with the enquiry in the manner implied in **“the application for a discharge”** and called upon the applicant to decide whether he would close his case without leading any evidence or whether he would lead evidence. The applicant decided to call an expert witness and another witness before closing his case. The respondent re-opened its case and led the evidence which appears to have been presented on the basis that it was expert evidence. That concluded the leading of oral evidence.

[15] The day on which the leading of oral evidence was concluded was Saturday the 28th November 1998. On that day the applicant communicated through his attorney to the respondent his commitment to his employment and his wish to meet with the trustees to promote a constructive relationship. That was before the applicant closed his case. The 5th December 1998 was then fixed as the date for the presentation of oral argument by both parties. However, the

hearing of argument was postponed at the instance of the respondent. The 12th December was then fixed as the date when argument would be heard.

[16] On the 11th December 1998, the respondent withdrew all charges against the applicant. This was communicated to the applicant's attorneys by the respondent's attorneys by way of a letter dated 11th December 1998. As that letter is very important in these proceedings, I deem it appropriate to quote its contents in full. The letter reads thus :-

“We have been instructed by our clients to advise you as follows :-

- 1. Our clients have decided to withdraw all the charges against your client and not to proceed with the disciplinary enquiry. Our clients have made this decision having regard to the prima facie view expressed by the chairman of the disciplinary enquiry, advocate F. Boda.**
- 2. Our clients intend meeting with your client next week to discuss his return to work. Our clients will contact your client directly in this regard. Your client is not to return to work pending the meeting with our clients. (My underlining). On the basis that the disciplinary enquiry is no longer proceeding, our clients have terminated our mandate”. (My underlining).**

[17] It appears that on the same day that the charges were withdrawn by the respondent namely, the 11th December 1998, the applicant completed the necessary form for the referral of a dispute to the Commission for Conciliation,

Mediation and Arbitration (**“the CCMA”**), (which is the tenth respondent in this matter), for conciliation. The CCMA date stamp on the referral form indicates that the referral form was received by the CCMA on the 15th December 1998.

[18] In par 3 of the referral form, the applicant described the dispute as **“the unfair suspension of the applicant”**. In par 4 of the referral form, the applicant was required to bring to the attention of the CCMA special features of the dispute. He gave them as being the following :-

“The applicant has been suspended for spurious reasons for over one year ‘pending a disciplinary enquiry’. Notwithstanding the collapse of its case and the expression of adverse prima facie views by the chairperson, the respondent has continued to suspend the applicant. The respondent has now purported ‘to withdraw the charges’ and ‘not to proceed with the enquiry’ yet still maintains the suspension”. In par 5 of the referral form the applicant wrote that the dispute **“arose on 24 October 1997 and aggravated further on 11/12/98”**.

[19] In par 3(b) of the referral form the applicant stated that the dispute related to item 2(1)(c) of Schedule 7 of the Labour Relations Act, 1995 (**“the Act”**). That is a reference to the residual unfair labour practice provisions relating to **“the unfair suspension of an employee or any other disciplinary action short of dismissal in respect of an employee”**.

[20] As on the 4th January 1999 the respondent had not contacted the applicant directly (as it had been intimated in the letter withdrawing charges against him) for the purpose of discussing his return to work, the applicant’s attorney wrote to the respondent and asked why the applicant remained

suspended and why the list of previous charges against the applicant remained displayed on the notice board in the Mosque. The respondent did not reply to this letter.

[21] The conciliation meeting was initially scheduled for the 8th January 1999. On that day the matter was postponed to the 14th December 1999 at the instance of an attorney who turned up at the CCMA on behalf of the respondent. On the 14th January the same attorney turned up and sought to have the referral dismissed on the basis that the applicant had cited the Trust and not the trustees individually.

[22] The CCMA was not prepared to dismiss the matter on the basis contended for by the attorney for the respondent. Accordingly it issued a certificate to the effect that the dispute remained unresolved. On none of those two dates did any of the trustees attend the CCMA. In fact the conciliating commissioner had to issue the outcome certificate without any actual conciliation being attempted. The matter was then referred to arbitration. The CCMA appointed the 11th respondent, a part time senior commissioner, to arbitrate the dispute.

The arbitration

[23] The matter was set down for arbitration on the 8th February 1999. On that day the applicant was still represented by the attorney who had represented him in the disciplinary enquiry. On behalf of the respondent appeared Adv. V. Soni who also represented the 1st to the 9th respondents in this matter. There was argument on the duty to begin. The commissioner ruled, after hearing argument,

that the respondent bore the duty to begin.

[24] After Mr Soni had heard during argument on the duty to begin that the applicant's position was that he did not know why the suspension continued, he announced that the Board of Trustees would be convening an enquiry into the applicant's conduct to determine whether the employment relationship between the applicant and the respondent had not broken down. The matter was then adjourned to the 11th February at the instance of the respondent's Counsel who said his witness was not available.

[25] On the 11th February the arbitration proceeded. Mr Soni closed the respondent's case without leading any oral evidence. However, certain admissions were agreed between the parties and were placed before the commissioner. Certain documents were also placed before the commissioner by agreement. The applicant's attorney also closed the applicant's case without leading any oral evidence. Thereafter argument was presented to the commissioner.

[26] On the 20th February 1999 the commissioner issued her award. The award was in the following terms :-

- “1. The suspension of the applicant was procedurally unfair;**
- 2. The suspension of the applicant is substantively fair;**
- 3. The respondent is directed to hold an inquiry to determine the compatibility of the applicant to remain as its employee by no later than 25 February 1999.**
- 4. The respondent is directed to pay 75% of the applicant's costs**

on the highest scale in the magistrate's court".

It is paragraphs 2 and 3 of the award that the applicant seeks to have reviewed and set aside.

The merits of the review application

[27] The basis on which the applicant seeks to have the commissioner's award reviewed and set aside is that the award has **"no rational objective basis justifying the connection made by the commissioner between the material properly available to her and the conclusion to which she came"**. At this stage I will deal only with the basis for the challenge of par 2 of the award of the commissioner. I will deal with par 3 of the award later.

The arbitrator's finding that the applicant's suspension was substantively fair

[28] In order to properly determine whether the commissioner's award falls to be reviewed and set aside on the basis contended for by the applicant, it is necessary to identify the material and evidence, that was before the commissioner and, to thereafter, assess the reasons given by the commissioner for the award in the light of such material.

[29] I have already stated above that the respondent's Counsel closed the respondent's case in the arbitration without leading any oral evidence. I have also said that certain documents and admissions were placed before the commissioner by consent of both parties. The admissions which were placed before the commissioner by consent of both sides are set out under par 118 of the founding affidavit. They are the following :-

"118.1 The applicant is the Imam and Khatib of the Grey Street Mosque;

118.2 the applicant was dismissed in January 1996 by the trust Board (sic);

118.3 the applicant was re-instated in terms of Section 43 of the Labour Relations Act, 1956 in June 1996;

118.4 the applicant was suspended subsequent to the Section 43 order being granted;

118.5 the applicant was reinstated in terms of section 46(9) of the Labour Relations Act, 1956 in May 1997;

118.6 the applicant was suspended in October 1997 pending a disciplinary enquiry in respect of charges set out in Exhibit E;

118.7 the disciplinary charges were supplemented in accordance with Exhibit A27;

118.8 a disciplinary enquiry proceeded on or about the dates reflected in Exhibit B;

118.9 at the time of the closure of [the applicant's] case before the disciplinary enquiry, the [applicant's] attorney recorded [the applicant's] tender to meet with the Trustees for the purposes of reconciliation. The tender was not accepted and remains open". (Par 118.9 of the following affidavit).

[30] A number of documents were then placed before the commissioner. They were introduced as exhibits A1-44; B, C, D, E, G and H. I have read the contents of all these exhibits. I do not intend referring to any one of them except if and when it really becomes necessary to do so as I proceed with this judgement. It suffices to state that exhibit C consists of the transcript of certain evidence led on behalf of the respondent during the disciplinary enquiry of 1998.

[31] A reading of the transcript referred to above reveals that evidence was led on behalf of the respondent to the effect that there was no longer any trust between the applicant and the respondent / the trustees, especially the first respondent. Part of that evidence was also to the effect that the employer - employee relationship between the parties had broken down and that the applicant could not continue to be employed by the respondent in those circumstances. In fact according to the transcript the first respondent inter alia testified as follows in the disciplinary enquiry:-

"Well, the conduct that has been going on for the past two years and the preceding conduct before that, any semblance of any trust has totally disintegrated". (See p198

of the indexed papers). The respondent is reported to also have said at the enquiry :- **“Once there is a breakdown employer/employee relationship (sic) there is going to be no contract existing and there is going to be no job”**.

[32] Exhibit **“G”** is a document recording the charges which, Mr Soni announced at the arbitration, would be faced by the applicant in a disciplinary enquiry which he said he had no instructions whether or not the trustees had taken a decision to hold.

[33] Exhibit **“G”** is not signed. It was written in that document that the applicant remained suspended pending an enquiry to determine the following :

- “1. Whether the employee, by his conduct and insubordinate attitude to the Trust and Trustees, has destroyed the trust and confidence between him and the Trustees;**
- 2. Whether the employee, by his conduct and insubordinate attitude to the Trust and Trustees, has rendered a continued employment relationship between him and the Trust to be intolerable;**
- 3. Whether the employment relationship between the employee and the Trust has broken down irretrievably;**
- 4. Whether the failure or inability of the employee to maintain the standard of relationship with peers, subordinates and superiors set by the Trust has led to the breakdown of the employment relationship on account of incompatibility”**.

[34] Having referred above to the common cause facts as well as documents which were placed before the commissioner by consent of the parties, it remains for me to also say, before proceeding with this judgement, that I have had the opportunity of reading the transcript of the arbitration proceedings before the 11th respondent in its entirety. If I find it necessary to refer to its contents in this judgement, I will do so. Otherwise I do not propose to do so.

The commissioner's award

[35] The commissioner stated in the last paragraph at page 8 of her award that, to determine whether the suspension was substantively fair, she had to satisfy herself that prima facie there was a breakdown in the employment relationship sufficient to warrant the holding of an enquiry into the applicant's compatibility. She later on concluded that : **“On the basis of these facts, it appears prima facie that the relationship has broken down and that there is a substantive basis for holding an inquiry to determine the relationship between the parties”**.

[36] When, before recording this conclusion in her award, the commissioner said: **“on the basis of these facts”**, she must have been referring to the six paragraphs in her award which come after the heading : **“Analysis”** at page 8 of her award which go up to the end of page 9 of her award. In the first of those paragraphs, the commissioner does not say anything much immediately relevant to this stage of this judgement.

[37] It is clear from the commissioner's award that what she perceived as the question for her to determine was whether prima facie there was a breakdown in the employment relationship justifying the holding of an inquiry into the applicant's compatibility. The dispute that the applicant had referred to the

CCMA did not anywhere make reference to a breakdown in the employment relationship nor did it refer to the applicant's compatibility or incompatibility with the respondent.

[38] The reason why the commissioner perceived the question before her as being whether there was a breakdown in the employment relationship was that the respondent's defence to the applicant's claim was that the suspension was justified because there was a pending enquiry to determine whether, by virtue of certain alleged conduct on the applicant's side, the employment relationship had broken down, or simply whether the employment relationship had broken down.

[39] The dispute before the commissioner was the one in respect of which the applicant had completed a referral form on the 11th December 1998. That is the claim which the respondent was called upon to answer and that was the dispute the commissioner was called upon to arbitrate. It is therefore clear that the suspension that the applicant was complaining about was the same suspension which the respondent had effected in October of 1997 **“pending a disciplinary enquiry”**. The enquiry contemplated in the letter of that suspension was the one which was chaired by advocate Boda which the respondent had abandoned just before the decision could be made on the charges brought against the applicant.

[40] A proper analysis of the applicant's referral form, the common cause facts placed before the commissioner as well as the argument presented before the commissioner on behalf of the applicant reveals that the applicant's true complaint was this :- As the enquiry pending which my suspension was instituted has been abandoned in the light of the withdrawal of all charges against me, it is unfair for the respondent not to allow me to resume my duties.

[41] In response to Mr Soni's statement from the Bar at the arbitration that an inquiry would be held to determine the alleged breakdown of the relationship, it had been made abundantly clear to both Mr Soni and the commissioner by the applicant's attorney that he was disputing any statement that the respondent had taken a decision to hold an enquiry such as was being referred to by Mr Soni or

that subsequent to the withdrawal of the charges on the 11th December 1998, the respondent had taken a decision to suspended the applicant.

[42] Mr Soni did not lead any oral evidence either to prove that a decision had been taken by the respondent that another inquiry would be held or to prove that a proper basis existed on which the respondent could reasonably have taken such a decision. Once there was no such evidence in circumstances where the respondent sought to defend the unfair suspension claim on the basis that there was to be an inquiry, it was not permissible for the commissioner to determine the dispute on the basis that there would be an enquiry. I say that because there was not even evidence that the trustees had decided to convene a meeting where such decision could be taken.

[43] This is not a case where the decision whether there would be an enquiry lay with one person. This is a case where such a decision had to be taken by all the trustees or by such number of trustees as would form a quorum in terms of the Deed of Trust. Once it is accepted that there was no such evidence, the question that arises is : What evidence was before the commissioner which tended to provide a justification for the applicant not being allowed to resume his duties?

[44] It must be remembered that among the common cause facts placed before the commissioner was the fact that the suspension in dispute had been effected pending a disciplinary enquiry. That enquiry had been abandoned by the respondent. Also the respondent indicated that it wanted to meet with the applicant to discuss his return to work.

[45] The question which the common cause facts before the commissioner gave rise to was the following :if upon the withdrawal of the charges on the 11th December 1998, the respondent thought there was a basis to discuss the applicant's return to work, what had happened after the 11th December 1998 which justified not allowing the applicant to resume his work?

[46] The defence raised by Mr Soni in the arbitration was to say that there was to be an enquiry to determine whether the employment relationship between the

parties had broken down. The applicant placed in issue that there was to be such an enquiry and that there was a basis for such an enquiry. In those circumstances for the respondent to succeed in its defence, it had to show by way of evidence that :

- (a) at a certain point the trustees had information which tended to show that prima facie there had been an irretrievable breakdown in the employment relationship between the two parties, and
- (b) that, in the light of that information, they had taken a decision that an enquiry would be held to determine the issues in Exhibit G.

[47] No oral evidence was led on behalf of the respondent before the commissioner. Also the agreed common cause facts which the parties placed before the commissioner did not include any of this.

[48] I hesitate to think that the commissioner regarded Mr Soni's statement from the Bar as evidence. I also hesitate to think that she regarded as evidence factual material stated from the Bar falling outside the common cause facts. In respect of the documents placed before the commissioner, the commissioner herself records in her award only the contents of the deed of trust and the employment contract as having been admitted as true. There was no agreement about the veracity of the contents of other documents and correspondence.

[49] The commissioner said whether or not the respondent had taken a decision to hold an enquiry was relevant to **“determining the fairness of the suspension”**. (P7 of award). She acknowledged at the top of p7 of her award that there was no evidence of a decision properly taken in terms of the trust deed, or in any other manner, to hold an enquiry. She then said this gave rise to the inference that the respondent had not seriously considered proceeding with an enquiry against the applicant until the time of the arbitration. She said that inference was fortified by the fact that even at the arbitration Mr Soni was not able to say whether the trustees had decided whether to hold an enquiry against the applicant in respect of the alleged breakdown of the relationship or to dismiss the applicant for operational reasons.

[50] When the commissioner said the absence of evidence of a decision on the part of the trustees to hold an enquiry against the applicant gave rise to the inference referred to above, she gave the respondent unwarranted credit in that the suggestion is that the respondent might have wanted to hold an enquiry but, may be, was not keen enough. In my view the absence of evidence to the effect that such a decision had been taken meant that it could not be said that there was an enquiry pending or that one was planned. Indeed it means that whether or not the suspension was fair had to be decided on the basis that there was no evidence that an enquiry would be held at any stage. The reason I say that this is the basis upon which the matter had to be decided is that, if and when the trustees met to discuss whether to allow the applicant back at work or what to do with him, they could well decide not to hold an enquiry.

[51] The commissioner seems to have accepted that as at the time of the arbitration, the position was that the trustees wanted to hold an enquiry. I infer this from the fact that the commissioner said that an inference could be drawn that **“until this arbitration”**, the respondent **“had not seriously considered proceeding with an enquiry against the applicant”**. There was no evidence justifying the qualification **“until this arbitration”**.

[52] Although the commissioner had correctly pointed out that the absence of evidence that a decision by the trustees to hold an enquiry had been taken was relevant for determining the fairness of the suspension, she later on proceeded to determine that issue without reference to the absence of that evidence. She did this notwithstanding the fact that during argument the applicant’s attorney had placed much reliance on the absence of such evidence in support of his argument that the suspension was not supposed to be continuing.

[53] In fact as one reads the commissioner’s award from just under the heading: **“Analysis”** at page 8 it becomes very and clear that the commissioner proceeded to decide the matter on the basis that there was to be an enquiry into whether the employment relationship had broken down. That is the only way one can explain the first sentence of the last paragraph at page 8 of the award. In

that sentence the commissioner stated what she had to be satisfied about if she was to determine that the suspension was substantively fair. The commissioner said she had to satisfy herself that prima facie there was a breakdown in the employment relationship. She could only state the test in these terms if she accepted that there was to be an enquiry to determine whether the relationship had broken down. There was no evidence before the commissioner to the effect that an enquiry was pending or planned nor was there any evidence that the trustees had taken a decision to convene such an enquiry.

[54] If it is accepted that there was no evidence justifying the commissioner's acceptance that there would be an enquiry, then her conclusion that the suspension was substantively fair cannot be said to have a rational connection with the material properly before her. Accordingly the commissioner would have exceeded her powers. Indeed, I find that she exceeded her powers within the meaning of sec 145(2)(iii) of the Act in finding that the applicant's suspension was substantively fair or that there was a basis for such a suspension. For that reason that finding falls to be reviewed and set aside.

[55] There is another part of the commissioner's award which also justifies the conclusion that this finding of the commissioner falls to be set aside. That is that, although the commissioner held that the applicant's suspension was substantively fair, she also stated, when dealing with the issue of costs, that, in defending the suspension claim before her, the respondent's conduct was frivolous and vexatious. (See top of the second page from the end of the award). My reasons for saying that these two findings justify the conclusion that the commissioner's finding should be set aside follow hereunder.

[56] The finding that the suspension was substantively fair means that there were good reasons for the employer to suspend, in which case then, obviously the employer was entitled to suspend the employee. If the employer was entitled to suspend the employee (because there were good grounds to do so), then the employer was entitled to defend its decision when such decision was challenged as being unfair. You cannot, on the one hand, say that there were good reasons for the suspension and, on the other, say the employer acted frivolously and vexatiously in defending such a suspension. The two conclusions are irreconcilable with each other and are mutually exclusive. In those circumstances there can be no doubt that this too makes the commissioner's

finding that the suspension was substantively fair inexplicable. The commissioner's award is, in my view, self-contradictory in this respect and therefore unjustifiable. Accordingly the commissioner exceeded her powers in this regard, too, and, on this ground also, her finding that the suspension was substantively fair falls to be reviewed and set aside.

[57] I have already found that the commissioner's finding that the suspension was substantively fair is based on the fact that she dealt with the dispute on the basis of an acceptance that there was to be an enquiry. I also conclude that her finding that the respondent acted frivolously and vexatiously in defending the unfair suspension claim is linked to that acceptance that there would be an enquiry. I base this on the commissioner's statement in the award to the effect that the respondent's best defence to the unfair suspension claim was to simply convene the enquiry. If the commissioner's statement is taken to its logical conclusion, an employer who suspends an employee will succeed in showing that the suspension is fair and justified by simply convening an enquiry. What if an employer convenes an enquiry but at the time he took the decision to suspend the employee, there were no grounds on which he could reasonably conclude that the suspension was called for or that an enquiry was called for? Would that not matter just because he convenes an enquiry? This can simply not be correct. I am of the opinion that in this respect the commissioner's focus moved away from the real issue before her.

[58] The commissioner was undoubtedly right in concluding that the respondent had acted frivolously and vexatiously in defending the unfair suspension claim of the applicant. But she was wrong to conclude that the suspension was substantively fair.

[59] In the light of all the above I conclude that the commissioner's award in so far as it says the suspension of the applicant was substantively fair is not justifiable in relation to the reasons given for it and that, for that reason, the commissioner exceeded her powers. Accordingly par 2 in the last page of the award is hereby reviewed and set aside. I now turn to deal with par 3 in the last page of the award which relates to the holding of an enquiry.

The award calling for the holding of an inquiry

[60] The second part of the commissioner's award that I need to deal with is par 3 in the last page of the award. In that paragraph the commissioner directed

the respondent to **“to hold an inquiry to determine the compatibility for the applicant remain (sic) as its employee by no later than 25 February 1999”**.

[61] The applicant complains that the commissioner exceeded her powers in directing the holding of an inquiry. Mr Soni dealt with this part of the award by submitting that the commissioner did not hold that an inquiry should be held but submitted that the commissioner meant to do no more than to simply direct that, in so far as the respondent might wish to hold an inquiry, it should convene that inquiry not later than the 25th February. Mr Soni submitted that that part of the award was made in the interest of the applicant to avoid the respondent delaying unreasonably in convening the enquiry. It seems to me that this part of the commissioner’s award is connected with the fact that the commissioner decided the matter on the basis of an acceptance that there was to be an enquiry. In the end Mr Soni had no objection to this part of the award being set aside. I am satisfied that it should be set aside especially as I have already found that the commissioner’s finding that the suspension was substantively fair falls to be reviewed and set aside.

Should the Court remit the dispute back to the CCMA or should it determine the dispute itself?

[62] The next question that arises for me to decide is: Now that paragraphs 2 and 3 in the last page of the award have been set aside, what should I do with the dispute? The one route, which the court would normally opt for in review cases, would be to remit the dispute back to the CCMA to be arbitrated afresh. Another route would be for the Court not to remit the dispute back to the CCMA but to determine it itself. That the Court has power to take the first route is trite and was not placed in issue during argument before me.

[63] With regard to the second route, I understood Mr Soni to argue that the Court has no jurisdiction to follow that route. Mr Soni referred me to the provisions of sec 157(5) of the Act in support of his argument that the court has no jurisdiction to determine this dispute of unfair suspension. Sec 157(5) of the Act says : **“Except as provided in section 158(2), the Labour Court does not have jurisdiction to adjudicate an unresolved dispute to be resolved through arbitration”**. Sec 158(2) refers to a case where a dispute has been referred to the Labour Court and it subsequently becomes apparent that the dispute should have been referred to arbitration. Sec 157(5) does not relate to a situation where the dispute comes before the court on review. It refers to a situation where a dispute is referred to the Court for adjudication.

[64] I am satisfied that the Court has power on review to itself determine a dispute which has been arbitrated by the CCMA once it has set aside the award. It has this jurisdiction by virtue of the provisions of sec 145(4)(a) of the Act. Sec 145(4)(a) of the Act says : **“If the award is set aside, the Labour Court may -**

(a) determine the dispute in the manner it considers it appropriate;”

[65] One of the grounds on which a review Court is entitled to usurp, as it were, the function or power of another body and perform its function after setting aside a decision of that body is where the court is in just as good a position to itself perform the function that has to be performed and to remit the matter back to the body concerned may cause undue delay and prejudice to one or both the parties and the outcome of the remittal would be a foregone conclusion.

[66] In this case the suspension dispute between the parties has been going on

for at least six months if one calculates from the date the charges were withdrawn against the applicant and the enquiry collapsed. If one calculates from the date the suspension was effected, which was the 27th October 1997, then the suspension has been going on for about 20 months. During that period the parties have gone through a lengthy enquiry in which they have incurred substantial legal costs. They have gone through an arbitration process as well as this review application. This Court is in just as good, if not better, a position to decide the dispute as would be any commissioner who would be appointed to arbitrate the dispute if the dispute was referred back to the CCMA.

[67] In all those circumstances I conclude that the preferable route would be for the Court to determine the suspension dispute itself and not to remit it back to the CCMA.

Determination of the suspension dispute by this Court

[68] As already stated above, the dispute that was before the commissioner was the fairness or otherwise of the suspension of the applicant after all charges that had been brought against him had been withdrawn. Put differently the dispute was whether it was fair for the respondent to continue not to allow the applicant to resume his duties after all the charges had been withdrawn against him and the respondent had abandoned the Boda enquiry.

[69] When Mr Soni presented his argument, sometime was taken by the issue of whether or not the applicant was entitled in this application to include evidential material which had not been placed before the commissioner. It was ultimately accepted by all concerned that in review proceedings, the review court is, generally speaking, bound to decide the matter only on the basis of the evidence and the material that was before the tribunal whose decision is sought to be reviewed.

[70] What I was not inclined to accept, which I am still not inclined to accept, is that there can never be circumstances where it would be permissible for the reviewing court to have regard to material which is placed before it but was not before such a tribunal in circumstances where the reviewing court has properly decided to itself exercise the powers which ordinarily would be performed by the tribunal whose decision has been set aside. However, that issue does not arise in this case. Accordingly I do not need to decide it. In determining the suspension dispute I intend confining myself to the material that was before the commissioner.

[71] On reaching this stage of this judgement I have once again gone back to the list of facts and documents that were placed before the commissioner as well as the transcript of those proceedings to refresh my memory on what was before the commissioner. I have also gone back to the earlier part of this judgement. I do not intend repeating matters that I have dealt with above albeit from the perspective of seeking to answer the question whether or not the finding of the commissioner on the alleged substantive fairness of the suspension was reviewable.

[72] It will be recalled that the defence raised by Mr Soni was that there was to be an enquiry to determine an alleged breakdown in the employment relationship between the parties. Mr Soni submitted that that was why the suspension was fair because, if the allegations were proved in the enquiry, they could lead to the dismissal of the applicant. As the applicant pertinently put this allegation in issue, the respondent ought to have placed the necessary evidence before the Court to prove that the trustees had taken a decision to continue the suspension, that they believed there was justification for an enquiry and that they had also taken a decision to convene an enquiry in this regard. The respondent placed no such evidence before the commissioner.

[73] In the absence of such evidence and bearing in mind that the enquiry pending which the suspension had been effected had been abandoned by the respondent, I conclude that the suspension was not shown to have any substantive basis. Accordingly the suspension was substantively unfair.

[74] Argument presented before the commissioner included argument to the effect that the respondent was not entitled to suspend the applicant at this stage in respect of allegations or matters which the industrial court had determined in 1997 or in respect of allegations or matters which had been the subject of the enquiry chaired by Adv. Boda which the respondent had abandoned. It does not appear from the commissioner's award that she considered this argument. I consider it warranted that I should consider it. I accordingly turn to consider it below.

[75] I have already given in par 6 above three of the allegations for which the applicant was dismissed in January 1996. I do not propose repeating them. By virtue of the fact that, after listening to the applicant's evidence, the industrial court found that the applicant's dismissal was both substantively and procedurally unfair, it must be accepted that those allegations were put to rest and the respondent can no longer bring them up again against the applicant. The respondent had an opportunity to put its case before the industrial court but

chose, of its own accord, to withdraw its opposition and the applicant went ahead and obtained a judgement in his favour on those issues. When I say those allegations cannot be brought up against the applicant, I refer to the substance rather than the form of those allegations. If the respondent could still raise them, this would be totally unacceptable and would seriously undermine the administration of justice.

[76] In par 10 above I have also listed the charges which were brought against the applicant by the respondent which were the subject of the disciplinary enquiry chaired by Adv Boda. Those charges were subsequently added to or supplemented. The supplemented or amended charges appeared in exhibit A27-28 which was placed before the commissioner.

[77] The supplemented/amended charges read thus :-

- “1. On or about 15 August 1997 you called for a Moulood before the congregation in the Grey Street Mosque without having obtained the consent of the Trustees; alternatively you convened a Moulood on the instructions of a so-called “Musalle Committee when you were aware that such committee did not have the requisite authority to do so on behalf of the Trust;**
- 2. On or about 26 September 1997 you called for a Moulood before the congregation in the Grey Street Mosque in contravention of a specific instruction from the Trustees;**
- 3. On or about 26 September 1997 you removed two copies of a notice without authority, one from the wall and one from the notice board at the Grey Street Mosque, knowing that these notices had been placed there by the Trustees to confirm the postponement of the AGM by the Trustees;**
- 4. On or about 26 September 1997 you misrepresented to a member of the congregation at the Grey Street Mosque that the AGM had not been postponed, despite having notice that**

the Trustees had postponed the AGM;

- 5. On or about 27 September 1997 you, pertaining to such removal on 26 September 1997, advised a member of the congregation to make a false statement to another person to the effect that you have not removed this notice;**
- 6. On numerous occasions during the course of September and October 1997 you have openly and unreasonably criticised the trustees before the congregation in the Grey Street Mosque;**
- 7. On or about 20 October 1997 you removed a further notice board in the Grey Street Mosque without authority knowing that this notice was placed there by the Trustees;**
- 8. Consistent failure to attend the compulsory Fajr and Esha Congregational Prayers at the grey Street Mosque;**
- 9. On or about 28 September 1997 you delayed the prayer call and the midday prayer (ZohrSalaat) by approximately one hour without the consent of the Trustees and contrary to Shariah (Islamic Law);**
- 10. In or about September 1997, you advanced the prayer call for the Friday midday prayer (Juma Salaat) from the appoint time of 12h10 (ten minutes past noon) to 11h50 without the consent of the Trustee and contrary to Shariah;**
- 11. In or about October 1997, you left the Republic of South Africa for Pakistan without obtaining permission from the Trustees, alternatively without authorisation by the Trustees.**

[78] It also needs to be borne in mind that, when Mr Soni had to explain the

reasons for the conduct of the respondent in not allowing the applicant back at his work to resume his duties, he explained this by reference to the charges which the applicant had been facing in the enquiry. Reference is made below to what Mr Soni is reported to have said in the arbitration proceedings before the commissioner.

[79] When dealing with the argument/accusation that the applicant was being subjected to another enquiry in respect of what in essence was the same charges which had been withdrawn, Mr Soni said that the idea was not to prove the charges preferred against the applicant but to look at what the response was on the part of the applicant to those charges. Mr Soni also said “ **... Now that the respondent is changing tactic might be an indication that it used a wrong procedure ..**”. (p51 of the transcript of the arbitration proceedings).

[80] Mr Soni also said before the commissioner : “**I’m saying that the charges were not properly formulated when they were initially set**”. (p65 lines 1-3 of the arbitration transcript). In response to a question by the commissioner as to when the respondent had informed the applicant that the reason for his continued suspension was the alleged breakdown in the employment relationship, Mr Soni said that had never been communicated “**but as my learned friend says . . . that’s been an underlying theme of the dispute between the parties**”.

[81] Mr Soni continued with his reply to the above question from the commissioner and said: “**I mean that was said in evidence quoted by my learned friend. I’m merely saying that purely from the point of view of labour law . . . what one does is one formulates charges and at the end of the day because it can become formalistic one tries to be as accurate as**

possible. And what one has here is a basis to say that if you look at what is contained in all the evidence that has been led, then this is the conclusion to which the trustees have come. Now they're entitled to say that". (p64 lines 2-18 of the arbitration transcript).

[82] If one has regard then to :

- (a) the reasons for the applicant's dismissal in January 1996;
- (b) the charges brought against the applicant in the Boda enquiry, as supplemented/amended;
- (c) the issues that, according to Mr Soni, the inquiry he referred to in the arbitration would seek to determine;
- (d) the evidence in the enquiry by the first respondent which was intended to show that, according to the respondent, the employment relationship between the parties had broken down;
- (e) the fact that, according to the respondent, the alleged breakdown of the employment relationship had throughout been the underlying theme in the dispute between the parties, it becomes clear that, if it can be said that the respondent sought an inquiry such as the one Mr Soni referred to in the arbitration proceedings, such inquiry would, in essence, deal with the same allegations which had been made against the applicant either in the industrial court or in the Boda inquiry. All those issues had either been determined by the industrial court in the applicant's favour or they had been withdrawn by the respondent in the Boda inquiry just before argument could be heard.

[83] In so far as there may be one or two issues that had not been the subject either of the litigation in the industrial court or of the Boda inquiry, they are matters which the respondent was aware of all the time which could have been added to the charges in the enquiry but which the respondent chose not to add, notwithstanding the fact that in the letter containing the charges against the applicant, the respondent had specifically reserved its right to amend or add to the charges and it had in fact added to or amended, the original charges. Notwithstanding its awareness that it could add to, or amend, the charges in the Boda inquiry if it wished to do so, the respondent had elected not to do so but instead had decided to withdraw all the charges against the applicant and not to proceed with the enquiry and to undertake to contact the applicant to discuss his return to work. The question which arises is why the respondent did not amend, or add to, the charges in the Boda inquiry so as to include whatever allegations

against the applicant it was aware of so as to bring the dispute or disputes between the parties to finality. In my view there are two possible explanations for this. The one is that, as the enquiry dragged towards its conclusion, the respondent accepted that it could not successfully prove any of the charges it had brought against the applicant nor would it be able to successfully show that, as alleged by the first respondent in his evidence in the enquiry, the employment relationship between the parties had broken down. It had then decided that, in those circumstances, it should withdraw all the charges against the applicant and abandon the enquiry.

[84] The other possible explanation is that the respondent decided that it did not want to risk a finding by the Boda inquiry that the applicant was innocent of all the charges brought against him and that there was no breakdown of the employment relationship. Because of that, the respondent decided to withdraw the charges, abandon the Boda enquiry but institute another one chaired by someone else, and bring the same charges against the applicant, may be, with minor changes here and there and focus on the aspect of the alleged breakdown of the employment relationship and hope, or, ensure, that the view that another chairperson takes of the respondent's case will be different from that one taken by the Boda inquiry.

[85] Irrespective of which of the two explanations is correct, it seems to me that, in either case, the respondent has no right to raise the same issues again against the applicant and pursue them by way of another inquiry or by suspending the applicant. With regard to the first explanation, I am of the opinion that, if the respondent accepted the situation as stated in that explanation, it either waived its right to pursue them or made an election (by which it is bound) that it would not pursue those charges and issues in any further inquiry. That is the only way any reasonable person can read the letter withdrawing the charges. There it is said that the respondent had decided to withdraw all the charges against the respondent and not to pursue the enquiry in the light of the prima facie views expressed by Adv. Boda and to discuss the applicant's return to work.

[86] It seems to me that when an employer has conducted himself in the above

manner towards an employee, the employee would be entitled to think that all the matters which were the subject of the enquiry or which the employer could reasonably have been expected to add to the enquiry if he felt strongly about but had not added, would be laid to rest once and for all. In my view simple justice between employer and employee demands this. That justice demands that such an employer cannot be allowed to raise those issues again.

[87] If the second explanation is the correct one, the result must, in my view, be the same as the result in the first explanation. That is because if the respondent were allowed to raise the issues again, it would mean that an employer who institutes an enquiry which is chaired by one person is entitled if he thinks that such chairperson will find in favour of the employee, to avoid the laying to rest of the matter by the simple device of withdrawing the charges against the employee even at the eleventh hour and abandoning the enquiry in favour of another one chaired by somebody the employer believes will find against the employee on essentially the same issues. That can simply not be our law.

[88] In all of the above circumstances I conclude that, not only was the applicant's suspension substantively unfair but also that the respondent was not entitled after the 11th December 1998 to take any action to the prejudice of the applicant on the basis of or arising out of, any act or omission on the part of the applicant or on the part of the applicant and the respondent or on the basis of any happening arising out of the employment relationship between the respondent and the applicant which was either the subject of the industrial court litigation in 1996-1997 or which was the subject of the Boda inquiry in 1998 or which occurred prior to 1998 and was known by the respondent to have occurred and could have been added to the allegations then being inquired into by the Boda inquiry but, for reasons best known to the respondent was not added.

What order should be made as part of determining the suspension dispute in terms of sec 145(4)(a) of the Act?

[89] When this Court determines a dispute in terms of sec 145(4)(a) of the Act, after setting aside an arbitration award in respect of that dispute, sec 145(4) (a) says it may **“determine the dispute in the manner it considers appropriate”**. Those terms give the court the widest possible powers necessary for it to determine a dispute in whatever manner the Court **“considers appropriate”**. When the commissioner was seized with the same dispute, her powers in terms of item 4(2) of Schedule 7 to the Act were **“to determine”** the dispute **“on reasonable terms”**. Those powers were very wide powers, too.

[90] When the Labour Court adjudicates a dispute which is about an act or omission referred to in item 2(1)(a) of Schedule 7, namely, an act of unfair discrimination on grounds there set out, one of the powers it is conferred with specifically is to reinstate. Item 4(1) of the Schedule gives this Court, when adjudicating such a dispute, power to **“determine”** such dispute **“on terms it deems reasonable, including, but not limited to, the ordering of reinstatement”**. It will be seen then that, with regard to the determination of residual unfair labour practice disputes both this Court (in terms of item 4(1) of Schedule 7) and the CCMA (in terms of item 4 (2) of Schedule 7) have been conferred with very wide powers to determine such disputes. I will bear all of the above powers in mind as I proceed to consider on what terms I should determine this unfair suspension dispute.

[91] Before the commissioner it was argued on behalf of the respondent that, when dealing with a dispute on the basis of her powers in terms of item 4(2), the commissioner had no power to order reinstatement.

[92] The above submission was based on the fact that in item 4(1) the

legislature specifically conferred the power to order reinstatement in respect of disputes of unfair discrimination but did not specifically confer it in item 4(2) in respect of the unfair labour practice disputes which are required to be referred to the CCMA for arbitration if conciliation fails. This is the *unius inclusio alterius exclusio* canon of construction.

[93] The commissioner dealt at some length with authorities relating to the *unius inclusio alterius exclusio* “**rule**”. Such authorities included those which are to the effect that :-

- (a) the maxim “**affords ... no more than a prima facie indication of the legislature’s intention the weight of which must depend on the purport of the enactment as a whole**”. (**Consolidated Mine of South West Africa v Administrator of South West Africa and Another 1958 (4) SA 572 (A)**).
- (b) before applying the maxim, “**it must be absolutely clear that the legislature’s intention was to exclude the other thing, person, remedy or mode of procedure or person’s rights, as the case may be**”. (see **Kellaway : Principles of Legal Interpretation, 1995, Butterworths** at 155).
- (c) the maxim is not a rigid rule of statutory construction and at all times it must be applied with great caution. (Milne JA in **SA Roads Boards v Johannesburg City Council 1991 (4) SA 1(A)** at 16).

[94] Ultimately the commissioner decided to invoke the *unius inclusio alterius exclusio* maxim and held that she did not have the powers to reinstate the applicant. It is permissible for the Court to take a view different from that taken by the commissioner on any matter of fact or law that was before the commissioner without, for example, having to first be satisfied that in taking a particular view the commissioner committed a reviewable act. That is because this Court has already decided that the disputed paragraphs of the award fall to

be reviewed and set aside and has now gone on to another stage of the matter, namely, that of determining the dispute itself in terms of sec 145(4)(a) of the Act instead of remitting it to the CCMA to be arbitrated afresh.

[95] Bearing in mind the above authorities which the commissioner referred to in relation to the maxim *unius inclusio, alterius exclusio* and other matters that I will mention shortly, I am of the opinion that the commissioner's conclusion that she did not have power to reinstate was erroneous.

[96] The power of the Labour Court under item 4(1) to, inter alia, order reinstatement is conferred on it in respect of unfair discrimination disputes which are said to constitute an unfair labour practice in terms of item 2(1)(a) of schedule 7. The power of arbitrators of the CCMA to **“determine”** disputes **“on reasonable terms”** in terms of item 4(2) of schedule 7 is conferred in respect of disputes referred to it in terms of item 3. There are only three disputes which may be referred to the CCMA under item 3 of Schedule 7. They are :-

1. the unfair conduct of the employer relating to the promotion, demotion or training of an employee or relating to the provision of benefits to an employee.
2. the unfair suspension of an employee or any other disciplinary action short of dismissal in respect of an employee.
3. the failure or refusal of an employer to reinstate or re-employ a former employee in terms of any agreement.

[97] A dispute such as is referred to in 3 above (or in item 2(1)(d) of Schedule 7) specifically relates to a situation where a former employee complains that his/her former employer had previously agreed to reinstate him if, for example, a vacancy arose in the future but, despite there being a vacancy, the employer has reneged on the agreement and refuses to reinstate him. Such a dispute does

not go to the Labour Court for determination in terms of item 4(1) of the Schedule but is required to be referred to arbitration in terms of item 4(2) of the Schedule.

[98] If it is correct that an arbitrator who determines a dispute in terms of item 4(2) of Schedule 7 has no power to order reinstatement that would mean that in the case of a dispute such as is referred to in the preceding paragraph, an arbitrator would have no power to order the employer to comply with the agreement by reinstating the employee - the most natural and reasonable way of determining such a dispute - even if to determine the dispute on those terms would be eminently reasonable.

[99] In fact if it were justified to invoke the *unius inclusio alterius exclusio* maxim in these circumstances in respect of the issue whether an arbitrator has the power to reinstate under item 4(2) of the Schedule, then the same reasoning would apply to the question whether under item 4(2) an arbitrator has power to order compensation. I say this because compensation is also specifically mentioned in respect of powers of the Labour Court under item 4(1) but, like reinstatement, it is not mentioned among the powers of arbitrators under item 4(2).

[100] If then an arbitrator, faced with the case I have referred to above, could arbitrate the dispute but could neither order reinstatement nor order payment of compensation, what effective relief could the arbitrator be said to have power to make in order to determine such a dispute? Simply for the arbitrator to give a declarator that the employer's refusal to reinstate the employee constitutes an unfair labour practice and to stop there would not amount to determining the dispute because to determine the dispute means to put to an end a dispute (see **Trident steel (Pty) Ltd v John NO & Others 1987 8 ILJ 27**). The employee would end up with a piece of paper in his hand which said the employer's conduct constituted an unfair labour practice but which he could not enforce if

the employer decided to ignore the declarator of the arbitrator.

[101] For the above and other reasons which I do not consider necessary to go into as the above is by itself a good enough reason, I am of the opinion that the *unius inclusio, alterius exclusio* maxim cannot be invoked in this matter, and that an arbitrator dealing with a matter referred to in item 2(1)(b), (c) and (d) of Schedule 7 has power under item 4(2) to order reinstatement.

[102] Having said the above about the power of an arbitrator to reinstate under item 4(2) of schedule 7, I must say that in the case of a suspension dispute, if one can speak of reinstatement, it can only be the reinstatement not of the employee to his employment of the employer because that applies to a case where an employee has been dismissed but it can only be the reinstatement of the terms, conditions, privileges and benefits of the employee which got suspended when the suspension was effected. It may be argued that the distinction is academic but I do not intend to go into that debate because I am satisfied that it is necessary to bear the distinction in mind.

[103] Whether the Court orders the reinstatement of all the terms, conditions, privileges and benefits of the employee or it sets the suspension aside, in the end the order that is made must be one which has the effect of ending or lifting the suspension.

[104] In the light of all the above I am satisfied that the applicant's suspension was wrong, unjustified and should not have been continued beyond the 11th December 1998 and should be set aside or lifted in its entirety.

The rule nisi in respect of alleged "harassment"

[105] The last part of this judgement will relate to the applicant's application for the confirmation of the rule nisi that was issued by Landman J. I deal in summary form with the various paragraphs of the rule :-

1. Par 1(a) sought to review and set aside paragraphs 2 and 3 of the award.
2. Par 1(b) sought to review and set aside the suspension.
3. Par 1(c) sought a declarator that the applicant's continued suspension was vexatious.
4. Par 1(d) sought to interdict the trustees from further suspending the applicant on the basis of alleged conduct which occurred prior to the 11th December 1998.
5. Par 1(e) sought to permanently interdict the Trust from suspending the applicant without leave of this Court or a senior commissioner of the CCMA and without following a certain procedure.
6. Par 1(f) sought to interdict the Trust from proceeding with any inquiries against the applicant in respect of conduct that occurred prior to the 11th December 1998 or in respect of the conduct which the industrial court had already dealt with or which had been investigated by attorneys Deneys Rietz on behalf of the Trust or which formed the subject matter of the charges against the applicant which were withdrawn.
7. Par 1(g) sought to stay par 3 of the arbitration award (i.e. that is the directive to the respondent to hold an enquiry by the 25th February 1999).
8. Par 1(h) sought payment of costs by the respondent.
9. Par 2 sought to make par 1(g) an interim interdict.
10. Paragraphs 3 and 4 relate to the further conduct of the matter and they are not of any relevance to the issues in this judgement.

[106] The stance taken by Mr Soni in his argument in relation to the confirmation of the rule was to first draw my attention to the relief that was sought by the applicant in the arbitration before the commissioner. Mr Soni set that relief out in his heads of argument as follows :-

- (a) a declarator that there was no substantive basis for the applicant's suspension.
- (b) full reinstatement into his employment.
- (c) a direction that the respondent must accept the applicant's tender of services and permit him to perform his duties at the Grey Street Mosque.
- (d) an order that the respondent not suspend him again except :-
 - (i) on 24 hours' notice to the Convening Senior Commissioner of the CCMA
 - (ii) on good cause shown on affidavit
 - (iii) subject to opposing representations on the applicant's behalf; and
 - (iv) with the leave of a Senior Commissioner.

[107] Mr Soni submitted that, save for the review of the commissioner's award and the order interdicting the respondent from proceeding with further inquiries, the relief sought by the applicant in this court is the same as the relief which the applicant had sought from the commissioner which the commissioner dismissed and ordered instead that an enquiry be held no later than the 25th February 1999.

[108] Mr Soni went on to submit that the relief being sought by the applicant in paragraphs 1(b) - (e) of the Notice of Motion is no more than the consequences of the setting aside of the commissioner's award. He submitted in par 8 of his heads that whether the applicant was entitled to the relief in paragraphs 1(b) - (e) of the Notice of Motion depended on whether the award of the commissioner ought to be reviewed and set aside.

[109] Adopting this approach by Mr Soni , it follows, subject to one issue that I will deal with shortly, that, as I have already decided that the commissioner's award should be reviewed and set aside in the respects complained of, the respondent does not advance any other basis in opposition why I should not

grant the relief sought by the applicant. In this regard I must say that my conclusion that the commissioner's award fell to be reviewed and set aside was arrived at on the basis of the material that was before the commissioner as well as on how the commissioner arrived at her conclusion as can be gathered from her award.

[110] The point which I said above I would deal with shortly is that, apart from submitting that the decision to grant the relief in paras 1(b) - (e) of the Notice of Motion must be on the strength of the material which was before the commissioner - which submission I have no difficulty with for purposes of this stage of the judgement- Mr Soni also submitted that this Court has no jurisdiction to grant such relief if the commissioner, sitting as an arbitrator, did not have the power to grant such relief. Mr Soni then relied on secs 157(5) and 158(2) of the Act to support his submission that the Court has no jurisdiction to grant such relief.

[111] I have already dealt above with secs 157(5) and 158(2) of the Act. I am of the opinion that this Court has power under sec 145(4)(a) of the Act to deal with any issue which the commissioner had power to deal with in an arbitration including a matter such as this one. For that reason in so far as Mr Soni's submission was to the effect that since the relief the applicant seeks in paras 1(b) - (e) of the Notice of Motion was required to be dealt with through arbitration and was actually dealt with in the arbitration, this Court is precluded by sec 157(5) of the Act from dealing with it, I am of the opinion that his submission is erroneous.

[112] Mr Soni went on to argue that this Court has no power to grant the relief claimed in par 1(c) - (f) of the Notice of Motion because, so the argument went, the commissioner had no power to grant such relief and, therefore, whether in or outside, a review, this Court has no such power. The orders sought in par 1(c) - (f) are in the nature of declaratory orders and interdicts. Mr Soni submitted that the Act does not confer powers on commissioners or arbitrators to grant declaratory orders and interdicts. I now turn to consider this submission.

[113] Earlier on in this judgement I referred to the powers which the commissioner dealing with this matter had under item 4(2) of Schedule 7 to the Act. In terms of item 4(2) the powers conferred upon her were **“to determine”** the dispute **“on reasonable terms”**.

[114] As already stated above, to **“determine”** a dispute means to put that dispute to an end. Accordingly the powers conferred on the commissioner under item 4(2) are, in my view, so wide that she was entitled to inter alia grant a declarator or an interdict if determining the dispute on those terms would constitute determining the dispute on reasonable terms as contemplated by item 4(2). In any event sec 138(9) of the Act confers on commissioners the power to **“make any arbitration award”** in terms of the Act including but not limited to (a) an award that gives effect to the provisions and primary objects of the Act and a declarator. Here a declarator is specifically provided for. There can be no reason why a commissioner should be able to issue a declarator under sec 138(9) but not under item 4(2) of the Schedule. It was not argued that it would have been unreasonable for the commissioner to grant declaratory orders or interdicts if she had found the suspension to be substantively unfair.

[115] In the light of all the above it seems to me that none of the points raised by the respondent to oppose the applicant’s application can be upheld and that the applicant is entitled to the relief he seeks, except that par (i) and (ii) of prayer 1(e) must be deleted and be replaced with the following order :-

“(a) unless such decision is taken after :-

- (i) the applicant has first been furnished in writing with reasons why his suspension is contemplated and, and**
- (ii) he has been given an opportunity to submit representations, and**
- (iii) Such suspension does not arise from conduct or events which occurred prior to the 11th December 1998 and which the respondent was aware of prior to withdrawing the charges against the applicant”.**

[116] With regard to costs, I am of the opinion that the first up to the 9th

respondents should be ordered to pay the applicant's costs of this application jointly and severally the one paying the others to be absolved.

[117] In all the circumstances I am of the opinion that the respondents have failed to show cause why I should not confirm the rule and make the orders in paragraphs 1(a), (b), (c), (d), (f) and (h) of the Notice of Motion. Par 1(e) is to be amended, as already stated, by the deletion of subparagraphs (i) and (ii) thereof which will be replaced with the amendment I have given above. With regard to (g), that order becomes unnecessary in the light of the fact that par 3 of the award has been set aside.

[118] In the premises the rule is confirmed and I make an order in terms of paragraphs 1(a), (b), (c), (d), (e) as amended above and (h) of the order issued by Landman J.

R. M. M. ZONDO

Judge : Labour Court of SA

Date of Argument	:	7 and 13 May 1999
Date of judgement :		25 June 1999
For the Applicant	:	Mr M. Pillimer SC
Instructed By	:	Chennells Albertyn & Tanner
For the Respondents	:	Mr V. Soni
Instructed By	:	Hassim Seedat Attorneys