

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: J 2953/00

In the matter between:

NETHERBURN ENGINEERING CC t/a

Applicant

NETHERBURN CERAMICS

and

ROBERT Mudau

First Respondent

CCMA

Second Respondent

JANE MOABELO

Third Respondent

JUDGMENT

LANDMAN J:

On 22 August 2003 I made the following order:

1. The first respondent's ruling refusing the applicant a postponement and the first respondent's award are reviewed and set aside.
2. The matter is remitted to the CCMA for arbitration afresh before a different commissioner.

3. The first respondent's ruling in terms of s 140(1) of the Labour relations Act 66 of 1995 that the applicant is not entitled to legal representation is confirmed.
4. There is no order as to costs.

These are my reasons for making the order.

Introduction

Ms Jane Moabelo, the third respondent, was employed by Netherburn Engineering CC, the applicant. She was dismissed for misconduct on 26 October 1998. She referred a dispute to the CCMA. She alleged that she had been unfairly dismissed. The dispute could not be resolved and she requested that it be arbitrated. The arbitration was scheduled for hearing on 17 May 2000. The first respondent, a commissioner of the CCMA, was appointed to preside over the arbitration. Netherburn was represented by an attorney. The Labour Relations Act 66 of 1995 does not permit a party to be represented by a legal practitioner, as of right, at arbitration proceedings concerning an alleged dismissal for conduct or capacity. Mr Sibiya, the General Secretary of SATAWU, who represented Ms Moabelo objected to Netherburn being represented by its attorney. The attorney sought to persuade the commissioner to exercise his discretion in terms of s 140(1) of the LRA and permit such representation. The commissioner declined to do so.

A request to stay the arbitration proceedings was refused. The attorney and Mr T J Featherstone, the managing member of Netherburn, withdrew and the arbitration proceeded in their absence. The commissioner handed down an award on 13 June 2000. It was in favour of Ms Maobelo. He found that her dismissal was procedurally and substantively unfair and ordered Netherburn to reinstate her and to pay her compensation in the amount of R8 328.00.

Netherburn seeks to review and set aside the award and to have matter the remitted to the CCMA to be heard by another commissioner with a direction to allow legal representation.

Netherburn challenges the award on basis of s 145 alternatively s 158(1)(g) of the LRA. The challenge is based on the following grounds: (a) that the commissioner has not provided any rational or objective basis for disallowing legal representation to Netherburn; (b) that the commissioner was biased against Netherburn; and (c) that effect was not given to Netherburn's constitutional right to be represented at the arbitration by a legal representative.

The exercise of the discretion and alleged bias

The proceedings concerning the request to be allowed legal representation have not been recorded. Netherburn's founding affidavit sets out what happened. This version is not seriously disputed. Mr Featherstone says that the arbitration was set down before the CCMA, for hearing at 14h00 on 17 of May 2000. Before attending the arbitration he consulted with an attorney, Mr Higgins. Mr Higgins prepared a bundle of documents to assist in the presentation of evidence at the arbitration. Mr Sibiya, Ms Moabelo and a number of other people were present in the room allocated for the hearing of the arbitration when Mr Featherstone and his attorney arrived. Mr Sibiya advised Mr Higgins that he would object to his presence as a legal representative.

Mr Featherstone says when the commissioner entered the room he greeted Sibiya in a manner which suggested that the two of them knew each other. I pause to record that Mr Sibiya says that the Commissioner greeted him in the same manner that he did the Netherburn party. In fact on the 15 May 2000 the Commissioner had given an award against Mr Sibiya in the matter between SASTAWU obo Banda v Sculpture Equipment Support under case No: GA77689.

Mr Featherstone goes on to say that when the Commissioner enquired whether there were any preliminary points to be dealt with, Mr Sibiya advised the Commissioner of his objection to Mr Higgins's presence. Mr Higgins presented argument on the nature of the questions of law raised by the dispute, the complexity of the dispute and the issue of public interest. But the main thrust of Mr Higgins' argument centered on the comparative ability of the opposing parties to deal with the arbitration of the dispute. Mr Featherstone says that his attorney highlighted the following:

“4.11.1 That ever since his involvement in labour law which, commenced in the mid-1980s he had a number of matters where Sibiya acted as the representative of the employees. This involved matters both in the old Industrial Court as well as in the High Court.

4.11.2 That Sibiya is a well-known union representative who is a regular litigant in both the CCMA and in the Labour Court.

4.11.3 That this was my first arbitration and that I had very little knowledge of our labour law, and certainly no experience of the relevant procedures.

4.11.4 In order to level the playing fields it would be both equitable and fair that the applicant be allowed legal representation. All the more so as I would have to be a witness in the applicant's case, whereas Sibiya would not have this disadvantage”.

(Mr Featherstone's emphasis.)

Mr Sibiya responded by alleging that the matter was a simple dismissal and therefore Netherburn did not require legal representation. He further alleged that whenever he had matters against Mr Higgins in the past, he had always briefed counsel. According to Mr Higgins this is simply untrue.

The Commissioner sets out, in his award, his reasons for refusing

Netherburn legal representation. He says that on the basis of the facts, presented by both parties, with specific reference to: the consent of the Commissioner and all the other parties; the complexity of the dispute; the public interest; and the comparative ability of the parties, he concluded that it was not unreasonable for Netherburn to deal with the dispute without legal representation.

Pursuant to an order by Farber AJ, the commissioner filed an affidavit, dated the 3 October 2000, setting out an expansion of his reasons. The Commissioner says:

“3 On the 14th of June 2001 (sic) presentations were made before me, the employee party raised a point in limine as per the provisions of Section 140 of the Labour Relations Act 66 of 1995 as amended.

4 The employee party did not consent to legal representation, I also did not.

5 It was common course (sic) that the employee was dismissed for misconduct.

6 The dispute was not complex neither was it in the public interest.

7 As far a representation was concerned (sic) the two representatives were not on par in terms of knowledge and experience, the employee party's representative was an experienced labour lawyer as opposed to a union official who was not that experienced.

8 In my mind it was not unreasonable to expect the employer party to deal with the dispute without legal representation.

9 I am convinced that in denying legal representation as provided by Section 140 I did not exceed my powers in doing so.

10 My decision was not influenced by any factors other than those listed on point 1 to 7 of this affidavit, I provide them as reasons why representation was refused."

Section 140 (1) of the LRA provides as follows:

"(1) If the dispute being arbitrated is one about the fairness of a dismissal and a party has alleged that the reason for the dismissal relates to the employee's conduct or capacity, the parties, despite section 138 (4), are not entitled to be represented by a legal practitioner in the arbitration

proceedings unless –

- (a) the commissioner and all the other parties consent;
- (b) The commissioner concludes that it is unreasonable to expect a party to deal with the dispute without legal representation, after considering -
 - (i) the nature of the questions of law raised by the dispute;
 - (ii) the complexity of the dispute;
 - (iii) the public interest; and
 - (iv) the comparative ability of the opposing parties or their representatives to deal with the arbitration of the dispute.”

In a situation such as the present one, the Commissioner must set out from the premise, in terms of s 140 of the LRA, that a party (employer or employee) is not entitled to be represented by a legal practitioner (any person admitted to practise as an advocate or attorney in the Republic, see s 213). But the Commissioner is given a discretion, which must be exercised judicially, to permit a party legal representation. In exercising this discretion the Commissioner must consider all the factors listed in s 140(1)(b).

See **Colyer v Essack N.O and Others** (1997) 19 ILJ 1387 (LC), **Malan v CCMA and Another** [1997] 8 BLLR 1173 (LC) , **Topics (Pty) Limited v CCMA and Others** [1998] 10 BLLR 1071

(LC), and **Ndlovu v CCMA Commissioner Mullens and Another** [1999] 3 BLLR 231 (LC).

Mr Buirski, who appeared for Netherburn, placed his cards on the table. He submitted that the essence of his client's case, is that the Commissioner failed to exercise a judicial discretion in relation to his discretion under s 140(1) and that in particular he did not pay adequate attention to the comparative ability of the opposing parties (ie Mr Featherstone and Mr Sibiya) when deciding the question of representation before him.

It is clear that the Commissioner knew Mr Sibiya. It was common cause that Mr Sibiya had appeared before him on at least one occasion. I may mention that Netherburn's complaint that because the Commissioner greeted Mr Sibiya in a manner which indicated that he knew him does not, on its own, give rise to even the faintest inference of the Commissioner being biased. Mr Buirski, correctly, did not pursue this unmeritorious ground.

It is clear that the Commissioner considered the requirements of the subsection. That he considered the matter to not to be a complex one must, as with the other factors, be considered together and given appropriate weight. Netherburn does not dispute that the matter was a relatively simple one. This has, for instance, a bearing upon the assessment of Mr Featherstone's capability to present the case for the CC. It would have been his first arbitration.

It was submitted that the Commissioner misdirected himself by not appreciating that Mr Sibiya is an experienced trade union official and that he has represented parties in various courts. It is clear that the Commissioner knew of at least one appearance by Mr Sibiya before him. The Commissioner also knew that Mr Higgins was an attorney experienced in labour disputes and that Mr Featherstone would have to be a witness in the case. This must also be considered in the light of the simple issues in dispute.

There is no merit in the submission that the Commissioner failed to apply his mind to the issues before him and in particular to the issue of the comparative ability of the opposing parties. It was submitted, that to the extent that the arbitrator made a mistake of fact in relation to the comparative ability of the parties, this mistake of fact constitutes a gross irregularity in the proceedings. It prevented a fair trial of the issues. This submission, put differently, is that the Commissioner laboured under a material error of fact to such an extent that the error precluded him from applying his mind to the true issues in dispute. It was also contended that the Commissioner failed to appreciate the nature of the discretion conferred on him and as a result failed to exercise the discretion. Had the Commissioner properly exercised his discretion, he would not have arrived at the decision.

I am not convinced that the grounds of review, which may be gleaned from the papers, permit me to entertain all these complaints. But I shall assume I may do so. There is no merit in them. A mistake of fact is not an irregularity. A mistake must be a gross one for it to constitute a gross irregularity. See **Hira and Another v Booyesen and Another** 1992 (4) SA 69 (A).

I am not convinced that the Commissioner has made a mistake. In my opinion, he was au fait with the ambit of the discretion that he was called upon to exercise. He took into consideration each of the factors and came to a conclusion which is rational and justifiable and in accordance with the objects of the LRA which, inter alia, requires labour disputes to be dealt with expeditiously. See **Carephone (Pty) Limited v Marcus N.O and Others** (1998) 19 ILJ 1425 (LAC) and **Shoprite Checkers (Pty) Limited v Ramdaw N.O and Others** (2001) 22 ILJ 1603 (LAC).

Netherburn complains that the commissioner took into account the consent of the employee party as to whether it can or should be granted legal representation. Mr Buirski submitted that it was not a factor which commissioner was entitled to consider and, to the extent that the Commissioner, took this factor into account, or was influenced by this factor, he misconceived the nature of the discretion conferred on him or that he took into account irrelevant considerations or that he had prejudged the case. This factor, would per se be a ground for the review of the ruling.

See **Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another** 1988 (3) SA 132 (A).

There is no merit in this submission. The absence of the consent of the one party to another being legally represented is the event which triggers the need for the commissioner to consider whether not withstanding the opposition to legal representation, representation should be permitted.

The result is that the Commissioner's refusal of Netherburn's request to be represented by a legal practitioner stands. This part of the application fails.

Some mention has been made in the papers about the Commissioner's refusal to stay the proceedings pending a review and, as a discrete point, his failure to grant a postponement on the basis that the Mr Featherstone was unprepared to take the matter over from his attorney. The general approach followed by tribunals is to grant a postponement where a decision is taken on review. This rule is not invariable.

What is of some importance is the Commissioner's failure to apply his mind properly to the dilemma which Mr Featherstone faced. Even if he were correct, as I have found, that legal representation should not be permitted, the Commissioner did not take into account the fact that Mr Featherstone had instructed an attorney and that he had not prepared to present his case. Mr Featherstone required a breather to be primed by his attorney because Netherburn had a legal right to request that legal representation be permitted. The Commissioner should have considered this.

The award should be set aside on this ground. However, the relief which Netherburn seeks goes further. It seeks an order that the matter be remitted to the CCMA to be arbitrated by a different commissioner and that it be allowed legal representation. I am of the opinion that this last part of this

prayer should not be granted. But this is not the end of the road. Netherburn claims an absolute right to be represented by a legal practitioner and alleges that s 140(1) of the LRA is unconstitutional and should be found to be such.

It therefore becomes necessary to consider the constitutional point. I turn to this.

A constitutional right to a lawyer?

Notice of a constitutional point

When this matter came before Farber AJ, he issued an order directing the way in which the parties should deal with the constitutional issue raised in the papers. The court directed that the Minister of Labour be granted an opportunity to be joined in these proceedings.

The Minister of Justice and Constitutional Development and the Minister of Labour have been notified of this application. The Director-General: Labour has advised the applicant's attorney that the Minister did not intend to intervene in this matter and that a joinder application would not be delivered.

It is Netherburn's case that s 140 (1) of the LRA (as it read at the time of the arbitration proceedings) is inconsistent with the provisions of the Constitution of the Republic of South Africa 108 of 1996 and that this court should therefore make an order declaring that s 140(1) is constitutionally invalid. See section 172(2) of the Constitution.

Jurisdiction

The Labour Court has jurisdiction, in terms of s 172(2) of the Constitution read with s 157(1) of the LRA (as a court of similar status to the High Court), to make an order concerning the constitutional validity of an Act of Parliament. See 151(2) of the LRA regarding the status of the Labour Court. An order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court. Should this court declare that s 140(1) is unconstitutional it must deal with the matter in terms of s 172(2) (a) of the Constitution.

Mootness

Section 140(1) of the LRA came into operation on 11 November 2003. Section 140(1) was deleted by section 28 of the Labour Relations Amendment Act 12 of 2002. However, clause 55 of this Act inserted item 27 in the 7th Schedule to the LRA. Item 27 provides:

“(1) Until such time as rules made by the Commission in terms of section 115(2A)(m) of the Act come into force-

(a) sections 135 (4), 138 (4) and 140 (1) of the Act remain in force as if they had not been repealed, and any reference in this item to those sections is a reference to those sections prior to amendment by this Amendment Act;”

The CCMA's existing rules were made in terms of section 116 read with s 115(2) (cA)(iii) and (iv). See R245 of 31 March 2000. These rules were withdrawn by R956 of 25 July 2002. On the same date the CCMA's governing body published

(and brought into operation) a new set of rules. The new rules were made in terms of section 115(2A). See GN R961 in GG23611 of 25 July 2002. The only 'new rule' which touches on representation is Rule 25. Rule 25(1) provides:

“(1) If a party to the dispute objects to the representation of another party to the dispute or the commissioner suspects that the representative of a party does not qualify in terms of the Act, the commissioner must determine this issue.”

This rule is not one envisaged by item 27. However, footnote 5 to the Rule 25 is potentially relevant. This footnote states that: “The representation of parties is dealt with in sections 135(4), 138(4) and 140(1) of the Act....” These subsections are reproduced in the footnote.

Rule 25 of the new rules has been interpreted as being a “rule” contemplated by item 27. See **SACCAWU obo Maharaj v Pharmed Pharmaceutical Ltd** [2003] 4 BALR 468 (CCMA). This too has been the interpretation by Commissioner Niehaus in **CEPPAWU obo Prince v Shatterprufe** (EC 3186-02). The Commissioner reasons that the existence of this rule and the fact that it refers to objections against a representative appearing clearly implies that there might be certain limitations on the right to representation. However, the Rules do not set out any implied limitations. Rule 25 contains a footnote which, as the Commissioner observes, is no more than a verbatim repetition of the repealed

sections 135(4), 138 (4) and 140 (1) of the Act. The Commissioner explores whether “what the Rules ostensibly do attempt to achieve, by way of this rather awkward reference to the repealed provisions of the Act in a footnote, is in fact to revitalise the repealed provisions of the Act?” The Commissioner finds that there is no basis in logic for such an interpretation for this. The Commissioner concludes that the CCMA Rules do not exclude legal representation.

The Commissioner points to what may be an error in the LRAA. The reference in item 27 of the Schedule refers to the s 115(2A)(m) dealing with the power to make rules for incidental matters (the intention was probably to refer to para (k) concerning the right of representation in conciliation or arbitration proceedings. The Commissioner concludes that the CCMA elected or failed to deal with the issue of legal representation in the new Rules but that this does not detract from the fact that “the resolute condition” contained in item 27 has been met. The effect is that legal representation should be permitted without any limitation.

Unfortunately, says the Commissioner, the issue has further been complicated by another unintended factor. The CCMA Rules were published and came into effect on 25 July ie before the section (s 115(2A)(m) of the LRAA) empowering these rules itself came into effect on 1 August. The Commissioner concludes that the unfortunate effect is that the Rules issued by the CCMA on 25 July 2002 are of no legal effect. It follows from this that there was no compliance with the condition contained in Item 27 of Schedule 7 to the Act and as such the transitional arrangements

will remain in tact until the CCMA properly publishes Rules in accordance with the Act. The Commissioner nevertheless held that only the Labour Court could declare the rules invalid. Therefore the provisions of the repealed ss 135(4), 138 (4) and 140(1) of the LRA are no longer in force by virtue of the transitional arrangements. The result was that the Commissioner held that the employer entitled to be legally represented.

The result is that on either reasoning s 140(1) (or its equivalent wording in the footnote to rule 25) currently governs legal representation in the circumstances contemplated in this judgment.

The constitutional rights allegedly infringed

Mr Burski submitted that s 140 (1) of the LRA is inconsistent with one or more or all of the following rights set out in the Constitution:

(a) Section 1(c). “The Republic of South Africa is one, sovereign, democratic state founded on the following values: .. (c) Supremacy of the constitution and the rule of law.”

(b) Section 23(1): Everyone has the right to fair labour practices;

(c) Section 34: Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or where appropriate another independent and impartial tribunal or forum;

(d) Section 33(1): Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(e) Section 9 (1): Everyone is equal before the law and has the right to equal protection and benefit of the law; and

(f) Section 9 (3): The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

The CCMA and arbitration

The CCMA is not a court of law. It is an organ of state. It is also an appropriate independent and impartial tribunal or forum for deciding, inter alia, dispute regarding certain alleged unfair dismissals) that can be resolved by the application of law in a fair public hearing. See s 34 of the Constitution. See **Eskom v Hiemstra NO and Others** (1999) 20 ILJ 2362 (LC).

Commissioners of the CCMA arbitrate, inter alia, disputes concerning unfair dismissal for reasons relating to conduct and capacity. Arbitration employed by the CCMA derives its origin from the LRA. The Arbitration Act 42 of 1965 does not apply. Neither does the common law of arbitration. "Arbitration involves the reference of a dispute between two or more parties for determination after a quasi-judicial hearing of all sides by a person other than a court of competent jurisdiction". See **LAWSA** vol 1 (First Reissue) para 411. Arbitration of misconduct dismissal disputes is compulsory, unless agreed otherwise. The parties do not choose the arbitrator although they have the right to request a senior instead of an ordinary commissioner to preside over the proceedings. See s 137 of the LRA. Consistent with the notion of arbitration, a CCMA

commissioner is obliged to adhere to the requirements of natural justice. See **Carephone (Pty) Limited v Marcus N.O. & Others** [1998] 11 BLLR 1093 (LAC) at para 18.

Legal representation generally

The history preceding the enactment of the LRA, more particularly s 140(1), sheds light on the legislature's decision to restrict legal representation as of right in conduct and dismissals but not so other representation.

The Labour Relations Act 28 of 1956 was the forerunner of the LRA. The adjudication of alleged unfair dismissals were performed by the Industrial Court. In terms of the LRA of 1956 parties were entitled to legal representation as of right 'provided no other party made prior objection thereto'. See sections 45(9) (c) and 46 (c) of the LRA of 1995. A party was entitled to object to the other side being legally represented. It was held that such an objection was not decisive. The provisions of the common law obtained and the court was endowed with the discretion to allow legal representation. See **Morali v President of the Industrial Court and Others** 1987 (1) SA 130 (C) at 133 G-H. Recently the Supreme Court of Appeal succinctly restated the rule in **Hamatta and Another v Chairperson, Penninsula Technikon Internal Disciplinary Committee** 2002 (5) SA 445 (SCA) at para 12 as follows:

"There may administrative organs of such a nature that the issues which come before them are always so mundane and the consequences of their decisions for particular individuals always so insignificant that a domestic rule prohibiting legal representation would be neither unconstitutional nor be required to be read down (if its language so permits) to allow for the

exercising of a discretion in that regard. On the other hand, there may be administrative organs which are faced with issues, and whose decisions may entail consequences, which range from the relatively trivial to the most grave. Any rule purporting to compel such an organ to refuse legal representation no matter what the circumstances might be, and even if they are such that a refusal might very well impair the fairness of the administrative proceedings, cannot pass muster in law.”

See also the **Morali** case at 133 D-E and **Dladla and Others v Administrator Natal and Others** 1995 (3) SA 769 (N) at 776-777.

The discretion afforded in the Industrial Court in this regard was interpreted widely and flexibly. Legal representation largely came to being permitted. See P Benjamin “Legal Representation in the Labour Courts” (1994) 15 ILJ 250, 252.

The draft Bill, which became the Labour Relation Act 66 of 1995 was accompanied by a memorandum. As the Bill passed through the steps on the way to becoming an Act so it outstripped, in some respects, the memo’s motivation for certain sections and procedures. The Explanatory Memorandum to the Draft Labour Relations Bill 1995 is published in (1995) 16 ILJ 270. The following extracts throw light upon the motivation of the drafters:

“The Draft Bill explicitly regulates unfair dismissal and clearly states the permissible and impermissible grounds for dismissal. The procedural requirements for fair dismissal are clarified as are competent remedies. A speedy, cheap and non-legalistic procedure for the adjudication of unfair dismissal cases is provided.” (285)

“The Draft Bill has been drawn up with due regard to the different circumstances and needs of small business. It seeks to accommodate these in the following ways:

Our system of adjudicating unfair dismissal disputes, is contrary to original intentions, highly legalistic and expensive. The Industrial Court conducts its proceedings in a formal manner, along the lines of a court of law, and adopts a strictly adversarial approach to the hearing of cases. Judgments are lengthy, fairness is determined by reference to established legal principles and, within an essentially adversarial system, the lawyer’s presentation of a case has inevitably emphasized legal precedent. Legalism undermines the goals of the system, namely cheapness, speed, accessibility and informality.” (316)

“Legal representation is not permitted during arbitration except with the consent of the parties. Lawyers make the process legalistic and expensive. They are also often responsible for delaying the proceedings due to their unavailability and the approach they adopt. Allowing legal representation places individual employees and small business at a disadvantage because of the cost.” (319)

I return to the focus point of this application: the constitutionality of section 140(1) of the LRA. The parties to a dispute concerning a dismissal for alleged conduct or capacity would be entitled to attend and present their case. A corporate body would be entitled to attend and present its case. A corporate body would, of course, be represented by an agent. The parties may be represented as of right at these proceedings by:

- (1) Any member, office bearer, or official of that party’s registered trade union (in the case of an employee); or
- (2) Any member, office bearer, or official of that party’s registered employer’s organisation (in the case of an employer);

(3) A director or employee of the party (in the case of an employer).

Legal representation is permitted as of right at all other arbitrations (ie other than conduct or capacity dismissals) conducted under the auspices of the CCMA. These include arbitrations concerning section 9, (freedom of association) 16(7)-(14) (disclosure of information), 21 (organisational rights), 22 (organisational rights), 24(5) collective agreements), 24(6) (agency shop agreements), 45(1)-(4) (ministerial determinations) 61(10)-(13) (collective agreements that regulate parties to a council), 62(1)-(12) (disputes about demarcations between sectors and areas), 74(1)-(4) (disputes in essential services), 86(4)-(7) (workplace forum disputes about joint-decision making), 89(3)-(10) (disclosure of information disputes in workplace forums), 94 (disputes about workplace forums), and 191(5)(a) (unfair dismissal disputes where the employee has alleged that the reason for dismissal is that the employer made continued employment intolerable or the employee does not know the reason for the dismissal, and, since 1 August 2002, unfair labour practice disputes).

It is unnecessary to examine all the sections that have just been mentioned. Dismissals relating to conduct hold serious social, financial and personal implications for employees and for employers. The concept of preserving job security is one of the paramount aims of the LRA. So protection against the invalid and unfair termination of an employment relationship has a special

significance. Employers too have a real and legitimate interest in maintaining a workforce that is not prone to misconduct (eg theft of goods and insubordination, inability to do the job, poor work performance). The LRA protects the employer's right and ability to conduct a business by permitting dismissal for these and other reasons. The importance and prominence of dismissal and its consequences suggest that legal assistance at the stage of the determination of whether the dismissal is valid and fair is desirable.

Section 140(1) leaves representation to the discretion of the commissioner. The discretion must be exercised judicially and rationally but an employer or employee remains a suppliant as regards legal representation. There are no rational reasons to deny a right to legal representation to an employee or his or her employer in arbitrations about dismissals allegedly occasioned by operational requirements, and not where the capacity the conduct or capacity of the employee is concerned. There is in particular no rationality in permitting a right of legal representation in disputes about discipline falling short of dismissal (where job security is not in jeopardy) and conduct and capacity dismissals. In these cases the stakes are so much higher and the consequences. On the other hand it is neither fair, nor does it encourage nor reward entrepreneurship and investment on the part of the employer if the employer is bound to keep in employment employees who do not abide by the rules of morality or who are unfit for the post. An employer too, may require legal representation, to ensure that a

fair and valid dismissal of such an employee is upheld.

Legal practitioners provide professional service that extends wider than their clients and embraces ethical obligations towards the presiding commissioner and, where appropriate, to the opposing party. These duties are subject to scrutiny by the professional bodies to which they belong. The High Court also has a supervisory role. Mr Buirski submits that legal practitioners provide: more effective cross examination, prevent or deter the summary dismissal of a party's case, bridge possible hostilities between the party and the commissioner, clear up vagaries and inconsistencies in the testimony, focus the attention of tribunal members on elements of a party's claim, assist in interpreting statutes and other relevant legal instruments, assist in ensuring consistency in administrative decision making by marshalling prior decisions of the tribunal or other relevant decisions which may serve as a guide in the exercise of the administrative discretion.

Evaluation

Fair labour practice

Section 23(1) of the Constitution provides that everyone has the right to fair labour practices. This concept is not defined in the Constitution but embraces the right to job security. This right should not be terminated except if it is lawful and fair to do so. An applicant is an employer and has certain rights vis-a-vis employees. I shall assume, without deciding, that an employer's rights vis-a-vis his or her employees are embraced in s 23(1). Procedures and institutions must be in place to enforce these rights should they be violated. But does this mean that the institutions and procedures to enforce them belongs to this class of rights? Prima facie I do not think so, but I need not decide this point.

Right to administrative justice

Netherburn relies upon s 33(1) that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. I have noted that the CCMA is an organ of state. It is not a court of law. Undoubtedly the CCMA performs some function that are of an administrative nature. But can its arbitration function be described as an administrative act or function? This question has arisen in the LAC in Checkers. A view was expressed about the

nature of the CCMA arbitration in the context of the Promotion of Administrative Justice Act. In Shoprite Checkers (Pty) Ltd v Ramdaw NO & other (2001) 22 ILJ 1603 (LAC) Zondo JP said the following:

“29. A ‘decision’ is then defined as meaning “ any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to’, among others, (a) making , suspending , revoking, or refusing to make an order, award or determination’. Even though the view expressed by this court in *Carephone* the making of an arbitration award by the CCMA commissioner constitutes an administrative action might not be correct, it seems to me that the definitions of ‘administrative action’ and of ‘decision’ in s1 of the PAJA may be wide enough to include it. I say this despite the reference in the definition of ‘decision’ to a decision ‘of an administrative nature’. It is not necessary to express a final view on this issue in this matter. It is sufficient if it appears that the PAJA may well be applicable to the making of an arbitration award by the CCMA because the question that has risen in this matter is whether or not there is a warrant to reconsider the decision

of this court in *Carephone*".

However, although the opinion of the LAC must carry weight, it was an obiter

remark. I prefer the view expressed by Wallis AJ in *Shoprite Checkers (Pty)*

***Ltd v Ramdaw NO & Others* (2000) 21 ILJ 1232 at para 90 that arbitration is not**

administrative action. See also *SA (Pty) Ltd v Brand NO &*

***Others* 2001 22 ILJ 993 (LC) at para 58 – 59.**

Right to representation implicit in s 34

The CCMA, as far as its arbitration function is concerned, is an appropriate neutral tribunal as contemplated by s 34 of the Constitution. Does it flow from this that a party in similar circumstances as *Netherburn* has a right to legal representation?

Section 22 of the Republic of South Africa Act of 1993 was the precursor of s 34 of the Constitution. It

read:

“Every person shall have the right to have justiciable disputes settled by a court of law or where appropriate, another independent and impartial forum”.

**Madlanga J, delivering judgment in Bangindawo v Head of
Nyanda Authority 1998 (3) 262 (Tk) at 277E-G said:**

“I accept Mr Trengove's submission that, even though there be no specific mention of the right to legal representation in civil cases, the right of access to court and of having justiciable disputes settled by courts would be rendered entirely nugatory if, in respect of civil proceedings, it were to be held that there is no constitutional to legal representation. As submitted by Mr Trengove, even the best educated lay people need the assistance of professional legal representation to exercise their right to access to court in a meaningful way. This applies with more force in respect of the vast numbers of uneducated and illiterate people of this. Though there be no specific mention of the right to legal representation in respect of civil matters, in my view the conclusion I have reached is not too long a jump. It accords with an interpretation that views the Constitution for what it is a living document.”

A flexible approach to the question whether there is a constitutional right to legal representation was taken by the Lesotho Court of Appeal in **Attorney-General of Lesotho v ‘Mopa** 2002 (6) BCLR 645 (Les CA). Gauntlett JA writing for the court said:

“[21] A comparable problem arose in South Africa relating to detailed provisions entrenching a constitutional right to fair trial in criminal proceedings, with no similar express provision relating civil proceedings. The majority of the South African Constitutional Court (per Chaskalson P) held:

“[I]n the context of our interim Constitution, and having regard to the specific wording of the section itself, and the fact that the right to a fair trial is dealt with specifically and in detail under section 25(3), I cannot read section 11(1) as including a residual a fair trial right. (**Ferreira v Levin** NO 1996 (1) SA 984 (CC) at paragraph [185] , rejecting the contrary conclusion by Ackerman J in his minority judgment).”

[22] It does not follow however that a litigant in civil proceedings in Lesotho has no entitlement to legal representation. As this Court stressed in **Rantuba** (*supra*), in the first place that is an ancient and cherished common law right. We rejected the contention advanced there that the Constitution had tacitly abrogated that common law right. It was not necessary for us to say more. The question however now arises as to whether the Constitution, quite apart from not abrogating the common law right to legal representation in civil proceedings in the way it does in relation to criminal proceedings, nonetheless itself provides a foundation for claiming an entitlement to legal representation in civil proceedings, either generally or in appropriate circumstances.

[23] In my view it does so, in appropriate circumstances. The protection has not been created by entrenching such a right *per se*. The protection lies in the provision for a right to a fair hearing in civil proceedings. That entitlement will not automatically found a claim under the Constitution to legal representation in all cases. It will however do when the requirements of a fair hearing in turn make legal representation appropriate. It follows that such a claim will not lie in all civil proceedings, in the way it exists (by virtue of the specific stipulation in section 12(2)(d)) in all criminal proceedings.

[24] The distinction may be simply illustrated. A statute may conceivably provide for the determination of a civil dispute of a very simple kind and with minimal consequences. Examples might include labour legislation providing for the determination of minor disciplinary matters and excluding an entitlement to legal representation, or legislation regulating the adjudication of minor disputes between neighbours, or even property claims of very low value. Sound policy considerations, balancing concerns of cost, fairness expedition and lack of formality, may in appropriate circumstances justify that approach, and not trench upon the right to a fair trial. Whether or not a particular provision excluding an entitlement to legal representation infringes upon the right to a fair trial would have to be examined in each instance on its own terms. Just such an approach was adopted by the Supreme Court of Canada in *G v*

Minister of Health and Community Services 7BHRC 615 (Can SC) at 633 (paragraph 75).”

It is Netherburn’s case that even though there is no specific mention of the right to legal representation before a neutral, impartial tribunal, the right of access to a tribunal would be rendered nugatory if it were to be held that there is no constitutional right to legal representation.

Mr Buirski submitted that the phrase “fair public hearing” in s 34 of the **Constitution governs both hearings before a court and another impartial tribunal or forum as the CCMA. He makes this submission because he proceeds from the premise that legal representation is a constitutional right of litigants participating in civil litigation. I do not share the view that the requirements for a fair hearing are the same for courts and tribunals. It ignores the fundamental distinction between courts and tribunals which this section draws. I am of the opinion that whereas s 34 read with the emphasis on the right to access to a civil court, may well imply a right to**

legal representation, the same cannot be said about access to an appropriate, impartial tribunal. There many tribunals, each having diverse procedures, powers and functions. Legal representation may be appropriate some situations and in a

specific tribunal and not in other cases or on other tribunals.

One cannot read a right of legal representation vis-a-vis a tribunal as being implicit in s 34.

It is, however, entirely consistent with the right to fair hearing before a tribunal, for the tribunal to have discretion, as is the common law position, to admit legal representation in appropriate circumstances. These circumstances may be governed by the law establishing such tribunals or the common law informed, of course, by the Constitution.

Right to equality

The approach to alleged unfair discrimination

The Constitutional Court has laid down a series of cases that the first step in determining a complaint about inequality or discrimination is to inquire whether there has been a differentiation. See **Harksen v Lane NO and Others** 1998 (1) SA 300 at para 53 and **Legal Soldier (Pty) Ltd v Minister of Defence** 2002 (1) SA 1 (CC) at para 44.

Mr Buirski submitted that the law in relation to legal representation in misconduct/incapacity dismissals with every other form of arbitration conducted by the CCMA is unequal in operation and arbitrary. Because

arbitrariness is inconsistent with the rule of law, the LRA therefore violates ss 1 and 9 (1) of the Constitution. He is correct that the LRA is inconsistent in the way in which it deals with legal representation at arbitration proceedings.

The short answer to Netherburn's case is that there is no differentiation as regards the qualified right of legal representation between it and its former employee, (the only party, who may be concerned in a conduct or capacity arbitration hearing). An employer or employee who seek to be represented by a legal practitioner at arbitration proceedings conducted before a commissioner of the CCMA are treated on the same footing ie neither one of them has an unqualified right to legal representation. The fact that theoretically where the employer and employee applies to be legally represented and this privilege is granted to one of them and not the other does not mean that s 140(1) discriminates between them.

In **Mpho's** case it was observed at para 32 that:

"The essential notion of equality jurisprudence persons similarly circumstanced should be similarly treated. What the South African Constitutional Court has termed "mere differentiation" (**Prinsloo v Van der Linde** 1997 (3) SA 1012 (CC) at paragraph [25]) may, as I believe to be the case here, be arbitrary and irrational but it need not necessarily constitute an act of discrimination repugnant of the equality clause."

In the result I am unable to find that Netherburn has suffered discrimination. I have adverted to the inconsistency and inherent illogicality in the LRA as regards the issue of legal representation. But, where, as is this case, the inconsistent or irrational regulation does not infringe a particular constitutional right, it does not permit the conclusion that

because one section of the LRA, which is out of step with a more expanded or generous right that s 140(1) is invalid in terms of our Constitution.

Conclusion

In the result the constitutional point raised raised in the application falls to be dismissed. There is no call to make a costs order in this matter. For these reasons the order was made 22 August 2003.

**SIGNED AND DATED AT BRAAMFONTEIN THIS 31st DAY OF AUGUST
2003.**

A A Landman

Judge of the Labour Court

Date of hearing:

Date of judgment:

For applicant: Adv P A Buirski instructed by

Bowman Gilfillan Inc

For third respondent: Union official