The employee in the proceedings which led to the decision of the Labour Court in Mogothle v The Premier of the Northwest Province & Others (J 2622/08) had been suspended by his employer. He felt that this suspension was unfair. He could have referred a dispute to the CCMA and claimed that the employer’s conduct constituted an unfair labour practice. He chose not to do so. He instituted a contractual claim in the Labour Court and argued that his suspension constituted a breach of contract.

In taking this approach the employee (hereafter referred to as the Applicant) was clearly influenced by three decisions of the Supreme Court of Appeal (SCA) in which employees relied on an alleged contractual entitlement not to be unfairly treated by their employer. They did not rely on the unfair dismissal or unfair labour practice provisions of the Labour Relations Act, 66 of 1995 (LRA). In all three cases the SCA upheld their right to do so. See Old Mutual Assurance Co SA v Gumbi [2007] 8 BLLR 699 (SCA), Boxer Superstores v Mthatha & Another [2007] 8 BLLR 693(SCA) and Murray v The Minister of Defence [2008] 6 BLLR 513 (SCA). All these decisions accepted that common law contract principles must be developed to reflect the constitutional right to fair labour practices. The Gumbi and Boxer Superstores decisions accepted that there was a contractual right not to be unfairly dismissed. The Murray decision went further. The SCA found that an employee has a contractual right not to be constructively dismissed. The important point was that this finding was based on the notion that an employer has a contractual obligation of “fair dealing” towards its employees.

In the Mogothle decision the Court found that the suspension of the employee was a breach of contract. In coming to this decision the Court provided interesting guidelines as to what requirements must be met in order for a suspension to be fair. This makes the decision important for industrial relations practitioners and these guidelines are set out and discussed in this article.

Perhaps of more importance, however, is that, in coming to its decision, the Court had to consider important issues relating to contractual rights to fair treatment and the employer's right to suspend.
whether contract law principles can still be relied upon by employees and whether they can only exercise rights provided for by the Labour Relations Act, 66 of 1995 (LRA). The Court’s reasoning and decision in this regard are important. This aspect of the decision is also dealt with below and is discussed in the context of two other recent decisions also dealing with this issue.

Common law or statutory rights?

The Old Mutual, Gumbi and Murray decision make it clear that the SCA is of the view that common law contract principles, which have traditionally not provided much protection for employees against unfair treatment inflicted upon them by employers, should be developed to provide this protection. This is required by the constitutional right to fair labour practices. These decisions of the SCA have been criticised on the basis that it is unnecessary to develop the common law in the situation where the LRA provides protection against unfair treatment. The common law only has to be developed where legislation does not address the issue. The result of the three decisions is the development of two (perhaps competing) separate systems of law protecting employees. The one is based on the statutory provisions of the LRA and is enforced though the institutions and mechanisms found in the LRA. The other is based on (developed) contract law principles. It is argued that this is contrary to the intention of the legislature which envisaged one coherent legal regime governing employment.

These arguments have been given impetus by an interpretation of the decision of the Constitutional Court in Chirwa v Transnet Ltd and Others (2008) 3 BCLR 251 (CC).

What was decided in the Chirwa decision, and its precise effect, has been the subject of debate and contradictory decisions in the lower courts. Much has been written about the precise meaning and effect of the Chirwa decision, but most commentators accept that its effect is to deny public sector employees the right to utilise the principles of administrative law when challenging the decisions of their employers. It also appears to accept that, in any event, such challenges should only be brought in the Labour Court and that the High Court does not have jurisdiction to hear such a claim.

This decision has now been utilised to advance a more far-reaching argument, namely that Chirwa overrules the three SCA decisions referred to above and that contractual claims cannot be utilised by employees, at least in the area where the LRA provides protection to employees. They are limited to the remedies granted by the LRA. In any event, if these remedies still exist, they can only be enforced in the Labour Court.

These arguments have been dealt with in three recent decisions of the Labour Court.

The Mogothele decision

The Applicant employee in this matter was appointed as the Deputy Director General of the Department of Agriculture, Conservation and Development in the Northwest Province in 2006. He reported to the Premier of the Province as well as the relevant MEC of the Province in 2006. He reported to the Premier of the Province as well as the relevant MEC of the Province in respect of certain matters.

On 4 November 2008 a report appeared in the Mail and Guardian in which imputations of corruption were levelled against the Applicant. The allegation was that he was a member of an entity called Thathana Farms CC which had received a state grant and that he had been involved in the decision to provide the grant to Thathana CC. The Applicant’s position has always been, and it appears to have been common cause in the proceedings, that he had been concerned with the implications of a possible conflict of interest. In addition to complying with all the procedures for the application for a grant, he had therefore made full disclosure to the MEC of his interest and that of his family in Thathana CC. The MEC acknowledged that the disclosure had been made and also approved the grant.

This notwithstanding, the MEC seems to have felt compelled to appoint outside auditors to investigate the allegations made in the newspaper article, but took no steps to suspend the Applicant. This took place on 10 November 2008. On 11 November 2008 the Legislature of the Northwest Province debated the issue and made various recommendations, including that the Applicant be suspended. This prompted the MEC to write a letter to the Applicant in which the appointment of the outside auditors was confirmed and in which the Applicant was requested to take leave of absence as from 18 November 2008. The letter also specifically referred to the power of the MEC to impose a “precautionary suspension” as provided for in an official document termed the “SMS
Code” which appears to have been incorporated into the Applicant’s contract of employment. However, the letter specifically recorded that the MEC did not intend to rely on the provisions of the SMS Code. The Applicant did not challenge the decision to grant him leave of absence because he had been assured that the investigation by the outside auditors would be completed by the end of November 2008.

The next day the legislature again discussed the issue and resolved that the matter be investigated by the Auditor General and that the Applicant be placed on “extended leave”. As a result, the MEC terminated the mandate of the outside auditor and awaited the Auditor General’s investigation. When the Applicant reported for work on 1 December 2008 he was informed of the above development by the MEC. The MEC indicated that he needed time to discuss the issues with the Acting Premier. He was then placed on “extended leave”. It was common cause that the Applicant had not been afforded a hearing prior to being placed on extended leave.

The Applicant then approached the Labour Court for an order on an urgent basis setting aside his suspension. Of importance here was the fact that the Applicant expressly stated that he was not relying on any rights that may have assisted him in terms of the LRA (presumably the unfair labour practice provisions of this Act). He based his claim on the allegation that his suspension was in breach of contract, “in breach of statute”, and in breach of the Promotion of Administrative Justice Act, 3 of 2000. These breaches took the form of the Applicant being suspended:

- as a result of a directive received from the Northwest Legislature rather than being the product of an independent discretionary decision being taken by the MEC;
- in breach of certain regulatory measures (the SMS Code referred to above) governing the suspension of certain senior employees;
- the Applicant not being provided with a hearing.

The Court only found it necessary to deal with the argument that the Applicant’s suspension constituted a breach of contract.

The Court commenced its discussion by referring to the three Supreme Court of Appeal decisions in which the contractual right to fair treatment has been developed, namely the **Gumbi**, **Boxer Superstores** and **Murray** decisions referred to above. It then pointed out that –

“[24] The development of the common law by the SCA is not uncontroversial. It has been criticised, amongst other grounds, for opening the door to a dual jurisprudence in which common law principles are permitted to compete with the protection conferred by the unfair dismissal and unfair labour practice provisions of the LRA. (See, for example, Halton Cheadle “Labour Law and the Constitution”, a paper given to the annual SASLAW Conference in October 2007 and published in Current Labour Law 2008, the comments by PAK le Roux at page 3 of the same publication, and the article by Paul Pretorius SC and Anton Myburgh “A Dual System of Dismissal law: Comment on Boxer Superstores Mthatha & another v Mbenya” (2007 28 ILJ 2209 (SCA)” published in (2007) 28 ILJ 2172).”

The Court nevertheless found that the SCA had unequivocally established a contractual right to fair dealing that binds all employers and which encompasses a substantive and a procedural element. This right exists independently of any statutory protection against unfair dismissal and unfair labour practices. The Labour Court found that it was bound by the SCA decisions to enforce this right.

The Employer’s legal representatives argued that the decision of the Constitutional Court in **Chirwa** had overruled the three SCA decision referred to above. Its argued effect was summarised as follows –

“[26] ... This reading of the Chirwa judgment requires that in a labour-related dispute, any remedy established by the LRA must be pursued to the exclusion of any other that might previously have been thought to exist. Put another way, it suggests that the objective of the LRA was to be exhaustive of all rights arising from employment.”

The Court accepted that the **Chirwa** decision was a
clear endorsement of the virtues of the “mechanisms, institutions and remedies” provided for in the LRA and the merits of a “one stop shop” for the resolution of all labour related disputes. Nevertheless the Court also accepted that it did not exclude the right of an employee to pursue a contractual claim in the Labour Court or in the civil courts. It referred to s 77(3) of the Basic Conditions of Employment Act, 75 of 1997 (BCEA) which explicitly grants the Labour Court concurrent jurisdiction with the civil courts to hear and determine contractual disputes. Such an approach did not undermine the policy reasons that underpinned the concerns and views expressed in the Chirwa decision.

The Court then stated that

“[30] In summary: the approach adopted by the majority of the SCA in Fedlife Assurance Ltd v Wolfaardt 2002 (1) SA 49 (SCA) remains intact post-Chirwa - the LRA does not expressly or impliedly abrogate an employee’s common law entitlement to enforce contractual rights. As controversial as the judgments in Gumbi, Boxer Superstores and Murray might be as a matter of law or policy, they unequivocally acknowledge a common-law contractual obligation on an employer to act fairly in its dealings with employees. This obligation has both a substantive and a procedural dimension. In determining the nature and extent of the mutual obligation of fair dealing as between employer and employee, the court must be guided by the unfair dismissal and unfair labour practice jurisprudence developed over the years. If any “dual stream” jurisprudence emerges as a consequence and if this represents an undesirable outcome from a policy perspective, that is a matter for the legislature to resolve. Finally, if an employer acts in breach of its contractual obligation of fair dealing, the affected employee may seek to enforce a contractual remedy which may, by virtue of s77(3) of the BCEA, be sought in this court.”

The Court then went on to deal with the merits of the case and considered whether the Employer had acted fairly. After a review of case law, primarily dealing with principles of administrative law, and two recent Labour Court decisions (see CLL Vol 18 No. 2), it came to the conclusion that in the case of a “preventative suspension” such as this, each case must be considered on its merits, but that, “at a minimum” the contractual principle of fair dealing, which imposes a continuing obligation of acting fairly on an employer, requires the following –

- the employer must have “justifiable reasons” to believe that, prima facie at least, the employee has engaged in serious misconduct;
- that there is some objectively justifiable reason to deny employees access to the workplace based on the integrity of any pending investigation into misconduct or some other relevant factor that would place the investigation or the interests of affected parties in jeopardy;
- that the employee must be given an opportunity to state a case before the employer makes any decision to suspend an employee.

The Court was clearly concerned that the requirement of an opportunity to be heard could be seen as giving an employee a right to some form of procedural hearing akin to the very formal disciplinary hearings conducted by many employers.

After referring to the decision in SAPO v Jansen van Vuuren NO & Others [2008] 8 BLLR 198 (LC) the Court expressed the following view –

“[37] I do not think that what the court intended by this statement was that a hearing prior to a suspension should be modelled on what has been termed the ‘criminal justice model’ with all of the hallmarks of a criminal trial. This court has held previously that the Code of Good Practice : Dismissal in Schedule 8 to the LRA envisages a less formal process, one in which the employer and employee engage in what the ILO’s Committee of Experts has termed, in the context of pre-dismissal procedures, a process of dialogue and reflection between the parties. I see no reason why the same conception of procedural fairness should
not apply prior to a proposed suspension pending an investigation into alleged misconduct”.

(Note: The reference in footnote 1 was to the important decision in Avril Elizabeth Home for the Mentally Handicapped v CCMA & Others (2006) 27 ILJ 1644 at 1653.)

The Court found that the suspension was substantively unfair. This was because there was no evidence to show that the Employer would have been jeopardised by the Applicant remaining at work. It was also clear that the MEC did not exercise an independent discretion when deciding to suspend and was influenced by the resolutions passed by the Northwest legislature.

“[41] The principle of fair dealing further required that the MEC exercise an independent discretion in relation to any decision to suspend the applicant. The papers filed in this application bear out the applicant’s contention that the legislature considered itself entitled to give the department instructions to suspend the applicant, and that in suspending him, the MEC heeded those instructions. In his founding affidavit, the applicant makes the express allegation that the MEC would not have acted as he had if the legislature had not passed the resolution it did. Although the allegation is denied only in general terms, the undisputed facts bear out this conclusion. By the time the applicant was finally suspended, the MEC had changed his position no less than five times: first he appointed Sekela Auditors but left the applicant unsuspended; then, by agreement, he suspended the applicant until the end of November; then he withdrew Sekela’s mandate; then he unilaterally suspended the applicant until the middle of December; and finally, he suspended the applicant indefinitely. These shifts in position precisely match the resolutions adopted by the legislature, and what the deputy speaker regarded as instructions that he considered the legislature entitled to issue. The MEC’s conduct smacks of a subservient and inappropriate response to the legislature. Fairness required the MEC to exercise an independent discretion, one that would have acknowledged the legislature’s position but that would have accounted too for other competing interests, not least those of the applicant.

[42] In short: nowhere in the correspondence between the parties is there any allegation that the applicant’s continued presence might jeopardise any of the investigations that were proposed, nor is there any suggestion that the well-being or safety of any person or property would be endangered. The respondents have failed in their affidavits to produce any substantive evidence to satisfy either of these requirements. “

The suspension was also procedurally unfair because the Applicant had not been afforded an opportunity to be heard. The argument that the employee had an opportunity to be heard but chose not to do so was rejected. The employer was under a duty to offer one. The decision to require the Applicant to take leave of absence was set aside.

This decision is authority for the following propositions–

• Common law contract principles and the rights contained therein remain available to an employee (and presumably an employer). The employee is not limited to the rights set out in the LRA or any other applicable legislation.
• These common law principles must be developed to give effect to the right to fair labour practices and there is now a duty of “fair dealing” imposed on an employer. (The Court acknowledges that this may result in two separate legal regimes governing the employment relationship but regards itself as bound by the SCA decisions.)

• The Labour Court and the ordinary courts both have jurisdiction to consider these contractual claims.

• As a result of the application of the duty of fair dealing an employer who suspends an employee as a precautionary measure pending an investigation into an employee’s conduct and possible disciplinary action must act fairly, both substantively and procedurally.

**Mohlaka v Minister of Finance & others J2283 13//11//2008**

The Employee in this matter claimed that he had been constructively dismissed. He referred a dispute to the CCMA well after the expiry of the 30 day period set for such referrals. His application for condonation was refused. Two years after his dismissal he lodged a claim in the Labour Court in terms of s 77(3) of the BCEA (ie a contractual claim) claiming damages for loss of earnings loss of future earnings, relocation costs and legal costs associated with being blacklisted as a debtor. He also lodged a claim based on a loss of dignity.

The Employer took the point that the Labour Court did not have jurisdiction to consider the claim. This was based on the argument that the **Chirwa** decision overruled the trio of SCA decisions referred to above. The **Mohlaka** decision seems to have made the following findings

• The claim was, in effect, a claim based on an allegation of an unfair dismissal and discrimination - it was a claim “founded in labour law” and could therefore not be brought before the Labour Court on the basis of a contractual claim.

• The **Chirwa** decision overturned the trio of SCA decisions;

• Section 77 (3) of the BCEA should not be interpreted to permit such a claim.

**Tsika v Buffalo City Municipality**

*(EL51/07 3/12/08)*

The employee in this case was dismissed on a number of charges of misconduct. He did not institute a claim for unfair dismissal in terms of the LRA, nor did he claim that his dismissal constituted a breach of contract. His claim in the High Court was simply for the payment of sums of money that he alleged the employer owed him in terms of his contract of employment. These were an amount of R 271,359.23 arising from the deduction of amounts by the employer from preservation policies into which part of his salary had been paid and an amount of R 1,800,000.00 due to him as a payment that would accrue if and when his employment was terminated. The employer instituted a counter claim for an amount in excess of one million rand representing amounts paid by the employer as a result of the employee’s alleged misconduct.

It is clear from the judgment that the employee had not instituted a contractual claim in circumstances where he could have instituted a claim in terms of the LRA. There was no attempt to argue for the development of common law contract principles to reflect principles of fairness that would compete with those found in, and developed in terms of, the LRA. The claims were, in effect “pure contractual claims” for the payment of monies owed. The arguments dealt with in the **Mogothle** and **Mohlaka** decisions in this regard were therefore irrelevant. The Employer did, however, raise the argument that the High Court did not have jurisdiction to hear the matter. Because this matter involved the employment relationship it should have been determined by the Labour Court. – once again an argument based on comments made in the **Chirwa** decision.

The Court found that it had jurisdiction to hear the claim. It made the following points –

• All the cases referred to by the employer in which the jurisdiction of the High Court to deal with employment related matters was challenged, dealt with cases concerning the application of administrative law principles. This was not the case here. This was simply a claim for the payment of money arising from an alleged breach of contract.

• The LRA did not give the Labour Court exclusive
jurisdiction to deal with this type of claim.

- Section 77 of the BCEA made it clear that the High Court had jurisdiction to hear such a contractual claim.

- The reasoning in the Chirwa decision dealing with s157 of the LRA in the context of the principles of administrative law did not apply to this case dealing with contract law and in which the provisions of s 77 of the BCEA applied.

- The decisions of the SCA referred to above accept that the ordinary courts still have jurisdiction to hear contractual claims arising from the contract of employment and that Chirwa does not overturn these decisions.

**Comment**

**Guidelines relating to suspension**

The guidelines and requirements set by the Court for a fair precautionary suspension will probably remain relevant, even if the view is later adopted that there is no contractual right (based on fair dealing) to substantive and procedural fairness when an employee is suspended. They will probably be followed by arbitrators hearing unfair suspension cases. They are, in any event simply a development of the views expressed in two other recent decisions of the Labour Court dealing with suspensions. (See SAPO Ltd v Jansen van Vuuren NO & Others [2008] BLLR 798 (LC) and HOSPERSA & Another v MEC for Health, Gauteng Provincial Government [2008] 9 BLLR 861 (LC)).

It may still be necessary to develop further the circumstances in which a suspension may be justified. The decision does not limit the right to suspend to the situation where the integrity of any investigation that may be taking place may be jeopardised. It also refers to relevant factors that could place the interests of affected parties in jeopardy. Perhaps the greatest danger is that arbitrators will develop detailed and strict rules relating to procedural fairness. The Court in fact cautions against this. A simple opportunity to make representations, whether orally or in writing, ought to suffice. See in this regard CLL Vol 18 No 2. An area which still needs to be addressed is the fairness or otherwise of lengthy periods of suspension.

**The contractual issue**

The Mogothle and Mohlaka decisions reflect differing approaches to various issues.

The first is whether common law contract principles should be developed to include a duty of fair dealing and/or to provide protection against unfair treatment. The Mogothle decision concedes that such a development is controversial but nevertheless finds that it must do so on the strength of the trio of SCA decisions referred to above. It finds that the decision of the Constitutional Court in Chirwa does not overturn these decisions. The Mohlaka decision finds that such principles should not be developed, on the basis of policy considerations such as the need to avoid competing (and possibly conflicting) legal regimes and the need to avoid the duplication of forums. It finds that the Chirwa decision does overturn the SCA decisions.

It is submitted that the Mogothle decision’s finding that the Chirwa decision has not overruled the SCA decision is correct. The comments made by the Judges in the Constitutional Court, and on which the Mohlaka decisions relies, were made in the context of a dispute as to whether administrative law principles should also be applicable to the employment relationship between the public sector employees and their employer — whether a third set out legal principles in addition to statutory and contractual principles should apply to this relationship.

The second is whether, assuming the Court has the jurisdiction to develop the common law, these cases should be heard by the Labour Court or the ordinary courts. The Mogothle decision indicates that both have jurisdiction. The tenor of the Tsika decision appears to be in agreement with this approach. The Mohlaka decision did not have to deal with this point but is seems clear that it would have argued that only the Labour Court has jurisdiction.

It is also perhaps necessary to consider a more far-reaching issue, namely whether employers and employees should be permitted to rely on contractual principles at all? Should the rights of employers and employees not be dealt with on the basis of statutes such as the LRA, the BCEA and the Employment Equity Act, 55 of 1998? From the way in which their arguments are reflected by the Courts, it seems that this
far-reaching proposition may have been put forward by some of the employer’s legal representatives. It is implicit in the Tsika and Mogothle decisions that they would not agree with this view. The Mohlaka decision is less clear on this issue but it seems that it would also not have taken such a view. This is, it is submitted, the correct approach – indeed the contrary approach would probably be impossible to uphold. Firstly, these statutes do not deal with all aspects of the employment relationship and contractual principles still deal with important facets of the employment relationship. Secondly, this would mean that employers have virtually no rights they could enforce.

Thirdly, most labour statutes are based on the assumption of the existence of a valid contract of employment and often envisage employees being able to negotiate more favourable terms and conditions of employment than those found in a statute or in collective agreement. ■

PAK Le Roux

Practice Notes

CCMA proceedings - Joinder of parties and legal representation

Two recent decisions, one by the Supreme Court of Appeal (SCA), the other by the Labour Appeal Court (LAC) are of interest for those who represent parties in the CCMA.

The first deals with the question whether a person who alleges that he has been refused promotion unfairly, and who refers a dispute to the CCMA, must cite or join the successful candidate who was promoted to the post. The second deals with the question whether a party to unfair dismissal arbitration proceedings are entitled to legal representation. Is there an absolute entitlement to legal representation?

Joinder of parties


In this case, the Applicant employee had applied for the post of Deputy Director: Administration at Gray’s Hospital in Pietermaritzburg. He was not appointed because affirmative action considerations had led to the appointment of a Black person. He referred a dispute to the Labour Court arguing that he had been unfairly discriminated against and that he should have been appointed. It is important to note that the Applicant sought what is termed a “protective promotion”. The effect of a court order to this effect would have been that he would have been entitled to all the benefits of promotion without actually being promoted into the post concerned. This in turn meant that the position of the successful candidate was not affected – he remained in his post.

The Labour Court accepted the employer’s affirmative action defence. On appeal, the LAC did not deal with the merits of the dispute but dismissed the appeal on the basis that the successful candidate should have been joined in the proceedings by the Applicant. The successful candidate had had an interest in the proceedings and the failure to join him had deprived him of an opportunity to have his say. The dispute was then taken on appeal to the SCA. The merits of the case have been discussed in CLL Vol 18. No 2 and will not be dealt with here. This note only deals with the SCA’s view of the LAC decision to the effect that the successful candidate should have been joined in the case.

In coming to its decision the LAC relied on its earlier decision in Public Servants Association v Department of Justice & Others (2004) 25 ILJ 692 (LAC). The SCA also considered this decision and other relevant cases. It pointed out that the test for joinder is whether the relevant person “has a direct and substantial interest in the matter” which may be prejudicially affected by the decision that the court may make. This would not depend on the nature of the subject matter of the dispute but the potential effect which the court order could have on the interests of the person concerned. It came to the conclusion that joinder had not been required in this case. Its views are set out in the following excerpt.

[10] All the cases I have referred to also illustrate the point that the order or judgment of the court is relevant to the question whether a party has a direct and
substantial interest in the subject matter of any proceedings. It is so that in the course of its reasoning a court makes findings and expresses views which do not form part of its judgment or order. An example in point in the employment arena concerns a potential finding by a court that a successful appointee was not suitable for appointment. The “unsuitable” appointee has no legal interest in the matter if the order will be directed at the employer (the author of the unsuitable appointment) to compensate the “suitable” but unsuccessful applicant. Of course the successful but “unsuitable” appointee will always have an interest in the order to confirm his/her suitability for the job but this is not a direct and substantial interest necessary to found a basis for him or her to be joined in the proceedings. In a situation where a number of applicants compete for a position, they provide information to the prospective employer to influence the decision in their favour. That is as far as they can take it. Once the employer selects from amongst them it is up to the employer to defend its decision if challenged. This is because the employer, as the directing and controlling mind of the enterprise which is vested with the managerial prerogative to manage it, has a legal interest in the confirmation of its decision as it faces a potential order against it. The successful appointee can only have a legal interest in the proceedings where the decision to appoint him is sought to be set aside which can lead to his removal from the post. He becomes a necessary party to the proceedings because the order cannot be carried into effect without profoundly and substantially affecting his/her interests.

[11] As already pointed out, the relief sought in this matter, and in Public Servants Association v Department of Justice, supra, was not directed at the setting aside of the Department’s decisions and the reversal of the appointment. The LAC was thus incorrect in finding that the facts in the Amalgamated Engineering Union case, supra, were analogous to those in the Public Servants Association case. In the Amalgamated Engineering Union case, the employer who had not been joined would have been prejudiced, as found by Fagan AJA, because it had a direct and substantial interest in the appointment of an arbitrator regarding a dispute it had with its employees and the union. In the Public Servants Association case, there was no potential prejudice to the successful appointees as no relief was directed at them. The LAC further erred in finding that the relief sought was irrelevant in considering whether a party had a direct and substantial interest in a matter. The cases referred to by the LAC do not support this conclusion and as pointed out above, they dealt with a completely separate and unrelated principle. In the circumstances, the LAC’s decision that Mr Mkongwa had a direct and substantial interest in the matter and that the failure to join him was fatal to the appellant’s case must be reversed.”

Legal Representation

Netherburn Engineering CC t/a Netherburn Ceramics v Mudau NO & Others JA 1/05  5/12/2008)

The debate whether legal representation should be permitted in the CCMA “as of right” has been debated since the Labour Relations Act, 66 of 1995 (LRA) came into force. The Labour Appeal Court has now expressed its views in this regard.

As far as conciliation proceedings are concerned, the position is regulated in rule 25(1)(a) of the Rules for the Conduct of Proceedings Before the CCMA. An individual who is a party to the dispute may, of course, appear in person. A company or close corporation may be represented by a director or employee of that company or a member of that corporation as the case may be. Legal representation is not permitted. However, it appears that, as a matter of practice, commissioners will often permit legal representation in order to argue points in limine relating to the jurisdiction of the CCMA.

At the time that the dispute in this matter arose the
issue of legal representation in arbitration proceedings was regulated is s 140 of the LRA. This section has now been repealed and legal representation is now dealt with in rule 25. However, rule 25 is identical to s 140. It starts with the general proposition in rule 25(1)(b) that a party is entitled to be represented by a legal practitioner. This is then qualified significantly by rule 25(1)(c). It states that if the dispute concerns the fairness of a dismissal and a party has alleged that the reason for the dismissal relates to the employee’s conduct or capacity, legal representation is not permitted unless –

- all parties and the commissioner agree to legal representation;
- if the commissioner permits legal representation in the absence of such an agreement.

To permit legal representation, the commissioner must be of the opinion that it would be unreasonable to expect the party concerned to deal with the dispute without legal representation. In considering this question the commissioner must take into account the nature of questions of law raised by the dispute, the complexity of the dispute, the public interest and the comparative ability of the parties to the dispute or their representatives to deal with the dispute.

Although the restriction on legal representation at arbitration proceedings only applies to disputes dealing with dismissals for misconduct and incapacity, by far the majority of cases fall within these two categories. It is therefore not surprising that especially employers have wanted to challenge the lack of an automatic right to legal representation in these circumstances. The most obvious challenge has been on the basis that this prohibition was unconstitutional.

In this case Netherburn Engineering had applied to the commissioner for permission to utilise legal representation in a case involving an alleged unfair dismissal for misconduct that had been referred to the CCMA. It did so on the basis that the employee concerned was represented by an experienced union official who had appeared before the CCMA and other tribunals on numerous occasions whereas the employer’s representative would have been dealing with this type of matter for the first time.

After considering these factors the commissioner refused legal representation. Netherburn’s representative then asked for the postponement of the arbitration proceedings in order to take the commissioner’s decision on review. This postponement was refused. Netherburn’s representative then left the room and did not participate further in the proceedings. The arbitration continued in its absence. The employee was found to have been unfairly dismissed.

Netherburn then brought an application in the Labour Court to have the decision of the commissioner reviewed. An element of its case, at least when it was argued, was that it had an absolute right to legal representation. This argument was rejected by the Labour Court. Certain aspects of the case proceeded on appeal to the LAC.

Although there was a majority and a minority decision the LAC was unanimous in its view that the appeal should fail. The majority decision pointed out that at various stages during the review proceedings and appeal Netherburn had raised differing arguments. The first did not challenge the constitutionality of s 140 at all but simply argued that the commissioner’s decision not to permit legal representation was reviewable. Later, in argument before the Labour Court and the LAC the constitutionality of s 140 was challenged. Here two arguments were raised. The one was that s 140 should be declared invalid because it is unconstitutional. The second was that it need not have been declared invalid but that the commissioner should simply have refused to have enforced it because it infringed the constitution.

The majority decision took the view that the case argued in the founding affidavit was not premised on a challenge to the constitutionality of s 140. It sought to review the commissioner’s decision on the basis that she should have exercised her discretion in favour of permitting legal representation. It was not permitted to raise a different argument relating to constitutionality at a later stage. It was also not an argument raised at the arbitration itself. Netherburn’s argument should therefore fail on this basis alone. The majority decision also considered the constitutionality arguments raised and found that there was no basis for challenging the constitutionality of s 140. The minority decision came to the same conclusion.

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