Reportable – Yes

Revised – Yes

Of interest to other Judges - Yes

IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

Case number: J 1782/03

In the matter between :

NORMAN TSIE TAXIS Applicant

and

POOE, M N. O. First Respondent

THE DIRECTOR OF THE COMMISSION FOR

CONCILIATION, MEDIATION & ARBITRATION Second Respondent

THE COMMISSION FOR CONCILIATION,

MEDIATION & ARBITRATION Third Respondent

SATAWU obo T E TSOALI Fourth Respondent

JUDGMENT

CORAM: A VAN NIEKERK AJ

[1] The Applicant seeks to review and set aside a ruling made by the First Respondent ('the Commissioner') that the Applicant was not entitled to legal representation in arbitration proceedings conducted under the auspices of the Third Respondent, the CCMA.

[2] An initial challenge to the Commissioner's ruling was based on submissions concerning *inter alia* the validity of the CCMA Rules in the form that they existed at the time that the arbitration proceedings that are the subject of the proceedings were conducted in 2003. By agreement between the parties, this point was separately argued, and is the subject of a judgment delivered by this Court on 21 January 2004. The judgment has been reported at (2004) 25 *ILJ* 724 (LC).

[3] On 3 February 2004, the Applicant filed an amended Notice of Motion in which it sought the following relief -

"1 THAT it be declared that any provision in the Labour Relations Act 55 of 1995, or any Rules of the Commission for Conciliation, Mediation and Arbitration promulgated in terms of the Labour Relations Act at any relevant time, in terms whereof legal representation in arbitration proceedings before the Commission for Conciliation, Mediation and Arbitration is in any way prohibited, limited or subjected to the discretion of the presiding arbitrator, are unconstitutional and contrary to and irreconcilable with the principles of a fair hearing and natural justice;

2 *THAT it be declared that the right to legal representation in all arbitration proceedings before the Commission for Conciliation, Mediation and Arbitration, is an imperative of and essential to the right to a fair hearing and natural justice in such arbitration proceedings, and a Constitutional pre-requisite for fair proceedings;*

3 *THAT the award of the First Respondent, being Commissioner M Pooe, dated 7 August 2003 and issued under case number FS4179/02, in terms whereof the Applicant was denied legal representation in the CCMA, be accordingly reviewed and set aside;*

4 *THAT it be declared that the Applicant is entitled to legal representation in the arbitration proceedings before the CCMA;*

5 *THAT such further and/or alternative relief be afforded to the Applicant as the Honourable Court may deem meet."*

[4] The first issue to be addressed is the application by the Association of the Law Societies of South Africa to intervene as *amicus curiae*, alternatively to be joined as a respondent in the matter. The Law Society, obviously aware of the revised and broad terms of the relief sought by the Applicant, filed its application to intervene as *amicus curiae* on 11 May 2004 in terms of Rule 19 of the Rules of the Labour Court. That Rule provides that -

"*(1) Any person interested in any proceedings before the court may, on application to the Judge President or any judge authorized by the Judge President, be admitted to the proceedings as an amicus curiae on the terms and conditions and with the rights and privileges determined by the Judge President or any other judge authorized to deal with the matter*

…

(3) An application in terms of subrule (1) must be made not later than 15 days before the date of hearing".

[5] The Law Society filed its application six days before the hearing of this matter. For the reasons recorded below, it did not become necessary to consider the application for condonation that accompanied the application to intervene.

[6] Mr David Gush states in an affidavit deposed to on behalf of the Association of Law Societies that every practising attorney in South Africa is a member of one of the four constituent societies of the Law Society of South Africa, that attorneys are involved in almost all litigation brought before our courts and in a substantial proportion of the litigation heard in other forums, and that the CCMA determines the vast majority of disputes arising out of the employment relationship in South Africa. For these reasons, he submitted that the Law Society has a real and substantial interest in the question whether or not legal representation is allowed in proceedings before the CCMA.

[7] Gush also sets out the main submission which the Law Society would make if it were to be admitted as an *amicus curiae* in the proceedings, namely, that the Rule 25, insofar as it purports to

give commissioners the right to exclude legal representation in the CCMA, is *ultra vires*. In essence, the argument, which is recorded in paragraph 12 of the affidavit, is that section 115(2A) (k) of the LRA provides that the CCMA may make rules regulating the right of persons or categories of persons to represent any party in any conciliation or arbitration proceedings. This power to regulate, it is submitted, does not encompass a power to prohibit, and to the extent that a commissioner has the power in terms of the Rules to exclude legal representation, they are *ultra vires*. The Law Society's submissions were it to be allowed to intervene in these proceedings would not deal with the constitutionality of the relevant provisions of the LRA at all. The Law Society's application was opposed by the Second, Third and Fourth Respondents, and by the Minister of Labour, who, consequent on service of the order made by this Court on 21 January 2004, was joined in these proceedings.

[8] In its judgment on the validity of the CCMA Rules promulgated in July 2002, the Court observed that these Rules have variously been withdrawn, replaced, and corrected. That history should be recalled for the purposes of this judgment.

[9] Prior to the Labour Relations Amendment Act, 2002, the right to legal representation in all arbitration proceedings was a general right afforded in the following terms by section 138(4) of the LRA -

"In any arbitration proceedings, a party to the dispute may appear in person or be represented only by-

a) a legal practitioner;

b) a director or employee of the party; or

c) any member, office bearer or official of that party's registered trade union or registered employers' organisation."

Section 140(1) qualified the rights extended by section 138(4) in relation to arbitration proceedings concerning a dismissal effected for misconduct or incapacity. The section read as follows -

"*If the dispute being arbitrated is 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; or

(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."

[11] The Amendment Act, which came into operation on 1 August 2002, repealed both sections 138(4) and 140(1). The statute did not replace the sections referred to with any new provisions

regarding the right to legal representation in arbitration proceedings except to insert a new subsection (2)(A) into section 115. The relevant paragraphs contained in section 115(2A) read as follows -

"The Commission may make rules regarding –

k) the right of any person or category of persons to represent any party in any conciliation or arbitration proceedings;

……

(m) all other matters incidental to performing the functions of the Commission."

[12] The Amendment Act also inserted a new section 27(1) into Part H of Schedule 7 of the LRA. Part H of Schedule 7 contains transitional provisions arising out of the application of the Amendment Act. That section provides as follows -

"*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;

b) a bargaining council may be represented in arbitration

proceedings in terms of section 33A of the Act by a person specified in section 138(4) of the Act or by a designated agent or an official of the council;

c) *The right of any party to be represented in proceedings in terms of section 191 of the Act must be determined by –*

i) *section 138(4) read with section 140(1) of the Act for disputes about dismissal; and*

j) *section 138(4) of the Act for disputes about an unfair labour practice."*

[13] The legislative intent underlying these provisions is obvious. After 1 August 2002, the LRA would no longer regulate the right to legal representation in CCMA proceedings. Any rights to legal representation would after 1 August 2002 be determined by the CCMA, subject to a retention of the status quo until such time as the CCMA promulgated a valid set of Rules.

[14] Implementing this intention has been less easily achieved, and the confused and confusing attempts to do so represent bureaucratic bungling at its best. First, the reference to section 115(2A)(m) in the preamble to item 27(1) appears to be an error. The reference ought presumably to have been made to section 115(2A)(k) which deals *with "the right of any person or category of persons to represent any party in any conciliation or arbitration proceedings".* Secondly, on 25 July 2002, a new set of rules for the conduct of proceedings in the CCMA was published in terms of Government

Notice No. R961 of the same date. In that notice, the Governing Body of the CCMA, acting in terms of section 115(6) of the LRA, records that it has published *"the Rules made in terms of section 115(2A)".* Rule 25 of these Rules provided that -

"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 [LRA], the commissioner must determine this issue."

Footnote 5 to Rule 25 stated that "*the representation of parties is dealt with in sections 135 (4), 138(4) and 140(1) of the LRA*". These sections are then reproduced in the footnote. In terms of the definitions clause contained in the Rules (see Rule 41), a rule is defined to include any footnote to a rule.

[15] The Amendment Act, which, as I have noted, incorporates the empowering provision in the form of section 115(2A), came into force on 1 August 2002. The empowering provision in terms of which the rules published on 25 July 2002 were purportedly made was not in operation on that date. On this basis, the Court held in its judgment delivered in January 2004 that the Rules were void.

[16] On 10 October 2003, the CCMA issued another new set of rules which appear to constitute an endeavour to clarify the position regarding legal representation in the CCMA (see Government Notice R1448 published in Government Gazette No. 25515 of 10 October 2003).

[17] On 17 October 2003, a "correction notice" was published in Government Notice R1512 *Government Gazette* 25607. The notice purports to address certain errors contained in the set of

rules published the previous week.

[18] On 5 December 2003, yet another set of rules was published. Rule 25(1)(c) of those rules regulates the right to legal representation. The Rules provide as follows -

"If the dispute being arbitrated is 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 subrule (1)(b), are not entitled to be represented by a legal practitioner in the proceedings unless-

1) *the commissioner and all the other parties consent;*
2) *the commissioner concludes that it is unreasonable to expect a party to deal with the dispute without legal representation, after considering -*

a) *the nature of the questions of law raised by the dispute;*

b) *the complexity of the dispute;*

c) *the public interest; and*

d) *the comparative ability of the opposing parties or their representatives to deal with the dispute."*

[19] Mr Pretorius SC, who appeared for the Second and Third respondents and the Minister of Labour, noted that the rule contains a patent error. He observed that in section 140(1) of the repealed provision of the LRA, the word "or" links sections (1) and (2). A mistake appears to have arisen when this provision was incorrectly quoted in footnote 5 of the CCMA Rules promulgated on 25 July 2002. The intention was to quote section 140(1) and to incorporate this provision into the Rules, but the word "or" was mistakenly left out of the quotation. This mistake was perpetuated in the

version of the CCMA Rules promulgated on 10 October 2003, and ultimately in the version promulgated on 5 December 2003.

[20] This litany of the inept attempts to regulate the right to legal representation in arbitration proceedings before the CCMA may be of significance in any future proceedings concerning challenges, constitutional or otherwise, to the present Rules. For the purposes of these proceedings, the Commissioner was obliged to apply the provisions of section 140(1), since that section, by virtue of the transitional provisions, was required to be read in August 2003 as if remaining in force.

[21] Against that background, I turn now to the present application, and in particular, to the relief sought in the amended Notice of Motion. When this matter was called, the Court indicated to the parties that despite the broad terms of the relief sought by the Applicant, it was unlikely that in the present proceedings, there could be any valid consideration of the law beyond that which existed on the date that the Commissioner made her ruling. Although the Applicant in its amended Notice of Motion appeared to seek relief in respect of laws present, past and future, the Court expressed the view that the Commissioner's award ought necessarily, given the approach to be adopted (see *Carephone (Pty) Ltd v Marcus and Others* (1998) (LAC) 19 *ILJ* 1425*, Shoprite Checkers (Pty*) *Ltd v Ramdaw NO & Others* [2001] 9 BLLR 1011 (LAC)), to be tested against the laws regulating the exercise of her discretion to grant legal representation, as they applied at the time that the discretion was exercised. Mr Pretorius had in his heads of argument suggested that there was a basis for the Court to venture beyond the law as it applied at the relevant time. He cited *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC), in which the Constitutional Court held that there was a discretion to decide a challenge or consider issues not alive between the parties, a discretion to be exercised according to the standards of justice. That decision can be distinguished

from the present application in that it concerned an application for relief that had substantially been afforded by the respondent by the time the matter was heard. In this instance, the Court has not been invited to deal with matters that have effectively become academic consequent on any concessions by the respondents. The invitation in the present instance to 'deal with the issue of legal representation in the CCMA once and for all', as it was put by the parties, clearly contemplated a consideration by the Court of amendments to the Rules of the CCMA that postdated the ruling that is the subject of these proceedings.

[22] When this difficulty was put to the parties, both Mr. Pretorius, and Mr. Tip S.C., who appeared for the Fourth Respondent, agreed that it was appropriate to determine the matter on the basis of a determination of the constitutionality of the limitations on legal representation as they existed at the relevant time. Even on this basis, the matter is of substantial importance to the parties in these proceedings, and to the parties to any pending applications for review in which the same point may have been raised. Mr. Gush, who appeared for the Law Society, then took the view that if the Court was to confine the issue in dispute to that of the constitutionality of section 140(1), the matter would be of historical interest only to the Law Society. Mr. Gush then elected to withdraw the Law Society's application in terms of Rule 19, in circumstances where none of the other parties to the proceedings sought any order as to costs.

[23] However enticing the invitation by the parties to consider the broader issue of the constitutionality of the existing Rules, the crisp and only issue to be decided in these proceedings is whether section 140(1), in force on 7 August 2003 by virtue of Part H of Schedule 7 to the LRA, is inconsistent with the Constitution and invalid to the extent that it limits a party's access to legal representation in certain CCMA arbitration proceedings. Whether any of the various attempts at

making Rules for CCMA proceedings that were published in October 2003 or at any time after that date are either unconstitutional or otherwise invalid, is not a matter that the Court is now called on to decide.

[24] Mr. Pretorius submitted that in order for the Applicant to succeed in these proceedings, it was incumbent on the Applicant to establish a constitutional right to legal representation on the basis as claimed by it, an infringement of that right, and that the striking down of the relevant section of the LRA and/or Rule is the appropriate remedy in the circumstances. The arguments submitted by the parties canvassed the common law, the Promotion of Administrative Justice Act, and the Constitution.

The common law

[25] At common law, the Courts have consistently held that there is no absolute right to legal representation in arenas other than courts of law. This principle was recently reaffirmed in *Hamata and Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee* 2002 (5) SA 445 (SCA); (2002) 23 *ILJ* 1531 (SCA) when the Supreme Court of Appeal stated -

"[5] *Entitlement as of right to legal representation in arenas other than courts of law has long been a bone of contention. However, as the Court a quo correctly observed, in Dabner v South African Railways and Harbours 1920 AD 583 at 598 more than 80 years ago, this Court categorically denied the existence of any such absolute right. South African Courts have consistently accepted the*

correctness of that view. It is not entirely clear from the judgment in Yates v University of Bophuthatswana and Others whether the Court was holding otherwise or whether its recognition of a right to legal representation in that case was grounded solely upon an implication arising from the terms of the conditions of service applicable to the Applicant. If the former, the decision would have to be regarded as, with respect, an aberrant one. Indeed, counsel for the appellants laid no claim to any such general and absolute entitlement and declined to submit that legal representation, whenever sought, is a sine qua non of any procedurally fair hearing. The submission was less bold and infinitely less productive of the potential tyranny of artful forensic footwork and heavy accompanying costs to which all manner of organisations, institutions, voluntary associations and individuals might become exposed, no matter how mundane the issue which arises."

[26] The common law recognises a right to a procedurally fair hearing in civil and administrative proceedings that may require, in certain circumstances, the right to legal representation. In *Hamata's* case, this was explained as follows -

"*[23] … I am satisfied that an application of the principles of the common law in existence in the pre-constitutional era also lead to the same conclusion. They, too, require proceedings of a disciplinary nature to be procedurally fair, whether or not they can be characterised as administrative and whether or not an organ of State is involved. If, in order to achieve such fairness in a particular case legal representation may be necessary, a disciplinary body must be taken to have been intended to have the power to allow it in the exercise of its discretion unless, of course, it has plainly and unambiguously been deprived of any such discretion. If it has, the validity in law of the deprivation may arise but, in my opinion, there is no such deprivation in these rules. In short, the*

point of departure when interpreting the rules remains the same in this case, whether the procedural fairness of the proceedings of these particular disciplinary bodies is regulated by the Constitution or by the common law as subsumed under the Constitution. Such a point of departure (the assumed existence of the discretion) would of course be consistent with the values embodied in the Constitution."

[27] The provisions of the now repealed section 140(1) of the LRA, in so far it confers a discretion on a Commissioner to permit legal representation in defined circumstances, are therefore entirely consistent with the common law.

[28] The Applicant does not contend that the factors listed in section 140 unduly restrict Commissioners' discretion to permit legal representation. Indeed, there is a close correlation between the factors listed in section 140(1) and those factors that the Supreme Court of Appeal in *Hamata's* case considered relevant. In this respect the Court held -

"[21] That does not mean, of course, that permission to be represented by a lawyer who is neither a student nor a member of the staff of Pentech is to be had simply for the asking. It will be for the IDC to consider any such request in the light of the circumstances which prevail in the particular case. Such factors as the nature of the charges brought, the degree of factual or legal complexity attendant upon considering them, the potential seriousness of the consequences of an adverse finding, the availability of suitably qualified lawyers among the student or staff body of Pentech, the fact that there is a legally trained 'judicial officer' presenting the case against the student and any other factor relevant to the fairness or otherwise of confining the student to the kind of representation for which

the representation rule expressly provides, will have to be considered. In doing so, Pentech's legitimate interest in keeping disciplinary proceedings 'within the family is of course also to be given due weight, but it cannot be allowed to transcend all else no matter how weighty the factors in favour of allowing of 'outside' legal representation may be."

The provisions of the Promotion of Administrative Justice Act

[29] In so far as the Applicant relies on the Promotion of Administrative Justice Act (PAJA) in support of its contention for an absolute right of legal representation, that Act clearly provides that a fair administrative procedure depends on the circumstances of each case (see section 3(2)(a)). Subsection (3)(a) of the same section expressly confers on an administrator a discretion to permit legal representation. The statute does not establish an absolute right to legal representation. The subsection referred to provides that in order to give effect to the right to procedurally fair administrative action, an administrator may, in his or her discretion, also give a person referred to in subsection (1) an opportunity to obtain assistance and, in serious or complex cases, legal representation. In *Hamata's* case, the Supreme Court of Appeal confirmed that section 3(2)(a) simply recognises and reaffirms what has long been axiomatic in the common law, namely that "fair administrative procedure depends on the circumstances of each case".

[30] Whether or not proceedings before the CCMA are subject to the provisions of PAJA is a matter of some controversy. The Court *a quo* in *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* [2000] 7 BLLR 835 (LC) at paragraph 90, per Wallis AJ expressed the view that a commissioner's

award was not an 'administrative action' as defined by section 1 of PAJA. On appeal, the Labour Appeal Court, in a statement that was clearly obiter, expressed the view that -

"*Even though the view expressed by this Court in Carephone that the making of an arbitration award by a CCMA commissioner constitutes an administrative action might not be correct, it seems to me that the definitions of "administrative action" and of "decision" in section 1 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 arisen in this matter is whether or not there is a warrant to reconsider the decision of this Court in Carephone." (Shoprite Checkers (Pty) Ltd v Ramdaw NO &* others (2001) 22 *ILJ* 1603 (LAC) at 16163 – D).

See also the unreported decision of *PSA on behalf of Haschke v MEC for Agriculture and others* (case number D252/03 14 May 2004), in which the Court drew a distinction between arbitration awards and rulings made by Commissioners, and held that rulings (such as the ruling that is the subject of these proceedings) do not constitute administrative action subject to PAJA.

[31] In *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau & others* (2003) 24 *ILJ* 1712 (CC), Landman J preferred the view expressed by Wallis AJ that arbitration is not administrative action. A determination of whether it is administrative action is not material to this application. Even on the assumption that PAJA regulates CCMA proceedings (and I make no finding in this regard), the repealed section 140(1) of the LRA is not inconsistent with that Act. On the contrary, the Applicant's

contention that there is an absolute right to legal representation in CCMA arbitration proceedings is entirely inconsistent with the Act.

The Constitution

[32] Section 33 of the Constitution provides that -

"Everyone has the right to administrative action that is lawful, reasonable and procedurally fair."

[33] Section 34 provides that -

"*Everyone has the right to have every 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."*

[34] Mr Pretorius submitted that the Constitution itself does not provide for an absolute and unqualified right to legal representation either in judicial proceedings of a civil nature or in administrative proceedings, and that in the absence of such an absolute right, it matters little whether the CCMA is regarded as a court of law or a statutory tribunal.

[35] The Applicant's case in support of its contention that section 140(1) infringes the Bill of Rights is principally based on a submission that in effect, the CCMA is more akin to a court of law than an administrative tribunal. Mr Snyman advanced a detailed analysis of the nature and extent of the CCMA's jurisdiction in disputes concerning unfair dismissals for reasons related to conduct or

capacity, and contended that given the nature, powers and functions of the CCMA, legal representation must either be permitted as of right, or it must not. It is not permissible, he submitted, for the LRA or the Rules of the CCMA to distinguish between different forms of or reasons for dismissal, and to determine a right to legal representation on that basis.

[36] Mr Snyman based his analysis, in part, on a comparison between the objectives sought by the LRA and what he contended was the reality of litigating before the CCMA. I understood Mr Snyman to base his case for a constitutional infringement largely on this comparison and the conclusions drawn from it. This was also the basis on which he sought to persuade the Court that the judgment in *Netherburn Engineering CC* was wrongly decided.

[37] Mr Snyman submitted that the CCMA exercises considerable powers and in particular, that in respect of relief in unfair dismissal claims, it enjoyed the same powers as the Labour Court. He suggested that even with the statutory limitations on compensation or unfair dismissal, CCMA awards could significantly exceed the maximum amount for which a Magistrate's Court might give judgment. Mr Snyman suggested further that the absence of any appeal to a higher court, the CCMA's ability to certify its own awards and to have them enforced were all indicative of a tribunal that was capable of wielding considerable powers. Further, Mr Snyman suggested that the nature of arbitration proceedings before the CCMA were legally technical and approximated that applicable to a civil trial.

[38] Mr Snyman also referred to the Explanatory Memorandum that preceded the Labour Relations Act. The Memorandum (published at (1995) 16 *ILJ* 278) established a number of imperatives that were intended to underpin the new statutory dispute resolution system. These included effective

procedures largely free of legal technicality that were both expeditious and inexpensive. In developing his argument, Mr Snyman applied each of these criteria to what he contended was the current reality of the dispute resolution system provided by the CCMA, and concluded that none of the objectives outlined in the memorandum had been achieved. On this basis, he suggested that the rationale for excluding legal representation in certain arbitration proceedings had fallen away, and that the initial objectives recorded in the explanatory memorandum could not longer be used as a basis for determining the legitimacy of any exclusion or limitation of the right to legal representation in the CCMA.

[39] Mr Snyman's criticisms were addressed in answering affidavits filed on behalf of the Second and Third Respondents and the Minister of Labour. Mr Tip associated himself with the submissions made in these papers. Several reasons were suggested as to why legal representation is not permitted as of right in misconduct and incapacity dismissal cases, whereas it is so permitted in other matters. The first reason raised was the question of workload. Statistics were provided to demonstrate that unfair dismissal disputes are by far the most common form of referral to the CCMA, and consequently, the largest part of the CCMA's workload. In order for it to fulfil its statutory obligations, the CCMA is required to deal with unfair dismissal referral efficiently. Secondly, it was suggested that disputes relating to dismissal for conduct or capacity were generally capable of being resolved in accordance with a prescribed and standard approach. They were distinguishable, for example, from dismissals based on operational requirements that more often than not are collective in nature and involved more complex questions of fact and law. Where dismissals for misconduct and incapacity fall into the latter category, it was submitted further that section 191(6) of the LRA requires the director of the CCMA to refer a matter to the Labour Court for adjudication. It was submitted that the distinction between those disputes in respect of which there was an automatic

right to legal representation and those in respect of which there were no such right, was both rational and designed to achieve the legitimate objectives of an efficient and effective statutory dispute resolution procedure. Finally, it was suggested that the Labour Relations Act was unique in the sense that it was the product of negotiation, and that it consequently enjoyed an unmatched degree of legitimacy. It was essential, so the argument went, to preserve the parties' "buy-in". In this regard, an affidavit deposed to by Mr Andrew Levy, an industrial relations consultant, was filed. Mr Levy expresses that view that dismissals as a strike trigger are now a negligible factor and that in his considered opinion, this is due to the speed, accessibility and credibility of the CCMA dispute resolution procedures. He further expresses the view that were the legal profession to "take over the process, much of its efficacy, understandability and credibility would be lost', and that an increase in the numbers of strikes triggered by dismissals could be expected.

[40] The starting point in any evaluation of these submissions is the nature and status of the CCMA. The CCMA is not a court of law. In *Fredericks and Others v MEC for Education and Training, Eastern Cape and Others* 2002 (2) SA 693 (CC); 2002 (2) BCLR 113 (CC) at paragraph 30, the Constitutional Court held that it is quite clear from the provisions of the Labour Relations Act that the CCMA is not a court. Although the CCMA may make awards that may be financially onerous on the parties to arbitration proceedings and while the nature of arbitration proceedings before the CCMA may resemble that adopted in a civil court, the fact remains that the CCMA, is an administrative agency, at most in some instances a statutory tribunal, which in the discharge of its various statutory functions is required, *inter alia*, to arbitrate and determine those disputes in respect of which it has jurisdiction. I agree with Landman J who in his judgment delivered in *Netherburn Engineering CC* stated the following –

"*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 section 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 are many tribunals, each having diverse procedures, powers and functions. Legal representation may be appropriate in 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-à-vis a tribunal as being implicit in section 34* (at 1728 H – J)*."*

[41] However, the fact that there is no right of legal representation in a tribunal, even implicit, in section 34 does not necessarily mean that the right to legal representation may be denied in all proceedings before the CCMA. The Supreme Court of Appeal succinctly restated the rule in *Hamata* at paragraph 12 as follows -

"There may be administrative organs of such 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 relatively trivial to the most grave. Any rule purporting to compel such 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."

[42] From whatever perspective the matter is viewed, the requirements of fair procedure in labour disputes are met not by an absolute right to legal representation but rather by affording that right as and when the circumstances demand it, in the exercise of a discretion which itself is to be exercised judicially. Section 140(1) is consistent with this requirement in that a commissioner must, when the right to legal representation is requested, take into account the seriousness and complexity of the matter, the existence and nature of any questions of law, the public interest, and the comparative ability of the opposing parties or their representatives to present their cases. In the proper circumstances, legal representation is thus assured, and when the discretion is improperly exercised, there is a right of recourse to this Court by way of an application for review.

[43] The generalisations proffered by both parties in pursuit of their arguments takes the matter no further. Not all dismissal disputes can be easily classified as either serious or complex. Even if this were not so, it does not necessarily follow that legal representation ought to be afforded in all such cases on this basis. Section 140, properly applied, would mean only that the factors of seriousness and complexity would result in every exercise of the discretion being decided in favour of a party wishing to have legal representation. Similarly, it would be incorrect to proceed from the premise that all dismissal disputes are always simple, or, as the respondents appeared to suggest, that each dismissal dispute is capable of being resolved by the application of a formula. The question of comparative advantage similarly does not lend itself to resolution at the level of generalisation. It is not appropriate to assume, as was inferred, that the limitation established by section 140(1) is primarily intended to protect dismissed employees, litigating alone or with the assistance of a trade union at a disadvantage to large corporates employing battalions of lawyers. Experience in this Court indicates that there are a large number of trade union legal officers and other officials who are

experienced and proficient at representing the interests of their members, and in this instance, it is the inexperienced manager, often engaged in a small or medium sized enterprise and unable to afford legal representation, who is at a disadvantage. In short, it would not be prudent to make assumptions about the factors that may be potentially applicable in individual cases, and to derive from those an absolute right to legal representation in terms of either section 33 or section 34 of the Constitution. The discretion in terms of section 140(1) that must be exercised on request by either party enables a proper consideration of each case, and proper reflection on any competing merits in regard to each of the factors listed in section 140(1)(b).

[45] Similarly, whether or not the objectives set out in the Explanatory Memorandum have been met seem to me to be inconsequential to a consideration of the constitutionality of section 140(1). The LRA might well enjoy the support of the major employer and trade union federations, and their "buy-in" may well be significant for a number of reasons. However, the constitutionality or otherwise of section 140(1) (or any other legislative provision that is the product of the negotiation process referred to), is not one of them. The protections extended by the Bill of Rights exist over and above and irrespective of the intentions or inclinations of particular interest groups, however influential or powerful they may be in relation to the nature and content of labour legislation. To hold otherwise would be to undermine both the purpose for which the Constitution was enacted and its status, and amount to a shielding of the whole or part of a statute from constitutional review.

[46] For the same reason, the lower levels of industrial action that are attributed to efficient statutory dispute resolution mechanisms would seem to me to be irrelevant in this enquiry. In any event, the decline in industrial action that appears to have been recorded is less attributable, I would have thought, to the exclusion of legal representatives from the CCMA than the exclusion of strikes in

furtherance of dismissal disputes from the ambit of the protections conferred by the LRA. If an efficient system of statutory dispute resolution has the consequence of fewer strikes, that is obviously commendable. But it does not necessarily follow that a system of dispute resolution can be efficient only if it excludes lawyers. On the contrary, one might imagine situations where lawyers might contribute to the success of a dispute resolution process either by seeking tomorrow the issues that may be in dispute, or by dampening the expectations of their clients. This is no doubt a factor that a commissioner may take into account in the exercise of a discretion in terms of section 140(1).

[47] In short, the success or failure of the CCMA as an institution of the labour market and the extent to which it has discharged its mandate as envisaged by the Explanatory Memorandum and crafted by the LRA, is of little consequence in these proceedings. That is a judgment that must be made not by this Court but by those who engage with the CCMA and rely on that institution to fulfil its statutory obligations.

[48] That being so, I do not agree with the criticisms levelled by the Applicant against the judgment by Landman J in *Netherburn Engineering CC*. In that case, the Court held that the limitations on legal representation established by the LRA do not infringe any constitutional right. None of the Applicant's submissions in these proceedings call that conclusion into doubt.

Conclusion

[49] There is no basis for the Applicant's contention that the Constitution confers an absolute right to legal representation in arbitration proceedings before the CCMA. Even if section 140(1) is

considered to have the effect contended for by the Applicant, the nature of proceedings in the CCMA cannot confer an automatic and absolute right to legal representation where none exists under the Constitution, the LRA and the common law. It is entirely consistent with the right to a fair hearing before a forum such as the CCMA for the presiding commissioner to have a discretion to admit legal representation in appropriate circumstances. Section 140(1) of the LRA is accordingly not inconsistent with the Constitution, in so far as it requires the exercise of a discretion on the part of commissioners to allow legal representation in arbitration proceedings when the reason for dismissal relates to conduct or capacity.

[53] Since there is no constitutional right to legal representation in arbitration proceedings before the CCMA, the limitation on legal representation in terms of section 140(1) of the LRA need not be justified in terms of section 36 of the Constitution.

[54] It follows that the application to review and set aside the Commissioner's ruling to deny the Applicant the right to legal representation must fail.

Costs

[55] When this matter was first called before Francis J on 20 October 2003, the matter was postponed by agreement and costs were reserved. Mr Tip submitted that costs for this day should be awarded in favour of the Respondents, including the costs consequent on the engagement of two counsel.

[56] With regard to the hearing on 20 January 2004, Mr Tip submitted that since it was held that the Applicant had not properly identified the constitutional points it wished to advance and that it had failed to properly set out the relief sought, there was no reason why the Applicant should not pay costs for the whole day. He pointed out that only one counsel had been engaged on that day. Mr Snyman argued that costs against the Applicant were inappropriate for this day, since both parties had in fact succeeded to some extent in their arguments.

[57] On 29 April 2004, costs were reserved when the matter was postponed by agreement. No costs were sought for this day.

[58] Finally, while Mr Tip conceded that where a matter is in the public interest, the Court can decide to make no order as to costs, he submitted that this should not be the case in the present matter. He contended that although the Applicant had filed its application before the *Netherburn Engineering CC* decision became available, this decision was brought to the Applicant's attention at an early stage. In effect, the Applicant had been warned to proceed at its peril. Despite the *Netherburn Engineering CC* judgment, the Applicant had proceeded with this application, on the basis that the matter had not been determined decisively in *Netherburn Engineering CC*. In these circumstances, the matter was not of such public importance so as to warrant a conclusion that costs should not be awarded, and therefore costs were sought against the Applicant in respect of the matter as a whole.

[59] I agree with Mr Tip's submissions. I accordingly make the following order:

1 The application is dismissed.

2 The Applicant must pay the costs of the Second and Third Respondents and the Minister, and

the Fourth Respondent, on the basis indicated:

i) costs in respect of the proceedings on 20 October 2003, including the costs consequent on the engagement of two counsel;

ii) costs in respect of the proceedings on 20 January 2004, including the costs consequent on the engagement of one counsel;

iii) costs in respect of the proceedings on 19 May 2004, including the costs consequent on the engagement of two counsel.

_____

ANDRE VAN NIEKERK
Acting Judge of the Labour Court

Date of hearing : 19 May 2004
Date of judgment : 10- August 2004

For the Applicant — Mr Sean Snyman
Snyman van den Heever Heyns

For the Second and Third Respondents
And the Minister of Labour — Advocate P J Pretorius SC
Advocate T Mpanza
Instructed by State Attorney, Pretoria

For the Fourth Respondent — Advocate K Tip SC
Advocate N H Maenetje
Instructed by Cheadle, Thompson & Haysom Inc.

For the Law Society — Mr David Gush
Tomlinson, Mnguni, James
C/o Sonnenberg Hoffmann Galombik, Johannesburg