IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT BRAAMFONTEIN)

CASE NUMBER JR161-07

IN THE MATTER BETWEEN

MINISTER OF SAFETY AND SECURITY	**APPLICANT**
AND	
LL MADISHA	**1ST RESPONDENT**
RUSSEL MOLETSANE N.O	**2ND RESPONDENT**
SAFETY AND SECURITY SECTORAL BARGAINING COUNCIL	**3RD RESPONDENT**

REASONS FOR ORDER DATED 29 JULY 2008

AC BASSON, J

Order

[1] On 29 July 2008 I made the following order.

> *"The following order is made:*
>
> *(1) The Application to review and set aside the arbitration award under case number PSSS 208-06/07 is granted.*
>
> *(2) The matter is remitted back to the First Respondent for arbitration before a different Commissioner.*
>
> *(3) There is no order as to costs."*

Herewith my reasons for this order.

Reasons

[2] This was an application to review and set aside an arbitration award under case number PSSS208-06/07. The Applicant in this matter is the Minister of Safety and Security. The First Respondent, Inspector LL Madisha (I will refer to him as "the Respondent") was employed as an inspector. The Respondent was found guilty on two charges and dismissed on 29 August 2005. The two charges relate to (i) an alleged act of kidnapping by removing a foreigner from Oliver Thambo International Airport and (ii) an act of releasing a prisoner who was in custody by wilfully allowing him to escape.

[3] The Respondent referred an unfair dismissal dispute to the Third Respondent (the SSSBC). The Second Respondent (hereinafter referred to as "the Commissioner") arbitrated the dispute.

[4] Evidence was led on behalf of the Applicant at the arbitration and at the close of the Applicant's case, the representative on behalf of the Respondent brought an application for absolution from the instance. The Commissioner granted absolution from the instance and held that the dismissal of the Respondent was substantively unfair. The Commissioner then ordered the retrospective reinstatement of the Respondent and ordered the Applicant to also pay the Respondent back pay in the amount of R 107 000.00 which is equivalent to twelve months' salary.

The review

[5] The Applicant brought this review application on the following grounds: The Commissioner committed a gross irregularity in that he had failed to apply his mind to the evidence; he committed a gross irregularity in not granting the Applicant a postponement in order to call its key witness; the rules of absolution from the instance are not applicable. Although the fact that the Commissioner had granted an application for absolution from the instances is not strongly pursued on the papers, I am nonetheless of the view that this is the most important ground on which this review should be decided. The crucial question in this review is therefore whether a Commissioner at arbitration may consider and grant an application of absolution from the instance.

[6] In order to arrive a conclusion, it is, in my view necessary to briefly refer to the Labour Relations Act 66 of 1995 (hereinafter referred to as the "LRA") as the source of the powers of a Commissioner of the Commission for Conciliation, Mediation and Arbitration (hereinafter referred to as the "CCMA") and to the powers of a judge of the Labour Court (and for that matter of any other Court of law) in order to determine whether a Commissioner may assume the power to consider an application for absolution from the instance at the close of the employer's case at arbitration. It is, of course also necessary to refer to the constitution of the Safety and Security Sectoral Bargaining Council to determine whether or not an arbitrator may consider and grant an application for absolution although I have however been assured from the bar by Counsel on behalf of the Applicant that the arbitrator does not have this power in terms of the Council's constitution. Counsel on behalf of the Respondent did not argue that this power derive from the constitution but strongly argued that a Commissioner at arbitration has this power and that this power derive from the LRA.

[7] A system of compulsory arbitration was introduced in the LRA for the determination of disputes relating to dismissals for conduct and capacity.[1] Arbitration in terms of the LRA is a compulsory process in terms of which an arbitrator is appointed by the CCMA (or by a Bargaining or statutory council) to determine the dispute referred to

[1]Section 191 of the LRA. See also Thompson Clive & Benjamin Paul *South African Labour Law* Volume 1at AA2 - 172.

the CCMA or the Bargaining Council. The process is subject to review in the Labour Court.[2]

[8] Section 39(1) of the Constitution Act 108 of 1996 stipulates that when interpreting the Bill of Rights, a court, tribunal or forum must, *inter alia*, promote the values underlying an open and democratic society based on human dignity, equality and freedom. Section 39(2) further stipulates that when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

[9] The CCMA is a creature of statute and hence it only has jurisdiction in respect of those disputes referred to it in terms of the LRA. See in this regard section 115(4) of the LRA which reads as follows:

> "*The Commissioner must perform any other duties imposed and may exercise any other powers* ***conferred on it by*** *or* ***in terms of*** *this Act and is committed to perform any other functions entrusted to it by any other law."*[3]

[2] *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* (2007) 28 *ILJ* 2405 (CC).
[3] Own emphasis.

[10] In *Mkhize v CCMA & Another*,[4] Zondo J (as he then was) held that, although there is no definition of a tribunal and forum in the Constitution, there can be no doubt that the CCMA is a tribunal or forum such as envisaged in section 39 of the Constitution. When performing its arbitration functions under the LRA, the CCMA must therefore comply with sections 39(1) and (2) of the Constitution.[5]

[11] Chapter VII of the LRA[6] establishes the CCMA as an autonomous, statutory agency with juristic personality[7] with its independence, jurisdiction and governance regulated by various sections.[8] The functions of the CCMA are set out in section 115 of the LRA and according to section 115(1), the CCMA must attempt to resolve, through conciliation, a dispute referred to in terms of the LRA. If the dispute remains unresolved after conciliation, the CCMA must arbitrate the dispute if the LRA requires arbitration and if any party to the dispute has requested that the dispute be resolved through arbitration,[9] or if all the parties to a dispute in respect of which the

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[4] 2001 (1) SA 338 (LC). In this case the court pointed out the following: The CCMA is a '*tribunal or forum'* in the context of s 39 of the Bill of Rights and therefore has the power and the obligation to apply the provisions of the Bill of Rights.

[5] *Ibid* at 344 C-D.

[6] In *Carephone (Pty) Ltd v Marcus NO & Others* (1998) 19 ILJ 1425 (LAC) the Court at paragraph [11] described the commission in the following terms: "*Although the commission is an independent body with jurisdiction in all the provinces, it was not created as a court of law (ss 112-14 of the LRA, read with ss 165 and 166 of the Constitution). It thus has no judicial authority in constitutional terms. It is, nevertheless, a public institution created by B statute. When it (through duly appointed commissioners - ss 125 and 136 of the LRA) conducts compulsory arbitration in terms of the LRA this involves the exercise of a public power and function, because it resolves disputes between parties in terms of the LRA without needing the consent of the parties. This makes the commission an organ of state in terms of the Constitution (see the definition of "organ of state' in s 239 of the Constitution)."*

[7] Section 112: establishes the CCMA as a juristic person.

[8] Sections 113-114, 116, 118, 119 and 121.

[9] Section 115(1)(b)(i).

Labour Court has jurisdiction, consent to arbitration under the auspices of the commission.[10]

[12] Commissioners have specific duties and considerable general powers to resolve disputes through conciliation and arbitration.[11] In this regard section 138 of the LRA sets out general provisions for arbitration and the Commissioner may conduct the arbitration in a manner that the Commissioner considers appropriate in order to determine the dispute fairly and quickly, and deal with the substantial merits with the minimum of legal formalities.[12] This section reads as follows:

> *"(1) The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairy and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities."*

The Commissioner may also make any appropriate arbitration award in terms of the LRA[13] except if the statute specifically limits the jurisdiction.[14]

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[10]Sections 115(1)(b)(ii), s 133(2)(b) and 141(1).
[11]Section 142(1)-(6) provide that a commissioner may, in appropriate circumstances, question people, issue subpoenas and call for documents, administer an oath, enter business premises (with the permission of the Director) and private residential premises (with the permission of the LC); seize documents and call for expert witnesses.
[12]Section 138(1).
[13] Section 138(9).
[14] Sections 193 – 196 stipulate remedies for unfair dismissal, but limits the amount of compensation, that may be ordered.

[13] It should, however be pointed out that the CCMA is an *administrative tribunal*[15] (creature of statute) and as such bound, in principle, to the Constitution.[16] Furthermore, it should also not be ignored that the CCMA is a creature of statute (section 115(4) of the LRA) and that, although the CCMA is afforded discretion to make decisions about its jurisdiction and powers, the exercise of that discretion is subject to review on the ground of *"excess of powers*" (section 145 of the LRA).

[14] The Labour Court, on the other hand, is a court of law. Although established in terms of the LRA, this Court has the same status as

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[15] When dealing with compulsory arbitrations by the CCMA in respect of certain disputes, to use the words of Judge Landman in *Reunert Industries (Pty) Ltd t/a Reutech Defence Industries v Naicker & Others* (1997) 18 ILJ 1393 (LC) we are not dealing with "*classical arbitration, ie a voluntary submission to arbitration, [but] we are dealing with judicial power entrusted to an administrative body which is to be exercised without the submission of a respondent to the jurisdiction of the commission and generally without the right to appeal from such a decision*" (ibid at 1396 B-C).

[16] *Carephone (Pty) Ltd v Marcus NO & Others* (1998) 19 ILJ 1425 (LAC) In reaching this conclusion, the court had to answer two questions: firstly, whether s33 of the Constitution was applicable to arbitration awards conducted under the auspices of the CCMA, and secondly, whether the stricter grounds of review in s145 were in conflict with s33. In answering the first question, the court rejected the argument that s33 was not applicable to CCMA arbitration awards because such compulsory arbitrations are judicial in nature, and thus fall outside the ambit of "administrative action". The LAC held that the issuing of an arbitration award by a commissioner of the CCMA constituted an administrative action as contemplated in s33 of the Constitution read with item 23(b) of schedule 6. It held further that this introduced "a requirement of rationality in the merit or outcome of the administrative decision" which included an arbitration award. Froneman DJP held that, although the CCMA performs many functions, some of which are judicial in nature, the CCMA did not function as a court, and therefore had no judicial authority under the Constitution holding that "[a]dministrative action may take many forms, even if judicial in nature, but the action remains administrative". The court found that the CCMA was a public institution created by Statute and exercising public powers and functions. Consequently, it is an 'organ of State' in terms of the Constitution and thus bound directly by the Bill of Rights and the basic values and principles governing public administration, including s 33 read with item 23(2)(b), which provides for just administrative action. Thus provisions governing its function must be interpreted in this Constitutional context and parties subject to compulsory arbitration under the auspices of the CCMA are entitled to have their fundamental rights respected (including the right to lawful and fair administrative action that is also "justifiable in relation to the reasons given for it").

a Provincial Division of the High Court[17] with national jurisdiction[18]. Important, however, is the fact that it is trite that the Labour Court[19] has *inherent powers*[20], which the CCMA, as a creature of statute does not have (see, *inter alia*, *Mafuyeka v CCMA & Others* (1999) 8 LC 1.15.1).

[15] The question to be answered in this particular instance is whether a Commissioner at arbitration has the power *to* grant absolution from the instance.

[16] It is clear that a Commissioner may determine the dispute referred to it in a manner that the Commissioner considers appropriate in order to determine the dispute fairly and quickly. This much is clear from the first part of section 138(1) of the LRA which deals with the general provisions for arbitration proceedings.

[17] It is important in any arbitration process that the Commissioner grants each party a proper and fair opportunity to present their respective cases to an unbiased arbitrator. This principle is not new

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[17] See section 151 of the LRA.
[18] See section 156 of the LRA.
[19] Section 173 of the Constitution states that The Constitutional Court, Supreme Court of Appeal and High Courts have the in inherent to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.
[20] Section 151 of the LRA reads as follows: Establishment and status of Labour Court.—
"(1) The Labour Court is hereby established as a court of law and equity. [Sub-s. (1) amended by s. 11 of Act No. 127 of 1998.]
(2) The Labour Court is a superior court that has authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which a court of a provincial division of the Supreme Court has in relation to the matters under its jurisdiction.
(3) The Labour Court is a court of record."

to our law and derives from the common law and more specifically from the rules of natural justice. These rules include the "*audi alteram partem rule"* and the rule *"nemo iudex in suam causam"* rule.[21] In *Chirwa v Transnet Ltd & Others* (2008) 29 *ILJ* 73 (CC) the Constitutional Court also confirmed that the LRA is premised on the principle of natural justice:

> *"[42] The LRA includes the principles of natural justice. The dual fairness requirement is one example; a dismissal needs to be substantively and procedurally fair. By doing so, the LRA guarantees that an employee will be protected by the rules of natural justice and that the procedural fairness requirements will satisfy the audi alteram partem principle and the rule against bias. If the process does not, the employee will be able to challenge her or his dismissal, and will be able to do so under the provisions and structures of the LRA. Similarly, an employee is protected from arbitrary and irrational*

[21] One of the cardinal rules of natural justice is that an employee has the right right to be heard (see Minister of Safety & Security v Mashego & others (2003) 12 LC 1.11.9. In Van Papendorp and South African Police Services (2004) 13 SSSBC 6.10.1. In *Kock & Another v Department of Education, Culture & Sport of the Eastern Cape & others* [2001] 7 BLLR 756 (LC) Acting Judge Nkabinde gave a brief analysis of the traditional rules of "natural justice": "[*15] The primary procedural safeguards in South African administrative law are expressed by the twin principles of natural justice: audi alteram partem ('the audi principle') and nemo iudex in causa sua: that is, that a public official should hear the other side, and that one should not be a judge in his own cause. As a general rule it may be said that the principles of natural justice apply whenever an administrative act is quasi-judicial. An administrative act was considered to be quasi-judicial if it affects the rights, liberties (and perhaps, the privileges) of an individual.*

decisions, through substantive fairness requirements and a right not to be subjected to unfair labour practices."

[18] An employee may be tempted to argue that it is not fair to allow an employee to give evidence in *"self-incrimination*" and that it is therefore competent to apply for absolution from the instance at the close of the Employers case.[22] This argument, in my view, lose sight of the fact that the employee does not have to give evidence and can elect to close his or her case without leading evidence and to request the arbitrator to find against the employer.[23]

Civil Courts

[19] It is trite in civil law that a (civil) court may grant *absolution from the instance*[24] in appropriate circumstances. Very briefly, this means that evidence is insufficient for a finding to be made against the defendant (in a civil trail). Absolution from the instance may thus be granted at the close of the plaintiff's case when it appears that there is no evidence to support the plaintiff's claim or if there is insufficient evidence upon which a court, acting reasonably might find for the plaintiff. The court is then entitled to *"absolve the*

[22] This is, of course, also a right specifically afforded to an accused in a criminal trail in terms of section 35(3)(j) of the Constitution in terms of which an accused person may not "be compelled to give self-incriminating evidence".
[23] This is, of course, consistent not only with section 35(3)(h) of the Constitution which provides for the right (in a *criminal* trail) "*to be presumed innocent, to remain silent, and not to testify during the proceedings".*
[24] For a detailed discussion of the meaning of and the circumstances in which a court in civil proceedings may grant absolution from the instance see: Schwikkard & Van der merwe *Principles of Evidence* 2nd edition page 542 *et seq*.

defendant from the instance". The effect of such a decision is to bring at an end the proceedings. The test to be applied in deciding whether or not absolution should be granted has been set out by the Appellate Division in *Claude Neon Lights (SA) v Daniel* 1976 4 SA 403 (A):

> *"… [W]hen absolution from the instance is sought at the close of the plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff."*

[20] The effect of absolution is, however that the decision is not *res iudicata*: the plaintiff may re-institute action on the same cause of action. Put differently, the effect of such a decision is **not** to bring finality to the dispute.

Criminal Courts

[21] In a criminal trial, the Criminal Procedure Act 51 of 1977 (hereinafter referred to as the "CPA") also specifically provides in section 174 that if, at the close of the case for the prosecution, the court considers that there is no evidence that the accused committed the offence charged with, the court may return a verdict

of not guilty. It is further trite that the phrase "*no evidence*" is interpreted to mean that *"no evidence on which a reasonable man could properly convict"* has been presented by the State to the court. See in this regard *R v Shein* 1925 AD 6 at 9. See also *S v Lubaxa* 2001 (2) SACR 703 (SCA).[25] It should, of course not be overlooked that a criminal court in exercising a discretion in terms of section 174 of the CPA does so within a particular legal framework: Section 174 of the CPA *permits* a trial court to return a verdict of not guilty at the close of the case for the prosecution if the court is of the opinion that there is no evidence (meaning evidence upon which a reasonable person might convict).

Labour Court

[22] The Labour Court has the power to grant absolution from the instance – a power that the Labour Court derives from its inherent powers. In *Schmahmann v Concept Communications Natal (Pty) Ltd* (1997) 18 ILJ 1333 (LC) the Labour Court confirm that it is able to grant absolution from the instance in light of the fact that it has *inherent powers* equal to that of the High Court. The Court explained the legal position, also with reference to the legal position which governed the old Industrial Court. In respect of the

[25] *"[11] If, in the opinion of the trial court, there is evidence upon which the accused might reasonably be convicted, its duty is straightforward - the accused may not be discharged and the trial must continue to its end. It is when the trial court is of the opinion that there is no evidence upon which the accused might reasonably be convicted that the difficulty arises. The section purports then to give the trial court a discretion - it may return a verdict of not guilty and discharge the accused there and then; or it may refuse to discharge the accused thereby placing him on his defence.*

powers of the old Industrial Court, the Court held that it is incompetent for the Industrial Court to grant absolution from the instance:

> *"ABSOLUTION FROM THE INSTANCE*
>
> *In the Industrial Court of South Africa it was held that it was incompetent for that court to grant absolution from the instance after an applicant had led his or her evidence. The Industrial Court was, however, not a court of law, but an administrative organ. The question that arises in this matter is whether the Labour Court has the power to grant absolution from the instance after an applicant has led evidence. The Labour Court of South Africa is a court of law and a superior court that has authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which our High Court has in relation to the matters under its jurisdiction. See section 151(2) of the Labour Relations Act 66 of 1995 (the LRA).*
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> *Harms Civil Procedure in the Supreme Court, paragraph … states:*
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> > *"At the close of the plaintiff's case the defendant may, without leading evidence, apply for an order of absolution from the instance. On such an*

application the procedure is that the defendant addresses the court, the plaintiff answers and the defendant has the right to reply.

The test to be applied by the court at this stage of the trial is : Is there evidence upon which a regional man might find for the plaintiff? Another approach is to enquire whether the plaintiff has made out a prima facie case. The application is akin to and stands on very much the same footing as an application for the discharge of an accused at the end of the state case in a criminal trial.

The court has the discretion to grant or refuse absolution from the instance. In the exercise of its discretion it will not normally have regard to the credibility of witness unless the plaintiff's witnesses are so obviously lying, or have so palpably broken down that no reasonable man can place reliance upon them. The court may also have regard to the possibility that the plaintiff's case may be strengthened by evidence emerging in the defendant's case. Where plaintiff's case depends upon the interpretation of a document, the court ought to refuse absolution unless the proper interpretation appears beyond doubt . . . Absolution from the instance can only be granted if the onus rests upon the plaintiff. If the onus

rests on the defendant there can be no order for absolution from the instance, either at this stage or later."

In terms of section 192 of the LRA in any proceedings concerning any dismissal the employer must establish the existence of the dismissal. If the existence of the dismissal is established, the employer must prove that the dismissal is fair.

In this instance therefore an onus rested upon the applicant to show that she had been dismissed. This raises the question what is meant by dismissal? The protection against unfair dismissal is premised on the concept of a dismissal. The LRA seeks to define a dismissal in section 186. …

THE FAIRNESS OF THE DISMISSAL

Strictly speaking, it is unnecessary to make any observations on this account for there has not been a dismissal. Had there been a dismissal the onus of proving fairness of it would have been on the employer and absolution from the instance would not have been competent…

In the circumstances for the reasons set out relating to the failure of the applicant to prove that she had been dismissed, absolution from the instance was granted. "

[23] See also, for example, *Basson v Cecil Nurse (Pty) Ltd* (2000) 9 LC 7.19.7 where the Labour Court granted an order for absolution from the instance. In *Ntai & others v South African Breweries Ltd* (2001) 22 *ILJ* 214 (LC) the Court refused absolution from the instance. See also *Louw v Golden Arrow Bus Services (Pty) Ltd* (1999) 8 LC 6.12.5 where the court ordered absolution from the instance.

Industrial Court

[24] In *NUMSA obo The Workforce & Others v National Bolts* (1994) 3 LCD 126 (IC) the presiding officer of the now defunct Industrial Court declined to grant absolution from the instance in view of the fact that the Industrial Court was, under section 46(9) (of the previous LRA) *obliged* to determine the dispute. The Court held that absolution from the instance could thus not be granted. A similar view was held in *TWU (Tvl) & Another v Sandown Clothing Manufacturing ltd (Pty)* (1991) 12 ILJ 890 (IC). In this case the respondent's attorney contended after the applicants' had closed their case that the respondent had not made out a case and argued that the Industrial Court was in a position *'effectively to grant absolution'*. The Court declined to make such an order and referred to section 46(9) of the (old) LRA and pointed out that this section is clear when it says that the court *'shall ... determine the dispute'*. The Court held that the essence of a decree of absolution from the instance is that the party against whom it is granted is free to enter once again upon the dispute. The Court held that this is

inconsistent with the finality, which the industrial court is enjoined to bring about in section 46(9) proceedings. The court's view was that the application for "*effective absolution"* at the close of the applicant's case was misplaced and the Court therefore refused the application. See also *Textile Workers Union (Tvl) & another v Sandown Clothing Manufacturing (Pty) Ltd* (1991) 12 *ILJ* 890 (IC). This approach was endorsed by the LAC in *David v Controlled Specialised Cleaning CC* (1997) 2 LLD 131 (LAC) where the court held as follows:

> *"There is no procedure in the Industrial Court for taking exception to the other party's pleading nor can the respondent ask for absolution from the instance at the close of the applicant's case. The reason for this is that the court is interested in hearing the version of both of the parties after which it will "determine' the dispute."*

Safety and Security Bargaining Council

[25] In *Jacob Druier and South African Police Services* (2003) 12 SSSBC 8.21.1, the arbitrator of the SSSBC held a similar view. In this case the presiding officer of the SSSBC was requested to grant absolution from the instance after the close of the employer's case. The commissioner held as follows:

"64. At the close of the employer's case, Mr. Dell indicated that he wanted to apply for absolution from the Instance but eventually did not persist in this application.

65. Section 138 of Act 66 of 1995 enjoins the Commissioner to finalise the dispute between the parties by way of arbitration.

66. An order of absolution from the Instance has the effect that the party against whom such order is made still has the opportunity to have the matter adjudicated afresh. Having regard to the contents of the LRA in general, and more specifically the process of compulsory arbitration for disputes of dismissal, following unsuccessful conciliation, I am convinced that it was never the intention of the Legislature to allow an arbitration to lead to an order of absolution from the Instance. The overbearing intention of the Legislature with the arbitration process under the auspices of the CCMA and Bargaining Councils was to bring a dispute to finality as soon as possible with as little legal formalities as possible. See section 138(1).

67. With regard to an arbitration in terms of the Arbitration Act, Act 42 of 1965, and an arbitration agreement between the parties, the following was said by

Levy AJ in Irish and Company Inc v Kritzas 1992(2) SA 623 (WLD) at 633 H to 634:

> *"In my view it was not within the contemplation of the parties that there should be an award made which left the disputes unresolved. It was applicant's duty therefore not to have treated the matter as one appropriate for a default award of absolution against respondent, but to have proceeded with its evidence and to have invited the arbitrator to make a positive ruling for or against applicant on the evidence presented. It was also the arbitrator's duty to give effect to the agreement between the parties so that his award should be final and decisive between them and that the party in whose favour the award was given would be entitled to proceed upon the basis of the award as being res iudicata ... 'Thus a judgment of absolution from the instance cannot be a final adjudication between the parties since it does not debar the party against whom the award is given from instituting proceedings in the appropriate Court. The award therefore cannot have achieved the finality it was intended to achieve. It was the duty of the arbitrator to see that his award was a final decision on all matters*

requiring his determination. See Law of South Africa, Volume I, and Paragraph 479 at 272. It seems to me therefore that the award of the arbitrator of absolution from the instance is not a proper award to be made an order of this Court."

68. *Having regard to the difference between an arbitration in terms of the Arbitration Act and a compulsory arbitration in terms of the LRA, I am of the opinion that it is not open to a party to apply for absolution from the Instance in an arbitration in terms of the LRA under the auspices of the CCMA and the Bargaining Councils*

69. This, of course, does not prevent the respondent from closing his case at the end of the applicant's case, if he is convinced that insufficient evidence was put before the Commissioner to make a finding against him."

Section 138 of the LRA: Powers of the Commissioner

[26] Section 138 of the LRA, which deals with the general provisions for arbitration proceedings, makes it clear in my view that the Commissioner "*must deal with the substantial merits of the dispute with the minimum of legal formalities"*. To a large extent this provision mirrors the provisions in section 49(9) of the now

repealed LRA in terms of which the Industrial Court "*shall . . . determine the dispute"*. The CCMA Commissioner is therefore, in my view, enjoined by section 138 of LRA to determine a dispute fairly and quickly and in doing so must deal with the substantial merits of the dispute. Such a determination of the dispute is final and binding. In light of the fact that an arbitration award is final and binding it would, in my view, not be consistent with the notion of reopening proceedings where absolution of the instance has been given. To restate: If a Commissioner is allowed to grant absolution from the instance it cannot be said that the Commissioner has dealt with the substantial merits of the dispute as it is enjoined to do so in terms of section 138 of the LRA. This view was also endorsed by Commissioner Hutshinson in *Mohale v Dedcor* (1999) 20 *ILJ* 701 (CCMA):

> *"The jurisprudence developed under the predecessor of the current Act, viz the Labour Relations Act 28 of 1956, establishes the notion that the Industrial Court was not empowered I to grant absolution as a consequence of the injunction contained in s 46(9) that the court: 'shall . . . determine the dispute' (see Textile Workers Union (Tvl) & another v Sandown Clothing Manufacturing (Pty) Ltd (1991) 12 ILJ 890 (IC)).*

The foregoing approach was endorsed by the LAC in the case of David v Controlled Specialised Cleaning CC (1997) 2 LLD 131 (LAC) where the court pronounced that:

> *'There is no procedure in the Industrial Court for taking exception to the other party's pleading nor can the respondent ask for absolution from the instance at the close of the applicant's case. The reason for this is that the court is interested in hearing the version of both of the parties after which it will "determine' the dispute.'*

Similarly, as in the case pertaining to the Industrial Court in terms of s 46(9), s 138(1) of the new Act, enjoins the commission to determine the dispute fairly and quickly. In my view, to determine a matter, must be construed as a final determination as opposed to leaving the matter 'hanging in the air'. It is also significant that the Act does not provide for any appeal against an arbitration award made by a commissioner.

Accordingly, since an arbitration award is final and binding (s 143(1)) it is inconsistent with the notion of a party being allowed to reopen proceedings pursuant to a successful application for absolution. Any other interpretation militates against the stated objective of disputes being speedily resolved to finality.

For the reasons set out above, I am satisfied that absolution from the instance is not a competent order and accordingly the application falls to be dismissed on the basis that the CCMA has no jurisdiction to entertain it."

I am in respectful agreement with the learned Commissioner's view.

[27] In conclusion, there are also policy considerations that must be taken into account in considering the purpose of CCMA / Bargaining council arbitrations: It is trite that the procedure should be fair and that an employee and the employer should be afforded a fair opportunity to present her/his case. If the employee decides not to avail itself of this opportunity, so be it. It is, however also in the interests of justice and fairness that finality should be reached in the procedure and that such finality should be reached as soon as possible. To assume that an arbitrator / Commissioner has the right to grant absolution from the instance will, in my view, defeat this purpose.

Conclusion

[28] In light of the foregoing, it appears that the following legal principles can, *inter alia*, be distilled from the cases and legal principles referred to:

(i) The Labour Court has the inherent power to grant an order for absolution from the instance;

(ii) The CCMA and the Bargaining Council in this instance, as a creature of statute, does not have inherent powers. More in particular, the CCMA/Bargaining Council cannot assume the power to grant an order for absolution from the instance in the absence of an empowering provision.

(iii) The CCMA "*must*" issue an award within 14 day's of the conclusion of the award (section 138(9) of the LRA). It is thus, in my view, clear from a reading of this section that a commissioner cannot / does not have the necessary power to grant absolution from the instance;

(iv) The CCMA (and the Bargaining Council) must deal with the substantial merits of the dispute in order to bring finality to the dispute.

(v) It is not consistent with the purpose of the LRA, which is to provide for the speedy and final resolution of labour disputes to grant absolution from the instance. In this regard I am in full agreement with the sentiments expressed by the Court in *Irish & Co Inc (now Irish & Menell Rosenberg Inc) v Kritzas* 1992 (2) SA 623 (W) where the Court held (in the context of an arbitration in terms of the Arbitration Act 42 of 1965) that it is not within the contemplation of the parties that there should be an award made which left the disputes unresolved

and that it is not appropriate for an award of absolution to be rendered against a party to the dispute. It was further pointed out by the Court that it is incumbent to have proceeded with the evidence and to have invited the arbitrator to make a positive ruling for or against the applicant on the evidence presented. I am also in agreement with the express statement that a judgment of absolution from the instance cannot be a final adjudication between the parties since it does not debar the party against whom the award is given from instituting proceedings in the appropriate Court and that it was the duty of the arbitrator to see that his award was a final decision on all matters requiring his determination.

[29] In light of the aforegoing, I am of the view that an arbitrator and commissioner at arbitration do not have the power to grant absolution of the instance. Where an arbitrator does so, as in this instance, the Commissioner committed a gross irregularity in the conduct of the arbitration proceedings and exceeded his or her powers as a commissioner which in turn renders the arbitration award reviewable.

AC BASSON, J

FOR THE APPLICANT:	MNGOMEZULU ATT
FOR THE RESPONDENT:	STATE ATT
DATE OF HEARING:	29 JULY 2008
DATE OF REASONS:	30 JULY 2008