The VWSA case

the CCMA and Labour Court rulings

Reynaud Daniels and Peter Mahlangu discuss the CCMA and Labour Court judgments in the Volkswagen case.

In January 2000 NUMSA expelled 13 of its shopstewards at the Volkswagen SA (VWSA) Uitenhage plant. Some of the union's members began a work stoppage in protest against the union's decision. VWSA approached the Labour Court for an interdict to prevent the workers from participating in the 'strike action' for the purposes of dealing with an internal union grievance. The interdict was granted.

VWSA issued an ultimatum calling on those workers on the work stoppage to return to work by 3 February 2000 or face dismissal. On 3 February VWSA dismissed 1 300 workers who had ignored the ultimatum. A dispute concerning some of these dismissals was referred to the CCMA

The CCMA and the Labour Court

The CCMA arbitrated the dispute[1] and found that the dismissals were for a fair reason, but that VWSA did not follow a fair procedure before dismissing the workers. This was because VWSA did not give the workers a hearing before dismissing them. The CCMA commissioner ordered VWSA to reinstate the workers.

VWSA then took the CCMA arbitration award on review to the Labour Court.[2] Judge Landman disagreed that the dismissals were procedurally unfair, as he believed that VWSA had done all in its power to solve the problem. However, he held that, because it was a narrow review, he was unable to interfere with the commissioner's decision even though he disagreed with it. He did overturn the CCMA ruling to reinstate the workers because he felt that the commissioner did not have the power to reinstate.

Landman J held that re-instatement was not a legally competent solution if the dismissals were only procedurally unfair Having taken into account the context of the dismissals, Landman J decided not to award the dismissed workers compensation.

Several important issues arise from this case, including:

- whether the actions of the workers constituted strike action;
- whether the dismissals were procedurally unfair;
- whether the test on review is a broad or narrow one;
- whether the LRA allows for reinstatement if a dismissal is only procedurally unfair.

Column contributed by Cheadle, Thompson and Haysom

Was it a strike?

Section 213 of the LRA defines a strike as 'the partial or complete concerted refusal to work, or retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee'.

The CCMA, despite its doubts, dealt with this case as if the workers had participated in an unprotected strike. On review, however, Landman clarified that the work stoppage was not a strike as defined in the LRA This is because the dispute was not between VWSA and the workers, but between the workers and their union

Procedurally unfair?

In *Modise and others v Steve's Spar Blackheath*,[3] the Labour Appeal Court stated that an employer must give workers on an unprotected strike a hearing before dismissing them. The court stated that:

- It does not need to be a formal hearing and may take place through the representatives of the striking workers.
- A hearing in this situation and an ultimatum are two different things.
- The purpose of a hearing is for the employer to 'hear what explanation the other side has for its conduct and to hear what action, if any, can or should be taken against it'.

The CCMA followed the *Modise* case but also stated that, as there was tension between the union and its members, the employer should have given the workers a direct hearing.

On review Landman J stated that the CCMA had applied the requirement of a pre-dismissal hearing too strictly, but he could not interfere with that decision because he believed the test for review is a limited and narrow one. Landman J implied that VWSA had met with the requirement of a pre-dismissal hearing.

Broad or narrow test?

In general the test on review is a limited and narrow one, in which the courts only interfere if the arbitrator:

- exceeds his or her powers;
- commits misconduct;
- or acts in a grossly irregular manner, which includes bias.

This test does not allow the courts to review an award where there is a bona fide mistake of fact or law. However, if the mistake were gross or obvious it may constitute misconduct or amount to a gross irregularity.[4]

Recently however, in the case of *Carephone (Pty) Ltd v Marcus No. and others*[5] the Labour Appeal Court broadened the test on review. The court stated that the CCMA was an organ of state that performed statutory functions – functions given to it by laws of Parliament – amounting to administrative acts These are, as a general rule, acts performed by government bodies exercising powers derived from legislation.

It is obviously more difficult to review an award than to appeal against it.

In terms of section 33 of the South African Constitution everyone has the right to administrative acts that are reasonable. Therefore the CCMA award had to be reasonable in relation to the material that was before the arbitrator. If it were unreasonable, the arbitrator would have exceeded his or her powers

The broad test confuses the distinction between reviews and appeals In general,

appeals deal with whether the arbitrator was right or wrong, while reviews deal with the manner in which the award was achieved. It is obviously more difficult to review an award than to appeal against it.

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One reason why the narrow test is not desirable is, in the words of Landman J, because of 'the inexperience and lack of legal background of a large number of CCMA arbitrators'. In our view this reason is outweighed by the fact that the broad test creates the potential for more review applications. This would congest the Labour Court roll and delay finality of dismissal disputes arbitrated before the CCMA.

As the Explanatory Memorandum to the LRA[6] states, one of the aims of the LRA is to provide for 'a simple, quick, cheap and non-legalistic approach to the adjudication of unfair dismissal disputes'. If all awards could effectively be 'appealed' through a broad test for review the process will no longer be simple, quick, cheap and non-legalistic. Unions' lack of resources already forces them to carefully examine which of their victories at the CCMA can or cannot be defended. The broader test will generally benefit employers who have greater resources than unions. These employers can take unfavourable arbitration awards on review.

We believe that the injustices evident in some CCMA arbitration awards can be fixed in the long run through proper training, appointment and assessment procedures for CCMA arbitrators. The unions must fully exploit all the means at their disposal to ensure that these issues are properly addressed.

We believe that adopting the broad test in reviews of CCMA arbitration awards undermines the CCMA because it often does not finalise disputes as quickly as those referred to private arbitration. This also undermines one of the fundamental aims of the LRA.

With private arbitrations,[7] the test on review is still narrow because this type of arbitration is not an administrative act. It is obviously undesirable for the courts to apply different standards of review to similar dispute resolution functions.

As Landman J stated: 'It is time that the Labour Court recognises that the legislature intended certain labour disputes to be arbitrated by the CCMA, for better or worse.'

Legal certainty

In *Shoprite Checkers (Pty) Ltd v Ramdaw*,[8] Judge Wallis refused to follow the broad test on review and instead followed the narrow test. Wallis J stated that arbitrations under the CCMA are not administrative acts, but are judicial in nature. He referred to recent Constitutional Court cases[9] in which the court stated that it is necessary to distinguish administrative acts by looking at the function performed by an institution and not the characteristics of that institution.

The system of precedent that applies in our judicial system requires, in broad terms, the lower courts to follow and apply the legal principles set by the higher courts. This serves an important purpose because it creates certainty in our legal system. These two recent judgements of the Labour Court, even if correct, have however created uncertainty as to the appropriate test on review.

Both of these Labour Court decisions are on appeal and we hope the Labour Appeal Court will soon put this matter to

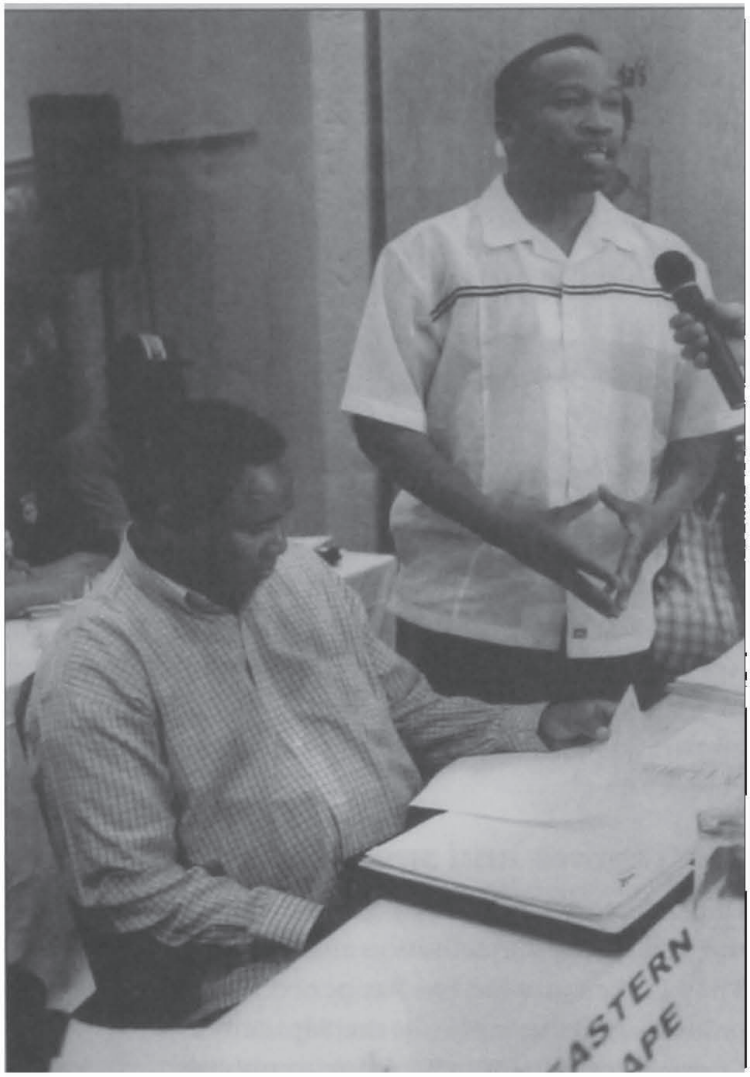
rest by finally determining which test on review is applicable.

Reinstatement?

The CCMA believed that it had the discretion to award reinstatement even if the dismissal of the VWSA workers was only procedurally unfair.

On review, however, the Labour Court held that LRA requires the CCMA to reinstate dismissed workers, unless one or more of the exceptions in the LRA exists. It stated that one of the exceptions is where the dismissal is only procedurally unfair. Therefore, if the dismissal is only procedurally unfair, the only possible remedy is compensation. The Labour Court held that, in awarding reinstatement the CCMA commissioner exceeded his powers

The Labour Court also considered what compensation was appropriate in these circumstances. It refused to award any compensation to the dismissed workers. Landman J's reasons were: 'It would be intolerable to require an employer to continue to employ employees who have no respect for the provisions of the LRA, the Labour Courts and institutions and are oblivious to the consequences of their actions. Their repeated conduct and complete lack of contrition constitutes further aggravation of their position'



NUMSA Eastern Cape leadership, under whom VWSA falls.

Endnotes

1 Mzeku and Others v Volkswagen SA (2001) 22 ILJ 771 (CCMA)
2 Volkswagen SA (Pty) Ltd v Brand NO & others [2001] 5 BLLR 558 (LC)
3 (2000) 21 ILJ 519 (LAC)
4 ACTWUSA v Veldspun (Pty) Ltd (1993) 14 ILJ 1431 (A) at 1435
5 (1998) 19 ILJ 1425 (LAC)
6 (1995) 16 ILJ 278-336
7 Eskom v Hlemstra NO and others 1999 (11) BCLR 1320 (LC)
8 (2000) 21 ILJ 1232 (LC)
9 Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council 1999 (1) SA 374 (CC), President of South Africa v SARFU 2000 (1) SA 1 (CC), Pharmaceutical Manufacturers Association of SA. In re ex parte President of South Africa 2000 (2) SA 674 (CC)

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