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When is a secondary strike reasonable ?

The connections between separate employers

by Dawn Norton

Section 66(1) of the Labour Relations Act, 66 of 1995 (LRA) defines a secondary strike as ;

> *"a strike, or conduct in contemplation or furtherance of a strike, that is in support of a strike by other employees against their employer but does not include a strike in pursuit of a demand that has been referred to a council if the striking employees, employed within the registered scope of that council, have a material interest in that demand."*

In other words a secondary strike is a strike in which the employees of one employer (the secondary employer) express their support for the striking workers of another employer (the primary employer) in circumstances where they have no material interest in the issue giving rise to the primary strike and do not bear the consequences, or enjoy the benefits, of the outcome of the primary strike.

In terms of s 66 of the LRA a secondary strike will acquire protected status (ie protection against dismissal, interdicts and delictual claims), if the following procedural and substantive requirements have been met –

- the primary strike must be a protected strike;
- the employees taking part in the secondary strike must give at least seven days notice of the intended strike action to the secondary employer; and,
- and the nature and extent of the secondary strike must be *reasonable in relation to the possible direct or indirect effect that the secondary strike may have on the business of the primary employer.*

The first two requirements are relatively simple to satisfy and require an uncomplicated factual enquiry. It is the third requirement of "reasonableness" set out in s 66(2)(c) of the LRA that is most often the subject of litigation in the Labour Courts as secondary employers seek to interdict secondary strike action on the basis that the

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strike action has little or no impact on the business of the primary employer.

Whilst our courts have made it clear that the reasonableness or otherwise of an "ordinary" strike has no bearing on the question whether it will be protected or not, in contrast, the reasonableness of a secondary strike is a key factor in determining its legitimacy or protected status. The policy purpose underlying this unique criterion is simply to protect the secondary employer in circumstances in which its business is suffering financial harm as a result of the action of its own striking employees, who are supporting other striking workers in their own dispute with a different employer.

Expressed colloquially, the necessity of satisfying the criterion of "reasonableness" offers some protection to the secondary employer who argues "*why are my workers striking when it's not their dispute and why should I suffer harm when the dispute doesn't concern me, but a different employer?*"

Regrettably for that employer, if employees or their representatives can show on a balance of probability that the secondary strike may have a possible indirect or direct effect on the business of the primary employer (and provided that the other statutory requirements have been satisfied) then the secondary strike will be protected and the secondary employer will have to endure the secondary strike. Conversely, if no possible direct or indirect effect is shown, then it is likely the secondary strike will be regarded as unprotected and may be interdicted by the Labour Court.

The quality "reasonableness" imparts ideas of "rationality", "fairness" and "sensibleness". It is an inevitably imprecise quality and calls for value judgments to be made on a case by case basis. The extent to which the Labour Court has attempted to determine which facts satisfy the reasonableness requirement is the subject of this contribution. The key cases will be considered in historical sequence and thereafter some of the general principles which arise from them in order to determine the threshold of legitimacy of secondary strikes will be discussed.

The key cases

The first of these decisions was that of the Labour Court in **Sealy of SA (Pty) Ltd & Others v Paper Printing Wood & Allied Workers Union** (1997) 18 ILJ 392 (LC). The facts were briefly as follows: The employees of the primary employer, Mondi Paper, embarked on a primary strike. The union concerned, the Paper, Pulp, Wood and Allied Workers Union (PPWAWU) then gave notice of its intention to institute a secondary strike at five other employers, namely Sealy of SA (Pty) Ltd, Impulse Designs, Softex Mattress (Pty) Ltd, Peach and Hatton Heritage (Pty) Ltd and Edblo Africa. These employers then sought an interdict from the Labour Court preventing PPWAWU and its members from encouraging or participating in this strike, largely on the basis of non compliance with s 66(2)(c).

Basson J found that the relationship between Mondi Paper and four of the secondary employers (Sealy of SA, Impulse Designs, Peach and Hatton Heritage and Edblo Africa) was "tenuous" as the secondary employers did not operate in the same sector as Mondi (pulp and paper manufacturing) and although the secondary and primary employers had Anglo American as a common shareholder the extent of that shareholding amongst those secondary employers was less than one per cent. Basson J therefore granted the interdict preventing the employees of these employers from embarking on secondary action. He declined to grant the interdict against the striking employees at Softex Mattress as Softex Mattress purchased paper from Mondi Paper (and some of its other plants) and the Court was satisfied that the nexus between Mondi and this particular secondary employer was reasonable and had a possible impact on Mondi's business to influence the outcome of the primary strike.

Two years later, in 1999, the Labour Court again considered the status of a secondary strike in **Samancor Ltd & Another v National Union of Metalworkers of SA** (1999) 20 ILJ 2941 (LC). In this case two companies, Samancor and Manganese Metal, sought a final interdict against their workers embarking on a secondary strike in support of striking workers at Columbus Steel.

Landman J declined to grant the interdict in favour of Samancor's chrome alloy divisions as Samancor provided 80% of the chrome required by Columbus Steel, a key mineral in the production of stainless steel by Columbus Steel. Furthermore the business relationship between Samancor (as the secondary employer) and Columbus (the primary employer) was strengthened by a joint venture in which Samancor was

a partner with Columbus Stainless Steel. Landman J granted an interdict in favour of Manganese Metal as that secondary employer did not play a significant role in the provision of chrome. In confirming the order drafted by the parties the Court was mindful of the fact that Manganese Metal was a wholly owned subsidiary of Samancor but commented that that relationship -

> *"merely establishes a nexus between it and Columbus. But a mere nexus which does not have an effect on the primary employer's business is insufficient to permit a secondary strike." (At par 29)*

Landman J's judgment is important in another respect and that is its consideration of the effect of the secondary strike on the business of the secondary employer. As will be seen, this was to be a contested theme in later cases, namely whether s 66(2)(c) required an investigation into the "proportionality" of the secondary strike – ie whether the effect of the strike on the secondary employer was at all relevant in determining its reasonableness. He made the point that the damage suffered by the secondary employers (for example loss of production estimated at 4 200 tons per day amounting to a loss of revenue of R3.5 million per day) could not be ignored, but that it was unnecessary to weigh up that damage against the effect of the strike on the primary employer's business. He said

> *"It seems to me that s 66(2)(c) requires me to concentrate on the nature and extent of the strike, that is the withholding of labour, its timing and other ramifications in relation to the effects which it may have on the business of Columbus."(At par 31)*

The third of these decisions is that of the Labour Court (in 2001) in **Billiton Aluminium SA Ltd v NUMSA** [2002] 1 BLLR 38 (LC) The facts were as follows: workers at Billiton Aluminium went on strike in support of striking workers at Samancor. Pillay J, noting that the secondary employer and the primary employer were connected indirectly through a common owner (BHP Billiton) and that all three entities could be subject to market sentiment, found that that nexus was sufficient to satisfy the reasonableness criterion.

She set that threshold arguably low and commented –

> *"whatever the nature and extent of the secondary strike, it has to be reasonable in relation to the 'possible' effect on the primary employer. The standard of reasonableness is somewhat anti-climactically whittled down to a mere possibility. It is further widened by permitting the effect to be either direct or indirect." (At paras 6 /8)*

The Court rejected the proportionality test with respect to the effect on the secondary employer as it would pose a limitation on the right to strike. Thus the cost of the secondary strike to Billiton Aluminium - which ,if it resulted in the shutting down and recommissioning of just one continuously operating smelter was reported to be R700 million, was not considered in Pillay J's decision making process.

A year later Pillay J considered another secondary strike dispute in **Hextex & Others v SA Clothing & Textile Workers Union & Others** (2002) 23 LJ 2267 (LC). The secondary employers in this case, namely Hextex, Romatex and Berg River sought to interdict their workers from engaging in strike action in support of workers striking at Team Puma (the primary employer). Pillay J found a nexus between the primary and secondary employers, in the form of Berg River which provided less than one per cent of the yarn required by Team Puma and on the basis that Hextex and Romatex could place pressure on Berg River to influence Team Puma. The nexus between the secondary and primary employers in this case was, it is submitted, extremely remote and not even reasonably explained by Pillay J's own analysis of the words "*possible direct or indirect effect*" in s 66(2)(c) of the LRA. Having considered various dictionary definitions of the word "possible" she arrived at the view that those words mean "*likely or capable of existing*...". It is submitted that the Court's view that the economic relationship between the primary and secondary employers in this case was capable of meeting the standard set in that threshold (ie "likely or capable of existing") was debatable in the extreme.

Pillay J also reaffirmed her view that "*the effect of the strike on the secondary employer is not a consideration*" and went further -

> *"I doubt s 66(2)(c) invokes a proportionality test either as regards the effect of the secondary strike on the secondary employer, the primary employer or the secondary and primary employers*

> *relative to each other. If a secondary strike has a devastating effect on the secondary employer but only a marginal, but nevertheless, possible effect on the primary employer's business, the secondary strike would not be a contravention of subsection (2).(At par 36)*

In 2007, this time in the public sector, the Labour Court considered the dispute in **SALGA v SAMWU** [2008] 1 BLLR 66 (LC). In this case SALGA approached the Labour Court to interdict an impending one day secondary strike of local government employees intent on striking in support of public sector workers engaged in a national primary strike against their employers in the provincial and national tiers of government.

Van Niekerk AJ dismissed the application on the basis that a nexus had been established between the primary and secondary employers which could have an impact on the resolution of the primary strike. In this regard he drew attention to the co-operative structure of government and the provision of services by all three tiers. He concluded –

> *"Given the integrated, co-ordinated and co-operative structure of government as a whole, it is entirely possible that the withdrawal of municipal services will have, at least, an indirect if not a direct effect on the business of those higher levels of Government engaged in the primary strike, and will, thus, place pressure on them in the national bargaining process currently underway." (At par 21)*

Contrary to the decisions in *Hextex* and *Billiton Aluminium* he also argued that the reasonableness criterion had to be considered with respect to both the impact on the primary employer as well as on the secondary employer. He said –

> *"…the use of the words 'reasonable in relation to' … clearly import a proportionality assessment…In short, whether or not a secondary strike is protected is determined by weighing up two factors – the reasonableness of the nature and extent of the secondary strike (this is an enquiry into the effect of the strike on the secondary employer and will require consideration, inter alia, of the duration and form of the strike, the number of employees involved, their conduct, the magnitude of the strike's impact on the secondary employer and the sector in which it occurs) and secondly, the effect of the secondary strike on the business of the primary employer, which is, in essence, an enquiry into the extent of the pressure that is placed on the primary employer." (At par 16)*

A consideration of the above judgments indicates that the following three variables impacting on the legitimacy of the secondary strike may be distilled:

- a supplier/purchaser relationship between the employers;
- a common shareholding or ownership shared by both employers; and
- co-operative arrangements between the employers.

The Courts seem to be at odds about whether or not there is a further variable, namely the effect of the secondary strike on the secondary employer's business. Each variable will be discussed below.

A supplier/purchaser relationship between the employers

In the **Sealy** decision Basson J dismissed an application to interdict the secondary strike of employees at Softex Mattress because Softex Mattress (secondary employer) purchased paper from Mondi (primary employer). (Regrettably the judgment does not specify how much paper was purchased)

Similarly, Landman J in **Samancor** dismissed an application to interdict the secondary strike of employees at Samancor's chrome alloy divisions as Samancor provided Columbus with eighty per cent of its chrome requirements. The quantum of this supply of the product justified Landman's decision.

Pillay J too refused to interdict striking secondary workers in **Hextex** as Berg River provided 1% supply of its yarn to Team Puma (primary employer). Furthermore, Pillay J refused to interdict the strike at two other factories on the strength that those employers could influence Berg River to influence Team Puma to settle the primary strike. With respect I am of the view that the relationship between the secondary employers

and the primary employer in **Hextex** does not justify Pillay J's decision to protect that secondary strike in that the "possible direct or indirect effect" on the primary employer would be negligible. It would seem then that even a minor trading relationship will satisfy the reasonableness criterion in s 66(2)(c) of the LRA and the secondary strike will be regarded as protected.

Common shareholding and ownership

In **Billiton Aluminium** Pillay J considered the fact that BHP Billiton was a common owner of the secondary and primary employer and that that nexus was sufficient to satisfy the reasonableness criterion. However, the Court in **Samancor** cautioned that the mere fact that there is a nexus with respect to shareholding does not in itself satisfy the reasonableness criterion. (In that case although Manganese Metal, a secondary employer, was wholly owned by Samancor, the primary employer, that fact alone did not satisfy the reasonableness criterion as it did not have an effect on Samancor's business). In some cases the courts have considered the size of the shareholding. When it transpired in **Sealy** that the majority of secondary employers and the primary employers shared a common shareholder in Anglo American, but that Anglo American's shareholding was less than one per cent of the total secondary employer's shareholding, the Court granted an interdict to stop the secondary strike – presumably because the Court was of the view that the reasonableness criterion had not been met.

Co-operative arrangements between employers

The Court has been persuaded that legally enforceable co-operative arrangements such as joint ventures between employers or their subsidiaries (such as the joint venture between Samancor and Columbus Stainless Steel in **Samancor v Numsa)** could influence the reasonableness of a secondary strike because secondary strike action could give rise to a possible effect on the business of the primary employer.

The force of the co-operative principle was keenly considered in the **SALGA** matter. The Court drew attention to the constitutional requirement that municipalities participate in national and provincial development programmes, and that National Government support and strengthen the capacity of municipalities to perform their functions.

The proportionality test, weighing up the harm against the secondary employer vis a vis the primary employer

The court decisions on whether or not the reasonableness criterion requires a consideration of the harm inflicted on the business of the secondary employer are at odds with one another.

On the one side of the debate is Pillay J. Her view as expressed in the **Billiton Aluminium** and **Hextex** decisions is that such harm is irrelevant to a consideration of s 66(2)(c) on the basis that such a consideration would undermine the right to strike. She further argues that, on a plain language interpretation of the words of that section, only the effect on the primary employer is to be taken into account. The other side of the debate is represented by van Niekerk, AJ in **SALGA** who argues that –

> *"an assessment of the nature and extent of the secondary strike clearly contemplates that its impact on the business of the secondary employer is a fundamental factor, and that an assessment of that impact is required."(At par 14)*

Landman J, hovers somewhere in between saying –

> *"I do not think it necessary to weigh up the damage inflicted (on the secondary employer)…but of course I do not ignore it." (At par 31)*

In my respectful view a consideration of the damage to the secondary employer would accord with notions of fairness, reasonableness and proportionality, qualities which underlie s 66(2)(c). However, Pillay J appears

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correct that the words quite expressly refer to the effect on the primary employer, and that if the legislature's intent was to accommodate the interests of secondary employers, such an intent has not found its way into the language of that section.

Conclusion

Secondary strikes, more so than primary strikes, highlight the tension between the interests of employees vis-a-vis the interests of employers. Whilst secondary employees want to support their striking colleagues/ comrades, secondary employers bear the financial brunt of strike action which has nothing or little to do with their business. The Labour Court, in assessing the legitimacy of secondary strikes, plays an important role in considering the impact of the strike action on the business of the primary employer, (usually through trading relations or common shareholding or co-operative arrangements between the secondary and primary employers), and the extent to which the secondary strike action may possibly influence collective bargaining taking place between primary employees and their employer.

Where to draw the line on reasonableness will continue to be debated in the Labour Court, particularly in circumstances in which there is no consensus on whether or not the impact on the business of the secondary employ is a consideration in the determination of the legitimacy of secondary strikes.

Dawn Norton

The presence of witnesses in the arbitration room

by P.A.K. Le Roux

It is the practice of arbitrators to request persons who will be giving evidence at some stage during the arbitration process to leave the room whilst other witnesses are giving evidence. The reason for this is, of course, to prevent them from hearing evidence provided by another witness which may influence what they may say when they give evidence. But what is the position if this practice is not complied with and a witness gives evidence on a certain issue after hearing the evidence after another witness dealing with the same issue?

This question was considered in **C/K Alliance (Pty) Ltd t/a Greenland v L Mosala & Others** (JR 3134/ 06 15/8/08). The employee in this matter referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration. A Ms Robinson represented the employer at the arbitration. She was assisted by a Ms Vance. Vance presented an opening statement to the commissioner on behalf of the employer. Prior to the employer's first witness giving evidence the employee's representative objected to both Robinson and Vance leading the evidence of this witness. The commissioner ruled that Vance was not required to leave the room and that either Vance or Robinson could lead the evidence of the witness.

After the first witnesses' evidence had been led, Vance indicated that she also wanted to give evidence. The commissioner refused to permit her to do so for two reasons. The first was that she had been present when the first witness gave evidence. The second was that she had made an opening statement on behalf of the employer. The dismissal was found to be unfair.

The employer then sought to have the award reviewed and set aside on the basis that the arbitrator had erred in not permitting Vance to give evidence. The Labour Court held that both reasons given by the commissioner for not permitting Vance to give evidence did not hold water.

As far as the first reason is concerned, the Court stated the following –

> *"[9] As a general rule witnesses are normally required to wait outside the court until such time when they would have presented their evidence. The reason for this is to guard against the version of a witness being influenced by what they may have heard whilst sitting in during the testimony of other witnesses. This rule is generally not as firmly enforced in arbitration proceedings, and correctly so, as is the case in the courts. This being the case it seems to me that the appropriate approach is that commissioners are duty bound to warn potential witnesses or those that may have already been*

identified as such of the possible consequences of their presence during the testimony of other witnesses. But where for any reason it turns out later that a witness sat in during the testimony of other witnesses that should not disqualify such a person from testifying. At best what the commissioner should do in such a situation is to allow the witness to testify and then evaluate at the end of the proceedings when assessing his or her testimony as to whether his or her version may have been influenced by the version of the other witnesses who testified while present in the hearing. The other party would have the right during cross examination to test the extent to which the version of such a witness who had been sitting in during the proceedings may have been influenced by his or her presence during testimony of other witnesses.

[10]The danger of excluding a witness simply because he or she sat in during the testimony of others is that such an approach prejudices the testimony of such a witness. It may well turn out that such a witness would have testified on an issue which those before him or her have not testified on. It may also be that the witness is so honest that he or she is willing to go against those who are suppose to be on his or her side.

[11]The probative value which the commissioner accords to such evidence would depend on the extent to which the witness may have sought to tailor make his or her evidence with those who testified before him or her. This would however not apply where the witness who sat in during the testimony of others testifies on a totally different issue to the one that the others may have testified on."

The Court found that the commissioner had erred by not warning the employer's representative of the consequences of Vance sitting in the hearing. The consequence of this fact was not that the Vance would not be entitled to give evidence, but rather that the weight that would be given to this evidence could be affected by the fact that she was in the room during the course of the evidence of another witness. The second reason why the commissioner had refused to permit Vance to give evidence was disposed of as follows -

"*[13]I know of no rule in our law that a person who makes an opening statement on behalf of a party in litigation proceedings would be disqualified for that reason to testify at later stage. There is also no rule that a representative of any party in the arbitration proceedings is disqualified to testify for that reason."*

From the above it seems that the following guidelines can be formulated -

- It would clearly be advisable that Witness A, who is to give evidence at a later stage of the arbitration proceedings, should not be in the room when Witness B gives evidence on issues that Witness A will deal with. If Witness A is present, the weight that may be given to his evidence may be affected by the fact that it is possible that he may tailor his evidence in the light of what he heard Witness B say.
- However, there ought to be no objection to Witness A being present in the room when witnesses are testifying on issues that he will not testify about. Similarly, there ought to be no problem about Witness A being present in the room to hear other witnesses testify after he has given his evidence, unless there is the possibility that he may have to be recalled to give further evidence.
- It is not uncommon that a party's representative at an arbitration is not as well versed in the facts and circumstances of a case as a person who will also be giving evidence at the arbitration. The most obvious example of this situation is where the allegations of misconduct have been investigated by a person who has been specifically appointed to do so, for example an internal auditor or an employee in the employer's security department. The employer's representative may want to have this investigator present in the arbitration room to assist him. At the same time, it may be that the investigator may have to give evidence at some stage as well, often on a limited aspect of the case. In this case it would, of course, be preferable that the investigator give evidence first.

  Alternatively, it may be possible to request the investigator to leave the room when a witness

commences that part of his evidence that will overlap with that to be given by the investigator. If the latter option is decided upon it would be advisable to inform the commissioner that this is what is going to occur and to see what her reaction is in this regard.

- The informal nature of arbitration proceedings means that it is sometimes difficult to predict what issues are going to be raised, especially in cross-examination. If an issue is raised that a person who is present in the room may be able to testify to, immediately request that person to leave the room.
- Although this may not be advisable from a practical perspective, at least in certain circumstances, nothing prevents a person representing a party also giving evidence during arbitration proceedings on behalf of that party. However, in the light of what has been said above, it would also be advisable that this person give evidence as early in the process as possible. Perhaps the most important point to be made is that a clear distinction should be drawn between those statements made by a such a representative in his capacity as a representative, and those as a witness. The latter are given under oath and are subject to cross-examination and can be given due evidentiary weight. The former carries little weight and are usually seen as argument rather than evidence.

PAK le Roux

Determining the fairness of a dimissal for misconduct

The two stage process

by Wayne Hutchinson

In the matter of **Sidumo and Another v Rustenburg Platinum Mines Ltd and Others** [2007] 12 BLLR 1097 (CC), the Court dealt with the two-stage enquiry applicable to arbitration proceedings. The first duty of a commissioner is to determine whether the misconduct was committed. The employer must show that there was a workplace rule in existence and that it was breached by the employee.

> *"This is a conventional process of factual adjudication in which the Commissioner makes a determination on the issue of misconduct ... The next part of the process is that the fairness of the dismissal must be considered". (A par 61)*

The Court went on to state that commissioners adopt the same techniques of establishing and determining the facts that a court of law employs.

Item 2 (1) of the Code of Good Practice: Dismissal provides that the question whether or not a dismissal is for a fair reason must be determined by the facts of the case and the appropriateness of dismissal as a sanction.

Generally speaking, the factual enquiry relates to whether the alleged misconduct was committed and if there was a valid and fair workplace rule in existence that was applied consistently. A commissioner exercises a value judgment in determining whether the sanction of dismissal is fair or appropriate in a case of proven misconduct and whether the rule breached was valid or fair. In practice, few instances will be encountered where commissioners would be inclined to declare rules to be unfair or invalid.

In **Sidumo**, the issue centred around the commissioner's interference with the sanction imposed and not the guilt of the employee for breaching the rule. It was common cause that the employee had acted in breach of certain procedures relating to the searching of employees. The Court pointed out that the adoption of the reasonable employer test in determining the appropriateness of the sanction in cases of proven misconduct tilted the balance in favour of employers. To restore balance, the commissioner's own sense of fairness must ultimately override the employer's view.

The first enquiry

In arbitration proceedings, the burden of proof is discharged as a matter of probability. The employer must prove its case on a balance of probabilities. Important guidelines have been laid down by the Courts in dealing with conflicting factual versions presented by the parties.

For example, in **Stellenbosch Farmers' Winery Group Ltd & Another v Martell et Cie & Others** 2003 (1) SA 11 (SCA) at 13 para 5, the test is formulated as follows:

> *"On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by Courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a Court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the Court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn, will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box; (ii) his bias, latent and blatant; (iii) internal contradictions in his evidence; (iv) external contradictions with what was pleaded or put on his behalf; or with his own extracurial statements or actions; (v) the probability or improbability of particular aspects on his version; (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events."*

The second stage of the enquiry

The second stage of the process is to assess the fairness of the dismissal. The fairness is assessed by the commissioner passing a value judgment. It is his/her sense of fairness that must ultimately prevail. The exercise of a value judgment is something about which reasonable people may readily differ (**Sidumo**, para 179)

The fairness of a dismissal entails an enquiry into various factors, including the following:

- the importance of the rule breached;
- the reason why the employer imposed the sanction of dismissal;
- the effect of the dismissal on the employee and his/her length of service;
- the continuation of the relationship on terms which are fair to both.

The standard of review applicable to both enquiries

The truism that decision makers acting reasonably may reach different conclusions appears to apply across the board to both stages of the enquiry. Nevertheless, there appears to be a distinction between the passing of a value judgment in respect of the fairness of the employer's sanction and the commissioner's factual findings. When a commissioner is in the process of determining factual issues, he or she is not engaged in the passing of a value judgment. Factual findings should have a greater scientific content than value judgments. The imposition of a value judgment in respect of the fairness of a sanction should be subject to less scrutiny than the underlying facts that inform the value judgment. Logic dictates that a reviewing court will less likely interfere with the exercise of a value judgment as opposed to the factual findings made by a commissioner. A misdirection on important factual issues could result in the decision maker arriving at a decision about the fairness of the dismissal that he or she would not normally have reached.

The review test that decision makers acting reasonably may reach different conclusions should be evaluated in the following suggested context:

- the commissioner must be impartial;
- the commissioner must display an adequate degree of proficiency in being capable of properly evaluating the facts and evidence and arriving at a reasoned conclusion;
- the standard that reasonable commissioners may readily differ on factual findings should be subjected to similar guidelines that an Appeal Court exercises over appeals on factual findings;
- a material factual misdirection should be a strong indication that a commissioner has failed to apply his mind to a relevant fact;
- the weighing up of evidence and the drawing of inferences from primary facts is more akin to embarking upon a scientific exercise than the exercising of a discretionary value judgment which is based on a person's subjective sense of fairness.

The distinction between an appeal and a review has been formulated as follows:

> *"The system of judicial review is radically different from the system of appeals. When hearing an appeal the Court is concerned with the merits of the decision under appeal. When subjecting some administrative act or order to judicial review, the Court is concerned with its legality. On an appeal, the question is right or wrong? On review, the question is lawful or unlawful?"*
>
> ***(Wade and Forsyth Administrative Law** (7th Edition 1994) at 38)*

An appeal body examines the merits of the decision to determine whether it is right or wrong. For reviews, the underlying policy rationale is that Courts are reluctant to substitute their views for those of the administrators. The administrator is entrusted with the power to weigh up and determine the facts of a dispute.

The test adopted by an Appellate Court on questions of fact is of interest. The Court's powers of substitution are circumscribed. The Court will only interfere with a factual finding where there has been a clear misdirection and the Court is convinced that it is wrong.

In **Toyota South Africa Motors (Pty) Ltd v Radebe & Others** [2000] 3 BLLR 243 (LAC), Nicholson JA was constrained to conclude that the test for an appeal on a question of fact was *"... similar to the notion that an award can be set aside if it is not justifiable with regard to the reasons given"* (At par 39).

In the matter of **R v Dhlumayo** 1948 (2) SA 678 (A), the Court dealt with an appeal of fact and expounded the following guidelines:

- The trial Judge has advantages – which the appellate court cannot have – in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial. Not only has he had the opportunity of observing their demeanour, but also their appearance and whole personality. This should never be overlooked.
- Even in drawing inferences the trial Judge may be in a better position than the Appellate Court, in that he may be more able to estimate what is probable or improbable in relation to the particular people whom he has observed at the trial.
- Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct; the Appellate Court will only reverse it where it is convinced that it is wrong.
- In such a case, if the Appellate Court is merely left in doubt as to the correctness of the conclusion, it will uphold it.
- There may be a misdirection on fact by the trial Judge where the reasons are either on their face unsatisfactory or where the record shows them to be such; there may be such a misdirection also where, though the reasons as far as they go are satisfactory, he is shown to have overlooked other facts or problems.
- The Appellate Court is then at large to disregard his findings on fact, even though based on credibility, in whole or in part, according to the nature of the misdirection and the circumstances of the particular case, and so come to its own conclusion on the matter.

Where an administrative tribunal proceedings are of an adversarial nature, akin to those of a court of law, the reasonable commissioner test and the rationality threshold must be appropriately adapted to meet the exigencies of such a setting. Standing alone, the reasonable commissioner test is vague unless some meaning can be derived from the context in which it is applied.

As our law of administrative review unfolds some guidance may be sought from the principles that have been applied to appeals of fact. Since CCMA proceedings closely resemble those of a court of law in which parties are allowed to fully present their cases, little purpose would be served if commissioners are empowered to commit material mistakes of fact with impunity.

In conclusion, commissioners should be less immune from attack on review for decisions involving factual findings.

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