IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD INJOHANNESBURG

CASE NO. JA 32/02

In the matter between:

NEIL MARTIN VAN ONSELEN **Appellant**

and

MOGALAKWENA LOCAL MUNICIPALITY **First Respondent**

MERVYN M RIP NO **Second Respondent**

JUDGMENT

JAFTA AJA:

[1] This is an appeal against the judgment of the Labour Court refusing to set aside, on review, the ruling of the chairman of a disciplinary enquiry. The appellant, who was the first respondent's employee, was, by agreement between the parties, subjected to a disciplinary enquiry on certain charges. The second respondent was the chairman of the said enquiry. At the commencement of the disciplinary hearing, on 17 October 2001, the appellant challenged the validity of the charge sheet on the basis that a preliminary and peremptory procedural step of having a written complaint, as required by the first respondent's disciplinary code, was not complied with prior to the formulation of the charge sheet. It was then contended on his behalf, that the omission rendered the charge sheet invalid.

[2] Having considered the matter, the second respondent ruled that the appellant could no longer raise the point because in the settlement agreement that the parties entered into in respect of the previous High Court application, he had waived his procedural rights thereon. Dissatisfied with that decision, the appellant launched a review application in the court ***a quo.***

The matter came before **Ngcamu AJ** who declined to interfere with the second respondent's decision and consequently dismissed the application. Subsequently, the appellant sought and was granted leave to appeal to this court. The principal basis on which the decision of the court ***a quo*** is attacked is that it erred in not finding that the second respondent has committed an errror of law when he came to the conclusion that the appellant had, in the settlement agreement referred to above, waived his procedural right to objecting to the validity of the charge sheet. Even Mr Grobler, who appeared for the appellant before us, confined himself to the aforesaid ground of appeal. It was made clear that no reliance was placed on grounds such as the justifiability or the rationality test.

[3] The appeal should, therefore, be dealt with on the basis of the sole ground referred to in the previous paragraph and the point raised by the first respondent regarding the mootness of the appeal. It was contended that he committed an error of law when he found that the appellant had waived his procedural right to attacking the validity of the charge-sheet on the ground that a prerequisite step of a written complaint had not been taken. For this proposition the appellant's counsel relied solely upon the decision of **Hira and Another v Booysen and Another 1992 (4) SA 69 (A) at 93A-94A.** At those pages **Corbett CJ** is reported to have said:

" **To sum up, the present-day position in our law in regard to**

common – law review is, in my view, as follows:

1) **Generally speaking, the non-performance or wrong performance of a statutory duty or power by the person or body entrusted with the duty or power will entitle persons injured or aggrieved thereby to approach the Court for relief by way of common-law review. (See the *Johannesburg Consolidated Investment* case supra at 115)**
2) **Where the duty/power is essentially a decision –making one and the person or body concerned (I shall call it 'the tribunal') has taken a decision, the grounds upon which the Court may, in the exercise of its common-law review jurisdiction, interfere with the decision are limited. These grounds are set forth in the *Johannesburg Stock Exchange* case supra at 152 A-E.**
3) **Where the complaint is that the tribunal has committed a material error of law, then the reviewability of the decision will depend, basically, upon whether or not the Legislature intended the tribunal to have exclusive authority to decide the question of law concerned. This is a matter of construction of the statute conferring the power of decision.**
4) **Where the tribunal exercises powers or functions of a purely judicial nature, as for example where it is merely required to decide whether or not a person's conduct falls within a defined and objectively ascertainable statutory criterion, then the Court would be slow to conclude that the tribunal is intended to have exclusive jurisdiction to decide all questions, including the meaning to be attached to the statutory criterion, and that a misrepresentation of the statutory criterion will not render the decision assailable by way of common-law review. In a particular case it may appear that the tribunal was intended to have exclusive jurisdiction, but then the legislative intent must be clear.**

5) **Whether or not an erroneous interpretation of a statutory criterion, such as is referred to in the previous paragraph (ie where the question of interpretation is not left to the exclusive jurisdiction of the tribunal concerned), renders the decision invalid depends upon its materiality. If, for instance, the facts found by the tribunal are such as to justify its decision even on a correct interpretation of the statutory criterion, then normally (ie in the absence of some other review ground) there would be no ground for interference. *Aliter*, if applying the correct criterion, there are no facts upon which the decision can reasonably be justified. In this latter type of case it may be justifiably be said that, by reason of its error of law, the tribunal 'asked the wrong question', or 'applied the wrong test', or 'based its decision on the matter not prescribed for its decision', or 'failed to apply its mind to the relevant issues in accordance with the behests of the statute', and that as a result its decision should be set aside on review.**

6) **In cases where the decision of the tribunal is of a discretionary (rather than purely judicial) nature, as for example where it is required to take into account considerations of policy or desirability in the general interest or where opinion or estimation plays an important role, the general approach in ascertaining the legislative intent may be somewhat different, but it is not necessary in this case to expand on this or express a decisive".**

[4] It seems to me that not all of the guideline principles listed in **Hira** are applicable to the present matter. In my view only the first five principles and more especially the fourth and fifth apply to this matter. It would appear that the powers or functions performed by the second respondent were essentially of a judicial nature. However, we were not referred to any particular statute as an instrument which conferred the power on the second respondent to preside over the disciplinary enquiry nor was it argued that in

terms of the enabling statute the second respondent was intended to have exclusive jurisdiction on matters placed before him during the enquiry. Therefore, I shall assume that his decision is justiciable in court on review.

[5] The crucial issue for consideration in this matter is whether the appellant has successfully established grounds upon which the second respondent's decision should be reviewed and set aside under common law. The second respondent reasoned his way to the conclusion that the appellant had waived his procedural rights in the following manner:

> **"When one has consideration of the settlement agreement, the overall and dominant impresssion obtained from the reading thereof is that the parties appear to have come to an agreement that the disciplinary enquiries relating to Van Onselen and Groenewald will now commence and run their normal course. This would be in my view, by necessary implication, mean that any procedural aspects which had to be completed prior to the commencement of the disciplinary enqury itself before the chairman of the disciplinary enquiry, to be completed and/or waived…**
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> **Whilst, as I have already indicated, [I] agree wholeheartedly with Mr Coetzee's submission that he is entitled to raise defences to the charge sheet and is not prevented from so by settlement agreement, I fail to see how in the circumstances and all the factors that were present, the same can be said for the procedural prerequisite. The fact that one or more of the charges on the charge sheet may be attacked by the employee on the basis of splitting of charges or other defences does not however mean that the entire charge sheet is invalid. It is my clear understanding that what was intended, was that the matter would proceed to hearing stage and that all procedural prerequisites prior to the hearing stage were compromised or waived. I cannot on the basis of what has been placed before me, accept that is still open to the employee to raise the issue of the written accusation as**

a defence to the charge sheet at this time."

[6] The appellant has contended in the founding papers that the second respondent has erred in law by failing to deal with the authorities regarding waiver of rights and thereby created the perception that he did not apply his mind to the existence of the burden of proof. The first respondent replied thereto by stating that the contention was incorrect because the second respondent had merely to construe the settlement agreement between the parties and that the issue of onus did not arise for consideration.

[7] On a close examination, the aforesaid statement by the appellant fails to fit in under any of the common law grounds of review set out in **Johannesburg Stock Exchange v Witwatersrand Nigel Ltd and Another 1988 (3) SA 132 (A) at 152 A-E**. The appellant complained that the second respondent's failure to deal with authorities on waiver created the perception that he failed to apply his mind. Firstly, establishing a mere perception that the administrative tribunal has failed to apply its mind falls short of constituting a ground for review. It is incumbent upon the applicant for review to prove that the tribunal has in fact failed to apply its mind and not that it is perceived to have done so. Secondly and according to the decision in **Hira** it is a material and erroneous interpretation of a statutory criterion that gives rise to the conclusion that the tribunal has failed to apply its mind to the relevant issue in conformity with the behests of the statute. The appellant has not alleged and proved that the second respondent was guilty of erroneous construction of a specific statutory criterion but merely stated

that the latter has failed to deal with relevant authorities on the point. I am unable to appreciate how the failure to deal with authorities per se can be the basis for deducing that the second respondent failed to apply his mind to the issues before him. The main issue before the second respondent was to interpret the settlement agreement concluded by the parties and made an order of the court with a view to determining whether its terms show that the appellant has waived his rights. The determination of that issue did not, quite clearly, involve the interpretation of a statutory criterion. Even if it could be said, for a moment, that the second respondent has erroneously interpreted a particular statutory criterion, such error would not have been material because there are facts which would justify his decision on the correct interpretation of the parties' agreement. Consequently the court would not be entitled to interfere on review. See also **SA Veterinary Council v Veterinary Defence Association 2003 (4) SA 564 (SCA) at para [35].**

[8] With none of the common law review grounds in **Johannesburg Stock Exchange** having been established, for the appellant to succeed he had to show that the decision could be interfered with on the basis of some other grounds permissible in law. However, the appellant's case has been confined to a single common law review ground which has already been dealt with above. In fact counsel for the appellant conceded that the appellant has to fail or succeed on the basis of the ground relating to the error of law. As I have already found that such ground has not been established, it follows that the appeal cannot be upheld. I may add that even if the second respondent's decision was challenged on the basis of either the justifiability test or

rationality test, I would still have come to the conclusion that the appeal cannot be sustained.

[9] In the light of the view I have taken of the matter, it is not necessary to deal with the point raised by the first respondent pertaining to whether or not the appeal has become academic. Insofar as costs are concerned, there is no reason for departing from the ordinary rule that they should follow the cause.

[10] Accordingly the appeal is dismissed with costs.

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JAFTA AJA

I agree

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NICHOLSON JA

I agree.

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WILLIS JA

Appellant's counsel : S.J Grobler SC

Instructed by : S.J. van der Berg Attorneys

First respondent's counsel: ESJ van Graan
Instructed by : De Swart Attorneys

Heard on 9 September 2003.

Delivered on 30 September 2003.