The Correct Approach to a Reviewable 'Error in Law'

by Kellie Hennessy

ASSMANG LIMITED v CCMA AND OTHERS [14 JANUARY 2015] (LC)

In order to encompass the holistic values fostering alternative dispute resolution, the Commission for Conciliation Mediation and Arbitration ("CCMA") is more informal in its processes and introduces a relaxation of complex evidentiary rules and procedures. In practice, the informal structure of the CCMA and the abilities of some commissioners to grasp technical concepts seem to fall short in their application of the intricacies of the provisions and rules of Labour Law, as well as the requisite rules of evidence. In certain circumstances the law is being grossly misapplied and as a result, decisions containing latent and patent errors of law are emanating from the commission. What is the recourse for an aggrieved party faced with certain 'errors in law', can this be construed as being unreasonable? In a litigation context, there is a fundamental difference between an 'appeal' and a 'review'.

In short, an appeal is when the tribunal has made an error in law, misapplied the legal principles and got the answer plainly wrong; whereas, a review considers the procedural irregularities which goes to the root of an award and renders it unreasonable. The Labour Relations Act No. 66 of 1995 ("LRA") firmly entrenches the fact that the CCMA arbitration awards are final and binding (Section 143(1)).

Furthermore, it is trite that no appeal lies against a CCMA award and review must be confined to one of the express grounds. This leaves aggrieved parties with a particularly difficult conundrum. Even more so with the commencement of the labour law amendments which have essentially cast the jurisdictional doors of the CCMA wide-open to incorporate a flood of 'new' species of labour matters to come before it. In the context of labour law, the LRA confines the grounds for review to three instances (Section 145 (2) (a)), namely that the commissioner committed misconduct in relation to his or her duties as an arbitrator. Secondly, that the commissioner committed a gross irregularity in the conduct of the arbitration proceedings and thirdly, that the commissioner exceeded the commissioner's powers. When approaching an application for review, one must first impute to the matter a certain and specific conduct or irregularity which ascribes with one of the listed grounds relied upon. Once that ground has been established, the 'Sidumo test' must be applied to consider whether 'the decision reached by the commissioner is one that a reasonable decision maker could not reach'.

When faced with a misapplication of the law to a matter, the ground of review to rely upon is not misconduct, nor is it that the commissioner exceeded his powers. The correct ground of review which one can successfully rely upon is section 145(2)(a)(ii) – that the commissioner committed a gross irregularity in the conduct of the arbitration proceedings.

The concept of 'gross irregularity' was explained by Schreiner J (as he then was) in Goldfields. Schreiner held that gross irregularities fall broadly into two classes, certain patent irregularities and latent irregularities. The latter is 'where the decision maker has undertaken the wrong enquiry or undertaken the enquiry in the wrong manner'. Schriener J in Goldfields went on to explain 'that a mistake which leads to the court's not merely missing or misunderstanding a point of law on the merits but to it misconceiving the whole nature of the enquiry, or its duties in connection therewith amounts to gross irregularities'. This concept was later accepted in Herholdt, where the SCA endorsed Schreiner J's reasoning and held: "for a defect in the conduct of the proceeding to amount to a gross irregularity as contemplated by section 145(2)(a)(ii) the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result." The correct approach was applied in a recent judgment in the Labour Court handed down on 14 January 2015 in Assmang Limited v CCMA and Others (LC). Voyi AJ considered a matter whereby a commissioner who was faced with two conflicting and probable versions before him, found that he was unable to come to a conclusion that the employer had discharged the onus and ruled against him. Effectually, the commissioner made a decision purely on the basis of onus of proof without weighing up the probabilities of the versions before him. Voyi AJ considered the gross irregularity and found that failure to correctly apply the rules of evidence in evaluation of the probabilities and improbabilities of each party's version, was conduct which was grossly irregular.

Voyi AJ held that as the commissioner misconceived the nature of the enquiry and his duties in the proceeding before him, the outcome of the decision was one that no reasonable decision maker could have reached. Accordingly, when facing a matter on review where a commissioner has clearly misapplied the law and come to an incorrect conclusion, one grazes the boundaries of an appeal and must be careful not to approach a court with grounds whereby the commissioner merely missed or misunderstood a point of law on the merits. Such an approach will be rejected as it may be deemed as a 'process' related review. This would translate into placing far too much emphasis on a particular point of either evidence, facts or of a rule of law which the commissioner unreasonably emphasised or misapplied. Such is akin to hen-pecking in a piecemeal fashion at pieces of an award rather than considering holistically that the consequence was to render the outcome unreasonable. The recent judgment in Assmang provides a clear-cut example of how to approach a review where a commissioner has incorrectly applied the law and as a result thereof, misconceived the whole nature of the enquiry, or his or her duty falling under the reviewable ground of section 145(2)(a)(ii).

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