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Case No 308/90
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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

KISHORE PURBHOOJEE HIRA	First Appellant
PERUMAL NAIDU	Second Appellant
and	
J H BOOYSEN	First Respondent
THE MINISTER OF EDUCATION AND CULTURE : HOUSE OF DELEGATES	Second Respondent

CORAM: CORBETT CJ, NESTADT, MILNE, GOLDSTONE JJA et NICHOLAS AJA

DATE OF HEARING: 20 March 1992

DATE DELIVERED: 3 June 1992

J U D G M E N T

NICHOLAS AJA/...

NICHOLAS AJA:

This appeal arises out of an application brought in the Durban and Coast Local Division of the Supreme Court for the review of certain disciplinary proceedings conducted under the Indians Education Act 61 of 1965 ("the Act").

The applicants were Mr Kishore Purbhoojee Hira ("Hira") and Mr Perumal Naidu ("Naidu"), who are teachers on the staff of schools in Stanger, Natal. Each occupies on a full-time basis in a permanent capacity a post included in the establishment of a State school and consequently is a person referred to in s 15(1) of the Act. Both are members of the Teachers Association of South Africa ("TASA"), which is a private organisation whose membership is restricted to persons employed as teachers in schools falling under the Department of Education and Culture in the House of Delegates. It is an

association of teachers recognized by the Minister of Education and Culture under s 30 of the Act. Hira is the editor of a newsletter published quarterly by the Stanger branch of TASA and distributed among the three to four hundred members of that branch.

The first issue of the Newsletter of the Stanger Branch of TASA appeared in November 1987. It contained an article which was entitled "The Joys and Frustrations of Teaching" (hereinafter referred to as "the subject article"). The author was Naidu.

The publication of this article led to a letter dated 8 April 1988 being addressed to Hira from the Office of the Director-General, Administration: House of Delegates. It informed him that he was charged with misconduct in terms of s 16(f) of the Act, in that

> "... on or about November 1987 [he did] publish or permit or cause to have published for public dissemination amongst members of the Teachers Association of South Africa, and otherwise than at a

> meeting convened by an association or organisation recognised by the Minister as representative of persons contemplated in section 15(1) of the said Act, a written article entitled "The Joys and Frustrations of Teaching" in the TASA Stanger Branch Newsletter (Vol. 1 No. 1) which was critical of the administration of the Department of Education and Culture of the Administration : House of Delegates."

There was an alternative charge which is not now relevant. A similar letter was addressed to Naidu, as well as to certain other teachers who are not concerned in these proceedings. S 16 provides that any person referred to in s 15(1) of the Act shall be guilty of misconduct and subject to disciplinary proceedings in terms of s 17 if -

> "(f) he publicly, otherwise than at a meeting convened by an association or organisation recognized by the Minister as representative of persons contemplated in sub-section (1) of section fifteen, criticizes the administration of any department, office or institution of the State."

In a reply dated 25 April 1988 attorneys acting for Hira and Naidu stated that the charges were denied: it was obvious that the subject article was

never intended to be anything but light-hearted and humorous; and in any event the acts complained of did not fall within the ambit of s 16(f) of the Act.

S 17 of the Act comprises 29 sub-sections which contain detailed provisions as to the procedure to be followed in cases where misconduct is charged. Sub-sections (1) to (3) deal with a charge of misconduct. In terms of ss (8)(b), if the person charged denies it, the Director-General shall appoint a person to enquire into the charge. The procedure to be observed at the enquiry is set out in the following provisions:

> "(9)(b) The law relating to witnesses and evidence which applies in connection with criminal cases in a magistrate's court, shall **mutatis mutandis** apply for the purposes of and at any such enquiry: Provided that subpoenas to procure the attendance of witnesses thereat shall be issued by the person who is to hold the enquiry.
>
> (10) The Director-General may authorize any person to be present at the enquiry and to adduce evidence and arguments in support of the charge, and to cross-examine any person called as a witness for the defence.

(11)(a) At the enquiry the person charged may be present, shall have the right to be heard, to cross-examine any person called as a witness in support of the charge, to inspect any documents produced in evidence and to call other persons as witnesses, either personally or by a representative, and may give evidence himself.

(b) The failure of the person charged to be present at the enquiry, either personally or by a representative, shall not invalidate the proceedings.

(c) The person holding the enquiry shall keep a record of the proceedings at the enquiry and of the evidence given thereat."

Ss (13) provides that

> "The person holding the enquiry shall after the conclusion thereof decide whether the person charged is guilty or not guilty of the misconduct with which he is charged and inform him and the Director-General of his decision."

Ss (15) gives to a person found guilty of misconduct a right of appeal to the Minister. In terms of ss (19), the Minister may inter alia allow the appeal in whole or in part or dismiss the appeal and confirm the finding. If the person charged has been found guilty of misconduct, and his appeal has been dismissed, then in terms of ss (23) the Director-General may make a recommendation to

the Minister that -

> "(a) the person charged be cautioned or reprimanded;
> (b) a fine, not exceeding two hundred rand, be imposed upon the person charged;
> (c) the person charged be transferred to another post;
> (d) the emoluments or grade or both the emoluments and grade of the person charged be reduced; or
> (e) the person charged be discharged from the service of his employer or be called upon to resign therefrom."

In terms of ss (25)(a) the Minister is empowered inter alia to act in accordance with the recommendation of the Director-General made in terms of ss (23). There is no provision for any appeal from a decision by the Minister.

The Director-General appointed Mr J H Booysen, a senior magistrate attached to the Durban Magistrate's Court, to enquire into the charge. I shall refer to him as "the magistrate".

The enquiry was held on 24 January 1989. The "defendants" formally admitted that the newsletter referred to in the charge was distributed among the members of the Stanger Branch of TASA; that Hira was the editor of the newsletter; and that Naidu was the author of the subject article. They placed on record a denial that the article criticized the administration of any department, office or institution of the State; and that, even if it were to be found that the article was criticism, it constituted public criticism. The department called as a witness Mr B Panday who is Chief Director, Control in the Department of Education in the Administration: House of Delegates. He was examined and cross-examined. The case for the defendants was closed without Hira or Naidu giving evidence.

The magistrate announced his finding at the end of the enquiry. He found that the subject article did criticize "the administration of (a) department, office

or institution of the State". He said that s16(f) was contravened if criticism was expressed anywhere except at a meeting of teachers. By distributing the newsletter to members of TASA, Hira as the editor and Naidu as the author of the article were responsible for the public criticism of the Department. He accordingly found each of them guilty of a contravention of s 16(f) of the Act as charged.

On 31 January 1989 Hira and Naidu noted an appeal to the Minister. They did not challenge the magistrate's finding that the article was critical of the department, but contended that the magistrate erred in holding that any criticism, other than criticism expressed at a meeting of teachers, constituted public criticism; and that the criticism was clearly not public and the finding was clearly wrong. The magistrate then filed a "Statement of findings and reasons therefor", to which reference will be made later in this judgment.

By letter dated 15 May 1989, Hira was advised that the Minister had dismissed his appeal, confirmed the magistrate's finding and imposed upon him a fine of R100,00. A similar letter was presumably written to Naidu.

By notice of motion dated 4 September 1989 Hira and Naidu launched an application against the magistrate as first respondent and the Minister of Education and Culture: House of Delegates, as second respondent, in which they claimed -

(1) an order that the finding made by the first respondent on 24 January 1989 that the applicants had contravened s 16(f) of the Act be reviewed and set aside;

(2) an order that the decision of the second respondent dismissing the appeals of the applicants, and confirming the magistrate's finding and imposing a

fine on each of the applicants be reviewed and set aside; and

(3) an order for costs.

It was alleged in paras 19 and 20 of the founding affidavit as the only ground of review that the magistrate and the Minister erred in making their respective decisions and findings. In support of the allegation the applicants relied on two documents annexed to the founding affidavit, namely, the notice of appeal to the Minister against the magistrate's finding, and their representations to the Minister in support of the appeal.

The application was heard by Bristowe J. During the argument it was assumed by all concerned that the decisions in question were reviewable. After judgment had been reserved, however, a doubt arose in the learned judge's mind, and he called for written argument on the point. The substantial contention on both sides was that

if the respondents had misinterpreted s 16(f), their decisions could be corrected on review. Bristowe J held, however, that "if the respondents misapplied the section that was in each case a mere mistake of law" which was not reviewable **per se**. In case it should be found that he was wrong, however, he went on to consider what he would have decided if the decisions had been reviewable: his conclusion was that the respondents' interpretation of s 16(f) was incorrect. The application was dismissed. Each party was ordered to pay his own costs. Subsequently Bristowe J granted leave to appeal to this court.

Mr Wallis appeared for Hira and Naidu at the enquiry, in the application proceedings, and in this court. In arguing the appeal he supported the view of Bristowe J as to the proper interpretation of s 16(f), but attacked his finding that the decisions in question, although erroneous, were not reviewable. Mr Marnewick

appeared for the Minister. (The magistrate did not oppose the application in the court a quo and he abides the decision of this court.) Mr Marnewick said that the attitude of the Minister was that he did not contend in the court a quo that the decisions were not reviewable, and that he maintained that stance; the Minister's contention was that the review should fail because the conduct of Hira and Naidu amounted to misconduct in terms of s 16(f) of the Act.

This judgment deals only with the first issue, that is, the correctness of the magistrate's finding and of the Minister's confirmation of it. The second issue, that is, whether the decisions are reviewable, is dealt with in the judgment of the Chief Justice.

The decision on the first issue turns on the meaning of the word publicly as used in s 16(f). (I apprehend that there is no difference in meaning between

this word and the phrase in public and in what follows I shall use either expression.)

The Act does not define publicly. Innes J observed that the word public is one of wide significance and it may have several meanings (in **Rondebosch Municipal Council v Trustees of the Western Province Agricultural Society** 1911 AD 271 at 283). Lord Wright MR said in **Jennings v Stephens** 1936 Ch 469 (CA) at 476 that "the public" is a term of uncertain import, and that "such authorities as there are do not seem very precise in defining the meaning of the words 'in public'." In **S v Davidson & Bernhardt Promotions (Pty) Ltd** 1983(1) SA 676 (T), Van Dijkhorst J gave consideration to the meaning of the word public as used in the phrase "public sale or public dissemination" in a statute. He referred to definitions in the OXFORD ENGLISH DICTIONARY, Webster's NEW WORLD DICTIONARY, the STANDARD DICTIONARY OF THE ENGLISH LANGUAGE and the HANDWOORDEBOEK VAN DIE

AFRIKAANSE TAAL. He observed that the meaning of the word, where used in statutes, varies in different cases, influenced by the context in which it is used and the intention of the legislature as evidenced in the enactment; and he quoted a number of illustrative cases (see pp 679B to 681H). From the cases he extracted certain guidelines, which he applied to the facts of the case before him. But for obvious reasons he did not attempt to define the word public. As Lord Wright observed in **Jennings v Stephens supra loc cit**, it is certainly difficult and perhaps impossible to define the precise borders of the territory which it covers.

Romer LJ said in that case (at 481) that the words "in public" are probably incapable of precise definition, and added:

> "It can safely be asserted that they mean 'not in private', but this does not carry the matter much further without some definition of the words 'in private'. There are, however, many cases in which there can be no doubt at all whether a particular performance is in public or in private. No one, for

> instance, can doubt that the concerts given at the Albert Hall are, in general, performances 'in public', or that music provided by a man for the entertainment of his guests after dinner or at a reception is performed 'in private'."

The territory which lies between in public on the left side and in private on the right is largely uncharted, and it is difficult to define the position of the boundary between them. Clearly a mass public meeting (or publication in a large-circulation newspaper) is located on the left and a conversation between two people (or a private written communication) is located on the right. At what stage does in public become in private? The problem is of a recurrent and familiar kind. (See the discussion on "drawing the line" by R E Megarry in Miscellany at Law p 221.) In **Boyse v Rossborough** [1856-57] 6 HLC 3 at 46; 10 ER 1192 at 1210, the Lord Chancellor had to consider whether the alleged testator was a person of sound mind at the time of the execution of a will. He said:

> "... the difficulty to be grappled with arises from the circumstance that the question is almost always one of degree. There is no difficulty in the case of a raving madman or of a drivelling idiot, in saying that he is not a person capable of disposing of property. But between such an extreme case and that of a man of perfectly sound and vigorous understanding, there is every shade of intellect, every degree of mental capacity. There is no possibility of mistaking midnight for noon; but at what precise moment twilight becomes darkness is hard to determine."

In **Hobbs v The London & South Western Railway Co.** [1875] LR 10 QB 111, Blackburn J said at 121:

> "It is a vague rule, and ... it is something like having to draw a line between night and day; there is a great duration of twilight when it is neither night nor day; but on the question now before the Court, though you cannot draw the precise line, you can say on which side of the line the case is."

Lord Coleridge CJ expressed himself similarly in **The Mayor of Southport v Morriss** [1893] 1 QB 359 at 361:

> "The Attorney-General has asked where we are to draw the line. The answer is that it is not necessary to draw it at any precise point. It is enough for us to say that the present case is on the right side of any reasonable line that could be drawn."

S 16(f) itself provides little assistance for

determining whether the distribution of the subject article constituted public criticism. But a number of considerations point to the necessity of giving to the word publicly a restrictive interpretation.

What is the policy of s 16(f)? Similar provisions are not unusual in statutes which deal with State employees. Thus, s 17(f) of the repealed Public Service Act (No 54 of 1957) provided that any officer shall be guilty of misconduct if he "publicly comments on the administration of any department". See also s 19(f) of the present Public Service Act (No 111 of 1984). And the Education Affairs Act (No 70 of 1988) makes it misconduct for any person at a departmental institution to publicly criticize the administration of any State department. The **raison d' être** would seem to be that such provisions are considered requisite for the protection of the "public image" of the government service, the effectiveness of which depends to an extent

on public confidence and trust. No doubt government departments are not and should not be immune to criticism from the general public, but the idea, presumably, is that the government service should not be exposed to public criticism from within by those who owe an obligation of loyalty to their employer; and, that there should be maintained among State employees **esprit de corps** - that "spirit of jealous regard for the corporate honour and interests, and for those of each member of the body as belonging to it." (Shorter Oxford English Dictionary).

There may be differing opinions on the soundness of such a policy, but that question does not arise now, when the concern is not the wisdom of the provision but its reach.

The rationale of s 16(f) suggests that it should be construed restrictively, so as to limit the

area of its operation to the presumed mischief. Speaking generally, such area should relate only to criticism expressed in circumstances such that it tends to tarnish the public image of "any department, office or institution of the State".

A second consideration which points to the necessity for a restrictive interpretation of s 16(f) is that it is a penal provision, breach of which may render an offender liable to the punishments set out in s 17(23), including discharge from his employment. Steyn's DIE UITLEG VAN WETTE, 5th ed., p 112 quotes the statement by Kotze JP in **Moss v Sissons and McKenzie** 1907 EDC 167: "The observation of Paulus, In **poenalibus causis benignius interpretandum est** (Dig. 50, 17, **lex** 155), is a just and sound one, for it imports that where the language is obscure or ambiguous the Court should give the benefit of the doubt in favour of the defendant or of the accused." Reference is made in footnote 71 on

the page of Steyn's work cited above to numerous other cases on the point.

A third consideration arises from the wide ambit of the provision: it proscribes public criticism of the "administration of **any** department, office or institution of the State." If "publicly" were to be given an extended interpretation, there would result a diminution in the right of free expression of such a nature that it could not have been within the contemplation of the legislature. As Bristowe J observed in the judgment **a quo**, criticism is after all an essential precursor to improvement and it is obvious that the Legislature could not have intended to entirely prevent members of the staff of a department from voicing their criticisms of the way in which the department is run.

In his finding made at the end of the enquiry,

the magistrate said in regard to the word publicly -

> "What has to be decided is whether this criticism has been exercised publicly 'of dan in die openbaar'. Now, if one looks at the wording again of the section, and I turn to the English version ...:
>
> > 'Otherwise than at a meeting convened by an association or organisation recognised by the minister as representative of persons contemplated in sub-section 1 of section 15, criticises the administration of any department, office or institution of the State.'
>
> If one reads section 15 it refers specifically to members of the teaching organisation. It says:
>
> > 'Any person occupying on a full time basis in a permanent capacity a post included in the establishment of a State school, school of industries, or a reform school, or a State aided school.'
>
> That means that a meeting of teachers as such is regarded as a public meeting. Criticism can be expressed there. But if criticism is expressed elsewhere, then it is done in contradiction to the provisions of section 16(f) and that brings a person then within the ambit of the Act."

In his "Statement of findings and reasons therefor" furnished after the filing of the defendants' representations on appeal to the Minister, the magistrate said:

> "In respect of the second issue (this is also the only issue taken on appeal) it must be mentioned

> that the term 'publicly' (in die openbaar - Afrikaans text) is not defined in the Act. The wording of section 16(f) does, however, indicate what is intended. A careful scrutiny of section 16(f) makes it abundantly clear that criticism levelled openly is always regarded as being made public hence the provision that when such criticism is made at a meeting convened as contemplated in section 16(f) the teacher will not be subjected to a charge of misconduct in terms of the Act.
>
> This view is also substantiated by the Concise Oxford Dictionary where 'publicly' is defined as synonymous to 'openly' under the adjective (in) public."

Thus, the magistrate adopted not a restricted but a very wide interpretation of publicly, drawing the line well to the right. It seems that the magistrate thought that the words in s 16(f), namely,

> "otherwise than at a meeting convened by an association or organisation recognized by the Minister as representative of persons contemplated in sub-section (1) of section fifteen"

showed that all criticism made openly is made publicly. That was a wrong view.

The words quoted are of the nature of a proviso, and the magistrate overlooked the true function and effect of a proviso. In **Mphosi v Central Board for Co-operative Insurance Ltd** 1974(4) SA 633 (A), Botha JA said at 645 C-F:

> "According to Craies, **Statute Law**, 7th ed., at p 218 -
> 'the effect of an excepting or qualifying proviso, according to the ordinary rules of construction, is to except out of the preceding portion of the enactment, or to qualify something enacted therein, which but for the proviso would be within it; and such proviso cannot be construed as enlarging the scope of an enactment when it can be fairly and properly construed without attributing to it that effect'.
>
> In **R v Dibdin**, 1910 P. 57, LORD FLETCHER MOULTON at p 125, in the Court of Appeal, said -
>
> 'The fallacy of the proposed method of interpretation (i.e. to treat a proviso as an independent enacting clause) is not far to seek. It sins against the fundamental rule of construction that a proviso must be considered in relation to the principal matter to which it stands as a proviso. It treats it as if it were an independent enacting clause instead of being dependent on the main enactment. The Courts, as for instance in such cases as **Ex parte Partington**, 6 QB 649; **In re Brockelbank**, 23 QB 461, and **Hill v East and West India Dock Co.**, 9 App. Cas. 448, have frequently pointed out this fallacy, and have refused to be led astray by arguments such as those which have

> been addressed to us, which depend solely on taking words absolutely in their strict literal sense, disregarding the fundamental consideration that they appear in a proviso.'"

When those rules of construction are applied to s 16(f), it is clear that the effect of the proviso is to except from the word publicly used in the first part a meeting convened by a recognized association or organization. The proviso does not enact that criticism expressed openly, or otherwise than at a meeting of teachers, is a contravention of the section. Moreover, the magistrate has misinterpreted the proviso. It excepts a meeting convened by a recognized association or organization. Such a meeting may well be a public meeting in the sense that it is accessible to the public at large, as would be the case of a meeting convened by TASA in pursuance of the first of the objects set out in its constitution, namely,

> "to advance promote and represent the interests of its members and to voice collectively their opinions on matters pertaining to education and to strive for improvements in their conditions of service."

The proviso does not deal with meetings of a recognized association or organisation, whether it be a general meeting of members, or a meeting of the executive, or a branch meeting or any other meeting. Consequently it does not supply any answer to the question whether such meetings are to be regarded as public for the purposes of s 16(f), and the solution must be sought elsewhere.

Counsel for the Minister submitted in argument in this court that publicly as used in s 16(f) means "outwardly" or "outside the department" - by which he meant otherwise than through "internal channels of the department". He said that criticism made in that way was not public criticism, but subject to this single exception, the intention of the provision was to prohibit all external criticism of the administration of the department, whether it occurred at a meeting or in writing, including criticism published only to a "section of the community" such as members of TASA.

In answer to questions from the court, counsel agreed that criticism expressed at a meeting of teachers in the staffroom at a school was not made publicly. But he said that the same criticism expressed at a meeting of the same teachers in the home of one of them was made publicly. The dissemination of the subject article in the school building to staff members would not, he said, be in public; but if the dissemination was to the same staff members outside the school it would.

That position is manifestly untenable and the submission must be rejected.

In the judgment of the court a quo (which the appellants supported on this point), Bristowe J said that apart from the exceptional case dealt with in the proviso, publicly means "outside the Department".

> "The exception is made precisely because outsiders might be present; their very presence would result

> in any criticism made at the meeting being 'publicly' expressed. On the other hand criticism in a staff meeting would not be expressed 'publicly' nor would criticism on a more casual basis in the staff common room ... To give the section any other meaning would, in my view, lead to absurd results. Members of staff could not air their views to each other about all sorts of practical matters without running the risk of appearing critical of the Department."

He said that it was clear to him that the respondents had not correctly interpreted the section.

As stated above, publicly must be interpreted restrictively, with due regard to the rationale of s 16(f) and the fact that it is a penal provision and one which inhibits freedom of speech. So interpreted, domestic or quasi-domestic criticism would not be criticism made publicly. (I use the word domestic in an extended sense, as in the phrase domestic tribunal.) For purposes of the present case, the "family" may be regarded as comprising at any rate the members of the Stanger branch of TASA, who are bound together by a

common interest in teaching at schools for Indians in the Stanger area, and by common aspirations as members of TASA, including the attainment of the second of its objects -

> "to promote the maintenance of high standards of professional integrity and the development of a high standard of professional efficiency."

In his evidence at the enquiry Mr Panday said that to the best of his knowledge newsletters of the various branches of TASA were distributed to members and not outside the profession, and he agreed that it could safely be inferred that the newsletter concerned went no further than amongst the body of teachers in the Stanger area.

In my view, therefore, critical though the article was, its dissemination did not constitute public criticism. The magistrate was wrong in finding that Hira and Naidu were guilty of the charge brought against them,

and the Minister erred in confirming that finding.

H C NICHOLAS
Acting Judge of Appeal

NESTADT JA]
MILNE JA] CONCUR
GOLDSTONE JA]

113A/92

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In the matter between:

KISHORE PURBHOJEE HIRA First Appellant

PERUMAL NAIDU Second Appellant

and

J H BOOYSEN First Respondent

THE MINISTER OF EDUCATION AND CULTURE: HOUSE OF DELEGATES Second Respondent

CORAM: Corbett CJ, Nestadt, Milne, Goldstone JJA et Nicholas AJA

DATE OF HEARING: 20 March 1992

DATE OF JUDGMENT: 3 JUNE 1992

J U D G M E N T

CORBETT CJ...../

CORBETT CJ:

The relevant facts of this matter are set forth in the judgment of my Brother Nicholas. Two main issues arose on appeal: (1) whether, as held by the Court a quo, the magistrate misconstrued sec 16(f) of the Indians Education Act 61 of 1965 ("the Act") and as a result thereof incorrectly found that the appellants had been guilty of the misconduct prescribed by that subsection; and (2) whether on this ground the finding of the magistrate, and its confirmation on appeal by the Minister, could be set aside on review. My Brother's judgment deals only with issue (1) and for reasons which I shall state I agree with his conclusion that the magistrate did misconstrue sec 16 (f) and as a result thereof did come to an incorrect conclusion as to the guilt of the appellants. The circumstances under which the question of reviewability arose and the attitude

thereto of the parties are described in the judgment of Nicholas AJA. It is necessary for this Court to decide this issue, for the success or failure of the appeal depends upon it. I shall deal with it in my judgment.

The question which the magistrate was required by sec 17(13) of the Act to decide was whether each of the appellants was guilty of the misconduct with which he was charged. The charge of which the magistrate found the appellants guilty was based upon the publication and dissemination amongst members of the Teachers Association of South Africa ("TASA") of a newsletter containing an article entitled "The Joys and Frustrations of Teaching" ("the article"). This was alleged to constitute misconduct in terms of sec 16(f) of the Act. This subsection provides that any person referred to in section 15(1) shall be guilty of misconduct and subject to the provisions of sec 17 if -

> "he publicly, otherwise than at a meeting convened by an association or organization recognized by the Minister as representative of persons contemplated in subsection (1) of section fifteen, criticizes the administration of any department, office or institution of the State;"

The person referred to in sec 15(1) is -

> "Any person (other than an officer) occupying on a full-time basis in a permanent capacity a post included in the establishment of a State school, school of industries or reform school, or State-aided school other than a State-aided vocational school...."

("Officer" means an officer as defined in sec 1 of the Public Service Act, now Act 111 of 1984.) For convenience I shall call the person referred to in sec 15(1) a "teacher". Sec 17 prescribes the procedure to be followed in a case of alleged misconduct.

It is now common cause (i) that the appellants are, and were at all material times, teachers; (ii) that they participated - first appellant as editor of the newsletter and second appellant as author of the article

- in the publication of the article; (iii) that the article contains criticism of the administration of a department of State, viz the Department of Education and Culture: House of Delegates; and (iv) that the dissemination of the newsletter was confined to the 300 to 400 members (all teachers) of the Stanger Branch of TASA. What is in issue is whether or not such dissemination amounted to public criticism. Did the appellants by doing what they did "publicly...criticize" (Afrikaans: "in die openbaar.... kritiek uitgeoefen aangaande") the Department?

In his "Finding" delivered at the enquiry held in terms of sec 17 Mr Booysen (whom I also shall call "the magistrate") took a fairly simplistic view of the meaning of sec 16(f). Having referred to the words in the subsection (read with sec 15(1)) which in effect except or exempt criticism at a meeting convened by an

association or organization recognized by the Minister as representative of teachers, the magistrate stated:

> " That means that a meeting of teachers as such is regarded as a public meeting. Criticism can be expressed there. But if criticism is expressed elsewhere, then it is done in contradiction to the provisions of section 16(f) and that brings a person then within the ambit of the Act."

He thus appears to have taken the view that criticism expressed anywhere other than at such a meeting would be "public" and would amount to misconduct in terms of sec 16(f). He accordingly found the appellants guilty of such misconduct.

In his subsequent "Statement of Findings and Reasons Therefor", compiled presumably in terms of sec 17(16)(a)(iii) of the Act, the magistrate elaborates upon this by saying:

> "In respect of the second issue (this is also the only issue taken on appeal) it must be mentioned that the term 'publicly' (in die openbaar - Afrikaans text) is not

> defined in the Act. The wording of section 16(f) does, however, indicate what is intended. A careful scrutiny of section 16(f) makes it abundantly clear that criticism levelled openly is always regarded as being made public hence the provision that when such criticism is made at a meeting convened as contemplated in section 16(f) the teacher will not be subjected to a charge of misconduct in terms of the act.
> This view is also substantiated by the Concise Oxford Dictionary where 'publicly' is defined as synonymous to 'openly' under the adjective (in) public.
> In view of the aforementioned the enquiry is satisfied beyond a reasonable doubt that the article mentioned in fact contained criticism and that such criticism was public hence the conviction of the two appellants."

With respect, however, to say that criticism levelled "openly" (other than at such a meeting) falls within the subsection because "publicly" is synonymous with "openly" does not take the matter much further. The enquiry then becomes: what is meant by "openly"? The magistrate appears to have taken an expansive view of what is meant

by "publicly", or "openly", and, as I read his reasons, he regarded criticism voiced to others outside a meeting of a teachers' association generally to fall foul of sec 16(f). He does not appear to have considered the antitheses of "publicly" and "in private"; or seen the problem to some extent as one of degree; or attempted to draw the line between the two.

I agree with my Brother Nicholas, for the reasons stated by him, that "publicly" in sec 16(f) should be restrictively interpreted and that it includes the element of being made "outside the Department". This is not to say that every critical statement made outside the Department would be one made "publicly"; but it does mean that, as my Brother puts it, "domestic or quasi-domestic criticism would not be criticism made publicly". If this general criterion be applied to the facts of this case it is clear that the article contained in the newsletter circulated to the members of the

Stanger branch of TASA did not constitute public criticism. It follows that the magistrate, through misinterpreting sec 16(f), wrongly found the appellants to have been guilty of misconduct in terms of that subsection. When the matter came before the Minister and was considered by him on appeal in terms of sec 17(19) of the Act, he had before him written representations filed on behalf of the appellants, in which the magistrate's interpretation of sec 16(f) was attacked. The Minister dismissed the appeal and confirmed the finding of the magistrate. He did not give separate reasons for his decision, but it is fair to assume that he endorsed the magistrate's interpretation of sec 16(f) and that his decision is, for the same reasons, also wrong in law. Consequently the Minister's decision must stand or fall in accordance with the fate of the magistrate's decision and for the sake of brevity

I shall henceforth refer merely to the decision of the magistrate.

I turn now to the question as to whether the magistrate's error renders his decision liable to be set aside on review. There is, in this instance, no statutory ouster of the Court's jurisdiction and it is common cause that the remedy afforded by the second species of review referred to in Johannesburg Consolidated Investment Co v Johannesburg Town Council 1903 TS 111, at 115, ("common law review") is available to the appellants provided that they can establish proper grounds for review.

The Judge a quo, after referring to such well-known cases as Doyle v Shenker & Co Ltd 1915 AD 233, Union Goverment (Minister of Mines and Industries) v Union Steel Corporation (South Africa) Ltd 1928 AD 220, Goldfields Investment Ltd and Another v City Council of Johannesburg and Another 1938 TPD 551, Johannesburg City

v Chesterfield House (Pty) Ltd 1952 (3) SA 809 (A) and South African Railways v Swanepoel 1933 AD 370 held that an error of law alone, with no consequential irregularity, is not a sufficient ground for review. Here the magistrate made a mere error of law: there was no consequential irregularity. This error was therefore "regrettable but not reviewable".

The question as to when an error of law gives rise to a good ground for review in our law is a vexed one and one upon which the decisions of the Courts are not altogether harmonious. In the Johannesburg Consolidated Investment case, supra, Innes CJ described common law review in the following terms (at 115):

> "Whenever a public body has a duty imposed upon it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty, this Court may be asked to review the proceedings complained of and set aside or correct them. This is no special machinery created by the Legislature; it

> is a right inherent in the Court, which has jurisdiction to entertain all civil causes and proceedings arising within the Transvaal. The non-performance or wrong performance of a statutory duty by which third persons are injured or aggrieved is such a cause as falls within the ordinary jurisdiction of the Court. And it will, when necessary, summarily correct or set aside proceedings which come under the above category."

This formulation is not to be regarded as precise or exhaustive. It is clearly established by a long series of cases that, for instance, common law review applies also to cases where the statute creates a power rather than a duty; where the duty or power is vested in an individual official, as distinct from a public body; where the decision under review is taken without proceedings, in the sense of a hearing, having occurred; and where the duty or power is created not by statute but consensually, as in the case of a domestic tribunal. Over the years, too, the grounds of review have been elaborated and defined. Recently these grounds were

restated by this Court (with reference to a decision of the president of the Johannesburg Stock Exchange) as follows:

> "Broadly, in order to establish review grounds it must be shown that the president failed to apply his mind to the relevant issues in accordance with the 'behests of the statute and the tenets of natural justice' (see National Transport Commission and Another v Chetty's Motor Transport (Pty) Ltd 1972 (3) SA 726 (A) at 735F-G; Johannesburg Local Road Transportation Board and Others v David Morton Transport (Pty) Ltd 1976 (1) SA 887 (A) at 896B-C; Theron en Andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en Andere 1976 (2) SA 1 (A) at 14F-G). Such failure may be shown by proof, inter alia, that the decision was arrived at arbitrarily or capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the president misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforestated.

> (See cases cited above; and Northwest Townships (Pty) Ltd v Administrator, Transvaal, and Another 1975 (4) SA 1 (T) at 8 D-G; Goldberg and Others v Minister of Prisons and Others (supra at 48 D-H); Suliman and Others v Minister of Community Development 1981 (1) SA 1108 (A) at 1123 A.) Some of these grounds tend to overlap."

(Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another 1988 (3) SA 132 (A), at 152 A-E, followed in During N O v Boesak and Another 1990 (3) SA 661 (A), at 671 I - 672 D; Jacobs en 'n Ander v Waks en Andere 1992 (1) SA 521 (A), at 550 H - 551 C.)

The problem highlighted by the present case is whether a decision-maker who misconstrues the statutory provision in terms of which his decision has to be given and thereby comes to a conclusion which objectively speaking is erroneous can be said to have failed to apply his mind to the relevant issues in accordance with the behests of the statute; whether he can be said to have misconceived the nature of the discretion conferred upon

him and taken into account irrelevant considerations or ignored relevant ones. To answer these questions it is necessary to look more closely at the cases which have dealt with errors of law in the context of review proceedings.

I start with the case of Doyle v Shenker & Co Ltd 1915 AD 233. This case took the form of an application to this Court for special leave to appeal and leave to appeal in forma pauperis. The applicant had sued the respondent in the Cape Town magistrate's court for damages under sec 24 of the Workmen's Compensation Act of 1905 (C). The magistrate dismissed the action on the ground that the applicant had signed a document releasing respondent from liability. The Act expressly prohibited an appeal from the decision of the magistrate. The applicant brought an application for review in the Cape Provincial Division ("CPD") claiming that the release was invalid in terms of sec 37 of the Act. The

CPD entertained the application, but held that the release was not invalid and that no irregularity had been committed by the magistrate. In this Court it was pointed out that the application was brought in terms of sec 32 of the Charter of Justice which conferred upon the Court the authority to review proceedings of inferior courts on certain specific grounds. The only ground relied on was "gross irregularity in the proceedings". This Court dismissed the application on the ground that there was no hope of success. In the course of his judgment Innes CJ said (at 236-7):

> "Now a mere mistake of law in adjudicating upon a suit which the magistrate has jurisdiction to try cannot be called an irregularity in the proceedings. Otherwise a review would lie in every case in which the decision depends upon a legal issue, and the distinction between procedure by appeal and procedure by review, so carefully drawn by statute and observed in practice, would largely disappear. Yet in this case it is a mistake of law alone which is relied upon as constituting gross irregularity.

> There is neither allegation nor suggestion that the magistrate, his attention having been drawn to sec 37, deliberately refused to apply his mind to it, or to consider it. The position, if the section means what the applicant contends, is that the magistrate either honestly misinterpreted or completely overlooked it. In either event it would not, I am afraid, be the first occasion on which a court of law has misread a statutory provision or overlooked one not brought to its notice at the trial. Whichever supposition were the correct one, the result would be (still assuming the correctness of the applicant's interpretation) an unfortunate error of law which, but for the special prohibition of the statute, would afford good ground for an appeal. But there would be no gross irregularity in the proceedings, and therefore no justification for a review."

I draw attention to three features of Doyle's case. Firstly, it was a review of the proceedings of an inferior court in terms of sec 32 of the Charter of Justice, ie one falling under the first species of review described in the Johannesburg Consolidated Investment case, supra, at 114-15, and not a review under the common

law of the decision of a body or tribunal vested with a specific statutory power. As Innes CJ pointed out in the Johannesburg Consolidated Investment case, at 115-16, the grounds upon which a review may be claimed under the common law are "somewhat wider" than those which alone would justify a review of judicial proceedings. Secondly, there was a statutory prohibition against an appeal which required a clear line of distinction to be drawn between the appeal and review procedures. And, thirdly, the only one of the various grounds of review set forth in sec 32 relied on by the applicant was gross irregularity.

In the ensuing years a number of cases which dealt strictly with common law review came before this Court and, as far as errors of law are concerned, their effect is summed up by De Villiers JA in South African Railways v Swanepoel 1933 AD 370. This case concerned the alleged wrongful dismissal of a railways employee by

the general manager on grounds of incapacity. On appeal to this Court it was suggested that the general manager may have reached his decision on a mistaken view as to the effect of a certain regulation 42. In regard thereto De Villiers JA said (at 378):

> "....even if the general manager had been shown to have come to his decision on a mistaken view as to the meaning of Regulation 42, that would not entitle this Court to interfere with his decision. It is trite law that where a statute commits a matter to the determination of an administrative official, his determination is final, and the Court cannot interfere, even if his discretion is exercised on a mistaken view of the law: Crown Mines v C.I.R. (1922, A.D. at p. 101); C.I.R. v. City Deep Ltd. (1924, A.D. at p 307). There are certain exceptions to this general rule, e.g. if the administrative officer has deliberately ignored an express provision of a statute: Crown Mines v C.I.R. (1922, A.D. at p 100); or if the administrative officer fails to appreciate the nature of his discretion through misreading the Act which confers the discretion: Union Government v Union Steel Corporation 1928, A.D. at p. 235). The principle of all these decisions is, of course, that subject to

> certain exceptions, the Court can only inquire whether the official has in fact decided, not whether he has decided rightly or wrongly."

It should be noted that this statement of the law postulates that the statute commits the matter (including presumably the question of law) to the determination of a particular decision-maker; and that it deals more particularly with the exercise of a discretion by an administrative official.

The next case to be considered is Goldfields Investment Ltd and Another v City Council of Johannesburg and Another 1938 TPD 551. There the plaintiffs appealed to the Johannesburg magistrate's court against certain property valuations by the valuation court. The magistrate held (wrongly as it turned out) that in terms of the relevant statutory provisions he could not interfere with the decision of the valuation court. The plaintiffs brought review proceedings under sec 19 of

Proc 14 of 1902 (T) on the ground that the magistrate had misconceived the nature of his duties and thereby committed a gross irregularity. The Court (Greenberg and Schreiner JJ) held that because of the wrong view which he had taken of the law the magistrate had declined to exercise the function which the statute had entrusted to him; and that this constituted a reviewable irregularity. In his concurring judgment Schreiner J (at 560-1) elaborated on the distinction between an error of law which relates merely to the merits and one which results in the decision-maker "misconceiving the whole nature of the enquiry or his duties in connection therewith". Only in the latter case, so it was held, is there a reviewable irregularity.

This case, I would observe, also deals with the first species of review and not common law review.

In Johannesburg City Council v Chesterfield House (Pty) Ltd 1952 (3) SA 809 (A) the respondent

claimed compensation from appellant on the ground that a zoning provision under a town-planning scheme had adversely affected the value of properties owned by it. Before a compensation court constituted to consider, **inter alia**, respondent's claim appellant contended that it was not bound in law to pay compensation to respondent. This contention was upheld by the valuation court. Respondent noted an appeal to the Transvaal Provincial Division ("TPD") and also filed a petition raising a number of points of irregularity. The TPD upheld one ground of irregularity (based on "ultra vires") and held that the determination of the valuation court was invalid. On appeal, this Court reversed the finding of the TPD on the point of "ultra vires" and proceeded to consider another alleged irregularity, viz the finding of the compensation court that appellant was not obliged to pay compensation to the respondent. In

the course of dealing with this point Centlivres CJ remarked (at 825):

> "That court (ie the compensation court) was entitled to and bound to decide the legal issues involved and even if it came to a wrong decision in law we cannot in review proceedings set its decision aside on that ground alone. See Doyle v Shenker & Co Ltd., 1915 A.D. 233. I must not be taken to suggest that the decision of the compensation court was wrong in law."

The learned Chief Justice (at 826) distinguished the case from that described by Stratford JA in Union Government (Minister of Mines and Industries) v Union Steel Corporation (South Africa) Ltd, supra, at 234-5, where the following was said:

> "If a discretion is conferred by Statute upon an individual and he fails to appreciate the nature of that discretion through misreading of the Act which confers it, he cannot and does not properly exercise that discretion. In such a case a court of law will correct him and order him to direct his mind to

> the true question which has been left to his discretion."

To similar effect is the decision of this Court in Administrator, South West Africa v Jooste Lithium Myne (Eiendoms) Bpk 1955 (1) SA 557 where with reference to certain mining regulations Hoexter JA said (at 569 C-E):

> " In my opinion the Legislature intended that the regulations should be interpreted in the first instance by the inspector and on appeal by the Administrator. It is for the Administrator to decide any legal issues involved in a dispute as to the pegging of a claim, and the most important legal issue is the interpretation of the regulations. It cannot be said that the wrong interpretation of a regulation would prevent the Administrator from fulfilling its statutory function or from considering the matter left to it for decision. On the contrary, in interpreting the regulations the Administrator is actually fulfilling the function assigned to it by the statute, and it follows that the wrong interpretation of a regulation cannot afford any ground for review by the Court."

(See further Blue Circle Ltd v Valuation Appeal Board, Lichtenburg, and Another 1991 (2) SA 772 (A), also a valuation case, in which a dictum of De Villiers JP in Harpur and Others v Steyn NO 1974 (1) SA 54 (O), at 56 G - 56 in fin, was quoted with approval - see 788 A - E.)

With these cases must be contrasted SA Medical and Dental Council v McLoughlin 1948 (2) SA 355 (A), Local Road Transportation Board and Another v Durban City Council and Another 1965 (1) SA 586 (A) and Reynolds Brothers Ltd v Chairman, Local Road Transportation Board, Johannesburg and Another 1985 (2) SA 790 (A).

In McLoughlin's case the respondent, a medical practitioner, had been found guilty, at an inquiry conducted by the Medical Council, of improper or disgraceful conduct and certain disciplinary steps were taken against him. On application to the Witwatersrand Local Division ("WLD") the decision of the Medical Council was set aside on the ground that certain

irregularities had taken place at the inquiry. On appeal, this Court disagreed with the WLD in regard to the allegations of irregularity in the proceedings, but proceeded to consider on the merits whether there were common law grounds for reviewing the decision of the Council. Two of the charges against the respondent were (a) charging and attempting to recover "excessive and extortionate fees" in respect of services rendered (in contravention of sec 80 of Act 13 of 1928) and (b) making use in treating a patient of "a form of treatment or technical process which is secret" (in contravention of reg 20(a) of the regulations, promulgated under Act 13 of 1928). Tindall JA, having pointed out (at 392) that a practitioner such as the respondent had a remedy only by way of common law review and that the jurisdiction of the WLD was therefore a limited one (at 393), continued (at 393):

> "In regard to the Council's findings in respect of the allegations of fact involved in the charges against Dr McLoughlin, a Court of law could not interfere if the Council had before it evidence on which it could reasonably and honestly arrive at the conclusion at which it did. It is unnecessary to decide whether, if the evidence was such that the finding in question could not on such evidence have been given reasonably, though it might have been given honestly, the jurisdiction of a Court of law would be excluded. But if the Council was wrong in its interpretation of the words " 'excessive or extortionate charges' in sec 80 or of the words 'making use of any form of treatment or technical process which is secret' (Reg 20), then it would have disregarded important statutory provisions and a Court of law could interfere on this ground."
> (My emphasis.)

In the result Tindall JA held that, as regards charge (a) above, it had not been shown that the Council misinterpreted the meaning of "excessive and extortionate fees" and that consequently the Council's verdict on this charge should be restored (at 396). As regards charge

(b) above the learned Judge of Appeal held that the words "which is secret" had reference to "non-disclosure of a form of treatment, apparatus or technical process to the medical profession, not non-disclosure to patients"; that the Council did not find the treatment given by the respondent was secret in this sense; that (in effect) there was no evidence to support charge (b), so interpreted; and that the verdict on this charge was an illegality and should not be restored (at 399-400).

The other members of the Court concurred in the finding of Tindall JA on charge (a) and his reasons therefor, but were divided on his finding in regard to charge (b). Watermeyer CJ agreed with it, while Centlivres, Greenberg and Schreiner disagreed, not on Tindall JA's interpretation of the meaning of the charge, but on the questions as to whether the Council did misinterpret reg 20(a) and whether there was evidence to support charge (b), properly interpreted.

I have dealt with this case in some detail in order to show that although the members of the Court were not unanimous they were all agreed that if in such circumstances the Council had misinterpreted the statutory provisions under which the charges of improper or disgraceful conduct were framed and as a result had come to a wrong verdict, the decision of the Council could be set aside in common law review proceedings. (As to the view expressed in Clan Transport Co (Pvt) Ltd v Swift Transport Services (Pvt) Ltd and Others; Clan Transport Co (Pvt) Ltd v Rhodesia Railways and Another 1956 (3) SA 480 (FSC), at 489 H - 490 B that the McLoughlin case did not deal with common law review, see the judgment of Jansen JA in Theron en Andere v Ring van Wellington van die N.G. Sendingkerk in Suid-Afrika en Andere 1976 (2) SA 1 (A), at 19 D, to which case further reference will be made in this judgment.)

In the case of Local Road Transportation Board and Another v Durban City Council and Another, supra, the appellant had refused to renew certain motor carrier transportation certificates on the ground that as there were de jure no certificates in existence, there were, in effect, no applications before it (at 597 H). This Court held that this decision was erroneous in law and that the appellant (the Local Board) had thereby precluded itself from considering the applications. Holmes JA, delivering the judgment of the Court, continued (at 597 H - 598 C):

> "Thus it failed to exercise its discretion in regard to them. The case is akin in principle to that of Goldfields Investment Ltd. and Another v. City Council of Johannesburg and Another, 1938 T.P.D. 551 the head-note whereof reads:
>
> > 'A mistake of law per se is not an irregularity but its consequences amount to a gross irregularity where a judicial officer, although perfectly well-intentioned and bona

fide, does not direct his mind to the issue before him and so prevents the aggrieved party from having his case fully and fairly determined.'

The case of Doyle v. Shenker & Co Ltd, 1915 A.D. 233, relied upon by the appellants, is distinguishable. There, as was pointed out by GREENBERG J.P., in the Goldfields Investment case, supra, at p 559, the magistrate did direct his mind to the question whether the workman was entitled to receive compensation from the employer and came to the conclusion that he was not so entitled; hence the issue which was before him in the proceedings was considered by him. In the present case the issue was whether the certificates should be renewed. By wrongly deciding that de jure there were no certificates in existence, and therefore that there was nothing capable of being renewed, the Local Board never applied its mind to the issue before it. That was an irregularity justiciable on review."

In the more recent case of Reynolds Brothers Ltd v Chairman, Local Road Transportation Board,

Johannesburg and Another, supra, the appellant had applied to respondent Board for certain private road carrier permits. In terms of sec 18(3) of the relevant legislation the Board could not grant the permits unless satisfied, inter alia, that it would be unreasonable to expect the applicant to make use of "any available railway service" for the conveyance of the goods to which the application relates. The Board refused the application for the permits, holding that the Piet Retief station was "an available railway service" and that it was not unreasonable to expect the appellant to use this service for the conveyance of the goods in question. The appellant sought to review the Board's decision and, on appeal, Miller JA, delivering the judgment of the Court, stated (at 801 G-I):

> "The ground upon which the appellant contends that it is proper for the Court to review the decision of the board is that the board wrongly interpreted s 18(3) read with s 1(2)(y) of the Act and by

> reason of such wrong interpretation failed to apply its mind to certain aspects of the matter, more particularly to the distance separating the mill from Piet Retief station, which, on a proper interpretation of the Act, it was incumbent on the board to consider when deciding whether such station represented a railway service that was 'available' to the appellant for purposes of conveyance of its sugar; the decision of the board would clearly be reviewable upon such a ground. (See Union Government v Union Steel Corporation (South Africa) Ltd 1928 AD 220 at 234; South African Broadcasting Corporation v Transvaal Townships Board and Others 1953 (4) SA 169 (T) at 177."

In the result the Court held that the Board's decision was reviewable on this ground and set it aside.

As would appear from a number of the cases to which I have referred, the Courts have often relied upon a distinction between (a) an error of law on the "merits" and (b) one which causes the decision-maker to fail to appreciate the nature of the discretion or power conferred upon him and as a result not to exercise the discretion or power or to refuse to do so. A category

(a) error (which might be said to be exemplified in the Chesterfield House case, supra) has been held not to be reviewable, whereas a category (b) error (illustrated by the Local Road Transportation Board case (1965)) has been held to be a good ground for review at common law. Yet it is difficult in principle to draw a clear line of distinction between the two. On the facts in the Chesterfield House case it could well be contended that by erroneously holding that respondent was not a person entitled to compensation (assuming that this was erroneous) the valuation court precluded itself in this instance from exercising the power conferred upon it to determine his claim for compensation; and that, therefore, a reviewable error was committed. And the decision of the Local Board in the Local Road Transportation Board case (1965), supra, can be viewed as one relating to the merits of the application for renewal of

the permits. (See also observations of Jansen JA in Theron's case, supra, at 15 C - F.)

Furthermore it is difficult to reconcile the decisions of this Court in the cases SA Medical & Dental Council v McLoughlin, supra, and Reynolds Brothers Ltd v Chairman Local Transportation Board, Johannesburg and Another, supra, with the aforementioned distinction. In each of these cases, as I have shown, an error of law which consisted of a misinterpretation of the statutory criterion which the decision-maker had to apply was held to be a good ground for setting aside the decision in common law review proceedings.

In McLoughlin's case, supra, the majority of the Court held that the decision of the Council was reviewable when there was no evidence upon which it could reasonably have arrived at its decision (at 369, 406 and 410). See also SA Medical and Dental Council v Lipron 1949 (3) SA 277 (A), at 283; Theron's case, supra, at 17

D - 18 D. Where, as in McLoughlin's case and the similar decisions to which I have referred, the decision-maker is vested with the statutory power - and duty - to decide in a particular case whether a defined statutory criterion applies and where owing to a misinterpretation of this statutory criterion he sets his sights on the wrong target, then it may well turn out that his decision will be unsupported by relevant evidence. For the evidence which he may think justifies his decision (based upon an erroneous view of the target) may not in fact justify the decision if the correct target be aimed at. (See remarks of Jansen JA in Theron's case, at 20 F - H.) In such a case there seems to be little doubt that the decision would be susceptible to common law review. (See also Van Duyker v District Court Martial and Others 1948 (4) SA 691 (A).)

Many of these matters were discussed by Jansen JA in his penetrating judgment in Theron's case, supra.

The general thesis of his judgment is that unreasonableness in itself (and not merely as evidence of some other defect) is a substantive ground for review in cases where a statutory body gives a decision of a purely judicial nature ("van suiwer regsprekende aard"). Upon this thesis the Court was divided: Van Blerk ACJ concurred in this thesis, but Botha JA and Muller JA dissented. The fifth member of the Court, Hofmeyr JA, concurred in the conclusion reached by Jansen JA, but for different reasons. The correctness of Jansen JA's thesis is not of relevance to the present case, but what is of considerable assistance, in my respectful view, is the learned Judge's consideration of many of the cases to which reference has been made in this judgment. Further important points which emerge from the judgment of Jansen JA are:

(1) The distinction drawn by him between statutory powers which involve taking into account considerations of efficacy or desirability in the light of the general interest or the public good, etc ("die inagneming van doelmatigheids- of *wenslikheidsoorwegings* (in die lig van algemene belang, openbare welsyn, ens) ") or where opinion or estimation plays an important role, on the one hand, and statutory powers or functions of a purely judicial nature ("suiwer regsprekende aard"), on the other hand (Theron's case, at 20 A-D, 21 C).

(2) That fundamentally the question as to whether an error of law is reviewable depends upon the intention of the Legislature. Thus, in order to give effect to the clear legislative intent it may be necessary to interpret the statutory power as conferring on the decision-maker

exclusive jurisdiction to decide the question of law in issue and thus to exclude reviewability merely on the ground that the decision-maker decided the question wrongly. Doyle's case, supra, the Chesterfield House case, supra, and the Jooste Lithium case, supra, are cited by Jansen JA as instances of such a statutory power. (See Theron's case, supra, at 20 H - 21 C.) Whereas in other cases consideration of the legislative intent may lead one to the conclusion that the question of law was not left to the exclusive jurisdiction of the decision-maker and that a wrong decision thereon is reviewable.

Problems similar to these have arisen in the English courts. The leading case on the subject is Anisminic Ltd v The Foreign Compensation Commission and

Another [1969] 1 All ER 208 (HL). In that case a tribunal ("the commission") established by statute to consider certain claims for compensation rejected the appellant's claim on a ground which constituted an erroneous interpretation of the statutory provision ("the order") which they were required to apply. By a majority of four to two the House of Lords decided that this error of law rendered the commission's decision a nullity. Lord Reid (one of the majority) said (at 216 C-F):

> "It was argued that the whole matter of construing the order was something remitted to the commission for their decision. I cannot accept that argument. I find nothing in the order to support it. The order requires the commission to consider whether they are satisfied with regard to the prescribed matters. That is all they have to do. It cannot be for the commission to determine the limits of their powers. Of course, if one party submits to a tribunal that its powers are wider than in fact they are, then the tribunal must deal with that submission. But if they reach a wrong conclusion as to

> the width of their powers, the court must be able to correct that - not because the tribunal has made an error of law, but because as a result of making an error of law they have dealt with and based their decision on a matter with which, on a true construction of their powers, they had no right to deal. If they base their decision on some matter which is not prescribed for their adjudication, they are doing something which they have no right to do and, if the view which I expressed earlier is right, their decision is a nullity."

In similar vein is this extract from the speech of Lord Wilberforce, also of the majority (at 246 D-F):

> ".... the cases in which a tribunal has been held to have passed outside its proper limits are not limited to those in which it had no power to enter on its enquiry or its jurisdiction or has not satisfied a condition precedent. Certainly such cases exist (for example Ex p Bradlaugh (92)) but they do not exhaust the principle. A tribunal may quite properly validly enter on its task and in the course of carrying it out may make a decision which is invalid - not merely erroneous. This may be described as 'asking the wrong question' or 'applying the wrong test ' - expressions not wholly satisfactory since they do not, in

> themselves, distinguish between doing something which is not in the tribunal's area and doing something wrong within that area - a crucial distinction which the court has to make."

In the case of Re Racal Communications Ltd [1980] 2 All ER 634 (HL) Lord Diplock said of the Anisminic case (at 638 g-j):

> "It is a legal landmark; it has made possible the rapid development in England of a rational and comprehensive system of administrative law on the foundation of the concept of ultra vires. It proceeds on the presumption that where Parliament confers on an administrative tribunal or authority as distinct from a court of law, power to decide particular questions defined by the Act conferring the power, Parliament intends to confine that power to answering the question as it has been so defined, and if there has been any doubt as to what that question is this is a matter for courts of law to resolve in fulfilment of their constitutional role as interpreters of the written law and expounders of the common law and rules of equity. So, if the administrative tribunal or authority have asked themselves the wrong question and answered that, they have done something that the Act does not empower them to do and their

> decision is a nullity. Parliament can, of course, if it so desires, confer on administrative tribunals or authorities power to decide questions of law as well as questions of fact or of administrative policy; but this requires clear words, for the presumption is that where a decision-making power is conferred on a tribunal or authority that is not a court of law, Parliament did not intend to do so."

(As to this presumption compare the remarks of Jansen JA in Theron's case, at 21 C.)

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 will 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 misinterpretation 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 such 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 (i e 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 justifiably be said that, by reason of its error of law, the tribunal "asked itself the wrong question", or "applied the

wrong test", or "based its decision on some 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 to ascertaining the legislative intent may be somewhat different, but it is not necessary in this case to expand on this or to express a decisive view.

I now return to the facts of this appeal. The relevant statutory provisions are sec 16 (which defines misconduct) and sec 17 (which prescribes the procedure where a teacher is accused of misconduct). The main features of the procedure provided for by sec 17 are:

(i) the service upon the person accused of misconduct of a written charge;

(ii) a written response from the person charged admitting or denying the charge;

(iii) a deeming that, if the person charged admits the charge, he has been found guilty thereof;

(iv) in the case of a denial of the charge an inquiry, conducted by "a person" (I shall call him "the inquirer") appointed to enquire into the charge by the Director-General: Administration: House of Delegates;

(v) at the conclusion of the inquiry a decision by the inquirer whether the person charged is guilty or not guilty of the misconduct with

which he is charged, which decision is conveyed to the Director-General;

(vi) an appeal against a finding of guilty to the Minister, who after considering the record of the inquiry and other documents submitted to him, such as written representations, may allow the appeal in whole or in part and set aside or vary the finding, dismiss the appeal and confirm the finding, or remit the matter for further enquiry;

(vii) the imposition of a sanction or punishment by the Minister, on the recommendation of the Director-General, where the charge has been admitted or where the person charged has been found guilty and has not appealed or has appealed and his appeal has been dismissed wholly or in part.

It should be noted that, although in this case a magistrate was appointed as the inquirer under sec 17, the subsection does not require the person so appointed to be legally qualified; and he may be assisted by one or more assessors (again not necessarily legally

qualified), who sit in an advisory capacity. It is further provided in regard to the inquiry that the law relating to witnesses and evidence, as observed in a magistrate's court "in connection with criminal cases" shall apply; that the person charged shall have the right to be present at the inquiry, to be represented, to cross-examine witnesses called, and to inspect documents produced in evidence, at the enquiry in support of the charge, to call witnesses and to give evidence himself. The inquirer is required to keep a record of the proceedings at the inquiry. The inquiry and the appeal under sec 17 are clearly proceedings of a judicial nature.

The sanctions or punishment which the Minister is empowered to impose are caution or reprimand; a fine not exceeding R200; transference to another post; reduction of emoluments and/or grade; and discharge from

the service of the employer or being called upon to resign therefrom.

The definition in sec 16 of misconduct contains twenty paragraphs, of which 16(f) constitutes one. A perusal of the contents of these paragraphs shows that some of them lay down precise, objectively ascertainable criteria, others lay down criteria which involve in varying degrees the passing of what may amount to a value judgment. Par (p) - "he commits a criminal offence" - may be cited as an example of the former; while par (i) - "he conducts himself in a disgraceful, improper or unbecoming manner or, whilst on duty, is grossly discourteous to any person" - illustrates the latter. In the case of virtually all the paragraphs, the application thereof involves to a lesser or greater extent, questions of statutory interpretation.

Having regard to the nature of the inquiry prescribed by sec 17 and the fact that the inquirer

exercises powers and functions of a purely judicial character, to the fact that the inquirer and the assessor(s) advising him need not be legally trained, to the many problems of statutory interpretation which may arise in the application of the various criteria in sec 16 and to the fact that the inquiry is of a criminal nature, which may lead to the imposition of punitive sanctions (some of them very serious), I am of the view that the Legislature did not intend the inquirer to have exclusive jurisdiction in regard to the interpretation of the various grounds of misconduct listed in sec 16. On the contrary, I hold that where it can be shown that the inquirer (who has made a finding of guilty) has so misinterpreted the paragraph under which the person concerned was charged that he applied the wrong criterion and that had the correct criterion been applied there would not have been grounds for a finding of guilty, the

Court is entitled to review the inquirer's decision and set it aside.

In the present case, as I have shown, this is precisely what occurred. Accordingly, in my judgment, the decision of the magistrate was reviewable and should have been set aside by the Court a quo; and the decision of the Minister should suffer a like fate.

As regards costs, appellants' counsel asked for costs in both Courts only against second respondent; and, in regard to the hearing a quo, for the costs of two counsel.

It is accordingly ordered:-

(1) That the appeal be allowed with costs, such costs to include the costs of the application for leave to appeal and to be paid by second respondent.

(2) That the order of the Court a quo be set aside and there be substituted the following:

"It is ordered -

(a) that the finding of the first respondent (dated 24 January 1989) to the effect that the applicants had contravened sec 16(f) of Act 61 of 1965 be set aside;

(b) that the decision of second respondent dismissing the appeals of the applicants, confirming the finding of the first respondent and imposing a fine of R100,00 on each of the applicants be set aside;

(c) that the costs of the application be paid by second respondent, such costs to include the costs of two counsel."

M M CORBETT

NESTADT JA)
MILNE JA)
GOLDSTONE JA) CONCUR
NICHOLAS AJA)