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ARTICLE

JUDICIAL REVIEW OF ARBITRATION AWARDS UNDER THE NEW SOUTH AFRICA LABOUR RELATIONS ACT OF 1995

*Calvin William Sharpe**

THE SETTING

Nelson Mandela's transition from political prisoner to head of state and South Africa's transformation from repugnant apartheid regime to multi-racial democratic society have been two of the twentieth century's most profound political stories. Less prominent in this unfolding saga, yet pivotal to the Reconstruction and Development Programme (RDP) of the African National Congress (ANC),¹ was Parliament's passage of the Labour Relations Act 66 of 1995 (LRA) on September 13, 1995, after more than one year of drafting, negotiation among South Africa's social partners,² and mass political and economic action by unions.³ Although the South African Labour Minister's Five Year Plan on reform legislation included the Basic Conditions of Employment Act 75 of 1997,⁴ the Employment Equity Act 55

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¹ This program was developed by the ANC in 1994 to elaborate the policy details and legislative initiatives that would build South Africa's economy and human resources. *See* D. DU TOIT ET AL., *LABOUR RELATIONS LAW: A COMPREHENSIVE GUIDE* 17-18 (3d ed. 2000).

² This term describes the three parties, government, organized labor, and organized business participating with equal representation in the National Economic Development and Labour Council (NEDLAC). NEDLAC was created in 1995 and consists of four chambers: Trade and Industry, Public Finance and Monetary Policy, Labour Market, and Development. It is a pre-parliamentary process that attempts to achieve consensus among the social partners on all legislation relating to labor, economic, and development policy before it goes to Parliament. *Id.* at 18-19.

³ *Id.* at 29-30.

⁴ Like the Fair Labor Standards Act in U.S. law, this statute sets forth minimum wage and hour conditions for most South African workers. *Compare* Fair Labor Standards Act, 29 U.S.C. §§ 206-207 (1992), *with* §§ 6-18 of Basic Conditions of Employment Act 75 of 1997, 4 JSRSA 1-240, 1-244 to -245 (1999).

of 1998,⁵ and the Skills Development Act 97 of 1998,⁶ the LRA has been described as the “first step” and “central statute” in this legislative program.⁷

The LRA is a comprehensive statute that applies to all employees except those employed by agencies related to national security.⁸ It addresses a broad range of issues including freedom of association,⁹ union security,¹⁰ a variety of collective bargaining rights,¹¹ bargaining councils,¹² statutory councils,¹³ small and medium enterprises,¹⁴ industrial action,¹⁵ employee participation,¹⁶ unfair dismissal and dispute resolution. The LRA codified protection of employees against unfair dismissal and reformed the

⁵ See §§ 5-6, 28-33 of the Employment Equity Act 55 of 1998, 4 JSRSA 1-263, 1-266, 1-269. Enforced through an Employment Equity Commission, this statute outlaws unfair discrimination in employment.

⁶ This statute focuses on training, skills development, and employment services for South Africans. See Skills Development Act 97 of 1998, 4 JSRSA 2-306 (1998).

⁷ DU TOIT ET AL., *supra* note 2, at 46, 55.

⁸ Specifically, the LRA excludes members of the National Defense Force, the National Intelligence Agency, and the South African Secret Service. § 2 of the Labour Relations Act 66 of 1995, 4 JSRSA 2-165, 2-172 (1998).

⁹ Section 4 sets forth the trade union right of employees. *Id.* § 4 at 2-172.

¹⁰ Section 25 defines the rights and conditions of agency shop agreements. Section 26 defines the rights and conditions of closed shop agreements. *Id.* §§ 25-26 at 2-177.

¹¹ Section 11 defines trade union representative, Section 12 sets forth the parameters of a trade union's right of access to the workplace, Section 13 provides for dues check-off authorization, and Sections 14 through 16 establish the rights of trade union representation. *Id.* §§ 12-16 at 2-174 to -175. Sections 23 and 24 define the legal effect of collective agreements and the handling of disputes involving such agreements. *Id.* §§ 23-24 at 2-176 to -177. Section 67 specifies the rights of employers and employees during strikes and lockouts. *Id.* § 67 at 2-189.

¹² Section 27 permits the establishment of bargaining councils and defines their powers and function, *id.* §27 at 2-178, while Sections 51 and 52 deal with a bargaining council's dispute resolution functions and accreditation, *id.* §§ 51-52 at 2-185.

¹³ Section 39(1) and (2) provide for the establishment of statutory councils. *Id.* § 39 at 2-182. Section 43 sets forth the powers and functions of statutory councils. *Id.* § 43 at 2-183. Section 44 permits ministerial determinations upon recommendations by statutory councils. *Id.* § 44 at 2-183.

¹⁴ Section 30(1)(b) requires that “the constitution of every *bargaining council* at least provide for . . . the representation of small and medium enterprises.” *Id.* § 30 at 2-179.

¹⁵ Sections 65 through 69 govern the use of economic weapons. *Id.* §§ 65-69 at 2-188 to -189. Section 70 provides for the determination of an essential service. Employees designated as working in an essential service are prohibited from striking under Section 65(d)(i). *Id.* § 70 at 2-189.

¹⁶ Section 78 and Sections 80 through 94 provide for workplace forums. *Id.* §§ 78, 80-94 at 1-192 to -196.

dispute resolution system building upon the Interim Constitution's Bill of Rights, which includes the right to fair labor practices,¹⁷ the jurisprudence in the old Industrial Court and Labour Court regarding unfair dismissal, and the ineffective dispute resolution mechanisms under the old Labour Relations Act.¹⁸

The LRA gives *every* employee protection against unfair dismissal.¹⁹ Unlike dismissals that implicate important statutory rights and

¹⁷ Section 27 of the Interim Constitution reads:

- (1) Every person shall have the right to fair labor practices.
- (2) Workers shall have the right to form and join trade unions, and employers shall have the right to form and join employers' organizations.
- (3) Workers and employers shall have the right to organize and bargain collectively.
- (4) Workers shall have the right to strike for the purpose of collective bargaining.
- (5) Employers' recourse to the lock-out for the purpose of collective bargaining shall not be impaired, subject to Section 33 (1).

¹⁸ Statistics showed very low settlement rates by the old conciliation boards (20%) and industrial councils (less than 30%) and delays in the ultimate resolution of disputes going to the Industrial and Labour Courts. See du Toit et al., *supra* note 2, at 24-25.

¹⁹ Section 185 provides:

Every *employee* has the right not to be unfairly dismissed.

§ 185 of the Labour Relations Act 66 of 1995, 4 JSRSA 2-165, 2-215 (1998).

Section 186 provides:

"Dismissal" means that –

- (a) an employer has terminated a contract of employment with or without notice;
- (b) an *employee* reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it;
- (c) an employer refused to allow an employee to resume work after she –
 - (i) took maternity leave in terms of any law, *collective agreement* or her contract of employment; or
 - (ii) ...

[Sub-para. (ii) deleted by s.95 (4) of Act 75 of 1997.]
- (d) an employer who dismissed a number of *employees* for the same or similar reasons has offered to re-employ one or more of them but has refused to re-employ another; or
- (e) an *employee* terminated a contract of employment with or without notice because the employer made continued employment intolerable for the *employee*.

Id. § 186 at 2-215.

are deemed automatically unfair²⁰ or those that involve operational requirements,²¹ disputes about the substantive and procedural fairness of

²⁰ Section 187 defines automatically unfair dismissals as follows:

(1) A *dismissal* is automatically unfair if the employer, in dismissing the *employee*, acts contrary to section 5 (footnote admitted) or, if the reason for the *dismissal* is –

- (a) that the *employee* participated in or supported, or indicated an intention to participate in or support, a *strike* or *protest* action that complies with the provisions of Chapter IV; (footnote omitted)
- (b) that the *employee* refused, or indicated an intention to refuse, to do any work normally done by an *employee* who at the time was taking part in a *strike* that complies with the provisions of Chapter IV or was locked out, unless that work is necessary to prevent an actual danger to life, personal safety or health;
- (c) to compel the *employee* to accept a demand in respect of any matter of mutual interest between the employer and *employee*;
- (d) that the *employee* took action, or indicated an intention to take action, against the employer by –
 - (i) exercising any right conferred by *this Act*; or
 - (ii) participating in any proceedings in terms of *this Act*;
- (e) the *employee's* pregnancy, intended pregnancy, or any reason related to her pregnancy;
- (f) that the employer unfairly discriminated against an *employee*, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.

(2) Despite subsection (1)(f) –

- (a) a *dismissal* may be fair if the reason for *dismissal* is based on an inherent requirement of the particular job;
- (b) a *dismissal* based on age is fair, if the *employee* has reached the normal or agreed retirement age for persons in that capacity.

Id. §187 at 2-215.

²¹ Section 188 provides:

(1) A *dismissal* that is not automatically unfair, is unfair if the employer fails to prove–

- (a) that the reason for *dismissal* is a fair reason–
 - (i) related to the *employee's* conduct or capacity; or
 - (ii) based on the employer's operational requirements; and
- (b) that the *dismissal* was effected in accordance with a fair procedure.

(2) Any person considering whether or not the reason for *dismissal* is a fair reason or whether or not the *dismissal* was effected in accordance with a fair

dismissals are referred to the Commission for Conciliation, Mediation and Arbitration (CCMA).²² In that forum an unsuccessful attempt at statutorily mandated conciliation is followed by arbitration, where the employer who cannot prove the substantive and procedural fairness of a dismissal is subjected to an injunctive or monetary remedial order.²³ Although Section 191(9) of the Act makes it clear that a Commissioner's arbitration award is final, any party alleging a defect in any CCMA arbitration proceeding may apply to the Labour Court for an order setting aside the award.²⁴ Also, any party may apply for leave to appeal a Labour Court judgment to the Labour Appeal Court.²⁵ The LRA does not permit any appeal from a judgment of the Labor Appeal Court.²⁶

procedure must take into account any relevant *code of good practice* issued in terms of *this Act*.

Id. § 188 at 2-215.

²² Section 191 provides for the referral of conduct and capacity dismissal disputes to the CCMA. *Id.* § 191 at 2-216. Other disputes are referred to the Labour Court under Sections 187 and 188. *Id.* §§ 187-188 at 2-215.

²³ *Id.*

²⁴ Section 145 provides:

(1) Any party to a *dispute* who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award—

(a) within six weeks of the date that the award was served on the applicant, unless the alleged defect involves corruption; or

(b) if the alleged defect involves corruption, within six weeks of the date that the applicant discovers the corruption.

(2) A defect referred to in subsection (1), means—

(a) that the commissioner—

(i) committed misconduct in relation to the duties of the commissioner as an arbitrator;

(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or

(iii) exceeded the commissioner's powers; or

(b) that an award has been improperly obtained.

(3) The Labour Court may stay the enforcement of the award pending its decision.

(4) If the award is set aside, the Labour Court may –

(a) determine the *dispute* in the manner it considers appropriate; or

(b) make any order it considers appropriate about the procedures to be followed to determine the *dispute*.

Id. § 145 at 2-207.

²⁵ Section 166 provides:

The CCMA employs 111 full-time commissioners and 256 part-time commissioners throughout South Africa's nine provinces.²⁷ Given the broad protections against unfair dismissal and the guaranteed forum for adjudicating dismissal disputes, it is not surprising that the CCMA has been inundated since its effective date of operation in November 1996. From November 1996 to the end of December 1998, the CCMA closed 115,744 cases.²⁸ In 1998 it received an average of 323 cases every working day.²⁹ A total of 81,397 disputes were referred to the CCMA in 1998, a 35% increase over 1997.³⁰ Of the 63,208 cases handled that year, 38,000 were conciliated and just over 14,000 arbitrated.³¹ In some ways it is remarkable that a staff of 367 full and part-time Commissioners serving all nine provinces in 1998 could produce these numbers.

(1) Any party to any proceedings before the Labour Court may apply to the Labour Court for leave to appeal to the Labour Appeal Court against any final judgment or final order of the Labour Court.

(2) If the application for leave to appeal is refused, the applicant may petition the Labour Appeal Court for leave to appeal.

(3) Leave to appeal may be granted subject to any conditions that the Court concerned may determine.

(4) Subject to the Constitution and despite any other law, an appeal against any final judgment or final order of the Labour Court in any matter in respect of which the Labour Court has exclusive jurisdiction may be brought only to the Labour Appeal Court.

Id. § 166 at 2-212.

²⁶ Section 167 provides:

(1) The Labour Appeal Court is hereby established as a court of law and equity.

(2) The Labour Appeal Court is the final court of appeal in respect of all judgments and orders made by the Labour Court in respect of the matters within its exclusive jurisdiction.

(3) The Labour Appeal Court is a superior court that has authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which the Supreme Court of Appeal has in relation to matters under its jurisdiction.

[Sub-s. (3) amended by s. 18 of Act 127 of 1998.]

(4) The Labour Appeal Court is a court of record.

Id. § 167 at 2-212.

²⁷ John Brand, *CCMA: Achievements and Challenges- Lessons From the First Three Years*, 21 I.L.J. 77, 82 (S. Afr.) (2000) (citing 1998 CCMA Review).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

THE PROBLEM OF JUDICIAL REVIEW UNDER THE LRA

The sheer weight of the CCMA caseload places a premium upon the final, informal, efficient and cost-effective resolution of dismissal disputes. The drafters of the Labour Relations Bill envisioned the processes of conciliation and arbitration to be well suited to satisfying these criteria.³² However, the goal of finality is threatened to the extent that courts are permitted to second-guess arbitration awards. Indeed, the American labor arbitration structure and experience suggest that a broad scope of judicial review of arbitration awards undermines the attributes of arbitration.³³

The LRA recognizes the need to prevent judicial intrusion upon the arbitration process by providing for judicial *review* rather than *appeal* of arbitration awards.³⁴ The Court has jurisdiction under the latter to reverse an award based on its incorrectness; under the former a reversal on the merits would exceed the Court's authority.³⁵ Moreover, Section 145 narrowly constrains the grounds for setting aside an award on review to the following:

- (a) . . . the commissioner ----
 - (i) committed misconduct in relation to the duties of the commissioner as an arbitrator;
 - (ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
 - (iii) exceeded the commissioner's powers; or
- (b) . . . an award has been improperly obtained.³⁶

³² See *Shoprite Checkers (PTY) Ltd. v. A Ramdaw*, (2000) 21 I.L.J. 1232 (LC). Referring to *Explanatory Memorandum*, 16 I.L.J. 278, Judge Wallis said the following:

When the Bill was initially published for comment it was accompanied by a lengthy explanatory memorandum In that memorandum it was explained that the existing system of dispute resolution, particularly as it related to cases of unfair dismissal, was complex inefficient, protracted and expensive. The high level of legalism which characterised the system was noted with approbation. The dispute resolution provisions contained in the Bill are directed at resolving these problems.

Id. at ¶ 59.

³³ See *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 564 (1960); See generally Calvin William Sharpe, *Judicial Review Of Labor Arbitration Awards: A View From The Bench*, 52 NAT'L ACAD. ARBS. ANN. PROC. 126 (1999).

³⁴ See § 145 of the Labour Relations Act 66 of 1995, 4 JSRSA 2-165, 2-207 to -208 (1998); See *Carephone (Pty) Ltd. v. Marcus N.O. and others*, (1998) 19 I.L.J. 1425, 1427 (LAC), ¶ 1.

³⁵ See *Carephone*, 19 I.L.J. at 1435, ¶ 36.

³⁶ § 145 of the Labour Relations Act 66 of 1995, 4 JSRSA 2-165, 2-207 to -208 (1998).

True to the distinction between *review* and *appeal*, these grounds seem to be preoccupied with procedural problems that prevent the arbitration process from functioning as intended (review). They do not appear to permit an assessment of the merits of an award and reversal based on error (appeal).³⁷

Even if the LRA only contained Section 145, the American experience under the Federal Arbitration Act suggests that the Labour Court might not have been able to resist the pressure to review the merits.³⁸ Terms like “gross irregularity” that call for the exercise of judgment present an opportunity for broadening judicial consideration of the merits. However, Section 145 does not stand alone in the LRA as a governor of the Labour Court’s power of judicial review. It coexists with Section 158(1)(g) which says:

(1) The Labour Court may-----

* * *

(g) despite section 145, review the performance or purported performance of any function provided for in this Act or any act

³⁷ It should be noted that this standard is very similar to the Federal Arbitration Act of 1947, 9 U.S.C. § 10 (2000), at 1221, which provides:

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

- (1) Where the award was procured by corruption, fraud, or undue means.
- (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
- (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
- (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
- (5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

³⁸ All Federal Appellate Circuits have articulated non-statutory standards that permit courts to review the merits of commercial arbitration awards under Section 10(a) of the Federal Arbitration Act. See generally Stephen L. Hayford, *A New Paradigm For Commercial Arbitration: Rethinking The Relationship Between Reasoned Awards and the Judicial Standards for Vacatur*, 66 GEO. WASH. L. REV. 443, 466-496 (1998).

or omission of any person or body in terms of this Act on any grounds that are permissible in law.³⁹

The guarantee of just administrative action in the Bill of Rights of the South African Constitution may be interpreted as furnishing grounds for reviewing the performances of CCMA arbitrators as reflected in arbitration awards.⁴⁰

Before the Labor Appeal Court's 1998 decision in *Carephone (Pty) Ltd. v. Marcus N.O. and others*,⁴¹ the relationship between Section 145(2) and 158(1)(g) presented a dilemma for Labor Court judges. Section 145(2)(a) and (b) virtually track the narrow grounds for setting aside the award contained in the earlier Section 33 of the Arbitration Act 42 of 1965. That statute focused on misconduct, gross irregularities, excessive powers, and impropriety in securing the award and did not permit a court to second-guess the merits of an award.⁴² As already noted, Section 158(1)(g) permits review of any function under the LRA on any grounds that are permissible in law "despite section 145." By its terms this section furnishes a more generous basis of review that might include an assessment of the Commissioner's decision on the merits.⁴³

³⁹ § 158 of the Labour Relations Act 66 of 1995, 4 JSRSA 2-211 (1998).

⁴⁰ See *infra* note 51.

⁴¹ See *Carephone*, 19 I.L.J. 1425.

⁴² Section 33 of the Arbitration Act 42 of 1965 provided:

(1) Where:

- (a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or
- (b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or
- (c) an award has been improperly obtained, the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.

(2) An application pursuant to this section shall be made within six weeks after the publication of the award to the parties: Provided that when the setting aside of the award is requested on the grounds of corruption, such application shall be made within six weeks after the discovery of the corruption and in any case not later than three years after the date on which the award was so published.

§ 33 of the Arbitration Act 42 of 1965, 1 JSRSA (1998).

See *Dickenson & Brown v. Fisher's Executors*, 1915 AD 166, at 174-175; *Amalgamated Clothing & Textile Workers Union v. Veldspun Limited*, (1994) 1 SA 162 (AD at 168I-169C) (standing for the proposition that error in fact or law does not constitute arbitral misconduct).

⁴³ Although the Federal Arbitration Act does not contain contradictory provisions that create uncertainty about the scope of review of arbitral awards, American courts have

Understandably, these seemingly contradictory directives left Labour Court judges ambivalent about the reviewing function. Should Labour Court judges limit their review of Commissioner awards to the narrow grounds set forth in Section 145(2)(a) and (b)? Should they scrutinize the merits of the award for correctness as, arguably, required by Section 158(1)(g)? Or should any reviewing standard reflect some effort at reconciling the two provisions?

This ambivalence about the relationship between Sections 145(2)(a) and (b) and 158(1)(g) in defining the scope of review was reflected in *Kynoch Feeds (Pty) Ltd and Commission for Conciliation, Mediation And Arbitration and others*,⁴⁴ where Judge Revelas traced his own history of first adopting then rejecting the view that Section 158(1)(g) applied only to administrative acts other than arbitrators' awards.⁴⁵ Under the earlier view, Section 145 applied to CCMA arbitration for sound policy reasons, "particularly in the field of labour where it is advantageous to all parties and in the interests of good labour relations to have a binding decision made finally and expeditiously."⁴⁶ Judge Revelas later changed his view, holding that arbitration is an administrative action to which Section 158(1)(g) applies and that Section 145 has no application.⁴⁷ Acknowledging the increased interference with Commissioner awards that this broader review entailed, the judge felt that all interested parties would be better served by "a strong body of guidelines and principles to be followed by [CCMA commissioners]."⁴⁸

In *Carephone* the Labor Appeal Court finally addressed the appropriate standard of review of Commissioner awards issued under the auspices of the CCMA. The Court in *Carephone* found a general consistency between the LRA and the CCMA, on the one hand, and the requirements of the constitution, on the other.⁴⁹ While affirming the Labor

created the same uncertainty by enunciating non-statutory standards that permit a review of the merits of commercial awards. American scholars have disagreed about how extensive such review should be. Compare Hayford, *supra* note 39 (advocating limited review), with Martin H. Malin and Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective On Labor And Employment Arbitration from The Steelworkers Trilogy to Gilmer*, 44 HASTINGS L.J. 1187 (1993), and Norman S. Poser, *Judicial Review Of Arbitration Awards: Manifest Disregard Of The Law*, 64 BROOK. L. REV. 471 (1998) (advocating broader review in some cases).

⁴⁴ (1998) 19 I.L.J. 836 (LC).

⁴⁵ *Id.* at 846, ¶ 39.

⁴⁶ *Id.* at 847, ¶ 40.

⁴⁷ *Id.* at 847, ¶ 43.

⁴⁸ *Id.* at 848, ¶ 48.

⁴⁹ See *Carephone*, 19 I.L.J. 1425. It also pointed to the consistency between the purpose of the LRA in general—to give effect to and regulate the fundamental right conferred by section 27 of the Constitution [the workers rights section], *id.* at 1432, ¶¶ 21-22, and to

Court's judicial authority to review Commissioner arbitration awards, the *Carephone* Court was also careful to distinguish its review function from an appeal. Judge Froneman read sections 145 and 158(1)(g) together. Section 145 imposes procedural requirements on Commissioners. Section 158(g) broadens the scope of judicial review under the administrative justice section of the Bill of Rights to permit a review of the merits.⁵⁰

interpret the provisions of the LRA, *id.* at 1429, ¶ 8, and the specific obligation of a commissioner to determine the dispute fairly and quickly and with a minimum of formalities in Section 138 of the LRA, on the one hand, *id.* at 1432, ¶ 21, and the constitutional right to just administrative actions found in the Bill of Rights [sec. 33 and Item 23(2) of Sch. 6 of the Const.] on the other, *id.* at 1434, ¶ 31. Judge Revalas' later view may betray a judicial mood in some quarters regarding the competency of CCMA awards. For example, Susan R. Brown, American labor arbitrator and consultant to the CCMA, sees the Court's *Carephone* decision as result-oriented. She noted that the CCMA was the first government agency that was created after the dismantling of apartheid. Ms. Brown observed that the Commissioners initially employed by the CCMA were selected to represent a diversity of the South African population, a deliberate choice of representation across the political and cultural spectrum designed to make the CCMA's work (including arbitration awards) more credible to the public. As a result, many Commissioners did not have legal backgrounds or speak English as a first language, and they came from working rather than intellectual traditions. In Ms. Brown's view, it appeared that the Labor Courts interpreted the law of judicial review to give themselves more supervisory authority over awards because of a concern about the legal sufficiency as well as the public credibility of CCMA awards. Telephone Interview with Susan Brown, American Arbitrator and Consultant to the South African Government (CCMA) (February 13, 2002).

⁵⁰ Section 33 of the South Africa Constitution reads as follows:

- (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
- (3) National legislation must be enacted to give effect to these rights, and must -
 - (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
 - (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
 - (c) promote an efficient administration.

CONST. OF S. AFR. § 33 (1997), *reprinted in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Release 97-7) (Gilbert H. Flanz ed., Inter-University Associates, inc. trans., Oceana Publications, Inc. 1997).

Judge Froneman makes the point in *Carephone* that Section 33(1) and (2) should be read as incorporating Item 23(2) of Schedule 6 of the Constitution until the legislation envisaged in Sections 33(3) is enacted. Item 23(2) reads:

Every person has the right to—

- (a) lawful administrative action where any of their rights or interests is affected or threatened;

However, unlike an appeal, where the question is whether the award is correct, section 158(1)(g) only permits an inquiry into whether the award as an administrative action under the constitution is justifiable in relation to the reasons given for it, the constitutional standard set forth at Item 23(2)(d) of Schedule 6.⁵¹ The Court also referred to this “justifiability” standard as a requirement of substantive rationality. The question for the reviewing courts is:

[I]s there a rational objective basis justifying the connection made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at?⁵²

The *Carephone* court saw the justifiability standard as preserving the distinction between permissible review and impermissible appeal. The Court also acknowledged that “only judicial precedent will be able to give more specific content to the broad concept of *justifiability*.”⁵³

JUDICIAL PRECEDENT

While the *Carephone* mandate might have appeared to require a daunting high wire act of walking the fine line between review and appeal in evaluating arbitration awards, the Labour Court has actually performed the task quite well. A review of the cases suggests that the Labor Court has largely captured the sense of “justifiability” in reviewing arbitration awards articulated by the Labour Appeal Court in *Carephone*. A particularly apt formulation of the distinction between appeal and review is found in *Johannes Lowewik Cotzee v. Justice Lebea, N.O. Santam Ltd.*, where Acting Judge Cheadle said the following:

The fact that a reviewing court may have come to a different result if the matter had been brought on appeal can never be, on its own, a basis for attacking the process of reasoning. If it did, then the distinction between appeal and review would be obliterated. And whatever effect the constitutional entrenchment of the right to administrative justice may

(b) procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened;

(c) be furnished with reasons in writing for administrative action which affects any of their rights or interests unless the reasons for that action have been made public; and

(d) administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened.

See *Carephone*, 19 I.L.J. at 1431, ¶ 16.

⁵¹ See *id.* (explaining that administrative action must be justifiable in relation to the reasons for it).

⁵² *Carephone*, 19 I.L.J. at 1435, ¶ 37.

⁵³ *Id.*

have on our common law, it does not mandate a destruction of the distinction between these two remedies. What then distinguishes the two remedies when it comes to applying them to the reasoning process employed by a tribunal? It seems to me that the seeds of the distinction lie in the phrase so commonly used to describe a process failure in the reasoning phase of a tribunal's proceedings – 'the failure to apply one's mind. That test is different from the one that applies to an appeal – namely, whether another court could come to a different conclusion. Accordingly, once a reviewing court is satisfied that the tribunal has applied its mind, it will not interfere with the result even if it would have come to a different conclusion. The best demonstration of applying one's mind is whether the outcome *can* be sustained by the facts found and the law applied. The emphasis is on the range of reasonable outcomes not on the correct one.⁵⁴

Although predictably, a substantial majority of awards are upheld as justifiable under *Carephone*, the cases tend to fall into three categories: (1) the **easy cases** where the decision is correct and the Labor Court dismisses the application, or the award is not justifiable, (2) the **harder cases** where the award is wrong but justifiable, and (3) the **misapplication cases** where the award, wrong or right, is set aside because of the Court's misapplication of the standard.

Examples abound of easy cases where the award is correct and upheld as justifiable.⁵⁵ Following are two examples of easy cases where the award was deemed to lack justifiability. In *Dairybell Pty v. CCMA*,⁵⁶ the company dismissed an employee for four counts of misconduct: (1) misappropriation of company funds, (2) unauthorized possession of company property, (3) breach of confidentiality in the handling of company information, and (4) breach of confidentiality for personal gain. While suggesting in his award that the employee had engaged in the misconduct, the Commissioner inexplicably ordered the company to compensate the employee an amount equivalent to six months salary. The Labor Court set

⁵⁴ See Johannes Lowewik Coetzee and Justice Lebea, N.O. Santam Ltd., (1999) Case No. J250/98 (LAC), ¶ 10, available at <http://www.legalinfo.co.za>.

⁵⁵ See *Waverley Blankets Ltd. v. CCMA & others* (2000); *Aitken v. Khoza & others*, (2000) 5 LLD 504 (LC); *Gqibela v. West Driefontein Mine & others*, (2000) 4 BLLR 414 (LC); *Dr. Gabeba Abrahams v. South African Cultural History Museum*, (1999) Case No. C89/98 (LC), available at <http://www.legalinfo.co.za>; *Themba Mtshali v. CCMA*, (1999) Case No. J3103/98 (LC), available at <http://www.legalinfo.co.za>; *East Rand Gold and Uranium Co. Ltd v. CCMA & others*, (1999) Case No. J1351/97 (LC), available at <http://www.legalinfo.co.za>; *Purefresh Foods (Pty) Ltd. v. Advocate L. Dayal & others*, (1999) Case No. D239/98 (LC), available at <http://www.legalinfo.co.za>; *OD Zaayman v. CCMA and others*, (1999) 20 I.L.J. 412 (LC).

⁵⁶ See *Dairybelle (Pty) Ltd. v. CCMA*, (1999) 10 BLLR 1033 (LC), available at <http://www.legalinfo.co.za>.

aside the award because the Court could not comprehend what the Commissioner had found, since he had furnished no reasons. The Court noted that such reasons could be brief, but that they needed to demonstrate "a rational objective basis justifying the connection made by the . . . decision-maker between the material properly available to him and the conclusion he or she eventually arrived at."⁵⁷ The Court went on to make the following statement:

A consideration of the Commissioner's reasons [makes] it impossible to ascertain precisely what misconduct was found to have been proved and why the employee was acquitted of other charges. The Commissioner's discussion of the appropriate sanction suggests that he found some misconduct to have been proved but the precise nature of that misconduct is nowhere stated. Where, as in the present case, there are several charges of misconduct, each ought to be separately dealt with and the arbitrator's analysis and conclusions in relation to each count ought to be clearly set out. It is only in this way that the arbitrator's reasoning and conclusions will be comprehensible. In my view, the standard of justifiability has not been met in the present matter.⁵⁸

This conclusion seems clearly correct, since the Commissioner's conclusion seems wrong and the Commissioner makes no effort to support it with reasons.⁵⁹ The Court's refusal to accept the Commissioner's unexplained conclusions that appear wrong should not be controversial. In this situation the Court has no way of evaluating whether a rational objective basis exists.⁶⁰

⁵⁷ *Id.*

⁵⁸ *Id.* at ¶ 17.

⁵⁹ The Court relied upon the following instructive quote from an administrative law text in demonstrating the importance of supplying reasons:

There is a strong case to be made for the giving of reasons as an essential element of administrative justice. The need for it has been sharply exposed by the expanding law of judicial review now that so many decisions are [likely] to be quashed or appealed . . . on ground of improper purpose, irrelevant consideration (sic) and errors of law of various kinds. Unless the citizen can discover the reasoning behind the decision, he may be unable to tell whether it is reviewable or not and so he may be deprived of the protection of the law. A right to reasons is therefore an indispensable part of a sound system of judicial review. Natural justice may provide the best rubric for it since the giving of reasons is required by the ordinary [person's] sense of justice. It is also a healthy discipline for all who exercise power over others.

Id. at ¶ 16.

⁶⁰ See *Reutech Defense Industries (Pty) Ltd. t/a Reutech Defence Industries v. Govender & others*, (2000) 9 BLLR 1101 (LC), available at <http://www.legalinfo.co.za> (where the

In *Malelane Toyota and the CCMA*,⁶¹ the Court set aside an award in favor of an employee dismissed for fraud, where the Commissioner, believing that a CCMA proceeding was not a trial *de novo*, considered only the evidence at the company's disciplinary hearing and not the more complete evidence establishing the fraud at the arbitration. Since the reasons for the award related only to the company's internal discipline process, the Court found that the award was not justifiable in relation to the reasons given for it.⁶²

Although the Commissioner's refusal to consider relevant evidence probably qualifies as misconduct under Section 145(2)(a)(i) of the LRA, it also necessarily negates a rational objective basis justifying the connection between the Commissioner's conclusion and the "material properly available to him," where the Commissioner explicitly ignores some of that material.

The second category of cases, the **harder cases**, suggests that Labor Court judges appreciate the distinction between review under the "justifiability" standard and appeal. In these cases the Court refuses to set aside an award, even though it would have reached a different outcome from the Commissioner. For example, in *MetroCash & Carry Ltd. v. Francois Le Roux*,⁶³ the company dismissed an employee for assaulting a customer in a manner that admittedly exceeded the bounds of self-defense. Despite the employee's opportunities to defuse the situation, the Commissioner found that dismissal was an excessive sanction in light of the customer's provocation and ordered the employee reinstated after what amounted to a six-week suspension. Quoting extensively from the operative language of *Carephone*, the Court reminded the reader of its jurisdiction as a reviewing court rather than an appellate court. Finding the Commissioner's reasoning rational, the Court dismissed the application with the following observations:

The conclusions reached by the [Commissioner] . . . in making his arbitration award [are] such that I do not necessarily agree on the correctness of the outcome thereof. However, in reviewing arbitration awards of the CCMA the Labour Court must leave some room for differing opinions, as long as those opinions are justifiable in relation to the reasons given for [them]. This is not an easy test but I believe that the Labour Court should heed the warning by the Labour Appeal Court and

Commissioner ignored a positive lab test and inexplicably did not award full back pay despite a finding that the company failed to prove intoxication leading to the setting aside of the award under the *Carephone* standard).

⁶¹ See *Malelane Toyota v. the CCMA*, (1999) 6 BLLR 555 (LC), available at <http://www.legalinfo.co.za>.

⁶² *Id.*

⁶³ See *MetroCash & Carry Ltd. v. Francois Le Roux*, (1999) 4 BLLR 351 (LC), available at <http://www.legalinfo.co.za>.

not enter the merits of such arbitration award with a view to substitute the Court's opinion on the correctness thereof.⁶⁴

Another example of the harder cases is *City Lodge Hotels Ltd. and Annelie Gildenhuys N.O. and Others*,⁶⁵ where a Commissioner ordered the reinstatement of employees who had been dismissed for the improper removal of company property. The record, consisting exclusively of the Commissioner's notes, contained conflicting evidence on whether the employees were guilty, and the company cited evidence suggesting guilt in its application for review. The Court dismissed the application noting that the balancing and weighing of evidence is primarily a matter for the Commissioner and not the Court unless a decision gives "manifestly excessive or manifestly inadequate weight . . . to a relevant consideration." The Court concluded that "notwithstanding factors pointing to a suspicion of misconduct on the part of employees," it was simply not the place of the Court to interfere with the arbitration award on review.⁶⁶

In this category of cases Labor Court judges have been faithful to the distinction in *Carephone* between "justifiability" and "correctness" and the admonition that the judge should "enter the merits [of the Commissioner's award] not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable." It is also noteworthy that the Court in these cases cites the language of *Carephone* distinguishing between "justifiability" and "correctness."

The **misapplication** cases are those in which judges do not seem to properly distinguish between review and appeal or to otherwise fully appreciate the spirit of the *Carephone* decision.

In *Metcash Trading (Pty) Ltd. and Mr. Sithole N.O. and Others*,⁶⁷ the employer subjected six employees to six disciplinary hearings based on capturing them on videotape taking stock and hiding it on their persons. Six different presiding officers of the company conducted hearings finding three employees guilty and one not guilty; two charges were withdrawn. The employer dismissed the three employees found guilty and they referred the dispute to the CCMA. The Commissioner found disparate treatment in violation of the code of good practice, since all six employees had been

⁶⁴ *Id.* at ¶¶ 13-15.

⁶⁵ *See* *City Lodge Hotels Ltd. v. Annelie Gildenhuys N.O. and others*, (1999) Case No. J3054/98 (LC), available at <http://www.legalinfo.co.za>.

⁶⁶ *Id.* ¶¶ 33, 35.

⁶⁷ *See* *Metcash Trading (Pty) Ltd. v. Mr. Sithole N.O. and Others*, (1998) Case No. J1079/97 (LC), available at <http://www.legalinfo.co.za>

suspected of misconduct and only the three applicants had been dismissed, and ordered the three employees reinstated with back pay.

The Court reviewed and set aside the award because the Commissioner incorrectly thought the standard of misconduct encompassed actual or suspected misconduct, and therefore, misapplied the disparate treatment analysis. Since the employer found only the three dismissed employees actually guilty of misconduct, it was appropriate that only they be dismissed even though all six employees had been suspected of misconduct. Saying that the Commissioner must understand the law in order to apply it reasonably and arrive at a justifiable conclusion, the court said the following in its *Carephone* analysis:

In any event, I must point out that if this case is to be decided on the basis that the award must be justifiable in relation to the reasons for the award, then it is clear that the reasoning must take place in accordance with the logic permitted by the law. Put differently, but basically stating the same, the material which the commissioner takes into account must not simply be the factual material but must also include the rule of law which is applicable. This must be applied in order to arrive at a conclusion which is justifiable in light of that material. Where there is an error of reasoning and a misunderstanding of the law, then it is highly likely, and in this case it has been shown to be the case, that the award will not be a justifiable one.⁶⁸

While the judge's decision is very persuasive on the merits, it is difficult to see what is left of the distinction between review and appeal if the Commissioner cannot be wrong in his plausible interpretation and application of the disparate treatment rule without having the award set aside. Where judges under the guise of justifiability are effectively reviewing the merits for correctness, the Commissioner's only chance of preserving an award on review is by reaching the *right* decision – not simply a justifiable one.⁶⁹

And in another case in the misapplication category, *Mogamat Rashad Solomon and CCMA, and others*,⁷⁰ a case that seems to be a caricature of *Carephone*, an employee referred to the CCMA a dispute about his failure to receive a promotion claiming that the successful candidate was not qualified for the position under the National Building Regulations and Building Standards Act 103 of 1997 and that he was better qualified and should have received the position. At the hearing the Commissioner properly narrowed the issues, with the parties' consent, to

⁶⁸ *Id.* at ¶ 15.

⁶⁹ Compare *id.*, with *Sappi Fine Papers v. Lallie*, (1998) Case No. P235/98 (LC), available at <http://www.legalinfo.co.za>.

⁷⁰ *Mogamat Rashad Solomon v. CCMA and others*, (1999) 20 I.L.J. 2960 (LC).

the question of whether the successful candidate was qualified for his appointment in keeping with the 103 Act. The Commissioner found that the 103 Act did not apply and dismissed the application, but not before also finding that the appointment of the successful candidate was unfair and also that the Commissioner could not award the applicant the appointment because "the applicant was not in a position to produce the evidence needed to justify such relief."⁷¹

Even though the outcome of the case was correct, the Court set aside the award based on the reasoning. Since only the question of 103 Act coverage was before the Commissioner after the issues were narrowed, the Commissioner did not properly stick to the issues in allowing the evidence admitted or making the further findings on other issues. On this point the Court said:

If I were simply required to consider whether the outcome was rational on the basis of the evidence properly before [the Commissioner] and on the issue as identified at the outset, in a vacuum so to speak, I would not have been inclined to set aside the award. However, although the second respondent reached what appears to have been the correct decision on the issues as narrowed he did so on the basis of faulty reasoning and after introducing and pronouncing upon issues which he ought not to have been considering.

* * *

I considered the advisability of taking a very narrow view of the *Carephone* ratio, which it seems would enable me to simply say that the "conclusion eventually arrived at" by second respondent, namely, to dismiss the application, was justifiable in relation to the "material properly available" to him, being that evidence in relation only to the issues as narrowed. Such an approach might have produced a "correct" result but that is not, in my view, what I am called upon to do.⁷²

The Court proceeded to discuss its concerns about due process and sending the wrong message to Commissioners. But this case suggests that some Labor Court judges may view reasoning as even more important than results after *Carephone*. Query whether the *Carephone* standard supports this "putting of the cart before the horse."⁷³

Finally, in a decision couched in the language of review but subjecting the Commissioner's award to the scrutiny of an appeal, the Court

⁷¹ *Id.* at 2967, ¶ 20.

⁷² *Id.* at 2966-67, ¶¶ 20-21.

⁷³ *But see* Gqibela v. West Driefontein Mine & others, (2000) 4 BLLR 414 (LC), at ¶ 5 (suggesting that good results without good reasons constitute a basis for setting aside judgments on review but not on appeal, where good results are enough).

in *Eddels SA (Pty) Ltd v. Sewcharan & others*⁷⁴ set aside an award as too legalistic. The Commissioner had upheld the dismissal of two employees but awarded compensation based on his finding of procedural unfairness. The Commissioner had held that an employer must “properly and thoroughly” explain the function of mitigation after announcing a verdict. The Commissioner based this view on the need to focus the employee on the mitigation factors that the employer must consider in dismissal cases under the Code of Good Practice.⁷⁵ He concluded that it was not sufficient for the employer to deal with the issue in the initial stages of the disciplinary procedure. The Labour Court considered “whether the fact that mitigating evidence was not presented after the verdict stage is a sufficiently material procedural flaw warranting an award of compensation.”⁷⁶ The company argued that the Commissioner’s finding regarding the necessity of a two-stage procedure on mitigation was incorrect. While acknowledging the good reasons for the Commissioner’s ruling the Court dismissed them as idealistic concluding as follows:

[T]he fact that a two stage inquiry was not held is not a flaw which would amount to procedural unfairness within the meaning of our law. To require a two state inquiry, ie, a separate inquiry only after the finding of guilt, is to expect too much of lay employers. To punish them for failing to do so with a hefty compensation award, is to institute an overly technical and legalistic dimension into the employer/employee relationship which the new Labour Relations Act certainly did not intend.⁷⁷

The Labour Court’s conclusion that in reaching his ruling the Commissioner had “not . . . adequately applied his mind” is belied by the Court’s earlier approval of the Commissioner’s reasoning. It is also a thinly veiled attempt to mask the Court’s disagreement with the merits of the Commissioner’s award.

⁷⁴ *Eddels South Africa (Pty) Ltd v. Sewcharan & others*, (2000) 21 I.L.J. 1344, 1347 (LC).

⁷⁵ Schedule 8, item 3(5) of the Labour Relations Act provides:

(5) When deciding whether or not to impose the penalty of dismissal, the employer should in addition to the gravity of the misconduct consider factors such as the employee’s circumstances (including length of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement itself.

§ 145 of the Labour Relations Act 66 of 1995, 4 JSRSA 2-165, 2-251 (1998).

⁷⁶ See *Eddels*, (2000) 21 I.L.J. 1344, at 1347, ¶ 3.

⁷⁷ *Id.* at par. 14.

CHALLENGES TO CAREPHONE

Perhaps because of these categories of harder cases and misapplication cases, *Carephone's* basic premises have been challenged in Labor Appeal Court and Labor Court decisions. In *Toyota South Africa Motors (Pty) Lt. and Douglas Radebe and others*,⁷⁸ a Labour Appeal Court decision, Judge Nicholson characterizes the "justifiability" standard as *obiter dictum* and expresses doubt about whether "justifiability" can be an independent ground of review. He makes two points. First, noting that the LRA does not permit an appeal from an arbitration award, Judge Nicholson regards "justifiability" review as impermissible, since it "amounts, to all intents and purposes, to an appeal." Judge Nicholson also points out that Section 145 remains fully operative until declared unconstitutional and notes that there has been no suggestion that Section 145 is unconstitutional. He also notes that in any constitutional inquiry, one question would be whether the CCMA and its apparatus justified a limitation on the right of administrative justice found in the constitution and relied upon by the Court in *Carephone*.

Relying partially on the *Toyota* decision and partially on *Fedsure Life Assurance Ltd and others v. Greater Johannesburg Transitional Metropolitan Council and others*,⁷⁹ Judge Wallis in *Shoprite Checkers (PTY) Limited and A Ramdaw and others*,⁸⁰ refused to follow *Carephone* in dismissing the application to set aside an award that he found to be erroneous. Because of the widespread acceptance of the "justifiability" standard in Labor Court decisions, Judge Wallis did not accept Judge Nicholson's view that the justifiability standard is *obiter dictum*. Also, drawing upon legislative history,⁸¹ Judge Wallis concluded that the Legislature intended the scope of review of Commissioner awards to be the same as the scope of review for arbitration awards under Section 33(1) of the Arbitration Act of 1965.

Like Judge Nicholson in *Toyota*, Judge Wallis complained that the *Carephone* standard blurs the distinction between review and appeal, creating an intolerable inconsistency between private arbitration and arbitration under the LRA and sidelining the express grounds for review

⁷⁸ See *Toyota South Africa Motors (Pty) Lt. and Douglas Radebe and others*, (2000) 3 BLLR 243 (LAC), available at <http://www.legalinfo.co.za>.

⁷⁹ *Fedsure Life Assurance Ltd. & others v. Greater Johannesburg Transitional Metropolitan Council & others*, (1999) 1 SA 374 (CC); (1998) 12 BCLR 1458 (CC), available at <http://www.concourt.gov.za/cases.html>. This Constitutional Court decision found that not every action by an organ of the state is an administrative action for purposes of the Constitution.

⁸⁰ See *Shoprite Checkers*, (2000) 21 I.L.J. 1232 (LC).

⁸¹ See *id.* (referring to *Explanatory Memorandum*, 16 I.L.J. 278). The explanatory memo accompanied the bill in 1995.

under Section 145.⁸² Judge Wallis then challenged what he called the “fundamental starting point” of *Carephone* – that arbitration decisions under the LRA are administrative actions that warrant review for justifiability under the Constitution. Citing *Fedsure*, Judge Wallis found that the quasi-judicial action of Commissioners conducting arbitrations was not administrative. As a consequence, even if *Carephone* was not *dictum*, Judge Wallis declared himself unobligated to follow it. Reverting then to Section 145, Judge Wallis reviewed the award on what he said was the only ground for setting it aside, “gross irregularity”, and dismissed the application.

In a later pronouncement on the appropriate review standard the Labour Appeal Court was spared the task of resolving these differences of opinion. In *Softex Mattress (Pty) Ltd v. PPWAWU & others*,⁸³ Judge Nugent acknowledged the debate about the validity of *Carephone*’s “justifiability” standard elaborated in the *Toyota* and *Shoprite Checkers* discussions. Rather than attempting to resolve the debate, Judge Nugent applied *Carephone* noting that neither counsel had suggested that *Carephone* should not apply and that the award should not be set aside even under the more expansive *Carephone* standard. What followed was an exemplary analysis of the justifiability of the Commissioner’s award.

In *Softex* the company dismissed an employee for his alleged involvement in the theft of beds from the company’s warehouse. Suspicion had centered upon the employee when a private investigator subjected a security officer (SO) to a polygraph test that indicated that the SO had knowledge about the theft. Under further questioning the SO admitted his involvement. In an affidavit the SO implicated the employee in the theft, saying that the employee had intimidated the SO into participating. The SO then resigned and gave no further evidence at the disciplinary hearing or the arbitration. The only evidence against the employee at the disciplinary hearing was the SO’s affidavit and a company record showing that the employee had placed a telephone call to the SO during the period of the theft. The employee denied any involvement in the theft. Based on the bias of the SO, the hearsay nature of the evidence against the employee, and the implausibility of the SO’s story of intimidation, the Commissioner found that the affidavit was an insufficient basis for dismissing the employee. The Labour Court judge, affirmed by the Labour Appeal Court, found that the arbitrator’s reasons for finding an insufficient basis for dismissal “provided a rationally justifiable basis upon which to reach that

⁸² Some commentators in American law have argued for the propriety of just such a distinction between private and public arbitration. See Malin & Ladenson, *supra* note 44.

⁸³ See *Softex Mattress (Pty) Ltd. v. Paper Printing Wood & Allied Workers’ Union and Others*, (2000) 12 BLLR 1402 (LAC), at ¶ 55, available at <http://www.legalinfo.co.za>.

conclusion”.⁸⁴ Showing a keen appreciation for the distinction between appeal and review under the justifiability standard, the Labour Court wrote:

A critical element of fair administrative action is that the person performing the task applied his mind to the matter before him and took account of relevant considerations and evidence placed before him. Whilst it might be possible that based on the same facts someone else would come to a different conclusion, that however is not the test. In my view (the arbitrator) was perfectly entitled to weigh up [the SO's] confession and reject it with reasons. His decision and the reasons he gave for it do not support the view that he committed a reviewable irregularity. The review application of (the arbitrator's) award must also fail.⁸⁵

With equal perspicacity, Judge Nugent of the Labour Appeal Court agreed, citing *Carephone* and writing:

I do not think the arbitrator can be said to have misunderstood the nature of the enquiry. As to the conclusion that he reached, the question to be asked is not whether his conclusion was correct but rather whether it was capable of being arrived at rationally for the reasons that he gave, or, to put it another way, whether there was a “rational objective basis justifying the connection made by the (arbitrator) between the material properly available to him and the conclusion . . . he eventually arrived at.”⁸⁶

CONVERGENCE

In a sense the Labour Appeal Court's successful avoidance of the standards debate in *Softex* suggested that the contrast between narrow and broad standards of review may not involve a substantive difference. This point gains plausibility upon a closer examination of *Shoprite*. Judge Wallis in *Shoprite* cites the *Goldfields Investment Ltd and another v. City Council of Johannesburg and another*,⁸⁷ a case that describes latent and patent “gross irregularities” and makes the point that neither requires intentional misconduct by the arbitrator. The central question is whether the irregularity prevented a party from receiving a fair trial. And in the case of “latent” gross irregularities, those that take place inside the mind of the judicial officer, the reasoning of the arbitrator must be reviewed. Under the “gross irregularity” standard committing error through mistake or misunderstanding of the law is not enough. “[M]isconceiving the whole

⁸⁴ *Id.* at ¶ 64.

⁸⁵ *Id.* at Par 36

⁸⁶ *Id.* at ¶ 63.

⁸⁷ See *Shoprite Checkers*, (2000) 21 I.L.J. 1232 (LC).

nature of the enquiry of [the arbitrator's] duties [in connection with the enterprise] is required.”⁸⁸

Hence a line must be drawn between “erroneous but non-reviewable findings of fact or law” and “gross irregularity.” For Wallis, “gross irregularity” could only exist if “no reasonable commissioner could in the proper exercise of his function have made that award.”⁸⁹ Put another way “the unreasonableness of [the Commissioner's] decision is of such a degree as to be indefensible on any legitimate ground.”⁹⁰ Because Wallis' disagreement with the Commissioner was a matter of weighing the evidence differently,⁹¹ he was not able to say “no reasonable commissioner could in the proper exercise of his function have made that award.”⁹²

Curiously, Judge Wallis said that he would have held under the justifiability test that the award should be set aside “in light of the deficiencies in the Commissioner's process of reasoning.” However, the *Carephone* standard properly applied would seem to dictate the same result that Judge Wallis reached under the “gross irregularity” standard.⁹³ Moreover, in neither the easy nor the harder cases summarized earlier would the “gross irregularity” standard have led to a different result. An erroneous decision without reasons as in *Dairybell*, for example, can hardly be said to be defensible. Indeed, the Commissioner not supplying reasons chooses not to mount a defense. And a Commissioner explicitly ignoring relevant evidence as in *Malelane Toyota* for whatever reason would not seem to be a “reasonable Commissioner properly exercising her function”. The decisions in both *MetroCash & Carry* and *City Lodge Hotels* involved weighing evidence, and both the justifiability and gross irregularity standards permit a range of reasonable outcomes in such cases. Indeed, both the Labour Court and the Labour Appeal Court in reviewing the award in *Softex* refer to “reviewable irregularity” and misunderstanding “the nature of the enquiry,” terms that are associated with the “gross irregularity” standard.

Similarly, under either the “gross irregularity” or “justifiability” standard, it should be the rare arbitration decision that is set aside, where the Commissioner is applying a flexible standard such as “fairness” or

⁸⁸ *Id.* at ¶ 93.

⁸⁹ *Id.* at ¶ 96.

⁹⁰ *Id.*

⁹¹ The Commissioner found and Judge Wallis disagreed that the dismissed employee had not deliberately discounted the purchase price of a company product for a co-worker. *Id.*

⁹² *Id.*

⁹³ See *East Rand Gold and Uranium Co. Ltd v. CCMA & others*, (1999) Case No. J1351/97 (LC), available at <http://www.legalinfo.co.za>; *Dr. Gabeba Abrahams v. South African Cultural History Museum*, (1999) Case No. C89/98 (LC), available at <http://www.legalinfo.co.za>. In the above cases, the Court uses the justifiability and gross irregularity standards interchangeably.

“reasonableness” or interpreting an unsettled area of the law.⁹⁴ On the other hand, setting aside an award should be less troublesome and more frequent under either standard, where the Commissioner misapplies a clear and non-discretionary rule such as the *de novo* hearing rule in *Malelane Toyota*.

Despite the standards debate, recent cases in the Labour Court show a convergence of the justifiability and gross irregularity standards. For example, in *Waverley Blankets Limited v. CCMA & others*,⁹⁵ the Labour Court finessed the issue of whether the “justifiability” or a narrower standard is appropriate under Section 145 by dismissing the application for review under the broader *Carephone* standard. The Court upheld the Commissioner’s interpretation of a collective bargaining agreement in the face of the company’s challenges to the award on the grounds of gross irregularity and lack of justifiability.⁹⁶ Noting the standards debate the Court rejected both claims saying:

[39] In the circumstances, I am unable to find that any valid ground has been advanced to review and set aside the award. I have deliberately refrained from delving into the interesting debate on the so-called narrow or wide tests for review as revised in the *Carephone* decision and others for the simple reason that in my view, the present application cannot succeed on the grounds advanced or any other competent grounds, i.e. even on the widest possible terms for review.⁹⁷

In *SADTU & others v. Jajbhay & others*,⁹⁸ a case arising under the auspices of the Independent Mediation Services of South Africa (IMSSA) and reviewed under the limited grounds set forth in Section 33(1) of the Arbitration Act, the Labour Court set aside the award on the narrow basis of gross irregularity. In finding that the appointment of teachers at a secondary school to the posts of principal and heads of departments was regular, the arbitrator had failed to distinguish between the procedures required for the promotional posts in question and those for level-one posts. The Court contrasted the narrow scope of review for private arbitration awards under the Arbitration Act with the wider review of CCMA awards under *Carephone* and found that the narrower standard was appropriate in the case. Although careful to note that “a material mistake of fact” would

⁹⁴ See *Zaayman v. Provincial Director: CCMA Gauteng and Others*, 1999 (20) I.L.J. 412 (LC) (upholding on review under *Carephone* an award where the Commissioner chose between two possible interpretations of Section 194 of the Labor Relations Act).

⁹⁵ See *Waverley Blankets Ltd. v. CCMA*, (2000) 1 BLLR 114 (LC), available at <http://www.legalinfo.co.za>.

⁹⁶ *Id.* at ¶ 14.

⁹⁷ *Id.* at ¶ 39.

⁹⁸ See *SADTU & others v. Jajbhay & others*, (2001) 1 BLLR 92 (LC), available at <http://www.legalinfo.co.za>.

constitute a gross irregularity only if it prevented “a fair trial of the issues,” the Court held grossly irregular an “error . . . that . . . precluded the [arbitrator] from applying his or her mind to the true issues in dispute.”⁹⁹ To reinforce the point the Court cited *Toyota* for the proposition that even though “mistakes of facts and law are usually insufficient grounds for interference,” the rule is subject to certain exceptions.¹⁰⁰ The Court considered the arbitrator’s failure to “apply his mind to the true issues of the case” to be one such exception.¹⁰¹ From this analytical framework the Court held that the award should be set aside on the basis of a gross irregularity based on the following reasoning:

[27] Not having made such [a] distinction, the [arbitrator] clearly did not apply his mind properly to the issue in dispute, that is, whether the appointments [in question] were regular, or not. This grave error of fact thereby precluded the [arbitrator] from applying his mind to the true issue in dispute. The [arbitrator] namely appeared to accept that the prescribed procedures were the same, without making the necessary distinction between promotion posts and level one posts.

[28] It follows that the failure to do so amounts to the failure to apply his mind to the issues in dispute.¹⁰²

Since the arbitrator’s reasoning is also the central concern of the *Carephone* justifiability standard, it is difficult to see in the *SADTU* decision a practical distinction between justifiability and gross irregularity.

This convergence tendency was expressly embraced by Judge Waglay in *Cox v. CCMA & others*,¹⁰³ a decision which articulated a *Carephone*-like standard for policy reasons. Judge Waglay agreed with *Shoprite Checkers* that he was not obliged to follow *Carephone* after the *Fedsure* decision. He agreed with Judge Wallis in *Shoprite Checkers* that Section 33(1) of the Arbitration Act and Section 145(2) of the LRA should be interpreted consistently, but disagreed that the interpretation should be narrow. Judge Waglay worried about the public’s confidence in a Court that is both empowered to review arbitration awards and powerless to correct mistakes that “perpetuate injustice.” He suggested the following approach:

[20] Justice cannot be seen to be done by categorizing the decision(s) made by the arbitrator. What is required is for this Court to formulate a

⁹⁹ *Id.* at ¶¶ 16, 19.

¹⁰⁰ *Id.* at ¶ 20.

¹⁰¹ *Id.* at ¶ 21.

¹⁰² *Id.* at ¶¶ 27, 28.

¹⁰³ *Cox v. CCMA and Others*, (2001) 22 I.L.J. 137 (LC).

test that is neither superficial, formalistic or too fluid, particularly in dealing with reviews based on section 145(2)(a)(i) of the LRA or section 33(1) of the Arbitration Act, In this respect I believe that the proper test when dealing with these subsections is the test similar to the one laid down in the *Carephone* judgment. I say this notwithstanding the fact that I do not consider myself bound to that judgement. Although the test set out in *Carephone* is premised on an erroneous ground and further in my view incorrectly said to fall within the ambit of section 145(2)(a)(iii) it set out properly the duty of the arbitrator with regard to how the arbitrator's decision is required to be arrived at. It does not, nor should it be seen to constitute a new, separate or a constitutional ground of review but should be seen to hold that if an arbitrator fails to arrive at a decision based on the evidence properly before him then it must be said that he has committed a misconduct in relation to his duties or to put it differently on issues of merit if a decision of an arbitrator has no logical relation to the evidence presented to him then he has failed to apply his mind to the matter and therefore he can be said to have committed misconduct as provided for in section 145(2)(a)(i) of the LRA or section 33(1) of the Arbitration Act.¹⁰⁴ Similarly when an arbitrator makes a decision which is wrong in law, this Court must be able to interfere with such an award, however in this instance the court must only interfere where it feels satisfied that the only reason that the arbitrator arrived at a decision which is wrong in law, is because he failed to apply his mind to the law in question. He would have failed to apply his mind to the law in question only if there is no dispute about the law having regard to decisions handed down by this Court or the Labour Appeal Court.

[21] I believe that the above test would give effect to both section 33(1)(a) of the Arbitration Act and section 145(12)(a)(i) of the LRA. The fact that such an approach may not stem applicants seeking to appeal against an arbitration award in the guise of a review is not a ground to refuse to apply this test. While it does place a more onerous burden on this Court to consider the evidence and the merits it still does not change the process from a review to one of appeal because this Court will not consider whether the decision is correct or not but only whether the decision is based on the evidence presented at the arbitration.¹⁰⁵

¹⁰⁴ Even though technically Judge Waglay is melding the justifiability with the misconduct standard under 145(a)(2)(i) rather than the gross irregularity standard under 145(a)(2)(ii), the effect on the scope of review is the same, and this distinction is not important to the Court's policy discussion. § 145 of the Labour Relations Act 66 of 1995, 4 JSRSA 2-165 (1998).

¹⁰⁵ *Cox*, 22 I.L.J. at 142-43, ¶¶ 20, 21. In evaluating the Commissioner's award based on this approach the Court examined the evidence, the Commissioner's reasoning and his conclusions regarding the sick leave and insubordination charges underlying the dismissal

DENOUEMENT

Ultimately, the Labor Appeal Court in *Shoprite Checkers (Pty) Ltd v. Ramdaw N.O. & Others*,¹⁰⁶ resolved the debate first started in that case by Judge Wallis' decision at the Labour Court level. Embracing the *Carephone* approach to reviewing CCMA arbitration awards, the Labour Appeal Court said that the debate about whether *Carephone* had been wrongly decided had become academic because of the subsequent decision of the Constitutional Court in *Pharmaceutical Manufacturers of SA: in re Ex Parte President of the RSA*,¹⁰⁷ and the Promotion of Administrative Justice Act, 2000 (PAJA). In *Pharmaceutical Manufacturers* the Constitutional Court held that any exercise of public power was required under the Constitution to be based on rationality and that such exercises could be reviewed by the Court.¹⁰⁸ Since a CCMA award is an exercise of public power, it can be judicially reviewed for rationality. Citing *Carephone's* test of justifiability,¹⁰⁹ the Court declined to delineate the precise boundaries of the concepts of "justifiability" and "rationality." Instead it said the following:

[A]lthough the terms "justifiable" and "rational" may not, strictly speaking, be synonymous, they bear a sufficiently similar meaning to justify the conclusion that rationality can be said to be accommodated within the concept of justifiability as used in *Carephone*. In this regard I am satisfied that a decision that is justifiable cannot be said to be irrational and a decision that is irrational cannot be said to be justifiable.¹¹⁰

The PAJA, which became law in November 2000, gives effect to the Constitutional right to administrative action "that is lawful, reasonable and procedurally fair."¹¹¹ The Court views the PAJA's definitions of

and found no basis for setting aside the award. The Court noted that it could not "substitute its assessment of the evidence" for that of the arbitrator.

¹⁰⁶ See *Shoprite Checkers (PTY) Ltd. v. A Ramdaw*, (2001) 9 BLLR 1011 (LAC).

¹⁰⁷ *Pharmaceutical Manufacturers of SA: in re Ex Parte President of the RSA*, (2000) 3 BCLR 241 (CC).

¹⁰⁸ See *id.* This holding obviated Judge Wallis' challenge to the fundamental starting point of *Carephone* – that arbitration decisions under the LRA are administrative actions that warrant review for justifiability under the Constitution.

¹⁰⁹ See *supra* note 45 and accompanying text.

¹¹⁰ *Pharmaceutical Manufacturers of SA: in re Ex Parte President of the RSA*, (2000) 3 BCLR 241 (CC).

¹¹¹ *Id.* ¶ 27.

administrative action as broad enough to encompass CCMA awards and its standard for rationality as coextensive with *Carephone's*.

Applying the *Carephone* justifiability approach, the *Shoprite Checkers* Court reviewed the evidence before the Commissioner, his reasoning and his conclusions. Responding to the company's challenge that the Commissioner's reasoning was so deficient that the award was not justifiable in relation to the reasons given for it, the Court conceded that the award could be criticized in a number of respects. However, the Court found that the award could not be characterized as irrational or unjustifiable, because the Commissioner's conclusions were supported by some evidence in the record.¹¹² In reaching this conclusion the Court thoroughly reviewed the company's arguments and independently evaluated the evidence to determine whether the Commissioner's conclusions were reasonably supported on any view of the evidence.

CONCLUSION

Where arbitration substitutes for the Labour Court as enforcer of important statutory rights such as those contained in the LRA, the Court has a responsibility for the outcome of an enforcement proceeding that would arguably not exist in private arbitration.¹¹³ For this reason, the quest to convince judges to take a completely disinterested approach to reviewing the merits of arbitration awards in such cases seems appropriately futile.

Whether the standard is "justifiability," "gross irregularity," or "rationality," its purpose is to preserve the socially useful attributes of arbitration while retaining a substantive role for the Labour Court in cases where the LRA creates a public obligation. Judge Zondo speaking for the Labour Appeal Court in *Shoprite Checkers* put the matter as follows:

In my view it is within the contemplation of the dispute resolution system prescribed by the Act that there will be arbitration awards which are unsatisfactory in many respects but which nevertheless must be allowed to stand because they are not so unsatisfactory as to fall foul of the applicable grounds of review. Without such contemplation, the Act's objective of the expeditious resolution of disputes would have no hope of being achieved.¹¹⁴

Under any of these standards the question should be whether the Commissioner reached a reasoned conclusion based on a consideration of

¹¹² *Id.* ¶¶ 84-100.

¹¹³ As Judge Waglay suggests in *Cox* the special relationship between private arbitration and CCMA conducted arbitration reduces the importance of the distinction between private and public arbitration in dismissal cases. *See Cox*, 22 I.L.J. 137 (LC).

¹¹⁴ *See Shoprite Checkers*, (2001) 9 BLLR 1011 (LAC).

relevant legal and evidentiary materials.¹¹⁵ If the answer is yes, the process has worked as intended with a high probability that the public interest will be well served. An erroneous outcome alone should not be a reason for setting aside the award. Under this approach the South African system for resolving dismissal disputes under its core labor legislation will gain greater legitimacy in the eyes of its users and observers, while serving the country's overarching goal of achieving a more peaceful society.

¹¹⁵ See STEPHEN BURTON, *JUDGING IN GOOD FAITH* (1992).

