

**IN THE LABOUR COURT OF SOUTH AFRICA**

**CASE NO J2032/99**

In the matter between:

**TRANSVAAL SUGAR LIMITED**

Applicant

and

**I M SHONGWE NO**

First Respondent

**SOUTH AFRICAN FOOD & ALLIED  
WORKERS UNION**

Second Respondent

**S M MABUNDA**

Third Respondent

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**JUDGMENT**

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**JAMMY AJ**

1. In the well-known and frequently cited case of -  
**Carephone (Pty) Ltd v Marcus NO and others (1998) 19 ILJ 425 (LAC)**  
the Labour Appeal Court enunciated what it referred to as the Constitutional Imperatives for Compulsory Arbitration under the Labour Relations Act 1995 ("the Act"). They were, as there stated, that the process must be fair and equitable, that the Arbitrator must be impartial and unbiased, that the proceedings must be lawful and procedurally fair, that the reasons for the award must be given publicly and in writing, that the award must be justifiable in terms of those reasons and that it must be consistent with the fundamental right to fair labour practices.
2. At page 1435 of the judgment, **Froneman DJP** said this:  
**"In determining whether administrative action is justifiable in terms of the reasons given for it, value judgments will have to be made which**

**will, almost inevitably, involve the consideration of the 'merits' of the matter in some way or another. As long as the Judge determining the issue is aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order."**

3. That determination will depend, the Court declared, on whether -  
"**..... there is 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.**"
4. In seeking, in this application, an order reviewing and setting aside the award of the First Respondent in his arbitration, in terms of the Labour Relations Act 1995, of a dispute between the Applicant on the one hand and the Second and Third Respondents on the other, it is the Applicant's submission, broadly stated, that the imperatives defined and the test enunciated by the Labour Appeal Court in **Carephone** and followed in a succeeding line of cases, have not in various material respects been satisfied and that the award in question is irregular and defective in that it is not justifiable in terms of the reasons furnished for it. The First Respondent in that context, it is contended, misconducted himself in relation to his duties as Arbitrator and committed a gross irregularity in his conduct of the arbitration proceedings, as contemplated by s145 of the Act.
5. The facts of the matter, briefly stated, are the following:
  - 5.1 The Third Respondent had been employed by the Applicant since May 1974 and at the time of his dismissal held the position of Manpower Assistant on one of the sugar farms owned by the Applicant in its business operations as a sugar grower, miller and refiner.
  - 5.2 On 30 June 1998, at the commencement of a period of leave for which he had

applied, a security sergeant in the employ of the Applicant observed the Third Respondent and another person loading a gas bottle onto a bakkie in circumstances which he considered suspicious. The vehicle was stopped and searched and the gas bottle was found on its load bed covered with grass.

5.3 According to the evidence of the security sergeant, one Mathebula, the gas bottle in question was ordinarily the property of the Applicant and the Third Respondent, in answer to a question as to how it came to be in his possession, gave two conflicting answers. The first was that he had bought it - he could not however produce a receipt when asked to do so. The second, which followed, was that he had permission to remove it and take it to his home as it had been issued to him by the Applicant as part of his "ration." In that regard, he could not produce written or other evidence of such permission.

5.4 According to Mathebula the Third Respondent then requested him not to report the matter to his superiors, in consideration for which he would "look after him" in the future.

5.5 The matter was nevertheless duly and properly reported and, in a disciplinary enquiry held on 13 August 1998, he was charged with unlawful possession of company property and an attempt to remove it. The record of that hearing forms part of the Applicant's bundle in this application and of material relevance in that regard is the recordal that the Third Respondent, in answer to the charge put to him, "pleaded guilty." This notwithstanding, the enquiry chairman determined that evidence should be presented in order to enable him to evaluate that plea, the relevant circumstances and the "gravity of the misconduct."

5.6 The Third Respondent did not dispute his possession of the gas bottle at the time that he was confronted by the security officer. He informed him, he said, that the bottle was his and when asked if he had permission to remove it, replied that he was taking it home and that they could find out whether he was entitled to do so. Questioned in that regard, he reiterated that he had

permission to remove the bottle, that it had been given to him by the previous Estate Manager, certain Mr Ten Cate, who had since retired, and that his possession of it was accordingly lawful.

5.7 Of significance is the fact that, in the course of the enquiry, the security officer's evidence of the conflicting reasons given to him by the Third Respondent for his possession of the gas bottle was not challenged or contested either by the Third Respondent himself or by his representative. Of relevance in that regard is the fact that in the absence and apparent unavailability of the former Estate Manager, Mr Ten Cate, the chairman of the disciplinary enquiry communicated with him by telephone to ascertain the correctness or otherwise of the Third Respondent's contention that it was by him that he had been authorised, on a general basis, to remove the property in question. Mr Ten Cate denied ever having furnished such authorisation and confirmed this advice by subsequent letter to the company.

5.8 Pursuant to the enquiry, the chairman found the charge proved and, in consequence, that the trust relationship between the Third Respondent and the Applicant had been irremediably damaged. His ruling was that the Third Respondent's employment be terminated with immediate effect. The Third Respondent appealed in terms of the prevailing disciplinary procedure but, after a duly constituted appeal hearing, the findings and sanction in the disciplinary enquiry were upheld.

5.9 The matter was thereafter referred by the Second and Third Respondents to the CCMA and the dispute was arbitrated by the First Respondent on 31 March 1999. In his award, handed down on 16 April 1999, he records the grounds submitted by the Second Respondent in support of the contention that the dismissal was both procedurally and substantively unfair as being that -

**The disciplinary enquiry chairperson was involved in the investigation of the case and had access to and discussed documents with the complainant;**

**The witnesses stayed in the enquiry throughout, thus listened to**

**the evidence of others and also were part of the deliberations with the chairperson when deciding whether or not to find guilty or what sanction is appropriate;**

**The allegation against Mr Mabunda was not proved and the sanction was too harsh."**

5.10 The First Respondent then proceeded to review the evidence before him, canvassing in considerable detail the testimony of the security sergeant, the Applicant's Head of Security by whom the matter was further investigated and the current Estate Manager who gave evidence, inter alia, that the Third Respondent was well aware of the requisitioning procedures prevailing in the company.

5.11 In his review of the Third Respondent's testimony, the First Respondent makes no reference whatsoever to the conflicting explanations furnished by the Third Respondent to the security sergeant for his possession of the gas bottle in question. His only allusion to the procedural irregularities alleged by the Third Respondent in the course of his evidence, was the following:

**"He said at the end of the enquiry the disciplinary committee comprising Jakes, Nel and Lombard, stayed behind caucusing. He said when he was called back again he was told he is dismissed and was asked to sign discharge letter but he refused. He said he did appeal but Jakees De Jager with Martin Slabbert handled his appeal. He said appeal never changed the dismissal."**

The Third Respondent proceeds thereafter to record the submissions of the Second Respondent regarding alleged aspects of irregularity in the conduct of the disciplinary proceedings but nowhere makes reference to evidence submitted either in support or rejection thereof, merely recording the issue as part of the Second Respondent's allegations.

5.12 With regard to the evidence of Ten Cate, conveyed telephonically and subsequently confirmed by letter, that he at no time authorised either the Third

Respondent or any other person to remove company property as alleged by the Third Respondent, the First Respondent says this -

**"This is hearsay, which I will not accept as evidence (see s3 of the Law of Evidence Amendment Act 45 of 1988)."**

The First Respondent then continues -

**"I now turn to the fact that his current supervisor did not authorise him to go on leave with company gas cylinder, whether or not this amounted to theft or unauthorised possession. Mr Mabunda's current supervisor testified that he did not allow him to leave with gas cylinder. This Mabunda conceded. Can it therefore be said Mabunda was in unauthorised possession of company property or he attempted to steal?"**

The First Respondent then concludes that this could not be the case, citing aspects of the Third Respondent's evidence to support this, inter alia that the gas cylinder was part of his ration, that he was not leaving the company when he was found with it and that it was part of a benefit which accrued to him every three months.

5.13 The following comments then follow:

**"I think it would have been appropriate perhaps to charge him with attempting to remove company property without authorisation. I say this because by virtue of having the gas cylinders as his benefit he was in perfectly authorised possession of those as long as he correctly requisitioned them and were accordingly issued. (sic).**

**But in the unlikely event that I may be misdirecting myself to say he (Mabunda) was not in unauthorised possession of company property, the next question is: was it appropriate to dismiss him for that?"**

5.14 The First Respondent then concludes that on the evidence before him the gas cylinder in question "..... was lawfully given to him as a benefit" and that "the only wrong, if there is one at all, he was about to do was leaving with it home." (sic). Recording then that the Third Respondent "had a long service of

24 years with an unblemished record" and that he "was nearing retirement at the time", the First Respondent then concludes that - "I do not believe dismissal was an appropriate sanction ."

5.15 Finally, dealing with the allegations of procedural irregularity and reviewing those, "raised by the union", but again with no specific reference to any aspect of the evidence presented which related to that issue, the First Respondent said this -

**"Once there is a perception of bias in the matter it is really immaterial whether such perception is true or not, or whether the union or the employee could prove it."**

With no substantive reference to the rebutting testimony adduced by the Applicant in the course of the arbitration in that regard, the First Respondent concludes -

**"It was indeed an irregularity that interfered with the expected fairness that was to prevail during the processes."**

6. It is in my view unnecessary for me to traverse in any further detail the comprehensive analysis of the evidence presented both in his Heads of Argument and in his oral submissions, by the Applicant's Attorney. What emerges incontrovertibly therefrom is that the First Respondent, in reaching his conclusion and finding, paid no regard to, nor attempted at all to examine, inter alia, the material and unchallenged evidence of the conflicting explanations initially furnished by the Third Respondent for his possession of the gas cylinder in question, to the acknowledged lack of authorisation on his part to have attempted to remove it and to the unequivocal denial by Ten Cate that any such authorisation had ever been furnished by him to any person in the past. With regard to the First Respondent's assessment of that evidence as unacceptable hearsay, quite apart from the fact that an internal disciplinary enquiry is not a judicial or quasi-judicial process in which strict laws of evidence are necessarily either applicable or appropriate, it is apparent that the First Respondent made no effort, whether by way of personal enquiry or by way of procurement by subpoena, to assess its probative value before rejecting it.

The First Respondent's finding of procedural irregularity moreover, as I have indicated, is not substantiated by any analysis in the context of his award of evidence from any party relating thereto but is premised solely on what he describes as "the union's argument." It clearly cannot be said, in that context, to be justified.

7. Finally, the First Respondent, in his conclusion, is self-compromising. Although considering it unlikely, he acknowledges the possibility that he may have misdirected himself in his determination that the Third Respondent was not in unauthorised possession of company property and proceeds then to examine the question of an appropriate sanction. In that regard, he states,

**"I believe the nature of the offence is not that serious and of such gravity that his continued employment would undermine general discipline in the workplace."**

8. What then follows however, is a substantive conclusion that the gas cylinder, indisputably found in the Third Respondent's possession, "was lawfully given to him as a benefit."

9. The Labour Appeal Court, in **Carephone (supra)** and in a line of subsequent cases, is at pains to stress the difference between the concepts of appeal and review. In my opinion that analysis has no application in the present instance. Whilst a consideration of the merits of the respective cases presented by the Applicant and the Third Respondent is unavoidable in the assessment of the justifiability of the award, it is not the function of the Court, as was stressed by **Froneman DJP**, to substitute its own opinion on the correctness thereof. What must be examined is the rationality of the conclusion reached by the Arbitrator in relation to the evidential material before him.

10. In the context, as has been shown, that the First Respondent ignored or took no account of the material evidence, reflecting emphatically on the credibility of the Third Respondent, of his conflicting explanations for his possession of the cylinder, attached no evidential weight to the very material, albeit indirect,

evidence of Ten Cate on the issue of authorisation, and appears to have rejected, without comment or reason, the rebutting evidence of the Applicant's witnesses on the issues of irregularity presented by the union "in argument", the First Respondent failed to apply his mind to the evidential material before him to a degree constituting gross irregularity and which renders his award defective within the ambit of the provisions of s145 of the Act.

11. The final question for examination, in the context of this review, therefore relates to the issue of the sanction of dismissal imposed upon the Third Respondent. The comprehensive submissions relating to the consequences of dishonesty and breach of trust presented by the Applicant's Attorney, would, it seems to me, have had greater relevance had the final determination of the First Respondent been that the charges against the Third Respondent had been proved and that, in colloquial terms, he had been found guilty. That, as I have stated, was not the case. The Third Respondent, it was determined, was in lawful possession of the cylinder. The charge against him had therefore not been proved, his dismissal was consequently unfair, and he was to be reinstated. If, however, I am to understand from the Second Respondent's submission in that regard to the First Respondent, that the issue of the fairness or otherwise of the sanction of dismissal is raised in the nature of some form of alternative plea and that it was dealt with by him on an apparently hypothetical basis, then the copious authority dealing with dismissal for dishonesty has relevance. The Third Respondent was justifiably found in the disciplinary enquiry to have lied, both in the context of his conflicting explanations to the security sergeant and with regard to his alleged authorisation by Ten Cate. Whether or not his conduct constituted an isolated aberration in relation to his employment record and length of service, it is not for this Court to question the unequivocal conclusion of the Applicant, for the compelling reasons advanced by it, that its trust relationship with the Third Respondent had, by his conduct, been irretrievably damaged to a degree which rendered his continued employment untenable.

12. I find, in these circumstances, that in the respects to which I have alluded, the

conclusions reached by the First Respondent are not rationally justifiable in relation to the evidential material before him. His award does not evidence any acceptable basis, on the *conspectus* of the evidence submitted to him, to justify his interference in any respect with the findings of the disciplinary enquiry and the appeal which followed it.

- 13. I accordingly make the following order:
  - 1. The award of the First Respondent dated 31 March 1999 in CCMA Case No MP7992 is reviewed, set aside, and substituted by the following order:  
**"The dismissal of the employee, Mr M Mabunda, by the employer, Transvaal Sugar Limited, was substantively and procedurally fair."**
  - 2. The Second and Third Respondents are ordered jointly and severally to pay the Applicant's costs.

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**B M JAMMY**  
**Acting Judge of the Labour Court**

**25 August 2000**

**Date of Hearing: 17 August 2000**

**Representation:**

For the Applicant: Mr M Van Staden of Savage Jooste & Adams Inc

For the Respondent: Ms O Mamabolo of Maserumule Incorporated.