IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

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Case no: JA52/00

In the matter between

Stocks Civil Engineering (Pty) Ltd
Appellant

and

Advocate M M Rip NO **First Respondent**

M M Murray **Second Respondent**

JUDGMENT

VAN DIJKHORST AJA:

Introduction

1. This is an appeal against a judgment of the Labour Court dismissing the appellant's review application with costs. In that court the appellant sought to review the award handed down by the first respondent sitting as an arbitrator in accordance with a private arbitration agreement between the parties in a dispute relating to the second respondent's alleged dismissal by the appellant.

2. The appellant's case was that the second respondent's services were terminated by agreement. Despite the fact that the sole witness in the matter, Mr Saxby,

managing director of the appellant, who was found to be a good and reliable witness, testified to the contrary, the arbitrator found that the second respondent had been dismissed and that the onus placed on an employer by section 192(2) of the Labour Relations Act 66 of 1995 (the LRA) to prove that any dismissal was fair had not been discharged. He found that the dismissal of the second respondent was both substantively and procedurally unfair. The arbitrator declined to reinstate the second respondent but awarded him compensation in the sum of R511 573 which sum represents the remuneration the second respondent would have been paid from the day he left the appellant's employment until the arbitration was concluded.

3. **In the review application the appellant contended that the manner in which the arbitrator reached his findings on the merits and on awarding relief, rendered his award reviewable. The arbitrator, first respondent, did not oppose the review and left the matter in the hands of the Court.**

Jurisdiction

4. **The second respondent, who opposed the application on the merits, took a jurisdictional point in limine that the dispute referred to arbitration related to the fairness of the dismissal for operational reasons and accordingly is not a dispute as contemplated in the provisions of section 157(3) of the LRA.**

5. **The Labour Court rejected the second respondent's contention that it did not have jurisdiction to hear the matter, heard it, and found that the arbitrator's**

decision on both the merits and the relief awarded was not reviewable.

6. Section 157(3) of the LRA provides: " Any reference to the court in the Arbitration Act, 1965 (Act 42 0f 1965), must be interpreted as referring to the Labour Court when an arbitration is conducted under that Act in respect of any dispute that may be referred to arbitration in terms of this Act." The court of review in respect of any dispute relating to an arbitration in terms of the Arbitration Act is therefore the Labour Court when the dispute may be referred to arbitration under the Labour Relations Act of 1995.

7. In the present case the reason for the dismissal was based on the employer's operational requirements and the dispute must therefore be adjudicated in the Labour Court. But in section 141(1) of the LRA it is provided that if the parties to such a dispute prefer to have the matter arbitrated by the Commission for Conciliation, Mediation and Arbitration, the latter is obliged to arbitrate the dispute. The dispute is therefore a dispute "that may be referred to arbitration in terms of this act" within the contemplation of section 157(3) of the LRA. cf Eskom vs Hiemstra NO and others (1999) 20 ILJ 2364 (LAC) 2365 I-2367A (paras 8-14); Orange Toyota (Kimberley) v van der Walt & others 2001 (1) BLLR 85 (LC); Transnet Ltd v HOSPERSA & another 1999 20 ILJ 1293 (LC) and Shoprite Checkers (Pty) Ltd v Ramdaw NO & others 2000 7 BLLR 835 (LC) paras 64, 74. The decision of the Labour Court that it had jurisdiction to hear the review application was therefore correct. The appellant's counsel abandoned this jurisdictional objection on appeal.

Interpretation of section 194

8. **The arbitrator's decision to award compensation in the sum of R511 573 to the second respondent was based on his understanding that section 194 (2) of the LRA provides that the compensation awarded to an employee, whose dismissal is found to be substantively unfair, must not be "less than the amount specified in subsection (1)" of section 194, namely " equal to the remuneration that the employee would have been paid between the date of dismissal and the last day of the hearing of the arbitration".**

9. **It is now accepted law that when an arbitrator has to apply section 194(1), he has to exercise a judicial discretion as to whether or not to award compensation. Johnson & Johnson (Pty) Ltd vs CWIU (1998) 12 BLLR 1209 (LAC); Lorentzen vs Sanacem (Pty) Ltd (2000) 7 BLLR 763 (LAC); Mkhonto vs Ford NO and others (2000) 7 BLLR 768 (LAC); Alpha Plant and Services (Pty) Ltd vs Simmonds and others (2001) 3 BLLR 261 (LAC). Although these cases dealt with procedural unfairness, there is no reason not to apply the reasoning therein to cases of substantive unfairness and the compensation payable in respect thereof in terms of section 194(2). The reasoning in Johnson & Johnson's case (paras 38, 39, 40) is based on the provisions of section 158(1)(a)(v) of the LRA in terms of which the Labour Court "may make *any appropriate* order, including an award of compensation". It is only when the appropriate order is an award of compensation that the provisions of section 194 become operative. In the case of substantive unfairness in the dismissal the latter section requires that such amount must be just and equitable in all the circumstances [and then sets certain**

parameters]. It follows that the Court, after making its finding that the dismissal was substantively unfair, has a discretion to award compensation or not. This discretion has to be exercised judicially in the light of what is just and equitable. Only after this discretion has been exercised in favour of an award of compensation, must the Court direct its mind to the application of the provisions of section194.

Evidence

10. Is the arbitrator's decision that the second respondent had been dismissed reviewable? The second respondent elected not to give evidence. The sole witness in the case was Mr Saxby, who testified for the appellant. The arbitrator found him to be an honest and open witness who left a favourable impression. His evidence was that the appellant's company which deals with civil engineering projects such as toll roads, road construction, the building of bridges and waterworks, and township development, acquired the services of the second respondent for the expressed purpose of expanding its operations into Africa. A new division was created and the second respondent was employed to lead it. He commenced his services on 1 September 1997 at a remuneration far in excess of that of Mr Saxby himself, who was the managing director. The second respondent was regarded as one of the senior executives of the appellant and the prospects of his division were deemed to be extremely favourable.

11. It, however, transpired that the second respondent did not deliver the goods. The Stocks International Division was fast losing money. This aspect became a

concern with the board of directors and had been enjoying attention since May 1998. At the 24 July 1998 board of directors meeting it was pertinently discussed that the issue now had to be dealt with and that matters could not continue on this basis. Mr Saxby stated that he believed the Stocks International Division should be closed down and that the second respondent should leave. He arranged a meeting with the second respondent on 29 July 1998 with the specific intention to discuss this view with him. The discussion was amicable and the second respondent agreed that the division was making a loss and should be closed down. Mr Saxby then requested the second respondent to come back with a proposal of what he believed to be due to him. A second meeting took place on 31 July 1998. At this time the discussion centered around the paying out to the second respondent of whatever he was entitled to. The latter proposed payments set out on exhibit B14, a document headed "Termination Benefits". The negotiations appeared to break down as Mr Saxby was happy with the figures presented to him save that he required repayment of a R250 000 commencement loan which had been advanced to the second respondent. This would wipe out the benefits the second respondent claimed he was entitled to. The second respondent's attitude was that this was not a loan but a joining bonus which was not repayable. This was the sole bone of contention. No agreement was reached between the parties as to what was due to the second respondent upon termination of his employment.

Appellant's contentions

12. **The Labour Court correctly found that the arbitrator never considered whether**

or not the second respondent should receive no compensation at all. The appellant's complaint is that it is equally clear that the arbitrator never considered whether it would be " just and equitable in all the circumstances" to award compensation "less than the amount specified in subsection (1)". It is further argued that in terms of the arbitration agreement the arbitrator in determining the dispute was given "powers equivalent to that of a judge in the Labour Court". In the event that he found the dismissal unfair, he was accordingly enjoined to apply sections 193 and 194 of the LRA. It is submitted that the arbitrator in awarding compensation never exercised the powers he was enjoined to exercise and that he therefore in awarding the sum mentioned to the second respondent acted outside his powers. Therefore, so it is contended, his decision amounts to a reviewable irregularity within the contemplation of section 33(1)(b) of the Arbitration Act 42 of 1965 and should be set aside. It is further submitted that the manner in which the arbitrator decided to award compensation to the second respondent amounts to a latent gross irregularity in the proceedings. (cf Goldfields Investment Ltd vs City Council of Johannesburg 1938 TPD 551 at 560-561). The arbitrator's misunderstanding of the provisions of section 194 (2) resulted in him "misconceiving the nature of the enquiry, or of (his) duties in connection therewith." For this submission further reference is made to Paper, Printing, Wood and Allied Workers Union vs Pienaar NO 1993 (4) SA 621 (A) at 638G-J and Toyota SA Motors (Pty) Ltd vs Radebe (2000) 21 ILJ 340 (LAC) at 351F-352A, 354E-355H. It is further submitted that had the arbitrator acted properly within his terms of reference he would have exercised his discretion against awarding the compensation. He should have taken into account factors such as the fact that the second respondent joined the appellant

less than a year before the termination of his services; that he had found alternative employment soon after the termination of his services; that he had refused to repay the R250 000 commencement loan/joining bonus he had received from the appellant; that he was offered payment of his full contractual notice period despite the fact that he was not required to work; that the appellant had not attempted to comply with the requirements of section 189 of the Act because it in good faith held the view that the services of the second respondent had been terminated by consent; that the second respondent did nothing to alert the appellant to the fact that he would later contend that the appellant ought to have followed the procedures in section 189; and that as head of the international division the second respondent was at least partially responsible for the fact that it was closed down. This was the argument.

Criticism of arbitrator's approach

13. Against this background the arbitrator comes to the following conclusion. " I cannot accordingly find that a consensual agreement to terminate the employment relationship was ever brokered or reached between the parties. It was argued on behalf of the second respondent that the applicant in accepting that he should leave, had in fact agreed to leave, and the fact that the financial remuneration could later not be resolved, does not detract from this alleged agreement. I find this concept very difficult to accept in that clearly the applicant would not agree to terminate his employment unless he was satisfied with the remunerative benefits that would go with such termination. The two are inseparable and it is improbable that the applicant agreed to the one without

consensus on the other. Section 192 (2) of the act places an onus on the employer to prove that any dismissal is fair. In this regard the respondent has not discharged this onus."

14. This finding by the arbitrator flies in the face of the evidence which is that there was an agreement that the second respondent would leave, that he in fact left and that he was paid out three months salary in lieu of notice.

15. In my view the reasoning of the arbitrator set out above is suspect. The conclusion that the second respondent would not have agreed to terminate his employment unless he was satisfied with the remunerative benefits that would go with such termination, is wrong in view of the fact that there was no disagreement about the termination benefits and the sole dissent was about the commencement loan/bonus. It appears that the arbitrator did not consider that there was an onus on the second respondent to prove that he had been dismissed (section 192(1)) before there rested an onus on the appellant in terms of section 192 (2) of the LRA to prove that such dismissal was fair.

16. Counsel for the respondent sought support for the finding that the respondent had been dismissed in what she argued were concessions under cross-examination by Mr Saxby that there was no agreement. Read in their proper context they do not support that submission. They relate to the absence of agreement on the monetary dispute, not to the consensus on respondent's departure. It is significant that the arbitrator does not rely on these alleged concessions for his finding, which he would inevitably have done had he thought that they meant

what counsel contends. In fact counsel's cross-examination was at variance with a letter written by her client on 5 August 1998 to Mr Saxby in which he stated: "In our talks ... we ... agreed the following: 1 Due to Stocks Civil Engineering's (SCE) intention to reduce its commitments and activities cross-border, the International Division's activities would be discontinued. Therefore my contract with SCE would be rescinded on 31st July 1998." The remainder of this long letter deals with winding up arrangements and emoluments payable. The arbitrator did not refer to this letter.

Procedural unfairness

17. **The arbitrator found that the dismissal was both procedurally and "substantially" (sic) unfair. If there was a dismissal it was for operational reasons and the prescripts of section 189 had not been followed. But was it necessarily for that reason procedurally unfair? A "mechanical checklist approach" was frowned upon in Johnson & Johnson's case (para 29) and it was stated that the proper approach is to ascertain whether the purpose of the section, namely the occurrence of a joint consensus-seeking process, has been achieved. Section 189 requires consultation. That happened in the present case. The section requires that consensus must be sought on appropriate measures to avoid dismissals, change the timing and mitigate the adverse effects. There was consensus. It was that the second respondent would leave immediately but receive three months remuneration. The section requires that consensus be sought on severance pay. The second respondent produced his proposals thereon in exhibit B14 and they were acceptable to the appellant. The section requires that the employer must**

disclose all relevant information. In this case the employee had the best information at his disposal. He was the head of the division concerned. He never asked for additional information. It was accepted by both parties that he could not be accommodated elsewhere in the group. He never raised this possibility. He left and took up employment elsewhere. In these circumstances the purpose of section 189 was achieved. It would be highly technical and wrong to hold that the section has not been materially complied with. In my view the arbitrator wrongly concluded that the procedure had been unfair.

Substantive unfairness

18. Was the dismissal substantively unfair? The international division was running at a loss. There was consensus that it should be closed down. The second respondent accepted that he had no further role to play in the appellant's operations. He did not suggest that he be elsewhere employed within the appellant's organization. In fact at his remuneration, far in excess of that of the managing director, that would have been impossible. He accepted the situation and sought and immediately obtained other employment. In these circumstances I find it difficult to accept that the dismissal, if such it was, was substantively unfair. The finding of the arbitrator that the closing of the Stocks International Division was simply a method of "losing" the second respondent has no factual basis.

No reinstatement

19. The arbitrator found that this was not a matter where reinstatement is the correct option. I agree.

Arbitrator's calculation

20. The arbitrator thereupon determined the value of the monthly remuneration of the second respondent at R69 556.00, quoted section 194 of the LRA, stated that it dealt with the limits on compensation, found that section 194 (2) is applicable in view of his finding that the employee's dismissal was both substantively and procedurally unfair, and found that he accordingly had to make an award equal to at least that set out in section 194 (1) and not more than the equivalent of 12 months remuneration. He added that such an award, however, must be just and equitable in all the circumstances.

21. The arbitrator had regard to the fact that Mr Saxby as well as the second respondent were prepared to accept the amounts set out in exhibit B14 as a fair and reasonable termination benefit. This came to R229 866,52. He also had regard to the fact that the second respondent was re-employed although he had no details of his employment or remuneration level. In the light of the fact that the second respondent had not placed any evidence before him, he found that it would be just and equitable in these circumstances to make an award of compensation "at the minimum statutory compensation required and that is compensation equal to the remuneration that the employee would have been paid between the date of dismissal and the last day of the hearing of the arbitration." Accordingly an award was made of compensation at the monthly remuneration

of R69 556,00 from 1 August 1998 to 11 March 1999 (being the date on which the arbitration ended). This constituted seven months and eleven days. The fact that of this period three months remuneration had already been agreed upon, played no role. No award of costs was made .

22. It is clear from the above that the approach and award of the arbitrator are open to serious criticism in a number of respects, namely his approach and finding on the dismissal issue, his findings of procedural and substantive unfairness, his failure to consider and apply the principles set out in Johnson & Johnson's case and his consequent voluntary limitation of his discretion.

Review principles

23. The question which arises is whether, if these aberrations are reviewable, the Arbitration Act or the principles applicable in reviews under the LRA should govern the proceedings. One line of thought is that as section 33(1) of the Arbitration Act and section 145 of the LRA are virtually the same, this Court and the Labour Court should apply the same norm under both, viz that of rational justifiability laid down in Carephone (Pty) Ltd v Marcus NO & others (1998) 19 ILJ 1625 (LAC) [Now since this matter was heard redefined by this Court as rationality in Shoprite Checkers (Pty) Ltd v Ramdaw NO and Others 2001 4 SA 1038 (LAC) para 25]. This approach is to be found in Transnet v HOSPERSA (1999) 20 ILJ 1293 (LC) para 15; NUM v Brand NO & another 1999 8 BLLR 849 (LC) para 14 and Orange Toyota (Kimberley) v van der Walt & others 2001 1 BLLR 85 (LC). The other line of thought is that whatever the test may be for

matters falling under the LRA regime, private arbitrations are to be reviewed (also in the Labour Court) in terms of the norms laid down in section 33(1) of the Arbitration Act. The latter view was expressed in Eskom v Hiemstra NO & others (1999) 20 ILJ 2362 (LC) and Seardel Group Trading (Pty) Ltd t/a Bouwit Group v Andrews NO & others 2000 10 BLLR 1219 (LC).

24. In my view the latter is the correct approach. Private arbitrations are subject to the Arbitration Act, 1965. Section 40 provides for an exception where an Act of parliament expressly or by implication excludes its operation. An example is section 145 of the LRA. There is no such exception in the case of private arbitrations. Considerations of expediency based upon the fact that the arbitration provisions of the LRA coincide with those in the Arbitration Act and that it would be preferable for Labour Courts to apply one test throughout, cannot override the clear provisions of the Arbitration Act. I do not share the view of Molahledi AJ in the Orange Toyota case supra para 13 that the Arbitration Act is to be read subject to the constitution and that therefore the test for review of the CCMA arbitration awards set out in the Carephone judgment would equally apply to reviews in terms of section 33 of the Arbitration Act. The important difference between the two types of arbitration is that CCMA arbitrations were held to be by an organ of state to which the constitutional precepts for just administrative action applied, whereas private arbitrations are not. This arbitration therefore has to be evaluated against the norms laid down in section 33(1) of the Arbitration Act as if this were a High Court doing likewise.

25. As this arbitration is reviewable under section 33 of the Arbitration Act I will not

concern myself with the controversy over Carephone's case raised by obiter remarks in Toyota SA Motors (Pty) Ltd v Radebe & others 2000 3 BLLR 243 (LAC) para 42 It must be remarked however, that in the latter case the Court obiter advocated the fair trial test (para 42) on the basis of the Goldfields Investment case which is discussed below.

26. In Toyota SA Motors (Pty) Ltd v Radebe & Others para 31 it was stated that the review under sec 158(1)(g) of the LRA is the "full form of review previously referred to as common-law review. The review mentioned in s 145 was based on the Arbitration Act 42 of 1965, and is of a more limited nature." No particulars are given. Nicholson JA referred to the case of Goldfields Investment, stated that it had been followed in a long line of cases - the latest being Paper, Printing, Wood & Allied Workers Union v Pienaar NO & Others 1993 4 SA 631 (A) 638G and concluded "on the authority of the abovementioned judgments the latent gross irregularity had to be such that it prevents a fair trial of the issues."

27. When the case law is used to illustrate principles of general application it should be remembered that the dicta must be read against the background of the wording of the relevant statute. In the locus classicus on reviews Johannesburg Consolidated Investment Company v Johannesburg Town Council 1903 TS 111 the Court classified reviews according to the procedure applicable. The first class, which was instituted by summons, was the review of the proceedings of inferior courts. This was governed by the provisions of the Administration of Justice Proclamation 14 of 1902 (Transvaal). Section 19 set out the grounds,

which can be summarized as: incompetency of the Court in respect of the cause or in respect of the Judge himself; malice or corruption on the part of the Judge; gross irregularity in the proceedings; the admission of illegal or incompetent evidence or the rejection of legal and competent evidence. The second class which rested on "somewhat wider" grounds, was that instituted by motion in respect of the review of public bodies. This type of review was not based on the said proclamation, but on the High Court's inherent power to review the proceedings of such bodies based on the common law. (Under this mode the review of domestic tribunals was later accommodated). The third type of review was that which arose in particular instances where it was statutorily created and was "much wider" than the powers which the Court had under the other two. This was the popular sense of the word review. The majority of the Court held that a Valuation Court was not an inferior court of law and that therefore the first type of review was not applicable but the second (common law) type was. It is however clear that the Court meant that the power to review and its extent was embedded in the particular enactment which granted it and should be found there.

28. The common-law review powers were clarified in Hira and another v Booysen and another 1992 4 SA 69 (A). The Appellate Division there grappled with the question when the bona fide misinterpretation of a statute by an official sitting as chairman of a statutory disciplinary enquiry into conduct of teachers will be reviewable. Corbett CJ after stating that the "common law review" was the mode applicable, set out the relevant principles. I extract therefrom succinctly what is relevant to the present case (which is not about a statutory tribunal). Non-performance or wrong performance of a statutory duty or power is reviewable.

Where that duty or power is essentially a decision-making one (as opposed to a judicial one) the grounds for review are limited. These are set out in Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another 1988 3 SA 132 (A) 152A-E. Where the complaint is that the tribunal committed an error of law, the reviewability of the decision will depend upon whether exclusive authority was granted to the tribunal to decide the question of law. Where the tribunal exercises powers or functions of a purely juridical nature, it is improbable that it has been granted exclusive jurisdiction to decide all questions, including the meaning of statutory criteria to be applied and the scope of its powers. If the decision cannot be arrived at should the correct criterion be applied, it may justifiably be concluded (in the context of an error of law) that the tribunal 'asked itself the wrong question' or 'applied the wrong test' or 'based its decision on some matter not prescribed for its decision' or 'failed to apply its mind to the relevant issues in accordance with the behests of the statute'. Such decision is reviewable.

29. The above was said in the context of the exercise of a statutory duty. It was applied by this Court in Kaefer Insulation (Pty) Ltd v President of the Industrial Court & Others 1998 3 BLLR 230 (LAC) 239 in the review of an interlocutory order by the Industrial Court which had misinterpreted the principles applicable to rescission of judgments.

30. The Labour Court has no inherent common law powers of review. Its powers are to be found within the confines of its enabling act. In the case of reviews of awards of commissioners of the CCMA it is section 145 of the LRA, in the review

of functions, acts and omissions under the LRA section 158(1)(g) of that Act, and in the case of private arbitrations section 33(1) of the Arbitration Act.

31. It is clear that common law review powers are not granted by section 33(1). Neither are the "wide powers" of review in the popular sense of a total rehearing of the merits. But it does not follow that for this reason the first, so-called "narrow" review is the option. The scope of this review is to be determined from section 33(1) itself, bearing in mind that terms used in the statute may historically have acquired a special jurisprudential meaning.

32. Wallis AJ in Shoprite Checkers (Pty) Ltd v Randaw NO & Others (2000) 21 ILJ 1232 (LC) dealt with the test on review. The learned judge in criticizing the judgment of this Court in Carephone (Pty) Ltd v Marcus NO & others (1998) 19 ILJ 1425 (LAC) and the rational justifiability test for review there laid down, expressed the view (para 61) that arbitrations under the LRA and those under section 33 of the Arbitration Act 42 of 1965 should be treated alike, that the grounds for review should be limited to those applicable under the latter Act, and that the intention appears to have been that of the three types of review identified by Innes CJ in the Johannesburg Consolidated Investment Company case it was a review of the first type that was intended in section 145 of the LRA; and not even the common law review of which the scope has been broadened by cases like Johannesburg Stock Exchange & another v Witwatesrand Nigel Ltd & another 1988 3 SA 132 (A) 152A-E; Jacobs & 'n ander v Waks ea 1992 1 SA 521 (A) and Hira & another v Booysen & another 1992 4 SA 69 (A).

33. I respectfully differ from this view. I have demonstrated above that the Johannesburg Consolidated Investment Company case limited the first type of review to that of the decisions of lower courts and dealt with the Valuation Court's review under the second category. It would be wrong, in my view, to attempt first to categorize and then on the strength thereof to curtail the powers of the reviewing Court. The starting point and finishing line must be the relevant enactment, properly interpreted. In this case section 33(1) of the Arbitration Act. cf Amalgamated Clothing & Textile Workers Union v Veldspun Ltd 1994 1 SA 162 (A)169

34. **I respectfully differ from Landman J who in Eskom v Hiemstra NO *supra* paras 20, 23 bases the Court's review powers on a lack of impartiality and independence on the part of the arbitrator. The true basis is the absence of a fair trial because the arbitrator did not function as (impliedly) agreed. Impartiality and a lack of independence are merely some of the possible manifestations of dysfunction. This will be dealt with later. The statement that "the arbitrator is the judge of the law for purposes of the arbitration and a fortiori the arbitrator cannot do wrong" (para 27) is too wide. He may not lay down the law. He is to apply it. He may not redefine his function. The arbitration agreement defines it. Baldwin v Bateman 1908 TS 54, 56; Clark v African Guarantee and Indemnity Co Ltd 1915 CPD 68, 76. He may not curtail his functions within or expand them outside the parameters of the arbitration agreement.**

35. Section 33(1) sets out four grounds of review: (i) Misconduct by the arbitrator in relation to his duties as arbitrator: (ii) Where the arbitrator has committed a

gross irregularity in the conduct of the arbitration proceedings; (iii) Where the arbitrator has exceeded his powers; and (iv) Where the award has been improperly obtained.

36. **It will be noted that these grounds are not synonymous to those considered as grounds under the first type of review mentioned in the Johannesburg Consolidated Investment case, the *locus classicus* on reviews. Far from it.**

Misconduct

37. Counsel for the respondent emphasized that we are not at liberty to interfere with the arbitrator's factual findings on the dismissal, however wrong they may be, and that there is no appeal against his finding of procedural and substantive unfairness even though it is in conflict with the evidence. Such approach, which amounts to a mechanical refusal to act, would in my view be incorrect. I will through a review of the relevant case law (which is not unanimous) seek to establish that in certain respects errors of law and fact are reviewable in private arbitrations.

38. Before the question can be answered whether there was misconduct by the arbitrator in relation to his duties it has first to be established what those duties were. His function is normally a judicial one. As stated in Hira's case, it is improbable that in such a case he has the exclusive power to the exclusion of the courts to determine what the law is. A moment's reflection leads to the conclusion that, in the absence of clear indications to the contrary, an arbitration

agreement by implication prescribes that the arbitrator is to apply the law of the land and that he has to act reasonably (which includes rationally). The words of Kotze J in Lazarus v Goldberg and another 1920 CPD 154, 157 are apposite: "According to the practice of the Roman-Dutch law, a submission to arbitration (Verblyf) was always subject to the conditio tacita that the arbitration should proceed according to law and justice. Although our modern practice has somewhat departed from that of the Roman-Dutch law in regard to the procedure for setting aside an award, the above principle...still exists at the present day." Support for the view that there is an implied term in every arbitration agreement that the law will be upheld by the arbitrator and that his award may be tested with the reasonableness test is to be found in the judgment of Jansen JA in Theron v Ring van Wellington N G Sendingkerk in SA 1976 2 SA 1 (A) 22B-23C and the Roman-Dutch and English law referred to by the learned Judge. Further support is to be found in the Arbitration Act itself. In section 20 it provides the mechanism (presumably because many arbitrators have no legal learning) for obtaining a binding opinion on the law from the court or from counsel.

39. The starting point should be the approach of the Appellate Division in Dickenson & Brown v Fisher's Executors 1915 AD 166, 174-5 namely that the parties have voluntarily entered upon the arbitration process and selected their own judge to resolve the dispute, and that it is therefore appropriate that they be bound by his decision. In this case the Appellate Division considered misconduct in terms of section 18 of the Natal Arbitration Act of 1898 which provided:"Where an arbitrator or umpire has misconducted himself ... the Court may set the appointment or award aside." It was contended that there was an error on the

face of the award as the umpire had placed a wrong construction on the deed of partnership. In this context the Court held that a bona fide mistake of law or fact could not be characterized as misconduct and that unlike English law a mistake of law was not reviewable. The Court declined to define misconduct "for it is a word which explains itself". Some wrongful or improper conduct was required.

40. In Donner v Ehrlich 1928 WLD 159, 160 Solomon J stated:"As I read Dickenson and Brown v Fisher's Executors 1915 AD 160 the misconduct which entitles a Court to set aside the award of an arbitrator must amount to dishonesty." In my view this is an unwarranted contraction of the meaning set out in Dickenson's case, which was "some wrongful or improper conduct" (176).

41. In Allied Mineral Development Corporation v Gemsbok Vlei Kwartsiet 1968 1 SA 7 (C) 12, 17 the Court left the question open whether an arbitrator who had failed to notice that an agreement was invalid (and therefore committed an error of law) was guilty of misconduct.

42. RPM Konstruksie (Edms) Bpk v Robinson en 'n ander 1979 3 SA 632 (C) was a case in which it was sought to set aside an award, but the grounds upon which this was based are not ascertainable from the judgment. Fagan J did remark (635H), obiter it seems, that in interpreting an award it could not be assumed that an arbitrator knows and applies the principles of our law. No authority is given for this bald statement. The learned Judge did however refer to Dickenson's case for his statement that the parties are bound by the findings of the arbitrator even though he errs in law or fact (636A). In my respectful view

this statement is too wide.

43. **In Benjamin v Sobac SA Building & Construction (Pty) Ltd 1989 4 SA 940 (C) 940, 971 Selikowitz J pointed out that Solomon JA in the Dickenson case when discussing the ground of misconduct and stating that an element of wrongfulness or impropriety was required, was dealing with "personal misconduct", but that misconduct in relation to the proceedings did not require an element of personal turpitude and could be a bona fide error in the procedure denying a party a fair trial. See also Naidoo v Estate Mahomed and others 1951 1 SA 915 (NPD) 9 In Steeledale Cladding (Pty) Ltd v Parsons NO and another 2001 2 SA 663 (DCLD) Levinsohn J after stating (668D) that section 33(1) codifies the existing law, and referring to Dickenson's case, quoted with approval from the judgment of Selikowitz J in Benjamin's case (971A-D) on this point.**

44. **In Kolber and another v Sourcecom Solutions (Pty) Ltd and others 2001 2 SA 1097 (C) 1107 it was held that gross carelessness or gross error does not constitute misconduct under sec33(1)(a) unless there is moral turpitude or mala fides.**

45. **In Amalgamated Clothing & Textile Workers Union v Veldspun Ltd 1994 1 SA 162 (A) 169 Goldstone JA stated:"It is only in those cases which fall within the provisions of s 33(1) of the Arbitration Act that a Court is empowered to interfere. If an arbitrator exceeds his powers by making a determination outside the terms of the submission, that would be a case falling under s33(1)(b). As to misconduct, it is clear that the word does not extend to bona fide mistakes the**

arbitrator may make whether as to fact or law. It is only where a mistake is so gross or manifest that it would be evidence of misconduct or partiality that a court might be moved to vacate an award." The distinction between personal misconduct and misconduct in the proceedings drawn by Selikowitz J in Benjamin's case was not referred to. It probably did not arise because the complaint was that the arbitrator made an award that would constitute an unfair labour practice , be contrary to public policy and / or require the employer to commit a criminal offence. The complaint was therefore about the outcome, not the method. The Veldspun case is unusual as the parties had "referred to the arbitrator the very question as to his jurisdiction"and were held to be bound by his ruling thereon.

46. In Monticello (Pty) Ltd v Edgerton 1982 1 SA 762 (ZSC) the Zimbabwe Supreme Court held that "misconduct of proceedings" in section 12 of the Zimbabwe Arbitration Act included a wrong application of the legal principles relating to costs.

47. In Clark v African Guarantee and Indemnity Co Ltd 1915 CPD 68 78 the question was left open whether the English law that the Court will not enforce an award where a mistake of law is apparent on the face of it, was applicable. The Court stated that before an award could be set aside on the ground of a lack of evidence to support it, such absence must establish " a total want of that judicial capacity which is required even of an ordinary fair-minded layman appointed to adjudicate by the parties to a dispute."

48. **In Hyperchemicals International (Pty) Ltd and Another v Maybaker Agrichem (Pty) Ltd and Another 1992 1 SA 89 (WLD) Preiss J was called upon to decide whether "misconduct" as used in section 33(1)(a) included the so-called legal misconduct known to English law. He quoted Mustill and Boyd's Commercial Arbitration:"Although from the point of view of logic the word misconduct is entirely appropriate to describe the conduct of proceedings otherwise than in the way required by law, the choice of language has proved to be unfortunate, especially since the 1889 Act referred only to the arbitrator having misconducted himself. Arbitrators...were understandingly resentful of the implication that the work which they have carried out in good faith involved personal misconduct. The Courts have been sensitive to this resentment and have constantly taken pains to point out to arbitrators that allegations of misconduct do not necessarily mean what they appear to say... There has been a tendency to invent a category of technical misconduct which is contrasted with misconduct of a more personal nature."**

After referring to Dickenson's, Donner's and Clark's cases which were pre-1965 and RPM Konstruksie's case (which merely followed them) the learned Judge held that the phrase in the 1965 Act was substantially the same as in the old Natal Act of 1898 and concluded that "legal misconduct" was not a ground for review. "Mistake, no matter how gross, is not misconduct; at most, gross mistake may provide evidence of misconduct in the sense that it may be so gross or manifest that it could not have been made without misconduct on the part of the arbitrator" The meaning of the total phrase "misconduct in relation to his duties" was not dealt with, nor the question whether the addition of the words "in relation to his duties" might not evidence an intention on the part of the

legislator to include the concept of legal misconduct as in England and as the Appeal Court invited the legislator to do should it deem it fit. (Dickenson's case 181)

49. In Bester v Easigas (Pty) Ltd and Another 1993 1 SA 30 (C) 35, 36 Brand AJ (with King J) followed the Hyperchemicals judgment, stating that the differences between the 1989 and 1965 Acts were not material. The view of Selikowitz J in Benjamin's case was overruled. The meaning of misconduct was not limited to dishonesty (as had been done in Donner's case) but said to be moral turpitude or mala fides. However, in Badenhorst-Schnettler v Nel en 'n ander 2001 3 SA 631 (C) Cleaver J, without reference to Bester v Easigas supra (which autority was binding upon him) or to the Hyperchemicals judgment followed the approach of Selikowitz J in Benjamin's case.

50. A failure by the arbitrator to exercise the duties he has taken upon himself will be dereliction of duties and thus misconduct. This was the view of Basson J in Seardel's case para 79 supported by a quotation from Halsbury's Laws of England vol 2 p 402 that where an arbitrator fails to comply with the terms, express or implied, of the arbitration agreement, that will amount to misconduct. No South African authority was referred to. In that case the failure to apply Labour Appeal Court precedents which the arbitrator was obliged to do in terms of a collective agreement, was held to be misconduct, alternatively exceeding of powers (paras 78, 80).

51. What can then be concluded on the meaning of misconduct by an arbitrator in

relation to his duties? The judgments evidence tension between the requirements of speed and finality in arbitration (and therefore a minimum of interference by the Courts) and the requirement of fairness (which is a public policy consideration and also the supposition upon which the arbitrator's appointment is based). When one analyses the grounds set out in section 33(1) it is clear that the first three relate to the manner in which the arbitrator functioned, not to the outcome of the arbitration. The fourth ground, i.e. where the award has been improperly obtained, is also a ground which relates to function. Where for example, false evidence is adduced or a bribe is taken, it detrimentally affects the arbitrator's judicial functioning. It is also clear that the grounds overlap. The taking of a bribe is misconduct and renders the award improperly obtained. Where the arbitrator seriously shirks his duties it can be classified as misconduct or a gross irregularity in the proceedings. These are some examples. It is not an "either or" situation.

52. **In my view the following principles emerge: A court is entitled on review to determine whether an arbitrator in fact functioned as arbitrator in the way that he upon his appointment impliedly undertook to do, namely by acting honestly, duly considering all the evidence before him and having due regard to the applicable legal principles. If he does this, but reaches the wrong conclusion, so be it. But if he does not and shirks his task, he does not function as an arbitrator and reneges on the agreement under which he was appointed. His award will then be tainted and reviewable. It is equally implicit in the agreement under which an arbitrator is appointed that he is fully cognizant with the extent of and limits to any discretion or powers he may have. If he is**

not and such ignorance impacts upon his award, he has not functioned properly and his award will be reviewable. An error of law or fact may be evidence of the above in given circumstances, but may in others merely be part of the incorrect reasoning leading to an incorrect result. In short, material malfunctioning is reviewable, a wrong result *per se* not (unless it evidences malfunctioning). If the malfunctioning is in relation to his duties, that would be misconduct by the arbitrator as it would be a breach of the implied terms of his appointment.

Gross irregularity

53. In Goldfields Investments Ltd v City Council of Johannesburg & another 1938 TPD 551,560 (a case according to Corbett CJ in Hira's case 87A dealing with the first and narrowest species of review, not common law review) Schreiner J distinguished between gross irregularities that are patent – and occur during the course of the trial – and those that are latent – that occur in the mind of the judicial officer . These are only ascertainable from the reasons given by him. In neither case need there be intentional arbitrariness of conduct or any conscious denial of justice. The crucial question is whether the irregularity prevented a fair trial of the issues. A wrong conclusion on law or fact does not necessarily lead to a conclusion that there has not been a fair trial. But if a mistake of law leads to a material misconception of the nature of the inquiry or of the court's duties in connection therewith, then the losing party has not had a fair trial.

54. The concept of irregularity in the proceedings was dealt with by the Full Court

in Ellis v Morgan and Dessai 1909 TS 576, 581 which remarked that "..an irregularity in the proceedings does not mean an incorrect judgment; it refers not to the result but to the methods of a trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined." Mala fides is therefore not a prerequisite and the bottom line is: has there been a fair trial? See also Paper, Printing, Wood and Allied Workers Union v Pienaar NO 1993 4 SA 621 (A) 638H. In this case Botha JA expressed doubts whether the approach to errors of law in the context of common law reviews as summarized in Hira's case, can be accommodated under section 24(1) (c) of the Supreme Court Act 59 of 1959 which grants the power of review in the case of gross irregularity in the proceedings (639D). In so far as errors of law relate to the functions of an arbitrator, I do not share the doubts. Such errors, if material, amount to a gross irregularity in the sense this phrase has acquired.

55. The meaning of the phrase "gross irregularity" has therefore been widened to include latent thought processes in the mind of the arbitrator which adversely impact upon the fairness of the proceedings. It must be accepted that the legislature was aware of this when the Arbitration Act was passed.

56. It would appear that in the absence of a ground of misconduct in the Supreme Court legislation in the sense set out above the Courts extended the meaning of gross irregularity in the proceedings to include latent errors of law which impacted upon the arbitrator's function. In my view those facts slot better into the niche of misconduct.

57. **In Tuesday Industries (Pty) Ltd v Condor Industries (Pty) Ltd and another 1978 4 SA 379 (T) 383 it was held that a court will not interfere with a discretion exercised by an arbitrator if it is based on some evidence merely because the finding is erroneous or unreasonable. Interference would be justified if there is no evidence to support the finding and there has been a gross irregularity or a failure of natural justice.**

58. **In Wittstock t/a J D Distributors v De Villiers 1999 3 SA 866 (ECD) 873D Erasmus J stated: "It seems to me that, in the absence of fraud or dishonesty on the part of the arbitrator or patent error or absurdity in his interpretation of his mandate, the parties are bound by his identification of the subject matter of the dispute."**

59. **Mia v D J L Properties (Waltloo) (Pty) Ltd and another 2000 4 SA 220 (T) 230 applied the definition of gross irregularity of the Goldfields Investments judgment.**

60. **In respect of the meaning of gross irregularity in the conduct of the proceedings there is clarity. It includes both patent irregularities and latent ones. The latter include an incorrect grasp by the arbitrator of his jurisdiction and powers. To an extent this may overlap with exceeding his powers which would be a manifestation of the former.**

Exceeding of powers

61. **This ground for review is clear. In Seardel's case Basson J regarded the non-exercise of a power when there was an obligation to do so as an instance hereof. This can, however, be better accomodated under either misconduct or gross irregularity in its extended sense.**

Conclusion

62. **In our case the arbitrator had the powers and duties of a Labour Court judge. Those duties include the duty to apply the law, not create his own. He had to find it, not make it.**

63. **In the present case it is not necessary to determine whether the arbitrator's functioning was defective in respect of his incorrect finding on the dismissal and the procedural and substantive unfairness issues. I therefore leave open the question whether his conclusions thereon evidence misconduct in relation to his duties and / or gross irregularity in the proceedings. He acted dysfunctionally in respect of his approach to the question of compensation by disregarding the principles expounded in the Johnson & Johnson case, thereby materially limiting his discretion. His award is therefore tainted and reviewable. It must be set aside.**

64. **Should we refer the matter back to the arbitrator or impose our own "award"? All the relevant facts are before us. However, the discretion is that of the arbitrator. On appeal we have in terms of section 33 the power to set aside the**

award, which would include setting aside a part of the award. If requested, we may submit the dispute to a new tribunal. No such request was made. In this case the outcome is obvious. On the facts set out above in paragraphs 10, 11 and 18 read with the benefits agreed as payable and set out in exhibit B14, any discretionary award of compensation must be nil. These agreed benefits were not in dispute and thus not referred to the arbitrator. They were not included in the award and need not be dealt with in our order. It would serve no purpose to refer the matter back to this arbitrator or to another one.

65. I propose the following order:

1 The appeal is upheld with costs.

2 The order of the Labour Court is set aside and the following order is substituted therefor: "The award of the arbitrator is set aside with costs. No order is made in respect of the costs of the arbitration."

Van Dijkhorst AJA

For appellant: Adv J G van der Riet S C
instructed by Edward Nathan & Friedland (Pty) Ltd
Johannesburg
For second respondent: Adv M E D Moyses
instructed by Ehlers Inc
Pretoria
Date of hearing: 7 June 2001
Date of judgment: 1 February 2002

CASE NO:

JA52/00

In the matter between

STOCK CIVIL ENGINEERING (PTY)LTD **Appellant**

And

ADVOCATE MM RIP N.O **First Respondent**

M M MURRAY **Second Respondent**

JUDGEMENT

ZONDO JP

Introduction

[1] I have had the benefit of reading the judgement prepared by my Colleague Van Dijkhorst AJA in this matter. I agree with the order proposed by him. However, I prefer to confine my reasons to those I give below.

[2] It is not necessary to set out the facts of this matter in this judgement in any great detail as they have been adequately set out in Van Dijkhorst AJA's judgement. It will suffice to state only those facts that are necessary for a proper understanding of this judgement.

Brief facts

[3] The second respondent had been employed by the appellant. The contract of employment between the parties was terminated. The respondent sought to bring an unfair dismissal claim against the appellant. The appellant took the

attitude that the termination of the contract of employment occurred pursuant to an agreement between the parties that it be terminated.

[4] The appellant and the second respondent then concluded an arbitration agreement providing for the dispute between them relating to the termination of employment of the second respondent to be arbitrated privately. The first respondent was appointed to arbitrate that dispute. The terms of reference and the powers of the arbitrator were set out in clause 2(1) of the arbitration agreement. Clause 2(1) read thus:-

"Powers of the arbitrator and terms of reference

2.1 The arbitrator shall in relation to the applicant's alleged unfair dismissal claim, have powers equivalent to that (sic) of a Judge in the Labour Court. In addition the rules of the Labour Court will be applicable;"

The arbitration and the review

[5] The first respondent arbitrated the dispute. One of the issues he had to decide was an issue that had been raised by the appellant to the effect that there had been no dismissal in the sense of a unilateral dismissal of the second respondent by the appellant but that the two parties had agreed that the contract of employment be terminated. The second respondent's stance on this was that there had been a dismissal in the sense of a unilateral decision by the appellant

to dismiss him and that there had been no mutual agreement that his contract of employment be terminated. The first respondent decided that there had been no mutual agreement to terminate the second respondent's contract of employment. His arbitration award was to the effect that the dismissal had been both procedurally and substantively unfair. He awarded the second respondent compensation amounting to R 511 573,00. The appellant then brought an application in the Labour Court to review and set aside the award. One of the points taken by the second respondent was that the Labour Court had no jurisdiction to deal with such matter. The Labour Court dismissed this point and proceeded to deal with the balance of issues. The Labour Court dismissed the application with costs. With the leave of that court, the matter now comes before this Court on appeal.

The appeal

[6] On appeal the second respondent pursued the point that the Labour Court had lacked jurisdiction. In his judgement Van Dijkhorst AJA has dealt with this point. For the reasons given by Van Dijkhorst AJA, I agree with him that the point cannot be upheld.

[7] The ground on which the appellant relied to have the first respondent's award set aside is that, in making the award that

he made, the first respondent exceeded his powers within the contemplation of sec 33(1)(b) of the Arbitration Act, 1965 (Act no: 42 of 1965) (**“the Arbitration Act”)**. The appellant’s attack was directed first and foremost at the first respondent’s decision that the appellant and the second respondent did not reach agreement that the second respondent’s contract of employment be terminated. The appellant contended that the first respondent’s decision in this regard fell to be reviewed and set aside. If this contention by the appellant is upheld, the need to deal with the appellant’s attack on the first respondent’s decision to award the second respondent compensation will fall away.

[8] As the arbitration in this matter was a private arbitration as opposed to a compulsory arbitration provided for under the Labour Relations Act, 1995 (Act 66 of 1995) (**“ the Act”**), the provisions of sec 145 would ordinarily not be applicable with the result that the award would fall outside the ambit of the decision of this Court in **Carephone (Pty) Ltd v Marcus NO & Others (1998) 19 ILJ 1425 (LAC)**. However, in this matter the appellant contends that the terms of reference which were agreed to between the parties in the arbitration agreement incorporated the notion that the first respondent’s award had to be justifiable or rational failing which it would be

susceptible to being reviewed and set aside.

[9] In par 6.4. of the founding affidavit the appellant provided what, in its contention, the terms of reference agreed upon between the parties in this matter mean. Par 6.4. reads thus:-

> " As appears from annexure RS3, the first respondent's terms of reference enjoined him to decide the matter in the same way that a Labour Court judge would be obliged to decide the matter. I am advised that this means that he would not act in accordance with his terms of reference if he did not decide the matter on the evidence before him and in accordance with the applicable legal rules and principles. I am further advised **that the first respondent's terms of reference incorporate the notion that his decision must have a rational objective basis justifying the conclusions reached by him on the issues in dispute between the parties, on the evidence properly before him and in accordance with the applicable legal principles".** (My emphasis).

[10] The second respondent's answer to par 6.4 is to be found in par 6.8 of his answering affidavit. After admitting that the terms of reference agreed to between the parties were contained in annexure **"RS3"** to the founding affidavit, the second respondent denied the remaining allegations in par 6.4 but stated that, in any event, these were matters for legal

argument. In argument before us, Counsel for the second respondent submitted that the only grounds on which the award in this case could be set aside were those contained in sec 33(1) of the Arbitration Act. He submitted that the ground of justifiability was not one of those grounds.

[11] In Carephone this Court held that, when a commissioner of the Commission for Conciliation, Mediation and Arbitration(CCMA), makes an arbitration award in terms of the Act, his award must have **“ a rational objective basis justifying the connection made by the [commissioner] between the material properly available to him and the conclusion he or she eventually arrived at.” [(1998) 19 ILJ 1425 (LAC) at 1435E - F]**. One cannot help but notice the striking similarities between this statement by this Court in Carephone and the last sentence in par 6.4 of the founding affidavit.

[12] This Court continued in Carephone and held that, if a commissioner made an award that is not justifiable or that does not have a rational objective basis justifying the connection made by the commissioner between the material properly available to him and the conclusion he or she arrived at, he would be exceeding his powers as contemplated by sec

145(2)(a)(iii) of the Act. Sec 145(2)(a)(iii) of the Act gives the exceeding of his powers by a commissioner of the CCMA as a ground upon which his award can be reviewed and set aside. In sec 33(1)(b) of the Arbitration Act it is also provided that an arbitration award of an arbitration tribunal may be set aside inter alia on the ground that the arbitration tribunal exceeded its powers. In **Pharmaceutical Manufacturers of SA in re Ex Parte President of the RSA 2000 (2) SA 674 (C C) par 85** the Constitutional Court held that anybody exercising public power is required by the Constitution to exercise it rationally and that if, in the exercise of such power, he or she makes a decision that is irrational, such decision can be reviewed and set aside by a court of competent jurisdiction.

[13] In **Shoprite Checkers (Pty) Ltd v Ramdaw N.O and Others (2001) 22 ILJ 1603 (LAC) at 1613E-1614I** this Court had cause to examine the relationship between justifiability as a requirement for the validity of a decision or action taken under sec 33 of the Constitution as interpreted by this Court in Carephone and rationality as a requirement for the validity of a decision or action taken in the exercise of public power as interpreted by the Constitutional Court in the Pharmaceutical Manufacturers's case. After an analysis of the two decisions, this Court concluded in Shoprite Checkers at

par 25 at 1614 that, although they did not, strictly speaking, bear the same meaning, the two terms, namely, justifiability and rationality, bore a **"sufficiently similar meaning to justify the conclusion that rationality can be said to be accommodated within the concept justifiability as used in Carephone."** The Court continued in the next sentence: **"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".**

Did the terms of reference in this matter incorporate the requirement of justifiability or rationality for the award?

[14] A question that may arise in this matter is whether a judge - including a judge of the Labour Court - exercises public power when he or she decides disputes that come before him or her. If he or she exercises public power in deciding such disputes, then, quite clearly, he or she is obliged to give a decision that is rational or justifiable. A judge of the Labour Court is appointed in terms of s 174(6) of the Constitution read with s 154(1) of the Act. A discussion of the appointment of judges of the Labour Court, the status and powers of the Labour Court, all of which may be relevant to the

determination of such question, is to be found in the judgement of this Court in **Langeveldt v Vryburg Transitional Local Council and Others 2001 (6) BCLR 554 (LAC) at 557 I - 562F**. In terms of sec 154(6) of the Act a person who is appointed as a judge of the Labour Court who is not already a judge of a High Court is required, before he or she can perform his or her functions, to take an oath or make a solemn affirmation in the prescribed form before the Judge President of the Labour Court. In terms of the prescribed oath a judge of the Labour Court swears that he will **"uphold and protect the Constitution of the Republic and the fundamental rights therein and in so doing administer justice to all without fear, favour or prejudice in accordance with the Constitution and the law of the Republic".**

[15] In my judgement it is not necessary to decide whether or not a judge exercises public power when he or she decides cases that come before him or her. This is so because whatever label one can give to the power that a judge exercises when he or she decides cases that come before him or her, it is implicit in that kind of power that the judge's decision must be rational or justifiable. Bearing in mind that the Constitution requires decisions made by public officials

and certain functionaries to be rational, there can be no basis for any proposition that a decision made by a judge is not required to be rational. In the light of this I am of the view that, when the appellant and the second respondent in their arbitration agreement vested the first respondent with **“ the powers equivalent to that of a judge in the Labour Court”** and said that **“ the rules of the Labour Court will be applicable**”, they bound the first respondent, as their arbitrator, to give a rational decision. Accordingly, if the first respondent has given a decision that is irrational or unjustifiable, he has exceeded his powers within the meaning of that phrase as used by this Court in Carephone. This would accord with the ground relied upon by the appellant in the founding affidavit. His decision would then fall to be reviewed and set aside in such a case.

Is the appellant’s award justifiable?

[16] The first respondent was called upon to decide, among other issues, the question of whether or not there had been a dismissal of the second respondent by the appellant. This issue arose because the appellant and the second respondent had different versions about how they parted ways. The appellant’s version was that the two parties had reached agreement that the second respondent’s contract of employment be terminated and what they had failed to reach agreement on was whether the second respondent was entitled to keep a certain amount of R250 000,00. The appellant’s version was that the amount had

been a loan and the second respondent was obliged to repay it. The second respondent's version was that the amount had been a bonus and he was not required to repay it. On the issue of the termination of the contract of employment, the second respondent's stance in the pleadings was that the appellant had dismissed him - in the sense that it was the appellant's own unilateral decision to terminate the contract of employment. He maintained in the pleadings that there had been no agreement on his part that his contract be terminated.

[17] In the arbitration before the first respondent the appellant's Mr Saxby gave evidence supporting the appellant's version as set out in the preceding paragraph. He testified that the only issue the parties could not reach agreement on was the amount of R250 000,00.The second respondent did not give any evidence to rebut the appellant's version in any respect nor did he call any witness to testify on his behalf.

[18] The first respondent rejected the appellant's version that the two parties had reached agreement that the second respondent's contract of employment be terminated. He gave two reasons for rejecting the appellant's version. The first was that he found it **"very difficult to accept in that clearly the [second respondent] would not agree to terminate his employment unless he was satisfied with the remunerative benefits that would go with such termination"**. He stated that the two issues were **" inseparable and it is improbable that the [second respondent] agreed to the one without consensus on the other".** The second reason given by the first respondent was that sec 192(2) of the Act **"places an onus on the employer to prove that any dismissal is fair"**. The first

respondent then said in the next sentence: **“In this respect the [appellant] has not discharged this onus”**.

[19] Let me deal with the first reason first. The first respondent said that it was improbable that the second respondent had agreed that his contract of employment be terminated prior to agreement being reached on what he would be paid because the two issues were, in his view, inseparable. This on its own is not improbable. The second respondent could have easily agreed to the termination of his contract of employment first prior to the parties agreeing on the payment to be made to him. This could happen if he did not anticipate any difficulty with the parties reaching agreement on the other issue.

[20] It could also happen, if he thought there was another way for him to secure payment if there was no agreement between the parties. He could also easily deal with these two issues separately if his position was that he also did not want to remain in the appellant’s employment if the appellant felt that he should leave. Of course, there can be no doubt that a shrewd negotiator would take the attitude that he would not agree to the termination of his contract of employment before there was an agreement on what he would be paid. But not everybody is a shrewd negotiator. There was, in my view, no basis whatsoever for the first respondent to have thought that the second respondent could not have agreed to the termination of his contract prior to the parties agreeing on what he was going to be paid. Quite often an employer and an employee reach agreement that the employee will work for the employer

without the two of them first agreeing on the employee's salary and the employee proceeds to commence his duties. This would normally happen when both parties genuinely hope to soon reach agreement on the salary.

[21] In this regard it is as well to bear in mind that the evidence that was given by Mr Saxby about how the parties commenced their employment relationship in this matter reveals that the second respondent and the appellant reached agreement that the second respondent commence his duties before they had completed their negotiations on certain aspects. The fact that the parties had not as yet reached agreement on certain issues did not detract from the fact that the two had nevertheless reached agreement that the second respondent would work for the appellant. The reason why the second respondent agreed to commence duties despite the fact that agreement had not yet been reached on certain issues must have been that he was hopeful that agreement would be reached in due course on the outstanding issues. It follows, in my view, that the reason advanced by the first respondent for rejecting Mr Saxby's version is fatally flawed.

[22] The second reason, namely, that the appellant had failed to discharge the onus resting upon it in terms of sec 192(2) of the Act to prove that the dismissal was fair is no reason at all for the rejection of the appellant's version that the second respondent and the appellant had reached agreement that the second respondent's contract of employment be terminated. In fact the reliance by the first respondent on the appellant's onus to prove that the dismissal was fair demonstrates that, in referring to the appellant's version that the termination of the second respondent's contract of employment was terminated by mutual agreement, the first respondent was considering the merits of the dismissal dispute. Otherwise his reliance on the onus to prove the fairness of the dismissal makes no sense. The first respondent had first to consider the question whether the second respondent had discharged the onus to prove the existence of the dismissal before he could consider the question whether the appellant had discharged the onus to prove that the dismissal was fair.

[23] The appellant's contention that the second respondent's contract of employment was terminated by mutual agreement

raised two separate issues. The one was whether or not the second respondent had been dismissed in the sense that the appellant acted unilaterally in dismissing him. This was like a point in limine because, if there was no dismissal in this sense, that would be the end of the matter as there would be no dismissal whose fairness could be inquired into. The other went to the merits in the sense that, if it was found that the termination had been by mutual agreement, it could not be said that there was any unfairness.

[24] Despite the fact that the appellant's contention went to both a preliminary issue as well as the merits of the dispute, the first respondent had to bear in mind that there were important but different provisions relating to onus that were relevant to each one of the two issues. These are that, in relation to the question whether there had a dismissal in the sense of a unilateral dismissal of the second respondent by the appellant, the second respondent bore the onus of proof in terms of s192(1) and that, if the second respondent discharged this onus and proved that a dismissal had taken place, then in relation to whether or not the dismissal was fair, the appellant bore the onus to prove that in terms of sec 192(2). S192(2) reads: **" If the existence of the dismissal is established, the employer must prove that the dismissal is fair"**. It is clear from this provision that the employer's onus does not arise until the employee has discharged his own onus to prove the existence of the dismissal.

[25] The first respondent was obliged to first deal with the question whether there had been a dismissal and with that he had to consider the onus that the second respondent bore to prove the existence of a dismissal.If he found that there had been no dismissal, that would have been the end of the matter. Only if he found that there had been a dismissal, could he then proceed to consider whether such dismissal had been unfair. It is only in considering the latter question that he could consider the onus that the appellant would have borne of proving that such dismissal had been fair. In considering the question of whether the existence of a dismissal had been proved, the first respondent had to take into account that:-

n) the second respondent had not given any evidence or called any witness to rebut Mr Saxby's evidence;

o) Mr Saxby was, on the first respondent's own finding, an honest witness who made a good impression on him;

p) the onus to prove the existence of the dismissal rested on the second respondent and not the appellant;

q) in the second respondent's letter dated the 5th August 1998 addressed to Mr Saxby there were statements which seemed to corroborate the appellant's version because they were to the effect that the two had agreed that the second

respondent's contract of employment be **"rescinded with effect from the 31st July 1998"** and to the effect that the two parties had agreed to negotiate an amicable settlement between the appellant and the second respondent; the statements to this effect appear in the first three paragraphs of the letter; the relevant portion of the letter reads:-

" Dear Richard

1. In our talks on Wednesday, 29th July and Friday, 31st July we discussed and agreed the following:

Due to Stocks Civil Engineering's (SCE) intention to reduce its commitments and activities cross - border, the International Division's activities would be discontinued. Therefore my contract with SCE would be rescinded on 31st July 1998.

2. **We agreed to negotiate an amicable settlement between SCE and myself.**

3. Due to my short period of employment you agreed to give me a **reference justifying the circumstances of my early leaving. I explained that I intended to stay in South Africa until at least December 1998 because of commitments with my children's schooling and university and you agreed to pay the contractual 3 month's notice".(** My emphasis**)**.

[26] The first respondent did not refer to anyone of these important factors in considering the question of whether to accept the appellant's version. These factors were not only relevant but fundamental in the consideration of the question whether there had been a dismissal in the sense that the appellant had terminated the second respondent's contract of employment unilaterally.

[27] The first respondent could not reject the appellant's version that there had been no dismissal without these issues being taken into account and still expect that it could be said that there had been a fair trial of issues. In my view the first respondent's failure to take them into account and the fact that instead the first respondent relied on the employer's onus to prove the fairness of the dismissal before it was established that there had been a dismissal shows beyond any doubt that the

first respondent did not consider the question whether a dismissal had been proved. If he did consider it, he disregarded matters that were so vital to that issue that the inference is inescapable that he had no proper appreciation of the legal implications arising out of that issue with the result that it cannot, in my view, be said that there had been a fair trial of issues. This constituted a gross irregularity. In any event the first respondent had no power to proceed to consider the merits of the matter before he could deal with the question of whether the existence of a dismissal had been proved. To this extent I agree that he exceeded his powers.

[28] I am also satisfied that the first respondent's decision to reject the appellant's version is irrational, without any basis and is wholly unjustifiable if regard is had to the following:-

a) the first respondent rejected the appellant's version despite the fact that he said that he found Mr Saxby an honest witness who made a good impression on him; the first respondent did not even attempt to reconcile these two apparently conflicting findings;

b) the first respondent failed to explain why, having found that Mr Saxby was an honest witness, he nevertheless would not accept his version that the termination was by mutual agreement;

c) the second respondent did not testify or call any witness in order to rebut Mr Saxby's evidence;

d) the first respondent did not take into account

the fact that the second respondent bore the onus to prove the existence of the alleged dismissal; the first respondent failed to do this despite the fact that in the last sentence of the first page of his award, he had noted that the parties had not reached agreement on issues of onus and had promised to deal with onus where relevant; in this case he must have regarded onus as irrelevant and yet it was highly relevant and could well have been decisive;

e) The first respondent did not take into account the fact that the second respondent's letter of the 5th August 1998 addressed to Mr Saxby contained statements which seemed to corroborate Mr Saxby's version that the termination was by mutual agreement;

f) the fact that one of the reasons given by the first respondent for rejecting the appellant's version was flawed and that the only other reason advanced by the first respondent for his finding was completely irrelevant to the issue of whether there had been a dismissal; this left

his finding completely without foundation.

[29] In these circumstances the first respondent's award cannot stand and falls to be set aside.

RMM Zondo

Judge President

I agree.

RG Comrie
Acting Judge of Appeal

Appearance:

For the Appellant:	Adv. J.G Van der Riet SC
Instructed by:	Edward Nathan & Friedland
For the First Respondent:	No appearance
For the Second Respondent:	Adv. M.E.D. Moyses
Instructed by:	Ehlers Attorneys
Date of judgement:	1 February 2002