REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA

DURBAN AND COAST LOCAL DIVISION

CASE NO.D409/99

In the matter between:

SHOPRITE CHECKERS (PTY) LIMITED **APPLICANT**

and

A RAMDAW (in his capacity as Commissioner for the CCMA) **FIRST RESPONDENT**

MAVIS ZIQUBU **SECOND RESPONDENT**

SOUTH AFRICAN COMMERCIAL CATERING AND ALLIED WORKERS UNION **THIRD RESPONDENT**

J U D G M E N T

WALLIS A.J.

On the 9th June 1998 Cynthia Lourens, an employee of the Applicant, presented six items which she wished to purchase to the Second Respondent, Ms Mavis Ziqubu, a part-time cashier employed at the Applicant's Newcastle store. One of these items was an electrical extension cord priced at R20,00. Ms Ziqubu rang it up on her till, which was manually operated, at R2,00. The other items were correctly rung up and Ms Lourens paid the resulting total of R31,79.

When Ms Lourens left work that afternoon she presented her parcel for inspection by the Applicant's security guard. As it happens the guard in question was new and meticulous in the performance of his duties which apparently is not always the case. He examined the goods, checked their prices against the till slip and discovered the discrepancy. This he drew to the attention of the appropriate senior members of staff.

The result of this was that the Applicant convened a disciplinary enquiry into the conduct of Ms Ziqubu. The charge put to her was expressed as follows:

"Gross misconduct in that on the 9/6/98 you operated till no. 28 and rang up R2,00 for an extension cord costing R20,00 which resulted in the company having a loss of R18,00."

Ms Ziqubu was found guilty on this charge and dismissed.

That dismissal was challenged in arbitration proceedings before a commissioner appointed for that purpose by the CCMA. The arbitration was held on the 2nd March 1999 and an award was handed down on the 12th March 1999. It was in favour of Ms Ziqubu and ordered her reinstatement. In these proceedings the employer seeks to review and set aside that award.

The approach of the commissioner to the case emerges from that portion of the award in which he analyses the evidence and arguments of the parties. This reads as follows:

"ANALYSIS OF EVIDENCE AND ARGUEMENTS (sic)

The employer had to show on a balance of probabilities that the employee acted fraudulently and in cohorts (sic) with Cynthia Lourens to defraud the company of R18-00. I am not satisfied that the employer party discharged this burden of proof sufficiently and I have found the dismissal to be substantively unfair for the following reasons:

There was no clear evidence to indicate that Cynthia Lourens and the employee planned that Cynthia would make her purchases at the employees till and that the employee will under till her purchases. It was coincidental that Cynthia used the employees till as the employer party did not dispute that Cynthia was in another queue when the supervisor announced that staff could use the employees till after 16:00.

Why a purchase of R31-00 and an under-tilling of R18-00. Why not a trolley load of groceries if there was a plan to defraud the employer.

R2-00 instead of R20-00 can be a honest mistake. The employee omitted to punch one 0.

The employee was distracted and could have acted carelessly in not checking whether she punched the right buttons before finalizing the payment.

The employer partys tills do not have modern scanners, bar codes or computer checks. This explains the large stock losses.

The employer party is not consistent in the application of its disciplinary code and has given final warnings for similar offences.

The employer party appear to be too quick to charge an employee. The employee, Monica who was treated harshly received a final warning for undertilling R10-00 when the till was defective. Secondly charging Cynthia Lourens and dismissing her even after finding that there was no conclusive proof of any collusion or admission thereof also appears to be harsh.

The employee has a clean disciplinary record with 4-5 years service. She is still working part time earning R146-16 per week. She is married and the bread winner of her family of 3 children.

She was negligent and this does not suggest intent to defraud. Discipline has to be progressive with dismissal being the last resort.
A proper enquiry was held and the employee kept to her version from the outset that she had made a mistake and was sorry for the same."

Although at the outset of this passage the commissioner suggests that there was an obligation on the employer to prove that Ms Ziqubu's conduct was fraudulent only five of the nine points made by him relate to this question. The other four deal with the appropriateness of the disciplinary sanction. This he found to be inappropriate in the light of the employer's past treatment of similar offences. It appears therefore that the commissioner's approach was not restricted to making a choice between fraud and negligence and having found only the latter to reinstate Ms. Ziqubu. A fair reading of the award is that he rejected the employer's contention that the under-tilling was deliberate; accepted that negligent under-tilling was nonetheless misconduct within the terms of the charge which Ms Ziqubu had faced at the disciplinary enquiry, but regarded dismissal as an excessive sanction for that misconduct.

This understanding of the approach by the arbitrator is important because one of the submissions advanced before me by Mrs. Annandale on behalf of the Applicant was that the commissioner had overlooked that the misconduct with which Ms Ziqubu had been charged was not in its terms dependant on fraud being proven against her. This was so despite the Applicant having contended that the circumstances indicated that she had perpetrated a fraud. Accordingly, so the submission went, the commissioner had failed to address his mind to the fact that even on the version of Ms Ziqubu she had committed misconduct of a serious nature warranting her dismissal in the light of the importance which the Applicant attaches to compliance with proper and careful procedures in the operation of tills.

On my reading of the award I do not think that this submission can be sustained. So to hold would inevitably mean that the commissioner had seriously misdirected himself in addressing the first issue, namely whether the under-tilling was deliberate or negligent, by having regard to the factors mentioned in points 6 to 9 of his award when those factors are clearly irrelevant to that question. Bearing in mind that commissioners are only required to give brief reasons for their awards (s138(7)(a) of the Labour Relations Act 66 of 1995 - the LRA) one must I think adopt a benevolent rather than a strict approach to the

construction of those reasons. It is inappropriate to stigmatise a commissioner for having misdirected himself or herself or failing to address an issue when a fair construction of the award suggests otherwise as in the present case.

I turn then to consider the commissioner's approach to the question whether the under-tilling was deliberate and therefore fraudulent or negligent. This is the first issue as it was never suggested that in the event of the under-tilling being fraudulent any sanction other than dismissal would have been appropriate.

On this aspect of the case the commissioner had the benefit of the evidence of Ms Ramlakan the cash office supervisor. She has eighteen years of experience and testified to the procedures to be followed by a cashier. Although the transcript of her evidence is riddled with breaks in the recording the following emerges from it. A cashier must first identify the department from which the article comes and then the price of the article. She then rings up the price and must check on the till screen that she has done so correctly. Then a process called registering takes place in which a code is entered which identifies the department from which the item comes. The cashier is expected to make a rough mental tally of the total value of all items rung up and to check this against the total reflected on the till. When no packer is available the cashier packs the goods once her operation of the till is finished.

The first point made by the commissioner was that according to Ms Ziqubu, Cynthia Lourens was not initially in the queue to use her till but was re-directed there by a supervisor. From this he reasoned that there could not have been collusion between the two of them. There are two problems with this approach. Firstly, it accepts without reservation the evidence of Ms Ziqubu in this regard even though the first time she mentioned this was at the arbitration and then only in response to questions posed by the commissioner. The record on this aspect is replete with omissions so that it is impossible to tell whether those questions were leading questions although this is possible. Leaving that aside, however, an explanation produced at this late stage should always be scrutinised with care. That is particularly the case where the new evidence is by its very nature incapable of being tested at an arbitration taking place six months after the event occurred. There needed to be a consideration of the general probabilities in regard to Ms Ziqubu's testimony as a whole but there is no indication that the commissioner did this.

The other problem with this reasoning is that it only eliminates the possibility of one form of collusion and not all possibilities as seems to have been the view of the commissioner. The form which is eliminated is a plan worked out in advance that Ms Lourens would produce the extension cord at the till operated by Ms Ziqubu who would then ring up a lower price for this item. However, other possibilities for collusion remain. The evidence of Mr. Acker was that shrinkage at this store in 1998 caused losses amounting to

R753 000,00 of which the largest percentage was "in-house", that is, theft in various forms by members of staff. The possibility of on-going collusion between staff members to take, in the words of the landlord's song from Les Miserables, "here a little slice, there a little cut" should not have been overlooked. A quick exchange of words between Cynthia Lourens and Ms Ziqubu at the till was also a possibility which could readily have gone unobserved by a supervisor late on a busy afternoon. Depending on the fertility of one's imagination other possibilities consistent with collusion can be conceived.

This is not to say that the approach of the commissioner was necessarily wrong. The possibility he fastened upon was clearly one which existed in the overall situation. It is manifest however that he regarded it as the only possibility and one to which he attached particular importance in the determination of the case. It is the first item he mentions in his reasons and if one peruses the record of the hearing it appears that not only did he initially extract this information from Ms Ziqubu but at the end of her cross-examination he returned to the topic and explored it in greater detail. It seems to have made a great impression upon him.

The next point made by the commissioner by way of the rhetorical questions : "Why a purchase of R31-00 and an under-tilling of R18-00? Why not a trolley load of groceries if there was a plan to defraud the employer?" is simply absurd. The obvious answer is that fraud relating to a trolley load of groceries would probably be observed by a supervisor at the till and would certainly be detected by any security guard, however indolent, other than a dishonest one. The possibility of evading detection by way of repeated small frauds is much higher than in the case of the theft of a trolley load of groceries.

As to the third and fourth points no-one disputed the possibility of a mistake being made in punching numbers on the till. The question though was whether this was a mistake. Here the commissioner does not appear to have weighed the probabilities and given appropriate consideration to the evidence of Ms Ramlakan. For example it was not simply a case of Ms Ziqubu omitting to punch one of three zeros as the commissioner apparently thought because, as her representative mentioned in argument, the till has a double zero which would be used to ring up cents. It is therefore the nought in twenty rand which was omitted. The ordinary sequence of numbers which should have been pressed would have been two, zero, double zero. To omit the zero in those circumstances is odd and it would be even odder if, as is commonplace, this till had required her to press a further key for the intervening decimal.
The commissioner attributed the error to Ms Ziqubu being distracted. His summary of the evidence on this point is as follows:

"She was distracted by a customer who was rude and rowdy. This customer complained of losing some of her belongings in the store and at that time she was tilling Cynthia Lourens' items."

It appears that the commissioner accepted this evidence as truthful and that it formed the basis for his finding that the employee was distracted. There are, however, problems with it which are not addressed in the award. It is true that at the arbitration Ms Ziqubu said that when she was dealing with Cynthia Lourens another customer came and complained about a parcel that was lost. She said this customer started an argument. That is all that she volunteered and even then it went further than she had gone at the disciplinary hearing. The rudeness and rowdiness is a product solely of the intervention by the commissioner in the form of blatantly leading questions. Thus it was he who asked :"Was this woman shouting at you?" and elicited an affirmative answer. Later he took it further in a preamble to one question where the record reads:

"Listen now. You.....(inaudible).....the woman was screaming there. She must have distracted you and so forth, right. You punched in R2,00".

However one reads this passage it is unsatisfactory. If one supplements the omission by inserting the word "said" it is an inaccurate reflection of the prior evidence because all that Ms Ziqubu had done was to agree with the proposition put by the commissioner himself. If one inserts "were dealing with Cynthia and" the statement is simply a figment of the commissioner's imagination, which is then reflected in the award as representing the evidence.

Commissioners conducting arbitrations must be very careful to refrain from asking leading questions, that is, questions which unfairly suggest the answer to the witness. Evidence procured by these means on controversial matters is virtually worthless. If this information had been elicited by means of the question: "How was this customer behaving?" or "What did this customer do when she approached you?" it would have been helpful as a fair indication of Ms Ziqubu's evidence. That is so with any evidence obtained by asking questions in accordance with the classic form, that is, questions commencing with who, when, where, what, why and how. As it is this evidence is more indicative of a predisposition by the commissioner in favour of Ms Ziqubu than of anything else. Its weakness and lack of value is compounded by the commissioner's failure to enquire from the employer's representative whether any such incident had in fact been observed by or reported to one of its supervisors on the day in question.

What is also problematic about the commissioner's approach to Ms Ziqubu being distracted is that it is difficult to reconcile with the general probabilities. She rang up six items for Cynthia Lourens. The extension cord was the first of these. Although the price was incorrectly entered it was correctly registered as a non-food item. There was no suggestion that Ms Ziqubu misread the price and in any event a price of R2,00 for an extension cord should immediately have rung a warning bell in her mind as being far too low

for such an item. The other five items were all correctly entered and correctly registered. That suggests that any distraction was of such short duration that it started and finished with the extension cord. That is a highly improbably scenario.

One possible explanation - although not tendered in evidence - might have been that the distraction occurred whilst the price of the extension cord was being rung up and that Ms Ziqubu broke off to deal with the customer before returning to her task of ringing up the other items. However, that would not assist her in making a case of carelessness. It would merely compound the case that she was grossly derelict in performing her duties by leaving unanswered the question of why, once the distraction was past, she did not check back on the only item she had rung up before it occurred in order to make sure that she had done it correctly.

That brings me to the biggest problem in this regard which is what happened - or more accurately did not happen - when Ms Ziqubu pressed the key on the till in order to ring up the total amount of R31,79. This was R18,00 short - a considerable amount in a bill of just under R50,00. What is more, apart from the extension cord which was R20,00, two other items had been priced at R10,00 each. Those three alone amounted to R40,00. How in those circumstances could Ms Ziqubu ever have thought that she had performed her task correctly when R31,79 appeared on the screen? I note that she does not suggest that she has any difficulty in performing the simple task of mental arithmetic involved in keeping a running total of items as she is required to do.

In considering that question it would have been appropriate for the commissioner to consider Ms Ziqubu's version of events as put to the disciplinary enquiry. There she is recorded as saying the following:

"The mistake is that I rang R2,00 instead of R18,00. It was not my aim by then I agree that I did a mistake and there was a long queue and I had a customer that came to ask for her parcel and I had no packer. It was not my aim to under-ring the item by me. Maybe I was confused so I did it."

and a little later the following exchange passed between her and her representative:

"Representative: By the time you rang the items for Cynthia were you concentrating?
Ms Ziqubu: I would say I was but because that customer came she confused me."

When being questioned by Mr. Acker the following exchange occurred:

"Neil Acker (NA): When you are ringing up an article how do you check the price.
Mavis Ziqubu (MZ): When you ring you check on the till screen.
NA: So you have just stated that you were confused by a customer.

MZ: It was then these people came that I lost my concentration.
NA: If you think you've (rung the) wrong price up you should call the till controller.
MZ: Yes its true I never noticed I rung the wrong price.
NA: So you did not check.
MZ: No.
NA: Isn't that your responsibility as a cashier.
MZ: I told myself this is one of the staff member we are helping each other.
NA: How were you helping each other.
MZ: I told myself Cynthia will check. If the price is wrong we send the packers for the price to check if it is wrong or right. So Cynthia will check if the price is correct or not."

If this exchange is taken at face value it conveys at the very least a grave dereliction of duty on the part of Ms Ziqubu. To my mind it is a feeble excuse proffered to explain what is otherwise inexplicable namely how Ms Ziqubu could have proceeded with the transaction when the till reflected a total of R31,79 which cannot have accorded with her own rough tally of the total price of the six items. That there were so few items and that half of them represented just on 80% of the total makes the prospect of genuine error far less likely than in the case of say a basket of fifteen or so similarly priced items.

The explanation that Ms Ziqubu was relying upon Cynthia Lourens to check the prices of the items does not stand up to scrutiny. This was not a case where there was a doubt about a price so that it would be necessary to send a packer to the shelves in order to check the price. It is common cause that the extension cord was correctly priced at R20,00. What had happened was that Ms Ziqubu rang up R2,00. How then was Cynthia Lourens to check? One's only comment in this regard is that the simple arithmetic which Ms Ziqubu was supposed to have done must just as easily have been done by Cynthia Lourens who should have realised that the total reflected was considerably less than the total of the prices of the six items she had bought. Her failure to do anything in that regard does not exonerate Ms Ziqubu but rather increases the possibility that there was collusion between them.

A final factor which should have been borne in mind by the commissioner was the fact that Ms Ziqubu was not a novice or an inexperienced cashier. She had been working as such, admittedly on a part-time basis, for some four years. That experience was also a pointer to the improbability of an error occurring of the type in question. Overall the probabilities were strongly against a finding that this was a mistake occasioned by Ms. Ziqubu being distracted.

The last reason given by the commissioner for reaching his conclusion does not bear scrutiny. It was no concern of his whether the Applicant's equipment was the most up to date possible or whether its checks on the activities of cashiers were adequate. The suggestion that the absence of the most up to date equipment

was the cause of the stock losses is ludicrous. The most charitable interpretation to be put upon this statement is that what he intended to say was that the system in use was one which permitted errors which would not occur in a more up to date system. I would have thought that the conclusion to be drawn from this was that it required greater care and attention to detail on the part of cashiers not less.

Taking all these matters together do they justify a conclusion that the award of the commissioner is reviewable? It must be remembered that the onus lay on the Applicant to prove both the reason for the dismissal and that this reason was fair (s192(2) of the LRA). From this point of view at least the commissioner's approach was correct.

If I had been assessing the evidence placed before the commissioner as a finder of fact at first instance I think that I would have concluded that the Applicant discharged the onus of proving that the under-tilling was deliberate. My starting point would be the fact and nature of the under-tilling. The evidence of extensive shrinkage in the store attributable to staff members and the fact that the beneficiary in this case was a co-employee would suffice in my view to call for some explanation. Where as here the explanation is shot through with improbability that could provide the basis for rejecting the explanation of innocence leaving only the alternative of guilt.

It is unnecessary however for me to express a final view on this question for the simple reason that I am not the finder of fact of first instance. Nor is this a court of appeal which can revisit and override the findings of fact of a lower tribunal if it is satisfied that they are wrong, having borne in mind the advantages which that tribunal has had of hearing the witnesses in person (*R v Dhlumayo* 1948 (2) SA 678 (AD)). As a court of review my functions are more limited. Whatever the proper approach to reviews under section 145 of the LRA- a matter to which I will revert - I would have to be satisfied at the least that the conclusion of deliberate wrongdoing was either the only possible conclusion or so overwhelmingly probable that the failure to reach it indicated the presence of reviewable irregularity. That is not, however, in my view possible on the facts of this case. I think that a perfectly reasonable and proper fact finding exercise could arrive at the conclusion that the under-tilling was deliberate. I cannot, however, exclude the reasonable possibility that a similarly impeccable fact finding exercise would find that what occurred here was grossly negligent and a flagrant disregard of the prescribed procedures to be followed by a cashier, but not take the further step of holding that there was deliberate fraud.

The consequence of that conclusion is to move the enquiry forward to the stage of the penalty imposed by the Applicant for Ms Ziqubu's accepted misconduct. As I said earlier the approach of the commissioner involved an acceptance that even if the under-tilling was occasioned by negligence on the part of Ms Ziqubu

it was nonetheless misconduct. No other basis exists for his having examined the question of the appropriateness of the sanction of dismissal imposed by the Applicant upon Ms Ziqubu. I turn then to consider his approach on sanction.

It is clear that the commissioner's view of Ms Ziqubu's misconduct was that she was guilty of nothing more than carelessness, which he described as "a mistake" for which she was sorry. That flowed from his analysis of the facts which I have considered in some detail above. It follows from what I have said in that regard that in my view there was no justification for this conclusion. The proper approach on the facts was that Ms Ziqubu had been guilty of very serious misconduct and the consideration of the question of sanction should have followed from that.

That initially erroneous approach was compounded by further errors. Neither the charge of inconsistency nor that of being unduly hasty to charge employees with misconduct was justified. The two cases mentioned in evidence were in no way comparable to this one. Here the under-tilling flowed either from fraud or, at the very least, from a flagrant disregard of the standard procedures to be followed by cashiers. The first case mentioned, involving a cashier referred to only as Monica, was one of under-tilling which might have been occasioned by a defect in the till. That is a possible mitigating feature wholly absent from the present case. The second case involved a cashier called Adelaide who rang up the marked price on a packet without noticing that it contained not one but two pies whereas the marked price was for one pie only. That case is wholly different from this one.

Nor is there any justification for the finding that the Applicant is too quick off the mark in charging employees with this type of misconduct. In the light of the level of stock losses referred to in the evidence of Mr. Acker it is perfectly proper and appropriate for the Applicant to require strict adherence to the procedures which it lays down for cashiers in the performance of their duties. The reason is simply that if there is such compliance one avenue for shrinkage to take place is cut off. The employer would be equally entitled for the same reason to insist on strict compliance by its security personnel with the procedures for checking staff parcels.

The commissioner not only does not refer to these matters but seems to deprecate them. Indeed his one finding concerning the absence of modern scanners, bar codes and computer checks appears to be directed at placing the blame for shrinkage at the door of the employer. All this is contrary to the clearly stated jurisprudence of the Labour Appeal Court that it is for employers to determine what standards of conduct are to be observed by their employees in the light of the needs of their own particular business. In the absence of irrationality it is not for commissioners or courts to nullify or disregard those standards or to

supplant them with others (*Scaw Metals v Vermeulen* (1993) 14 ILJ 672 (LAC) at 675A - B; *Computicket v Marcus NO & others* (1999) 20 ILJ 342 (LC) at 347 A - D; *County Fair Foods (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration and others* (1999) 20 ILJ 1701 (LAC) para 11, p1707 and para 45, p1716).

Lastly on this aspect of the case the commissioner said that Ms Ziqubu had a clean disciplinary record and he referred to the concept of progressive discipline in which dismissal is regarded as the last resort. The problem is that far from having a clean disciplinary record Ms Ziqubu had been disciplined on five previous occasions in the previous two years and three months for failures to comply with prescribed procedures for the operation of her till. It is clear from a passage in the transcript of the arbitration proceedings that the commissioner held the view that Ms Ziqubu had a clean disciplinary record solely because the final warnings previously given to her had lapsed after four months but that is clearly incorrect. The fact that a person no longer has a final warning hanging over their head no more extinguishes prior misconduct than the lapsing of a suspended prison sentence extinguishes the conviction from a person's criminal record.

Once the seriousness of the misconduct is appreciated and the sanction is viewed from a correct perspective the conclusion is I think inevitable that the commissioner's decision that dismissal was an excessive sanction was wrong. In turn the decision that the dismissal of Ms Ziqubu was unfair is also wrong. Does that mean that the arbitration award is capable of being corrected on review? That brings me to the powers of this court in review proceedings.

Mrs Annandale for the Applicant and Mr. Mazwi for Ms Ziqubu were at one that the application is one in terms of section 145 of the LRA. Their initial approach to a review under that section was that laid down by the Labour Appeal Court in *Carephone (Pty) Limited v Marcus N.O. and others* (1998) 19 ILJ 1425 (LAC). In that case it was said in paragraph 37 under the general heading of the "standard of review" that:

"Many formulations have been suggested for this kind of substantive rationality required of administrative decision makers such as "reasonableness", "rationality", "proportionality", and the like..... Without denying that the application of these formulations in particular cases may be instructive, I see no need to stray from the concept of justifiability itself. To rename it will not make matters any easier. It seems to me that one will never be able to formulate a more specific test other than, in one way or another, asking the question : **Is there a rational objective basis justifying the connection made by the administrative decision maker between the material properly available to him and the conclusion he or she eventually arrived at?** In time only judicial precedent will be able to give more specific content to the broad concept of justifiability in the context of the review provisions in the LRA."

Later in the judgment at paragraph 53 the following was said:

"Accordingly, the only bases for review are (1) that the facts amount to misconduct or gross irregularity or impropriety under s145(2)(a)(i)-(ii) and s145(2)(b) of the LRA, or (2) that his actions are not justifiable in terms of the reasons given for them and that he has accordingly exceeded his constitutionally constrained powers under s145(2)(a)(iii) of the Act."

A reading of the subsequent decisions of this court in reviews under section 145 shows that the formulation of whether there is a rational objective basis justifying the connection made by the commissioner between the material properly available to him or her and the conclusion he or she eventually arrived at has effectively become the basis for reviews under this section. See, for example, the statement by Marcus AJ in *Nel v Ndaba* (1999) 20 ILJ 2666 (LC), para 10, p 2699 I - J.

Sitting as a judge of first instance I am of course bound by decisions of the Labour Appeal Court and ordinarily I would simply have proceeded to deal with this case on that basis. However, in a recent and as yet unreported decision of the Labour Appeal Court, *Toyota South Africa Motors (Pty) Limited v Radebe and others*, Nicholson JA, in paragraph 33 of his judgment (which was concurred in by the other two members of the court) said the following concerning this standard of review:

"I intend dealing briefly with the last mentioned ground, namely the justifiability of the award, as I have certain misgivings about whether it constitutes an independent ground upon which an award can be attacked. As such it is not part of section 145, which restricts an applicant to misconduct, corruption, gross irregularity and the excess of powers. I am not sure that Froneman DJP was importing the last mentioned ground into section 145 and I believe the mention of it in the passage above was in any event an *obiter dictum.* I have two difficulties with importing this ground into the Act. The first relates to the difference between appeals and reviews and the second relates to the constitutional implications of section 145."

In paragraph 40 Nicholson JA said:

"The reference by Froneman DJP to the constitutional provisions must be seen in the context of the specific grounds for review in section 145. My misgivings relate, therefore, to the notion that the grounds set out in that section are not the only avenues open to a party to challenge an award. It was not suggested in this case that the grounds set out in section 145 were unconstitutional and they are fully operative until declared unconstitutional. If there was such a constitutional challenge the court would have to evaluate whether the creation of the CCMA and the other machinery of the Act provides sufficient justification for the limitation of the rights of administrative justice provided in the constitution. Although, as I have mentioned, it is not necessary for the purposes of this judgment to decide the issue, I have grave doubts that the concept of an award being justifiable as to the reasons given is an independent ground of review."

I drew the attention of Mrs. Annandale and Mr. Mazwi to the judgment in *Radebe* and also to the judgment of the Constitutional Court in *Fedsure Life Assurance Ltd and others v Greater Johannesburg Transitional Metropolitan Council and others* 1999 (1) SA 374 (CC) and invited their submissions as to their effect on

my task in deciding this case. Both of them addressed me on the topic with Mr Mazwi, in a colourful phrase, proclaiming that "We are in love with the misgivings of Nicholson JA". (The matrimonial image extended to his supplementary heads of argument where he said that "The Second and Third Respondents happily "tie a knot" with the misgivings expressed by the learned Nicholson JA in the *Toyota* decision at paragraph 40".) More pertinently Mr. Mazwi contended that in the light of what was said in *Radebe* I should regard myself as being limited to the strict grounds of review set out in section 145 and should not regard justifiability of the award as referred to in *Carephone* as being a proper ground of review. In an impressive argument of higher standard than many delivered to me by legal practitioners in the course of my acting appointment he bluntly contended that these proceedings were nothing more than an appeal in the guise of a review. Accepting some of Mrs. Annandale's criticisms of the award and seeking to explain and deflect others he submitted that the record amply demonstrated that the commissioner had addressed his mind to the right questions, namely whether there was misconduct and if so its nature and the appropriate sanction which should flow therefrom. That being so if he had erred - even if there were a number of errors of a serious nature - he was nonetheless not guilty of misconduct, gross irregularity or excess of his powers and accordingly his award must stand. Whilst I might disagree strongly with the commissioner's conclusions therefor there was so, Mr. Mazwi contended, nothing I could do about it.

Mrs. Annandale (whose argument was equally of a high standard) on the other hand relied strongly on the *Carephone* judgment. In her submission the cumulative effect of the errors in the commissioner's award was such that the award could not be said to be justifiable on the material before the commissioner. That is fairly and squarely to base the review on *Carephone.* Neither in her original heads of argument nor in her oral submissions did she contend that it was appropriate for me to construe misconduct, gross irregularity or excess of jurisdiction from the contents of the award. In supplementary heads of argument delivered at my invitation after the hearing she submitted that *Carephone* remains authoritative and is unaffected both by *Radebe* and by *Fedsure*. She did however make a brief submission in regard to gross irregularity which can be dealt with later.

In the face of these conflicting submissions it seems to me necessary to consider again the question of the powers of review which this court enjoys in regard to arbitration awards made by commissioners and the current status of the judgment in *Carephone.* My starting point is section 145 of the LRA which governs such reviews.

The relevant portions of section 145 read as follows:

"Review of arbitration awards

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

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

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

A defect referred to in subsection (1), means:

a) that the commissioner:

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

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

(iii) exceeded the commissioner's powers; or

b) that an award has been improperly obtained."

On the face of the language used in the section therefore it appears that an arbitration award can be set aside in four circumstances namely:
if there was misconduct on the part of the commissioner;

if the commissioner perpetrated a gross irregularity in the conduct of the arbitration proceedings;

if the commissioner acted outside his or her powers; or

if the award was improperly obtained.

No-one familiar with the law of arbitration could overlook the correspondence between this section and section 33 of the Arbitration Act 42 of 1965 which reads as follows:

"**Setting aside of award.**

Where -

a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or
b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or

c) an award has been improperly obtained,

the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.

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

The correspondence between this and section 145 has been noted on several occasions by this court. (*Abdull & Another v Cloete N.O. and others* (1998) 19 ILJ 799 (LC) para. 13, p803; *Standard Bank of SA Limited v Commission for Conciliation, Mediation & Arbitration and others* (1998) 19 ILJ 903 (LC), para. 5, p907; *Carephone, supra,* para. 25, p1432).

There is ample authority in cases dealing with arbitration under the Arbitration Act and its predecessors as to how these provisions are to be interpreted. The position in regard to misconduct is summarised as follows in *Lawsa,* Vol.1 (First Re-issue), para. 445 :

"445. **Misconduct by arbitrator**

The word misconduct must be construed in its ordinary sense of wrongful or improper conduct on the part of the person whose behaviour is in question. A bona fide mistake of law or fact cannot be construed as misconduct; but if the mistake is so gross or obvious that it could not have been made without some degree of misconduct the award may be set aside, not on the ground of mistake but on the ground of misconduct, the mistake merely amounting to evidence of the misconduct. If there is an explanation for the error other than misconduct or corruption, a court would not be entitled to set aside the award in question. There is no assumption that an arbitrator knows and applies the principles of our law. Accordingly if an arbitrator misdirects himself on the law, that in itself is no reason for setting aside the award; the parties are bound by his finding even if he errs on the facts or the law.

An arbitrator is appointed not as the agent of the party who nominated him, but as a judge who should act impartially and should have no personal interest in the proceedings. He must dispense justice equally and impartially between the parties. Impartiality is achieved *inter alia* by granting both parties an equal opportunity to be heard. Where an arbitrator hears one party and refuses to hear the other, the court will interfere and set aside the award. Likewise, where the arbitrator fails to hear evidence of either party, the award will not be upheld unless the failure can be justified on the ground that the parties agreed that evidence should not be led."

It is accordingly not misconduct for the arbitrator to be wrong in either fact or law. (*Dickenson & Brown v Fisher's Executors* 1915 AD 166 at 174-175; *Amalgamated Clothing & Textile Workers Union v Veldspun Limited* 1994 (1) SA 162 (AD) at 168I-169C). It is not even misconduct for there to be no evidence apparent from the record that supports the award. Such an absence of evidence is merely a factor from

which the inference may permissibly be drawn that the arbitrator could only have reached the decision in question as a result of misconduct. (*McKenzie NO v Basha* 1951 (3) SA 783 (N) at 786B-D; *Hyperchemicals International (Pty) Limited v Maybaker Agrichem International (Pty) Limited* 1992 (1) SA 89 (W)).

Gross irregularity in the conduct of the arbitration ordinarily relates to procedural irregularities. (*Lawsa, supra,* para. 447; *Bester v Easigas (Pty) Limited and another* 1993 (1) SA 30 (C) at 42J-43B). Instances of that are a failure to give notice of the hearing or conducting a material part of the arbitration in the absence of a party not in default or refusing to one party an opportunity to call evidence extended to the other party or excluding cross-examination of a witness on a material point. The irregularity is gross when it results in the aggrieved party not having his case fully and fairly determined. (*Ellis v Morgan : Ellis v Desai* 1909 TS 576 at 581).

An act in excess of the arbitrator's jurisdiction is liable to be set aside. That encompasses both going outside the terms of the reference insofar as the matter in dispute is concerned and acting beyond the powers conferred upon the arbitrator under and in terms of the reference. (*Lawsa, supra,* para 448). The same principle applies in relation to arbitration awards by commissioners. Thus, for example, in a case where the only dispute between the parties was whether the employee had committed misconduct, it being common cause that in that event dismissal was an appropriate sanction, the arbitrator went beyond her powers in considering the question of sanction. (*Reunert Industries (Pty) Limited t/a Reutech Defence Industries v Naicker and another* (1997) 18 ILJ 1393 (LC)).

It is true that in certain circumstances the question of an arbitrator exceeding his or her powers may arise in relation to procedural matters. Thus, for example, if the terms of the reference were to record that the arbitrator was obliged to follow the procedures and rules of evidence applicable in the High Court it would be beyond the arbitrator's powers to conduct the arbitration in an inquisitorial manner although this could also be dealt with as misconduct *(c/f Halsbury,* Vol. 2 (Fourth Ed, Re-issue) para. 694). It is also beyond the powers of the arbitrator to act contrary to public policy. (*Halsbury, supra*, para 694; *Amalgamated Clothing & Textile Workers' Union v Veldspun Limited, supra,* 174G*).* Apart from this, it is unusual for procedural matters to arise under the heading of excess of powers on the part of the arbitrator. It is certainly novel to suggest, as the judgment in *Carephone* suggests in paragraph 53 thereof, that justifiability of the award on the merits of the material placed before the arbitrator can properly fall within the ambit of an excess of the arbitrator's powers. To adopt that approach is effectively to say that the only jurisdiction which the arbitrator has is to decide the case correctly and that is not only contrary to authority but would have the effect of transforming a review into an appeal.

Reverting to the general principles governing reviewability of awards the last situation is the case where an award has improperly obtained. There is no authority in our courts on what this means presumably because no case has arisen where a substantial contention was advanced that an award should be set aside on this ground. In my view if one looks at the structure of section 33(1) of the Arbitration Act it is clear that this head of review covers matters which relate primarily, if not entirely, to conduct on the part of the successful party to the arbitration which would justify the setting aside of the award. Thus an award procured through fraud or the subornation of perjury could be set aside on this ground. (c/f *Makings v Makings* 1958 (1) SA 338 (AD)).

Of course these categories are not watertight compartments and the same matters may fall into more than one category. Thus the acceptance of a bribe is misconduct by the arbitrator whilst the giving of the bribe means that the award was irregularly obtained. Equally some procedural matters may amount to both misconduct on the part of the arbitrator and gross irregularity in the conduct of the arbitration.

I have set this out in some detail because it can I think be seen from this broad and general exposition of the effect of section 33(1) of the Arbitration Act that the conduct which under that Act warrants the setting aside of an arbitration award is as much conduct which should justify the setting aside of an arbitration award made by a commissioner acting in terms of the LRA. The provisions of the Arbitration Act and the finality which its limited power of review provides in respect of awards have been applied and approved in relation to arbitrations in the field of labour relations. (*Amalgamated Clothing and Textile Workers Union v Veldspun Limited, supra; Bester v Easigas(Pty) Ltd and another, supra.*)

Against the background set out above one would have thought that the obvious reason for the legislature adopting the language of section 33 of the Arbitration Act and section 145 of the LRA was to provide for a similarly circumscribed power of review on the part of this court to interfere with arbitration awards handed down under the auspices of the CCMA. That view of things would have been reinforced by section 143(1) of the LRA which provides that such awards are final and binding. This provision corresponds with the provisions of section 28 of the Arbitration Act. It would also have accorded with the well established canon of statutory interpretation that where the legislature deliberately includes language in a statute which in the same or a similar context has been subject to clear judicial interpretation it intends to include such language on the basis that it bears the interpretation already given to it by the courts. (*S v R J Southey (Pty) Ltd & another* 1979 (1) SA 858 (T) at 860 E - H*).*

Initially in cases decided in this court it was accepted that the review powers conferred by section 145 were

to be given the same meaning as the corresponding powers of review conferred upon the High Court in terms of section 33 of the Arbitration Act. (*Moloi v Euijen NO & another* (1997) 18 ILJ 1372 (LC)*; Abdull and Another v Cloete N.O. and others, supra; Standard Bank of SA Limited v Commission for Conciliation, Mediation & Arbitration and others, supra.* Only Landman J in *Reunert Industries (Pty) Ltd t/a Reutech Defence Industries v Naicker and another, supra,* appears to have suggested that this might not be so.) It was recognised that the test for review under this section was a strict and relatively narrow test, probably narrower than the scope of common law review. (*Kynoch Feeds (Pty) Limited v Commission for Conciliation, Mediation & Arbitration and others* (1998) 19 ILJ 836 (LC) para. 30, p844). It was also accepted that there were sound policy reasons for adopting that approach. (*Kynoch Feeds (Pty) Limited v Commission for Conciliation, Mediation & Arbitration and others, supra,* para. 40, pp846-847; *Shoprite Checkers (Pty) Limited v Commission for Conciliation, Mediation & Arbitration and others* (1998) 19 ILJ 892 (LC) para. 27.9, p899). Where members of this court felt unhappy with such a narrow standard of review their approach was not to depart from a correspondence in meaning between section 33(1) of the Arbitration Act and section 145(2) of the LRA, but to accept that arbitration awards by commissioners could be reviewed not only under section 145 but also under section 158(1)(g) of the LRA. That approach was adopted in each of the judgments in *Abdull and another v Cloete N.O., Kynoch Feeds, Shoprite Checkers v CCMA* and *Standard Bank v CCMA* to which I have already referred.

This understanding of the scope and effect of section 145 accorded with the intention of those who drafted the LRA. When the Bill was initially published for comment it was accompanied by a lengthy explanatory memorandum which is to be found in (1995) 16 ILJ 278-336. In that memorandum it was explained that the existing system of dispute resolution, particularly as it related to cases of unfair dismissal, was complex, inefficient, protracted and expensive. The high level of legalism which characterised the system was noted with approbation. The dispute resolution provisions contained in the Bill are directed at resolving these problems.

It is helpful to quote two passages from the memorandum (at 318). They described the system proposed under the Bill in the following terms:

"A major change introduced by the draft Bill concerns adjudicative structures. In the absence of private agreements, a system of compulsory arbitration is introduced for the determination of disputes concerning dismissal for misconduct and incapacity. By providing for the determination of dismissal disputes by final and binding arbitration, the draft Bill adopts a simple, quick, cheap and non-legalistic approach to the adjudication of unfair dismissal."

A little later the memorandum states:

"In order for this alternative process to be credible and legitimate and to achieve the purposes of the legislation, it must be cheap, accessible, quick and informal. These are the characteristics of arbitration, whose benefits over court adjudication have been shown in a number of international studies.

The absence of an appeal from the arbitrator's award speeds up the process and frees it from the legalism that accompanies appeal proceedings. It is tempting to provide for appeals because dismissal is a very serious matter, particularly given the lack of prospects of alternative employment in the present economic climate. However, this temptation must be resisted as appeals lead to records, lengthy proceedings, lawyers, legalism, inordinate delays and high costs. Appeals have a negative impact on reinstatement as a remedy, they undermine the basic purpose of the legislation and they make the system too expensive for individuals and small business."

When the revised Bill was submitted to Parliament the explanatory memorandum which accompanied it repeated these statements concerning appeals in slightly abbreviated form. *Thompson and Benjamin, South African Labour Law,* Vol. 1, AA2-172.

To interpolate a comment at this stage it is apparent when one has regard not only to the borrowing of language from the Arbitration Act but also to the expressed intention of those responsible for the drafting of the statute that the aim was to ensure as far as possible that arbitration awards made by commissioners under the LRA would exhibit a high degree of finality and would only be interfered with in very limited circumstances. Not only was it made perfectly clear that there should be no appeal from decisions by commissioners but it was also the manifest intention that the scope for review of such decisions would be narrower than that attendant upon even a review under the common law, the scope for which has been broadened in the past fifteen years or so by judgments such as those in *Johannesburg Stock Exchange and another v Witwatersrand Nigel Limited and another* 1988 (3) SA 132 (AD) at 152A-E; *Jacobs en 'n ander v Waks en andere* 1992 (1) SA 521 (AD) and *Hira and another v Booysen and another* 1992 (4) SA 69 (AD). The intention appears to have been that of the three types of review identified by Innes CJ in his much quoted judgment in *Johannesburg Consolidated Investment Co. v Johannesburg Town Council* 1903 TS 111 it was a review of the first type that was intended, not a common law review, which is a review of the second type. I understand that also to be the approach of Nicholson JA in *Radebe* because in upholding the review in that case the learned Judge of Appeal relied upon the test for gross irregularity laid down by Schreiner J (as he then was) in *Goldfields Investment Limited and another v City Council of Johannesburg and another* 1938 TPD 551 which was, as Corbett CJ pointed out in *Hira and Another v Booysen and another, supra,* p87A, a case dealing with the first and narrowest species of review and not a common law review.

It is unclear whether and to what extent any of this was drawn to the attention of the Labour Appeal Court in *Carephone.* It represents, however, an understanding of section 145 of the LRA which appears to have been firmly rejected by the Court. Having held that the only basis for reviewing a commissioner's arbitration award under the LRA was to be found in section 145 there is then a significant departure from the accepted interpretation of the section based on its correspondence with the provisions of the Arbitration Act and the material referred to above. The Labour Appeal Court viewed such a correspondence with disfavour and said as much in paragraph 25 of its judgment in the following terms:

"What has bedevilled the interpretation of s145 and has led to the conclusion that it provides for a narrow and unconstitutional basis of review, is the reliance placed on decisions interpreting a corresponding section in the Arbitration Act 42 of 1965 (c/f *Amalgamated Clothing & Textile Workers Union v Veldspun Limited* 1994 (1) SA 162 (A); (1993) 14 ILJ 1431 (A)). The meaning accorded to this section by the courts cannot be taken over without qualification. That Act's operation in respect of arbitration under the auspices of the commission is expressly excluded in the LRA (s146); it applies to private, consensual arbitration (in contrast to the compulsory arbitration under the LRA); and its provisions were assessed and interpreted in a different constitutional context. In any event, even under the provisions of the Arbitration Act an award could be reviewed and set aside if the arbitrator exceeded his or her powers by making a determination outside the terms of this submission (*Veldspun* at 169C). These considerations augment the canon of interpretation that the legislature, by including an existing formulation in a statute, is presumed to intend to give it the meaning previously accorded by the courts".

With the utmost respect it is unclear what is meant by this passage. If the settled meaning accorded by authority in the highest court cannot be taken over without qualification those qualifications need to be spelt out. Unfortunately this is not done in the judgment in *Carephone.* Nor do the factors mentioned cast any light on the issue. The simple and obvious reason why the Arbitration Act is excluded in respect of arbitrations under the auspices of the CCMA is that this court is given jurisdiction in respect of such matters to the exclusion of the High Court. It does not mean that the jurisdiction conferred on this court in identical language to that conferred on the High Court by the Arbitration Act is in any way different or intended to be exercised any differently. As I have pointed out all of the background material available to the court pointed in the other direction.

It is true that arbitration under the auspices of the CCMA is generally, although not exclusively (see s141 of the LRA), compulsory. However, the review powers vested in this court are the same in either event. I am not aware of any authority that suggests that this justifies a departure from the well established meaning of the language in which powers of review of arbitration awards have over the years been conferred on our courts. It is not as if compulsory arbitration is in any way a novelty. It is a long established feature of legislation dealing with expropriations and valuations for rating purposes. In the field of labour relations it has long been provided for in respect of public service employees in the predecessors to the LRA, where it

was the *quid pro quo* for the exclusion of the right to strike. It must also be borne in mind that if the parties do not wish to arbitrate before a commissioner of the CCMA they are free to agree upon alternative dispute resolution procedures and thereby to avoid that fate. If they do so their arbitrations will be subject to the provisions of the Arbitration Act and the awards made therein will be subject to review under section 33(1) of that Act. Such awards will then be reviewed by this court in terms of section 157(3) of the LRA. This is a point to which I will revert.

The argument arising from the lack of voluntariness in regard to arbitrations before the CCMA is referred to by Pretorius AJ in the *Shoprite Checkers case, supra,* p899 where he said:

9 There are arguably sound policy reasons within the context of the LRA and labour relations in general for imposing the narrow review test contained in s145 on parties who are subject to arbitration awards of the CCMA. Similar policy reasons are set out in the decision of the Appellate Division of the Supreme Court in *Amalgamated Clothing & Textile Workers Union v Veldspun Limited.....*

0 On the other hand, there are in my view equally important policy considerations for demanding of commissioners of the CCMA when they conduct arbitrations that they comply with the more stringent standards implicit in s33 of the Constitution. Not only the interests of justice, but also sound labour relations may well be better served by arbitration decisions which comply with the standards implicit in s33 of the Constitution than by arbitration decisions which do not necessarily comply with those standards, but serve to end labour relation disputes more speedily. Further, it must be borne in mind that the reasoning in the *Veldspun* case applies to circumstances where parties have voluntarily submitted their dispute to arbitration. This is not the case where the arbitration provisions of the LRA are concerned."

To similar effect is a passage from the judgment of Tip AJ in the *Standard Bank case, supra,* para. 6, p907 which reads as follows:

"..... there is an important point of distinction in that arbitrations conducted under the Arbitration Act are entered into voluntarily, as was the submission to arbitration in *Veldspun's* case, whereas those conducted in the CCMA have a strong element of compulsion. Clearly, there is a stronger policy consideration in the context of private arbitration in limiting the grounds upon which an award may be taken further, than there is in a situation where a respondent party is obliged through statute to participate in arbitration proceedings, as is the case under the Act."

This point is perhaps strengthened when one reads judgments such as that of the Appellate Division in *Dickenson & Brown v Fisher's Executors, supra,* where one finds that a substantial factor in holding that the power to set aside an award of an arbitrator is a limited power is said to be the fact that the parties have voluntarily entered upon the arbitration process and selected their own judge to resolve their disputes. In those circumstances, so it is said, it is appropriate that they should be bound by that person's decision. All

of this I accept. However, it leaves untouched the fact that the LRA contains a deliberate legislative choice in favour of arbitration as the means to settle a large range of disputes in the field of labour relations. That arbitration may be consensual but, if there is no consensus, it is imposed upon the parties. In so imposing it the legislature has chosen to do so by prescribing that the award of a commissioner shall be final and conferring power upon this court in terms substantially identical to those conferred upon the High Court to set aside consensual arbitration awards under the Arbitration Act. I can find little room in those circumstances for arriving at a broader interpretation of the language of section 145 solely on the ground that the arbitral process is compulsory rather than voluntary.

As to the last factor mentioned in paragraph 25 of the *Carephone* judgment I venture with respect to suggest that it adds nothing to the matter. It is true that under the Arbitration Act an award can be reviewed and set aside if the arbitrator exceeds his or her powers by making an award outside the terms of the submission. That is expressly provided for in section 33(1)(b) of the Arbitration Act, and the power in question corresponds precisely with the power to review and set aside a commissioner's arbitration award in terms of section 145(2)(a)(iii) of the LRA. Wherein therefore lies the difference between the provisions of the Arbitration Act and those of the LRA?

Having rejected what may be described as a "traditional" interpretation for section 145(2) the Labour Appeal Court in *Carephone* sought for an interpretation which is consistent with the Constitution, more specifically the administrative justice provisions of the Constitution. Indeed that appears to have been its principal concern that the "narrow" basis for review in section 145 might be unconstitutional. The basis for this concern is however unclear. Earlier in its judgment the court had pointed out that the establishment of the CCMA as an independent and impartial tribunal or forum to determine certain classes of labour dispute satisfied the constitutional requirements of section 34 of the Constitution. The obligation of fairness in the conduct of arbitration under the auspices of the CCMA is not restricted or abrogated by section 145 and the powers of review given to this court provides ample scope for judicial regulation of any departures from that constitutional standard under the heading of misconduct of the arbitrator and gross irregularity in the conduct of the arbitration. As pointed out above where procedural injustice has led to someone not having a fair hearing before the arbitrator the award will be reviewed and set aside. Where then does the perceived constitutional problem lie?

As I read *Carephone* and particularly paragraphs 11 to 22 thereof the court's concern was the following. It held that the CCMA constituted an organ of state for the purposes of the Constitution so that its actions would have to comply with the requirement of fair administrative action laid down in section 33 of the Bill of Rights read with item 23(2) of Schedule 6 to the Constitution. (A similar view was expressed in *Kynoch*

Feeds, supra, paras. 45 and 46, pp847-848). Returning then to the *Carephone* judgment the court rejected a submission that an arbitration under the auspices of the CCMA was a proceeding of a judicial nature and therefore did not amount to administrative action for the purpose of those provisions. Finally it held that the categorisation of different functions of the State administration into judicial, quasi judicial and administrative was not part of our administrative law and said:

"It would be ironic indeed if they are reintroduced at this stage of the development of our law to limit the scope of judicial review of administrative action".

On that basis the Labour Appeal Court held (para. 20) that:

"The constitutional imperatives for compulsory arbitration under the LRA are thus 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."

Building on this foundation the Labour Appeal Court held (in paragraph 30) that the effect of the administrative justice provisions of the Bill of Rights was to broaden the scope of judicial review of administrative action. By reference to the constitutional requirement that administrative action must be justifiable in relation to the reasons given for it the court said (para. 31) that:

"This provision introduces a requirement of rationality in the merit or outcome of the administrative decision. This goes beyond mere procedural impropriety as a ground for review, or irrationality only as evidence of procedural impropriety."

That, so the court held, provided the basis for an extended scope of review which it formulated in the terms set out above. That extended scope does not, however, arise from an interpretation of section 145 but appears to be independent of it and additional to it.

With respect I share not only the misgivings of Nicholson JA in regard to the result of this line of reasoning but I am unable to accept that the reasoning itself is correct. If as Nicholson JA suggested it is an *obiter dictum* I am free to reject it and would do so. However that seems to me rather too cavalier an approach to take when the contents of that judgment and the passages I have quoted have never been treated as *obiter dicta* by any member of this court. Far from it. In preparing this judgment I have referred to every decision of this court reported in the Industrial Law Journal and the Butterworths Labour Law Reports since the *Carephone* judgment became available involving the review of an arbitration award arising out of a CCMA

arbitration. In virtually every one the court has referred to one or other of the leading passages from *Carephone*, both of which are quoted above, and in some at least there is reference only to the broader ground of review enunciated in that judgment (c/f *Nel v Ndaba, supra*).

The problem with justifiability as a ground for review and the suggestion that an award must be rationally connected to the material before the arbitrator is that it blurs the distinction between review and appeal. If the commissioner's award is based upon erroneous findings of fact and erroneous processes of reasoning it is difficult to see on what basis it can then be regarded as justifiable in relation to the material before the commissioner. Once that is the approach, however, there appears to be no significant distinction between a review on the grounds of justifiability and an appeal. This has occasioned confusion and considerable endeavours on the part of this court and the Labour Appeal Court to emphasise that notwithstanding the *Carephone* judgment there remains a distinction between a review and an appeal (*Coetzee v Lebea N.O. and another* (1999) 20 ILJ 129 (LC); *Computicket v Marcus N.O. and others, supra* at 346; *County Fair Foods (Pty) Limited v Commission for Conciliation, Mediation & Arbitration and others* (1999) 20 ILJ 1701 (LAC). There is a useful summary of the endeavours to maintain this distinction in the judgment of Kennedy AJ in *Jimini Indent Agencies CC t/aS & A Marketing v Commission for Conciliation, Mediation & Arbitration and others* (1999) 20 ILJ 2872 (LC) para. 7, pp2876-2877.

The impact of the judgment has extended to the situation mentioned above of a review of an arbitration award made in a labour matter but conducted in terms of the Arbitration Act. Such reviews come before this court in terms of section 33(1) of the Arbitration Act by virtue of the provisions of section 157(3) of the LRA. In at least one instance (*Transnet Ltd v Hospersa & another (*1999) 20 ILJ 1293 (LC) 1297 D - I*)* this court has extended the approach in *Carephone* to the review of an arbitration held in terms of the Arbitration Act. (*sed contra Eskom v Hiemstra* (1999) 20 ILJ 2367 (LC) at para 17, p1267). The extent of the dilemma is apparent. It would be absurd for this court to review the arbitration awards of CCMA commissioners on less stringent grounds than those of private arbitrators whose appointment may have been designed to circumvent arbitration before a commissioner. On the other hand it results in this court giving a different interpretation to section 33(1) of the Arbitration Act to that which has been laid down by the High Court and the Supreme Court of Appeal and which is applied by those courts. Such inconsistency is undesirable if not intolerable.

The further and no doubt unintended effect of the *Carephone* judgment has been in some measure to sideline the grounds of review which are expressly provided for in section 145 of the LRA and to introduce a constitutional basis for review which is nowhere to be found in the LRA. That cannot be correct. Apart from anything else it does not flow from a proper process of constitutional reasoning. That process should

start with the interpretation of the statutory provision in question, in this case, section 145 of the LRA. If there is doubt as to its meaning - which is not the case as that is established by clear and long standing authority - then the court is enjoined to select that interpretation which accords with constitutional values (see s36 of the Constitution and s3 of the LRA). Having determined the proper interpretation of the section the next question is whether the provision is in breach of any of the rights embodied in the Bill of Rights or any other provision of the Constitution. I note that other than the reference in paragraph 25 of the *Carephone* judgment to "a narrow and unconstitutional basis of review" it has never otherwise been suggested that section 145 is unconstitutional and until that occurs and the section is declared unconstitutional then as Nicholson JA pointed out in para. 40 of his judgment in *Radebe* it remains fully operational. I note that Mpati J in *Patcor Quarries CC v Issroff and another* 1998 (4) SA 1069 (SECLD) expressed the view that there is nothing unconstitutional in section 28 of the Arbitration Act. It would seem to follow *a fortiori* that there is nothing constitutionally wrong with section 33 thereof and the position is the same in respect of the corresponding provisions of the LRA.

Even if section 145 infringes some right conferred by the Constitution because it does not afford an aggrieved party before a CCMA commissioner a full right of appeal against an arbitration award that is by no means the end of any constitutional enquiry. (I should not be understood as saying that the absence of a full right of appeal may constitute an infringement of any constitutionally protected right or that I share the view that : "In a perfect society with unlimited resources full rights of appeal should be allowed from every administrative decision". There seem to be overwhelming reasons of equity, proper administration, finality and the like which suggest that many administrative decisions should be final and only subject to challenge on fairly narrow review grounds. In my experience it is primarily lawyers - many of whom stand to benefit from it - who are convinced for the need for appeals and they are viewed with the more jaundiced eye by others in the community. The point is made in more amusing fashion in A.P. Herbert's "Why the House of Lords?", Misleading Cases From the Common Law, p255. In any event this approach begs the question of whether an arbitration under the auspices of the CCMA is an administrative decision).

The next stage of any constitutional enquiry is the question of whether any infringement of a constitutionally protected right is justified in terms of the limitation clause in section 36 of the Constitution. That as Nicholson JA points out requires an evaluation of whether the creation of the CCMA and the other machinery of the Act in the light of its stated purpose, which is itself a constitutional purpose (see section 23 of the Constitution), is such as to justify any limitation of rights embodied in section 145. None of that was considered by the court in *Carephone* and at the time *Carephone* was decided (28th August 1988) this court had no jurisdiction to consider such matters as the amendment to section 157(2) brought about by section 14 of Act 127 of 1998 had not yet come into effect.

My task and that of other judges sitting in the Labour Court would have been made simpler (and this judgment a good deal shorter) had the court in *Radebe* simply overruled *Carephone*, but after expressing his reservations concerning it Nicholson JA added that "It is not necessary for the purposes of this judgment to decide the issue". Where does that leave the matter as far as other cases in this court are concerned which raise that issue? As I have indicated I am reluctant to treat *Carephone* as *obiter* as hitherto it has not been so treated by this court. Am I obliged to follow it?

In this regard I am confronted with a further difficulty. As I mentioned in paragraph 67 the court in *Carephone* rejected the primary contention, which would have been decisive of the case, that an arbitration before a CCMA arbitrator does not involve the performance of administrative functions but rather functions of a judicial or quasi judicial nature and accordingly the constitutional provisions governing fair administrative action are inapplicable thereto. The question which has now arisen is whether that fundamental starting point is consistent with the jurisprudence of the Constitutional Court.

Shortly after the judgment in *Carephone* was delivered the Constitutional Court was called upon to consider the meaning of the expression "administrative action" in section 24 of the Interim Constitution, which expression was carried forward in the corresponding provisions of the final and present Constitution. That consideration occurred in *Fedsure, supra*.

The *Fedsure* case dealt with the decisions of a local authority to approve a budget and fix rates and levies by way of resolution and those decisions were challenged as administrative action not sanctioned by the Constitution. Accordingly the Constitutional Court was obliged to consider what was administrative action for the purposes of the Constitution. It did so in paragraphs 21 to 46 of the joint judgment of Chaskalson P, Goldstone J and O'Regan J, which was endorsed by all the members of the court.

What is significant in the first instance is that the court considered the judgments in the Appellate Division (as it was then called) in which that court moved away from and finally rejected for the purposes of administrative law and the application of the principles of natural justice the English categories of administrative, quasi judicial and judicial actions. (*Pretoria North Town Council v A One Electric Ice-Cream Factory (Pty) Limited* 1953 (3) SA 1 (A) at 11A-C; *South African Roads Board v Johannesburg City Council* 1991 (4) SA 1 (A); *Du Preez and another v Truth and Reconciliation Commission* 1997 (3) SA 204 (A) at 231A-B). It is pointed out in paragraph 25 of the judgment that in the development of our administrative law as reflected in these cases:

"The distinction between legislative and administrative or quasi judicial acts of such authorities was then

not always of importance. What was more important was the nature of the power being exercised and whether it was of a character which required the public authority to adhere to the requirements of natural justice."

It was on the basis that this distinction had ceased to be relevant that the Labour Appeal Court in *Carephone* in paragraph 17 of its judgment rejected the argument that the work of a CCMA commissioner sitting as an arbitrator is judicial and not administrative action. However, as the Constitutional Court pointed out in *Fedsure* that was the position under the former constitutional dispensation. Under our present Constitution the need for some such classification is dealt with as follows in paragraph 26 of the judgment namely that:

"Whilst it might not have served any useful purpose under the previous legal order to ask whether or not the action of a public authority was "administrative", it is a question which must now be asked in order to give effect to s24 of the Interim Constitution and s33 of the 1996 Constitution".

In other words the Constitutional Court accepted the need to distinguish between instances where the actions of organs of state constitute administrative action and those where they do not in order to give effect to the express language of the Constitution. This is precisely what it did in the *Fedsure* case in considering that the actions of a local authority in fixing a rate, levying a contribution and determining to pay a subsidy out of public funds were not administrative actions although undertaken by an organ of state in the exercise of its statutory powers. It is also the approach it adopted in *Pharmaceutical Manufacturers' Association of South Africa (association incorporated in terms of section 21) and another: In re the ex parte application of The President of the Republic of South Africa and seven others CCT 31/99,* unreported.

Whilst the judgment of the Constitutional Court in *Fedsure* does not necessarily resuscitate the old distinctions in their entirety it makes two things clear. Firstly, not every action by an organ of state under statutory powers constitutes administrative action for the purposes of the Constitution. Secondly, it is necessary in every case to consider whether the particular action by the particular organ of state is of its nature administrative action for constitutional purposes. The Labour Appeal Court did neither of these things in *Carephone* and arrived at its decision that a CCMA commissioner conducting an arbitration is subject to the administrative justice requirements of the Constitution on the simple basis that because the CCMA is an organ of state not vested with any judicial functions in terms of the Constitution its actions are administrative action for constitutional purposes. That approach is irreconcilable with the decision of the Constitutional Court in *Fedsure.* As the Constitutional Court is the highest court in all constitutional matters (s167(3)(a) of the Constitution) its judgment on a constitutional issue must be followed. In my view therefore and with the utmost respect this part of the judgment in *Carephone* cannot any longer be treated as good law. It is in manifest conflict with the proper approach to what constitutes administrative action as

laid down by the Constitutional Court.

What then is the proper answer to the question raised in *Carephone* whether the conduct of an arbitrator and the making of an arbitration award by a CCMA commissioner under the LRA is administrative action for the purposes of the Constitution? I am mindful of the fact that a commissioner of the CCMA, even when sitting as an arbitrator, cannot claim to be a court and cannot claim to be vested with any judicial authority in terms of the Constitution, but then no arbitrator ever makes such a claim. The CCMA as a body and commissioners as part of the body have much in common with the old Industrial Court which was characterised as an administrative tribunal having wide-ranging powers of investigation. (*SA Technical Officials' Association v President of Industrial Court* 1985 (1) SA 597 (AD); *Paper, Printing Wood and Allied Workers' Union v Pienaar N.O.* 1993 (4) SA 621 (AD) at 634D-E). That is the general position but here we are concerned with a commissioner functioning as an arbitral tribunal not one acting as an investigator.

I think that it is unprofitable and probably constitutionally irrelevant to seek to categorise the activities of the CCMA generally as being either administrative or not administrative and then to proceed from there. The Constitution speaks of administrative action and the enquiry in my view is whether the particular action under consideration is administrative action for constitutional purposes. That raises the possibility that some actions by the CCMA are administrative and some not. That does not seem to me to matter. It is perfectly clear from the *Fedsure* judgment that some actions by a local authority will be administrative actions and others not.

On this basis the proper question is whether the conduct of an arbitration concerning an alleged unfair dismissal by an arbitrator appointed in terms of the LRA by the CCMA is administrative action. I cannot think that it is. Other than the element of compulsion in most, but not all cases, such an arbitration is no different from any other arbitration. It is well known that it was seen at the time the Act was drafted as an extension of the already thriving field of private arbitration developed largely under the auspices of the Independent Mediation Service of South Africa (IMSSA) and in recognition agreements concluded between trade unions and employers. The LRA did not do away with private arbitrations but sought to impose the same system upon cases where no private agreement was in place. It was an alternative to a court-based system of adjudication of disputes

Arbitration has never so far as I am aware been regarded as a matter of administrative action. In *Lawsa, supra,* para. 406 it is said that:

"An arbitration is the reference of a dispute between parties for a final determination in a quasi judicial manner, by a person or persons other than a court of competent jurisdiction."

Similarly in *Halsbury* (Fourth Ed. Re-Issue) Vol. 2, para. 601 it is said that:

"Arbitration is the process by which a dispute or difference between two or more parties as to their mutual legal rights and liabilities is referred to and determined judicially and with binding effect by the application of law by one or more persons (the arbitral tribunal) instead of by a court of law. The decision of the arbitral tribunal is usually called an award. The reference to arbitration may arise from the agreement of the parties (private arbitration) or from statute." (The reference to a statute is important as it shows that arbitration does not change its character because it is compulsory.)

Other than the fact that the CCMA is an organ of state acting in terms of statutory authority and exercising statutory powers, neither of which is decisive as the Constitutional Court has made clear, I can find no reason to characterise the work of a commissioner of the CCMA presiding over an arbitration in terms of section 136, 138, 139 or 141 of the LRA as being administrative action. In my view it clearly is not administrative action. The fact that the commissioner is not performing judicial functions under the Constitution and does not form part of the judicial arm of the State or come within the judicial process (*Carephone,* para. 18) is neither here nor there. The question is whether the conduct of such an arbitration is administrative action and the answer is that it is not.

My conclusion therefore is that the misgivings of Nicholson JA in *Radebe* were amply justified both on the grounds he expressed and the broader grounds set out in this judgement and that the view in *Carephone* that an arbitration award by a CCMA arbitrator can be reviewed on the grounds that it is not justifiable in terms of the reasons given for it is incorrect. As I have endeavoured to indicate that view rests upon an approach to the expression "administrative action" in the Constitution which has been rejected by the Constitutional Court and cannot therefore be regarded as authoritative. Accordingly even if the decision in *Carephone* is not *obiter* I am not obliged to follow it. That being so it seems to me that the only grounds of review available to the Applicant in this case are those contained in section 145 of the LRA. I proceed to consider the application on this basis.

The only ground for contending that this award falls to be reviewed and set aside in terms of section 145 of the LRA is that the commissioner committed a gross irregularity in the conduct of the proceedings. The claimed irregularity is said to lie broadly in a wholly incorrect approach by the commissioner to his task as a result of which he did not apply his mind properly to the issues before him. Thus so the argument runs the Applicant was deprived of a fair hearing.

In support of these propositions I was referred to the following passage from the judgment of Schreiner J in

Goldfields Investment Limited and another v City Council of Johannesburg and another, supra, 560:

"It seems to me that gross irregularities fall broadly into two classes, those that take place openly, as part of the conduct of the trial - they might be called patent irregularities - and those that take place inside the mind of the judicial officer, which are only ascertainable from the reasons given by him and which might be called latent.....Neither in the case of latent nor in the case of patent irregularities need there be any intentional arbitrariness of conduct or any conscious denial of justice.....The crucial question is whether it prevented a fair trial of the issue. If it did prevent a fair trial of the issues then it will amount to a gross irregularity. In matters relating to the merits the magistrate may err by taking a wrong one of several possible views or he may err by mistaking or misunderstanding the point in issue. In the latter case it may be said that he is in a sense failing to address his mind to the true point to be decided and therefore failing to afford the parties a fair trial. But that is not necessarily the case. Where the point relates only to the merits of the case, it will be straining the language to describe it as a gross irregularity or a denial of a fair trial. One would say that the magistrate has decided the case fairly but has gone wrong on the law. But if the mistake leads to the court's not merely missing or misunderstanding a point of law on the merits, but to its misconceiving the whole nature of the enquiry, or of its duties in connection therewith, then it is in accordance with the ordinary use of the language to say that the losing party has not had a fair trial."

This passage which, as I have pointed out above, dealt with the first and narrowest grounds of review, was quoted with approval by the Labour Appeal Court in *Radebe, supra,* para. *41.*

The line which distinguishes erroneous but non-reviewable findings of fact or law from errors of the same type which constitute gross irregularity is not easy to draw or, in many cases, to discern. That much emerges from a consideration of the various decisions analysed in the judgment of Corbett CJ in *Hira v Booysen, supra,* a case dealing with common law review. In *Radebe's* case the irregularity lay in the commissioner's approach which was either that a clean disciplinary record and long service always precluded dismissal as an appropriate sanction for misconduct or that the existence of some other lesser sanction, for example suspension or demotion, excluded the appropriateness of dismissal. (The commissioner's reasons did not make it clear which of these was the approach which he had adopted). This approach was so deficient in law, logic and sound labour relations practice that it was said to be "indefensible on any legitimate ground" (per Zondo AJP, para. 26). There was "a yawning chasm between the sanction which the court would have imposed and that which the commissioner imposed" (per Nicholson JA, para. 53). This constituted a gross irregularity.

I am unable to detect an error of similar proportions in this case. Fundamentally the commissioner's award flowed from one error and one error only namely his finding that the under-tilling by Ms Ziqubu arose from a single moment of carelessness on her part when she was under pressure. That was a factual conclusion arrived at on a weighing up of all the evidence and a consideration of the proper question raised by the case namely, whether Ms Ziqubu was guilty of misconduct and if so the nature of that misconduct. I disagree with the commissioner's conclusion. If the test were whether it is justifiable on all the material before the

commissioner I would hold, in the light of the deficiencies in the commissioner's process of reasoning, that it is not. That is not, however, the test which I believe I am obliged to apply.

In my view in the absence of an obviously erroneous approach by the commissioner to the questions which he had to answer I could only set his award aside if I came to the conclusion that no reasonable commissioner could in the proper exercise of his functions have made that award. To adopt the test approved by Zondo AJP in *Radebe* it would be necessary for me to say that the unreasonableness of his decision is of such a degree as to be indefensible on any legitimate ground. After anxious thought I do not think that I can properly say that about this award. I am particularly mindful of the fact that the commissioner had the benefit of observing Ms Ziqubu as a witness and clearly regarded her as a credible witness. I doubt that assessment but lacking the advantages which he had I cannot say that such conclusion is beyond the borders of reasonableness. The patent errors in some of the commissioner's reasoning such as his rhetorical question about the theft of a trolley load of groceries or his reference to the absence of bar codes and scanners are in my judgment merely supplementary to his central factual finding and intended to support it. If they are stripped away that conclusion nonetheless remains undisturbed. Similarly on his factual finding that this was a careless mistake even a proper regard to Ms Ziqubu's prior misconduct would not I think have led to him sustaining the sanction of dismissal. Nor on that factual basis would I have done so.

In the result the commissioner's errors did not amount to a gross irregularity in the conduct of the proceedings. There are accordingly no grounds for me to interfere with his award in terms of section 145 of the LRA.

The application is dismissed.

M.J.D. WALLIS ACTING JUDGE

29 February 2000

5th April 2000

MS A ANNANDALE

NT: DENEYS REITZ

: MR V MAZWI, an official of the THIRD RESPONDENT