

**A STUDY ON THE GROUNDS UPON WHICH THE COMMISSION FOR
CONCILIATION, MEDIATION AND ARBITRATION AWARDS ARE
REVIEWED BY THE LABOUR COURTS WITH SPECIFIC REFERENCE
TO CHALLENGES POSED TO ARBITRATORS.**

By

Ediretse Donald Motswakhumo

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Declaration

I, Ediretse Donald Motswakhumo, hereby declares that the work contained herein is entirely my own, except where indicated in the text itself, and that the work has not been submitted in full or partial fulfilment of the academic requirements for any other degree or qualification at any other University.

Signed and dated at Durban on the 7th day of August 2003.



Ediretse Donald Motswakhumo

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Chapter One

1.1 Introduction

One of the key pieces of legislation that emerged subsequent to the democratisation of South Africa in 1994 was the Labour Relations Act 66 of 1995 (LRA). The LRA was passed in Parliament on 13th September 1995 after more than one year of drafting, negotiation among South Africa's social partners, and mass economic and political action by unions.¹ The LRA, among other things, guarantees all South African employees, with the exception of employees working for agencies dealing with national security, protection against unfair dismissal. In line with the foregoing, the LRA has created new democratic institutions, the purpose of which is to resolve disputes that emerge from the labour arena. One such institution is the Commission for Conciliation, Mediation and Arbitration (CCMA), which is independent of the state, any political party, trade union, employer, employers' organisation, and federation of trade unions or federation of employers' organisation.²

The CCMA plays a central role in the statutory dispute-resolution process. All disputes not handled by private procedures or accredited bargaining councils or agencies must be referred to it for conciliation or mediation before they can be referred to arbitration or adjudication.³ Parties that make use of this statutory form of dispute resolution, have the right to have the decisions or awards of the CCMA commissioners reviewed by the labour courts, albeit on limited grounds prescribed by the LRA. The grounds for review or defects upon which an award may be reviewed are briefly that: the commissioner committed misconduct in relation to the duties of the commissioner as an arbitrator; he committed a gross irregularity in the conduct of the arbitration proceedings; he exceeded his powers and that the award was improperly obtained.⁴ It is these grounds for review, as they are often raised from time to time by aggrieved parties, that will constitute the subject of investigation in this

¹ C.W. Sharpe 'Reviewing CCMA Arbitration Awards: Towards clarity in the labour court' (2000) 21 *ILJ* 2160

² S 112 and 113

³ J Grogan *Workplace Law* 6 ed (2001) 301

⁴ S 145

work. The aim is to investigate how commissioners' awards have fared in the light of these reviews, as well as the extent to which the review function has impacted on the tasks of the commissioners through its judgements. To achieve the foregoing, the study will among other things investigate whether or not the labour courts have adhered to the principles of a review and hence maintained the distinction that exists between these principles and those of appeal. One will further find out whether or not the review function has been consistent in its rulings, an area that may cause confusion in the activities of the CCMA if it is lacking. In the overall, the study seeks to find out if the actions of both the arbitration and adjudication function have contributed positively towards the achievement of the objectives set out in the LRA, one of which is the speedy and effective resolution of labour disputes, a thing that was a far cry in the old system.⁵

While this chapter introduces the subject of this study, the second chapter will focus on understanding the basis for the choice of a review in the new legislation over an appeal. In the chapter, one will further see the motivations for preferring a review to an appeal. A brief discussion will be made on the early debates regarding the appropriate section of the LRA that enables parties to take the awards on review. This is where the distinction between the two concepts will be addressed.

The third chapter will focus on the grounds for review as prescribed in section 145 of the LRA. The objective will be to see how the commissioners' awards have fared in the light of these defects, and the extent to which the principles of review have been adhered to in the process of reviewing these awards. Additionally, the study will touch on the test for review brought about by the Labour Appeal Court in the decision of *Carephone v Marcus No and others*.⁶ The test is that commissioners' awards should be rationally justifiable in terms of the reasons given for them. Lastly, chapter four will critically evaluate the review function with the view to seeing how its activities have impacted on the arbitration function. Among other things, the issue of consistency in its jurisprudence will be dealt with. The study will draw conclusions from these investigations in chapter five.

⁵ See s 1(d)(iv)

⁶ (1998) 19 ILJ 1425 (LAC)

Chapter Two

2.1 Understanding the basis for review

2.2 Introduction

One of the key objectives of the Labour Relations Act No 66 Of 1995 (LRA) is the 'effective resolution of labour disputes.'⁷ The LRA seeks to achieve this by promoting voluntary and orderly collective bargaining between labour and management with a view to their reaching collective agreements that will assist in the resolution of their differences.⁸ Notwithstanding the foregoing, the LRA further acknowledges that no system of collective bargaining can be perfect as to resolve all disputes. It is on the basis of this that the LRA has prescribed methods and procedures to resolve disputes and hence reduce the incidence of resorting to industrial warfare.⁹

Unlike in the previous dispensation where employers and employees were free to engage in industrial action in regard to any matter not covered by an agreement or determination, provided that it concerned the employment relationship,¹⁰ the current LRA has distinguished between methods and procedures for resolving rights and interest disputes. Disputes of interests may be resolved through industrial action while rights disputes are resolved by arbitration or adjudication. Arbitration in terms of the LRA, is performed by the Commission for Conciliation Mediation and Arbitration (CCMA)¹¹ whilst the Labour Courts¹² have jurisdiction over disputes arising from the same Act. Unlike in interests disputes where awards prior to industrial action are purely advisory, awards in respect of rights disputes are intended to be final and binding.¹³ This was intended to enhance expeditious resolution of disputes, which is

⁷ See s 1(d)(iv)

⁸ J. Grogan (note 3 above) 300

⁹ Ibid 300

¹⁰ Ibid 300

¹¹ See s 136

¹² See s 157

¹³ S 143(1) states that an arbitration award issued by a commissioner is final and binding and may be made an order of the Labour Court in terms of s 158(1)©, unless it is an advisory award.

one of the primary objects of the LRA. There is therefore no right of appeal against these awards. Instead the aggrieved party may apply for review of the award in the Labour Court on certain limited grounds.

Since the promulgation of the current law, there has been on-going debates relating to this review function. For instance, those in favour of an appeal are of the opinion that a review is restrictive, especially where arbitration is compulsory. There has further been debates as to which of the sections, s 145 and/or 158, is applicable when one considers an award on review. The Labour Courts, charged with the review function, have made several pronouncements with regards to these competing sections for purposes of certainty and stability in the resolution of disputes. It has in the process laid down review tests that have resulted in a blurring of the line between appeal and review, prompting a call for legislative intervention to restore certainty in this area of the law. The purpose of this chapter is to explore the foregoing developments with the view to finding the impact they have had on the review process as well as the policy considerations that underpinned the choice of a review over that of appeal.

2.3 Review vs Appeal

When the present LRA was drafted, many of the changes introduced were meant to address the shortcomings experienced in the previous system. In the Explanatory Memorandum that accompanied the new LRA, the perceived shortcomings of the previous system were summarised as follows¹⁴:

Existing statutory conciliation procedures are lengthy, complex and pitted with technicalities. Successful navigation through the procedures requires a sophistication and expertise beyond the reach of most individuals and small business....The absence of procedures for the independent and effective mediation of disputes means that many resolvable disputes culminate in industrial action.

¹⁴ Explanatory Memorandum to the draft Labour Relations Bill, 1995 Ministerial Task Team, Dept of Labour (1995) 16 ILJ 308

To address these shortcomings, a system of compulsory arbitration was introduced for the determination of disputes and the awards emanating from the same were to be final and binding in order to achieve a simple, quick, cheap and non-legalistic approach to the resolution of disputes. It was evident that unless a credible, legitimate alternative process was provided for determining unfair dismissal disputes, workers were likely to resort to industrial action in response to dismissal.¹⁵ In order to facilitate swift disputes resolution, final and binding awards were not to be appealed against but rather reviewed. In the instance of a review, the reviewing body is limited to a consideration of the conduct of the process and that of the arbitrator, and legality or validity of the decision under examination.¹⁶ New evidence may be led, if this is necessary to determine the existence of illegalities.¹⁷ It must however be noted that in the context of the LRA, there are prescribed grounds upon which a review action may be brought before the court.¹⁸ An appeal on the other hand generally involves a reconsideration of the merits of a dispute, but the re-hearing is often limited to the evidence on which the decision under the appeal was given.¹⁹ However appeals can also involve a complete re-hearing of the case and thereafter a new determination on the merits.²⁰ The above difference has been noted in the case law that has emerged from our courts. For instance in *Coetzee v Lebea No and another*²¹ the court as per Cheadle AJ made the following distinction:

A review concerns itself with the manner in which the tribunal comes to its conclusion rather than with its result. An appeal, on the other hand, is concerned with the correctness of the result.

The reasons motivating the choice of a review are articulated in the memorandum and are summarised as follows:

¹⁵ Ibid 309

¹⁶ L Baxter *Administrative Law* (1991) 256

¹⁷ Baxter (note 16 above) 256

¹⁸ See s 145

¹⁹ John Brand et al *Labour Dispute Resolution* (1997) 204

²⁰ Ibid 204

²¹ (1999) 20 ILJ 129 (LC)

The absence of an appeal from the arbitrators 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 tend 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.

However the above views in favour of a review have not gone unchallenged. Proponents of this process argue that it ought to be there considering that the parties are compelled into a process and above all an arbitrator is forced upon them.²² It is admitted by the same critics however that the deprivation of the right of appeal is perfectly in order where the parties deliberately and voluntarily contract out of formal litigation and choose private arbitration. In their view, without some kind of appeal, it is very difficult to eliminate the inconsistency in CCMA procedure and jurisprudence.²³ It is however not entirely true that arbitrators are forced upon parties as any or both parties may object to the appointment of a commissioner as an arbitrator²⁴. It is however admissible that there is some element of compulsion in the whole process as parties have no choice but to go through the CCMA or whatever procedures are prescribed by the LRA if they do not have private arrangements for the resolution of disputes.

Although there is no right of appeal, the way the courts have gone about setting tests for the review of awards has resulted in questions being asked as to whether there still

²² J. Brand. 'CCMA: Achievements and Challenges – Lessons from the first three years' (2000) 21 *ILJ* 77,90

²³ *Ibid* 90

²⁴ S 136(3) states: Any party to the dispute, who wants to object to the arbitration also being conducted by the commissioner who attempted to resolve the dispute through conciliation, may do so by filing an objection in that regard with the commission within seven days after the date on which the commissioner's certificate was issued, and must satisfy the commission that a copy of the objection has been served on all the other parties to the dispute.

exists a distinction between a review and an appeal as applied by the Labour Court. The scope of review has been extended by the court to a point where the merits of the dispute are considered, with the court arguing that this is appropriate as long as it does not replace the decision of the arbitrator with its own findings. The disturbing tendency with which the scope of review is rapidly widening flouts the important underlying policy considerations for choosing a review as opposed to an appeal and this has not gone unnoticed. Froneman DJP in *Carephone* issued the following caution at page 1435E of the judgement:

One must be careful not to exceed the scope of review for the wrong reasons. One such wrong reason would be the fact that the labour court has no original or appeal jurisdiction in respect of the matters specified to be conciliated and arbitrated under the auspices of the commission and to compensate for this by an extended review.

It must be said that the erosion of the review in the context of what was initially intended by the legislation threatens to revert the current system to the shortcomings of the past system.

2.4 Review of CCMA arbitration awards – Section 145 or 158?

As referred to above, the Labour Court does not lightly substitute its views for that of a commissioner on such subjective issues as whether a dismissal was appropriate for a particular offence except in the case of the most flagrant errors of judgement.²⁵ For that is the essence of a review. Flowing from the absence of the right of appeal, much has been said and debated on the test(s) which the labour courts have developed for reviewing arbitration awards with reference to the reasoning of the commissioner concerned.²⁶ It must be said that during the initial stage, the debate focused on the appropriate provision of the LRA in terms of which reviews must be brought before

²⁵ J Grogan (note 3 above) 306.

²⁶ Ingrid de villiers 'Behind Closed Doors: Reviewing the conduct of CCMA Commissioners' (2001) 10 *CLL* 71,71

the labour court.²⁷ Those who favoured a wide review test typically argued in favour of the application of section 158(1)(g) of the LRA. The said section is entitled 'Powers of labour court' and states that 'the labour court may despite section 145, review the performance or purported performance of any function provided for in the act or omission for any person or body in terms of this act on any grounds that are permissible by law.' Those who tended to prefer a strict review test favoured the application of section 145 of the LRA. The said section entitled 'Review of arbitration awards' states that 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 and that the defect referred to in the foregoing means 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.

Whether or not arbitration awards are reviewable by the labour courts in terms of section 145 or the general provisions of section 158(1)(g) has been a subject of many contradicting judgements. The uncertainty reigning in this area was somewhat laid to rest in *Carephone (Pty) Ltd v Marcus No and others*.²⁸ There is however a considerable amount of criticism levelled at this decision and this shall be reverted to at a later stage. In the foregoing decision, the labour court decided that the appropriate section for reviewing awards was section 145 of the LRA and not section 158(1)(g). It was submitted that section 145 applies to the review of awards made by commissioners of the CCMA whereas section 158(1)(g) applies to administrative action taken by the state as an employer. The LAC made the following remarks with respect to the confusion in the interpretation of these sections:

By virtue of its judicial authority and specific provisions of the LRA it may review the exercise of functions by the commission. Where a commissioner exceeds the constitutional constraints on his or her powers on arbitration, this

²⁷ P.A.K.Le Roux 'The Test for review of CCMA commissioners: some certainty at last' (2001) 10 *CLL* 117,118

²⁸ Note 6 above, 1431

can be reviewed by the labour court under section 145, in particular s145(2)(a)(iii). It is not necessary to resort to s 158(1)(g) to achieve this end.

In finding that s 145 was the appropriate medium of review, the court had to contend with several opposing views in favour of s 158(1)(g). One view was that the provisions of s 145, which provides for specified limited grounds for reviewing the CCMA's arbitration awards, violate the constitution. This argument was based on the grounds specified in s 145 being narrower than those provided for by s 33(1)²⁹ read with item 23(2)(b)³⁰ of the constitution – particularly in that the constitutional imperative that the commissioner's decision be justifiable in relation to the reasons given for it is not clearly a ground for review in terms of s 145. Froneman DJP however held that the view that s 145 should be interpreted narrowly stems from inappropriate reliance placed on decisions interpreting a corresponding section of the Arbitration Act 42 of 1965³¹, notably the decision in the case of *Amalgamated*

²⁹ Section 33(1) states that 'Everyone has the right to administrative action that is lawful, reasonable and procedurally fair'

³⁰ Item 23(2)(b) of the Constitution states that;

(2) until the legislation envisaged in section 32(2) and 33(3) of the new constitution is enacted –

(b) section 33(1) and (2) must be regarded as follows:

'Every person has the right to –

- (a) lawful administrative action where any of their rights or interests is affected or threatened;
- (b) procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened
- (c) be furnished with reasons in writing for administrative action which affects any of their rights or interests unless the reasons for that action have been made public; and
- (d) administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened

³¹ The corresponding section of the Arbitration Act 42 of 1965 is section 33 entitled 'Setting aside of award' which states;

(1) Where

- (a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or

*Clothing and Textile Workers Union v Veldspan Ltd.*³² He held that the Arbitration Act's operation in respect of arbitration under the auspices of the commission is expressly excluded in the LRA (S 146); 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. The Honourable Froneman DJP further attributed the confusion to the way section 158(1)(g) is worded. In respect of the foregoing he made the following remarks at 1434BCD:

It must be admitted that the choice of the word 'despite' in s 158(1)(g) is an unhappy one. It allows for an interpretation of s 158(1)(g) as granting a general review power to the Labour Court over any function, act or omission under the LRA, instead of its providing merely for the court's residual powers of review for administrative functions not defined specifically in ss 145 and 158(1)(h). If the latter interpretation is accepted, the provisions of ss 145, 158(1)(g) and 158(1)(h) apply to distinct and different forms of administrative action and do not overlap. If, however, the former interpretation is accepted, the field of application of ss 145 and 158(1)(h) do overlap, with the result that the provisions of s 145 become superfluous.

It suffices to state finally that the court as per Froneman DJP came to the finding that commissioner's arbitration duties are administrative in nature and hence subject to the imperatives set out in section 33 of the constitution, of fair administrative action. It was in this context that the decision of a commissioner should be justifiable in relation to the reasons given for it. This finding came under criticism in *Shoprite Checkers (Pty) Ltd v Ramdaw No and others*.³³ In this case Wallis AJ, basing his argument on the decision of the Constitutional Court in *Pharmaceutical Manufacturers Association*

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- (b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded his 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

³² (1993) 14 ILJ 1431 (A)

³³ (2000) 21 ILJ 1232 (LC)

of SA; in re: *Ex parte application of the president of the RSA and others*³⁴ came to the conclusion that a commissioner does not perform an administrative function and therefore the principles of fair administrative action did not apply.³⁵ In yet another decision by the same court, in *Toyota SA Motors (Pty) Ltd v Radebe and others*,³⁶ it was held as per Nicholson JA that the court had inappropriately forced a rationality review into section 145. The decision in *Shoprite* was taken on appeal and the LAC addressed the issue of the appropriate review test in detail and came to the conclusion that the *Carephone* decision and the test formulated therein still applied. It is common cause that the test in *Carephone* was that of justifiability whereas the one in *Pharmaceutical* was that of rationality. The court found that although the two terms were not strictly speaking synonymous, they have sufficiently similar meaning to justify the conclusion that rationality can be said to be accommodated within the concept of justifiability as espoused in the *Carephone* decision.³⁷

Thus contrary to the ruling of the Labour Court in *Shoprite*, the *Carephone* decision remains good law. The implication is that reviews of arbitration decisions are to be brought before the courts through section 145 of the LRA which consists of a time frame within which such action should be undertaken. Furthermore, it is clear from the judgement that the merits and substance of the decision of the commissioners are also subject to review which goes beyond mere consideration of procedural irregularities.³⁸ It however remains questionable as to just how wide the rationality test should be and how it is to be applied. One thing however that seems to emerge out of this tussle of tests is the difficulty to distinguish between a review and an appeal. As observed by Mischke,³⁹ at first glance, this review of the logical cogency of the decision-making process appears dangerously close to appeal, but the Labour Appeal Court is at pains to point out that the difference between review and appeal can be maintained.

³⁴ 2000 (2) SA 674 (CC)

³⁵ le Roux (note 27 above) 119

³⁶ (2000) 21 ILJ 340 (LAC)

³⁷ le Roux (note 27 above) 120

³⁸ C Mischke 'After the award: Challenging and enforcing CCMA arbitrations' (2001) 8 *CLL* 11,19

³⁹ *ibid* 18

Chapter Three

3.1 Analysis of cases taken on review

3.2 Introduction

It has already been observed in the previous chapter that the choice for a review as opposed to that of appeal in arbitration awards/proceedings was intended to give finality to the disputes and hence achieve speedy resolution of the same. Further discussion was made about the sections in the Labour Relations Act (LRA) that enable this review function by the labour courts. It is common cause that despite the criticism levelled against it, the decision in *Carephone (Pty) Ltd v Marcus No and others*⁴⁰ remains good law. The debate on whether or not a proper approach was used in the foregoing decision was put to closure by Zondo JP in *Shoprite Checkers (Pty) Ltd v Ramdaw No & others*⁴¹ when he made the following remarks:

The Carephone debate has been going on for a long time. Nevertheless the labour relations community has for sometime now organised its lines and activities on the basis of that judgement of this court. I accept that some of the criticism against Carephone is justified but, having regard to all the circumstances and in order to bring about certainty and stability in the law in this area, I think the debate must come to an end.

As a result of the *Carephone* decision, review proceedings must be brought before the labour courts in terms of section 145 of the LRA. The said section prescribes among other things the time limit within which proceedings must be brought before the courts as well as the defects that may be raised against awards issued by commissioners. It is this latter part of the section that is of significance to the deliberations in this chapter. The defects or grounds for review are to be found at s 145(2) which states as follows:

⁴⁰ Note 6 above, 1425

⁴¹ Note 33 above, 340

'A defect referred to in subsection (i) 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

In practice, applicants tend to cite more than one of these grounds as a way of enhancing their chances of influencing the courts to review and set aside an award complained of. The courts have over time developed tests to deal with the various grounds. As a court of both law and equity, creating precedents and certainty in the process has not been an easy task. The foregoing coupled with the tendency of the court to set awards aside with specific instructions as to what should be done has made the duties of the commissioners quite unenviable. In other respects, the court's actions have been criticised to amount to appeal under the banner of a review. This has attracted remarks such as, 'it is doubtful whether our jurisprudence recognises a hybrid of an appeal and a review.'⁴² If it does, under what label does it parade and how does one define its nature, content and scope?⁴³

The purpose of this chapter is to examine the attitude adopted by the court in its review of the defects referred to in section 145 and the impact this has had on the conduct of arbitration proceedings. In other words, how far have the decisions of the court been justifiable in relation to the reasons given for them?⁴⁴ In the process one would like to see the extent to which the courts have attempted to adhere to what is expected of them in terms of their review function.

⁴² W Hutchinson 'Is the Labour Court Succeeding in its endeavours to create certainty in our jurisprudence' (2000) 22 *ILJ* 2223,2225

⁴³ *Ibid*, 2225

⁴⁴ Note 6 above, 1425

3.3 Gross irregularity in the conduct of arbitration proceedings

An application may be made to the labour courts to have an award reviewed and set aside on the grounds that the commissioner committed an act of gross irregularity in the conduct of the arbitration proceedings. It is common cause that this concept is not defined in the LRA. Neither is it defined in the Arbitration Act 42 of 1965 where a similar defect may be brought against an award. Owing to this absence of definition, the courts have crafted their own meaning as a way to resolve disputes brought about on the basis of this ground. The meaning was dealt with in the context of the Arbitration Act, which as observed earlier on, has an identical phrase as one of the grounds of review. For example, in *Bester v Easigas (Pty) Ltd and another*,⁴⁵ it was remarked as follows:

We have not been referred to any decision by our courts where the phrase 'gross irregularity in the proceedings' within the context of s 33(i)(b) of the [Arbitration] act formed the subject of consideration. Generally speaking, this phrase is not however foreign to our law and it has in fact been discussed in a number of reported cases. From these authorities it appears, firstly, that the ground of review envisaged by the use of this phrase relates to the conduct of the proceedings and not the result thereof.

The court in the latter part of the above quotation was referring to the dictum of *Mason J in Ellis v Morgan; Ellis v Dessai*⁴⁶ where it was stated as follows:

But an irregularity in proceedings does not mean an incorrect judgement, it refers not to the result but to the method of a trial, such as, for an example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined

It appears from these authorities that not every irregularity in the proceedings will constitute a ground for review of an award.⁴⁷ In order to justify a review on the basis

⁴⁵ 1993 (1) SA 30 (c)

⁴⁶ 1909 TS 576, 581

of gross irregularity, the irregularity must have been of such a serious nature that it resulted in the aggrieved party not having his case fully and fairly determined.

The courts have gone further to state that gross irregularity can be categorised into two classes. This was observed in *Goldfields Investment Ltd and another v City Council of Johannesburg and another*⁴⁸ where Schreiner J stated as follows:

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 might be called latent. Of course, even the first class are only material in as much as they prevent, or are deemed to prevent, the magistrate’s mind from being properly prepared for the giving of a correct decision. But unlike the second they admit of objective treatment, according to the nature of the conduct. 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.

It was held in the same case that the crucial question is whether the actions of the arbitrator, intentional or otherwise, prevented a fair trial of the issues. If it did prevent fair trial of the issues then it is said to amount to a gross irregularity. By implication, if it did not, then it will not constitute a gross irregularity. Thus the test for irregularity goes to the integrity of the hearing.⁴⁹ It is worth noting that the policy considerations that underpinned the approach of the High Court in making decisions relating to the provisions of the Arbitration Act differ from those that underlie the present LRA. Whereas arbitration under the Arbitration Act is voluntary, arbitration under the LRA is compulsory and underpinned by policy considerations such as the need to resolve labour disputes speedily and efficiently.

⁴⁷ *Moloi v Eujen No and Another* (1997) 18 ILJ 1372 (LC) 1376

⁴⁸ 1938 TPD 551, 560

⁴⁹ J Grogan (note 3 above) 618

Despite these differing policy considerations, the present Labour Court is of the view that the reasoning relating to gross irregularity as espoused by the High Court in the above instance is equally applicable to the concept as is found in the LRA. There was nothing to convince the courts that this reasoning could not be adopted to the present circumstances.⁵⁰

Having looked at what constitutes gross irregularity, one needs now to focus on the case law that has emerged from review applications based on this ground. The aim is to observe how the courts have discharged their review function in regard to this ground. Instances where the courts have pronounced the presence of the defect as well as where the applicants have failed to convince the courts as to the existence of the defect under scrutiny will be considered. In the process it is hoped to find out the extent to which the courts have endeavoured to confine themselves to review as opposed to appeal.

There are various defects that have been put before the courts under the banner of gross irregularity. The defects are considerable but the discussion shall be confined to the following; (a) the commissioner denied the applicants legal representation, (b) the commissioner denied the applicants the opportunity to present evidence that they deemed relevant to the case or (c) the commissioner ignored the material evidence before him in his award and (d) the commissioner did not allow for the postponement of the proceedings.

It must be conceded at the outset that the case law on this aspect is at times contradictory, if not confusing. The confusion seems to stem from what is gross and what is not. As observed by Du Toit,⁵¹ it is not clear if the applicant would need to show that the irregularity had a material effect on the award itself by prejudicing the aggrieved party, or whether even if there is no prejudice as to outcome, the award should stand, not merely on the 'no difference' principle, but simply that the irregularity was not gross.

⁵⁰ Note 47 above, 1372

⁵¹ Du Toit et al Labour Relations Law – A Comprehensive Guide 3 ed (2000) 618

3.3.1 Legal Representation

The fact that parties have been denied legal representation in the arbitration proceedings has on many occasions led to an application for review and the setting aside of the award on the ground that the commissioner committed an act of gross irregularity by so declining to allow such representation. Legal representation in arbitration proceedings is regulated by section 140(1)⁵² of the LRA. There are instances where the courts have agreed with the applicants. For instance in *Mthembu and Mahomed Attorneys v CCMA and others*⁵³ the applicants and the respondent agreed that those wishing to have legal representation could do so at the arbitration proceedings. However the respondent reneged on the agreement at the arbitration proceedings and this resulted in the commissioner refusing to allow legal representation for both parties.

The court, as per Landman J, was of the view that representation should have been allowed in compliance with the agreement that was reached by the two parties. The court observed that the harm that was caused to the applicant by this refusal was incalculable and hence came to the conclusion that the refusal by the commissioner to allow the applicant legal representation constituted gross irregularity.

⁵²Section 140(1) reads:

- (1) If the dispute being arbitrated is about the fairness of a dismissal and a party has alleged that the reason for the dismissal relates to the employee's conduct or capacity, the parties, despite section 138(4), are not entitled to be represented by a legal practitioner in the arbitration proceedings, unless –
 - (a) the commissioner and the other parties consent; or
 - (b) the commissioner concludes that it is unreasonable to expect a party to deal with the dispute without legal representation, after considering –
 - (i) the nature of the questions of law raised in the dispute
 - (ii) the complexity of the dispute
 - (iii) the public interest; and
 - (iv) the comparative ability of the opposing parties or their representatives to deal with the arbitration of the dispute

⁵³ (1998) 19 ILJ 144 (LC) See also *Ndlovu v Mullins No and another* (1999) 20 ILJ 177 (LC) where the fact that the commissioner allowed a self styled legal representative led to the award being set aside. The court insisted that the commissioner ought to have consciously and expressly addressed the question of legal representation.

It has further been ruled that it is permissible to have a legal practitioner as an observer in arbitration proceedings as long as he/she does not participate. This was decided by the Labour Court in *Pelletier v B & E Quarries (Pty) Ltd; B & E Quarries (Pty) Ltd v CCMA and others*⁵⁴ where the commissioner did not allow legal representation but nevertheless permitted the respondent's lawyer to observe the proceedings. The applicants argued that this constituted a defect in that once the commissioner has disallowed legal representation, he does not have the discretion to allow the attorney to remain present during the proceedings. During these proceedings, the attorney had apparently assisted in the clarification of certain issues that were causing confusion. The court as per Kennedy AJ was of the view that the employer did not suffer any injustice from the proceedings and hence the ground for review was said to be without merit.

It seems that occasions where the courts have rejected the review on the basis of legal representation are plentiful when compared with instances where commissioner's awards have been set aside on this defect. This is indeed a welcome development in that it reflects that commissioners have applied the relevant section in accordance with the spirit of the law. In *County Fair Food (Pty) Ltd v CCMA and others*⁵⁵ the applicants sought to have the award reviewed and set aside on the strength that they were denied legal representation. The respondents were apparently dismissed for refusing to work overtime. The court felt that the facts of the case were not sufficiently complex to necessitate legal representation; on the contrary they were simple and straightforward. In addition to this, the court held that the matter was not of any public interest. Similar sentiments were expressed in *Afrox Ltd v Laka and others*⁵⁶ where the court as per Zondo J, as he then was, found that there was nothing before it to suggest that the first respondent (commissioner) was ever told on what basis it could be said that the dispute was complex. It ruled that this was a simple

⁵⁴ (2000) 21 ILJ 624 (LC)

⁵⁵ (1999) 20 ILJ 2609 (LC)

⁵⁶ (1999) 20 ILJ 1732 (LC) see *Vider Ruber Products (Pty) Ltd v CCMA and others* (1998) 19 ILJ 1275 (LC) where a Labour relations consultant was denied the opportunity to represent the company by the commissioner. The Labour court upheld the decision of the commissioner.

dispute largely dependent on facts. This was a matter in which the respondent employees had been dismissed after assaulting a temporary employee during a strike. Unfortunately, in instances where legal representation is the cause for a review, the courts are almost left with no choice but to replace the decision of commissioners with theirs. For instance, where legal representation is deemed to have been unreasonably disallowed by the commissioner, the court almost orders that such be allowed. The reverse of this situation is also true. That is, where representation has been allowed and is deemed to have been inappropriate, the court simply orders that there be no representation when the matter is re-heard. This appears perfectly logical and hence it may not be fair to assess the ability of the courts to adhere to the principles of review on the basis of this ground.

3.3.2 Evidence during arbitration proceedings

The evidence that is led during the arbitration proceedings is another area that has prompted the reviewing and setting aside of awards. Very often applicants allege that the commissioner did not allow them to lead evidence that they considered relevant to the dispute. Alternatively, the parties taking the matter on review may allege that the commissioner, in arriving at the award, did not apply his mind to the material evidence before him. For example in *Moloi v Euijen No and another*,⁵⁷ in which the court dealt extensively with the interpretation of gross irregularity and in the process made reference to the High Court decisions in *Ellis v Morgan; Ellis v Desai*⁵⁸ and *Benjamin v Solac SA Building construction*⁵⁹, the labour court as per Maserumola AJ came to the conclusion that the first respondent, the CCMA commissioner, did not commit gross irregularity in the conduct of the arbitration proceedings and the application was dismissed. An application had been made to the labour court to the effect that certain evidence was not allowed by the first respondent and hence this denied the applicant a fair hearing. The court remarked:

⁵⁷ Note 47 above, 1372

⁵⁸ Note 46 above, 576

⁵⁹ 1989 (4) SA 940 (C)

In the present case, it cannot be said that the first respondent acted in a high-handed fashion or that he made a mistake which resulted in the applicant's not having a fair and complete hearing. She was also given the opportunity to give evidence and put her case before the first respondent. She was thus also given a complete hearing.

Gross irregularity was said to have been committed by a commissioner who refused to admit certain evidence in the arbitration – the commissioner refused to admit minutes of the disciplinary hearing and the appeal hearing into evidence, the purpose of which was to demonstrate the inconsistency between the version of a witness put before arbitration and the version of the witness during the disciplinary enquiry. These events transpired in *Afrox Ltd v Laka and others*⁶⁰ and the court as per Zondo J, as he then was, came to the conclusion that this was a case where the issue of credibility played an important role and, if the applicant sought to introduce evidence that was going to show that the respondents were giving versions which were different from those they had given at the disciplinary hearing, such evidence should have been admitted. Without making any finding as to what constitutes gross irregularity, the court found that the non-admission of the evidence precluded the applicant's case from being fully and fairly determined.

It can be said that the irregularity occasioned in the event of denying parties the opportunity to lead evidence constitutes patent gross irregularity, whereas in situations where the evidence is glaringly in front of the commissioner and he ignores the same in the process of reaching his award, the irregularity may be said to be latent. Perhaps one of the most classic examples of latent gross irregularity was dealt with in the case of *Toyota SA Motors (Pty) Ltd v Radebe and others*.⁶¹ In this case, the commissioner found that the respondent committed acts of fraud and gross dishonesty

⁶⁰ Note 54 above, 1732 see *Malelane Toyota v CCMA (1999) 6 BLLR 565 (LC)* where it was affirmed that a fundamental requirement in any arbitration process is that the arbitrator must consider and assess relevant evidence placed before him. Also see *Legal Aid Board v John No and another (1998) 19 ILJ 851 (LC)* where the commissioner disallowed evidence sought to be addressed by the applicant subsequent to the characterisation of the issue in a particular way.

⁶¹ Note 36 above, 340

but ordered his reinstatement. Thus the award was not supported by the evidence and the findings of the commissioner. Similarly in the case of *Abdull and Another v Cloete No and others*⁶² the Labour Court came to the finding that a gross irregularity of a latent nature was committed by the commissioner who gave contradicting reasons for his award. The Labour Court per Pretorius AJ stated:

The first respondent in this matter appears to have conducted himself in a manner which Schreiner J [in Goldfields] would have described as latent gross irregularity. An examination of his reasons indicates that he has failed to appreciate what the LRA requires of him when arbitrating a dispute referred to the CCMA. To paraphrase the words of Shreiner J, he has misconceived the whole nature of the enquiry and his duties in connection there with.....In this context, a complete failure to make the necessary decisions or findings in a manner which is capable of reasonable understanding, constitutes a gross irregularity as defined in s 145 of the LRA.

Finally, in the decision of the *Director-General: Department of Labour v Claassen and others*⁶³ the court examined the material evidence before it and came to the conclusion that there was no clear sign that the oral evidence and documentation as a whole had been closely analysed and considered by the commissioner. The court as per Tip AJ averred that there was no demonstration to be found in the award that the conclusion was logically connected to the overall assessment and impact of the oral evidence and documentation treated together and hence set aside the award. It must be said that there are instances where commissioners have taken consideration of evidence that was not led in the arbitration proceedings. This transpired in *AA Bull (Pty) Ltd v Kolisi and another*.⁶⁴ Neither party had alleged at any time that the notice

⁶² (1998) 19 ILJ 799 (LC)

⁶³ (1998) 19 ILJ 1142 (LC) see also *Kynoch Feeds (Pty) Ltd v CCMA and others* (1998) 19 ILJ 836 (LC) where the court as per Reveals J came to the finding that the commissioner's findings were unsupported by substantial evidence, that they were based on inferences of fact and were not reasonably justifiable in terms of the evidence that was produced. See also *County Fair Food (Pty) Ltd v CCMA and others* (1999) 20 ILJ 2609 (LC) where the commissioner had relied on an expired collective agreement

⁶⁴ (1998) 19 ILJ 795 (LC)

of the meeting was too short, or that the first respondent had insufficient time to prepare for the meeting. The court as per Revelas J remarked, '*in my view, to raise a matter after proceedings have been concluded and not affording either party the opportunity to make submissions in response thereto, is gross irregularity, particularly having regard to the circumstances of this matter.*'

3.3.3 Postponement of arbitration hearings

Another equally vexing issue is that of postponements of arbitration hearings. For many parties this is one of the most disturbing issue, as they prepare to put a case before a commissioner (the preparation often entailing significant disruptions to the lives of parties not directly involved – such as witnesses), only to find that the other party to the dispute fails to put in an appearance and the entire matter has to wait until another day.⁶⁵ The inconvenience caused by the postponement or the lack of it, where the one party deems it necessary, has been a subject of many reviews. The issue is regulated by section 138(5)⁶⁶ of the LRA and it is quite evident from the same that commissioners have a wide discretion in exercising their powers in relation to this subject. This was confirmed in the Labour Appeal Court decision in *Carephone*⁶⁷ and reaffirmed in the Labour Court decision of *Frasers International Removals v CCMA and others*⁶⁸ where the following remarks were made:

Commissioners enjoy a wide discretion with regard to granting postponements. The labour court will not interfere with this discretion, unless there are compelling reasons to do so. Accordingly, I cannot find that the refusal to postpone the matter amounted to an irregularity or to the second respondent [the CCMA commissioner] exceeding his powers.

⁶⁵ C. Mischke 'Practice and Procedure in the CCMA – The labour court lays down the law (1999) 9 CLL 1,1

⁶⁶ Section 138(5) provides that if a party to the dispute fails to appear in person or to be represented at the arbitration proceedings, the commissioner may continue with the arbitration proceedings in the absence of that party; or adjourn the arbitration proceedings to a later date

⁶⁷ Note 44 above, 1425

⁶⁸ (1999) 7 BLLR 689 (LC) 694c

The commissioner's discretion is unfettered and hence the courts have indeed found compelling grounds to interfere with the same. The commissioner's discretion to disallow postponement came under review in *Dimbaza Foundaries Ltd v CCMA and others*⁶⁹ where the employer was caught off guard by the employee's sudden change of issues in dispute at the commencement of the arbitration proceedings. The employee had initially indicated that it would only challenge the sanction meted out by the employer, but however changed to deny that it committed the misconduct alleged. The employee in this case was represented by a union official who was an admitted attorney with vast experience in labour litigation whereas the employer was represented by a layman. The commissioner acknowledged, in his award, that the sudden turn of events caught the employer's representative off guard. It is common cause that the employer did not request or apply for postponement of proceedings. However the court held that the commissioner ought to have guided the process by coming to the assistance of the employer. According to the court, the commissioner erred by assuming that the employer had the knowledge to apply for postponement. As a consequence of the commissioner's failure to guide the process fairly, his finding on the evidence was said to have been affected and hence the award was set aside.

Events similar to those that transpired in the above case were brought to the same court but this time around the court upheld the decision of the commissioner not to postpone. This was the case in *Cementation (Africa contracts) (Pty) Ltd v CCMA and others*.⁷⁰ Despite the fact that the *Dimbaza* case was cited as the authority for challenging the award, the court ironically made the following findings; '*It was not incumbent on the second respondent to postpone the matter of his own accord in the absence of any indication that such a postponement was sought or that it would serve any purpose.*' The court did not motivate any grounds as to why it differed with the *Dimbaza* dicta. There is vast case law to show that the courts would not lightly

⁶⁹ (1999) 8 BLLR 779 (LC) See also *Keeron Casa Hotel v Heinrichs and another* (1999) 1 BLLR 27 (LC) where the commissioner's reason for not postponing the proceedings was that the circumstances raised were not 'sufficiently exceptional'. The court set the decision aside on the strength that this was a wrong test. The proper test was whether justice and fairness required a postponement – in particular whether a postponement would prejudice the CCMA and the employee and , if so, whether this could be alleviated.

⁷⁰ (2000) 5 BLLR 573 (LC)

interfere with the decision of the commissioner in these circumstances. For instance in *Ross and Son Motor Engineering v CCMA and others*⁷¹ the applicant had declined to attend proceedings at the CCMA on the grounds that the same did not have the jurisdiction to arbitrate on the matter. On the day of the hearing, the applicant was contacted telephonically by the CCMA to inform him that the hearing was proceeding in his absence. At this point, the applicant requested a postponement which was vehemently opposed by the union official representing the respondent. It is common cause that the commissioner did not allow the postponement of the proceedings as he was not satisfied with the explanation rendered by the applicant. The decision of the commissioner was upheld on the basis that it was justifiable in relation to the reasons given for it.

Finally in *Seafood King v CCMA and others*⁷² the applicant sought to review the commissioner's award on the basis that the arbitration proceedings should not have proceeded in its absence. The court said that the sole question to be asked on the basis of the foregoing was, did the arbitrator exercise his discretion properly in electing to proceed with the arbitration in the applicant's absence and furthermore, did he apply his mind to the matter in hand? Apparently the applicant was to be represented by a consultant who was however denied audience as consultants do not have the right of audience before the commission. Owing to the foregoing, the postponement could not possibly be made on the basis of the commitments of a person who is not allowed audience in arbitration. In upholding the decision of the commissioner, the Labour Court made the following remarks:

The commission was created to play a crucial role in the resolution of labour disputes. It goes through elaborate preparation to enrol matters for conciliation and arbitration. Once a commissioner is reserved to conduct an arbitration, the commission is liable to pay the commissioner his fee whether the arbitration takes place or not. Other than the cost aspect, the commission must fulfil the legislative objective of expeditious resolution of labour disputes. If the commission were to postpone each and every arbitration where a party

⁷¹ (1998) 11 BLLR 1168 (LC)

⁷² (1999) 1 BLLR 42 (LC)

is absent, it would fail lamentably on this legislative objective. It is simply not the duty of the commission to mollycoddle parties to appear at the arbitration proceedings.

Reasons for review bordering on gross irregularity are quite vast. This is not surprising if one considers that they relate to the manner in which the arbitration proceedings are conducted. The few scenarios that have been referred to in this work are sufficient to show among other things how the awards have fared, their impact on the duties of the commissioners as well as the extent at which the Labour Courts have adhered to the principle of review. It must be said that commissioners enjoy a wide discretion as regards how they are to conduct arbitration proceedings.⁷³ It is common cause that this discretion would be abused if there did not exist a forum where this could be challenged. It follows that the duty of the labour court is to see to it that the discretion is exercised within the confines and spirit of the LRA in particular and the Constitution in general. As to how the awards have performed under the scrutiny of the courts in as far as this defect is concerned, one must admit that there is no clear cut answer. What is however useful is the impact these reviews have had in the manner in which commissioners conduct their affairs. They have indeed acted as a guide as to how one can best conduct proceedings to minimise situations where unfairness is alleged. It is only unfortunate that at times the messages from the reviewing body are contradictory and hence leave commissioners at a loss as to what is it that is expected of them. For instance, if they are to be seen as impartial, to what extent should they go in terms of advising a lay party without the risk of being labelled biased.

It is evident from the analysis of cases falling under this defect that the courts have striven to maintain the difference between a review and an appeal. This has not been particularly easy where options in a particular situation are limited. For instance, as alluded to earlier on, in situations of whether or not legal representation should be

⁷³ The manner in which they are to conduct arbitration proceedings are regulated by section 138 of the LRA which states as follows at subsection (1) 'The commissioner may conduct the arbitration in manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities.

allowed. Finally it must be said that the courts have not come out clearly on what is gross and what is not. In many occasions omissions detected have been readily labelled gross, to the probable and understandable dismay of many commissioners.

3.4 Exceeding One's Powers [s 145(2)(b)(iii)]

The body of case law that has emerged in our courts does not create a clear distinction between the concept of exceeding one's powers and that of gross irregularity. In many instances, the courts have come to the findings that the commissioners' actions amounted to gross irregularity and exceeding of his powers on virtually similar factual allegations. Perhaps this should not come as a surprise if one considers that the Arbitration Act 42 of 1965⁷⁴ does not only amalgamate the two, but that there is a considerable reliance on the case law generated from the defects entailed in this Act. As a result of the overlap, cases cited under gross irregularity will feature in one way or the other in the justification of this defect

Du Toit⁷⁵ submits that the concept of exceeding one's powers assumes two forms. Firstly it denotes a situation where the commissioner strays from the ambit of his jurisdiction or where he makes a ruling which is beyond the powers conferred by the LRA⁷⁶ and the Constitution in as far as it relates to the regulation of administrative power. Secondly, the phrase denotes a failure to use a power or a discretion that ought to be used.⁷⁷

It is evident from the case law that the first version of this concept is more prevalent than the latter and can manifest itself in various forms. One of the most difficult duties of the commissioners is to determine, on the basis of opening statements by the parties, what is in dispute for that is not only important in terms of whether or not they

⁷⁴ Section 33 of the Arbitration Act partly states that an award is set aside where an arbitration tribunal has committed any gross irregularity in the conduct of the proceedings or has exceeded his powers

⁷⁵ Du Toit et al (note 51 above) 619

⁷⁶ These powers are, in the case of compulsory arbitration, the powers conferred by the LRA and include the exercise of such discretion as the law allows

⁷⁷ Du Toit et al (note 75 above) 620

have jurisdiction to preside over the matter, but also in terms of the questions to be asked, evidence to be led and tests to be applied in the resolution of the case. Thus the characterisation of the nature of the dispute has very often been a contested terrain leading to allegations that the commissioner exceeded his powers. This is so because once the nature of the dispute has been determined, then the commissioner in terms of section 138(1)⁷⁸ can only allow what he considers relevant evidence to be led. This has indeed created discomfort and dissatisfaction in various quarters leading to situations where awards are taken on review. An example of characterisation of the nature of a dispute occurred in *Legal Aid Board v John No and another*⁷⁹ where the arbitrator gave a ruling that the issue before him was confined to ‘*whether there had been an unfair labour practice by the board in not applying the audi alteram partem before cancelling the payment of the allowance to Mr Hutchinson with effect from December 1996.*’ Pursuant to this ruling, the arbitrator ordered that the evidence be confined to the issue as had been characterised by him. He disallowed evidence sought to be adduced by the applicant in regard to the nature and content of the motor scheme and whether Mr Hutchinson was entitled to the motor allowances.

The court as per Pretorius AJ did not accept the characterisation of the dispute especially as regards the assertion that Mr Hutchinson should have been afforded the opportunity to be heard in person before the withdrawal of the allowances. Furthermore, the court was not comfortable with the characterisation as it denied the applicants the opportunity to lead evidence relating to the nature and content of the scheme. The court held that the commissioner did not only commit gross irregularity in not affording the applicant a fair trial but also exceeded his powers in the process.

Exceeding one’s powers may further take the form where there is a material error of law committed by the arbitrator. However, not every error of law is capable of rendering a decision of an arbitrator reviewable.⁸⁰ It is indeed undesirable that that should be the case because not only will that undermine the advantage of arbitration

⁷⁸ s 138(1) states that the commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantive merits of the dispute with the minimum of legal formalities.

⁷⁹ (1998) 19 ILJ 851 (LC)

⁸⁰ *Mlaba v Masonite (Africa) Ltd and others* (1998) 3 BLLR 291 (LC)

which litigation lacks but also the system of the administration of justice would not be able to cope with the amount of work that would result if every error of law were to render decisions of arbitrator or lower courts or tribunals reviewable.⁸¹ When then is the error of law capable of rendering a decision of an arbitrator reviewable? This question was explored by the High Court in *Hira and another v Booyson and another*⁸² where Corbett CJ said the following:

Where the complaint is that the tribunal has committed a material error of law, then the reviewability of the decision will depend, basically, upon whether or not the legislature intended the tribunal to have exclusive authority to decide the question of law concerned. This is a matter of construction of the statute conferring the power of decision.

The labour court has since declared that the legislature intended the CCMA to have exclusive authority to decide the question of law⁸³ and hence this leaves its error on law reviewable. The labour court had the opportunity to decide on the allegation on the material error of law in *Mlaba v Masonite (Africa) Ltd and others*.⁸⁴ In this decision, the applicant employee was dismissed for disobeying instructions he deemed unlawful for it contravened his hours of work. The hours of work enforced by the respondent employer turned out to contravene section 7 of the Basic of Conditions of Employment Act (BCEA). The commissioner did not make reference to this section in his award and as a result came to the finding that the instruction was lawful and hence endorsed the dismissal imposed by the employer.

On review, the court explored whether the instruction was indeed lawful as per the commissioner's award. The court found that the instruction was contrary to the provisions of section 7 of the BCEA and ruled that it was therefore unlawful. It followed that in concluding that the instruction was lawful, the second respondent (commissioner) made an error of law. The error of law led the second respondent to find that the applicant(employee) had had no good reason to disregard the instruction,

⁸¹ Note 80 above, 301

⁸² 1992 (4) SA 69 (A)

⁸³ Note 80 above, 302

⁸⁴ Note 80 above, 300

and to the ultimate decision that his dismissal was fair. The commissioner was said to have exceeded his powers when he declared the instruction lawful contrary to the provisions of the BCEA on this subject. A material error of law was further the subject of contention in *Rope, Constructions Co (Pty) Ltd v CCMA and others*⁸⁵ where upon finding that the dismissal was procedurally unfair, the commissioner awarded compensation amounting to six months wages despite the fact that the period between the employee's dismissal and the final date of arbitration exceeded the twelve months in relation to which the calculation of compensation in terms of section 194(1)⁸⁶ is limited. The commissioner did not offer any reasoning to support the exercise of his discretion and it was open to speculation whether, had he been conscious of the fact that he was obliged to make an award of twice the amount in fact decreed, he would have awarded compensation at all or whether the award constituted merely an error of formulation. The court concluded that, whatever the position, this aspect of the commissioner's award amounted to him exceeding his powers and hence could not be allowed to stand.

However it appears that the court will not always regard miscalculation of compensation as amounting to exceeding one's powers. For instance in *Zaayman v Provincial Director: CCMA Gauteng and others*⁸⁷ the commissioner miscalculated the amount of compensation due to a dismissed employee and the court found that the error had not amounted to excess of power.

Arbitrators have also been found to have exceeded their powers where they ignored or misconstrued the appropriate statute or legal principles. Appropriate legal principles

⁸⁵ (2002) 23 ILJ 157 (LC) see also *Johnson and Johnson (Pty) Ltd v Chemical Workers Industrial Union* (1999) 20 ILJ 89 (LAC)

⁸⁶ Section 194(1) is entitled 'limits on compensation' and states as follows: (1) If a dismissal is unfair only because the employer did not follow a fair procedure compensation must be 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 or adjudication, as the case may be, calculated at the employee's rate of remuneration on the date of dismissal. Compensation may however not be awarded in respect of any unreasonable period of delay that was caused by the employee in initiating or prosecuting a claim.

⁸⁷ (1999) 1 BLLR 92 (LC)

were not applied in *Morkels Stores (Pty) Ltd v Woolfrey No and another*⁸⁸ where the employer dismissed several employees for violating picketing rules during a strike. The applicant employee was one of the individuals who were identified to have violated the agreed rules. In his award the arbitrator stated:

There is no question that the conduct of the picketers was contrary to both the agreed picketing rules and to acceptable disciplinary norms. I am satisfied that the actions of the picketers were sufficiently serious to justify their dismissal. However, the employer chose not to take disciplinary action against the group. Instead it singled out individuals for discipline based on specific acts of misconduct. The employee was one of those whom the employer chose to discipline individually.

On the strength of the above submissions, the arbitrator was of the view that the failure to take action against the group or those that were not identified nullified the dismissal of the applicant employee. This he said despite the fact that the employer conducted about fifty disciplinary inquiries resulting in only nine dismissals. It follows that the employer could only prove misconduct deserving dismissals in nine employees. How then was the employer to dismiss employees on a wholesale scale when there was no proof of misconduct committed by the all? Furthermore, how could he dismiss those that he could not identify? The court as per Revelas J held as follows:

Employers cannot be precluded from taking disciplinary action against individuals, properly identified as having conducted acts of misconduct simply because, given the nature of the strike action and the number of employees involved, the employer is unable to identify all of the individual transgresses.

Thus the commissioner concerned misconstrued the legal principle of consistent application of discipline in circumstances that are similar. It could not be reasonably said, without proof, that all involved in the strike violated the picketing rules. Hence it was always going to be unfair for the employer to dismiss employees who conducted

⁸⁸ (1999) 6 BLLR 572 (LC)

themselves within the rules on the basis of a few who became a nuisance. Misconduct is not a new phenomenon and so is individualised disciplinary action.⁸⁹ By so misconstruing the aforesaid legal principle, the commissioner was said to have exceeded his powers, for the power to afford relief to an employee in a dismissal dispute, depends on the commissioner finding that there was no fair reason for the dismissal.

It is possible to look at the above award from a different perspective. Given that the remedy awarded by the arbitrator is derived from section 193,⁹⁰ it can be argued, rightly so, that the arbitrator failed to demonstrate understanding of the discretion in the foregoing section by awarding relief in respect of the applicant employee when he had arrived at the findings that the misconduct committed was serious enough to warrant dismissal as a sanction. Another example of failure to demonstrate understanding of the discretion conferred by section 193 came to the fore in *Polifin Ltd v Sebeko No and another*⁹¹ where the commissioner made an award which read as follows:

- (a) *Polifin did not act unfairly both procedurally and substantively when terminating the services of Mr Yacob – it did what it reasonably could under the circumstances;*
- (b) *Should any vacancy arise in the company, Mr Yacob should be re-employed and be given preference, this is because I took account of the report by Dr Rendree dated 30/05/97*

⁸⁹ See *Rickett and Colman SA (Pty) Ltd v Chemical Workers Industrial Union and others* (1991) 12 ILJ 806 (LAC) 814 where the court said the following: it has is not been suggested that the appellant had any ulterior motive in disciplining those whom he chose to discipline and not disciplining those that were not in fact disciplined. Furthermore, as was recognised by the Industrial Court, it is not unreasonable to take disciplinary action against those individuals who could he identified. It is clear that the appellant had no evidence at his disposal to identify any other individual transgresses.

⁹⁰ Section 193 is entitled remedies for unfair dismissal and unfair labour practice. It gives the labour court and arbitrator various options in terms of remedies that may be awarded should the dismissal be deemed unfair.

⁹¹ (1999) 20 ILJ 628 (LC)

The company, Polifin, made an application to the court asking that paragraph (b) of the award be set aside on the strength that the arbitrator exceeded his powers by so making such an award. The court as per Landman J had this to say about the award:

This dispute was about an alleged unfair dismissal. It was found by the commissioner, and this is common cause, that the dismissal was fair. Notwithstanding this finding, the commissioner went on to order that re-employment take place if a position was to become available. In my opinion that was not a course of action available to the commissioner. Section 193 of the Act, which deals with remedies for unfair dismissal, permits an order for re-employment in a finding that the dismissal is unfair. Where a commissioner comes to the conclusion that the dismissal is fair, that is the end of the matter. The commissioner has no power to order re-employment.

Failure to understand the discretion conferred by the LRA is not only confined to the above cited section. In *Superstar Herbs v CCMA and others*⁹² the court had to explore whether the commissioner's award was appropriate within the meaning of section 138(9)⁹³ and whether there had been a failure of justice. The dispute involved the dismissal of an employee for theft. The employee barely denied the offence or the act of theft while the employer led elaborate evidence on the matter. The commissioner put excessive weight on the employee's bare denial and held that the employer's evidence required corroboration. The court's view was that the commissioner erred in these instances by putting undue weight on the bare denial of the employee as well as asserting that there should have been corroboration. The court was of the view that the evidence led was enough to prove, on a balance of probabilities, that the employee was guilty of dishonesty. The award was therefore inappropriate and not in the spirit of section 138(9) of the LRA. By so awarding, the arbitrator was deemed to have exceeded his powers.

⁹² (1999) 1 BLLR 58 (LC)

⁹³ S 138(9) states: The commissioner may make any appropriate arbitration award in terms of this Act (LRA), including, but not limited to, an award –

- (a) that gives effect to any collective agreement;
- (b) that gives effect to the provisions and primary objects of this Act;
- (c) that includes, or is in the form of a declarator order

Another area that has been raised to challenge the awards of commissioners on this defect relates to decisions or awards that are not justified by the evidence adduced. This is one area where there is a great overlap between this defect and that of gross irregularity.⁹⁴ In *Balfour/Siyathemba Transitional local authority v CCMA and another*⁹⁵ the arbitrator failed to take into consideration the housing agreement that stipulated how housing allowances were to be paid out to employees. Despite the fact that the housing agreement was adduced as evidence, the commissioner ignored it in arriving at his findings that the employee was entitled to housing allowance. The labour court found to the contrary and said that the commissioner erred in finding that the employee was qualified to be granted a home ownership allowance. The court as per Mlambo J was of the view that the commissioner did not apply his mind to the matter as required by the LRA and exceeded his powers when he ignored key evidence put before him.

Ignoring evidence as adduced is one aspect of this wide area. Other aspects are such as making incorrect findings from evidence put before the arbitrator, basing the award on inadequate evidence and drawing inferences inappropriately. The arbitrator was said to have drawn inappropriate inferences in *Kynoch Foods (Pty) Ltd v CCMA and*

⁹⁴ Basson J submitted in *Seardel Group Trading (Pty) Ltd t/a the Bonwit Group v Andrews No and others (2000) 21 ILJ 1666 (LC)* that this ground of review (exceeding of powers by arbitrators) can be better accommodated under either misconduct or gross irregularity in its extended sense.

⁹⁵ (1998) 9 BLLR 923 (LC) see also *Dimbaza Foundries Ltd v CCMA and others (1999) 20 ILJ 1763 (LC)* where the court examined the award in the light of the evidence and noted that the commissioner had failed to apply his mind to several issues. The court concluded that the process was unfair, inequitable and procedurally unfair and led to an unjustifiable conclusion and in the absence of fairness, the commissioner had exceeded his powers; *Venture Motor Holdings Ltd t/a Williams Hunt Delta v Biyana and others (1998) 19 ILJ 1266 (LC)* where the court having reviewed the evidence placed before the commissioner agreed that the commissioner had in no significant way applied himself to the highly relevant evidence which had been placed before him. A fundamental requirement in any arbitration proceedings had not been met, namely that relevant evidence had to be taken into account and reasonably assessed and that the outcome had to be reasonably connected.

*others*⁹⁶ where the respondent employee resigned for personal and domestic reasons and later claimed severance pay from the applicant employer. The employee would have been retrenched but was offered redeployment and when his wife could not find a job at or near where he was relocated, he decided to resign and claim severance pay as if he was retrenched. It is common cause that the commissioner granted the employee severance pay. In setting aside the award, the court said that the commissioner's award was unsupported by substantial evidence, that it was based on inferences of fact and was not reasonably justifiable in terms of the evidence that was produced. The court further found that the arbitrator did not take proper account of the relevant provisions of the LRA regarding payment of severance pay.

As mentioned from the onset, there are instances in this defect which relates to failure to exercise the discretion as it is the expectation owing from the powers bestowed by the LRA. Limited case law on this area suggest that allegations relating to the foregoing have failed to see the light of the day or are hardly raised given the wide discretion within which commissioners operate. However similar allegations have been raised in terms of the Arbitration Act where a similar defect may be raised against an award. For example in *Seardel Group Trading (Pty) Ltd t/a The Bronwit Group v Andrews No and Another*⁹⁷ where the issue in dispute was whether or not the arbitrator may interfere with a sanction imposed by an employer. During the proceedings, the arbitrator's attention was drawn to the Labour Appeal Court decision in *County Fair Foods (Pty) Ltd v CCMA and other*⁹⁸ where the interference on the sanction imposed by the employer was discussed at length. Despite being made aware of this authority, the arbitrator ignored to make reference to the decision in his

⁹⁶ (1998) 19 ILJ 836 (LC) see to the contrary *Purefresh Foods (Pty) Ltd v Dayal and another* (1999) 5 BLLR 518 (LC) where the commissioner found that the employee was entitled to severance pay despite the fact that the employer had been instrumental in securing alternative employment for him with the purchaser of the employer's business. The court found that the commissioner's findings were not reviewable because, even if it was wrong in law, it would not be set aside unless an injustice had been committed. An injustice would be committed if a party was deprived of a fair hearing or if a commissioner failed to apply his mind to the evidence before him.

⁹⁷ Note 92 above, 1676

⁹⁸ (1999) 20 ILJ 1701 (LAC)

findings and it was the contention of the applicants that he failed to exercise his discretion by so failing to take cognisance of this dicta.

The labour court found that the arbitrator exceeded his powers by not making reference to the authority availed to him without motivating any reasons as to why he did not. It was said that he failed to exercise the discretion expected of him. Similarly in *Stocks Civil Engineering (Pty) Ltd v Rip No and another*⁹⁹ the arbitrator failed to make reference to an important decision in the matter that was being dealt with. The subject of contention was compensation resulting from an unfair dismissal. The court was of the view that the arbitrator acted dysfunctionally in respect of his approach to the question of compensation by disregarding the principles expounded in *Johnson and Johnson (Pty) Ltd v Chemical Workers Industrial Union*¹⁰⁰ thereby materially limiting his discretion. On the basis of the foregoing the award could not stand.

The authorities cited so far to show how the defect under scrutiny has fared in the courts may give the impression that litigants are always successful in challenging awards on this ground. There is however a great body of case law to show that the courts would not readily view the actions of the arbitrators to amount to this defect. In *Moloi v Euijen No and another*¹⁰¹ the applicant's application for review was based on three grounds viz: that the commissioner committed a gross irregularity in the conduct of the proceedings: that the commissioner exceeded his powers and that the award was improperly obtained. The issue in dispute was the characterisation of the dispute by the arbitrator. Whilst the employee party alleged that she was not allowed to lead evidence on the existence of her dismissal, something which she said was an issue in dispute, the arbitrator denied that this was the issue in dispute and said what was in dispute was the exact date of the employee's dismissal. Elsewhere in this work the characterisation was discussed and in those instances, arbitrators were found to have exceeded their powers. However in this instance the court as per Maserumule AJ found otherwise. The following remarks were made:

⁹⁹ (2002) 23 ILJ 358 (LAC)

¹⁰⁰ Note 85 above, 89

¹⁰¹ (1997) 18 ILJ 1374 (LC) note also 87 above, 92

I am unable to find that the first respondent (commissioner) exceeded his powers in any way. In terms of s 138(1) of the Act, a commissioner, such as the first respondent, is empowered to conduct an arbitration in a manner that he considers appropriate in order to determine the dispute fairly and quickly. This power, in my view, includes the power to decide what evidence will be allowed or disallowed. Insofar as the first respondent may have taken the view that evidence in relation to the alleged shortage of petty cash could not be led or relied upon to justify the applicant's dismissal, this falls within his competency to decide on the manner of how the arbitration is to be conducted. Applicant's claim for relief on this ground must accordingly, also fail.

It is clear from the above decision that the courts will not lightly interfere with the discretion of the arbitrators unless the same is deemed to have been unjustly and unfairly exercised to the extent that it denies one of the parties not only a fair hearing but a decision that is connected to the reasons given for it. As a result of the foregoing, it has not been an easy task to prove this defect in the light of these wide powers. The misfortune however is that the courts do not seem to make a refined distinction between the various defects. Although du toit's categorisation of this defect seems quite comprehensible, examples of the same emerging from our courts seem to suggest that the court has used the ground in ways far removed from du toit's explanation. The tendency to widen the scope of this defect has inevitably led to the blurring of the distinction that has to exist between this ground and other grounds for review. It is my submission that we would see less of reviews before the courts if the simple explanation given by du toit, which does not seem restrictive in anyway, was to be the basis for reviewing decisions of the commissioners under this ground.

There is no doubt that the review function of the courts have had a great impact on the decisions of the commissioner in as far as this defect is concerned. For instance one cannot find that the dismissal was fair but nevertheless award compensation or reinstatement on the strength that they have the discretion to do so. In other words this discretion cannot be exercised outside of the relevant statutes and the case law generated by the courts. However this is easier said than done as the situations differ from one case to the other.

Whether or not the courts have maintained the not so easy to maintain distinction between an appeal and review appears doubtful. There are several instances where the courts have replaced the decisions of the commissioners with their own on the strength that their rulings make it a foregone conclusion as to the next cause of action. The actions of the Labour Courts seem to stem from s 145(4)(a) and (b) which states as follows:

- (4) If the award is set aside, the labour court may –*
- (a) determine the dispute in the manner it considers appropriate; or*
 - (b) make any order it considers appropriate about the procedures to be followed to determine the dispute*

For instance in the *Superstar Herbs* case, the court was called upon to determine a dispute relating to dishonesty. The commissioner had ruled that the employer had failed to prove a case of dishonesty and reinstated the employee. The court found to the contrary and went on to state:

I do not deem it wise to refer the dispute back to the commission for a fresh arbitration. I am satisfied that Madikwa was involved in dishonesty conduct. In terms of section 145(4)(a) I will determine the dispute. I find that Madikwa's dismissal was for a fair reason. I do not award any costs as same were not requested nor was the application opposed. It stands to reason that the application in terms of section 158(1)(c) whereby Madikwa seeks to have the award made the order of court, must fail.

It is common cause that no reasons were motivated as to why the matter could not be remitted to the commission except that the court was satisfied that a case of dishonesty was proved. In other decisions, the courts reasoned that its rulings made next cause of action obvious and hence the decision to replace the award. This was the case in *Mlaba v Masonite (Africa) Ltd and others*¹⁰² where the court as per Zondo J (as he then was) came to the following conclusion:

¹⁰² Note 80 above, 303

Having considered which of the two courses I should follow, I have come to the conclusion that this court should not remit the matter but should decide it itself. I have arrived at this conclusion because, in my view, it would serve no useful purpose to remit the matter as the end result is, with respect, a foregone conclusion. To do so will simply cause an unnecessary delay in the resolution of the dispute between the parties – a delay which, it seems to me, will be prejudicial to both the applicant and the first respondent.

The issue before the court was whether or not the instruction disobeyed by the applicant was legal. The second respondent had made an award to the effect that the instruction was lawful and hence dismissal resulting from failure to obey it was fair. The court found to the contrary. The instruction was found to be illegal as it went against certain provisions of the BCEA. It was the view of the court that the only logical conclusion from the above findings was that the dismissal was unfair and hence this foregone conclusion could not be remitted to the second respondent. The only question that the second respondent was left with to consider was that of relief. Even then the court motivated some reasons for deciding on this matter saying it will be unfair to the applicant to remit the matter. Finally in *Balfour/Siyathemba Transitional Local Authority v CCMA and another*¹⁰³ the court was called upon to decide whether the first respondent, Tsotetsi, qualified to be granted a home ownership allowance in the light of the housing agreement that was entered into between him and his employer, the applicant. The commissioner had found that he was entitled to the housing allowance. The court found that the commissioner erred when he found that the first respondent was entitled to a housing allowance as he did not make reference to the housing agreement. The award was therefore found to be inappropriate and set aside. It was however not remitted to the second respondent on the reasons almost a replica of the previous case. The court as Mlambo J reasoned as follows:

I now have to consider whether it is expedient to refer the matter back to the commission for further attention by another commissioner. I am of the view that to refer it back would serve no purpose in view of my finding that the

¹⁰³ Note 95 above, 926

language of the house ownership agreement is very clear that Tsotetsi does not qualify for the housing allowance. There is therefore no need to refer the dispute back for further consideration by the commission. I therefore determine it on the basis that the applicant does not qualify for the housing allowance.

A recap on what constitutes a review would show that the courts could consider the merits of the matter in one way or another. However in doing so the Judge concerned should know that he enters into the merits not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable.¹⁰⁴ What we have seen in the foregoing decisions is the entering into the merits of the case by the courts and the ultimate replacement of the arbitrator's award by the decision of the court. This obviously smacks of an appeal. It is quite evident that if the test was to be that of a foregone conclusion, then the courts would determine two thirds of the cases that come before them, for they end in a state that we find the above decisions. It however seem the courts would selectively advance reasons from time to time as to why they intend determining the dispute to a point where they make their own decision. In the final analysis, the above case law goes to show the fragile distinction between an appeal and a review in our courts. At most how difficult it has been to maintain the distinction. An escalation of this tendency can only serve to undermine the integrity of the CCMA as an organisation intended to be a first stop in the resolution of disputes in this country.

¹⁰⁴ Du Toit et al (note 75 above) 620

3.5 Misconduct in relation to the duties of an arbitrator [s 145(2)(a)(i)]

There are few cases where commissioners have been found guilty of misconduct. Litigants usually allege a host of defects including misconduct, but indications are that they are more often successful in proving other reviewable faults than it is the case with misconduct. It follows that it is generally difficult to convince or prove that there has been a case of misconduct on the part of the commissioner to a point where the courts have expressed concern over unsubstantiated claims of impropriety.¹⁰⁵ However, as a way of establishing what constitutes misconduct, the labour court as per Stelzner AJ in *County Fair Foods (Pty) Ltd v Theron No and others*¹⁰⁶ described misconduct in relation to arbitration proceedings as follows:

For there to be misconduct, it has been held that there must be some “wrongful or improper conduct” on the part of the decision-maker in this instance the commissioner. Misconduct has also been described as requiring some “personal turpitude”¹⁰⁷ on the part of the decision-maker.

¹⁰⁵ Note 22 above, 131 where the court said, to accuse the first respondent, a commissioner appointed by the Commission for Conciliation, Mediation and Arbitration, of not applying his mind is one thing, but to accuse him of impropriety without substantiating that accusation borders on contempt....It does a great disservice to our public institutions to weigh in with unsubstantiated claims of impropriety.

¹⁰⁶ Note 55 above, 2649 see also *Dickinson and Brown v Fisher's Executors* 1915 AD 166, 176; see also *Reunet Industries (Pty) Ltd t/a Reutech Defence Industries v Naicker and others* (1997) 12 BLLR 1632 (LC) 1638C where it is stated that a gross mistake of law or fact may be indicative of misconductMistake, 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. Gross carelessness may also constitute evidence of misconduct. Not much is said as to what constitutes gross carelessness. See also *Amalgamated and Textile Workers Union v Veldspun Ltd* 1994 (1) SA 162 (A) where Goldstone JA (as he then was) stated that misconduct does not extend to bona fide mistakes the arbitrator may make whether as to fact or law.

¹⁰⁷ The Oxford Advanced Learners Dictionary defines turpitude as a state or quality of being wicked

As a way of explaining the foregoing remarks, the court provided a test to the effect that the basic standards of proper conduct for an arbitrator are to be found in the principles of natural justice, and in particular the obligation to afford the parties a fair and unbiased hearing. It follows from these principles that a commissioner must conduct the proceedings before him in a fair, consistent and even-handed manner. This means that he must not assist, or be seen to assist, one party to the detriment of the other. It must be noted that the labour courts have drawn much from the High Court decisions where similar defects emanating from the Arbitration Act 42 of 1965 were the basis for reviewing arbitrators' awards.¹⁰⁸ It is evident from this case law that other than assuming the form of bias¹⁰⁹, misconduct has manifested itself in other forms such as gross negligence or gross mistake of law or fact.¹¹⁰ The latter form of misconduct has seen to its overlap with other defects such as gross irregularity and exceeding of powers by commissioners.

In instances where commissioners have been accused of bias, the courts have applied a strict test that the same must be objectively established. To explore bias as a form of misconduct, one perhaps ought to start from the provisions of the LRA that sanction the appointment of commissioners as arbitrators. It is essential to do so because one of the basis for challenging the commissioners' awards has been the relationship that the arbitrator has had with one of the parties in the dispute. It is common cause that section 136 of the LRA contains certain provisions relating to the appointment of a commissioner for the purpose of arbitration proceedings. In s 136(3) provision is made for a party to object to the commissioner who conducted the conciliation being the one to conduct the arbitration. Section 136(4) stipulates that if such objection is

¹⁰⁸ See 2 above relating to the nature and content of misconduct as has been perceived under the Arbitration Act. Other authorities are; *Donner v Ehrlich* 1928 WLD 159; *allied Mineral Development Corporation v Gemsbok Vlei Kwartsiet* 1968 (1) SA 7 ©; *Kolber and another v Sourcecom Solutions (Pty) Ltd and others* 2001 (2) SA 1097 (C)

¹⁰⁹ In *Franklin v Minister of Town and Country Planning* 1948 AC 84 (HL) 'bias' is said to denote the departure from the standard of even-handed justice which the law requires from those who occupy judicial office or those who are commonly regarded as holding a quasi-judicial office

¹¹⁰ Du Toit et al (note 75 above) 617

made, the commission must appoint another commissioner. Section 136(5) makes provision for parties to indicate a preference in respect of arbitrator.

It is evident that none of the above sections specifically provide for an objection to be made to the appointment of a particular commissioner on the apprehended view that they may not conduct the proceedings fairly. On the strength of the foregoing, it is no wonder that some commissioners when faced with this allegation give the following defence:

There is no provision in the Act for a commissioner to disclose where he comes from by way of disclosing his background. It is not a practice in any CCMA proceedings for an arbitrator to disclose his/her background prior to commencing arbitration proceedings.....The CCMA has appointed commissioners from various fields and professions.....It has never occurred to me in any arbitration proceedings that I have to disclose my previous involvement. Neither is it a requirement as indicated above.¹¹¹

The above defence was rendered despite the fact that the Code of Conduct of Commissioners issued in terms of section 117¹¹² provides that commissioners must disclose any interest or relationship likely to affect their impartiality or which might create a perception of partiality.¹¹³ This obviously amounted to deliberate misrepresentation of facts in the light of the stipulations of the Code of Conduct for Commissioners and hence the need for the courts to stamp on this conduct.

Commissioners are indeed aware of the provisions of the code and where circumstances justify and permit, have recused themselves from the proceedings in

¹¹¹ *Venture Motor Holdings Ltd t/a Williams Hunt Delta v Biyana and others* (1998) 19 ILJ 1266 (LC)

¹¹² Section 117(6) states that the governing body must prepare a code of conduct for the commissioners and ensure that they comply with the code of conduct in performing their functions.

¹¹³ Clause 4 of the Code of Conduct for Commissioners. Under this head commissioners should disclose financial and personal interests, as well as financial, business, professional, family or social relationships.

the interest of fairness. This has not been possible in every situation though. For instance in *Kwazulu Transport (Pty) Ltd v Mnguni and others*¹¹⁴ the commissioner was of the view that the objections were without merit and hence made the following remarks; ‘*I considered and rejected the application. In terms of CCMA Code of Conduct I am bound to disclose any relationship with either of the parties, and recuse myself if necessary. But in this case I have no relationship with either DELATUSA or the applicant employee.*’¹¹⁵ Even if the Code of Conduct was not to be invoked, the courts have adopted the attitude that the capacity of a party to raise such objection has its origins in the common law. Thus where a party has a reasonably well-founded apprehension that it will not receive an impartial and unbiased hearing, it will be entitled to seek relief.¹¹⁶ This is because the common-law considerations relating to impartiality of an arbitrator and consequently the duty of disclosure, apply no less strongly where arbitration is compulsory than they do where the entry into arbitration is voluntary.¹¹⁷ Allegations relating to bias often take two forms, firstly that the arbitrator had a past relationship with either of the parties and secondly that the arbitrator’s conduct during the arbitration was suggestive of bias.

The commissioner’s past relationship with one of the parties came under scrutiny in *Venture Motor Holdings Ltd t/a Williams Hunt Delta v Biyana and others*¹¹⁸ where the commissioner had failed to disclose that he had been previously employed as a legal advisor by the third respondent trade union of which the employee was a member and by whom she was represented. On the strength of the facts of the case, the court as per Tip AJ made the following observations:

¹¹⁴ (2000) 22 ILJ 1646 (LC) 1651

¹¹⁵ It shall be seen later on that the commissioner indeed once had a strong relationship with the respondent employee

¹¹⁶ *BTR Industries SA (Pty) Ltd and others v Metal and Allied Workers union and another* (1992) 13 ILJ 803 (A) where the court stated that the test is that of ‘reasonable suspicion of bias’ as opposed to the ‘real likelihood of bias.’ Thus provided that the suspicion of partiality is one which might reasonably be entertained by a lay litigant, a reviewing court cannot be called upon to measure in a nice balance the precise extent of the apparent risk. If suspicion is reasonably apprehended then that is an end of the matter.

¹¹⁷ Note 111 above, 1268

¹¹⁸ *Ibid* 1268

It is no means required of a CCMA commissioner who undertakes a conciliation or arbitration that he or she should in each and every case preface proceedings with the exposition of his or her background. But where, as in the present case, there was a lengthy and close relationship between the commissioner and one of the parties, then a clear duty arises to make disclosure of such fact. In the circumstances, I find there to be considerable merit in the complaint raised by the applicant.

A case of failure to recuse oneself was yet the subject of contention in *Kwazulu Transport (Pty) Ltd v Mnguni and others*.¹¹⁹ Subsequent to becoming aware of the past relationship between the commissioner and the employee, the employer made an application to the effect that the commissioner recuse himself to which he declined. The commissioner had represented employees in labour litigation against the employer on at least three occasions as a labour consultant. After setting out the test as was done in the *BTR Industries*¹²⁰ case and having regards to the facts in the case, the court as per Pillay J came to the following conclusion:

A person who renders services not only as a commissioner but also as a representative of one of the parties before the CCMA should recuse himself or herself without hesitation if the apprehension of bias is based on the dual role played by the commissioner. A commissioner who has litigated against a party who is scheduled to appear before him or her should disclose that fact immediately she or he receives notice of the hearing and offer to recuse herself or himself. An early and timeous response by the commissioner would avoid delay and the costs of an aborted process.

It was further observed by the honourable court that the commissioner's failure to disclose his past relationship with the respondent (employee) was, at best, negligent and, at worst, a deliberate misrepresentation which amounted to gross misconduct. In its view, the misconduct created doubt about the commissioner's suitability to serve as such and said this should be brought to the attention of the Director and the

¹¹⁹ Note 114 above, 1651

¹²⁰ Note 116 above, 803

Convening Senior Commissioner of Kwazulu-Natal. Lastly in *Ellerine Holdings Ltd v CCMA and others*¹²¹ the court found that the CCMA committed a reviewable irregularity by reversing its earlier decision to appoint another commissioner to arbitrate a dispute after it had received an objection by one of the parties to the appointment of the original arbitrator.

From the scenarios where the commissioners have been found to have faulted by failing to recuse themselves, it is quite clear that the court will not lightly view any form of past relationship between the commissioner and any of the parties. It seems the court would prefer commissioners to offer to recuse themselves even when they may hold the view that the same cannot cloud their best judgement. This is different from disclosing one's background for the parties to decide. What seems to matter however is what one of the parties may allege should things not turn out in their favour. It is indeed imperative that commissioners disclose their past so that where objection is raised the party that does raise such objection is given the opportunity to motivate reasons for the objection. This is necessarily so because I do not believe that every past relationship can lead to a situation where the commissioner cannot properly apply his mind objectively and fairly to facts before him. For instance, most commissioners are academics and are likely in one way or the other to come across their former students either as Industrial relations managers or lawyers. To suggest that they should recuse themselves when ever this comes to light will indeed make a meal of the concept of bias. Commissioners are no doubt part of the society and hence interact in various ways. If these interactions easily make one susceptible to bias, then one day we may not have commissioners to arbitrate disputes. Perhaps the test should not only go as far as establishing that a relationship of some sort existed, but rather even if it did exist, whether it can be reasonably said that the same could have a bearing on the impartiality of the commissioner concerned.

The second form of bias alleged by litigants usually relates to the manner in which the commissioner conducted the arbitration proceedings. This is often in the form of remarks or interventions that s/he makes in the course of the proceedings. It should be borne in mind that the LRA gives commissioners wide-ranging powers as to how they

¹²¹ (2002) 23 ILJ 1282 (LC)

should conduct arbitration proceedings. In the words of Ingrid de Villiers, '*they have an almost unfettered discretion as to how conciliation and arbitration proceedings should be conducted.*'¹²² The power to conduct arbitrations derives from sections 138(1) and (2).¹²³ However wide, the power has to be exercised within the principles of justice and fairness. It follows that if these principles and others that one need not mention here are not followed, the courts would not hesitate to set awards aside. Thus the courts have from time been called upon to find out if the commissioner did not conduct himself in a manner that is suggestive of bias especially in his inquisitorial role. For example in *Venture Motor Holdings LTD t/a Williams Hunt Delta v Biyana and others*¹²⁴ the applicants alleged that the commissioner interfered in the questioning of the employee by suggesting a possible explanation for what in the face of it would otherwise be a telling piece of evidence against her. The court held that the intervention was strongly suggestive of bias on the part of the commissioner in favour of the employee. It was further found that even if it fell short of actual bias, it was a grossly irregular intervention by the commissioner and it was certain to and in fact did fuel the belief held by the company that it was not receiving a fair hearing.

Incidents of bias almost similar to the above were alleged in *Mutual and Federal Insurance Co Ltd v CCMA*¹²⁵. The commissioner was alleged to have made a statement to the effect that managers of Mutual and Federal insurance were incompetent. It was further alleged that, after a witness was excused subsequent to leading evidence, the commissioner made comments to the effect that with his many

¹²² I de Villiers 'Behind the closed doors: Reviewing the conduct of CCMA commissioners' (2001) 10 CLL 71,71

¹²³ Section 138(1) and (2) of the LRA provides:

- (1) The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities.
- (2) Subject to the discretion of the commissioner as to the appropriate form of the proceedings, call witnesses of any other party, and address concluding arguments to the commissioner.

¹²⁴ Note 111 above, 1266

¹²⁵ (1997) 12 BLLR 1610 (LC)

years of experience, he already knew what the case was all about. On the strength of the foregoing evidence, the court as per Jali AJ made the following findings:

If I consider these two comments by the commissioner, which I do believe were unwarranted in whatever context they were made, I am disposed to agreeing that a lay litigant in the position of the applicant and its witnesses was likely to form an impression that the commissioner was partial to the employee's case. Both comments were made during and only after the very first witness had led his evidence. The applicants then (respondents in this occasion) had not even led their evidence regarding the incident which had been the subject matter of the enquiry. At the time it could not have been said that the commissioner had an objective evaluation and analysis of the evidence to reach the conclusion he had reached about the applicant's case.

Apart from the allegations dealt with above, there were others such as regular interruptions, shouting at the company's witnesses and cross-examination in an aggressive manner. The court felt that there was no merit in these allegations as the commissioner acted within the powers granted by sections 138(1) and (2)¹²⁶ of the Labour Relations Act. However in *Commuter Handling Services (Pty) Ltd v Mokoena and others*¹²⁷ in circumstances that almost mirrored the above, the court was of the view that the arbitrating committed acts of misconduct. The commissioner was alleged to have hurried up the employer in the giving of evidence, interrupted and interfered with the conduct of the case. The court observed that even though a commissioner has the power to conduct arbitration proceedings in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly under the provisions of section 138(1)¹²⁸ of the LRA, this does not give him the power to depart from the principles of natural justice. Thus although it lies within the commissioner's powers to decide whether to adopt an inquisitorial or adversarial mode of fact finding, once this decision has been made it ought to be consistently applied to both parties. It must be admitted that there is a wide range of incidents that

¹²⁶ See 123 above

¹²⁷ (2002) 23 ILJ 1400 (LC)

¹²⁸ Note 123 above

have been brought up by litigants as indications of bias from commissioners such as refusal to allow legal representation¹²⁹, being found in the arbitration room with one party when the other has not arrived or left early¹³⁰, and that these failed to see the light of the day for they were proved to be frivolous.

Lastly, misconduct bordering on gross negligence or gross mistake of law or fact has led to the blurring of the line between this defect and gross irregularity. Very often reasons motivated for gross irregularity are raised when justifying gross misconduct on the strength of the above grounds. As these grounds have been dealt with when one was discussing gross irregularity as a defect, it would certainly amount to duplication if they were to be raised here for there is an overlap between the two.

It has already been noted at the beginning of this work that there is limited case law on this defect than it is the case with other defects. Although a wholesale of factors are often alleged to enhance one's chances of success, it appears that diminished success rate in this area has made it less attractive. More often than not it is a case of sour taste than anything substantial. The little case law that exists bears testimony to this and in a way put the activities of the commissioners in a good light.

However, there are indeed incidents that are deserving of the sympathy of the courts as they were glaringly irregular as to suggest that the arbitrator was biased. Owing to these findings, it is possible that commissioners are increasingly recusing themselves where circumstances are similar to these findings. Unfortunately the CCMA does not keep a record of these recusals and the reasons leading to the same for they were to show that commissioners do excuse themselves when they are of the view that they cannot fairly handle a matter. The record would have further shown applications

¹²⁹ In *Afrox v Laka and others* (1999) 20 ILJ 1732 (LC) the commissioner denied applicants legal representation and this was deemed to amount to bias. The court held that the test for qualifying bias was not satisfied and the issue was without any merit.

¹³⁰ In *Moloi v Euijin and another* (1997) 18 ILJ 1372 (LC) it was alleged that the commissioner held a secret meeting with the respondents subsequent to the completion of the arbitration proceedings. The respondents had apparently remained while the applicants left immediately. The court remarked; the question is whether each time that one party to an arbitration departs from the venue first, knowingly leaving a commissioner and a representative of the other party behind, gives rise to a secret meeting and taints the commissioner with bias, impartiality and dishonest conduct. In the court's view this did not.

objecting to the appointment of commissioners on the strength that they would be biased and why they failed. This is an important part of the equation for it makes a difference between a genuine delay and a frivolous one, a thing that can ultimately affect speedy resolution of disputes.

The courts have to a greater extent maintained the distinction between an appeal and review in handling this defect. In almost all the authorities that were visited, the courts remitted the matters to the commission albeit with an instruction that a different commissioner be appointed to arbitrate on the matter.

3.6 The Award was improperly obtained [s 145(2)(b)]

Section 145(2)(b) of the LRA provides that an award issued by the commissioner in terms of section 138(7)(a)¹³¹ may be reviewed and set aside if it is deemed, by one of the parties, to have been improperly obtained. This sub category, is borrowed from the Arbitration Act 42 of 1965¹³² and focuses on misconduct by a party whereas misconduct in s 145(2)(a)(i)¹³³ is limited to the conduct of the commissioner. As shall be seen, the misconduct by the party influences the decision of the commissioner and may in some instances result in the misconduct by the commissioner, that is, where owing to the influence, he deliberately issues an award in favour of the said or concerned party.

The first inescapable inquiry however relates to what is to be understood by the phrase ‘an award has been improperly obtained’ as found in s 145 of the LRA. Recent

¹³¹ S 138(7)(a) provides as follows: within 14 days of the conclusion of the arbitration proceedings –

(a) the commissioner must issue an arbitration award with brief reasons, signed by the commissioner.

¹³² S 33 of the Arbitration Act 42 of 1965 is entitled ‘setting aside of award.’ S 33(1)© states that where 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.

¹³³ S 145(2)(a)(i) states that a defect referred to in subsection (1) means that the commissioner committed misconduct in relation to the duties of the commissioner as an arbitrator.

case law has not shed light on this phrase. However, as the phrase has been borrowed from the Arbitration Act, there is case law emanating from the same that has explored the meaning of this phrase. For example in *Bester v Easigas (Pty) Ltd and another*¹³⁴ the court had the opportunity to deal with the meaning of this phrase as it appears in the Arbitration Act and the learned Brand AJ had the following to say at 38 C – D:

Thirdly, it is obvious, in any opinion, that dishonest or blameworthy conduct on the part of the arbitrator will not always be covered by section 33(1)(c) of the Arbitration Act. As I understand the Act, the problem is, broadly speaking, that section 33(1)(a)¹³⁵ deals with improper conduct on the part of the arbitrator whereas section 33(1)(c) contemplates misconduct on the part of the successful party. Where the successful party bribes the arbitrator, the two subsections will overlap. This overlap is of no significance, however, in determining the meaning of the two subsections.

The labour court dealt with this defect or ground in *Moloi and Euijen No and another*.¹³⁶ The court made reference to the definition of the phrase as espoused in the *Bester case*. The court further explained the overlap noted in the *Bester case* and had this to say:

In my view, the latter subsection contemplates a situation where the one party to the arbitration through fraud or other improper means, obtains an award in his or her favour. This can either be in the form of a bribe or by misleading and false or fraudulent representation which lead to an award being granted in that party's favour. It is different, in my opinion, from a charge that the commissioner misconducted himself, although it is quite possible that the commissioner's misconduct may give rise to the improper obtaining of an award. For example, if a party to an arbitration bribes the commissioner and

¹³⁴ Note 45 above, 30

¹³⁵ S 33(1)(a) states as follows –

(a) any member of the arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire.

¹³⁶ Note 47 above, 1372

obtains an award in its favour, the award would have been improperly obtained and the commissioner would also have misconducted himself.

Limited case law on this defect is testimony to the fact that it is difficult to prove that commissioners have been bribed or influenced in one way or the other. However, differently viewed, it is a testimony that commissioners do not engage themselves in illicit activities that lead to the miscarriage of justice. An application for review of awards on the basis of the foregoing has not been successful. In the *Moloi* case, an application for review and the setting aside of the award was brought before the labour court on the strength that one of the parties remained with the commissioner in the arbitration room while the applicant party departed. The commissioner was said to have held a meeting with the respondent party in the absence of the applicant party and hence, it was claimed, this influenced his award. The party was deemed to have improperly obtained the award. In dismissing this claim, the court stated:

The question is whether each time that one party to an arbitration departs from the venue first, knowingly leaving a commissioner and a representative of the other party behind, gives rise to a secret meeting and taints the commissioner with bias, impartiality and dishonest conduct. In my view it does not.

A review application bordering on this defect was further dismissed in *County Fair v CCMA and others*.¹³⁷ In this case, the applicant alleged that the award was improperly obtained on the basis that whilst cross examining one of the witnesses, the representative to the witness kept on indicating, by way of hand signals, when to answer and when to keep quite. In dismissing this ground, the court noted that there was no justification on the papers for inferring that the award had been improperly obtained. Instead the court assumed in favour of the applicant that what it was actually seeking to allege under this head was that the respondent had committed a gross irregularity by failing to appreciate the circumstances in which the events he was evaluating occurred.

¹³⁷ Note 106 above, 2609

The other aspect of this defect constitutes misleading and or giving false evidence. The labour court was ceased with the task to determine whether or not an award was improperly obtained on the basis that false evidence was admitted by the commissioner. This transpired in *Lekota v First National Bank of SA Ltd*¹³⁸. The applicant was dismissed for refusing to obey an instruction. The commissioner found that the dismissal was fair. In support of his application for review, the applicant alleged that the commissioner accepted false evidence in a manner that made him an accessory to perjury and that he did not treat the case seriously. The court dismissed this application, stating that there were no grounds to prove the allegation.

Finally, in *Coetzee v Lebea no and another*¹³⁹ an application for review was based among other things on the allegation that the commissioner entertained irrelevant and improper considerations, and that he failed to act in a judicial and proper manner. The labour court observed that there was not a jot of evidence to show that the commissioner did not act judicially or that he had acted improperly. The court further said:

To accuse the first respondent, a commissioner appointed by the commission for conciliation, mediation and arbitration, of not applying his mind is one thing, but to accuse him of impropriety without substantiating that accusation borders on contempt.....It does a great disservice to our public institutions to weigh in with unsubstantiated claims of impropriety.

Owing to the limited case law on this ground, it is not possible to make a good assessment of the review function on this particular ground. It is quite possible that the difficulty in terms of proof posed by this ground has led to a situation where parties have sought refuge in other reviewable grounds prescribed in the LRA.

¹³⁸(1998) 10 BLLR 1021 (LC)

¹³⁹ Note 105 above, 129

3.7 The award is not rationally justifiable in relation to the reasons given for it.

The grounds for review discussed hitherto are all prescribed in s 145 of the LRA. However, owing to the Labour Appeal Court ruling in *Carephone (Pty) Ltd v Marcus* no and another,¹⁴⁰ awards by commissioners have been challenged on other grounds which continue to be the subject of major debates amongst practitioners. One such ground is that the award must be rationally justifiable in relation to the reasons given for it. This is intended to cater for the constitutional imperative that commissioners' decisions must be justifiable in relation to the reasons given for them.¹⁴¹

In the *Carephone* case, the Labour Appeal Court was ceased with the task to determine whether review of commissioners' awards should be brought before the courts in terms of s 145 or s 158(1)(g) of the LRA. Prior to the ruling, s 145 was deemed to constitute narrower grounds for review whilst s 158(1)(g) was perceived to allow for a review on far broader grounds.¹⁴² In dismissing this argument, the court

¹⁴⁰ Note 6 above, 1425

¹⁴¹¹⁴¹ S 33 of the Constitution reads: Everyone has the right to administrative action that is lawful, reasonable and procedurally fair. This must be read with item 23(2)(b) of the same which reads: Every person has the right to –

- (a) lawful administrative action where any of their rights or legitimate expectations is affected or threatened;
- (b) procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened;
- (c) be furnished with reasons in writing for administrative action which affects any of their rights or interests unless the reasons for that action have been made public; and
- (d) administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened.

¹⁴² It was argued that the provisions of s 145, which provide for specified, limited grounds for reviewing the CCMA's arbitration awards, violate the constitution. The argument has been that the grounds specified in s 145 are narrower than those provided for by s 33(1) read with item 23(2)(b) of the constitution – particularly in that the constitutional imperative that the

per Froneman DJP held that the view that s 145 should be interpreted narrowly stems from inappropriate reliance placed on decisions interpreting a corresponding section of the Arbitration Act 42 of 1965.¹⁴³ He also stated that the effect of allowing the review of CCMA arbitration awards in terms of s 158(1)(g) would be to render s 145 superfluous. The learned judge's finding was that s 145 is not unconstitutional and that it must be interpreted in accordance with the constitution. Thus the constitutional imperative that commissioner's decision ought to be rational and justifiable in relation to the reasons given for it was held to be located within s 145 of the LRA, and in particular s 145(2)(a)(iii). It was therefore unnecessary to resort to s 158(1)(g) to achieve this end. The purpose of citing this ground for review is not to enter into the debate as to whether or not the *Carephone* decision was correct. At any rate the Labour Appeal Court has already pleaded with the labour relations fraternity to bring to an end the debate in the interest of certainty and stability.¹⁴⁴ The intention is to show that there is a body of case law that has been generated owing to reviews on the basis of this ground.

As alluded to above, the review in terms of this ground is brought about in terms of s 145 of the LRA. Usually a host of grounds are cited including the foregoing. Such was the case in *Leisure Industries Ltd v Macgahey and others*¹⁴⁵ where the application for review was made in terms of s 145(2)(ii) and (iii) of the LRA. The issue in dispute was whether or not the respondent was an employee in terms of the LRA. If found to be an employee, the court was to determine whether or not his dismissal was fair. The commissioner had found that the respondent was an employee and that he had been unfairly dismissed. After assessing the manner in which the arbitration proceedings were conducted, the court made the following remarks:

commissioner's decision be justifiable in relation to the reasons given for it is not clearly a ground for review in terms of s 145.

¹⁴³ This is the decisions in the case of *Amalgamated Clothing and Textile Workers Union v Veldspun Ltd (1994) (1) SA 162 A*.

¹⁴⁴ The LAC found this in *Shoprite Checkers (PTY) Ltd v Ramdaw No and others (2001) 22 ILJ 1603 (LAC)*

¹⁴⁵ (2001) 22 ILJ 2026 (LC)

In conclusion, I should say that the alacrity with which the arbitrator disposed of the hearing and the fact that he issued his award only two days later lend some credence to the suspicions of bias alluded to. In any event,, I am of the opinion that the arbitrator's award is singularly lacking in rationality and justifiability in the light of the totality of the evidence before him(limited as it was by the irregularities) and for this reason, too, is reviewable.

The test for review espoused in the *Carephone* decision was further the subject of review in *Gimini Indent Agencies cc t/a S & A Marketing v CCMA and others*.¹⁴⁶ In this case, the employee walked out of the disciplinary inquiry and the commissioner found that he had foregone his right to a fair hearing. On the basis of this, the employer brought in a review saying it was not reasonably justifiable for the commissioner to have examined the procedural fairness of the enquiry particularly the impartiality of the chairperson. Apart from finding that the argument was unpersuasive, the court held as follows:

Applying the test for review laid out in Carephone, it could not be said that there was no reasonable objective basis to justify the connection made by the commissioner between the material properly available to him and the conclusion which he eventually arrived at. The evidence presented before the commissioner showed a history of events characterised by serious antagonism between the employee and the managing member (chairperson). In these circumstances there was at least a rational connection between the factual material available before the commissioner and his conclusion that the managing member was so personally involved that he could reasonably be perceived as not being sufficiently impartial to chair the disciplinary inquiry.

¹⁴⁶ (1999) 20 ILJ 2872 (LC) see also *Cadema (Pty) Lt v CCMA (Western Cape Region) and others* (2000) 21 ILJ 2261 (LC) where an employee was dismissed for insolence. In his award, the commissioner stated that dismissal was not the appropriate sanction. In his view, the employer should have instituted a sanction short of dismissal. The employer then sought to review the award on the grounds that the commissioner's decision was not rationally justifiable on the basis of the evidence before him. In considering the merits of the matter on the limited basis permitted by *Carephone*, the court was unable to conclude that the decision of the commissioner was rationally justifiable.

It appears that even where the applicant has not raised this as a ground for review, the courts are more than willing to test the award of commissioners on the basis of the ground, perhaps in an effort to ensure that they are within the confines of the constitution. For instance, in *Shield Security Group (Pty) Ltd v CCMA and others*¹⁴⁷ the grounds for review were stated as follows: that the commissioner misdirected himself in holding that the applicant had not considered alternatives to the employee's dismissal for operational requirements; that the commissioner had erred in law in approaching the provisions of s 189 of the LRA as though they were peremptory; and that the commissioner had misdirected himself by exercising the discretion that he was required to exercise in relation to the award of compensation. It is common cause that the applicant did not state as one of his grounds that the award was not justifiable in relation to the reasons given for it. Perhaps this was not necessary as the legislature did not deem it essential to have this as a separate ground for review. The ground is perhaps all encompassing and tends to fit in all reviewable situations.

In the above case the court found that the applicant had established a good cause for review. Thus it concluded, the decision of the commissioner was not justifiable on the basis of the material placed before him. Similarly in *Capwest Mouldings and Components cc v Ely and others*¹⁴⁸ the court dealt with the justifiability of the award even though this was not spelt out as one of the grounds for review. The commissioner found that the employee was constructively dismissed and hence awarded compensation. The court however found that the commissioner failed to apply the two-stage test that deals with a dispute involving an alleged constructive dismissal set out in *Sappi Kraft (Pty) Ltd t/a Tugela Mill v Majake no and others*.¹⁴⁹ According to the test, the employee discharges the onus that he was constructively dismissed. Once he has been successful, then the employer justifies why the dismissal was fair. As a result of this omission by the commissioner, the court was of the view that the evidence before the commissioner did not reasonably justify his finding that the employee was constructively dismissed.

¹⁴⁷ (2000) 21 ILJ 958 (LC)

¹⁴⁸ (1999) 20 ILJ 2859 (LC)

¹⁴⁹ (1998) 19 ILJ 1240 (LC)

Lastly in *Vita Foam SA (Pty) Ltd v CCMA and others*¹⁵⁰ an application for review was brought before the labour court on the basis of s 145. The employer alleged that the commissioner erred in finding that the dismissal of five employees for misconduct during a protected strike was both substantively and procedurally unfair. The employees were seen either holding or leaning against the gate and thus impeding entrance or departure through the gate. Despite the fact that evidence was led to this effect, the commissioner nevertheless found that the dismissal was substantively unfair. To this the court held that the decision of the commissioner was not justifiable in relation to the evidence adduced and hence set aside the award.

As it has been the case in other reviewable circumstances, the court has in a number of decisions replaced the decisions of the commissioners with its own on the basis that the decisions were not rationally justifiable in terms of the reasons given for them. In the cases to be stated shortly, the court did not motivate any reasons as to why it chose to replace the decision rather than remitting the matters to the CCMA. In the *Leisure*¹⁵¹ case, the court found that the respondent was not an employee in terms of the LRA and hence ruled that he was not dismissed. This was perhaps in order in that once he was not an employee then that put to the end the enquiry regarding his dismissal. However in the shield decision, the matter was not so conclusive. Here the commissioner found that the retrenchment of the employee was both substantively and procedurally unfair and awarded compensation as a result. After perusing the merits of the case, the court was of the view that the commissioner's award was not justifiable and hence replaced the award with a ruling that read; the dismissal of the applicant is determined to have been both substantively and procedurally fair.

The above and other similar scenarios noted elsewhere make the role of the court quite a confusing issue especially if one has regards to the distinction between a review and an appeal. In its attempt to maintain a distinction between the foregoing concepts, the Labour Appeal Court in *Carephone* emphasised that although there may be a need to consider the merits of the case, that will be in order as long as the judge determining the issue is aware that he or she enters the merits not in order to substitute

¹⁵⁰ (2000) 21 ILJ 244 (LC)

¹⁵¹ Note 145 above, 2026

his or her own opinion on the correctness thereof, but rather to find out whether the outcome is rationally justifiable. It seems to me that once that has been achieved, then that should constitute the end of the enquiry.

Chapter Four

4.1 Evaluation of the review function

The assessment and evaluation of the review function should not only be done against the back drop of what it was intended to achieve when the new dispensation was ushered in but further against what it has achieved so far in terms of guiding the arbitration function through its reviews. One of the key objectives of the current labour dispensation is the effective and speedy resolution of disputes in order to promote the peaceful existence of labour and capital in the industrial relations arena¹⁵². The LRA is further intended to bring justice more closely to the parties and hence instil the confidence eroded in the past system due to delays exacerbated by prolonged litigation.

To eliminate the litigious nature of the past system, awards by commissioners are final and binding. However, aggrieved parties may take the awards on review strictly on the basis of the grounds prescribed in s 145 of the LRA. This therefore means that parties do not have the right of appeal as was the case in the past. The foregoing was done with the hope that the system will be less litigious. A review as opposed to appeal, especially where grounds are prescribed, reduces the possibilities of matters being taken on review and hence dragging forever. Thus less reviews were expected. However, contrary to the above expectation, a relatively large number of cases find their way to the review function. Whilst some analysts in this field find this as a reflection of the inadequacy in the performance of the CCMA, something that may be too harsh a criticism, others regard it as a normal phenomenon in a system where arbitration is compulsory. Others are even of the opinion that a review in these circumstances is not sufficient.¹⁵³ It can however be said that the CCMA as an

¹⁵² Section 1 of the LRA states: The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are amongst others the effective resolution of labour disputes.

¹⁵³ N Whitear-Nel 'Carephone (Pty) Ltd v Marcus No and others (1998) 19 ILJ 1425 (LAC)' (1999) 20 ILJ 1483 where states as follows at page 1488-1489 'It is my submission that it would be preferable, in the interest of clarity and certainty, for the legislature to intervene and to provide for a mechanism for appeal against compulsory arbitration awards. In order to

institution that has recently emerged in the new democracy was always destined to encounter hiccups in its early stages of operation. It is quite possible that some of the motivations for reviews can be traced to the inadequacies or problems that are faced by the organisation. Amongst the failures or problems observed by John Brand¹⁵⁴ are shortage of financial and human resources, enormous case load, delay in the resolution of disputes, poor quality of arbitration awards, inadequate training leading to incompetence in commissioners.

According to Brand,¹⁵⁵ in the period November 1996 to April 1999, the CCMA received 175 046 cases averaging 323 cases every working day. This case load exceeded the case load budgeted for by 37.5% yet the funds budgeted for only increased by 6.6%. This shortfall in funding had far reaching effects. For instance, the scarcity of the resources caused commissioners to receive only very basic training. Those with limited legal qualification and experience were initially not supposed to arbitrate.¹⁵⁶ However due to enormous case load leading to backlog, least experienced and qualified commissioners had to arbitrate leading to poor quality of awards. Thus this lack of resources obviously impacted on the CCMA's capacity to deliver the effective, expeditious and quality services expected of it.¹⁵⁷ It is on the basis of the foregoing shortcomings that the advocacy for the right of appeal has always been based.¹⁵⁸

prevent this from hampering the effective resolution of labour disputes, it may be necessary to consider limiting the right of appeal to issues involving complex question of law.

¹⁵⁴ J. Brand 'CCMA: Achievements and challenges – Lessons from the first three years' (2000) 21 *ILJ* 77, 81

¹⁵⁵ *Ibid*,

¹⁵⁶ *Ibid*,

¹⁵⁷ *Ibid*

¹⁵⁸ *Ibid*, 90 where John Brand states: It is perfectly in order for the parties to be deprived of a right of appeal when they deliberately and voluntarily contract out of formal litigation and choose private arbitration. Then they choose the arbitrator and agree to be finally bound by his or her decision. It is totally different when one party forces another into a process and they have an adjudicator imposed on them. In such a situation the dictates of fairness and legitimacy indicate that an adverse of fairness and legitimacy indicate that an adverse finding should be able to be challenged.

The labour courts are entrusted with the review function and do the same in the light of all inadequacies stated above. It must however be said that all is not dark and gloomy in the CCMA. There are quality awards that continue to emerge out of this institution due to qualified and experienced commissioners as well as the guidance that has been provided by the labour courts overtime. Thus the review function should not only be viewed in the light of the shortcomings of the CCMA but also in terms of its positive results in the form of well reasoned awards. At any rate, inadequacies or not, the labour court has no jurisdiction to treat a matter as if they were dealing with an appeal. The very courts have emphasised from time to time that the distinction between review and appeal should be maintained at all costs.¹⁵⁹ However, whether or not they have lived up to this expectation remains debatable as shall be seen shortly.

One of the key tasks of the labour courts is to create stability and certainty in as far as the labour jurisprudence is concerned. It has long been a principle of our law that the law must be seen as certain, to enable the average citizen to know, at any given time, what the law is and what his or her rights and obligations are.¹⁶⁰ Thus conflicting decisions emerging both from the Labour Appeal Court and the Labour Courts does not only cause confusion within the CCMA ranks but also in the industrial relations fraternity as to the state of our law. The lack of certainty is likely to lead to a fertile ground for litigation resulting in the prolonged resolution of disputes, a situation that is contrary to the objects of the LRA. It would appear that conflicting decisions have become an accepted norm within our labour jurisprudence much to the discomfort of

¹⁵⁹ Note 6 above, 1425 where Froneman DJP stated: 'One must be careful not to extend the scope of review for the wrong reasons. One such wrong reason would be the fact that the Labour Court has no original or appeal jurisdiction in respect of the matters to be conciliated and arbitrated under the auspices of the commission and to compensate for this by an extended review.' See also *Coetzee v Lebea No and another* (1999) 20 ILJ 129 (LC) where Cheadle AJ said the following: 'Accordingly, once a reviewing court is satisfied that the tribunal has applied its mind, it will not interfere with the result even if it would have come to a different conclusion. The best demonstration of applying ones mind is whether the outcome can be sustained by the facts found and the law applied. The emphasis is on the range of reasonable outcomes not on the correct one.'

¹⁶⁰ N. Van Dokkum 'The issuing of 7.12 Certificates and the jurisdiction of the CCMA' (2001) 22 ILJ 1492

many practitioners. As observed by Hutchinson¹⁶¹ ‘the methodology of expressing reservations which fall short of overruling previous authorities is all too familiar. Unfortunately, it leads to much uncertainty which is something that a court of appeal should eschew. If anything the Labour Appeal Court should be charting the way forward by plotting a steady course.’

One such area of law where the courts created a lot of uncertainty was with regards to the appropriate standard for reviewing awards emerging from the CCMA. The initial controversy was with regards to the appropriate provision in the LRA in terms of which reviews should be brought before the labour courts. The LRA provisions, discussed at length in the first chapter, are section 145 and 158(1)(g). Those who favoured a wide review test argued in favour of the latter section whilst those who preferred a strict review test tended to be in favour of the former section. The matter finally came before the Labour Appeal Court (LAC) in the important decision of the *Carephone*¹⁶² decision where it was decided that the appropriate section for reviewing awards was section 145 of the LRA and not section 158(1)(g).

The test established in the above dictum was that the awards of the commissioners should be justifiable in terms of the reasons given for it. Unfortunately the controversy failed to dissipate. In *Toyota SA Motors (Pty) Ltd v Radebe and others*¹⁶³ a differently constituted LAC expressed doubts as to the correctness of the approach adopted in the *Carephone* decision although it did not expressly overturn it. The controversy was heightened when Wallis AJ entered into the fray with his decision in *Shoprite Checkers (Pty) Ltd v Ramdaw No and others*.¹⁶⁴ In a lengthy and well argued decision, he came to the conclusion that the *Carephone* decision did not constitute

¹⁶¹ W. Hutchinson ‘Is the Labour Appeal Court succeeding in its endeavours to create certainty in our jurisprudence’ (2001) 22 ILJ 2223 See also the remarks by N Van Dokkum (see 9 above, 1492) where he says ‘if the fabled alien visitor were to land in our country today and attempt to understand the state of our labour law by reading the various judgements of our labour courts, it would quickly rocket back to Mars with its tails between its legs. Different judges say different things, usually as pronouncements of policy disguised as purposive interpretation, and this leading to great uncertainty.’

¹⁶² Note 6 above, 1425

¹⁶³ Note 36 above, 340

¹⁶⁴ (2000) 21 ILJ 1232 (LC)

good law. The decision was taken on appeal and the LAC, in a lengthy decision too, addressed the issue of the appropriate review test in detail and came to the conclusion that the *Carephone* decision and the test formulated therein still applied. The court did accept some of the criticisms levelled against the *Carephone* decision but nevertheless decided that the decision should be left unperturbed in the interest of certainty and stability in the law in this area.¹⁶⁵

While the above confusion did not impact so much on the way the commissioners go about conducting their matters, in that it concerned itself with how awards are to be brought before the courts, it certainly had an impact in the rest of the industrial relations community which makes use of the CCMA and the labour courts in the resolution of their disputes.

Another area of the law that has been a subject of several contravening decisions from the courts relates to the defective applications to the CCMA. Defective applications arise when one party, usually the respondent, alleges that the matter is not properly before the CCMA because the referral form was not properly completed. The usual course of events when an employee declares a dispute with his or her employer, more often than not concerning an allegation of unfair dismissal, is that the employee will approach the CCMA and make an application on form 7.11 alleging the unfair dismissal, briefly stating the background to the dismissal, and applying for the establishment of a conciliation hearing.¹⁶⁶ Thereafter, a conciliation hearing is held, and if the dispute is unresolved, the conciliating commissioner will issue a form 7.12 certificate to effect that the matter remains unresolved. Once this has been done, the dispute can be referred to the CCMA for arbitration, if it has the jurisdiction to hear the case. If the matter comes before the CCMA, an award is handed out at the end of the arbitration proceedings.

¹⁶⁵ The LAC as per Zondo JP concluded; 'The carephone debate has been going on for a long time. Nevertheless the labour relations community has for sometime now organised its lines and activities on the basis of that judgement of this court. I accept that some of the criticism against carephone is justified but, having regard to all the circumstances and in order to bring about certainty and stability in the law in this area, I think the debate must come to an end.

¹⁶⁶ See 161 above, 1492

Very often the respondent party waits until the applicant party attempts to make the award an order of court. It is then that it challenges the award on the grounds that the dispute was not properly before the CCMA as the form of referral was not properly completed, and as such the subsequent proceedings at the CCMA, including the arbitration handed down, were void ab initio. The defect on the application form was usually on the basis that the form was not completed and filed by the applicant employee in his personal capacity, a requirement that was said to flow from s 191(1) of the LRA.¹⁶⁷ It was this interpretation of the law that saw many contradictory rulings emerging out of our courts much to the confusion of the applicants, practitioners and CCMA commissioners alike. The issue was whether or not the form could be signed and filed on behalf of the applicant employee(s). The initial rulings from the labour courts were that the dismissed employees could be assisted in referring the dispute to the CCMA as long as the assisting party did not sign the referral form.¹⁶⁸ The courts interpreted the above section to mean no other person other than the employee could sign the forms.¹⁶⁹

The above interpretation of section 191(1) of the LRA came under tremendous criticism in subsequent decisions of the same court. It was attacked for being over-technical and not in congruence with the objects of the LRA.¹⁷⁰ For instance, in the case of *Pasmans v ABC Telesales*,¹⁷¹ Soni AJ made the following observations:

In my view, the Rustenburg Platinum Mines case is clearly distinguishable. True enough, s 191 states that a dismissed employee may refer the dispute for conciliation. But this must be read together with ss 161 and 138(4) of the Act, which set out the class of persons who may represent parties in labour disputes. So long as the person who signs the form is one of such a class and

¹⁶⁷ s 191(1) states that if there is a dispute about the fairness of a dismissal, the dismissed employee may refer the dispute in writing within 30 days of the date of dismissal.

¹⁶⁸ *Rustenburg Platinum Mines Ltd (Rustenburg section) v CCMA and others* (1998) 19 ILJ 327 (LC)

¹⁶⁹ *Ibid*, 327

¹⁷⁰ See for example the judgement of *Etschmaier v CCMA* (1999) 20 ILJ 144 (LC) 150C

¹⁷¹ (2001) 22 ILJ 624 (LC)

is duly authorised, in my view there can be no challenge to the validity of the referral.

To rule otherwise would make a mockery of the role of union officials in cases of mass dismissals for example. In my view, a referral is a juristic act. It can be performed by a duly authorised agent. Section 138(4) and (6) enumerates who those agents are. So long as a referral is made by such an agent, it is proper and the CCMA or a bargaining council, as the case may be, and the other party are obliged to consider it as if made by the party himself or herself.

Owing to decisions such as the above, certainty as to who is authorised to sign the referral forms was restored in this area of the law.

Whereas various areas of the law have been the subject of contradicting decisions from the courts and thus causing uncertainty in the arbitration function, it is perhaps in the actual reviewing process where the failure to make a distinction between a review and an appeal has caused anxiety both in the CCMA and the industrial relations community at large. As observed elsewhere in this work, maintaining this distinction has not been quite an easy task. The occasional blurring of the difference between these concepts has great implications for the CCMA in the sense that it makes a difference between an award being set aside and the same being allowed to stand. Every time an award is not set aside, that constitutes a plus to the CCMA and hence bolters the confidence of the industrial relations community on the institution.

However a success in review on the other hand, especially in circumstances where the courts appear to have abandoned its review function in favour of appeal, constitutes a draw back in the system in that it encourages the litigious elements in our society to persevere with the hope that an alternative decision may be secured in the courts. This indeed undermines the integrity of the CCMA. The normal course of events is that parties should learn to live with the decisions of the CCMA as long as they are rational and justifiable. The temptation to occasionally stretch the review to a point where it almost amounts to an appeal can be traced to the general feeling of the lawyers in this field. A quick review of the articles generated by the same suggest that

they are in favour of appeal and would thus do everything in their capabilities to influence the courts in this direction.¹⁷²

It is common knowledge by now that over and above the grounds of review prescribed by section 145 of the LRA, the courts have adopted the justifiability test in their review of the CCMA awards. The test states that the decisions by the commissioners should be justifiable in relation to the reasons given for them. It is further the *carephone* approach that judges may enter the merits of the dispute in their review function as long as they do so not in order to substitute their opinions on the correctness thereof but to determine whether the outcome is rationally justifiable. An expression on the correctness is deemed to amount to an appeal. There are several instances where the courts have not lived up to this test. For example, in *Adcock Ingram critical care v CCMA and others*,¹⁷³ the respondent employee was a member of the union negotiation committee negotiating with the management during a bloody and acrimonious strike involving death, assaults and petrol bombing. He was reported to have said to management: ‘You can treat this as a threat – there will be more blood on your hands. He was charged with and found guilty of intimidation. The dispute was referred to the CCMA and an arbitrator found that the words were uttered within a privileged environment at the negotiating table behind closed doors. He further found among other things that the threat was an empty one as it was not directed to any particular individual and hence concluded that the dismissal was substantively unfair.

The matter was taken on review and the labour court dismissed the application on the grounds that the commissioner had properly applied his mind to the matter and had not committed any irregularity which tainted his award. It was held that the statement did not amount to a threat. Further more, even if the statement was intimidatory, so said the labour court, it was made in a representative capacity and within the privileged environment at the negotiation table and that it would therefore be grossly unfair to single out the employee for individual disciplinary action and to dismiss him for it. The matter was taken on appeal, and the labour appeal court was of the view

¹⁷² See 153 above, 1488. See also 154 above, 90

¹⁷³ (2001) 22 ILJ 1799 (LAC)

that the court a quo's approach amounted to 'anything goes approach.' The court accepted that an employee playing the role of a negotiator enjoys a greater leeway than normal. By so doing it conceded the fact that the negotiation environment is privileged. It however observed that it is wrong to suggest that such employee has free rein to do or say whatever they want. The court did not go as far as to determine what constitutes acceptable conduct in a negotiation environment. It was however of the view that the words uttered by the employee amounted to unacceptable conduct. It was on the basis of the foregoing that the court submitted that its view of the matter greatly differed with that of the lower court and hence warranted interference. It submitted that this is a typical example of a situation where the court simply substituted its opinion for that of the lower court. Its argument vis-à-vis that of the commissioner and the lower court is not convincing. Further more, it was not shown how the two markedly differed. It seems the court was preoccupied with the correctness of the award as opposed to whether or not it was rationally justifiable under the circumstances.

Another example where the court seemed to go beyond its review function is to be seen in *Solomon v CCMA and others*¹⁷⁴ where an employee referred a dispute to the CCMA about his failure to receive a promotion. The employee further claimed that the successful candidate was not qualified for the position and that he was better qualified and should have occupied the position. At the hearing, the commissioner narrowed the issues with the parties' consent to the question whether the successful candidate was qualified and his appointment in keeping with the Public Service Act. The commissioner dismissed the application on the basis that the applicant did not qualify for the position. He further found that it was unfair to appoint the successful candidate. Even though the court was of the view that the outcome of the case was correct, it set aside the award on the strength that the reasoning leading to the same was not logical or consequential. In other words, the reasoning was faulty. It has been observed in various decisions¹⁷⁵ that the fact that the reasoning is faulty should not in itself be the ground for interference with an award. However in this case, the court justified its decision to interfere by stating as follows:

¹⁷⁴ (1999) 20 ILJ 2960 (LC)

¹⁷⁵ *Ibid*, 1802

The review process is designed to ensure that certain fundamental values are upheld, that 'due process' is followed in regard to administrative action, in this instance being arbitration proceedings under the auspices of the CCMA. I am satisfied that these values were not upheld and that 'due process' did not occur when this matter was dealt with by the second respondent. To allow the award to stand in the circumstances would set an undesirable precedent and would send a wrong message to CCMA commissioners, in the effect, that it does not matter how you reach the result as long as the result is correct.

It is difficult to imagine situations where the court will find the reasoning faulty and allow the award to stand, for in the cases that one has come across, the court has always found justification for interfering with an award. Thus contrary to Sharpe's¹⁷⁶ views, a correct award is equally vulnerable to being set aside by the courts.

Lastly, a focus on the correctness of the merits is discernable in the decisions of the labour appeal court in *Miladys (a division of Mr Price group Ltd) v Naidoo and others*¹⁷⁷ and *Chemical Energy Paper Printing Wood and Allied Workers Union (CEPPWAWU) and Another v Class and Aluminium 2000 CC*¹⁷⁸ where the court dealt with a dispute relating to constructive dismissal. The two decisions, delivered by Nicholson JA on behalf of the other two judges, are a clear testimony of how the line between a review and an appeal may suddenly disappear. Reading through the decisions, one can not help the feeling that the court interfered unnecessarily. In both disputes, employees brought cases of constructive dismissals against their employers. In the *Miladys* decision, the CCMA and the labour court found in favour of the employee. Without setting out the test for constructive dismissal as was done in *Pretoria Society for the Care of the Retarded v Loots*¹⁷⁹ the court went on to find that the award was reviewable on the ground that the commissioner did not apply his mind

¹⁷⁶ C.W. Sharpe 'Reviewing CCMA Arbitration Awards: Towards clarity in the labour courts' (2000) 21 *ILJ* at 2168 where he stated: 'where judges under the guise of justifiability are effectively reviewing the merits for correctness, the commissioner's only chance of preserving an award on review is by reaching the right decision – not simply a justifiable one.'

¹⁷⁷ (2002) 23 *ILJ* 1234 (LAC)

¹⁷⁸ (2002) 23 *ILJ* 695 (LAC)

¹⁷⁹ (1997) 18 *ILJ* (LAC) 985

seriously to the issues at hand and reason his way to the conclusion by disbelieving the respondent on a ground that was inconsequential. It was the court's view that once the employee had resigned, it regretted the step and tried to concoct a case of constructive dismissal. The same was not said of an employee who resigned and reported to work the following day. The foregoing events transpired in the *CEPPWAWU and another* decision where the court, unlike in the previous decision, was not only sympathetic to the course of the employee but was prepared to go an extra mile in showing a case of constructive dismissal where none actually existed. In this case, the employee alleged that he was dismissed and on the alternative that he was constructively dismissed. The employee failed to discharge the onus that there was direct dismissal and hence the court moved on to the alternative allegation; being that he was constructively dismissed. In finding that the employee was constructively dismissed, the court made the following observations:

If the second appellant did resign, which is not entirely clear, he did so in the heat of the moment and as such on the above authorities should not be held effective. That he returned the next day to get his employment back is indicative that he had made such a decision as a result of the circumstances under which he was acting at the time. It was common cause in the case that a fracas did occur in the Williams's office and that the second appellant (employee) was engaged in a duty which he was required to carry out as a shop steward. The probabilities favour that his treatment at this fracas made him despair of continuing in employment with respondent.

It must be said that the events in these cases are strikingly similar in that prior to the resignations a fracas occurred. However, whereas the decision to resign at the heat of the moment cost the employee her job in the first case, this was not the case in the second decision where the court manufactured a convenient justification for the same. The court was more than willing to invoke the standard of probabilities in finding in the employee's favour. Surely with this unconvincing standard of reasoning, it is not surprising that the court did not openly state that the commissioner failed to apply his mind or that his decision was not justifiable in relation to the material before him for the same cannot be said about the decision of the labour appeal court. All that it did was to impose its opinion which is contrary to the justifiability test. This thus

becomes a classic example of a situation where the court overstepped its boundaries. This contrasting state of affairs leaves one with the feeling that the labour appeal court at times goes to great length in tempering with decisions that ought to have been left alone.

Whereas judges have, on many occasions, been faithful to the distinction in *carephone* between 'justifiability' and 'correctness,' and the admonition that the judge should enter the merits not in order to substitute his or her own opinion on the correctness thereof, but determine whether the outcome is justifiable, there are instances such as the ones sighted above which give an indication that the distinction, at least in the South African context, will for a while remain academic. It is this failure to respect the distinction that will make the system of our dispute resolution litigious and hence of less service to most, for justice delayed is justice denied.

Chapter Five

5.1 Conclusion

At the outset of this paper, several questions were asked and investigations were conducted to get answers to the same. The questions were such as; on what grounds may the CCMA awards be reviewed?; whether or not the principles of review have been adhered to by the labour courts? Whether or not the courts have provided consistency and guidance in its jurisprudence? And finally whether or not the activities of the arbitration and adjudication functions have contributed positively towards the attainment of the key objectives of the LRA, one of which is the speedy and effective resolution of labour disputes.

There is no doubt that awards by commissioners are reviewable in terms of the grounds prescribed in section 145 of the LRA. It was further revealed that awards should be justifiable in relation to the reasons advanced by commissioners. This test, which emanated from the *Carephone* decision, also emphasised the need for the protection of the principles of review. In this regard, it was stated that judges should enter the merits of the case not in order to establish their correctness, but rather to do in order to establish the justifiability of the award. It is quite evident from the discussion that judges have not always been successful in maintaining the distinction between review and appeal. This has been discernable from the way they have failed to adhere to the test stated above. It is quite clear, from a couple of decisions that judges have strayed from this test and hence fallen pray to the dictates of appeal. This is obviously an undesirable development especially if one has regards to the shortcomings of the past system. The past system was overly criticised for being extremely litigious as a result of the existence of the right of appeal. The tendency to drift into appeal has the potential to throw the present system into problems experienced in the past system. Once lawyers get the feeling, owing to the decisions of the courts, that they can always salvage a different decision as a result of their persistence, then the system will become litigious once more and unachievable will be the objective that disputes should be resolved speedily and effectively.

Some analysts have welcomed the overly broader approach the courts have adopted in its review function. In justifying the same, the compulsory nature of arbitration has always come handy. And so has been the shortcomings of the CCMA in as far as delivering quality awards is concerned. There is no doubt that the CCMA has made its service as accessible, simple, expeditious and competent as its resources permit. The same however cannot be confidently said about its capacity, which has been affected right from the onset by limited financial resources. This has resulted in less manpower and very limited training in the light of increased caseload. These constraints however cannot be a justification for letting appeals through the back door. Besides, the standard of awards delivered by the commissioners is generally high and continues to improve over time. It is submitted that a review is therefore sufficient to deal with grievances emanating from the arbitration function.

It has further been the observation of this study that the courts have struggled to maintain consistency in their jurisprudence. Admittedly these are courts of equity, and can perhaps be excused when for viewing facts differently from time to time owing to the standard of test employed. But one cannot pardon them when the inconsistency goes as far as the interpretation of the labour statutes. This has had the effect of creating confusion and uncertainty in the CCMA and the labour law fraternity where issues such as condonation, jurisdiction, representation and others are grappled daily and hence require decisive judgements. There is no doubt that the courts should improve their performance in this area so that the overall objective of speedy and effective resolution of disputes is realised.

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