CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 85/06
[2007] ZACC 22

Z SIDUMO — First Applicant

CONGRESS OF SOUTH AFRICAN TRADE UNIONS — Second Applicant

versus

RUSTENBURG PLATINUM MINES LTD — First Respondent

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION — Second Respondent

COMMISSIONER MOROPA — Third Respondent

Heard on : 8 May 2007

Decided on : 5 October 2007

JUDGMENT

NAVSA AJ:[1]

Introduction

[1] In this case, issues of importance to employees and employers alike arise because of two key findings by the Supreme Court of Appeal (Cameron JA, with

[1] Navsa AJ is a judge with the Supreme Court of Appeal who, at the time of this judgment, was appointed as an Acting Justice of this Court for the period 15 February to 30 June 2007.

Harms, Cloete, Lewis and Maya JJA concurring).[2] The question is whether the findings are correct. In summary the findings are the following:[3]

(a) In deciding dismissal disputes in terms of the compulsory arbitration provisions of the Labour Relations Act 66 of 1995 (LRA), commissioners acting under the auspices of the Commission For Conciliation, Mediation and Arbitration (CCMA), should approach a dismissal with "a measure of deference" because "it is primarily the function of the employer" to decide on a proper sanction. In deciding whether a dismissal is fair a commissioner need not be persuaded that dismissal is *the only* fair sanction – it is sufficient that the employer establishes that it is *a* fair sanction.

(b) Compulsory statutory arbitration in terms of the LRA undertaken by the second respondent, the CCMA, constitutes "administrative action" as defined in section 1 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and is therefore subject to the standard of review set under that Act rather than that provided for in the LRA – the review criterion is whether the decision is rationally connected with the information before the commissioner and the reasons for it.

[2] The applicants and the CCMA adopt the position that the Supreme Court of Appeal erred in relation to the first finding in that, on a proper interpretation of section 23 of the Constitution and the relevant provisions of the LRA, commissioners should

[2] *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration* 2007 (1) SA 576 (SCA); [2006] 11 BLLR 1021 (SCA); (2006) 27 ILJ 2076 (SCA).

[3] See the key and associated findings by the Supreme Court of Appeal id at para 48.

determine whether a dismissal was fair without deference to either side in the dispute. In respect of the second finding, the applicants and the CCMA submit that the Supreme Court of Appeal erred in that CCMA arbitrations are judicial proceedings and not administrative action and are consequently not subject to review in terms of section 33 of the Constitution and PAJA. The first respondent supports the Supreme Court of Appeal's findings.

Background

[3] The first applicant is Mr Z Sidumo. The litigation leading up to the present proceedings had its origins in his dismissal a long time ago. On 2 December 1985 the first respondent, Rustenburg Platinum Mines Ltd (the Mine), which as its name suggests, is a company principally involved in mining platinum, employed Mr Sidumo as part of its Security Services. He was a constable until 1992. Thereafter he was promoted to the position of a Grade II patrolman. On 20 January 2000, Mr Sidumo was transferred to the Waterval Redressing Section, where he was responsible for access control. On 26 June 2000, he was dismissed from his job at the Redressing Section. He contested his dismissal. Up until the events leading up to his dismissal, Mr Sidumo had a clean disciplinary record – for a period of almost 15 years.

[4] Little did Mr Sidumo know that after an internal disciplinary inquiry, an internal appeal and litigation in three courts over a long period of time, his dismissal dispute with his employer would remain unresolved. He could hardly have imagined

that almost seven years later it would be contended before this Court that decisions in relation to his individual dismissal dispute raised important constitutional questions.

[5] The Waterval Redressing Section is a high security facility near Rustenburg that provides benefaction services, separating high grade precious metals such as platinum, rhodium and gold from lower grade concentrate. These metals are extremely valuable and are the livelihood and core business of the Mine.

[6] Mr Sidumo was dismissed for negligently failing to apply established and detailed individual search procedures, significantly different from the random search procedure followed in his earlier posting, prior to his transfer to the Redressing Section. The search procedures were part of the overall effort to minimise losses due, amongst other things, to theft. The dismissal followed on an internal disciplinary inquiry and an internal appeal. Subsequently, Mr Sidumo referred an unfair dismissal dispute to the CCMA in terms of section 191(1)(a) of the LRA.[4]

[7] Conciliation failed, and thereafter Mr Sidumo, in terms of section 191(5)(a) of the Act,[5] successfully challenged his dismissal under the compulsory arbitration

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[4] Section 191(1)(a) of the LRA provides:

> "If there is a *dispute* about the fairness of a *dismissal*, or a *dispute* about an unfair labour practice, the dismissed *employee* or the *employee* alleging the unfair labour practice may refer the *dispute* in writing to—
> (i) a *council*, if the parties to the *dispute* fall within the registered *scope* of that *council*; or
> (ii) the Commission, if no *council* has jurisdiction."

[5] Section 191(5)(a) of the LRA provides:

> "If a council or a commissioner has certified that the dispute remains unresolved, or if 30 days have expired since the council or the Commission received the referral and the dispute remains unresolved—

provisions of the LRA administered by the CCMA. The third respondent found Mr Sidumo guilty of misconduct but held that dismissal was not an appropriate or fair sanction. He reinstated Mr Sidumo with three months' compensation subject to a written warning valid for three months. I refer to the third respondent as the Commissioner.

[8] The Mine applied to the Labour Court, in terms of section 145 of the LRA, to review and set aside the Commissioner's award. The interpretation and application of section 145 loom large in this case and will be dealt with in greater detail in due course.

[9] The Labour Court held that the award did not contain any reviewable irregularity and dismissed the application with costs. The Mine appealed to the Labour Appeal Court,[6] which held, that although some of the Commissioner's reasons for reinstating Mr Sidumo were questionable, his finding, that dismissal was too harsh

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(a) the *council* or the Commission must arbitrate the *dispute* at the request of the *employee* if—
(i) the *employee* has alleged that the reason for *dismissal* is related to the *employee's* conduct or capacity, unless paragraph *(b)* (iii) applies;
(ii) the *employee* has alleged that the reason for *dismissal* is that the employer made continued employment intolerable or the employer provided the employee with substantially less favourable conditions or circumstances at work after a transfer in terms of section 197 or 197A, unless the *employee* alleges that the contract of employment was terminated for a reason contemplated in section 187;
(iii) the *employee* does not know the *reason* for dismissal; or
(iv) the *dispute* concerns an unfair labour practice . . . "

[6] Section 173(1) of the LRA provides:

"Subject to the Constitution and despite any other law, the Labour Appeal Court has exclusive jurisdiction—
(a) to hear and determine all appeals against the final judgments and the final orders of the Labour Court; and
(b) to decide any question of law reserved in terms of section 158(4)."

a sanction, was justified. The Labour Appeal Court dismissed the Mine's appeal with costs. A subsequent appeal to the Supreme Court of Appeal resulted in success for the Mine.[7] The Supreme Court of Appeal overturned the decisions of both the Labour Court and the Labour Appeal Court and substituted the finding of the Commissioner with a determination that the dismissal was fair. Mr Sidumo then applied to this Court for leave to appeal the judgment of the Supreme Court of Appeal.

Intervention by COSATU

[10] The second applicant, the Congress of South African Trade Unions (COSATU),[8] which was not a party to the preceding litigation, now applies for leave to appeal in this Court in its own name and in support of Mr Sidumo. At the time of his dismissal, Mr Sidumo was a member of a COSATU affiliate, namely, the National Union of Mineworkers. COSATU has applied for leave to appeal on the basis that the findings of the Supreme Court of Appeal have far-reaching, adverse implications for its members and affiliates. It submitted that it should be afforded standing in relation to questions that are fundamental to the industrial relations community at large. The Mine opposed the intervention at this late stage. The question of COSATU's standing and its explanation concerning its late entry will be dealt with later.

[11] Both Mr Sidumo and COSATU contended that the question of the correctness of the Supreme Court of Appeal's judgment raises constitutional issues. The

[7] In terms of section 168(3) of the Constitution, the Supreme Court of Appeal is the highest court of appeal in matters other than constitutional matters. See also *National Union of Mineworkers v Fry's Metals (Pty) Ltd* 2005 (5) SA 433 (SCA); [2005] 5 BLLR 430 (SCA); (2005) 26 ILJ 689 (SCA) at paras 32-33.

[8] COSATU is the largest federation of trade unions in the country with 21 affiliated unions representing over 1,8 million employees.

applications for leave to appeal have been filed outside of the prescribed time limits and are therefore accompanied by an application for condonation. These are aspects to which I will revert.

The internal disciplinary hearing and appeal

[12] A senior superintendent at the Mine, Mr Page, conducted the internal disciplinary hearing where Mr Sidumo was charged as follows:

> "(1) Negligence – Failure to follow established procedures in terms of the Protection Services Department search procedure. Which caused prejudice or possible prejudice to the Company in terms of production loss.
>
> (2) Failure to follow established procedures in terms of the Protection Services Department search procedures."

[13] The facts on which Mr Page's findings were based were largely uncontested. Mr Sidumo, was however, aggrieved at the lack of training he had received in relation to his position at the Waterval Redressing Section. He also alleged that he had not been properly informed that the search procedures at the Redressing Section were significantly different from the random searches his previous job required.

[14] Mr Sidumo's main duty at the Redressing Section was to safeguard the Mine's precious metals. The detailed compulsory search procedures for all persons leaving the Redressing Section entailed an individual search of each person in a private cubicle, with close personal inspection plus a metal detector scan. The procedures were in written form and were distributed and made known to all, including Mr

Sidumo. In August 1999 he signed a document acknowledging that they had been read and explained to him.

[15] The Mine's production continued to decrease and possible causes for the decline, including inefficient processes, poor ore quality and outdated machinery were investigated. Over three days, in April 2000, the Mine resorted to video surveillance of employee performance at various points, including the point where Mr Sidumo did duty at the Redressing Section. This revealed that of 24 specifically monitored instances involving Mr Sidumo, he conducted only one search in accordance with established procedures. On eight occasions he conducted no search at all. Fifteen other searches did not conform to procedures. The video also revealed that Mr Sidumo allowed persons to sign the search register without conducting any search at all.

[16] Mr Page found Mr Sidumo guilty of misconduct in the form of negligence and failure to follow procedures. He concluded that the misconduct had "created potential production losses/theft". In mitigation, he accepted that "nothing went out during your shift, as far as you know" and took into account Mr Sidumo's service record. That notwithstanding, he found that the misconduct went to the heart of Mr Sidumo's capacity as a member of the Mine's Protection Services and that the relationship of trust had broken down, making a future relationship intolerable. Mr Sidumo was dismissed.

[17] Mr Sidumo lodged an internal appeal. Another senior employee, Mr Denner, conducted the appeal hearing. He held that since Mr Sidumo had not been charged with dishonesty, the fact that losses had not occurred was irrelevant – the charge was negligently failing to follow procedures. He considered it important that through Mr Sidumo's wrongdoing the Mine could have suffered losses. He considered alternatives to dismissal but found none appropriate. The appeal was dismissed.

The CCMA

[18] An arbitration under the auspices of the CCMA is a hearing de novo.[9] The relevant additional evidence adduced at the CCMA is set out hereafter. Mr Botes, one of Mr Sidumo's supervisors, who was responsible for the video surveillance, testified that during the surveillance period, though not on Mr Sidumo's watch, one thief had been caught with materials worth R44 000 hidden between his legs. Mr Botes was adamant that Mr Sidumo was aware of how to conduct searches. Mr Sidumo had, after all, been posted to that security checkpoint to conduct searches. He conceded that the tasks entrusted to Mr Sidumo would normally have been carried out by employees graded as senior patrolpersons. Mr Sidumo, however, had been posted to the Redressing Section because of his longstanding experience in Protection Services. Mr Botes accepted that the Mine's disciplinary code entailed that disciplinary and

[9] Sections 138(1) and (2) of the LRA accord the commissioner a discretion to determine the manner and form of proceedings. In terms of section 138(2), subject to the discretion of the commissioner, a party may give evidence, call witnesses and address concluding arguments to the commissioner. In *County Fair Foods* (*Pty*) *Ltd v CCMA & Others* [1999] 11 BLLR 1117 (LAC); (1999) 20 ILJ 1701 (LAC) at para 11, the following appears:

> "However, the decision of the arbitrator as to the fairness or unfairness of the employer's decisions is not reached with reference to the evidential material that was before the employer at the time of its decision but on the basis of all the evidential material before the arbitrator. To that extent the proceedings are a hearing de novo."

corrective measures be put in place to ensure that employees are put "on the right track".

[19] Mr Williams, the Mine's assistant chief chemist testified that in his view, the major losses that occurred, which led to the video surveillance being installed, were due to the poor quality of the metallics. According to Mr Williams, the daily production yield loss was in the region of R500 000. Mr Sidumo testified and claimed that he had received no training in relation to the search procedures and further, that he had objected to his posting to the Redressing Section.

[20] The Commissioner rejected both claims. He held that the rule that searches should be conducted in a particular manner was valid and that Mr Sidumo had contravened the rule. The Commissioner had regard to section 188(2) of the LRA which compels a person, when considering whether or not a reason for dismissal is fair, to take into account the Code of Good Practice (the Code) contained in Schedule 8 to the LRA.[10] The Commissioner did so and, in particular, considered article 7(b)(iv), which provides that a person determining whether dismissal for misconduct was fair should consider whether the dismissal was an appropriate sanction.

[10] Section 203 of the LRA provides that the National Economic Development and Labour Council (NEDLAC) may publish a Code of Good Practice. Section 203(4) states that the Code may provide that it must be taken into account in applying or interpreting any employment law. Section 3 of the National Economic, Development and Labour Council Act 35 of 1994 in terms of which NEDLAC was established, provides that it shall consist of members representing organised business; organised labour; organisations of community and development interests; and the State. It is therefore safe to conclude that, at the very least, it can be said that the Code contains the norms and values set by the industrial relations community.

[21] The Commissioner took the view that the concept of progressive discipline, endorsed by the Labour Court, was applicable. In terms of this concept employee behaviour is to be corrected through a system of graduated disciplinary measures, such as counselling and warning. The Commissioner considered Mr Sidumo's service record in his favour. He concluded that dismissal was too harsh a sanction and motivated it as follows: There had been no losses suffered by the Mine; the violation had been unintentional or had been a "mistake"; and Mr Sidumo had not been dishonest. Before making his award the Commissioner stated that he did not consider the offence committed by Mr Sidumo to "go into the heart of the relationship [with the employer], which is trust."

The Labour Court and the Labour Appeal Court

[22] In applying to the Labour Court to review the Commissioner's award, the Mine took the view that the Commissioner had erred in concluding that no losses had been suffered by the Mine, that the violation of the rule had been unintentional or a mistake and that Mr Sidumo's honesty was a factor to be considered in his favour. It was submitted on behalf of the Mine that there had been evidence that, for the period February to May 2000, there had been revenue loss of approximately R500 000 per day. It had been shown that precious metals had been found on persons during the surveillance period. It was materially relevant, contended the Mine, that Mr Sidumo had been specifically employed to prevent theft and that he had conducted only one proper search over the surveillance period.[11]

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[11] In fact only one proper search was conducted during a specifically monitored period and not for the entire period of the surveillance.

[23] It was submitted on behalf of the Mine that the Commissioner's reasons were irrational and that there was no link between the evidence and his factual conclusions. The Commissioner's finding that the misconduct did not go to the heart of the relationship was also criticised as being irrational. The Mine contended that the Commissioner had been so grossly careless that he could rightly be described as having committed misconduct. It was submitted that the Commissioner had failed to apply his mind to such an extent that the Mine did not have a fair hearing and furthermore, that the Commissioner had exceeded his powers.

[24] The Labour Court considered that employees who perform poorly (which was how it categorised Mr Sidumo's misconduct), but who had not been dishonest, should not automatically face dismissal. It took into account Mr Sidumo's service record. It did not disapprove of the Commissioner's application of the principle of corrective or progressive discipline. The Labour Court found that there was not an "iota of evidence" that theft had occurred during Mr Sidumo's shift. It thought it significant that he had been doing work usually assigned to a more senior employee.

[25] The Labour Court considered the test for review of a commissioner's award as enunciated by the Labour Appeal Court in *Carephone (Pty) Ltd v Marcus NO and Others*::[12]

[12] 1999 (3) SA 304 (LAC); 1998 (11) BLLR 1093 (LAC); (1998) 19 ILJ 1425 (LAC). *Carephone* was decided before the advent of PAJA.

> "It seems to me that one will never be able to formulate a more specific test other than, in one way or another, asking the question: is there a rational objective basis justifying the connection made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at? In time only judicial precedent will be able to give more specific content to the broad concept of justifiability in the context of the review provisions in the LRA."[13]

The Labour Court concluded, with reference to the grounds of review set out in section 145 of the LRA and the test in *Carephone*, that there was no basis upon which it could interfere with the Commissioner's award.

[26] The Mine appealed to the Labour Appeal Court.[14] That court was critical of the Commissioner. It rejected his finding that no losses had been suffered by the company as a result of Mr Sidumo's failure to conduct proper searches. The court stated that it could not be ruled out that individuals who had not been searched might have departed with precious metals on their person.

[27] In respect of the Commissioner's findings that the misconduct was unintentional or a mistake and that Mr Sidumo's honesty was a factor to be taken into account in his favour, the Labour Appeal Court had the following to say:

> "It is not clear what the [Commissioner] meant when he said that the violation of the rule by [Mr Sidumo] was unintentional or a 'mistake'. He might have been referring to the fact that one of the offences that [Mr Sidumo] was found guilty of was based on negligent conduct as opposed to intentional conduct. He did not elaborate on this but, even if that were the position, that would have had to be taken into account in the

[13] Id at para 37.

[14] The Labour Appeal Court's judgment is reported as *Rustenburg Platinum Mines Ltd v CCMA & Others* [2004] 1 BLLR 34 (LAC).

> light of all the circumstances. Quite frankly, how the third factor, namely, honesty, came into the picture in this case, is baffling. No dishonesty by [Mr Sidumo] was alleged."[15]

[28] The Labour Appeal Court went on to state that, had the reasons referred to been the sole basis of the Commissioner's award, it would have had no hesitation in holding that the award was unjustifiable. It noted, however, that the Commissioner took Mr Sidumo's service record into account. The court also observed that the Commissioner suggested graduated disciplinary measures such as counselling and a warning. The court thought it material that in its founding affidavit in the Labour Court, the Mine failed to challenge the Commissioner's findings on these aspects. The Labour Appeal Court concluded that Mr Sidumo's clean lengthy service record was "capable of sustaining the finding"[16] that the sanction of dismissal was too harsh. It dismissed the appeal. The Mine appealed the Labour Appeal Court's judgment to the Supreme Court of Appeal.

The Supreme Court of Appeal

The first finding – deference

[29] The Supreme Court of Appeal held that the Commissioner failed properly to appreciate the ambit of his duties under the LRA and therefore incorrectly approached the task entrusted to him in determining whether the employer's decision was fair.[17] In formulating what it considered to be the correct approach the Supreme Court of

[15] Id at para 12.

[16] Id at para 13.

[17] Above n 2 at para 36.

Appeal held that the discretion to impose a sanction for misconduct belongs "in the first instance to the employer."[18] The Supreme Court of Appeal referred with approval to the following dictum of the Labour Appeal Court in *Nampak Corrugated Wadeville v Khoza*:[19]

> "The determination of an appropriate sanction is a matter which is largely within the discretion of the employer. However, this discretion must be exercised fairly. A court should, therefore, not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether the court would have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable."[20]

[30] The Supreme Court of Appeal summarised the key elements of the approach in *Nampak* as follows: "*(a)* the discretion to dismiss lies primarily with the employer; *(b)* the discretion must be exercised *fairly*; and *(c)* interference should not lightly be contemplated."[21]

[31] The Supreme Court of Appeal also referred with approval to the following dictum of Ngcobo AJP (as he then was) in *County Fair*:

> "[C]ommissioners must approach their functions with caution. They must bear in mind that their awards are final – there is no appeal against their awards. In particular, commissioners must exercise greater caution when they consider the fairness of the sanction imposed by an employer. They should not interfere with the sanction merely because they do not like it. There must be a measure of deference to

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[18] Id at para 40.

[19] [1999] 2 BLLR 108 (LAC); (1999) 20 ILJ 578 (LAC).

[20] Id at para 33.

[21] Above n 2 at para 41.

> the sanction imposed by the employer subject to the requirement that the sanction imposed by the employer must be fair. The rationale for this is that it is primarily the function of the employer to decide upon the proper sanction.
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> . . . .
>
> The mere fact that the commissioner may have imposed a somewhat different sanction or a somewhat more severe sanction than the employer would have, is no justification for interference by the commissioner.
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> . . . .
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> In my view, interference with the sanction imposed by the employer is only justified where the sanction is unfair or where the employer acted unfairly in imposing the sanction. This would be the case, for example, where the sanction is so excessive as to shock one's sense of fairness. In such a case, the commissioner has a duty to interfere."[22]

[32] The Supreme Court of Appeal considered that two further points emerged from the *County Fair* judgment namely, "*(d)* that commissioners should use their powers to intervene with 'caution', and *(e)* that they must afford the sanction imposed by the employer 'a measure of deference'."[23] In its view, the analysis in the *Nampak* and *County Fair* judgments was:

> "[F]irmly rooted in the prescripts of the statute and affords an approach to the duties of commissioners that is not only fair and practicable, but would also shield the labour courts from the very flood of litigation the alternative tests have mistakenly been designed to avoid."[24]

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[22] Above n 9 at paras 28-30.

[23] Above n 2 at para 42.

[24] Id at para 43.

The following then appears in the Supreme Court of Appeal's judgment:

> "It is in my view regrettable that the LAC has not consistently affirmed and applied the analysis. Although some panels have affirmed Ngcobo AJP's approach, this case indicates how far the practice of the LAC has on occasion strayed from it . . . . Instead of exhorting commissioners to exercise greater caution when intervening, and to show a measure of deference to the employer's sanction so long as it is fair, it has insulated commissioners' decisions from intervention by importing unduly constrictive criteria into the review process."[25] (Footnote omitted.)

[33] According to the Supreme Court of Appeal there were three main reasons underlying the analysis of Ngcobo AJP. The first was textual, the second conceptual and the third institutional. In relation to the first, the Supreme Court of Appeal pointed to section 188(2) of the LRA, which obliged commissioners in considering whether or not the reasons for a dismissal were fair, to take into account the Code of Good Practice. Item 7(b)(iv) of the Code requires a commissioner to consider whether dismissal was "an" appropriate sanction. The use of the indefinite "an" as opposed to the definite "the" was, in the view of the Supreme Court of Appeal, important. It showed that the legislature had in mind that there could be a range of responses. The Code states that it is generally inappropriate to dismiss employees for a first offence unless a continued relationship would be intolerable. This, reasoned the Supreme Court of Appeal, meant that a measure of subjectivity was brought into play. It followed that the primary assessment of intolerability unavoidably belonged to the employer.

[25] Id.

[34] Turning to the conceptual aspect, the Supreme Court of Appeal stated that the concept of fairness is not absolute. It affords a range of possible responses. In this regard the court referred to Todd and Damant who state the following:

> "The court must necessarily recognize that there may be a range of possible decisions that the employer may take, some of which may be fair and some of which may be unfair. The court's duty is to determine whether the decision that the employer took falls within the range of decisions that may properly be described as being fair."[26] (Footnote omitted.)

The court concluded as follows on this aspect: "The fact that the commissioner may think that a different sanction would also be fair, or fairer, or even more than fair, does not justify setting aside the employer's sanction."[27]

[35] Dealing with the institutional aspect, the Supreme Court of Appeal stated that the solution to the problem of a flood of challenges to awards lay in pointing commissioners firmly to the limits of the statute. It reasoned that if commissioners could freely substitute their judgment and discretion for the judgment and discretion of the employer, employees would take every case to the CCMA.

The second finding – PAJA or the LRA?

[36] It is necessary to set out in some detail the Supreme Court of Appeal's reasoning in this regard. First, the Supreme Court of Appeal considered sections

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[26] Todd and Damant "Unfair Dismissal – Operational Requirements" (2004) 25 *ILJ* 896 at 907 quoted above in n 2 at para 46.

[27] Above n 2 at para 46.

145(1) and (2) and section 158(1)(g) of the LRA. The relevant parts of section 145, which contain the grounds of review, provide:

> "(1) Any party to a *dispute* who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award—
>
> (a) within six weeks of the date that the award was *served* on the applicant . . .
>
> (2) A defect referred to in subsection (1), means—
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> (a) that the commissioner—
>
> (i) committed misconduct in relation to the duties of the commissioner as an arbitrator;
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> (ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
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> (iii) exceeded the commissioner's powers; or
>
> (b) that an award had been improperly obtained."

[37] Section 158 (1) (g) reads as follows:

> "The Labour Court may—
>
> (g) subject to[28] section 145, review the performance or purported performance of any function provided for in *this Act* on any grounds that are permissible in law." (Footnote added.)

[38] The Supreme Court of Appeal then referred with approval to *Carephone*, where the application of these two sections was discussed. The Labour Appeal Court in *Carephone* was not prepared to hold that section 158(1)(g) created a separate and more expansive basis of review of CCMA awards. It held that the administrative

[28] The Labour Relations Amendment Act 12 of 2002 replaced the word "despite", as the first word in subsection (g), with the words "subject to".

justice provisions of the Constitution (as it read then) suffused the grounds of review under section 145 of the LRA, thereby extending the scope of review of CCMA awards. The Labour Appeal Court stated that section 33 of the Constitution[29] read with item 23(2)(b) of Schedule 6 to the Constitution[30] extended the scope of review and introduced a requirement of rationality in the outcome of decisions:

> "The peg on which the extended scope of review has been hung is the constitutional provision that administrative action must be justifiable in relation to the reasons given for it (s 33 and item 23 *(b)* of Schedule 6 to the Constitution). This provision introduces a requirement of rationality in the *merit or outcome* of the administrative decision. This goes beyond mere procedural impropriety as a ground for review, or irrationality only as evidence of procedural impropriety."[31]

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[29] Section 33 of the Constitution provides:

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

[30] The relevant part of item 23(2) of Schedule 6 reads as follows:

> "Until the legislation envisaged in sections 32(2) and 33(3) of the new Constitution is enacted—
> . . .
> (b) section 33(1) and (2) must be regarded to read 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] Above n 12 at para 31.

The Labour Appeal Court stated that, when the Constitution requires administrative action to be justifiable[32] in relation to the reasons given for it, it seeks to give expression to the fundamental values of accountability, responsiveness and openness.[33] The test formulated by the Labour Appeal Court[34] was based directly on the wording contained in the very last part of item 23(2) of Schedule 6 to the Constitution[35] which was part of the wording of sections 33(1) and (2) of the Constitution pending the promulgation of the national legislation which, as it turned out, was PAJA.

[39] The Labour Appeal Court described this approach as one of "substantive rationality",[36] likening it to administrative law concepts such as reasonableness, rationality and proportionality. In *Carephone*, it considered statutory arbitrations conducted in terms of the LRA to be administrative in nature and therefore reviewable on that basis.

[40] Mindful of the fact that its approach might have the effect of blurring the line between appeal and review, the court said:

> "In determining whether administrative action is justifiable in terms of the reasons given for it, value judgments will have to be made which will, almost inevitably, involve the consideration of the 'merits' of the matter in some way or another. As

[32] This is a reference to item 23(2)(b) to Schedule 6.

[33] Above n 12 at para 35.

[34] See para [25] above.

[35] Above n 30.

[36] See para [25] above.

> long as the Judge determining this issue is aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order."[37]

[41] After discussing *Carephone*, the Supreme Court of Appeal went on to consider the decision in *Shoprite Checkers (Pty) Ltd v Ramdaw NO and Others*,[38] where the Labour Appeal Court considered the possible effect of the enactment of PAJA on section 145(2) of the LRA and found it unnecessary to decide whether PAJA applied. The Labour Appeal Court did so on the basis that the dictum in *Carephone* referred to in paragraph [25] above is in line with the following statements of this Court in *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others*:[39]

> "It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.
>
> The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion

[37] Above n 12 at para 36.

[38] 2001 (4) SA 1038 (LAC); [2001] 9 BLLR 1011 (LAC); 2001 (22) ILJ 1603 (LAC) at para 33.

[39] 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC).

> would place form above substance and undermine an important constitutional principle."[40] (Footnote omitted.)

[42] After comparing the grounds of review under section 145 of the LRA with the more extensive provisions of section 6(2) of PAJA,[41] the Supreme Court of Appeal decided that PAJA, by necessary implication, extended the available remedies to parties to CCMA arbitrations and that PAJA superseded the specialised enactment of the LRA. Parliament enacted PAJA because of a constitutional obligation to give effect to the right to just administrative action embodied in the Constitution. That obligation, the Supreme Court of Appeal said, did not exempt from its ambit previous

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[40] Id at paras 85-86.

[41] Section 6(2) of PAJA provides:

> "A court or tribunal has the power to judicially review an administrative action if—
>
> (a) the administrator who took it—
> (i) was not authorised to do so by the empowering provision;
> (ii) acted under a delegation of power which was not authorised by the empowering provision; or
> (iii) was biased or reasonably suspected of bias;
>
> (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
>
> (c) the action was procedurally unfair;
>
> (d) the action was materially influenced by an error of law;
>
> (e) the action was taken—
> (i) for a reason not authorised by the empowering provision;
> (ii) for an ulterior purpose or motive;
> (iii) because irrelevant considerations were taken into account or relevant considerations were not considered;
> (iv) because of the unauthorised or unwarranted dictates of another person or body;
> (v) in bad faith; or
> (vi) arbitrarily or capriciously;
>
> (f) the action itself—
> (i) contravenes a rule of law or is not authorised by the empowering provision; or
> (ii) is not rationally connected to—
> (aa) the purpose for which it was taken;
> (bb) the purpose of the empowering provision;
> (cc) the information before the administrator; or
> (dd) the reasons given for it by the administrator;
>
> (g) the action concerned consists of a failure to take a decision;
>
> (h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or
>
> (i) the action is otherwise unconstitutional or unlawful."

parliamentary enactments, such as section 145, that conferred rights of administrative review. This was so, notwithstanding that the LRA is a specialised statute.

[43] In this regard the Supreme Court of Appeal relied on the decision of this Court in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*[42] where it was stated that section 6 of PAJA revealed a clear purpose to codify the grounds of judicial review of administrative actions.[43] The Constitution required PAJA to "cover the field" and it did so.[44] The Supreme Court of Appeal reasoned that a slightly different path would lead to the same conclusion. It explained that path as follows:

> "At the time the LRA was enacted, the interim Constitution required that administrative action be 'justifiable in relation to the reasons given for it'. For the reasons set out in *Carephone*, this right suffused the interpretation of s 145(2). When the administrative-justice provisions of the Constitution, as embodied in PAJA, superseded those of the interim Constitution, it could not have been intended that parties to CCMA arbitrations should enjoy a lesser right of administrative review than that afforded under the interim Constitution. The repeal of the interim Constitution and its replacement by the Constitution did, in other words, not diminish the review entitlement under s 145(2). Section 6(2) of PAJA is the legislative embodiment of the grounds of review to which arbitration parties became entitled under the Constitution."[45]

[44] The only tension in relation to reconciling section 145 of the LRA with the provisions of PAJA, so the Supreme Court of Appeal reasoned, was in relation to time

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[42] 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC).

[43] Id at para 25.

[44] *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as* Amici Curiae*)* 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) at para 95.

[45] Above n 2 at para 26.

limits. Section 145 of the LRA provides that a party may apply to set aside an arbitration award within six weeks of the date that the award was served on him or her. PAJA, on the other hand, requires that proceedings for judicial review be instituted without unreasonable delay and in any event not later than 180 days after exhaustion of internal remedies or after the person concerned became aware of the action involved and the reasons for it. The Supreme Court of Appeal relying on its decision and those of this Court emphasised that labour disputes require speedy resolution and the legislature, in prescribing the time period of six weeks in section 145(1) of the LRA, gave clear effect to this imperative. Thus, according to the court, it may be expected that the legislature would legislate different time periods in different fields and that did not militate against its earlier conclusions.

[45] The Supreme Court of Appeal held that both *Carephone* and PAJA required the Labour Appeal Court to consider whether the Commissioner's decision to reinstate Mr Sidumo was "rationally connected to the information before him and to the reasons he gave for it." According to it, the Labour Appeal Court had blurred the line between appeal and review by asking whether considerations taken into account by the Commissioner were "capable of sustaining" his finding. The question on review was not whether the record revealed relevant considerations that were capable of justifying the outcome, but rather whether the decision-maker properly exercised the powers entrusted to him.

[46] The Supreme Court of Appeal stated that the Mine had always considered Mr Sidumo's service record to be relevant. The Mine's case was that despite these factors continued employment was intolerable. Its complaint before the Labour Appeal Court properly characterised, was that the Commissioner's decision was tainted by reliance on misconceived considerations. The Labour Appeal Court did not apply the "rational objective test" explained in *Carephone*, which was in line with PAJA. It incorrectly asked whether there were factors capable of sustaining the Commissioner's findings, thereby treating the matter as an appeal rather than a review.

[47] The Supreme Court of Appeal noted that the Commissioner took four factors into account. In its view the Labour Appeal Court rightly rejected three of them, namely, absence of loss, mistake and no dishonesty. The fourth – that the misconduct did not go to the heart of the employment relationship – was, in the view of the Supreme Court of Appeal, also incorrect. It considered the failure to search, not to be "peripheral malperformance", but a "profound failure at the very core of the employee's functions."[46] The employer trusted Mr Sidumo to carry out searches. His failure necessarily violated that trust.

[48] The Supreme Court of Appeal held that it could not be said that the decision to reinstate Mr Sidumo was rationally connected to the information before the Commissioner. The following appears in the judgment of the Supreme Court of Appeal:

[46] Above n 2 at para 33.

> "Nor does PAJA oblige us to pick and choose between the commissioner's reasons to try to find sustenance for the decision despite the bad reasons. Once the bad reasons played an appreciable or significant role in the outcome, it is, in my view, impossible to say that the reasons given provide a rational connection to it."[47]

[49] Because of the time lapse, the parties agreed that, in the event of the award being set aside, it would not be in the interests of justice to remit the matter and that the Supreme Court of Appeal should finally decide it. In the result, the Supreme Court of Appeal upheld the dismissal of Mr Sidumo and set aside the decisions of the Labour Appeal Court, Labour Court and the Commissioner.

Is a constitutional issue raised?

[50] It is accepted by the parties that this case raises constitutional issues. It involves the interpretation and application of the LRA and PAJA. These statutes were enacted to give effect to the rights contained in sections 23 and 33 of the Constitution, respectively. Thus, matters relating to the application and interpretation of the LRA and PAJA are constitutional matters.[48]

[51] In addition, this case concerns the powers and functions of the Labour Court. The Labour Court and the Labour Appeal Court, both of which were established in terms of the LRA, are courts which have the same status as the High Court and

[47] Id at para 34.

[48] *Bato Star* above n 42 at para 25; *National Union of Metalworkers of South Africa and Others v Bader Bop (Pty) Ltd & Another* 2003 (3) SA 513 (CC); 2003 (2) BCLR 182 (CC) at para 15; *National Education Health and Allied Workers Union v University of Cape Town and Others* 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) (*NEHAWU*) at paras 14-15.

Supreme Court of Appeal, respectively. The powers and functions of the courts are constitutional issues.[49]

COSATU's standing and condonation

[52] It is true that COSATU was not a party to the preceding litigation. It is equally true that until the litigation in the Supreme Court of Appeal, it could not be predicted that Mr Sidumo's individual dismissal would result in the findings that are in issue before us.

[53] Relevant factors to be considered in deciding whether to grant COSATU leave to pursue an appeal at this stage are set out in *Campus Law Clinic, University of KwaZulu-Natal v Standard Bank of South Africa Ltd and Another*:[50]

> "[W]hether there is another reasonable and effective manner in which the challenge may be brought; the nature of the relief sought and the extent to which it is of general and prospective application; the range of persons or groups who may be directly or indirectly affected by any order made by the Court and the opportunity that those persons or groups have had to present evidence and argument to the Court; the degree of vulnerability of the people affected; the nature of the rights said to be infringed; as well as the consequences of the infringement. The list of factors is not closed."[51] (Footnotes omitted.)

[49] Sections 151(2) and 167(3) of the LRA read with sections 166(e) and 170 of the Constitution. See also *Phillips and Others v National Director of Public Prosecutions* 2006 (1) SA 505 (CC); 2006 (2) BCLR 274 (CC); 2006 (1) SACR 78 (CC) at para 31; *Bannatyne v Bannatyne (Commission for Gender Equality*, *as* Amicus Curiae*)* 2003 (2) SA 363 (CC); 2003 (2) BCLR 111 (CC) at para 17.

[50] 2006 (6) SA 103 (CC); 2006 (6) BCLR 669 (CC).

[51] Id at para 21.

[54] COSATU is acting, at the very least, on behalf of all of its members and the outcome of this case is generally of importance to employees, who are a vulnerable group in society. In addition, I am satisfied that a proper case has been made for condonation of the late filing of COSATU's papers as well as Mr Sidumo's late application for leave to appeal.

The Constitution and the statutory scheme

[55] The starting point is the Constitution. Section 23(1) provides that everyone has the right to fair labour practices.[52] Although the right to fair labour practices extends to employees and employers alike,[53] for employees it affords security of employment.

[56] One of the primary purposes of the LRA is to give effect to the fundamental rights conferred by section 23 of the Constitution. The relevant parts of section 1 of the LRA read as follows:

> "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—
>
> (a) to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution;
>
> (b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation;
>
> . . .
>
> (d) to promote—
>
> . . .

[52] In *NEHAWU* above n 48 this Court recorded that our Constitution is unique in constitutionalising the right to fair labour practices. Since the advent of our Constitution, Malawi has followed suit. See Cheadle et al *South African Constitutional Law: The Bill of Rights* 2 ed (LexisNexis Butterworths, Durban 2005) at 18-8 at fn 32.

[53] *NEHAWU* above n 48 at paras 37-38.

(iv) the effective resolution of labour disputes."

[57] Section 3 of the LRA provides that any person applying the provisions of the LRA must interpret its provisions to give effect to its primary objects; in compliance with the Constitution; and in compliance with the public international law obligations of the Republic. Commissioners are thus obliged to act accordingly.

[58] Section 185 of the LRA provides that every employee has the right not to be unfairly dismissed and subjected to unfair labour practices. Where an employee claims that he or she has been unfairly dismissed, the dismissal dispute is submitted to compulsory arbitration in terms of section 191(5)(a), either before the CCMA, or a bargaining council. On the other hand, section 192 of the LRA, under the title *Onus in dismissal disputes*, provides that once an employee establishes the existence of the dismissal, the employer must prove that the dismissal is fair.

[59] The statutory scheme requires a commissioner to determine whether a disputed dismissal was fair. In terms of section 138 of the LRA, a commissioner should do so fairly and quickly. First, he or she has to determine whether or not misconduct was committed on which the employer's decision to dismiss was based.[54] This involves an inquiry into whether there was a workplace rule in existence and whether the employee breached that rule. This is a conventional process of factual adjudication in which the commissioner makes a determination on the issue of misconduct. This

[54] See Article 7 of the Code.

determination and the assessment of fairness, which will be discussed later, is not limited to what occurred at the internal disciplinary inquiry.

[60] The Supreme Court of Appeal placed undue reliance on item 7(b)(iv) of the Code which requires the commissioner to consider whether dismissal was "an" appropriate sanction. The use of the indefinite article is not decisive. As indicated earlier the Code derives from NEDLAC and is a guide.[55] In any event it can hardly take precedence over the Constitution and the clear provisions of the LRA.

[61] There is nothing in the constitutional and statutory scheme that suggests that, in determining the fairness of a dismissal, a commissioner must approach the matter from the perspective of the employer. All the indications are to the contrary. A plain reading of all the relevant provisions compels the conclusion that the commissioner is to determine the dismissal dispute as an impartial adjudicator. Article 8 of the International Labour Organisation Convention on Termination of Employment 158 of 1982 (ILO Convention) requires the same.[56] Any suggestion by the Supreme Court of Appeal that the deferential approach is rooted in the prescripts of the LRA cannot be sustained.

Fairness of the dismissal

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[55] Above n 10.

[56] Article 8 of the ILO Convention requires that an employee whose employment has been unjustifiably terminated be afforded recourse to "an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator."

[62] The next part of the process is that the fairness of the dismissal must be assessed. As part of this process, the reasonableness or validity of the rule allegedly breached must be considered. The Code sets out factors that ought to be considered in relation to that aspect.

[63] The question of an approach to the inquiry into fairness is not novel. At the time that the LRA came into force, there was already an established jurisprudence in this regard. The Appellate Division[57] dealt with this question in relation to the Labour Relations Act 28 of 1956. In *Media Workers Association of South Africa and Others v Press Corpration of South Africa Ltd ('Perskor')*[58] it was stated as follows:

> "Clearly, the Court's view as to what is fair in the circumstances is the essential determinant in deciding the ultimate question. See *Marievale Consolidated Mines Ltd v President of the Industrial Court and Others* 1986 (2) SA 485 (T) at 498J-490I; Brassey and others *The New Labour Law* at 12-13, 58-9; Van Jaarsveld and Coetzee *Suid –Afrikaanse Arbeidsreg* vol 1 at 328.
>
> . . .
>
> In my view a decision of the Court . . . is not a decision on a question of law in the strict sense of the term. It is the passing of a moral judgment of a combination of findings of fact and opinions."[59]

Thus, the court is called upon as an impartial adjudicator to determine fairness.

[57] As the Supreme Court of Appeal was then known.

[58] 1992 (4) SA 791 (A).

[59] Id at 798F-H.

[64] In *National Union of Metalworkers of SA v Vetsak Co-operative Ltd and Others*,[60] the Appellate Division stated the following:

> "Fairness comprehends that regard must be had not only to the position and interests of the worker, but also those of the employer, in order to make a balanced and equitable assessment. In judging fairness, a court applies a moral or value judgment to established facts and circumstances (*NUM v Free State Cons* at 446I). And in doing so it must have due and proper regard to the objectives sought to be achieved by the Act. In my view, it would be unwise and undesirable to lay down, or to attempt to lay down, any universally applicable test for deciding what is fair."[61]

In *Chemical Workers Industrial Union & Others v Algorax (Pty) Ltd*[62] the Labour Appeal Court once again stressed that fairness had to be assessed objectively.

[65] In *NEHAWU* this Court said:

> "[T]he focus of s 23(1) is, broadly speaking, the relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both. In giving content to that right, it is important to bear in mind the tension between the interests of the workers and the interests of the employers which is inherent in labour relations. Care must therefore be taken to accommodate, where possible, these interests so as to arrive at the balance required by the concept of fair labour practices. It is in this context that the LRA must be construed."[63]

[66] The dicta in the preceding paragraphs and the ILO Convention clearly illustrate the importance of holding the scales between the competing interests of employees and employers evenly in the balance.

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[60] 1996 (4) SA 577 (A); (1996) 17 ILJ 455 (A).

[61] Id at 589B-D; 476D-E.

[62] (2003) 24 ILJ 197 (LC) at para 69.

[63] Above n 48 at para 40.

[67] The Labour Appeal Court in *Nampak* and *County Fair* was rightly concerned to ensure that, in determining whether a dismissal was fair, commissioners should not approach the matter on the basis of what decision they would have made had they been the employer. It was addressing the issue identified by Myburgh and Van Niekerk in their article *Dismissal as a Penalty for Misconduct: The Reasonable Employer and Other Approaches*:[64]

> "There is a disturbing inclination on the part of commissioners to substitute their personal opinions for those of employers. Whether that inclination is due to partiality, a different ethical code, inexperience or lack of training, is neither here nor there."[65]

[68] In *Nampak*, the Labour Appeal Court was careful to state that the fairness of a dismissal must be considered against the facts and circumstances of the case – an objective approach.[66] Regrettably, the decisions in *Nampak* and *County Fair*, in expounding on how a commissioner should approach his or her task, resorted to the reasonable employer test used in England. That test has its origins in section 57(3) of that country's Employment Protection (Consolidation) Act of 1978.[67] It is significant

[64] Myburgh and Van Niekerk "Dismissal as a Penalty for Misconduct: The Reasonable Employer and Other Approaches" (2000) 21 *ILJ* 2144.

[65] Id at 2158.

[66] Above n 19 at para 32.

[67] Section 57(3) provides:

> "[T]he determination of the question whether the dismissal was fair or unfair, having regard to the reasons shown by the employer, shall depend on whether the employer can satisfy the tribunal that in the circumstances (having regard to equity and the substantial merits of the case) *he acted reasonably in treating it as a sufficient reason for dismissing the employee*." (Emphasis added.)

that the provisions of that section are very different to the provisions of the LRA relating to the determination of the fairness of a dismissal.

[69] In applying that section the courts in England have resorted to the "band of reasonableness" test. In *British Leyland UK Ltd v Swift*,[68] Lord Denning stated the following:

> "[T]here is a band of reasonableness, within which one employer may reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other would quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair: even though some other employers may not have dismissed him."[69]

This approach, which was followed by the Supreme Court of Appeal, has been extensively criticised in England on the basis that it does not allow for a proper balancing of the interests of employer and employee.[70]

[70] As pointed out by the Supreme Court of Appeal, the Labour Appeal Court has been inconsistent in dealing with the question under discussion. In *Toyota SA Motors*

The highlighted part does not appear in the provisions of the LRA dealing with the powers of commissioners to determine dismissal disputes. Section 57(3) of the Employer Protection (Consolidation) Act (UK) now re-appears in section 98(4) of the Employment Rights Act 1996 (UK).

[68] [1981] IRLR 91.

[69] Id at para 11, quoted with approval in *Nampak* at para 33.

[70] *Haddon v Van den Bergh Foods Ltd* [1999] ICR 1150 (EAT), overruled by the Court of Appeals in *Foley v Post Office; HSBC Bank Plc (formerly Midland Bank Plc) v Madden* [2000] ICR 1283 (CA). See also Collins et al *Labour Law: Text and Materials* 2 ed (Hart Publishing, Oxford 2005) at 522 and 526; Deakin and Morris *Labour Law* 4 ed (Hart Publishing, Oxford 2005) at 492; Anderman in Barnard et al *The Future of Labour Law* (Hart Publishing, Oxford 2004) at 126-127; Collins *Employment Law* (Oxford University Press, New York 2003) at 176.

(Pty) Ltd v Radebe & Others,[71] decided after *County Fair* and *Nampak*, Nicholson JA noted that the LRA was differently worded from the English statute, providing as it does that an arbitrator should decide whether a dismissal is fair— he or she is not required to determine if the sanction is one which a reasonable employer would have arrived at.[72] With specific reference to *Nampak*, Nicholson JA stated the following:

> "As I mentioned above the ordinary rule is that this court is bound by its own decisions and unless a decision has been arrived at on some manifest oversight or misunderstanding, something in the nature of a palpable mistake, a subsequently constituted court has no right to prefer its own reasoning to that of its predecessors. I believe that the application of the reasonable employer test was such a palpable mistake which permits us to overrule it."[73]

[71] In *BMD Knitting Mills (Pty) Ltd v SA Clothing & Textile Workers Union*,[74] Davis AJA said the following:

> "I have some doubt as to whether this deferential approach which is sourced in the principles of administrative review is equally applicable to a decision by an employer to dismiss employees particularly in the light of the wording of the section of the Act, namely, 'the reason for dismissal is a fair reason'. The word 'fair' introduces a comparator, that is a reason which must be fair to both parties affected by the decision."[75]

[72] In deciding how commissioners should approach the task of determining the fairness of a dismissal, it is important to bear in mind that security of employment is a

[71] [2000] 3 BLLR 243 (LAC); (2000) 21 ILJ 340 (LAC).

[72] Id at paras 48 and 50.

[73] Id at para 50.

[74] [2001] 7 BLLR 705 (LAC); (2001) 22 ILJ 2264 (LAC).

[75] Id at para 19.

core value of the Constitution which has been given effect to by the LRA.[76] This is a protection afforded to employees who are vulnerable. Their vulnerability flows from the inequality that characterises employment in modern developing economies.[77] The relationship between employer and an isolated employee and the main object of labour law is set out in the now famous dictum of Otto Kahn-Freund:

> "[T]he relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination, however much the submission and the subordination may be concealed by that indispensable figment of the legal mind known as the 'contract of employment.' The main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship."[78]

[73] In *Engen Petroleum Ltd v CCMA & Others*[79] Zondo JP, although considering himself bound by the Supreme Court of Appeal's judgment in this matter, was critical of its stance in relation to the approach to be adopted by commissioners in adjudicating dismissal disputes. He stated the following in relation to the reasonable employer test:

> "Such a test is based on the perceptions and values of the employer side to these disputes. It emphasises the interests of employers more than those of workers. Such

[76] In this regard see *NEHAWU* above n 48 at para 42.

[77] Cheadle et al above n 52 at 18-5.

[78] Davies and Freedland *Kahn-Freund's Labour and the Law* 3 ed (Stevens & Sons, London 1983) at 18 quoted in Cheadle et al above n 52 at 18-5.

[79] [2007] 8 BLLR 707 (LAC). The judgment contains a useful discussion of the English approach to determining dismissal disputes and compares the English statutory provision referred to earlier in this judgment to provisions of the LRA. There is an extensive discussion of the historical position up to the judgments in *Nampak* and *County Fair*. There is a very comprehensive reference to case law and academic writings in relation to the test to be adopted by commissioners in relation to dismissal disputes.

> a test is, probably, as objectionable to workers as a 'reasonable employee test' would be to employers."[80]

[74] The Constitution and the LRA seek to redress the power imbalance between employees and employers. The rights presently enjoyed by employees were hard-won and followed years of intense and often grim struggle by workers and their organisations. Neither the Constitution nor the LRA affords any preferential status to the employer's view on the fairness of a dismissal. It is against constitutional norms and against the right to fair labour practices to give pre-eminence to the views of either party to a dispute. Dismissal disputes are often emotionally charged. It is therefore all the more important that a scrupulous even-handedness be maintained. The approach of the Supreme Court of Appeal tilts the balance against employees.

[75] It is a practical reality that in the first place it is the employer who hires and fires. The act of dismissal forms the jurisdictional basis for a commissioner, in the event of an unresolved dismissal dispute, to conduct an arbitration in terms of the LRA. The commissioner determines whether the dismissal is fair. There are therefore no competing "discretions". Employer and commissioner each play a different part. The CCMA correctly submitted that the decision to dismiss belongs to the employer but the determination of its fairness does not. Ultimately, the commissioner's sense of fairness is what must prevail and not the employer's view. An impartial third party determination on whether or not a dismissal was fair is likely to promote labour peace.

[80] *Engen Petroleum* id at para 111.

[76] The view that if there was no deference afforded to the employer's sanction there would be a flood of cases to the CCMA is no more than supposition. As the Labour Appeal Court correctly stated in *Engen Petroleum*:

> "[It] reveals a failure to appreciate the full rationale behind the creation of the CCMA. It is right and proper that as many disputes as possible that are not resolved amicably in the workplace, should be referred to the CCMA or bargaining councils and other mutually agreed fora for conciliation and, later, arbitration, irrespective of what any one may think of the merits or demerits of such disputes. The existence of the CCMA . . . helps to channel, among others, workers' grievances to where they can be ventilated without any interruption and disruption of production – at least up to a point. It is also right and proper that unions should be encouraged and not discouraged to refer dismissal disputes with employers to the CCMA for arbitration if they feel aggrieved by such dismissals. In that way, they can ventilate all issues about their grievances in regard to such dismissals in that forum before a third party, who can listen to all sides of the dispute and, using his own sense of what is fair or unfair, decide whether the dismissal is fair or unfair. In that way, the workers would have less urge to resort to industrial action over dismissal disputes."[81]

[77] Employees are entitled to assert their rights. If by so doing a greater volume of work is generated for the CCMA, then the State is obliged to provide the means to ensure that constitutional and labour law rights are protected and vindicated.

[78] In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are

[81] Id at para 117.

other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list.

[79] To sum up. In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances.

PAJA or the LRA?

[80] The Supreme Court of Appeal found that PAJA applies. It took the view that because PAJA was the national legislation passed to give effect to the constitutional right to just administrative action, was required to "cover the field" and purported to do so, it applied to awards by commissioners. In this regard it relied on decisions of this Court in *New Clicks*[82] and *Bato Star*.[83] It did not examine the nature of a commissioner's function by reference to section 33 of the Constitution, nor did it explore whether PAJA provided an exclusive statutory basis for the review of all administrative decisions.[84]

[82] Above n 44 at paras 95 and 433-437.

[83] Above n 42 at para 25.

[84] PAJA, of course, defines administrative action in section 1 as follows:

[81] In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*[85] the following appears:

> "In s 33 the adjective 'administrative' not 'executive' is used to qualify 'action'. This suggests that the test for determining whether conduct constitutes 'administrative action' is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not."[86]

[82] In form, characteristics and functions, administrative tribunals straddle a wide spectrum. At one end they implement or give effect to policy or to legislation. At the other, some tribunals resemble courts of law.[87] The old Industrial Court established in terms of the Labour Relations Act 28 of 1956, although performing functions similar

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> "'administrative action' means any decision taken, or any failure to take a decision, by—
> (a) an organ of state, when—
> (i) exercising a power in terms of the Constitution or a provincial constitution; or
> (ii) exercising a public power or performing a public function in terms of any legislation; or
> (b) a natural or juristic person, other than an organ of sate, when exercising a public power or performing a public function in terms of an empowering provision,
> which adversely affects the rights of any person and which has a direct, external legal effect . . ."

A list of exclusions are set out in subsections (aa)-(ii) which does not include CCMA arbitrations.

[85] 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC).

[86] Id at para 141. See also *New Clicks* above n 44 at para 448; *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at para 25.

[87] See Baxter *Administrative Law* (Juta & Co Ltd, Kenwyn 1984) at 244-246; Hoexter *Administrative Law in South Africa* (Juta & Co Ltd, Cape Town 2007) at 52-53 and *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA); 2005 (10) BCLR 931 (SCA) at paras 20-25.

to that of a court of law, was regarded as administrative in nature. In this regard, the Appellate Division said the following:[88]

> "An administrative body, although operating as such, may nevertheless in the discharge of its duties function as if it were a court of law performing what may be described as judicial functions, without negating its identity as an administrative body and becoming a court of law."[89]

[83] The Amnesty Committee, established in terms of the Promotion of National Unity and Reconciliation Act 34 of 1995, was empowered to conduct hearings in relation to applications for amnesty. Its proceedings were similar to those of a court of law. Nevertheless, it was an administrative body.[90]

[84] There are similarities between CCMA arbitrations and proceedings before a court of law. Section 138(2) of the LRA provides for the manner of adducing evidence, the questioning of witnesses and concluding arguments. Section 142 gives the Commissioner powers of subpoena. Section 142(8) provides for contempt proceedings in the Labour Court in the event that a party fails to comply with an award that orders the performance of an act other than the payment of money. Section 143(1) of the LRA provides that an award is final and binding and may be enforced as though it were an order of the Labour Court. A commissioner may make an order for payment of costs in terms of section 138(10) of the LRA.

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[88] *South African Technical Officials' Association v President of the Industrial Court and Others* 1985 (1) SA 597 (A).

[89] Id at 610G-H.

[90] See in this regard the decision of the Full Court in *Derby-Lewis and Another v Chairman, Amnesty Committee of the Truth and Reconciliation Commission, and Others* 2001 (3) SA 1033 (C); 2001 (3) BCLR 215 (C) at 1056D-F and 235C-D.

[85] However, there are significant differences. The CCMA is not a court of law. A commissioner is empowered in terms of section 138(1) to conduct the arbitration in a manner he or she considerers appropriate in order to determine the dispute fairly and quickly, but with the minimum of legal formalities. There is no blanket right to legal representation. The CCMA does not follow a system of binding precedents. Commissioners do not have the same security of tenure as judicial officers.

[86] Commenting on the status of the CCMA, Brassey states as follows:

> "Unlike the Labour Court, it enjoys none of the status of a court of law and so has no judicial authority within the contemplation of the Constitution. It is an administrative tribunal in the same way as the industrial court was and, being an organ of state under s 239 of the Constitution, is directly bound by the Bill of Rights. It is also subject to the basic values and principles governing public administration."[91] (Footnotes omitted.)

[87] Currie and De Waal state:

> "The CCMA is not a branch of the judiciary and does not exercise judicial power. Rather, the exercise of the compulsory arbitration power is an exercise of public power of an administrative ('governmental') nature. The arbitration power is designed to fulfil the primary goal of the Act which is to promote labour peace by the effective settlement of disputes. It does so with an element of compulsion, corresponding to the traditional government/governed relationship."[92]

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[91] Brassey *Employment and Labour Law: Commentary on the Labour Relations Act*, vol 3 (Juta & Co Ltd, Kenwyn 2006) at A7-1 - A7-2.

[92] Currie and De Waal *The Bill of Rights Handbook* 5 ed (Juta & Co Ltd, Wetton 2005) at 651, fn 34.

[88] Compulsory arbitrations in terms of the LRA are different from private arbitrations.[93] CCMA commissioners exercise public power which impacts on the parties before them. In the language of the pre-constitutional administrative law order, it would have been described as an administrative body exercising a quasi-judicial function.[94] I conclude that a commissioner conducting a CCMA arbitration is performing an administrative function.

[89] Section 33(3) of the Constitution[95] provides that national legislation must be enacted to give effect to the right to administrative action that is lawful, reasonable and procedurally fair. Section 145 of the LRA constitutes national legislation in respect of "administrative action" within the specialised labour law sphere. Of course, section 145 has to meet the requirements of section 33(1) of the Constitution ie it has to provide for administrative action that is lawful, reasonable and procedurally fair. This is a question to which I shall return in due course.

[90] The LRA, including section 145, was in place at the time that the Constitution came into force. Section 33(3) read with item 23(2) of Schedule 6 to the Constitution[96] contemplates that the national legislation referred to in section 33 of the Constitution is to be enacted in the future. It is clear that what was envisaged was

[93] *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA); 2007 (5) BCLR 503 (SCA) at para 45.

[94] Baxter above n 87 at 344-346.

[95] Above n 29.

[96] Above n 30.

legislation of general application. PAJA was the resultant legislation. The definition of administrative action in PAJA is extensive and intended to "cover the field".[97]

[91] Nothing in section 33 of the Constitution precludes specialised legislative regulation of administrative action such as section 145 of the LRA alongside general legislation such as PAJA. Of course, any legislation giving effect to section 33 must comply with its prescripts.

[92] In *Bato Star* the following appears:

> "The provisions of s 6 divulge a clear purpose to codify the grounds of judicial review of administrative action as defined in PAJA. The cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past. And the authority of PAJA to ground such causes of action rests squarely on the Constitution. *It is not necessary to consider here causes of action for judicial review of administrative action that do not fall within the scope of PAJA*. As PAJA gives effect to s 33 of the Constitution, matters relating to the interpretation and application of PAJA will of course be constitutional matters."[98] (Emphasis added.) (Footnote omitted.)

PAJA is a codification of the common law grounds of review. It is apparent, though, that it is not regarded as the exclusive legislative basis of review.

[93] It is against this background that the following dictum in *New Clicks* (relying on *Bato Star*) is to be understood:

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[97] *New Clicks* above n 44 at para 95.

[98] Above n 42 at para 25.

> "PAJA is the national legislation that was passed to give effect to the rights contained in s 33. It was clearly intended to be, and in substance is, a codification of these rights. It was required to cover the field and purports to do so."[99] (Footnote omitted.)

This does not in any way detract from the reservation contained in the quoted dictum from *Bato Star*.

[94] I have found that arbitration by a commissioner is administrative action. Does this mean that review provisions of PAJA are automatically applicable in the present context? To answer this question it is necessary first to deal with the LRA and its applicable provisions in relation to PAJA. The LRA is specialised negotiated national legislation[100] giving effect to the right to fair labour practices. The Ministerial task team responsible for the drafting of the Bill that led to the LRA was tasked, amongst other things, to "provide simple procedures for the resolution of disputes through statutory conciliation, mediation and arbitration and the licensing of independent alternative dispute resolution services".[101] The task team was tasked to "provide a system of labour courts to determine disputes of right in a way that would be accessible, speedy and inexpensive, with only one tier of appeal".[102] NEDLAC referred the Draft Bill to Cabinet recommending its adoption subject to agreed amendments.[103] Section 145 was purposefully designed as was the entire dispute resolution framework of the LRA.

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[99] Above n 44 at para 95.

[100] Du Toit et al *Labour Relations Law* 4 ed (LexisNexis Butterworths, Durban 2003) at 23-28 and "Explanatory Memorandum to the Draft Labour Relations Bill, 1995" (1995) 16 *ILJ* 278.

[101] *Explanatory Memorandum* id at 279.

[102] Id.

[103] Du Toit above n 100 at 28.

[95] The Supreme Court of Appeal was of the view that the only tension in relation to the importation of PAJA was the difference in time-scales in relation to reviews under section 145 of the LRA and PAJA. This difference is but one symptom of a lack of cohesion between provisions of the LRA and PAJA.

[96] Section 157(1) of the LRA provides that, subject to the Constitution and except where the LRA provides otherwise, the Labour Court has exclusive jurisdiction. Section 157(2) provides that the Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened infringement of any right in the Constitution and arising, inter alia, from employment and labour relations. High Courts will of course always have jurisdiction where a fundamental right is pertinently implicated in the labour relations field, as for example, when a union might seek to interdict an employment practice that is obviously racist. This of course, does not mean that in the ordinary course of reviewing decisions of CCMA commissioners concerning unfair labour practices, the Labour Court does not enjoy exclusive jurisdiction.

[97] If PAJA were to apply, section 6 thereof would not allow for such exclusivity and would enable the High Court to review CCMA arbitrations. This would mean that the High Court would have concurrent jurisdiction with the Labour Court. This negates the intended exclusive jurisdiction of the Labour Court and provides a platform for forum shopping.

[98] The powers of the Labour Court set out in section 158 of the LRA differ significantly from the powers of a court set out in section 8 of PAJA. The powers of the Labour Court are directed at remedying a wrong and, in the spirit of the LRA, at providing finality speedily. If an application in the normal course for the review of administrative action succeeds, an applicant is usually entitled to no more than the setting aside of the impugned decision and its remittal to the decision-maker to apply his or her mind afresh. Section 8(1)(c)(ii) of PAJA provides that only in exceptional cases may a court substitute the administrative decision or correct a defect resulting from the administrative action. This is a significant difference between the LRA and PAJA.

[99] All of this explains why section 210 of the LRA was enacted, and why it was not amended or repealed by PAJA. Section 210 of the LRA provides as follows:

> "If any conflict, relating to the matters dealt with in *this Act*, arises between *this Act* and the provisions of any other law save the Constitution or any Act expressly amending *this Act*, the provisions of *this Act* will prevail."

[100] The State in both its executive and legislative arms was involved in finalising the LRA together with persons representing business, labour and community interests. Section 210 is unsurprising. The main protagonists in industrial relations, having negotiated the terms of the legislation, were not likely to countenance any non-agreed intrusions. This is particularly so in relation to the method and manner of determining disputes.

[101] For more than a century courts have applied the principle that general legislation, unless specifically indicated does not derogate from special legislation. Lord Hobhouse delivering the judgment of the Privy Council in *Barker v Edger and Others*[104] stated the following:

> "When the Legislature has given its attention to a separate subject, and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject-matter and its own terms . . . . It would require a very clear expression of the mind of the Legislature before we should impute to it the intention of destroying the foundation of the work which it had initiated some four years before, and to which the Court has ever since been assiduously addressing itself."[105]

[102] In *R v Gwantshu*,[106] after citing *Barker* with approval, the court quoted the following passage from *Maxwell on the Interpretation of Statutes*:[107]

> "Where general words in a later Act are capable of reasonable and sensible application without extending to subjects *specially* dealt with, by earlier legislation, that earlier and *special legislation* is not to be held indirectly . . . altered . . . merely by force of such general words, without any indication or particular intention to do so." (Emphasis added.)

[104] [1898] AC 748.

[105] Id at 754.

[106] 1931 EDL 29 at 31.

[107] Bridgman (ed) *Maxwell on the Interpretation of Statutes* 7 ed (Sweet & Maxwell Limited, London 1929) at 153. See also *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) at para 49 and 1420H-1421B; *Sasol Synthetic Fuels (Pty) Ltd and Others v Lambert and Others* 2002 (2) SA 21 (SCA) at para 17; *Consolidated Employers Medical Aid Society and Others v Leveton* 1999 (2) SA 32 (SCA) at 40I-41B; *Khumalo v Director-General of Co-operation and Development and Others* 1991 (1) SA 158 (A) at 164C-165D.

[103] The legislature had knowledge of section 210 of the LRA and deliberately decided not to repeal that section or section 145 of the LRA. Moreover, it resulted from intense negotiations that led to the enactment of the LRA. This is an appropriate case for the application of the principle that specialised provisions trump general provisions.

[104] For the reasons set out above, the Supreme Court of Appeal erred in holding that PAJA applied to arbitration awards in terms of the LRA. That however, is not the end of the inquiry. What must now be addressed is whether the standard of review set by section 145 of the LRA is constitutionally compliant.

The standard of review

[105] As stated earlier,[108] section 3 of the LRA provides, inter alia that its provisions must be interpreted in compliance with the Constitution. Section 145 therefore must be read to ensure that administrative action by the CCMA is lawful, reasonable and procedurally fair.

[106] The *Carephone* test, which was substantive and involved greater scrutiny than the rationality test set out in *Pharmaceutical Manufacturers*, was formulated on the basis of the wording of the administrative justice provisions of the Constitution at the time, more particularly, that an award must be justifiable in relation to the reasons given for it. Section 33(1) of the Constitution presently states that everyone has the

[108] See para [57] above.

right to administrative action that is lawful, reasonable and procedurally fair. The reasonableness standard should now suffuse section 145 of the LRA.

[107] The reasonableness standard was dealt with in *Bato Star*. In the context of section 6(2)(h) of PAJA, O'Regan J said the following: "[A]n administrative decision will be reviewable if, in Lord Cooke's words, it is one that a reasonable decision-maker could not reach."[109]

[108] This Court recognised that scrutiny of a decision based on reasonableness introduced a substantive ingredient into review proceedings. In judging a decision for reasonableness, it is often impossible to separate the merits from scrutiny. However, the distinction between appeals and reviews continues to be significant.[110]

[109] Review for reasonableness, as explained by Professor Hoexter, does threaten the distinction between review and appeal. The Labour Court in reviewing the awards of commissioners inevitably deals with the merits of the matter. This does tend to blur the distinction between appeal and review. She points out that it does so in the limited sense that it necessarily entails scrutiny of the merits of administrative decisions. She states that the danger lies, not in careful scrutiny, but in "judicial overzealousness in setting aside administrative decisions that do not coincide with the judge's own opinions."[111] This Court in *Bato Star* recognised that danger.[112] A judge's task is to

[109] Above n 42 at para 44.

[110] Id at para 45.

[111] Hoexter above n 87 at 318.

ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.[113]

[110] To summarise, *Carephone* held that section 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that section 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in *Bato Star*: Is the decision reached by the commissioner one that a reasonable decision-maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair.

[111] A further aspect must be addressed. In contending that commissioners do not perform an administrative function and that their awards should not be subject to administrative review under PAJA, counsel for the applicant and the CCMA submitted that the rights sought to be vindicated in arbitrations conducted under the LRA are linked to the fundamental rights provided for in sections 23 and 34 and not to the right to just administrative action contained in section 33 of the Constitution. Section 34 of the Constitution provides:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

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[112] Above n 42 at para 45.

[113] Hoexter above n 87 at 106 and 316-318; *Bato Star* above n 42 at para 45.

[112] This submission is based on the misconception that the rights in sections 23, 33 and 34 are necessarily exclusive and have to be dealt with in sealed compartments. The right to fair labour practices, in the present context, is consonant with the right to administrative action that is lawful, reasonable and procedurally fair. Everyone has the right to have these rights enforced before the CCMA acting as an impartial tribunal.[114] In the present context, these rights in part overlap and are interconnected.[115]

Applying the standard

[113] The Commissioner gave three reasons for regarding the sanction as excessive and unfair. The first was that no losses were sustained. The second was that the misconduct was unintentional or a "mistake" and the third was the absence of dishonesty. He also took the view that the offence committed by Mr Sidumo did not go to the heart of the relationship of trust between Mr Sidumo and the Mine.

[114] It is clear that there was no evidence presented that the Mine suffered any loss as a consequence of Mr Sidumo's neglect. It is true that losses could have been occasioned by his misconduct, but it is equally true, as submitted on behalf of Mr Sidumo, that no loss was proven to have flowed from it.

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[114] The right in terms of section 34 of the Constitution to have a dispute resolved before an impartial tribunal underscores the point made in relation to the first issue, namely, that the commissioner must act impartially.

[115] *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) at paras 112 and 114.

[115] In respect of the Commissioner's finding that the misconduct was unintentional or a mistake, it was correctly pointed out on behalf of Mr Sidumo that it was Mr Botes, in his evidence before the Commissioner, who characterised his misconduct as "mistakes". It is true that Mr Sidumo did not conduct individual searches which were his main task. Therefore to describe his conduct as a "mistake" or "unintentional" is confusing and in this regard the Commissioner erred.

[116] In respect of the absence of dishonesty, the Labour Appeal Court found the Commissioner's statement in this regard "baffling". In my view, the Commissioner cannot be faulted for considering the absence of dishonesty a relevant factor in relation to the misconduct. However, the Commissioner was wrong to conclude that the relationship of trust may have not been breached. Mr Sidumo was employed to protect the Mine's valuable property which he did not do. However this is not the end of the inquiry. It is still necessary to weigh all the relevant factors together in light of the seriousness of the breach.

[117] The absence of dishonesty is a significant factor in favour of the application of progressive discipline rather than dismissal. So too, is the fact that no losses were suffered. That Mr Sidumo did not own up to his misconduct and his denial that he received training are factors that count against him. His years of clean and lengthy service were certainly a significant factor. There is no indication that the principle of progressive discipline will not assist to adjust Mr Sidumo's attitude and efficiency. In my view, the Commissioner carefully and thoroughly considered the different

elements of the Code and properly applied his mind to the question of the appropriateness of the sanction.

[118] CCMA figures reveal that each year between 70 000 - 80 000 cases are referred to the CCMA for conciliation in respect of dismissals. Given the pressures under which commissioners operate and the relatively informal manner in which proceedings are conducted, and the further fact that employees are usually not legally represented, it is to be expected that awards will not be impeccable.

[119] To my mind, having regard to the reasoning of the Commissioner, based on the material before him, it cannot be said that his conclusion was one that a reasonable decision-maker could not reach. This is one of those cases where the decision-makers acting reasonably may reach different conclusions. The LRA has given that decision-making power to a commissioner.

Costs

[120] The litigation in this matter has been long and protracted. It has been an arduous road for Mr Sidumo. COSATU entered the fray at a late stage in order to advance the interests of employees. The Mine was rightly concerned about security issues. In the light of the totality of circumstances, it appears to me to be appropriate that no party should bear costs either in the preceding litigation or in the present appeal.

Order

[121] The following order is made:

(a) The application for the condonation of the late filing of the applications for leave to appeal is granted.

(b) The application to intervene is granted.

(c) The application for leave to appeal is granted.

(d) The appeals against the decision of the Supreme Court of Appeal are upheld and the Commissioner's award is restored.

(e) The costs orders in the Labour Court and the Labour Appeal Court are set aside and substituted with the following: "No order is made as to costs."

(f) In respect of this appeal no order is made as to costs.

Moseneke DCJ, Madala J, O'Regan J and Van der Westhuizen J concur in the judgment of Navsa AJ.

O'REGAN J:

[122] I have had the opportunity of reading the judgments prepared in this matter by Navsa AJ, Ngcobo J and Sachs J. I concur in the judgment of Navsa AJ. Ngcobo J

raises some important issues concerning the scope of "administrative action" in section 33[1] of the Constitution to which I wish briefly to respond.

[123] Ngcobo J holds that, to answer the question whether action is "administrative" or not for the purposes of section 33 of the Constitution, it is necessary to focus on the function rather than the functionary.[2] He classifies the function performed by the Commission for Conciliation, Mediation and Arbitration (the CCMA) as judicial, identifies it as an "independent and impartial tribunal" within the scope of section 34 of the Constitution and concludes therefore that its decisions do not constitute administrative action as contemplated by section 33. The question whether the CCMA's decisions constitute administrative action is a difficult one. In answering it, we need to consider the role of the CCMA in our constitutional state and assess that role in the light of the constitutional purpose of section 33.

[124] I should start however by making plain that it is beyond doubt that the functions performed by the CCMA clearly fall within the terms of section 34 of the Constitution which provides that:

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[1] Section 33 provides that:

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

[2] Ngcobo J's judgment at para [203] below.

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

The CCMA is an independent tribunal established by the Labour Relations Act.[3] It determines disputes on a range of matters that arise between workers and trade unions, on the one hand, and employers, on the other. Its hearings must accordingly be "fair, public hearing[s]" within the contemplation of section 34. It is not clear to me, however, as it appears to be to Sachs J,[4] that this requirement tracks identically the provisions of section 33, which require administrative action to be "lawful, reasonable and procedurally fair" and also require that those whose rights have been adversely affected receive written reasons for the action.[5] This is not a matter to which a final answer need be given in this judgment, as in my view, the CCMA's proceedings are bound both by the constitutional provisions of section 34 and those of section 33.

[125] Tribunals play an important role in the modern administrative state. As Wade and Forsyth point out:

> "The social legislation of the twentieth century demanded tribunals for purely administrative reasons: they could offer speedier, cheaper and more accessible justice, essential for the administration of welfare schemes involving large numbers of small claims. The process of the courts of law is elaborate, slow and costly. Its defects are those of its merits, for the object is to provide the highest standard of justice; generally speaking, the public wants the best article, and is prepared to pay for it. But in administering social services the aim is different. The object is not the

[3] Section 113 of the Labour Relations Act 66 of 1995.

[4] Sachs J's judgment at paras [146]-[147] below.

[5] Sections 33(1) and (2) of the Constitution.

> best possible article at any price but the best article that is consistent with efficient administration. Disputes must be disposed of quickly and cheaply, for the benefit of the public purse as well as for that of the claimant. . . . The whole system is based on compromise, and it is from the dilemma of weighing quality against convenience that many of its problems arise."[6]

This passage captures precisely the raison d'être of the CCMA. Its aim is to provide affordable, accessible and quick resolution of workplace disputes. Its task, as Ngcobo J states, is to determine facts and to apply principles of law and fairness to those facts. In so doing, it determines the rights of both workers and employers. Such a task is adjudicative in character. The question is whether it is a task that falls within the scope of "administrative action" as contemplated by section 33.

[126] Ngcobo J's reasoning is that the task is not administrative because there is a distinction to be drawn between "administrative" and "judicial" tasks. He reasons that where judicial tasks are performed by independent and impartial tribunals, the performance of those tasks does not fall within the scope of administrative action in section 33 of the Constitution. My approach is different. While independent and impartial tribunals may perform adjudicative tasks, it does not automatically follow that their functions are not within the contemplation of section 33. Nor does it necessarily follow that because independent and impartial tribunals are governed by section 34, they are not governed by section 33.

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[6] Wade and Forsyth *Administrative Law* 8 ed (Oxford University Press, Oxford 2000) at 886. See also the helpful discussion in Baxter *Administrative Law* (Juta & Co Ltd, Kenwyn 1984) at 244-245 in which he identifies four factors which may lead to the creation of tribunals to determine disputes rather than courts: the need to avoid over-burdening the courts; the desirability of establishing tribunals with special expertise to resolve disputes in particular areas; the need to avoid "over-judicialising" issues; and the need for speedy, efficient and cheap resolution of disputes. See also Hoexter *Administrative Law in South Africa* (Juta & Co Ltd, Cape Town 2007) at 52-53.

[127] This Court has dealt with the relationship between "administrative action" as constitutionally contemplated,[7] and "judicial" tasks in only two cases. In *Nel v Le Roux NO and Others*,[8] this Court was concerned with the procedure for compelling witnesses provided for in section 205 of the Criminal Procedure Act.[9] That provision empowers a judge or a magistrate, upon the request of a prosecutor, to require a person to appear before him or her to be examined by the prosecutor. Section 205(4) empowered the judge or magistrate to sentence a person who fails to attend or who attends but refuses to answer questions without just excuse to a sentence of imprisonment. This Court held that this procedure is not administrative, but judicial in character (though this Court did hold that if it were to be administrative action, the

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[7] Both cases deal with section 24 of the Constitution of the Republic of South Africa Act 200 of 1993 ("the interim Constitution").

[8] 1996 (3) SA 562 (CC); 1996 (4) BCLR 592 (CC).

[9] Act 51 of 1977. Section 205 of the Criminal Procedure Act as under consideration in *Nel v Le Roux NO* provided that:

> "(1) A Judge of the Supreme Court, a regional court magistrate or a magistrate may, subject to the provisions of ss (4), upon the request of an Attorney-General or a public prosecutor authorised thereto in writing by the Attorney-General, require the attendance before him or any other Judge, regional court magistrate or magistrate, for examination by the Attorney-General or the public prosecutor authorised thereto in writing by the Attorney-General, of any person who is likely to give material or relevant information as to any alleged offence, whether or not it is known by whom the offence was committed: Provided that if such person furnishes that information to the satisfaction of the Attorney-General or public prosecutor concerned prior to the date on which he is required to appear before a Judge, regional court magistrate or magistrate, he shall be under no further obligation to appear before a Judge, regional court magistrate or magistrate.
>
> (2) The provisions of ss 162-165 inclusive, 179-181 inclusive, 187-189 inclusive, 191 and 204 shall *mutatis mutandis* apply with reference to the proceedings under ss (1).
>
> (3) The examination of any person under ss (1) may be conducted in private at any place designated by the Judge, regional court magistrate or magistrate.
>
> (4) A person required in terms of ss (1) to appear before a Judge, a regional court magistrate or a magistrate for examination, and who refuses or fails to give the information contemplated in ss (1), shall not be sentenced to imprisonment as contemplated in s 189 unless the Judge, regional court magistrate or magistrate concerned, as the case may be, is also of the opinion that the furnishing of such information is necessary for the administration of justice or the maintenance of law and order."

The Act has since been amended by section 59 of the Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002.

procedure would not offend the Constitution). One of the important reasons given for the conclusion that the procedure did not constitute administrative action was that it was subject to appeal in the same manner as a sentence imposed in a criminal case.[10]

[128] The second case was *De Lange v Smuts NO and Others.*[11] In that case, this Court was concerned with a challenge to section 66(3) of the Insolvency Act[12] which empowered an officer presiding at a meeting of creditors to issue a warrant to commit to prison a person who refuses to be sworn or to answer a question. The question that arose for decision was whether the power to issue a warrant of committal was a power that could only be exercised by "a judicial officer in the court structure established by the 1996 Constitution and in which s 165(1) has vested the judicial authority of the Republic".[13] A majority of this Court held that a power of committal could only be exercised by a judicial officer on the ground that the power to imprison a person could only be exercised by a court of law. This Court concluded that:

> "[I]t suffices to say that, whatever the outer boundaries of separation of powers are eventually determined to be, the power in question here – ie the power to commit an

[10] Above n 8 at para 24.

[11] 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC).

[12] Act 24 of 1936. Section 66(3) of the Insolvency Act provides:

> "If a person summoned as aforesaid, appears in answer to the summons but fails to produce any book or document which he was summoned to produce, or if any person who may be interrogated at a meeting of creditors in terms of subsection (1) of section sixty-five refuses to be sworn by the officer presiding at a meeting of creditors at which he is called upon to give evidence or refuses to answer any question lawfully put to him under the said section or does not answer the question fully and satisfactorily, the officer may issue a warrant committing the said person to prison, where he shall be detained until he has undertaken to do what is required of him, but subject to the provisions of subsection (5)."

[13] *De Lange v Smuts NO* above n 11 at para 57.

> unco-operative witness to prison – is within the very heartland of the judicial power and therefore cannot be exercised by non-judicial officers."[14]

The corollary of this conclusion by the majority of this Court was that the power to commit a person to prison for failing to co-operate was "clearly judicial and nothing else".[15] I should add for completeness that section 66(5) of the Insolvency Act provides that a person committed to prison under section 66(3) may apply to a court for discharge from custody on the basis that he or she was wrongfully committed to prison.

[129] Both cases concern the power to commit a recalcitrant witness to prison. Both powers were held not to involve "administrative action" but were held to be "judicial" in character. What is clear from the judgment of Ackermann J in *De Lange v Smuts NO*, in particular, is that when defining the power to commit a person to prison as an exercise of judicial power, the Court was not only speaking of the function but also of the functionary, that is the judiciary as constitutionally established. The reasoning recognises that there are certain powers in our constitutional order (and in both cases this was the power to commit a person to prison) that may only be exercised by judicial officers and not by members of the executive because of our constitutional doctrine of separation of powers. The powers then were held to be "judicial" not only because they involved adjudication, but because they were powers which, under our constitutional order, are to be exercised only by the judiciary.

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[14] Id at para 61.

[15] Id at para 80.

[130] The dictum from *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*[16] *(SARFU)* upon which Ngcobo J relies,[17] that "[w]hat matters is not so much the functionary as the function",[18] has thus not been employed by this Court in relation to the distinction to be drawn between judicial tasks and administrative action. That dictum was used in *SARFU* to assist in drawing the line between "executive" acts and "administrative" acts. This Court reasoned:

> "In section 33, the adjective 'administrative' not 'executive' is used to qualify 'action'. This suggests that the test for determining whether conduct constitutes 'administrative action' is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not."[19]

[131] This Court continued as follows:

> "It may well be, as contemplated in *Fedsure*, that some acts of a legislature may constitute 'administrative action'. Similarly, judicial officers may, from time to time, carry out administrative tasks. The focus of the enquiry as to whether conduct is 'administrative action' is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising."[20] (Footnotes omitted.)

[132] All that this paragraph makes plain is that at times arms of government other than the executive may perform administrative action. Again it does not assist us in

[16] 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC).

[17] Ngcobo J's judgment at para [203] below.

[18] *SARFU* above n 16 at para 141.

[19] Id.

[20] Id.

answering the question whether the performance of adjudicative tasks by the CCMA is to be classified as administrative action or not. In my view, that question needs to be answered by understanding the proper constitutional purpose of section 33 and then considering that purpose against the context of the adjudicative functions of the CCMA.

[133] A similar mode of reasoning was followed in *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*.[21] In that case, this Court held that the decisions of deliberative legislative assemblies did not constitute administrative action within the conception of section 24 of the interim Constitution.[22] Section 24 was the precursor to section 33 of the 1996 Constitution. This Court reasoned:

> "The procedures according to which legislative decisions are to be taken are prescribed by the Constitution, the empowering legislation and the rules of the council. Whilst this legislative framework is subject to review for consistency with the Constitution, the making of by-laws and the imposition of taxes by a council in accordance with the prescribed legal framework cannot appropriately be made subject to challenge by 'every person' affected by them on the grounds contemplated by s 24(b). Nor are the provisions of s 24(c) or (d) applicable to decisions taken by a deliberative legislative assembly. The deliberation ordinarily takes place in the

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[21] 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at para 41.

[22] Section 24 of the interim Constitution provided:

> "Every person shall have the right to—
> (a) lawful administrative action where any of his or her rights or interests is affected or threatened;
> (b) procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened;
> (c) be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public; and
> (d) administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened."

> assembly in public where the members articulate their own views on the subject of the proposed resolutions. Each member is entitled to his or her own reasons for voting for or against any resolution and is entitled to do so on political grounds. It is for the members and not the Courts to judge what is relevant in such circumstances. Paragraphs 24(c) and (d) cannot sensibly be applied to such decisions."[23] (Footnote omitted.)

[134] This reasoning starts by understanding what section 24 of the interim Constitution required and then considers whether in the overall context of the interim Constitution, it is appropriate to understand the decisions of deliberative legislative assemblies as falling within the scope of section 24.

[135] Similarly, the question of whether the CCMA falls within the scope of section 33 should be answered by determining the constitutional purpose of section 33 and then considering whether it is constitutionally suitable to impose the requirements of section 33 on the conduct of the CCMA. It should not be answered by asserting that the adjudicative functions of administrative tribunals are governed by section 34 of the Constitution and do not constitute "administrative action" as contemplated by section 33. In our pre-constitutional order, the classification of functions in administrative law proved to be an unsatisfactory basis for determining the scope of judicial review and it was finally and firmly rejected by the courts.[24] I am concerned that if we understand section 33 and section 34 to be mutually exclusive constitutional provisions, we may end up with a formalist jurisprudence based on a distinction

[23] Above n 21.

[24] *South African Roads Board v Johannesburg City Council* 1991 (4) SA 1 (A) at 10I-11A and *Administrator, Transvaal, and Others v Traub and Others* 1989 (4) SA 731 (A) at 759A-C, 762F-J and 763H-I. See also the famous English decision rejecting the classificatory approach *Ridge v Baldwin* [1964] AC 40 (CA). See also the discussion in Hoexter above n 6 at 352-355.

between "administrative" in section 33 and "judicial" or "adjudicative" decisions by tribunals governed only by section 34 which is at odds with the substantive vision of our Constitution. Similar concerns animate the judgment of Sachs J.[25]

[136] In my view, seeking to preserve a sphere of action for democratically elected legislative bodies (as we did in *Fedsure),* that does not constitute administrative action for the purposes of section 33 of the Constitution, flows from the doctrine of separation of powers. It recognises that courts are not appropriately placed to review the conduct of democratic legislatures under section 33. Similarly, this Court's reasoning in *SARFU* recognises that the executive has a special sphere of operation in our constitutional order which it is not appropriate to subject to judicial scrutiny by way of section 33.[26] Similarly too the distinction drawn in *De Lange* also rests on the doctrine of separation of powers under our constitutional order and the need to recognise the special terrain of the judicial authority of the Republic.

[137] The doctrine of the separation of powers, however, has no application in the present case. There is no reason why, from a separation of powers perspective, the conduct of the CCMA should be immune from scrutiny under section 33. Indeed, there are powerful reasons why adjudicative decisions of tribunals should be subject to the scrutiny of courts on the standards set by section 33, as I shall mention below. Seeking to draw a line, therefore, between administrative action and the adjudicative

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[25] Sachs J's judgment at paras [142] and [151] below.

[26] *SARFU* above n 16. See also the reasoning in *Permanent Secretary, Department of Education and Welfare, Eastern Cape, and Another v Ed-U-College (PE) (Section 21) Inc* 2001 (2) SA 1 (CC); 2001 (2) BCLR 118 (CC) at para 21.

decisions of administrative tribunals will, I fear, lead us directly to the arid classifications of our old administrative law. I prefer an approach to the question based on a substantive understanding of section 33.

[138] The content of section 33 is straightforward. It requires administrative action to be "lawful, reasonable and procedurally fair." It also requires that written reasons be given for administrative action that adversely affects the rights of individuals. Section 33 should be understood as one of the key constitutional provisions giving life to the constitutional values of accountability, responsiveness and openness to be found in section 1 of our Constitution.[27]. It recognises that requiring administrative action to be lawful, procedurally fair and reasonable is one of the ways of ensuring the exercise of public power that is accountable. The question of purposive constitutional interpretation that thus arises is whether it is constitutionally appropriate to hold the CCMA to these standards.

[139] In my view, it is. The CCMA is an organ of state exercising public power. Its statutory task is to resolve disputes that arise in the workplace by implementing the provisions of the Labour Relations Act read in the light of the provisions, in particular, of section 23 of the Constitution. Section 23(1) of the Constitution provides that

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[27] Section 1 of the Constitution provides:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
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> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
> (b) Non-racialism and non-sexism.
> (c) Supremacy of the constitution and the rule of law.
> (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

workers and employers are entitled to fair labour practices. The adjudicative task performed by the CCMA involves the determination of disputes often involving the question of fair labour practices that are of importance to the litigants before the CCMA. It is not an institution for private, agreed arbitration but a state institution established for the resolution of disputes. The procedures provided for in the Labour Relations Act make plain that the disputes are to be speedily and cheaply resolved by the CCMA. No appeal lies from the CCMA, but the Labour Relations Act expressly requires that the Labour Courts are to scrutinise the decisions of the CCMA.[28]

[140] It is clear that the CCMA has been established to expedite the resolution of labour disputes in an efficient and cost-effective manner. Special procedures have been created to avoid the delays and costs associated with dispute resolution in the ordinary courts. In this sense, the CCMA is properly understood as an administrative tribunal. Our Constitution recognises the need for the conduct of administrative agencies to be scrutinised, to ensure that they act lawfully, reasonably and procedurally fairly.[29] As the Labour Relations Act already provides for the scrutiny on review of decisions of the CCMA by the Labour Court, no further delay will be caused by that scrutiny being on the basis of the constitutional standards established in section 33. So the need for speedy and cheap resolution of disputes does not mean that the CCMA should not be held accountable for its decisions, nor that it should not be monitored by the Labour Court to ensure that it acts lawfully, reasonably and

[28] Section 145 of the Labour Relations Act.

[29] As Hoexter points out, above n 6 at 53, it is because administrative tribunals dispense with some of the procedural protections of the ordinary judicial process that they are subject to review, or even appeal, by the ordinary courts.

procedurally fairly. Indeed, as Sachs J has reasoned, it is entirely consistent with our constitutional order that the procedures and decisions of the CCMA should be lawful, reasonable and procedurally fair and that this should be ensured by appropriate scrutiny by the Labour Courts.

[141] For these reasons then, and for the additional reasons given by Navsa AJ at paragraphs [81]-[88] of his judgment, I agree with him that arbitrations by commissioners in the CCMA constitute administrative action within the contemplation of section 33 of the Constitution. I also concur with the rest of his judgment.

SACHS J:

[142] This case illustrates the need for our constitutional jurisprudence to find the space in appropriate cases to move away from unduly rigid compartmentalisation so as to allow judicial reasoning to embrace fluid concepts of hybridity and permeability in those matters.

[143] Is it a "judicial function" or is it "administrative action"? This was the stark classificatory choice that was presented to the Court by counsel in this matter. The

premise was that if arbitration in an unfair dismissal matter by a commissioner[1] amounted to judicial conduct, the powers of review would be limited to the relatively narrow confines established by the Labour Relations Act[2] (the LRA). If, however, it should be regarded as administrative action, a reviewing court could exercise the relatively wide powers granted by section 33 of the Constitution[3] and the Promotion of Administrative Justice Act[4] (PAJA). In my view, posing the question in these terms displays undue subordination to formal classification of rights, and insufficient regard for the manner in which rights overlap and basic values animate and bind discrete rights together.

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[1] The Commission for Conciliation, Mediation and Arbitration was established under section 112 of the Labour Relations Act 66 of 1995 (the LRA). In terms of section 117 of the LRA once conciliation has failed the governing body of the CCMA must appoint commissioners to resolve labour disputes through arbitration under section 115.

[2] Act 66 of 1995. Section 145 of the LRA provides in pertinent part:

> "(1) Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award—
> . . .
> (2) A defect referred to in subsection (1), means—
> (a) that the commissioner—
> (i) committed misconduct in relation to the duties of the commissioner as an arbitrator;
> (ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
> (iii) exceeded the commissioner's powers; or
> (b) that an award has been improperly obtained."

[3] Section 33 provides:

> "(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
> . . .
> (3) National legislation must be enacted to give effect to these rights, and must—
> (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
> . . .
> (c) promote an efficient administration."

[4] Act 3 of 2000. PAJA is the relevant national legislation mandated by section 33(3) of the Constitution.

[144] I accordingly associate myself with the challenge that Navsa AJ addresses to the existence of an assumed divide between the rights said to be in competition in this matter. He observes that it is misleading to define the central issue as being whether arbitration under the LRA should be identified as constituting administrative action or judicial conduct.[5] He then states that it is a misconception to assume that the rights in section 23 (the right to fair labour practices),[6] section 33 (the right to just administrative action) and section 34 (the right to settle disputes in a fair hearing)[7] of the Constitution are necessarily exclusive, and have to be dealt with in sealed compartments. Thus, even though he finds that PAJA does not in fact apply to what he would characterise as administrative action, nevertheless he holds that the broad principles of administrative justice as contained in section 33 of the Constitution should permeate the manner in which the commissioner functions. In the result, he reads the provisions of section 145 of the LRA in a broad manner, deciding that the reviewing court should apply the test of whether the commissioner's decision was one to which a reasonable commissioner, sensitive to the values of section 33, could come.[8]

[145] Ngcobo J, on the other hand, decides that the commissioner is not engaged in administrative action but in judicial conduct, which under section 34 of the

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[5] Above at para 112.

[6] Section 23(1) provides: "Everyone has the right to fair labour practices."

[7] Section 34 provides:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[8] Above at para 110.

Constitution necessitates a fair hearing by an impartial tribunal, provided in this case by the commissioner.[9] The starting point of the enquiry, he states, must be the wording of section 145 of the LRA. He too would construe these words in a broad fashion. This is because the very notion of a fair labour practice requires that fairness be the touchstone throughout. In his view, the basis of the review must be whether the commissioner applied the provisions of section 145 of the LRA in a fair manner,[10] not only procedurally but substantively and in keeping with the powers and duties flowing from the section.

[146] I find myself in the pleasant but awkward position of agreeing with colleagues who disagree with each other. In my view the rationale of each of their judgments is essentially the same, even though they are framed in different conceptual matrices. Employing almost identical processes when weighing the facts they unsurprisingly arrive at the same outcome. This concurrence of result comes about not through happenstance, but because in substance, though not in form, they concur on the context, interests and values involved. Both judgments are animated by the same goal, which is to determine in a constitutionally proper way the standard of conduct that can be expected of a public official arbitrating a labour dispute in an open and democratic society based on human dignity, equality and freedom. I would add that, formal trappings aside, it is difficult to see how a reasonable commissioner can act unfairly, or a fair commissioner can function unreasonably.

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[9] Below at para 209.

[10] Below at para 267.

[147] Thus, whether one labels the commissioner's work as performing a judicial function in an administrative context, or as fulfilling an administrative function in a judicial context, the activity is intrinsically the same. The commissioner must be impartial and basically fair and reasonable in the conduct of his or her work. This is so, whatever the technical description. To my mind, any attempt at pure classifications is doomed from the start. The reality is that the function of the commissioner is a hybrid one, composed of an amalgam of three separate but intermingling constitutional rights.

[148] Acceptance of hybridity is based on the fact that protected rights in a constitutional democracy overlap, intersect and mutually reinforce each other. Though in particular factual situations the interests secured by the rights might collide, there can be no intrinsic or categorical incompatibility between the rights themselves. Courts should not feel obliged to obliterate one right through establishing the categorical or classificatory pre-eminence of another. On the contrary, the task of the courts is to seek wherever possible to balance and reconcile the constitutional interests involved. In this endeavour the courts will be strongly guided by the constitutional values at stake.

[149] The values of the Constitution are strong, explicit and clearly intended to be considered part of the very texture of the constitutional project.[11] They are implicit in the very structure and design of the new democratic order. The letter and the spirit of

[11] See the preamble, foundational values in section 1, the Bill of Rights as a whole, and sections 36(1) and 39(1)(a) in particular.

the Constitution cannot be separated; just as the values are not free-floating, ready to alight as mere adornments on this or that provision, so is the text not self-supporting, awaiting occasional evocative enhancement. The role of constitutional values is certainly not simply to provide a patina of virtue to otherwise bald, neutral and discrete legal propositions. Text and values work together in integral fashion to provide the protections promised by the Constitution. And by their nature, values resist compartmentalisation.

[150] The Bill of Rights does specifically identify a number of rights for special constitutional protection. Each is independently delineated, reflecting historical experience pointing to the need to be on guard in areas of special potential vulnerability and abuse. Each has produced an outgrowth of specialist legal learning. Yet enumerating themes for dedicated attention does not presuppose or permit detaching the listed rights from the foundational values that nurture them. Nor does it justify severing the rights from the underlying values that give substance and texture to the Constitution as a whole. On the contrary, in a value-based constitutional democracy with a normative structure that is seamless, organic and ever-evolving, the manner in which claims to constitutional justice are typified and dealt with, should always be integrated within the context of the setting, interests and values involved.

[151] I conclude, therefore, that the Bill of Rights should not always be seen as establishing independent normative regimes operating in isolation from each other, each with exclusive sway over a defined realm of public and private activity. The

disparate textual protections are unified by the values immanent in all of them.[12] The relationship between the separately protected rights should thus be regarded as osmotic rather than hermetic. Seepage should be understood not as a form of analytical blurring to be avoided, but rather as a desirable mechanism for ensuring that constitutional interests in appropriate cases are properly protected, and constitutional justice fully achieved. And hybridity should be recognised for what it is, the co-existence and interpenetration of more than one guaranteed right in a particular factual and legal situation. Instead of seeking to put asunder what human affairs naturally and inevitably join together, we should, in these circumstances, develop an appropriate analytical methodology that eschews formal pigeonholing and relies more on integrated reasoning.

[152] Concepts of hybridity and permeability of rights have not been the subject of direct theorisation in this Court. And the facts of this case do not necessitate the determination of all the possible consequences lying in the wake of their receiving due acknowledgment in appropriate cases. Yet some guidance can be sought from the manner in which this Court has emphasised the intersection and interrelatedness of different protected rights in particular matters, and highlighted the influence of overarching values.

[12] See for instance *Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another Intervening)* 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC); 2001 (2) SACR 66 (CC) where this Court unanimously held at para 54 that extradition to the United States of America for purposes of prosecution which exposed the accused to the risk of execution did not only implicate sections 10 (the right to human dignity) and 11 (the right to life), but also section 12(1)(d) and (e) of the Constitution (the right to freedom and security of the person, which includes the right not to be tortured in any way and not to be treated or punished in a cruel, inhuman or degrading way).

[153] Thus, when dealing with capital punishment in *Makwanyane*, the Court stressed the overlap and interaction between the rights to life and dignity on the one hand, and the right not to be subjected to cruel, inhuman or degrading punishment on the other;[13] far from being mutually exclusive, each of these protected rights was seen as reinforcing and adding substance to the others. Similarly in the *Sodomy* case,[14] emphasis was put on the interconnection between the rights to equality, dignity and privacy respectively.[15] A choice between them was not required. *Grootboom*

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[13] *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC); 1995 (2) SACR 1 (CC) at para 80 where Chaskalson P stated:

> "The unqualified right to life vested in every person by s 9 of our Constitution is another factor crucially relevant to the question whether the death sentence is cruel, inhuman or degrading punishment within the meaning of s 11 of our Constitution."

See also paras 58-67, 84, 86, 90 and 94-5.

[14] *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC); 1998 (2) SACR 556 (CC).

[15] Id at paras 15-32 per Ackermann J. At paras 112-3 I wrote:

> "I will deal first with the question of inappropriate separation of rights and sequential ordering, that is with the assumption that, in a case like the present, rights have to be compartmentalised and then ranked in descending order of value. The fact is that both from the point of view of the persons affected, as well as from that of society as a whole, equality and privacy cannot be separated, because they are both violated simultaneously by anti-sodomy laws. In the present matter, such laws deny equal respect for difference, which lies at the heart of equality, and become the basis for the invasion of privacy. At the same time, the negation by the State of different forms of intimate personal behaviour becomes the foundation for the repudiation of equality. Human rights are better approached and defended in an integrated rather than a disparate fashion. The rights must fit the people, not the people the rights. This requires looking at rights and their violations from a persons-centred rather than a formula-based position, and analysing them contextually rather than abstractly.
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> One consequence of an approach based on context and impact would be the acknowledgment that grounds of unfair discrimination can intersect, so that the evaluation of discriminatory impact is done not according to one ground of discrimination or another, but on a combination of both, that is globally and contextually, not separately and abstractly. The objective is to determine in a qualitative rather than a quantitative way if the group concerned is subjected to scarring of a sufficiently serious nature as to merit constitutional intervention. Thus, black foreigners in South Africa might be subject to discrimination in a way that foreigners generally, and blacks as a rule, are not; it could in certain circumstances be a fatal combination. The same might possibly apply to unmarried mothers, or homosexual parents, where nuanced rather than categorical approaches would be appropriate. Alternatively, a context rather than category-based approach might suggest that overlapping vulnerability is capable of producing overlapping discrimination. A notorious example would be African widows, who historically have suffered discrimination as blacks, as Africans, as women, as African women, as widows and usually, as older people, intensified by the fact that they are frequently amongst the lowest paid workers."

See also paras 111, 114 and 125.

expressly referred to the indivisibility and interrelated character of protected rights, emphasising that the determination of what was reasonable in relation to the right of access to adequate housing had to take account of the right to dignity,[16] and the gender and racial dimensions involved.[17]

[154] In *Khosa* the question was whether withdrawal of certain welfare entitlements for permanent residents who were not South African citizens,[18] raised a question of equality (non-discrimination), or of the right of access to social welfare,[19] and whether the rights of the child also featured.[20] Mokgoro J stated:

> "[i]n this case we are concerned with these intersecting rights [socio-economic rights and the founding values of human dignity, equality and freedom] which reinforce one another at the point of intersection."[21]

Ngcobo J, characterising the question as "interesting and difficult", stated:

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[16] *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) at para 83 where Yacoob J stated:

> "The proposition that rights are interrelated and are all equally important is not merely a theoretical postulate. The concept has immense human and practical significance in a society founded on human dignity, equality and freedom. . . . The Constitution will be worth infinitely less than its paper if the reasonableness of State action concerned with housing is determined without regard to the fundamental constitutional value of human dignity. . . . In short, I emphasise that human beings are required to be treated as human beings."

[17] Id at para 23:

> "All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in chap 2. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential."

[18] *Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others* 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC).

[19] Id at para 102.

[20] Id at para 136.

[21] Id at para 41.

> "The exclusion of non-citizens from the scheme manifestly implicates the right not to be discriminated against. This question was not addressed in argument. It need not be considered on this occasion. The outcome would be the same under either constitutional provision. My Colleague, Mokgoro J, has approached the matter on the footing that the right of access to social security governs the question presented in this case. There is much to be said for this view. . . . The Bill of Rights is the cornerstone of our constitutional democracy and it 'affirms the democratic values of human dignity, equality and freedom'. The founding values will inform most, if not all, of the rights in the Bill of Rights. . . . A denial of access to a social welfare scheme may, as demonstrated by this case, therefore have an impact on more than one constitutional right. We are therefore concerned with a statute implicating multiple constitutional rights that reinforce one another at their point of intersection."[22] (Footnote omitted.)

[155] In *New Clicks* I raised the question of what I called a hybrid regulatory system. In relation to a debate as to whether the adoption of subordinate legislation amounted to an administrative or a legislative act, I said:

> "One may thus envisage a continuum ranging from pure law-making acts at one end, to pure administrative (adjudicative) acts at the other. All will be subject to constitutional control that is of both a procedural and a substantive kind. There will be a difference of emphasis rather than of kind, to take account of the different constitutional and public law values implicated at each end of the spectrum. Hybrid regulatory systems involving both generality (regulatory scheme) and specificity (adjudicative act) could then be comfortably accommodated at appropriate places along the spectrum. The precise form of the hearing required in each case, and the manner in which substantive reasonableness will be determined, will accordingly depend more on the nature of the interests at stake in each particular instance than on the label or labels to be attached. In this way administrative law emerges from its constitutional chrysalis as an integrated body of law. Shed of the remnants of its one-

[22] Id at paras 102-4.

time fragmented and particularistic form, it has been metamorphosed into a comprehensive, principled, operational and elegant new legal figure."[23]

[156] To my mind, far from promoting unprincipled eclecticism, acknowledgment where appropriate of hybridity encourages paying appropriate attention in a focused way to the context and the interests and values involved. The basic analysis remains the same, but more weight is given to context, interests and values, and less to categorical reasoning.

[157] Most constitutional issues will ordinarily fall within the parameters of one or other specifically protected right. The point that I underline, however, is that there are many cases where rights will not just touch at the margins but overlap in substance. I believe that in these matters undue preoccupation with a quest to establish the primacy of one or other right could defeat the constitutional objectives to be realised. The present case, I believe, is one of those. I accordingly emphasise the importance of

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[23] *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as* Amici Curiae*)* 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) at para 640.

See also *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) at para 135 where I observed that the judgments of Mokgoro J, Moseneke J and Ngcobo J eloquently mirrored each other, and that in relation to philosophy, approach and evaluation of relevant material and ultimate outcome, they were virtually identical. Only in relation to starting point and formal road travelled, were they apart. See also the rest of that para and para 140, where I said the following:

> "In my view it is no accident that even though they started at different points and invoked different provisions they arrived at the same result. Though the formal articulation was different the basic constitutional rationale was the same. I agree with this basic rationale. I would go further and say that the core constitutional vision that underlies their separate judgments suggests that the technical frontier that divides them should be removed, allowing their overlap and commonalities to be revealed rather than to be obscured. If this is done, as I believe the Constitution requires us to do, then the apparent paradox of endorsing seemingly contradictory judgments is dissolved. Thus, I endorse the essential rationale of all the judgments, and explain why I believe that the Constitution obliges us to join together what the judgments put asunder.
> . . .
> To my mind, where different constitutionally protected interests are involved, it is prudent to avoid categorical and definitional reasoning and instead opt for context-based proportional interrelationships, balanced and weighed according to the fundamental constitutional values called into play by the situation."

acknowledging hybridity in particular cases such as this one, and accept the significance of constitutional values in all matters. This does not in any way diminish the importance of classification being at the heart of all legal reasoning. As this Court held in *Prinsloo*:

> "It must be accepted that, in order to govern a modern country efficiently and to harmonise the interests of all its people for the common good, it is essential to regulate the affairs of its inhabitants extensively. It is impossible to do so without differentiation and without classifications which treat people differently and which impact on people differently. It is unnecessary to give examples which abound in everyday life in all democracies based on equality and freedom."[24]

The objective I would seek is not therefore to supplant precise text and rigorous classification with amorphous and arbitrarily-chosen values. It is to acknowledge the way values are anchored in text, and text is animated by values.

[158] In my view, then, the key to the present case is to interpret and apply section 145 in a manner that is compatible with the values of reasonableness and fair dealing that an open and democratic society demands. What is largely implicit in the judgments of my colleagues should, I believe, be the centrepiece of the analysis. I agree with what appear to be the underlying premises of the two judgments: in an open and democratic society based on human dignity, equality and freedom, it would be inappropriate to restrict review of the commissioner's decision to the very narrow grounds of procedural misconduct that a first reading of section 145(2) would suggest; at the same time, the labour-law setting, requiring a speedy resolution of the dispute

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[24] *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 24.

with the outcome basically limited to dismissal or re-instatement, makes it inappropriate to apply the full PAJA-type administrative review on substantive as well as procedural grounds; and to the extent that the right to just administrative action is involved, the values of fair dealing that underlie section 33 of the Constitution must be respected.[25] I accept that inasmuch as the right to a fair labour practice is at the centre of the analysis, the outcome of the arbitration process must not fall outside the bounds of reason; to accept it doing so would hardly represent a fair outcome. Finally, acknowledging the adjudicatory element that implicates the right to a fair hearing under section 34, I would hold that a fair hearing demands that at the very least there be some reasonably sustainable fit between the evidence and the outcome.

[159] To my mind, acknowledging hybridity and permeability leads to direct and unstrained engagement with the particular constitutional interests and values at stake. I weigh the facts in the same way according to the same basic criteria, and arrive at the same conclusion as they do. It follows that I concur in the order made by Navsa AJ and supported by Ngcobo J.

NGCOBO J:

[25] As Wade and Forsyth state in the preface to their book on administrative law in England, at the heart of all new developments in administrative law is the need to bring more fairness, along with justice, into the law. All the particular rules must be related to that primary purpose, directly or indirectly, and "amid much discussion of proportionality and legitimate expectation, it is the ordinary person's sense of fairness which is the touchstone." See Wade and Forsyth *Administrative Law* 8 ed (Oxford University Press, Oxford 2000) at viii.

Introduction

[160] This case raises important questions concerning the determination of fair labour practices. These questions arise out of the dismissal from employment of a worker for failure to follow correct procedures in the performance of his duties as a security officer at a platinum mining company. The first question concerns the proper approach that commissioners, who are charged with the duty to arbitrate disputes concerning alleged unfair dismissals under the Labour Relations Act 66 of 1995 (the LRA), should adopt. The second question concerns the ambit of the grounds of review in section 145(2)(a) of the LRA.[1] The final question is whether, on the facts of this case, the decision of the commissioner that the dismissal of the worker was unfair should be interfered with on any of the grounds of review contained in section 145(2)(a) of the LRA.

[161] I have had the benefit of reading the judgment prepared by Navsa AJ on these issues. I agree with the approach he formulates in relation to the first question. However, in view of the importance of the question I consider it desirable to add a few observations on the proper approach that commissioners should adopt in arbitration proceedings concerning unfair dismissal disputes.

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[1] Section 145(2) of the LRA provides:

> "A defect referred to in subsection (1), means—
> (a) that the commissioner—
> (i) committed misconduct in relation to the duties of the commissioner as an arbitrator;
> (ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
> (iii) exceeded the commissioner's powers; or
> (b) that an award has been improperly obtained."

[162] On the ambit of the grounds of review, Navsa AJ holds that the conduct of Commission for Conciliation, Mediation and Arbitration (CCMA) arbitration proceedings constitutes administrative action within the meaning of section 33 of the Constitution. However, he finds that the Promotion of Administrative Justice Act 3 of 2000 (PAJA) does not apply to reviews under section 145(2) of the LRA. He holds therefore that the ambit of the grounds of review under section 145(2) of the LRA must be informed by section 33 of the Constitution. He concludes that section 145(2) is now suffused by the constitutional standard of reasonableness which is implicit in the requirement of reasonable administrative action in section 33. Applying this standard, he concludes that the arbitral award of the commissioner should not be disturbed.

[163] I am unable to agree with the finding that the conduct of CCMA arbitration proceedings constitutes administrative action within the meaning of section 33 of the Constitution. In my view, on a proper understanding of the jurisprudence of this Court in *Fedsure*,[2] *SARFU*[3] and *Pharmaceutical*,[4] the conduct of arbitration proceedings does not constitute administrative action. However, in the performance of their functions, commissioners, who exercise public power, are constrained by other constitutional requirements. These include those found in sections 23 and 34 of

[2] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC).

[3] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC).

[4] *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC).

the Constitution and in the doctrine of legality, an incident of the rule of law which is one of the foundational values of our constitutional democracy. It is these constraints which must inform the interpretation and indeed the ambit of the grounds of review set forth in section 145(2)(a) of the LRA.

[164] The ultimate question in determining whether to interfere with a commissioner's award in an arbitral proceeding is whether the conduct of the commissioner falls into any of the grounds of review set forth in section 145(2) of the LRA, namely, misconduct in relation to his or her duties, gross irregularity in the conduct of the arbitration proceedings, or acting in excess of his or her powers. These grounds of review must be interpreted in the light of the constitutional constraints referred to above and the primary objective of the LRA. This is the interpretive injunction contained both in section 39(2) of the Constitution[5] and in the LRA.[6]

[165] Thus construed, the commissioners are required to act fairly in the determination of unfair dismissal disputes. If a commissioner fails to do so he or she commits a gross irregularity in the conduct of the arbitration proceedings and the ensuing arbitral award falls to be reviewed and set aside. Similarly, if a commissioner makes an award which is inconsistent with his or her obligations under the LRA, he or

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[5] Section 39(2) of the Constitution provides:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[6] Section 3 of the LRA provides:

> "Any person applying this Act must interpret its provisions—
> (a) to give effect to its primary objects;
> (b) in compliance with the Constitution; and
> (c) in compliance with the public international law obligations of the Republic."

she acts in excess of the powers conferred by the LRA and the award falls to be reviewed and set aside. On the facts of this case I am unable to say that the conduct of the commissioner falls into any of the grounds of review contained in section 145(2)(a) of the LRA. I therefore agree with the conclusion reached by Navsa AJ.

[166] The background facts to this case are set out in the judgment of Navsa AJ. I do not propose to repeat them. Only those that matter for the purposes of this judgment will be set out.

[167] But first, I wish to add observations of my own on the proper approach that commissioners are required to adopt when conducting arbitrations under the LRA.

The test to be applied by the commissioner

[168] There can be no question that the ultimate test that a commissioner must apply is one of fairness. This test is foreshadowed both in section 23 of the Constitution[7] and section 188 of the LRA.[8] All the parties accepted this. And this is the effect of the judgment of the Supreme Court of Appeal and the decisions of the Labour Appeal Court which have had the occasion to consider the test to be applied by commissioners.

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[7] Section 23(1) of the Constitution provides:

> "Everyone has the right to fair labour practices."

[8] Section 188 of the LRA provides:

> "(1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove—
> (a) that the reason for dismissal is a fair reason—
> (i) related to the employee's conduct or capacity; or
> (ii) based on the employer's operational requirements; and
> (b) that the dismissal was effected in accordance with a fair procedure.
> (2) Any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant code of good practice issued in terms of this Act."

[169] However both the Congress of South African Trade Unions (COSATU) and the CCMA criticised the use of phrases or words such as “deference”, “discretion” or “caution” or the reference to “reasonable employer” in attempting to describe the test for fairness. They submitted that the use of these words or phrases in the context of determining fairness has a potential to obscure the real test. These words and phrases tend to elevate the sanction imposed by the employer to the ultimate test of fairness and introduce the so-called reasonable employer test. Yet the applicable test, and indeed the ultimate test is one of fairness.

[170] These criticisms are not without merit. Words such as “discretion” or “deference” or “caution” and “reasonable employer” are likely to obscure the real test and sow seeds of confusion. Indeed, a review of the vast amount of case law and the somewhat conflicting decisions of the Labour Appeal Court on this issue indicate that the use of these phrases and words have obscured the real test. However, these expressions must be understood in the context of the test which commissioners must adopt; the test of fairness.

[171] The starting point in formulating the appropriate test is *NEHAWU*[9] where this Court said:

> “[T]he focus of s 23(1) is, broadly speaking, the relationship between the worker and employer and the continuation of that relationship on terms that are fair to both. In

[9] *National Education Health and Allied Workers Union v University of Cape Town and Others* 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC).

> giving content to that right, it is important to bear in mind the tension between the interests of the workers and the interests of the employers which is inherent in labour relations. Care must therefore be taken to accommodate, where possible, these interests so as to arrive at the balance required by the concept of fair labour practices. It is in this context that the LRA must be construed."[10]

[172] It is manifest from the very conception of fairness that the commissioner must hold the balance evenly between the worker and the employer. And fairness to both workers and their employers means the absence of bias in favour of either. The LRA makes it quite clear that the ultimate test that the commissioner must apply is one of fairness. This is apparent from section 188 of the LRA. The question however is whether there are any constraints on the exercise of the power to determine fairness.

[10] Id at para 40.

[173] The LRA distinguishes between dismissals that are automatically unfair[11] and those that are unfair.[12] In this case we are concerned with the latter. For this class of dismissals to be fair, the employer must establish that the dismissal was for a "fair reason" and "that the dismissal was effected in accordance with a fair procedure."[13] The LRA requires commissioners, when considering whether or not the reason for dismissal is a fair reason to take into account the Code of Good Practice issued under the LRA.[14] The Code of Good Practice: Dismissal (the Code) is contained in Schedule 8 to the LRA. It is framed in general terms and its "key principle" is that:

> ". . . employers and employees should treat one another with mutual respect. A premium is placed on both employment justice and the efficient operation of

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[11] Section 187(1) of the LRA provides:

> "A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is—
> (a) that the employee participated in or supported, or indicated an intention to participate in or support, a strike or protest action that complies with the provisions of Chapter IV;
> (b) that the employee refused, or indicated an intention to refuse, to do any work normally done by an employee who at the time was taking part in a strike that complies with the provisions of Chapter IV or was locked out, unless that work is necessary to prevent an actual danger to life, personal safety or health;
> (c) to compel the employee to accept a demand in respect of any matter of mutual interest between the employer and employee;
> (d) that the employee took action, or indicated an intention to take action, against the employer by—
> (i) exercising any right conferred by this Act; or
> (ii) participating in any proceedings in terms of this Act;
> (e) the employee's pregnancy, intended pregnancy, or any reason related to her pregnancy;
> (f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility;
> (g) a transfer, or a reason related to a transfer, contemplated in section 197 or 197A; or
> (h) a contravention of the Protected Disclosures Act, 2000, by the employer, on account of an employee having made a protected disclosure defined in that Act."

[12] Section 188 of the LRA.

[13] Section 188(1) of the LRA.

[14] Section 188(2) of the LRA.

> business. While employees should be protected from arbitrary action, employers are entitled to satisfactory conduct and work performance from their employees."[15]

[174] Item 2(1) of the Code provides that the question whether or not a dismissal is for a fair reason must be determined by the facts of the case and the appropriateness of dismissal as a penalty. Item 7 sets out guidelines in cases of dismissal for misconduct and provides:

> "Any person who is determining whether a dismissal for misconduct is unfair should consider—
>
> (a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and
>
> (b) if a rule or standard was contravened, whether or not—
>
> (i) the rule was a valid or reasonable rule or standard;
>
> (ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
>
> (iii) the rule or standard has been consistently applied by the employer; and
>
> (iv) dismissal was an appropriate sanction for the contravention of the rule or standard."

[175] It is clear therefore that the LRA and the Code impose certain constraints on the powers of commissioners in determining disputes concerning unfair dismissals.

[176] COSATU submitted that the constraints upon commissioners' functions arise from the employer's entitlement to set the rules. It is no doubt the prerogative of the employer to determine in the first instance that it will dismiss employees who are guilty of particular infractions of its disciplinary code and then in a particular case

[15] Item 1(3) of the Code.

decide whether to impose that sanction. Both the rule and the sanction must be reasonable, otherwise dismissal cannot be fair. All this is implicit, if not explicit from item 7 of the Code which requires a commissioner, in considering whether a dismissal is fair, to consider the reasonableness of the employer's rule or standard and the appropriateness of dismissal as a sanction for the contravention of the rule or standard.[16]

[177] Equally true is that when an employer determines what is an appropriate sanction in a particular case, the employer may have to choose among possible sanctions ranging from a warning to dismissal. It does not follow that all transgressions of a particular rule must attract the same sanction. The employer must apply his or her mind to the facts and determine the appropriate response. It is in this sense that the employer may be said to have discretion.

[178] But recognising that the employer has such discretion does not mean that in determining whether the sanction imposed by the employer is fair, the commissioner must defer to the employer. Nor does it mean that the commissioner must start with bias in favour of the employer. What this means is that the commissioner, as the CCMA submitted, does not start with a blank page and determine afresh what the appropriate sanction is. The commissioner's starting point is the employer's decision to dismiss. The commissioner's task is not to ask what the appropriate sanction is but whether the employer's decision to dismiss is fair.

[16] Item 7(b)(i) and 7(b)(iv) of the Code.

[179] In answering this question, which will not always be easy, the commissioner must pass a value judgment. However objective the determination of the fairness of a dismissal might be, it is a determination based upon a value judgment. Indeed the exercise of a value judgment is something about which reasonable people may readily differ.

[180] But it could not have been the intention of the law-maker to leave the determination of fairness to the unconstrained value judgment of the commissioner. Were that to have been the case the outcome of a dispute could be determined by the background and perspective of the commissioner. The result may well be that a commissioner with an employer background could give a decision that is biased in favour of the employer, while a commissioner with a worker background would give a decision that is biased in favour of a worker. Yet fairness requires that regard must be had to the interests both of the workers and those of the employer. And this is crucial in achieving a balanced and equitable assessment of the fairness of the sanction.

[181] These considerations imply certain constraints on commissioners. However, what must be stressed is that having regard to these considerations does not amount to deference to the employer's decision in imposing a particular sanction. As COSATU put it, what is required of a commissioner is to take seriously the reasons for the employer establishing the rule and prescribing the penalty of dismissal for breach of it. Where an employer has developed and implemented a disciplinary system, it is not for

the commissioner to set aside the system merely because the commissioner prefers different standards. The commissioner should respect the fact that the employer is likely to have greater knowledge of the demands of the business than the commissioner.

[182] However, such respect for the employer's knowledge is not a reason for the commissioner to defer to the employer. The commissioner must seek to understand the reasons for a particular rule being adopted and its importance in the running of the employer's business and then weigh these factors in the overall determination of fairness.

[183] There are other factors which are relevant to the determination of fairness such as the generally applicable industrial norms of which the commissioner will have knowledge through the institutional knowledge of the CCMA. This may involve a consideration of how other employers would respond to the misconduct in question. But these are subsidiary questions, as the CCMA pointed out in oral argument, which are only intended to assist the commissioner in determining the ultimate fairness of a sanction imposed by the employer. They go to the question whether dismissal was an appropriate sanction for the contravention of the rule or standard, a factor which a commissioner is obliged to consider under item 7(b)(iv) of the Code. And in addition, commissioners when considering the fairness of a dismissal are obliged to consider whether or not the employer's rule was a valid or reasonable rule or standard.[17] To

[17] Item 7(b)(i).

consider these matters is not to import the so-called reasonable employer test. It is to give effect to the LRA and the Code.

[184] These then are my observations on the proper approach that commissioners should adopt when performing their function to determine whether the sanction imposed by the employer is fair. I now turn to the proper approach that the Labour Court should adopt when reviewing a decision of a commissioner under the provisions of section 145(2)(a) of the LRA.

The challenge to the decision of the commissioner

[185] In its review application, the employer challenged certain findings by the commissioner. These include the findings that: there were no losses suffered by the employer; the violation of the rule by Mr Sidumo was unintentional or a mistake and that the type of misconduct of which Mr Sidumo was found guilty did not go to the heart of the trust relationship. The employer submitted that these findings had no basis on the evidence presented to the commissioner and they flew in the face of direct and to a large extent unchallenged evidence to the contrary. The employer submitted that these findings, which were fundamental to the commissioner's award, demonstrate that the commissioner failed to apply his mind to the matter to such an extent that it cannot be said that the employer was afforded a fair hearing. It was submitted that in these circumstances the commissioner committed a gross irregularity or committed a misconduct or acted in excess of his or her powers.

Authority of a Labour Court to review arbitral awards

[186] There is no appeal against a decision of a commissioner. The only remedy available to a person aggrieved by the decision of a commissioner is to institute review proceedings in the Labour Court. Section 158(1)(g) confers on the Labour Court the power to "review the performance or purported performance of any function provided for [in the LRA] on any grounds that are permissible in law".[18] While these powers are wide enough to include the power to review arbitral awards made by commissioners, they are subject to section 145 which makes provision for the review of arbitration awards. Reviews under this section 145 are confined to those instances where "[a]ny party to a dispute . . . alleges a defect in any arbitration proceedings under the auspices of the [CCMA]".

[187] I pause here to refer to the history of section 158(1)(g). This provision originally used the words "despite s 145" instead of "subject to section 145". Prior to the decision of the Labour Appeal Court in *Carephone*,[19] there were conflicting decisions of the Labour Court on the question whether the Labour Court has the power to review arbitral awards under section 158(1)(g). The one line of decisions held that there was no such power.[20] However a majority of the decisions of the Labour Court

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[18] Section 158(1)(g) provides:

> "The Labour Court may . . . subject to section 145, review the performance or purported performance of any function provided for in [the LRA] on any grounds that are permissible in law."

[19] *Carephone (Pty) Ltd v Marcus NO and Others* 1999 (3) SA 304 (LAC).

[20] *Ntshangane v Speciality Metals CC* (1998) 19 ILJ 584 (LC); [1998] 3 BLLR 305 (LC); *Pep Stores (Pty) Ltd v Laka NO and Others* (1998) 19 ILJ 1534 (LC); [1998] 9 BLLR 952 (LC); and *Edgars Stores (Pty) Ltd v Director, Commission for Conciliation, Mediation and Arbitration and Others* (1998) 19 ILJ 350 (LC); [1998] 1 BLLR 34 (LC) at paras 42C-42I.

held that there was such power.[21] As the Labour Appeal Court pointed out in *Carephone*, apart from the language of the provision, the reasoning in favour of the application of section 158(1)(g) found justification in the view that the grounds of review under section 145 were limited in scope and did not give expression to the right to just administrative action in section 33 of the Constitution.[22] In *Carephone* the Labour Appeal Court construed the word "despite" in section 158(1)(g) to mean "subject to", this being "a lesser evil than ignoring the whole of s 145" and held that the review of CCMA arbitration awards must proceed under section 145 of the LRA.[23] The Legislature subsequently intervened and introduced an amendment in line with the decision in *Carephone*.

[188] Section 145 of the LRA, in the relevant part provides:

> "(1) Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award—
>
> (a) within six weeks of the date that the award was served on the applicant . . .
>
> (2) A defect referred to in subsection (1), means—
>
> (a) that the commissioner—

[21] See *Deutsch v Pinto and Another* (1997) 18 ILJ 1008 (LC) at 1013C-1014H; *Kynoch Feeds (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (1998) 19 ILJ 836 (LC); [1998] 4 BLLR 384 (LC) at paras 32-48; *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration and Others* (1998) 19 ILJ 327 (LC); [1997] 11 BLLR 1475 (LC); *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (1998) 19 ILJ 892 (LC); [1998] 5 BLLR 510 (LC) at paras 25-28; and *Standard Bank of South Africa Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (1998) 19 ILJ 903 (LC); [1998] 6 BLLR 622 (LC) at paras 25-28.

[22] Above n 19 at para 27. See also *Shoprite Checkers (Pty) Ltd* above n 21 at paras 27-28; *Kynoch Feeds (Pty) Ltd* above n 21 at paras 30, 31 and 46; *Deutsch* above n 21 at 1013C-E.

[23] Above n 19 at paras 28-29.

> (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."

[189] The general powers of review of the Labour Court under section 158(1)(g) are therefore subject to the provisions of section 145(2) which prescribe grounds upon which arbitral awards of CCMA commissioners may be reviewed. These grounds are misconduct by the commissioner in relation to his or her duties; gross irregularity in the conduct of the proceedings; where the commissioner exceeds his or her powers; or where the award was improperly obtained. These are the only grounds upon which arbitral awards of CCMA commissioners may be reviewed by the Labour Court under section 145(2) of the LRA. It follows therefore that a litigant who wishes to challenge an arbitral award under section 145(2) must found his or her cause of action on one or more of these grounds of review.

[190] The central question to be answered in this aspect of the appeal is the proper approach to reviews under section 145(2)(a).

The approach of the Supreme Court of Appeal

[191] In determining the ambit of the grounds of review in section 145(2)(a), the Supreme Court of Appeal focused the enquiry on whether arbitral awards are products

of administrative action.[24] Having found that they are, it held that the provisions of PAJA apply to their review. It reasoned that the grounds of review in section 145(2)(a) have been subsumed under the grounds of review contained in PAJA.[25] It held that, by necessary implication, PAJA extended the grounds of review available to parties to CCMA arbitration.[26] It then proceeded to consider the standard of review applicable to the review of arbitral awards and concluded that the test for review is whether the commissioner's decision is rationally connected to the information before the commissioner and to the reasons given for it.[27] As I understand the reasoning of the Supreme Court of Appeal, this standard of review is applicable to all reviews under section 145(2)(a).

The contentions of the parties on appeal

[192] In this Court, both COSATU and the CCMA contended that the Supreme Court of Appeal erred in holding that (a) the conduct of arbitration proceedings constitutes administrative action within the meaning of section 33 of the Constitution; and (b) therefore PAJA applies to the review of arbitral awards. As a consequence, the test for the review of arbitral decisions formulated by the Supreme Court of Appeal was wrong in law, they contended.

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[24] *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration* 2007 (1) SA 576 (SCA).

[25] Id at para 25.

[26] Id at para 23.

[27] Id at para 29.

[193] They submitted that the conduct of arbitration proceedings under the auspices of the CCMA does not constitute administrative action under section 33 of the Constitution and therefore PAJA does not apply to their review. They submitted that commissioners perform adjudicative functions of the nature contemplated in section 34 of the Constitution. In the performance of their functions, commissioners, who exercise public power, are therefore subject to the same constitutional constraints that apply to the exercise of public power, so it was argued. Commissioners are obliged to act in a manner that is consistent with the constitutional requirement for the lawful exercise of public power. If they do not do so, COSATU submitted, then they either commit a gross irregularity or otherwise exceed their powers.

[194] COSATU amplified its argument and submitted that the exercise of public power imposed an obligation on commissioners to act rationally. The standard of rationality is satisfied if the result reached by the commissioner is open to the arbitrator acting rationally on the material before him or her, COSATU argued. Simply put, the evidence must provide rational support for the conclusion reached by the arbitrator. COSATU further submitted that to act rationally, the commissioner must apply his or her mind to the facts. A failure to apply his or her mind to the facts or substantial failure to have regard to relevant facts or paying attention to irrelevant facts may show irrationality, argued COSATU.

[195] For its part, the employer supported both the reasoning and the conclusion of the Supreme Court of Appeal.

[196] The central issue in this case is the proper interpretation of section 145(2) of the LRA, in particular, the ambit of the grounds of review specified in the provision. These grounds of review must, as the LRA requires, be construed and understood in the light of the right to fair labour practices in section 23 of the Constitution and the primary objectives of the LRA in creating the CCMA and giving it power to decide disputes concerning unfair dismissals.[28] This, in my judgement, is the proper approach to the construction of the provisions of section 145(2) of the LRA. Strictly speaking, this case does not require us to decide whether or not the function of the CCMA commissioners in adjudicating on disputes concerning unfair dismissals falls under section 33 or section 34 of the Constitution.

[197] However, in light of the finding of the Supreme Court of Appeal and the contentions of the parties, it is necessary to consider first the question whether the decisions of the CCMA commissioners constitute administrative action under section 33 of the Constitution and the validity of the proposition that their decisions are governed by section 34 of the Constitution.

[198] Accordingly, in this judgment I will consider the following issues: first, the finding of the Supreme Court of Appeal that CCMA arbitration proceedings constitute administrative action and that therefore PAJA applies to their review; second, the contention by COSATU that arbitral awards must be reviewed under the constitutional

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[28] Above n 6.

standard of rationality announced in *Pharmaceutical*;[29] third, the proper approach to reviews under section 145(2); fourth, the ambit of the grounds of review in section 145(2)(a) of the LRA; and, finally, whether on the facts of this case the employer has demonstrated that the conduct of the commissioner falls into one or more of the grounds of review in section 145(2)(a).

[199] With that prelude, I now turn to consider the question whether the decisions of the CCMA constitute administrative action.

CCMA commissioners exercise public power

[200] CCMA commissioners arbitrate over those disputes which, under the LRA, require arbitration. The CCMA is an entity created by the LRA and designed to fulfil the objectives of the LRA. It performs a public function by, among other things, providing an infrastructure for resolving labour disputes. It is therefore an organ of state within the meaning of section 239(b)(ii) of the Constitution which exercises public power in terms of the LRA.[30]

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[29] Above n 4.

[30] Section 239 of the Constitution provides:

> "In the Constitution, unless the context indicates otherwise—
> 'organ of state' means—
> . . .
> (b) any other functionary or institution—
> . . .
> (ii) exercising a public power or performing a public function in terms of any legislation,
> but does not include a court or a judicial officer".

[201] There can be no question therefore that when CCMA commissioners conduct arbitration proceedings, they perform a public function which is to resolve labour disputes. They therefore exercise public power under the auspices of the CCMA.[31] COSATU and the employer therefore correctly accepted that the conduct of an arbitration by a CCMA commissioner is an exercise of public power. But does the conduct of an arbitration constitute administrative action? This question must be answered in the light of the test for administrative action.

The test for administrative action

[202] Section 33 of the Constitution confines its operation to "administrative action". PAJA does so too. It follows therefore that to determine whether conduct is subject to review under section 33 and thus under PAJA, the threshold question is whether the conduct under consideration constitutes administrative action. The appropriate starting point is to determine whether the conduct in question constitutes administrative action within the meaning of section 33 of the Constitution.[32] If it does, it must then be determined whether PAJA nevertheless excludes it from its operation.[33]

[203] The test for determining whether conduct constitutes "administrative action" under section 33 is whether the *function* performed by the public official constitutes administrative action. The enquiry thus focuses on the nature of the function that the

[31] *Carephone* above n 19 at para 11.

[32] *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as* Amici Curiae*)* 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) at para 100.

[33] Id at paras 446 and 451.

public official performs. The identity of the functionary performing the function is not relevant for the purposes of determining whether a particular conduct constitutes administrative action. In *SARFU* this Court formulated the test as follows:

> "In s 33 the adjective 'administrative' not 'executive' is used to qualify 'action'. This suggests that the test for determining whether conduct constitutes 'administrative action' is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not. It may well be, as contemplated in *Fedsure*, that some acts of a legislature may constitute 'administrative action'. Similarly, judicial officers may, from time to time, carry out administrative tasks. The focus of the enquiry as to whether conduct is 'administrative action' is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising."[34] (Footnotes omitted.)

[204] It is apparent from this formulation that some acts of a public official will constitute administrative action as contemplated in section 33 while others will not.[35] This must be so because public officials and public bodies may be entrusted with a number of responsibilities. Cabinet ministers are a good example of such public officials. One of their responsibilities is the implementation of legislation, a task which is plainly administrative. Cabinet ministers also have the constitutional responsibility to develop policy and to initiate legislation. The carrying out of these tasks does not amount to administrative action.[36] Indeed if one has regard to the functions that are entrusted to the CCMA, they include administrative functions, when

[34] Above n 3 at para 141.

[35] Id at para 142.

[36] Id.

the CCMA conducts and supervises elections under the LRA and when the CCMA makes rules regulating the practice and procedure that is to be followed during conciliation and arbitration proceedings;[37] and, as I will show, adjudicative when CCMA commissioners resolve labour disputes through arbitration.

[205] However it will not always be easy to say whether particular conduct constitutes administrative action. This is so, as the Supreme Court of Appeal has observed, because "the exercise of public power generally occurs as a continuum with no bright line marking the transition from one form to another".[38] As this Court observed in *SARFU*, difficult boundaries may well have to be drawn in deciding what should or should not be characterised as administrative action.[39] These boundaries must of course be drawn carefully in the light of the Constitution. And naturally this can only be done on a case by case basis.[40] Determining whether action should be characterised as administrative or not will "depend primarily upon the nature of the power."[41] A number of considerations may be relevant to this enquiry, including the source of power and its subject matter.[42]

[206] With these principles in mind, I now turn to consider the question whether the conduct of an arbitration concerning an alleged unfair dismissal by an arbitrator

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[37] See *Fedsure* above n 2 at para 27. See also below n 92.

[38] *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA) at para 25.

[39] Above n 3 at para 143.

[40] Id.

[41] Id.

[42] Id.

appointed in terms of the LRA by the CCMA constitutes administrative action within the meaning of section 33 of the Constitution.

Do CCMA arbitration proceedings constitute administrative action?

[207] The function performed by a CCMA commissioner involves a determination of facts and the application of legal principles in order to decide whether or not a dismissal was fair. CCMA arbitrations are therefore in the nature of litigation, involving as they do disputes between employers and workers. These are disputes which may be adjudicated upon by the Labour Court but which, in a quest for a speedy and less costly dispute resolution mechanism, the LRA requires that they should be submitted to arbitration under the auspices of the CCMA. Indeed arbitration has been described as follows:

> "Arbitration is the process by which a dispute or difference between two or more parties as to their mutual legal rights and liabilities is referred to and determined judicially and with binding effect by the application of law by one or more persons (the arbitral tribunal) instead of by a court of law. The decision of the arbitral tribunal is usually called an award. The reference to arbitration may arise from the agreement of the parties (private arbitration) or from statute."[43]

[208] CCMA arbitrations bear all the hallmarks of a judicial function in that there is a *lis* between the employer and a worker in which a tribunal is called upon to apply a recognised body of rules in a manner consistent with fairness and impartiality. The adjudication deals primarily with rights of workers and employers.[44] CCMA

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[43] *Halsbury* 4th ed re-issue vol 2 at para 601 as cited in *Shoprite Checkers (Pty) Ltd* above n 21 at para 89.

[44] In *Re: Residential Tenancies Act, 1979* [1981] 1 SCR 714 at 743, Dickson J in different context, described judicial power in the following terms: ". . . the hallmark of a judicial power is a *lis* between parties in which a

commissioners are clothed with virtually all the powers that presiding officers in a court of law have, including the power to make findings of contempt of the commission.[45] The sole task of a commissioner in an arbitration hearing is to find facts and then apply the provisions of the LRA. In my view the process of factual and legal evaluation involved in deciding whether the dismissal was for a fair reason and to issue an award is clearly judicial in nature.[46]

[209] CCMA commissioners resolve disputes between employers and workers by applying the provisions of the LRA. They must determine disputes fairly.[47] It is apparent from the provisions of the LRA that arbitration hearings must be conducted

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tribunal is called upon to apply a recognized body of rules in a manner consistent with fairness and impartiality. The adjudication deals primarily with the rights of the parties to the dispute, rather than considerations of the collective good of the community as a whole." This decision was approved and applied in *Attorney-General of Quebec v Udeco Inc. et al.* (1985) 13 DLR (4th) 641 (SCC) at 648; *Chrysler Canada Ltd v Canada (Competition Tribunal)* (1992) 92 DLR (4th) 609 (SCC) at 624D; and *MacMillan Bloedel Ltd v Simpson* [1995] 4 SCR 725 (SCC).

[45] Section 142(8) of the LRA provides:

> "A person commits contempt of the Commission—
> (a) if, after having been subpoenaed to appear before the commissioner, the person without good cause does not attend at the time and place stated in the subpoena;
> (b) if, after having appeared in response to a subpoena, that person fails to remain in attendance until excused by the commissioner;
> (c) by refusing to take the oath or to make an affirmation as a witness when a commissioner so requires;
> (d) by refusing to answer any question fully and to the best of that person's knowledge and belief subject to subsection (6);
> (e) if the person, without good cause, fails to produce any book, document or object specified in a subpoena to a commissioner;
> (f) if the person willfully hinders a commissioner in performing any function conferred by or in terms of this Act;
> (g) if the person insults, disparages or belittles a commissioner, or prejudices or improperly influences the proceedings or improperly anticipates the commissioner's award;
> (h) by willfully interrupting the conciliation or arbitration proceedings or misbehaving in any other manner during those proceedings;
> (i) by doing anything else in relation to the Commission which, if done in relation to a court of law, would have been contempt of court."

[46] Compare *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at para 80 and *Carephone* above n 19 at para 18.

[47] Section 138 of the LRA.

in public and that CCMA commissioners must be independent and impartial.[48] CCMA arbitration proceedings are therefore the kind of proceedings contemplated in section 34 of the Constitution.[49] In terms of section 34 of the Constitution, everyone who has a dispute that can be resolved by the application of the law has a right to have the dispute decided in a fair public hearing before a court of law or an independent and impartial tribunal. The LRA has created the CCMA and Labour Courts to resolve labour disputes. CCMA arbitrations provide independent and impartial tribunals contemplated in section 34 of the Constitution.[50]

[210] In *Patcor Quarries CC v Issroff and Others*,[51] the High Court had to consider whether a private arbitration constitutes administrative action. It held:

> "The question is whether an arbitrator, in the performance of his duties as such, performs an administrative act when he adjudicates in arbitration proceedings and whether his decision (award) can be said to be an administrative decision. I think not. An arbitration is in the nature of litigation. There is a dispute between two or more parties, which, more often than not, may be adjudicated upon by the Courts, but in a quest for speedy and less costly resolution, the parties agree to submit such dispute to arbitration. One of the characteristics thereof 'is the finality of the arbitrator's award' (*Kollberg v Cape Town Municipality* 1967 (3) SA 472 (A) at 481F), hence the provisions of s 28 of the Arbitration Act. (See also the definition of the word 'arbitration' in Butler and Finsen *Arbitration in South Africa, Law and Practice* and

[48] Section 113 of the LRA provides:

> "The Commission is independent of the State, any political party, trade union, employer, employers' organisation, federation of trade unions or federation of employers' organisations."

[49] Section 34 of the Constitution provides:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[50] *Carephone* above n 19 at paras 10, 21 and 33.

[51] 1998 (4) SA 1069 (SE).

> in Jacobs *The Law of Arbitration in South Africa*.) I am accordingly of the view that an arbitrator does not perform an administrative function when adjudicating over a dispute in arbitration proceedings but rather a judicial function. It follows that s 24 of the interim Constitution cannot be invoked to challenge his award."[52]

[211] This decision was upheld by the Supreme Court of Appeal in *Total Support Management (Pty) Ltd and Another v Diversified Health Systems (SA) (Pty) Ltd and Another*,[53] where the court held:

> "The hallmark of arbitration is that it is an adjudication, flowing from the consent of the parties to the arbitration agreement, who define the powers of adjudication, and are equally free to modify or withdraw that power at any time by way of further agreement. This is reflected in s 3(1) of the Act. As arbitration is a form of private adjudication the function of an arbitrator is not administrative but judicial in nature. This accords with the conclusion reached by Mpati J in *Patcor Quarries CC v Issroff and Others* 1998 (4) SA 1069 (SE) at 1082G. Decisions made in the exercise of judicial functions do not amount to administrative action (cf *Nel v Le Roux NO and Others* 1996 (3) SA 562 (CC) at 576C (para [24]), and compare also the exclusionary provision to be found in (b)(ee) of the definition of 'administrative action' in s 1 of the Promotion of Administrative Justice Act). It follows, in my view, that a consensual arbitration is not a species of administrative action and s 33(1) of the Constitution has no application to a matter such as the present."[54]

[212] While these decisions were concerned with private arbitration, their core findings on the nature of the functions of an arbitrator are apposite here. They held that arbitration is a form of adjudication and that the function of an arbitrator is not administrative but judicial in nature. I agree with these findings. The fact that arbitration is conducted in terms of a statute as opposed to under a private agreement

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[52] Id at 1082D-G.

[53] 2002 (4) SA 661 (SCA).

[54] Id at para 25.

does not change its essential character although, as I will demonstrate later in this judgment, it has some implications for the powers of the arbitrator. The functions of the arbitrator are the same. Indeed, the provisions of the Arbitration Act 42 of 1965 (the Arbitration Act) apply to arbitrations which are "conducted under that Act in respect of any dispute that may be referred to arbitration in terms of [the LRA]".[55] Thus where the parties agree to refer a dispute to private arbitration, awards in such cases are reviewed by the Labour Court under section 33(1) of the Arbitration Act in terms of section 157(3) of the LRA.

[213] It is true section 146 of the LRA specifically excludes the operation of the Arbitration Act in respect of arbitration under the CCMA. The purpose of this exclusion however is to ensure that the review of CCMA arbitrations would be undertaken by the specialist Labour Court and not by the ordinary courts. And this is consistent with the scheme of the LRA to establish a system of specialist courts outside of the ambit of ordinary courts. This exclusion however did not alter the fundamental nature of arbitration proceedings and render them administrative action.

[214] COSATU drew attention to the fact that under the LRA it is open to parties to agree to refer a dispute to private arbitration whether for reasons of convenience or to circumvent the CCMA. Awards in such cases are reviewed before the Labour Court under section 33(1) of the Arbitration Act in terms of section 157(3) of the LRA. It

[55] Section 157(3) provides:

> "Any reference to the court in the Arbitration Act, 1965 (Act No. 42 of 1965), must be interpreted as referring to the Labour Court when an arbitration is conducted under that Act in respect of any dispute that may be referred to arbitration in terms of this Act."

would indeed be anomalous, as COSATU submitted, if the powers of the Labour Court on review were to differ depending on whether the arbitration was private or before the CCMA when the nature of the proceedings is the same; the issue in dispute is the same; the arbitrator may well be a CCMA arbitrator and the language of the statutory provisions describing the powers of the Labour Court on review are the same.[56] There is force in this submission.

[215] There are further considerations which militate against the finding that the CCMA commissioner performs administrative action. First, as I have pointed out above, the CCMA is an independent and impartial tribunal contemplated in section 34 of the Constitution.[57] It resolves disputes concerning unfair dismissal which are disputes capable of being decided by the application of the LRA. Although the CCMA, like the Labour Courts, is created by statute which also determines the nature and extent of its powers, its power to decide disputes concerning unfair dismissals derives from section 34 of the Constitution. The determination of disputes capable of being decided by the application of law is not confined to courts of law, it may be done by another independent and impartial tribunal. As the Labour Appeal Court pointed out in *Carephone*, the arbitration of labour disputes by an independent body, the CCMA, is permissible in terms of section 34 of the Constitution.[58] The action of CCMA commissioners in deciding unfair dismissal disputes cannot, in my view, be characterised as the implementation of legislation. Nor does this action amount to

[56] See *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* 2001 (3) SA 68 (LC) at para 74.

[57] *Carephone* above n 19 at para 33.

[58] Id.

administration. The action performed by commissioners in resolving unfair dismissal disputes is clearly a judicial function. This function cannot therefore be said to constitute administrative action within the meaning of section 33.

[216] Second, the functions performed by CCMA commissioners in an unfair dismissal arbitration are indeed no different from those performed by the Labour Court when it is seized with the same kind of dispute in terms of section 158(2)(b)[59] or 191(6)[60] of the LRA. Section 158(2)(b) contemplates that the Labour Court will sit as an arbitration tribunal where, in the course of its proceedings, it becomes apparent that the dispute ought to have been referred to arbitration. Similarly, section 191(6) contemplates that the director of the CCMA may refer to the Labour Court a dispute that under the provisions of the LRA should be referred to arbitration.

[217] It is apparent from the provisions of sections 158(2)(b) and 191(6) that the same functions that are performed by CCMA commissioners may be performed by the Labour Court. They adjudicate on the same kind of labour disputes. The proceedings

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[59] Section 158(2)(b) of the LRA provides:

> "If at any stage after a dispute has been referred to the Labour Court, it becomes apparent that the dispute ought to have been referred to arbitration, the Court may with the consent of the parties and if it is expedient to do so, continue with the proceedings with the Court sitting as an arbitrator, in which case the Court may only make any order that a commissioner or arbitrator would have been entitled to make."

[60] Section 191(6) of the LRA provides:

> "Despite subsection (5)(a) or (5A), the director must refer the dispute to the Labour Court, if the director decides, on application by any party to the dispute, that to be appropriate after considering—
> (a) the reason for dismissal;
> (b) whether there are questions of law raised by the dispute;
> (c) the complexity of the dispute;
> (d) whether there are conflicting arbitration awards that need to be resolved;
> (e) the public interest."

are substantially identical. It is only the nature of the tribunal that differs. To characterise the proceedings before the Labour Court as judicial but those of the CCMA commissioners as administrative in these circumstances is to make a distinction based on the functionary performing the function. Yet this Court has said that what matters is not so much the functionary but the function.[61] The focus of the enquiry is not on the identity of the tribunal that performs the function but on the nature of the power that is being exercised.[62]

[218] The performance of judicial functions is not confined to courts of law. Administrative tribunals are increasingly performing the same functions as courts of law do and they do so by similar process. Thus an administrative body may in the discharge of its duties under a statute function as if it were a court of law and perform judicial functions.[63] And at times it is "not easy to draw a clear line of demarcation between tribunals which are and those which are not Courts of Law."[64] What characterises a judicial function are proceedings in which rights are legally determined and liability imposed by a competent authority upon a consideration of the facts and the circumstances placed before it.[65]

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[61] *SARFU* above n 3 at para 141.

[62] Id.

[63] *South African Technical Officials' Association v President of the Industrial Court and Others* 1985 (1) SA 597 (A) at 610G-I.

[64] *Minister of Interior and Another v Harris and Others* 1952 (4) SA 769 (A) at 787G.

[65] *R v Beukman* 1950 (4) SA 261 (O) at 263H; *Cassem en 'n Ander v Oos-Kaapse Komitee van die Groepsgebiederaad en Andere* 1959 (3) SA 651 (A) at 660C.

[219] Professor Wade considers the distinction between judicial and administrative functions and concludes that many administrative tribunals perform judicial rather than administrative functions. In this regard he says:

> "The one distinction which would seem to be workable is that between judicial and administrative functions. A judicial decision is made according to rules. An administrative decision is made according to administrative policy. A judge attempts to find what is the correct solution according to legal rules and principles. An administrator attempts to find what is the most expedient and desirable solution in the public interest. It is true, of course, that many decisions of the courts can be said to be made on grounds of legal policy and that the courts sometimes have to choose between alternative solutions with little else than the public interest to guide them. There will always be grey areas. Nevertheless the mental exercises of judge and administrator are fundamentally different. The judge's approach is objective, guided by his idea of the law. The administrator's approach is empirical, guided by expediency. Under this analysis, based on the nature of the functions, many so-called administrative tribunals, such as social security and employment tribunals, have judicial rather than administrative functions, since their sole task is to find facts and apply law objectively."[66]

[220] But the performance of judicial functions does not transform an administrative tribunal into a court of law. The converse is also true. This much was recognised by the Appellate Division prior to the advent of our constitutional democracy.[67] The fact that the CCMA is not a court of law and does not have judicial authority under the Constitution, is irrelevant. The question is whether the conduct of an arbitration is administrative action.

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[66] Wade and Forsyth *Administrative Law* 9 ed (Oxford University Press, Oxford 2004) at 41.

[67] Above n 63.

[221] It is true, in the past administrative tribunals that performed judicial functions were subject to judicial review under administrative law. This must of course be understood in the context of the legal system that prevailed prior to the advent of the new constitutional order. It must be recalled that under the previous legal order, the exercise of public power was regulated by courts through judicial review of legislative and executive action. Courts applied the constitutional principles of common law, including the supremacy of parliament and the rule of law. The rule of law had a substantive as well as a procedural content. In this sense, judicial review enabled courts to place constraints on the exercise of public power. But judicial review was subject to the doctrine of parliamentary supremacy.[68]

[222] This was done in order to control the exercise of public power in the context of the doctrine of parliamentary supremacy. Judicial review was developed and applied by courts against the background of a legal order premised on the supremacy of parliament. Laws duly passed by parliament in accordance with the Constitution in force were not subject to judicial review. The court's role was confined to interpreting and applying those laws to particular cases.[69] The major source of constraint upon the exercise of public power lay in judge-made administrative law. Courts developed this branch of the law to "embrace the exercise of public power in fields which, strictly speaking, might not have constituted administration."[70] For

[68] *Pharmaceutical* above n 4 at paras 37-39.

[69] *Fedsure* above n 2 at para 28.

[70] *SARFU* above n 3 at para 148.

example "the action of a municipal council in setting rates was considered to be an action that was subject to judicial review on the principles of administrative law".[71] As this Court observed in *Pharmaceutical*,[72] courts had to claim space and push boundaries in order to find the means of controlling public power. The focus was not so much on the nature of the functions performed but was on the identity of the body performing the function. As a consequence, functions which strictly speaking did not amount to administration were nevertheless subject to judicial review under administrative law.

[223] All this has changed. Our new constitutional order firmly rejects the doctrine of parliamentary supremacy. It introduced the doctrine of the supremacy of the Constitution and the rule of law. Indeed the rule of law is specifically declared to be one of the foundational values of our new constitutional order.[73] Thus both the Constitution and the rule of law impose constraints on the exercise of public power. "The common-law principles that previously provided the grounds for judicial review of public power have been subsumed under the Constitution" and they now derive their force from the Constitution.[74] Constraints on the exercise of public power are to be found throughout the Constitution, including the right to just administrative action.[75]

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[71] *Fedsure* above n 2 at para 45. See also *Sehume v Atteridgeville Town Council* 1989 (1) SA 721 (T); *Sehume v Atteridgeville City Council and Another* 1992 (1) SA 41 (A).

[72] Above n 4 at para 45.

[73] Section 1(c) of the Constitution.

[74] *Pharmaceutical* above n 4 at para 33.

[75] *SARFU* above n 3 at para 148.

[224] What is administrative action must now be determined not by looking at the identity of the body that performs the function but by considering the nature of the function that is being performed. This fundamental shift in focus inevitably means that tribunals that in the past were subject to judicial review under administrative law even though the function they performed did not strictly speaking amount to administration, may no longer be subject to administrative review in light of the nature of the functions that they perform. It follows therefore that the fact that in the past administrative tribunals that performed judicial functions were subject to judicial review under administrative law, cannot today determine whether the function they perform is administrative action.

[225] The Supreme Court of Appeal did not elaborate on its finding that CCMA arbitration proceedings constitute administrative action. This must be understood in the context of the jurisprudence of the Labour Courts, in particular, the decision of the Labour Appeal Court in *Carephone* which held that the conduct of CCMA arbitration constitutes administrative action under section 33 of the Constitution.[76] *Carephone*[77] was delivered prior to the decision of this Court in *SARFU*,[78] which formulated the test for determining whether or not a particular conduct constitutes administrative action. With a few exceptions,[79] the *Carephone* decision has been followed both by

[76] Above n 19 at para 15. See also above n 21.

[77] Above n 19.

[78] Above n 3.

[79] *Toyota SA Motors (Pty) Ltd v Radebe & Others* (2000) 21 ILJ 340 (LAC); [2000] 3 BLLR 243 (LAC); *Shoprite Checkers (Pty) Ltd v Ramdaw NO and Others* 2001 (3) SA 68 (LC); and *Volkswagen SA (Pty) Ltd v Brand NO & Others* [2001] 5 BLLR 558 (LC) at paras 51-63. However, on appeal, the Labour Appeal Court promptly restored the precedential value of Carephone, see *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* 2001 (4) SA 1038 (LAC) at paras 32-33.

the Labour Appeal Court and the Labour Court. Its continued validity must be assessed in the light of the test for administrative action formulated by this Court in *SARFU*.[80]

Is Carephone still good law?

[226] In *Carephone,* the Labour Appeal Court had to consider the nature and extent of the right to review arbitration awards made by commissioners. There, as here, the CCMA contended that the commissioners' function of compulsory arbitration under the LRA was of a judicial nature and did not therefore amount to administrative action for the purposes of section 33 of the Constitution.[81] The Court rejected this contention. The Court in substance gave three answers to the contention by the CCMA.

[227] First, the classification of state conduct into conduct which constitutes administrative action and conduct which does not, reintroduces the distinction between judicial, quasi-judicial and purely administrative functions. These formal classifications are no longer relevant in the light of the development of our law on judicial review. They cannot therefore be reintroduced to limit the scope of judicial review of administrative action.[82] Second, in determining whether the action of a state organ exercising public power constitutes administrative action under the Constitution what matters is the identity of the functionary. Thus, although the commissioner may

[80] Above n 3.

[81] Above n 19 at para 15.

[82] Id at para 17.

perform functions of a judicial nature, it is not a court of law and thus has no judicial authority under the Constitution. Its performance of judicial functions does not transform it into a part of the judicial arm of government.[83] Administrative actions may take many forms even if judicial in nature, the function remains administrative.[84] Third, the purpose of section 33 of the Constitution is to extend values of accountability, responsiveness and openness to institutions of public power which might not have been subject to those constraints. Courts of law do not need those constraints because they were "always subject to the kind of requirements set out in the section."[85] It would therefore "be incongruous to free other public institutions exercising judicial functions from those constraints."[86] It is not necessary to seek those constraints in other provisions in the Bill of Rights such as the right of access to courts contained in section 34.

[228] The Court then proceeded to consider the standard of review under section 145 of the LRA on the footing that CCMA arbitrations constitute administrative action. It had regard to the provisions of section 33 of the Constitution[87] read with item 23(2)(b)

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[83] Id at para 18.

[84] Id at para 19.

[85] Id.

[86] Id.

[87] Section 33 of the Constitution provides:

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

of Schedule 6 to the Constitution.[88] The Court held that what is required is that administrative action must be justifiable in relation to the reasons given for it. It held that section 33 read with item 23(b) "introduces a requirement of rationality in the *merit or outcome* of the administrative decision [which] . . . goes beyond mere procedural impropriety as a ground for review, or irrationality only as evidence of procedural impropriety."[89] Relying on item 23(2) of Schedule 6 of the Constitution, the Court then formulated the test thus:

> "It seems to me that one will never be able to formulate a more specific test other than, in one way or another, asking the question: is there a rational objective basis justifying the connection made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at? In time only judicial precedent will be able to give more specific content to the broad concept of justifiability in the context of the review provisions in the LRA."[90]

[229] Central to the reasoning of the Labour Appeal Court are two propositions: first, although CCMA commissioners perform functions of a judicial nature, they are not

[88] Item 23(2) of Schedule 6 to the Constitution provides:

> "Until the legislation envisaged in sections 32(2) and 33(3) of the new Constitution is enacted—
> (a) section 32 (1) must be regarded to read as follows:
> '(1) Every person has the right of access to all information held by the state or any of its organs in any sphere of government in so far as that information is required for the exercise or protection of any of their rights.'; and
> (b) section 33(1) and (2) must be regarded to read 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.'."

[89] *Carephone* above n 19 at para 31.

[90] Id at para 37.

courts of law and are not vested with judicial authority under the Constitution. Second, administrative action may take many forms, including judicial in nature. Implicit in the reasoning of the Labour Appeal Court is the proposition that what is administrative action under the new legal order depends not on the function performed, but on the identity of the body performing the function.

[230] But this reasoning is at odds with the test formulated by this Court in *SARFU*.[91] The enquiry does not focus on the functionary who performs the function but focuses on the function that is being performed. Some functions of the CCMA will constitute administrative action as contemplated in section 33.[92] Others will not.[93] As this Court observed in *SARFU*, judicial officers may from time to time carry out administrative tasks.[94] Their action will constitute administrative action. The fact that it is performed by a judicial officer does not change the nature of the function.[95] The same is true of the CCMA. The Constitution does not contemplate that a function will be both administrative and judicial as the Labour Appeal Court in *Carephone*[96] implicitly suggested.

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[91] Above n 3.

[92] The functions of the CCMA are listed in section 115 of the LRA. Those that are plainly administrative include assisting in the establishment of workplace forums (section 115(1)(c)); conduct overseeing and scrutinising elections or ballots of registered trade unions (section 115(2)(f)). The rule-making authority of the CCMA under section 115(2A) would also fall under this category. In *Fedsure* above n 2 at para 27, this Court held that although the result of the action of law-making by functionaries in whom the power to do so has been vested by statute may amount to "legislation", the process by which the legislation is made is in substance "administrative".

[93] As when the CCMA resolves disputes concerning unfair dismissal through arbitration (section 115(1)(b)).

[94] Above n 3 at para 141.

[95] Id.

[96] Above n 19.

[231] The new constitutional order does not re-introduce the classification of public power into judicial, quasi-judicial and purely administrative functions. What it requires is the classification of state conduct into conduct which constitutes administrative action and conduct which does not. Section 33 and PAJA makes this necessary in order to determine the constitutional constraints applicable. As this Court pointed out in *Fedsure*:

> "Whilst it might not have served any useful purpose under the previous legal order to ask whether or not the action of a public authority was 'administrative', it is a question which must now be asked in order to give effect to s 24 of the Interim Constitution and s 33 of the 1996 Constitution."[97]

[232] To hold that the conduct of CCMA arbitration proceedings does not constitute administrative action is not to free commissioners from the values of accountability, responsiveness and openness. These are one of the founding values of our constitutional democracy. Every official who exercises public power is bound by these values. Commissioners are no exception. Nor does such a holding mean that the conduct of CCMA arbitrations is not subject to any constitutional constraints. The Constitution, as the supreme law, regulates the exercise of public power in different ways including through the application of the Bill of Rights and other specific provisions of the Constitution. The right to administrative action and the rule of law are some of those constraints. The rule of law requires that all those who exercise public power must do so in accordance with the law and the Constitution. In the case of commissioners, apart from the requirement of accountability, responsiveness and

[97] Above n 2 at para 26.

openness, they must comply with the provisions of the LRA and the Constitution, in particular, sections 23 and 34 of the Constitution.

[233] The CCMA as a body has a multiplicity of functions. It may conduct research into issues relating to its work, it conducts elections that are required to take place under the LRA; it has the authority to make rules of practice and procedure that govern arbitration and conciliation proceedings;[98] it provides the infrastructure for the conduct of arbitration and conciliation; and appoints commissioners who preside over arbitration proceedings. While most of these functions are clearly administrative in nature, the actual conduct of arbitration proceedings cannot in my judgment be classified as administrative. It is necessary to draw a distinction between those functions of the CCMA which are administrative in nature, and therefore constitute administrative action, and those that are adjudicative in nature which do not constitute administrative action.

[234] The effect of the decisions of this Court in *Fedsure*,[99] *SARFU*[100] and *Pharmaceutical*[101] is this: first, not every action by an organ of state which performs public power constitutes administrative action as contemplated in section 33 of the constitution; and second, it is therefore necessary in every case where it is alleged that the action in question constitutes administrative action, to consider whether the action in question constitutes administrative action. It is wrong to say that because the organ

[98] Above n 92.

[99] Above n 2.

[100] Above n 3.

[101] Above n 4.

of state in question is not vested with judicial authority under the Constitution therefore all its actions, regardless of their nature will remain administrative action, as the Labour Appeal Court did in *Carephone*.[102] To do so is to focus the enquiry on the arm of government performing the function and not on the nature of the function that is being performed. This is contrary to the test announced in *SARFU*.[103]

[235] What must be stressed is what was said in *Fedsure*. In *Fedsure* this Court recognised that functionaries may perform functions that are normally performed by other bodies such as legislative and adjudicative functions. In determining whether a function is administrative action or not, *Fedsure* teaches us that in such a case we must pay attention to the process by which the function is performed and not on the functionary performing the function. This is recognition that legislative, judicial and administrative functions are performed in a particular manner. Thus if the process by which a commissioner performs his or her function is in substance judicial, the result of the action cannot be administrative. In this regard, this Court said in *Fedsure*:

> "In addressing this question it is important to distinguish between the different processes by which laws are made. Laws are frequently made by functionaries in whom the power to do so has been vested by a competent legislature. Although the result of the action taken in such circumstances may be 'legislation' the process by which the legislation is made is in substance 'administrative'. The process by which such legislation is made is different in character to the process by which laws are made by deliberative legislative bodies such as elected municipal councils. Laws

[102] Above n 19 at para 18-19.

[103] Above n 3 at para 141.

> made by functionaries may well be classified as administrative; laws made by deliberative legislative bodies can seldom be so described."[104]

[236] Here we are concerned with a very unique tribunal. This tribunal is a permanent feature in the field of labour law; it was created to resolve unfair dismissal disputes through the application of the LRA; its functions are in substance and in form judicial in nature. It performs functions that are substantially similar in form and substance to those that are performed by a court of law, a function contemplated in section 34 of the Constitution; and therefore, in this sense, exercises original powers. The powers exercised by commissioners do not involve the implementation of legislation but they involve the application of the law in resolving unfair dismissal disputes. Commissioners must apply the Constitution, in particular, section 23 of the Constitution and section 188 of the LRA read with the Code.

[237] Their sole business is the adjudication of labour disputes between workers and employers. In this process they deal with the determination of facts and the interpretation of the LRA, the Code and indeed where necessary, the Constitution itself. Commissioners, have no regulatory, investigatory or policy-making authority. They are charged only with the fair and impartial adjudication of unfair dismissal disputes. In the performance of this task they employ the same techniques of establishing and determining facts that a court of law employs. These are the very functions that courts of law perform.

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[104] Above n 2 at para 27.

[238] This is the tribunal we are concerned with. It is very different from other administrative tribunals. Its powers and functions are closer to, if not identical to judicial function. In *SARFU*[105] we said that difficult boundaries may have to be drawn in determining whether a particular action constitutes administrative action under section 33 of the Constitution and that such determination must be made on a case by case basis. This case calls for such a difficult boundary to be drawn and our decision must be confined to the special functions of CCMA commissioners. In drawing this boundary, we must acknowledge the fact that the CCMA as a body fits the description of an administrative body but at the same time we must recognise that it has a multiplicity of functions some of which may be administrative while others are not. We should draw a line between its administrative functions on the one hand and the adjudicative functions performed by the commissioners on the other hand who sit as independent and impartial tribunals as contemplated in section 34.

[239] It follows therefore that the Labour Appeal Court in *Carephone*[106] erred in holding that the conduct of arbitrations under the LRA constitutes administrative action. So did the Supreme Court of Appeal in this case.[107]

[240] For all these reasons, I am unable to agree with the primary contention of the employer and the finding by Navsa AJ that the conduct of an arbitration concerning an alleged unfair dismissal by an arbitrator appointed in terms of the LRA by the CCMA

[105] Above n 3 at para 143.

[106] Above n 19.

[107] Above n 24.

constitutes administrative action within the meaning of section 33 of the Constitution. This conclusion renders it unnecessary to consider whether PAJA applies to the review of CCMA arbitrations.

[241] What then is the proper approach to the reviews under section 145(2)?

The proper approach to reviews under section 145(2)(a)

[242] What appears to have bedevilled the proper approach to the determination of the ambit of review under section 145 is the view that CCMA arbitrations constitute administrative action under section 33 of the Constitution and that the scope of review under section 145 is narrower than that under section 33 of the Constitution.[108] The effect of the right to just administrative action was seen as broadening the scope of judicial review of "administrative action".[109] As *Carephone* pointed out, the constitutional provision on which this extended scope of review was hung was that which required that administrative action must be justifiable in relation to the reasons given for it, which was to be found in section 33 read with item 23(b) of Schedule 6.[110] This provision has been construed as introducing "a requirement of rationality in the *merit or outcome* of the administrative decision [which] goes beyond mere procedural impropriety as a ground for review, or irrationality only as evidence of procedural impropriety."[111]

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[108] *Carephone* above n 19 at paras 30-32.

[109] Id at para 30.

[110] Id at para 31.

[111] Id.

[243] This approach has been criticised on the basis that it tends to blur the line between an appeal and a review, a line which the drafters of the LRA sought to draw and maintain. The Labour Appeal Court in *Carephone* was mindful of the fact that the standard of review would "almost inevitably, involve the consideration of the 'merits'".[112] It cautioned that when determining justifiability, a court should bear in mind that it is considering the merits, "not in order to substitute [its] own opinion on the correctness [of the merits], but to determine whether the outcome is rationally justifiable".[113] The Labour Appeal Court was indeed at pains to emphasise that "it would be wrong to read into [section 33 of the Constitution] an attempt to abolish the distinction between review and appeal."[114]

[244] What must be emphasised is that there may well be a fine line between a review and an appeal, in particular, where, as I will show later in this judgment, the reviewing court considers the reasons given by a tribunal, not to determine whether the result is correct, but to determine whether a gross irregularity occurred in the proceedings. At times it may be difficult to draw the line. There is however a clear line. And this line must be maintained. The drafters of the LRA were mindful of the distinction between review and appeal and they wanted this distinction to be maintained. What they sought to introduce was "a simple, quick, cheap and non-legalistic approach to the

[112] Id at para 36.

[113] Id.

[114] Id at para 32.

adjudication of unfair dismissals."[115] They specifically addressed the question of appeals and said:

> "In order for this alternative process to be credible and legitimate and to achieve the purposes of the legislation, it must be cheap, accessible, quick and informal. These are the characteristics of arbitration, whose benefits over court adjudication have been shown in a number of international studies. The absence of an appeal from the arbitrator's award speeds up the process and frees it from the legalism that accompanies appeal proceedings. It is tempting to provide for appeals because dismissal is a very serious matter, particularly given the lack of prospects of alternative employment in the present economic climate. However, this temptation must be resisted as appeals lead to records, lengthy proceedings, lawyers, legalism, inordinate delays and high costs. Appeals have a negative impact on reinstatement as a remedy, they undermine the basic purpose of the legislation and they make the system too expensive for individuals and small business. Without reinstatement as a primary remedy, the draft Bill's prohibition of strikes in support of dismissal disputes loses its legitimacy.
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> Prior to the establishment of the present LAC, it was argued that an appeal structure would provide the consistency required to develop coherent guidelines on what constitutes acceptable industrial relations practice. This has not been the case. The LAC's judgments lack consistency and have had little impact in ensuring consistency in judgments of the Industrial Court. The draft Bill now regulates unfair dismissal in express and detailed terms and provides a Code of Good Practice to be taken into account by adjudicators. This will go a long way towards generating a consistent jurisprudence concerning unfair dismissal despite the absence of appeals."[116]

[245] With this in mind, the drafters appear to have opted for the narrowest species of review.[117] By adopting "a simple, quick, cheap and non-legalistic" approach to the

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[115] Explanatory Memorandum (1995) 16 *ILJ* 278 at 318.

[116] Id at 318-319.

[117] See *Johannesburg Consolidated Investment Company v Johannesburg Town Council* 1903 TS 111; *Hira and Another v Booysen and Another* 1992 (4) SA 69 (A) at 87.

adjudication of unfair dismissals, the drafters of the LRA intended that, as far as is possible arbitration awards would be final and would only be interfered with in very limited circumstances. In order to give effect to this, they deliberately chose the narrow grounds of review similar to those contained in section 33(1) of the Arbitration Act and reproduced them in identical terms. They did this well aware of the jurisprudence under section 33(1) of the Arbitration Act. And they were aware of the well established rule of statutory construction that when the legislature deliberately includes language in a statute which in the same or similar context has been subject to judicial interpretation, it intends the provision to bear the same meaning already given by the courts.

[246] But the drafters of the LRA were equally aware that, in construing the provisions of section 145(2)(a), in particular, the ambit of the ground of review in that section, the labour courts will have regard to the primary objectives of the LRA and the right to fair labour practices guaranteed to everyone by section 23 of the Constitution. This is the interpretive injunction contained in section 39(2) of the Constitution and the interpretive injunction which the drafters themselves expressly included in section 3 of the LRA. Indeed consistently with section 39(2), it is now a settled principle of constitutional construction that where a statute is capable of more than one reasonable construction, with one construction leading to constitutional validity while the other not, the former construction being in conformity with the

Constitution must be preferred to the latter provided always that such construction is reasonable and not strained.[118]

[247] However in the context of the ambit of the review under section 145(2)(a) of the LRA, this interpretative injunction and principle of constitutional construction do not require courts to sideline the grounds of review which are expressly provided for in section 145(2)(a) of the LRA and introduce a constitutional basis for review. This has indeed been one of the unintended consequences of *Carephone*.[119] This has led to a concern that the Constitution based standard of review announced in *Carephone* introduces an additional ground of review which is not found in section 145 of the LRA. Thus in *Toyota SA Motors (Pty) Ltd*, the Labour Appeal Court expressed misgivings about whether *Carephone* introduced "an independent ground upon which an award can be attacked" and "the notion that the grounds set out in [section 145] are not the only avenues open to a party to challenge an award."[120]

[248] We have recently adopted the constitutional principle that where legislation has been enacted to give effect to the provisions of the Constitution, it is impermissible for a litigant to bypass that legislation and rely directly on the provisions of the Constitution in the absence of a constitutional challenge to the legislation so enacted.

[118] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at paras 22-24.

[119] Above n 19.

[120] Above n 79 at paras 33 and 40.

We formulated this principle as follows in *SANDU*,[121] in the context of section 23(5) of the Constitution:

> ". . . where legislation is enacted to give effect to a constitutional right, a litigant may not bypass that legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard."[122]

Explaining the rationale for this principle, we said:

> "Accordingly, a litigant who seeks to assert his or her right to engage in collective bargaining under section 23(5) should in the first place base his or her case on any legislation enacted to regulate the right, not on section 23(5). If the legislation is wanting in its protection of the section 23(5) right in the litigant's view, then that legislation should be challenged constitutionally. To permit the litigant to ignore the legislation and rely directly on the constitutional provision would be to fail to recognise the important task conferred upon the legislature by the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights. The proper approach to be followed should legislation not have been enacted as contemplated by section 23(5) need not be considered now."[123] (Footnote omitted.)

And we formulated the approach which courts should adopt as follows:

> "Once it is accepted that disputes that arise from collective bargaining in the SANDF should be considered first in the light of the provisions of chapter XX of the regulations rather than section 23(5) of the Constitution, the focus of a court's attention will be different to the focus of both the High Court and the Supreme Court of Appeal in these three matters. A court will start with a consideration of the regulations rather than the constitutional provision. The regulations, of course, must be construed in the context of the Constitution as a whole."[124] (Footnote omitted.)

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[121] *South African National Defence Union v Minister of Defence and Others* CCT 65/06, 30 May 2007, as yet unreported.

[122] Id at para 51.

[123] Id at para 52.

[124] Id at para 54.

[249] Consistently with this principle, it seems to me that where the legislation which is enacted to give effect to a constitutional right specifies the grounds upon which decisions of tribunals giving effect to that legislation may be reviewed, a court reviewing the decision of that tribunal should start with the interpretation of the statutory provision in question. And of course the provision under consideration must be construed in conformity with the Constitution. This approach is consistent with what we have said in *NEHAWU* in the context of section 23 of the Constitution, namely, that where "the legislature enacts legislation in an effort to meet its constitutional obligations, and does so within constitutional limits, courts must give full effect to the legislative purpose."[125]

[250] The LRA was enacted to give effect to the right to fair labour practices. It creates labour courts and the CCMA to deal with disputes concerning unfair dismissals. These disputes are to be dealt with, in the first instance, by commissioners and in the second instance by the Labour Court. The LRA limits the grounds upon which decisions of commissioners may be reviewed to those expressly specified in section 145. The deliberate choice made by the legislature, whose duty it is to do so, to permit a review of commissioners on the ground of review in section 145(2)(a) must be respected and given effect to. If the grounds of review in section 145(2)(a) are wanting in the protection that they provide, then the legislation should be challenged constitutionally. Once it is accepted that decisions of commissioners

[125] Above n 9 at para 14.

should be reviewed on the grounds specified in section 145, the reviewing court must start with the consideration of these grounds of review rather than the Constitution. The grounds of review must of course be construed in the light of the objectives of the LRA and the Constitution. The position is different when the question is whether the conduct alleged constitutes administrative action under PAJA. In such a case the question whether the particular conduct constitutes administrative action must be determined by reference to section 33 of the Constitution.

[251] In these proceedings, COSATU sought to disavow any attempt to suggest that the standard of rationality that it contended for constitutes an additional ground of review. It contended that the rationality test is not an independent ground of review but one flowing from the provisions of section 145(2). But the effect of the test contended for by COSATU seems to me to be the same. It imports a constitutional standard for review that is based on the test that we announced in *Pharmaceutical*[126] in connection with constitutional constraints on the exercise of public power in general. The fundamental problem with this approach is its starting premise; it starts with the Constitution and not with the provisions of section 145(2)(a).

[252] In the case of PAJA which sets out the grounds of review of administrative action, for instance, it would be both inappropriate and undesirable to ignore the provisions of PAJA and introduce a standard of review based on section 33 of the Constitution without challenging the provisions of PAJA. Once it is established that

[126] Above n 4 at paras 85 and 90.

the conduct in question constitutes administrative action and that PAJA does not exclude from its ambit the conduct in question, the enquiry in each case should be whether the facts alleged establish a ground of review in PAJA. And this is a matter of interpretation of the ground of review relied upon and determining whether the facts establish that ground of review. There is no reason both in principle and in logic why a different approach should be adopted in the case of section 145(2)(a) of the LRA, which was enacted, among other things, to give effect to the right to fair labour practices.

[253] The grounds of review in section 145(2)(a) are cast in very broad terms. This is deliberate. These grounds were intended to gather their meaning from experience. Their ambit must be determined carefully in the light of the primary objectives of the LRA and on a case by case basis. It is the primary responsibility of the Labour Court and the Labour Appeal Court to give meaning and content to each of these grounds. These are specialist tribunals whose responsibility it is to interpret and apply the LRA. In each case, these courts will have to determine whether the facts alleged constitute gross irregularity or misconduct or that the commissioner has acted in excess of his or her powers. And in so doing, they must have due regard to the objects sought to be achieved by the LRA and the provisions of the Constitution.[127] In time only judicial precedent will be able to give more specific meaning to the broad grounds of review in section 145(2)(a).

[127] Above n 6.

[254] The grounds of review in section 145(2)(a) provide a cause of action for the review of commissioners' awards by the Labour Court. Whether an arbitral award should be interfered with under the provisions of section 145(2)(a) will depend therefore on whether the conduct of the commissioner complained of falls under one or more of the grounds of review set forth in section 145(2)(a). It is therefore for a party alleging a defect in the arbitration proceedings to show that the facts alleged constitute gross irregularity or misconduct or show that the power conferred has been exceeded, as the case may be. This will require litigants to specify the grounds of review relied upon and the facts alleged as constituting the ground of review relied upon.

[255] With this approach in mind, I now turn to consider the scope and meaning of the grounds of review in section 145(2)(a).

The scope and meaning of section 145(2)(a)

[256] In its review application the employer relied upon all three grounds of review in section 145(2)(a), namely, misconduct, gross irregularity and acting in excess of powers conferred. This is plain from its affidavit in support of the review application. The employer submitted that the findings complained of had no reasonable basis on the evidence presented to the commissioner and they flew in the face of direct and to a large extent unchallenged evidence to the contrary. The employer submitted that these findings which were fundamental to the commissioner's award demonstrate that the commissioner failed to apply his mind to the matter to such an extent that it cannot

be said that the employer was afforded a fair hearing. It was submitted that in these circumstances the commissioner committed a gross irregularity or misconduct or otherwise, exceeded his powers.

[257] In the view I take of the ground of review alleging misconduct on the part of the commissioner, it is only necessary to consider the meaning and scope of gross irregularity and acting in excess of powers conferred.

The meaning of gross irregularity

[258] The phrase "gross irregularity in the conduct of the arbitration proceedings" is not a novel phrase in our law. It is one of the grounds of review of arbitration under section 33(1) of the Arbitration Act.[128] The grounds of review in section 33(1) of the Arbitration Act are identical to those contained in section 145(2) of the LRA. The Arbitration Act, which governs private arbitrations, was preceded by three colonial statutes.[129] Apart from the Arbitration Act, "gross irregularity" is also one of the grounds upon which the proceedings of lower courts may be reviewed by the High Court under the Supreme Court Act 59 of 1959.[130] It is also a ground of review under

[128] Section 33(1) of the Arbitration Act provides:

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

[129] *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) at para 54.

[130] Section 24(1) of the Supreme Court Act provides:

the common law. Gross irregularity as a ground of review has therefore been the subject of judicial decisions over a period of time.

[259] It is true that section 146 of the LRA provides that the "Arbitration Act . . . does not apply to any arbitration under the auspices of the Commission." This provision was included in order to give the Labour Court exclusive jurisdiction over arbitrations under the auspices of the CCMA. In addition, the LRA contemplates that the Labour Court will review arbitration conducted by arbitrators outside of the CCMA.[131] This provision was intended to ensure that all arbitrations concerning alleged unfair labour practice would be considered on review by the Labour Court. I do not understand the provision as intended to prevent the Labour Court from seeking guidance from court decisions interpreting identical provisions in other statutes.

[260] That said, however, while case law interpreting this phrase in other statutes provides a useful starting point in determining the meaning of the phrase, the differences in context in which the phrase occurs in the different statutes should not be overlooked. The most important is that a commissioner performs a public function

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> "(1) The grounds upon which the proceedings of any inferior court may be brought under review before a provincial division, or before a local division having review jurisdiction, are—
> (a) absence of jurisdiction on the part of the court;
> (b) interest in the cause, bias, malice or the commission of an offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, on the part of the presiding judicial officer;
> (c) gross irregularity in the proceedings; and
> (d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence."

[131] Section 157(3) provides:

> "Any reference to the court in the Arbitration Act, 1965 (Act 42 of 1965), must be interpreted as referring to the Labour Court when an arbitration is conducted under that Act in respect of any dispute that may be referred to arbitration in terms of this Act."

and exercises public power and is therefore subject to the constitutional constraints applicable to the exercise of public power. The grounds of the review in section 145(2)(a) must therefore be interpreted in the light of those constitutional constraints. In particular, the LRA was enacted to give effect to the constitutional right to fair labour practices. The grounds of review in section 145(2)(a) must therefore be interpreted in the context of the right to fair labour practices in section 23 of the Constitution and the objective of the LRA in creating the CCMA and the obligations imposed upon the CCMA commissioners by section 188 of the LRA read with items 1, 2 and 7 of the Code.

[261] With these considerations in mind, I now return to the meaning of gross irregularity.

[262] The basic principle was laid down in the oft-quoted passage from *Ellis v Morgan*[132] where the court said:

> "But an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result, but to the methods of a trial, such as, for example, some high-handed or mistaken action which has *prevented the aggrieved party from having his case fully and fairly determined*."[133] (Emphasis added.)

[263] In *Goldfields*,[134] the court qualified this general principle. This case concerned a situation where the decision-maker misconceived his or her mandate. The court held

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[132] *Ellis v Morgan; Ellis v Dessai* 1909 TS 576.

[133] Id at 581.

[134] *Goldfields Investment Ltd and Another v City Council of Johannesburg and Another* 1938 TPD 551.

that where a decision-maker misconceives the nature of the inquiry, the ensuing hearing cannot in principle be said to be fair because the decision-maker has failed to perform his or her mandate. Schreiner J expressed the principle as follows:

> "The law, as stated in *Ellis v. Morgan (supra)* has been accepted in subsequent cases, and the passage which has been quoted from that case shows that it is not merely high-handed or arbitrary conduct which is described as gross irregularity; behaviour which is perfectly well-intentioned and *bona fide*, though mistaken, may come under that description. The crucial question is whether it prevented a fair trial of the issues. If it did prevent a fair trial of the issues then it will amount to a gross irregularity."[135]

[264] In *Goldfields*, Schreiner J distinguished between "patent irregularities", that is, those irregularities that take place openly as part of the conduct of the proceedings, on the one hand, and "latent irregularities", that is, irregularities "that take place inside the mind of the judicial officer, which are only ascertainable from the reasons given" by the decision-maker.[136] In the case of latent irregularities one looks at the reasons not to determine whether the result is correct but to determine whether a gross irregularity occurred in the proceedings. In both cases, it is not necessary to show "intentional arbitrariness of conduct or any conscious denial of justice."[137] But as the Supreme Court recently has warned, the reasoning of the decision-maker must not be confused with the conduct of the proceedings. Although there may be a fine line between reasoning and the conduct of the proceedings, and sometimes it may be difficult to draw the line, there is a clear difference.

[135] Id at 560.

[136] Id.

[137] Id.

[265] The decisions of *Ellis*[138] and *Goldfields*[139] were recently endorsed by the Supreme Court of Appeal in the context of the Arbitration Act in *Telcordia Technologies*.[140] Both *Ellis* and *Goldfields* make it plain that the crucial enquiry is whether the conduct of the decision-maker complained of prevented a fair trial of issues.[141] The complaint must be directed at the method or conduct and not the result of the proceedings. And the reasoning of the decision-maker must not be confused with the conduct of the proceedings. There is a fine line between reasoning and the conduct of the proceedings, and at times it may be difficult to draw the line; there is nevertheless an important difference.[142] Determining whether the commissioner has committed a gross irregularity will inevitably require the reviewing court to examine the reasons given for the award. In doing so the reviewing court must be mindful of the fact that it is examining the reasons not to determine whether the conclusion reached by the commissioner is correct but whether the commissioner has committed a gross irregularity in the conduct of the proceedings.

[266] The requirement of fairness in the conduct of arbitration proceedings is consistent with the LRA and the Constitution. First, a CCMA commissioner is required by section 138(1) of the LRA "to determine the dispute fairly and quickly".[143] Second, in terms of section 34 of the Constitution, everyone has the right

[138] Above n 132.

[139] Above n 134.

[140] Above n 129 at paras 71-73 and 78.

[141] Above n 132 at 581 and above n 134 at 560.

[142] *Telcordia Technologies* above n 129 at para 76.

[143] Section 138(1) of the LRA provides:

to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court of law or an independent and impartial tribunal. The CCMA and Labour Courts were established to resolve labour disputes. CCMA arbitrations provide independent and impartial tribunals contemplated in section 34 of the Constitution.[144] The right to a fair hearing before a tribunal lies at the heart of the rule of law. And a fair hearing before a tribunal is a prerequisite for an order against an individual and this is fundamental to a just and credible legal order.[145] A tribunal like the CCMA is obliged to ensure that the proceedings before it are always fair. And finally, section 23 of the Constitution guarantees to everyone the right to fair labour practices.

[267] It is plain from these constitutional and statutory provisions that CCMA arbitration proceedings should be conducted in a fair manner. The parties to a CCMA arbitration must be afforded a fair trial. Parties to the CCMA arbitrations have a right to have their cases fully and fairly determined. Fairness in the conduct of the proceedings requires a commissioner to apply his or her mind to the issues that are material to the determination of the dispute. One of the duties of a commissioner in conducting an arbitration is to determine the material facts and then to apply the provisions of the LRA to those facts in answering the question whether the dismissal was for a fair reason. In my judgment where a commissioner fails to apply his or her

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> "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."

[144] Above n 49.

[145] *De Beer NO v North-Central Local Council and South-Central Local Council and Others* 2002 (1) SA 429 (CC); 2001 (11) BCLR 1109 (CC) at para 11.

mind to a matter which is material to the determination of the fairness of the sanction, it can hardly be said that there was a fair trial of issues.

[268] It follows therefore that where a commissioner fails to have regard to material facts, the arbitration proceedings cannot in principle be said to be fair because the commissioner fails to perform his or her mandate. In so doing, in the words of *Ellis*, the commissioner's action prevents the aggrieved party from having its case fully and fairly determined.[146] This constitutes a gross irregularity in the conduct of the arbitration proceedings as contemplated in section 145(2)(a)(ii) of the LRA. And the ensuing award falls to be set aside not because the result is wrong but because the commissioner has committed a gross irregularity in the conduct of the arbitration proceedings.

Acting in excess of powers conferred

[269] The question whether a commissioner has exceeded his or her powers within the meaning of section 145(2)(a)(iii) must be determined in the light of the powers conferred on the commissioners under the LRA. In terms of section 188(1)(a) a commissioner is required to determine whether the reason for dismissal is a fair reason. In terms of section 188(2), a commissioner is required to take into account the Code in considering whether or not the reason for dismissal is a fair reason. Schedule 8 to the LRA contains the Code in relation to dismissal. Item 1(3) declares that:

[146] Above n 132 at 581.

> "[t]he key principle in this Code is that employers and employees should treat one another with mutual respect. A premium is placed on both employment justice and the efficient operation of business. While employees should be protected from arbitrary action, employers are entitled to satisfactory conduct and work performance from their employees."

[270] Item 2(1), in turn, provides that "[w]hether or not a dismissal is for a fair reason is determined by the facts of the case, and the appropriateness of dismissal as a penalty." Item 7 in turn provides that any person who is determining whether a dismissal for misconduct is unfair should consider the factors set out in item 7(a) and (b).[147]

[271] All these provisions must be understood in the context of the right to fair labour practices in section 23 of the Constitution and the obligation imposed on a commissioner "to determine the dispute fairly and quickly".[148] In *NEHAWU* we emphasised that fairness is not confined to workers only. It "comprehends that regard must be had not only to the position and interest of workers, but also those of the employer".[149] Therefore "fairness required in the determination of an unfair labour practice must be fairness towards both employer and employee."[150] This is necessary in order to make a balanced and equitable assessment. We accordingly concluded:

> "[T]he focus of section 23(1) is, broadly speaking, the relationship between the worker and the employer and the continuation of that relationship on terms that are

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[147] See above para [174].

[148] Section 138(1) of the LRA.

[149] Above n 9 at para 38, citing with approval the judgment of the AD in *National Union of Metalworkers of SA v Vetsak Co-operative Ltd and Others* 1996 (4) SA 577 (A) at 589C-D and 593G-H.

[150] Id.

> fair to both. In giving content to [the right to fair labour practices], it is important to bear in mind the tension between the interests of the workers and the interests of the employers which is inherent in labour relations. Care must therefore be taken to accommodate, where possible, these interests so as to arrive at the balance required by the concept of fair labour practices. It is in this context that the LRA must be construed."[151]

[272] It is plain from all these provisions that the award which a commissioner ultimately makes, must be fair to both the employer and the employee.[152] The LRA regulates unfair dismissals in express and detailed terms and provides a Code that should be taken into account by commissioners.[153] And this defines the powers of the commissioner in relation to awards that they may make under the LRA. It follows from this that where a commissioner makes an award which is manifestly unfair either to the employer or the employee, the commissioner exceeds his or her powers under the LRA. Such an award falls to be reviewed and set aside under section 145(2)(a)(iii) of the LRA.

[273] In *Telcordia Technologies*[154] in the context of the expression "exceeding its powers" as a ground of review under section 33(1)(b) of the Arbitration Act, the Supreme Court of Appeal held that "[t]he term 'exceeding its powers' requires little by way of elucidation" and quoted with approval the following passage from a decision of the House of Lords:

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[151] Id at para 40.

[152] Id at paras 38-40.

[153] See above para [173].

[154] Above n 129 at para 52.

> "But the issue was whether the tribunal 'exceeded its powers' within the meaning of s 68(2)(b) [of the English Act]. This required the courts below to address the question whether the tribunal purported to exercise a power which it did not have or whether it erroneously exercised a power that it did have. If it is merely a case of erroneous exercise of power vesting in the tribunal no excess of power under s 68(2)(b) is involved. Once the matter is approached correctly, it is clear that at the highest in the present case, on the currency point, there was no more than an erroneous exercise of the power available under s 48(4). The jurisdictional challenge must therefore fail."[155]

[274] The Supreme Court of Appeal also referred to a US Court of Appeals decision of *Bull HN Information Systems Inc v Hutson*[156] where the court said that "[t]o determine whether an arbitrator has exceeded his authority . . . courts 'do not sit to hear claims of factual or legal error . . .' and '[e]ven where such error is painfully clear, courts are not authorized to reconsider the merits of arbitration awards,' . . . ".[157]

[275] These decisions were of course concerned with private arbitration. Commissioners have to exercise public power and therefore in the exercise of their powers they are constrained by the doctrine of legality which is an aspect of the rule of law. The rule of law is one of the foundational values of our Constitution. And it is central to the conception of our constitutional order that those who exercise public power including the commissioners, are constrained by the principle that they may exercise only those powers and perform only those functions which are conferred

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[155] *Lesotho Highlands Development Authority v Impregilo SpA and Others* [2006] 1 AC 221 at para 24.

[156] 229 F 3d 321 (1st Cir 2000), para 19.

[157] Above n 129 at para 52 fn 30.

upon them by the law.[158] The commissioners' sole claim to the exercise of lawful authority therefore rests in the powers allocated to them in the LRA and the Constitution. It follows therefore that commissioners must exercise their powers consistently with the powers conferred on them by the LRA and the Constitution. To the extent that the decision in *Telecordia Technologies*[159] and the authorities referred to in that decision hold that an arbitrator who makes an award which is inconsistent with the powers conferred on him or her, exceeds his or her powers they, are consistent with the requirement of the doctrine of legality.

[276] As public officials who exercise public powers, commissioners may only make those awards which are consistent with their obligations under the LRA and the Constitution. Where a commissioner renders an award that is inconsistent with his or her powers conferred on a commissioner by the LRA, in my view, the commissioner exceeds his or her powers and the award falls to be reviewed and set aside under section 145(2)(a)(iii) of the LRA. Given the constitutional right to fair labour practices, the provisions of section 188 read with items 1, 2 and 7 of the Code, an award which is manifestly unfair to either the employer or employee can hardly be said to be consistent with the powers conferred upon a commissioner to make an award that is fair. In effect, if a commissioner fails to determine the dispute fairly, he or she is in breach of the statute that is the source of his or her power to conduct the arbitration and is also in breach of the doctrine of legality, which is a constitutional constraint upon the exercise of his or her powers. This conduct on the part of the

[158] *Fedsure* above n 2 at para 58.

[159] Above n 129.

commissioner is ultra vires, that is, beyond powers conferred on the commissioners as contemplated in section 145(2)(a)(iii).

[277] This construction of the expression "exceeding the powers" is consistent with the rule of constitutional construction which requires that, where possible, a provision in a statute must be given a construction which will bring it within constitutional bounds. If section 145(2)(a)(iii) of the LRA were to be construed as permitting a manifestly unfair award to go unchallenged, then its provision would fall foul of section 23 of the Constitution. A construction which requires a commissioner to render an award which is fair is consistent with section 23 and must be preferred to a construction which would render section 145(2)(a)(iii) unconstitutional.

[278] Against this background, I now turn to consider whether the conduct of the commissioner complained of establishes that the commissioner committed a gross irregularity in the conduct of the arbitration proceedings or otherwise acted in excess of his powers.

Did the employer establish any of the grounds of review in section 145(2)(a)?

[279] Regrettably and no doubt under the influence of *Carephone*,[160] in argument in this Court, the employer did not rely on any of the specific grounds of review set out in section 145(2)(a). Nor did the Supreme Court of Appeal in reviewing and setting aside the award rely on any specific ground of review contained in section 145(2)(a).

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[160] Above n 19.

Instead the employer relied on the broad ground of unjustifiability as the basis for the attack on the award. In the alternative, the employer relied on rationality as being the basis for its attack. This demonstrates the point made earlier, namely, that the ground of review expressly provided for in section 145(2)(a) has somehow faded into the background as a result of the standard of review under section 145(2)(a) which is based directly on the Constitution. In these circumstances I consider that the proper approach is to consider the grounds of review alleged in the application for review.

[280] Now the findings of the commissioner which were attacked appear from the following passages from the award of the commissioner:

> "While I agree that this conduct was misconduct, I am not convinced that the dismissal was an appropriate sanction. In my view dismissal under the circumstances would be too harsh when taking into account the following: There were no losses suffered by the employer. The violation of the rule was done unintentional or "a mistake" as argued by the employee. Lastly the level of honesty of the employee is something to consider.
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> Based on the evidence before me the employee has had a clean record of service with the employer for the past fourteen (14) years. This, in terms of the code of good practice cannot be ignored. The labour court has endorsed the concept of corrective or progressive dispute. Employees' behaviour is to be corrected through a system of graduated disciplinary measures such as counselling (sic) and warning.
>
> It is therefore my view that the type of offence committed by the employee does not go into the heart of the relationship, which is trust. I therefore believe that the continued employment relationship

> is still intact. To deprive the employee of his employment in this circumstance would be wholly unfair.
>
> Turning finally to the question of the procedural unfairness, which at this stage is somewhat academic, I am satisfied that the dismissal of the employee was effected in accordance with a fair procedure and that none of the argument put by the employee in this regard can be supported."

[281] The commissioner accepted that the worker had violated a reasonable rule relating to searches. However he took the view that the dismissal was not appropriate. He advanced three reasons in support of this view, and these were the subject of the attack in all three courts below. These findings were: that a) the employer did not suffer any loss; b) the violation of the rule was unintentional or a mistake; and c) the level of the honesty of the worker had to be considered. Having considered other factors including the fact that the worker had an unblemished period of fourteen years with the employer, the commissioner concluded as follows:

> "It is therefore my view that the type of offence committed by the employee does not go into the heart of the relationship, which is trust. I therefore believe that the continued employment relationship is still intact. To deprive the employee of his employment in this circumstance would be wholly unfair."

[282] In evaluating the reasoning of the commissioner what must be borne in mind is that commissioners are not expected to give detailed and impeccable reasoning for their awards. They are required to "deal with the substantial merits of the dispute with the minimum of legal formalities."[161] This has regrettably resulted in unsubstantiated

[161] Section 138(1) of the LRA.

statements being made in awards. And without substantiation, it is often difficult to determine whether the statements made have any basis in the evidence or whether they demonstrate that material factors were ignored. This is often compounded by the fact that some statements are capable of more than one meaning. In these circumstances, the reviewing court must first ascertain what the statement intended to convey before embarking upon the task of determining whether these statements demonstrate that a gross irregularity occurred in the proceedings or that the commissioner exceeded his or her powers.

[283] While cognisance should properly be taken of the circumstances under which commissioners' work, this is no excuse for making unsubstantiated statements or reasons for a conclusion. At the bare minimum, an award should set out facts found and the reasons for the finding, the conclusion based on those facts and the reasons for the conclusion. It should not be necessary for the reviewing court to ask, "what did the commissioner mean by this statement?" A reviewing court should not be left to speculate on what the commissioner had in mind. Statements made may be fully justified, but if left unexplained a statement may be easily misunderstood. Such statement may easily fall prey to an attack based on gross irregularity in the conduct of the proceedings.

[284] The present award is not a model of clarity. The findings under attack on their face may appear to be wholly unfounded. They have to be interpreted in order to be

understood. This is the task that the Labour Appeal Court embarked upon. Although it found some of the reasons baffling, it found a possible explanation for some.

[285] The finding that the employer suffered no loss as a result of the worker's failure to search according to the procedure means no more than that there was no direct link between a failure to search and any theft that occurred. This does not mean that a potential loss as opposed to actual loss was ignored in the reasoning process. Similarly the finding that the misconduct was unintentional or a mistake may well have been intended to convey that the employee was found guilty of negligent conduct as opposed to intentional conduct. This does not mean that the commissioner did not take into account all the circumstances surrounding the misconduct which he should have taken into consideration. He simply did not elaborate on this finding. And I think it is in this context that a statement that the level of the honesty of the worker should not be ignored, can also be understood. The worker was not found guilty of an offence involving dishonesty.

[286] It is against this background that the ultimate conclusion by the commissioner that the type of offence did not go into the heart of the relationship which is trust, must be understood. What the commissioner may well be saying here is that if one has regard to the unblemished record of fourteen years of service, it cannot be said that the worker could not be trusted with any other functions by the employer. For fourteen years the worker had not rendered himself guilty of any misconduct. He had been loyal to the employer. One incident which did not involve dishonesty could not, in the

view of the commissioner, whose duty it was to assess these matters, wipe out the trust that was built over a period of fourteen years. In effect what the commissioner is saying is that if one has regard to all the circumstances of the case it could not be said that the relationship between the worker and the employer had become intolerable. There was nothing to suggest that he could not be entrusted with some other functions other than those relating to searches. That seems to me to be the context in which the commissioner made a statement. Seen in this sense, the statement cannot be faulted.

[287] Mr Sidumo was employed by the employer since 2 December 1985. He rose through the ranks. At the time of his dismissal he was a Patrolman Grade 2. He was stationed at Precious Metal Refineries and was transferred to Waterval Redressing Section of Rustenburg Platinum Mines. On the evidence only Patrolmen Grade 3, who are senior patrolmen, work in that section. He was posted at that section because of his working experience. He had mostly worked in a section where searches were conducted at random. It is true, on the evidence he had signed documents acknowledging that he knew search procedures. His evidence was that Mr Sibakela did not explain to him the procedures. The surveillance shows that he conducted random searches. Admittedly he failed to perform satisfactorily the duties he was hired to perform. But he had devoted fourteen years of loyal service to the employer.

[288] Ultimately, the commissioner had to balance, on the one hand, employment justice and the need to protect the worker from harsh and arbitrary action, and on the other hand, the need for efficient operation of the employer's business and the

employer's entitlement to satisfactory conduct and work performance from Mr Sidumo. Balancing these interests, in the light of the facts and circumstances of this case, the conclusion by the commissioner that dismissal was not fair, cannot be said to be unfair to the employer.

[289] In all the circumstances, I am unable to find that the commissioner ignored any material factor in evaluating the fairness or otherwise of the sanction imposed by the employer. In the result I cannot say that the employer did not have a fair trial before the commissioner with the result that a gross irregularity in the proceedings occurred. Nor can I, in all the circumstances of this case, conclude that the award made by the commissioner was manifestly unfair to the employer. It follows from these conclusions that the commissioner did not exceed his powers under the LRA. Nor can I say that the commissioner committed a misconduct.

In the event none of the grounds of review have been established. For these reasons I concur in the order proposed in the judgment of Navsa AJ.

Mokgoro J, Nkabinde J and Skweyiya J concur in the judgment of Ngcobo J.

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