THE REVIEW FUNCTION
OF THE LABOUR COURT

by

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SUMMARY

Under the 1956 Labour relations Act, parties who were dissatisfied with decisions of the then Industrial Court, could appeal to the old Labour Appeal Court, and then if still further unhappiness persists, to the former Appellate Division. Such appeals entailed placing before the court the complete record of the Industrial Court, and requesting it to decide if on the evidence, it would have come to the same conclusion. Sometimes the courts of appeal decide that they would, sometimes that they would not.

When planning the new Labour Relations Act 66 of 1995, the Cheadle Commission decided that this process was too slow, too technical, too cumbersome and too expansive. So it recommended that, at least in the case of the most common disputes, the issues should be decided quickly, informally and finally by arbitration. Unless the parties agree to private arbitration under the Arbitration Act, 42 of 1956, the Commission for Conciliation, Mediation & Arbitration (CCMA) would supply the arbitrators, who would exercise their powers, not under agreed terms of reference, but under the LRA itself. Like private arbitrators, those of the CCMA are also meant to dispose of matters with a minimum of legal formalities (see section 138(1) of the LRA).

But the drafters of the LRA did not mean to insulate arbitration awards entirely from the watchful eye of the Labour Court. They therefore specifically provided for review of CCMA arbitrations awards in section 145, but they also gave general powers of review in section 158(1)(g) respectively of the LRA.

As if the jurisdictional puzzle created by the LRA was not complex enough, the legislature added the Promotion of Justice Act 3 of 2000. It is an attempt to give expression to the constitutional right of fair labour practices and the constitutional standard of lawfulness and rationality. If section 145 limits the grounds on which commissioners’ actions can be reviewed, or if that section cannot be interpreted to reconcile it with the PAJA, it may well be that section 145 cannot pass constitutional
muster - unless that section constitutes a limitation compliant with section 36 of the Constitution. That would be for the Constitutional court to decide.
CHAPTER 1
INTRODUCTION

The Labour Court first had to determine what latitude it has to interfere with CCMA awards. The starting point is section 145 of the Labour Relations Act¹ (hereinafter “the LRA”). Section 33 of the Arbitration Act, which is virtually identical to the former section, has been the subject of a number of judgments by the High Court. Furthermore, the relationship between sections 145 and 158(1)(g) inevitably always plays a role in the court’s approach to its review function.

The court’s approach in Carephone v Marcus NO² means that one is entitled to review a commissioner’s arbitration award under section 145 on the same grounds provided for by the Constitution. One does not have to proceed in terms of section 158(1)(g) to achieve this. The court held, however, that section 145 does not allow consideration of the merits of a decision, as in an appeal. There is thus no mechanism in terms of which one can appeal against an arbitration award.

The Promotion of Justice Act³ (hereinafter “the PAJA”) was meant to give statutory muscle to the bones of the administrative justice provisions as set out in section 23 of the Constitution.⁴ The PAJA sets out inter alia the grounds on which administrative acts may be reviewed, and compels administrative tribunals and organs to provide reasons for their decisions. There are a number of points on which the provisions of PAJA and those of the LRA intersect.

PAJA regulates administrative action. This means essentially, the conduct of statutory organs. The LRA regulates the actions of the state, in its capacity as employer. Many decisions taken by the state as aforesaid, constitute administrative

¹ Act 66 of 1995.
³ Act 3 of 2000.
⁴ Act 108 of 1996.
action. So, apart from the jurisdictional uncertainty created by section 157(2) of the LRA, which confers concurrent jurisdiction on the Labour and High Courts in cases involving the state as employer, there is also now the possibility that such cases could be resolved either in the Labour Court under the LRA or the Employment Equity Act \(^5\) (hereinafter “the EEA”), or in the High Court under the common law or the PAJA. Furthermore the institutions created by the LRA are self-evidently statutory. Bargaining Councils and the CCMA exist by virtue of, and function according to the provisions of the LRA. The latter grants the Labour Court power to review these organs in terms of the provisions of sections 145 and 158(1)(g) of the LRA. But the CCMA and bargaining councils also seems to fall under the PAJA because their powers are statutory.

Chapter 2 contains the general principles of review in terms of section 145 of the LRA and also touches on section 33 of the Arbitration Act \(^6\) in passing. Chapter 3 includes the courts’ approach to errors of law, no jurisdiction, section 158(1)(g), a discussion of the review on grounds permissible in common law and the development of the common law rules.

Chapter 4 contains an exposition on the *Carephone* decision. Chapter 5 discusses PAJA. The discussion is subsequently concluded in Chapter 6.


\(^6\) Act 42 of 1965.
CHAPTER 2
REVIEW OF ARBITRATION AWARDS
IN TERMS OF SECTION 145

2.1 INTRODUCTION

Section 145 off the LRA sets out the following grounds:

1. **Section 145(2)(a)(i):** This section regulates misconduct by the commissioner in relation to his duties as arbitrator. Certain actions by arbitrators will plainly amount to misconduct, however, strictly that word is construed. One can cite, as obvious examples, outrageous rudeness to one or other of the parties or witnesses, imbibing on duty or closing off during the proceedings. But the more difficult question is whether an arbitrator is guilty of misconduct by making a mistake.

2. **Section 145(2)(a)(ii):** This section regulates gross irregularity in the conduct of the proceedings. Given the fact that commissioners are task to arbitrate two and sometimes three cases a day, it is not surprising that a number of procedural irregularities have surfaced in review proceedings.

3. **Section 145(2)(a)(iii):** Excess of power by the commissioner is regulated by this section. A commissioner will exceed his/her power when the former stays from the ambit of its jurisdiction, or makes a ruling or award beyond their powers, or where they make findings that are not justified by the evidence which leads him/her to draw inappropriate inferences. Conversely, a commissioner will not exceed his/her jurisdiction or powers if, given a choice of remedies, one remedy is chosen above another.

4. **Section 145(2)(b):** This situation where either one of the parties to the hearing has fraudulently, or by improper means, obtain an arbitration award in its
favour. The taking of a bribe is misconduct and renders the award improperly obtained.

### 2.2 SECTION 33 OF THE ARBITRATION ACT 42 OF 1996

This section is virtually identical to section 145, and has been the subject of a number of judgments by the High Court. These have stressed that by creating section 33 the legislature intended to limit judicial interference in the decisions of arbitrators to only the most flagrant miscarriages of justice. So the courts held, eg, that “misconduct” meant just that - and not merely errors of law or fact, which the English courts have labelled “legal misconduct”. To justify interference, irregularity must be “gross” and some judges ruled, of a procedural nature.

Excess of power only took place when the arbitrator stepped outside the terms of reference. And awards were improperly obtained only when arbitrators allowed themselves to be influenced by extraneous considerations, such as some promise of reward by one of the parties.

*Amalgamated Clothing & Textile Workers Union of SA v Veldspun*\(^1\) held, that the reason why the courts adopt a strict approach when it comes to reviewing the decisions of private arbitrations is, that the parties have agreed to the process for the obvious benefits it holds, not the least of which are speed and finality. It held further that the parties must put up with the downside of the process, which might include the odd mistake by an arbitrator. To subject an arbitration award to scrutiny on the merits (appeal) would not only undermine the consensual nature of the process, but also its speed and economy.

By replicating section 33 in section 145, it seems at first glance that the legislature intended the Labour Court to adopt the same strict approach when it came to reviewing arbitration awards. But, for reasons best known to themselves\(^\ast\), the drafters also conferred on the Labour Court the power to review any function performed under the LRA “on any grounds permissible in law” despite section 145

\(^1\) (1993) 4(10) SALLR 52 (A).
see section 158(1)(g). This created two problems for the court. Firstly is it bound to follow the decisions of the former Supreme Court when it review CCMA awards in terms of section 145. Secondly does section 158(1)(g) allow the court to venture beyond the confines of section 145 and consider grounds of review recognised at common law and more importantly by the Constitution.

2.3 THE MEANING OF MISCONDUCT

Before it dealt with the second problem, there were indications that the Labour Court was not taking as strict a view of the grounds specified in section 145 as the Supreme Court had done of the like provisions of the Arbitration Act.

In *Reunert Industries t/a Reutech Defence Industries v Naicker* Judge Landman noted that although decisions interpreting the Arbitration Act might provide useful guidance, the Labour Court had to remember that civil court judgments under section 33 of the former act, dealt with voluntary arbitration, and that “there will be less reason to base judicial restraint … on the premise that the parties have chosen their own judge and must bear the consequences of that choice”. That the compulsory nature of CCMA arbitrations proceedings is affecting the Labour Courts’ approach to the interpretation of section 145 is apparent from the reasoning in the judgments so far decided.

Certain actions by arbitrators will plainly amount to misconduct, however strictly that word is construed. One can cite, as obvious examples, outrageous rudeness to one or other of the parties or witnesses, imbibing on duty, or dosing off during the proceedings. But the more difficult questions is whether an arbitrator is guilty of misconduct by making a mistake. The English courts held that a gross mistake can amount to misconduct and, deferring to the sensibilities of arbitrators, have termed this “legal misconduct”, a notion firmly rejected by our civil courts.

In *Reunert*, however the court said that, while misconduct did not embrace a mistake of law or fact, a gross mistake or carelessness by a commissioner acting as

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2 (1997) 8(6) SALLR 91 (LC).
3 Supra.
an arbitrator can be indicative of misconduct as contemplated by section 145. The important message laid down in this judgment is that CCMA commissioners, unlike private arbitrators are governed by the LRA. Non-compliance with its provisions will render their actions unlawful and the awards that flow from them defective and hence reviewable. So it follows that commissioners are not intended to be the final arbiters of questions of law. This being so, it is possible that the notion of “legal misconduct”, rejected by the High Court in cases concerning private arbitration, may be applicable when it comes to the review of arbitrations awards by commissioners. They must in short adhere to the provisions of the LRA.

But giving the manner in which the Labour Court is interpreting the phrase “gross irregularity” in the proceedings, debate over the precise meaning of “misconduct” is probable academic. A gross irregularity in any event amounts to misconduct. Reunert stressed that the phrase must bear its ordinary meaning, and that the prime example would be non-compliance with the rules of natural justice, ie procedural irregularity. But in Mutual & Federal Insurance Co v CCMA the court indicated plainly that reviewable “gross irregularities” are not limited to those of procedural nature. Judge Jali cited Goldfields Investment v City Council of Johannesburg.  

“It seems to me [said Schreiner J] that gross irregularity falls into two broad classes. Those that take place openly as part of the conduct of the trial – they might be called patent irregularities, and those that take place inside the mind of the judicial officer, which are only ascertainable from the reasons given by him and which may be called latent … The crucial question is whether it prevented a fair trial of the issues. If it did prevent a fair trial of issues then it will amount to a gross irregularity. Many patent irregularities have this defect and if from the magistrate’s reasons it appears that his mind was not in a state to enable him to try the case fairly this will amount to a latent gross irregularity.”

Apart from its content, a noteworthy aspect of this passage is that it comes from a case concerned with a magistrate’s decision, with which a reviewing court is generally stricter than that of a private arbitrator. According to this approach, gross irregularity are not limited to procedural errors, but include errors of law and fact that are so unreasonable as to warrant the inference that the functionary “has not applied

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5 1938 TPD 551.
6 Ibid.
his mind to the matter in accordance with the behest of the statute”. The adjective “gross” still provides a serious limitation. The civil courts once held that a “mere error” is not reviewable, but that before it will become so a mistake must be so “gigantic as to warrant the inference that some other ground of review is present. The High Court has dropped this limitation in ordinary review cases, and there are signs that the Labour Court is prepared to do so when assessing unreasonableness under section 145.

2.4 THE MEANING OF “GROSS IRREGULARITY”

Given the fact that commissioners are tasked to arbitrate two and sometimes three cases a day, it is not surprising that a number of procedural irregularities have surfaced in review proceedings. *Mutual & Federal Insurance Co* is one such case. When the employee had given evidence at the arbitration the employer’s representative had sought to draw the commissioner’s attention to the fact that the answers furnished by the employee were materially different from what he had said at the disciplinary hearing. The commissioner, told the employer that this was a matter for argument and that the point should be pursued at that juncture. Not content with denying the employer an opportunity to put the conflicting statements to the witness in cross-examination, (which is in itself a gross irregularity), the commissioner informed the employer when he sought to make his closing argument that he need not bother because, he knew what the employer is going to say. This said the court amounted to a gross irregularity. So, too, did the commissioner’s comments that the employer’s representative were “incompetent” and that he “knew what the case was about” before the evidence had been presented.

The commissioner’s insistence that an employer’s representative put questions to the employee through him was held to amount to a frustration of the right to cross-examine, that amounted to a gross irregularity see *B & D Mines v Sebothana NO*.  

So too was the failure to put witnesses under oath in *Morningside Farm v Van Staden NO*. Perhaps the clearest example of “latent irregularity” yet to come before

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7 Supra.  
8 1162/97.
the court was in *Abdul v Cloete NO*,\(^\text{10}\) where a part time commissioner upheld the dismissal but ordered the employer to pay the employee three months’ salary as from the date of dismissal. He went further and filed an affidavit for purposes of the review proceedings in which he said in one breath that he believed that the sanction of dismissal had been too harsh and in the next, that the offence of which the employee had been found to be guilty had resulted in the irretrievably breakdown of the relationship of trust with the employer. The court found that both the award and the supplementary reasons were hopelessly confused and contradictory, and concluded that at the time he made his award the arbitrator had failed “to apply his mind to the issues before him”. The court found that the mindlessness exhibited by the arbitrator amounted at least to a latent irregularity of the type referred in the *Goldfield Investment* case. The court then held that it is not sufficiently merely to record a number of random and often mutually contradictory observations and then, in apparent attempt to resolve all these to conclude that, as was done in this case, an award of monetary compensation is appropriate.

The arbitrator said the court was obliged to resolve apparent contradictions which were essential to his decision and reasons and to make findings thereon. A complete failure to make the necessary decisions on findings in a manner that was capable of reasonable understanding constituted a gross irregularity as defined in section 145 of the LRA.

The failure in the logic of an award is reviewable under section 145 is also apparent from *Director General Department of Labour v Claasen*.\(^\text{11}\) Here the arbitrator was taken to task for finding against the employee because he had “pleaded” that he was legitimately entitled to be promoted, when his application contained an express averment to that effect.

An award, in short, must be justifiable, which means, according to the court, that the decision must be “capable of objective substantiation”. The award in *Shoprite*

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\(^\text{9}\) (1998) 19 *ILJ* 1204 (LC).
\(^\text{10}\) [1998] 3 BLLR 264 (LC).
\(^\text{11}\) J1033/97.
Checkers v CCMA\textsuperscript{12} was found to have fallen lamentably short of that standard. The commissioner had rejected the employer’s evidence of why it had given the employee 24 hours notice of the pre-dismissal disciplinary hearing (the fairness of which was the sole question reserved for his decision), with these immortal lines: “In my opinion the employer shot their own case in the foot. They gave Selina shorter notice than was customarily given.” If any intrinsic meaning could be given to these words, said the court, it was totally unjustified because no evidence had been led regarding the notice usually given by the employer for disciplinary hearings.

A commissioner also commits irregularity if he ignores relevant evidence in coming to his conclusion. In \textit{Sosha v Buthelezi},\textsuperscript{13} the court was concerned with the alleged unfair failure to promote the employee. The employer had placed before the commissioner evidence that the employee had refused promotion to any arrears other than those close to were he currently worked. By failing even to mention that this evidence had been presented, and accordingly not dealing with it, the commissioner committed a gross irregularity that amounted to misconduct. And he had exacerbated matters by ordering that the employee should “take corrective measures by removing the said unfair labour practices”, without specifying what they were and what the employer should do.

\textit{Legal Aid Board v John NO},\textsuperscript{14} provides another example. In this case the employee had alleged that the employer had committed an unfair labour practice (ULP) by depriving him of a car allowance. During the course of the hearing, the commissioner had ruled that the issue before him was whether the employer had committed an ULP by not giving the employee a hearing before taking away the allowance. Pursuant to this ruling, the commissioner had disallowed evidence from the employer on the nature and content of the motor scheme and as to whether the employee was entitled to the disputed allowance. The court held that this amounted to an irregularity, as the employee’s entitlement to be heard before the allowance was withdrawn could only be determined if it was established that he was entitled to it. Furthermore, the employee had based his claim on item 2(1)(b) of Schedule 7,

\begin{itemize}
  \item \textsuperscript{12} J852/97.
  \item \textsuperscript{13} [1997] 12 BLLR 1639 (LC).
  \item \textsuperscript{14} [1998] 4 BLLR 400 (LC).
\end{itemize}
which presupposed that the commissioner was obliged to consider whether the car scheme constituted a “benefit” within the meaning of that provision. This he clearly could not do without considering evidence regarding the nature of the scheme.

2.5 MEANING OF “EXCEEDS THE COMMISSIONER’S POWERS”

(a) In *Reunert Industries*\(^\text{15}\) the court held that a commissioner will exceed his powers when he/she strays from the ambit of the commissioner’s jurisdiction, or makes a ruling or award beyond the powers of the commissioner: or where the commissioner makes findings that are not justified by the evidence which leads him/her to draw inappropriate inferences. Conversely, a commissioner will not exceed his/her jurisdiction or powers if, given a choice of remedies, one remedy is chosen above another. These principles were also applied in *Smith v CCMA, Theron and Greyhound Coach Services*.\(^\text{16}\)

(b) It is impossible to give an exhaustive list of acts or the failure to act, which would amount to a commissioner exceeding his/her powers. However Van Zyl\(^\text{17}\) provide the following examples:

(i) where a commissioner awards compensation in excess of the amounts prescribed by the LRA or notice pay, which does not fall within the remedies available to an employee whose dismissal is arbitrated by the CCMA;

(ii) where a commissioner orders the employer to hold a disciplinary hearing;

(iii) where a commissioner accepts jurisdiction to arbitrate a dispute concerning organisational rights where the trade union had not fully complied with the requirements of section 21(2) of the LRA;

\(^\text{15}\) *Supra.*

\(^\text{16}\) [2004] 8 BLLR 73 (LC).

(iv) where a commissioner fails to follow principles laid down by decisions of
the Labour and Labour Appeal Courts;

(v) where a commissioner misconceived his/her functions as having to
determine a fair sanction instead of determining whether the dismissal is
for a fair reason;

(vi) failure to consider whether an employee has shown good cause for a late
referral of an unfair dismissal dispute for conciliation; and

(vii) where, in the absence of the power to make a final and binding award, a
commissioner rules at conciliation that the person referring the dispute is
an employee.

(c) In *Le Roux v CCMA* 18 it was held that one must not be misled by the use of the
word “exceeded”. It does not mean that an award can only be set aside if what
is awarded is greater than that which can permissibly be awarded. It was held
further that it simply means that if the award made is one which the
commissioner had no power to make, then it falls to be set aside as a award in
excess of the commissioner’s powers.

(d) In *Free State Buyers Association t/a Alpha Pharm v SACCAWU*, 19 it was held
that a commissioner does not exceed his/her powers by failing to issue an
arbitration award within 14 days, of the conclusion of the arbitration
proceedings as enjoined by section 138(7) of the LRA. It was held further that
an award, once it has been signed, will be issued once it is made available for
service and filing. Section 138 makes provision for an extension of the time
within which to issue an award, and that section 138(7)(a), in so far as it relates
to the signature and issuing of the award, is intended to be more of a guideline;
it is not intended to pre-empt or. It was held further that, there may, of course
be circumstances where an award is issued so late that different consequences

may follow. In conclusion it was held that if there is substantial compliance with the section the arbitration award is not a nullity.

2.6 THE MEANING OF “AN AWARD MUST BE JUSTIFIABLE IN RELATION TO THE REASONS GIVEN FOR IT”

(a) In Carephone and also in Malan v Bulbring NO, it was held that where an award is not “justifiable in relation to the reasons given for it”, the commissioner had acted outside the constitutional constraints to which he/she was subject and accordingly, the award is reviewable under section 145 of the LRA.

(b) In Rabie v Van Staden, the court applied the reasoning in Shoprite Checkers v Ramdaw that rationality is a basic requirement of any exercise of public power. Rationality is similar enough to justifiability in the sense understood in the Carephone test, to allow the conclusion that the Carephone test remains good law. Thus an arbitration award may be reviewed under section 145 on the basis that the outcome is irrational or not justifiable on the basis of the reasons given for it.

(c) In McCord Hospital v Sithole, it was held that the Labour Court only has to determine whether or not, on the basis of the evidential material before the CCMA, the award is rationally justifiable in relation to the reasons given therefore.

(d) In Adcock Ingram Critical Care v CCMA, Miles, SACWU and Vilikazi, it was stated that an award is reviewable on the basis of it not being “justifiable” where the difference between conclusions of law or fact reached by the tribunal of first instance, and those drawn by the reviewing court is so marked as to impinge upon the basic norm of the necessity of a fair trial. It was also held that the justifiability criteria extends also to errors of law.

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2.7 THE MEANING OF AN “AWARD HAS BEEN IMPROPERLY OBTAINED”

In *Stocks Civil Engineering v RIP NO.*, the following were stated that the phrase contemplates a situation where the one party to the arbitration has fraudulently, or by fraudulently withholding knowledge from the other party that arbitration proceedings were to take place, or by improper means, obtain an arbitration award in its favour. The grounds for review may also overlap. The taking of a bribe is misconduct and renders the award improperly obtained.

The phrase attracts a situation where one party to the arbitration has fraudulently, or by fraudulently withholding knowledge from the other party that arbitration proceedings were to take place or by other improper means, examples dishonesty or bribery, obtained an award in his or her favour. It is easily understood that the latter is misconduct and renders the award improperly obtained. The following cases attempt to expand on this topic.

2.7.1 *DICKSON & BROWN v FISHER’S EXECUTORS*  

The court declined to define misconduct and held that it was a word which explained itself, but stated that some wrongful or improper conduct was required.

2.7.2 *BESTER v EASIGAS*

The court discussed earlier cases and held that the meaning of misconduct was not limited to dishonesty, but said to be moral turpitude or *mala fides*.

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27 1915 AD 160.
28 1993 (1) SA 30 (C) at 35-36.

13
2.7.3 STOCKS CIVIL ENGINEERING v RIP NO

The court held that private arbitrations ought to be reviewed also in the Labour Court in terms of the norms of section 33 (1) of the Arbitration Act, and that this is the correct approach.

The court held further that, in dissecting the grounds in the latter section, it was clear that the first three relate to the manner in which the arbitrator functioned, not to the outcome of the arbitration. The fourth ground, it held further, for example, where the award was improperly obtained, is also a ground which relates to function; and further that where the arbitrator seriously reneges on his duties it can be classified as misconduct or a gross irregularity in the proceedings.

The court concluded on this score that, it will be entitled to review to determine whether an arbitrator functioned as aforesaid in the way he contracted to do, namely by acting honestly, duly considering all the evidence before him and having due regard to the applicable legal principles. It held further that if he does this, but arrives at wrong conclusions, so be it; but if he does not and shirks his duties, he is effectively malfunctioning as an arbitrator and reneges on the agreement under which he was appointed. His award, held the court, will then be tainted and reviewable.

At 378 paras 23-24.
At 385 para 51.
At 385 para 52.
This chapter deals with the courts’ approach to, errors of law, no jurisdiction, section 158(1)(g), review on grounds permissible in common law and the development of the common law rules.

3.1 ERRORS OF LAW

What about pure errors of law, which have traditionally been held to be beyond review?

(a) In *Mlaba v Masonite (Africa) (Pty) Ltd,* the court indicated that it is also prepared to classify them as gross irregularities if they lead a commissioner down the wrong path entirely. Here the employee had been dismissed for refusing to comply with working hours that contravened the provisions of the Basic Conditions of Employment Act (hereinafter “the BCEA”). The court held that since the employee was dismissed for insubordination, the first question was whether the instruction was lawful. The commissioner had failed even to consider this. The court held that this could only indicate that he was unaware of the applicable provisions of the BCEA. If he had applied the relevant sections, he would not have found that the employee was guilty of insubordination. The employer was accordingly ordered to re-instate the employee.

(b) In *Rustenburg Platinium Mines v CCMA NO,* the court set aside a decision by a commissioner, to grant condonation for the late referral of the dispute on the basis that he had completely disregarded the applicable legal principles and...
allowed himself to be influenced solely by the “attitude of the employee”, by which was meant his determination to proceed with the application.

(c) The court went still further in *Standard Bank of South Africa v CCMA*. Here the arbitrator had found that the employer had unfairly dismissed the employee, a senior official who was in charge of attendance registers, even though she had correctly been found guilty of falsifying her own register and fraudulently claiming overtime. The reason for this finding was that dismissal was too harsh a sanction in the circumstances. Not so, said that court. The employee had by her conduct committed an offence which carried a possible penalty of dismissal. She was in a position of trust, and it was trite that employee’s could be dismissed if they did anything incompatible with the due and faithful discharge of their duties. The court added: “There is no indication whatsoever in the award that [the commissioner] took into consideration the strong line of authorities (that confirmed the importance of trust to the employment relationship), or that he had regard to the particular needs of the applicant as an employer in the banking industry. There is simply nothing to suggest that he weighed as part of his reasoning, the code of conduct and disciplinary provisions to which I have referred.”

And further that: “Where as in this case, there is clearly established principles in our law, that bears on the circumstances then in question, parties should be able to participate in arbitration proceedings under the auspices of the CCMA, with the confidence that such principles will be recognised and taken into consideration.”

This judgment makes it clear that to avoid committing misconduct or a gross irregularity in the proceedings (of the latent type) a commissioner, is required not only to adhere to the rules of the LRA, but also to have regard to the guidelines laid down by the courts.

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5 At 106 para 48.
3.2 NO JURISDICTION

3.2.1 COMMISSIONERS EXCEED THEIR POWERS IF THEY MISTAKENLY ASSUME JURISDICTION

In NUMSA v Zeuna Starker,6 the commissioner concerned was required to decide whether the CCMA had jurisdiction over a dismissal dispute which the employer alleged arose prior to the implementation of the LRA, and the union alleged arose afterwards. The commissioner considered the written representations of the parties and decided that the CCMA did not have jurisdiction. The latter, said the court, had gone further than he was required to do; his duty was merely to make a finding on when the dispute as framed by the union had arisen. By going further and accepting the employer’s version, he exceeded his powers.

In Quality Workware Manufacturing Co v Commissioner Adair,7 the employee had been retrenched prior to the implementation of the LRA, but had raised a dispute concerning his entitlement to severance pay after 11 November 1996. The commissioner accepted as the date on which the dispute had arisen, the time when the employee had lodged it with the CCMA. But said the court, the mere fact that a new statutory regime had come into force did not have the effect of dividing what was essentially one dispute into two.

3.2.2 IS THE LABOUR COURT ALWAYS CORRECT WHEN IT DECIDES THAT THE CCMA LACKS JURISDICTION?

In Speciality Stores v SACCAWU,8 Judge Zondo found that the CCMA did not have the power to decide what a “workplace” was when it entertained disputes about organisational rights under section 21 of the LRA. He thereupon decided for it in an urgent application launched by the employer. His ruling that the places in which the union claimed organisational rights, were not workplaces as defined effectively put an end to the dispute. On appeal against this decision in SACCAWU v Speciality Stores,9 the union argued that the CCMA indeed had such competence. Although

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6 [1997] 12 BLLR 1629 (LC).
7 [1998] 4 BLLR 419 (LC).
8 [1997] 8 BLLR 1099 (LC).
not emanating from a review proper, the remarks of the LAC in this matter provide an important insight into its approach towards the powers of the CCMA.

Writing for an unanimous court, DJP Froneman began by remarking that since the CCMA was a statutory body, it could perform its functions only if the jurisdictional preconditions laid down by the relevant provisions of the LRA existed. These had to be determined by reference to the LRA and “other accepted principles of law”, by which he meant those of the common law and the Constitution.

The court held further that a distinction had to be drawn between “jurisdictional facts” that could be objectively determined and those which the administrative authority was given the exclusive power to determine. Where the precondition was an objective fact or question of law, the administrative agency’s decision that it existed could be reviewed by the court, and if found to be incorrect, set aside. But this did not preclude the administrative authority from determining it’s own jurisdiction, subject to review if it was wrong. The court concluded that the dispute should therefore have been referred to the CCMA, and the commissioner should have been permitted to decided whether the workplaces concerned fell within the statutory definition. Only then should the matter have been referred to the Labour Court for review.

3.3 SECTION 158(1)(g) OF THE LRA

(a) What emerges from the above judgments is that the Labour Court has taken a fairly liberal view of the grounds specified in section 145 of the LRA. But is it confined to these, or can it go further and apply the wider grounds that are recognised by the common law and provided for in the Constitution? This answer is of great importance because while the civil courts were limiting the interpretation of section 33 of the Arbitration Act, they were expanding the grounds upon which they could review the acts of statutory bodies under the common law. The drafters of the Constitution expanded these grounds still further when they gave every body a right to administrative action that is “justifiable according to the reasons give”. The Labour Court initially followed, and is still following a somewhat ambivalent approach towards the problematic relationship between sections 145 and 158(1)(g).
(b) In *Edgars Stores v Director, CCMA*,\(^{10}\) the applicant sought to persuade the court that a commissioner's ruling that the employer had unfairly dismissed an employee for taking leave without authorisation was unreasonable and hence reviewable. This was a bold line of attack, as it came close to asking the court to assess the merits of the case. But the applicant urged the court could do so as the arbitration award was an exercise of statutory power and subject to the normal grounds of attack afforded by the common law and the Constitution. These included unreasonableness of a form, which might not be “gross” but which, it was submitted, led the commissioner to an unjustifiable conclusion.

Under the common law, unreasonableness includes irrationality, which the courts' have found exists when a statutory functionary fails to take account of relevant evidence or has regard to irrelevant evidence or immaterial considerations, or draws illogical considerations from the evidence that is considered.

Judge Revelas conceded that the common law grounds of review had been relaxed to include mere unreasonableness as a ground of review, and that section 158(1)(g) would permit the court to review functions performed under the LRA on that ground. But she noted that section 145 expressly limited the scope of review of the arbitration proceedings to very narrow grounds. She added

“In my view the phrase, ‘despite section 145’ found in section 158(1)(g), should be construed to mean nothing more than despite the review of arbitrations awards on very narrow grounds in terms of section 145 all other acts[ which are not arbitrations awards] can be reviewed on any basis permissible in law, that is, on the wider basis permissible such as the basis of unreasonableness”.\(^{11}\)

(c) The court then referred to the contextual and policy factors which are clearly indicators of a legislative intent to restrict reviews of CCMA awards, to the narrow grounds specified in section 145. But the fear that application of the

\(^{10}\) [1998] 1 BLLR 34 (LC).

\(^{11}\) At 41 para H.
wider common law and Constitutional grounds would lead the court, “in effect deciding disputes” appears, with respect, to overlook the purpose of common law review. However, wide the grounds that have been developed under these regimes may be, a rose remains a rose. A court is simply permitted to ask whether the award is unreasonable, without having to take the further and essentially artificial step of asking whether it was so “grossly” unreasonable that it was symptomatic of some further defect, such as a complete failure to apply the mind. The fact was that the court was confronted with a challenge that went, not to some identifiable error of law or procedure but to the essentially subjective realm of whether the sanction of dismissal was appropriate given the admitted misconduct of the employee. That was why the applicant had to rely on “mere” unreasonableness. The court held then that since the commissioner had committed neither “misconduct” nor a “gross irregularity”, his award could not be interfered with.

(d) The *Edgars* approach was in any event short lived, because a few weeks later *Kynoch Feeds v CCMA*¹² was decided. The court was confronted with a similar challenge, this time against a decision of the commissioner that the retrenchment of an employee was unfair even though he had refused an alternative position in another area because his wife could not find work there. Judge Revelas decided that her decision in *Edgars* was “clearly wrong”, and she now noted that the LRA called upon any person applying it to interpret its provisions in compliance with the Constitution, which in turn required courts’ interpreting legislation or developing the common law to promote the spirit purport and objects of the Bill of Rights and conferred a right to administrative action which is “justifiable in relation to the reasons given for it”.

(e) She now conceded that the policy considerations she had cited in *Edgars* could never outweigh the rights afforded in the Constitution. On the contrary there were policy considerations that compelled a court to apply section 158(1)(g) to CCMA awards. One of these was that although the wide grounds might promote more interference by the court, it would be “beneficial” for all interested

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parties if there were to develop a strong body of guidelines and principles to be followed by commissioners. This said the court would “serve as an educational process”.

3.4 REVIEWS ON GROUNDS PERMISSIBLE IN COMMON LAW

In Hira v Booysen\(^\text{13}\) the court has considered and confirmed the position relating to common law reviews as follows:

(a) Generally speaking, the dictum in Johannesburg Consolidated Investment Co v Johannesburg Town Council\(^\text{14}\) applies. This means that the non-performance or wrong performance of a statutory duty or power by the person or body entrusted with the duty or power will entitle persons injured or aggrieved thereby to approach the court for relief by way of common law review.

(b) Where the duty or power is essentially a decision-making one and the person or tribunal has taken a decision, the grounds upon which the court may, in the exercise of its common-law review jurisdiction, interfere with the decision are limited. These grounds are set forth in Johannesburg Stock Exchange v Witwatersrand Nigel\(^\text{15}\) as follows:

(i) where the person or tribunal concerned failed to apply his or her mind to the relevant issues in accordance with the ‘behests of the statute and the tenets of natural justice;

(ii) the decision was arrived at arbitrarily or capriciously;

(iii) the decision was arrived at mala fide;

(iv) the decision was arrived at as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose;

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\(^{13}\) 1992 (4) SA 69 (A) at 93A-94A.

\(^{14}\) 1903 TS 111 at 115.

\(^{15}\) 1988 (3) SA 132 (A) at 152A-E.
(v) the person or the tribunal misconceived the nature of the discretion conferred upon him or her and took into account irrelevant considerations or ignored relevant ones;

(vi) the decision of the person or the tribunal was so grossly unreasonable as to warrant the inference that he or she had failed to apply his or her mind to the matter in the manner aforesaid; and

(vii) some of the stated grounds may overlap.

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

(d) Where the powers or functions exercised by the tribunal is of a purely judicial nature, for example, where it is merely required to decide whether or not a person’s conduct falls within a defined and objectively ascertainable statutory criterion, then the court will be slow to conclude that the tribunal is intended to have exclusive jurisdiction to decide all questions, including the meaning to be attached to the statutory criterion, and that a misrepresentation of the statutory criterion will not render the decision assailable by way of common law review. In a particular case, it may appear that the tribunal was intended to have such exclusive jurisdiction, but then the legislative intent must be clear.

(e) Whether or not an erroneous interpretation of a statutory criterion, such as is referred to in the previous paragraph, ie where the question of interpretation is not left to the exclusive jurisdiction of the tribunal concerned, renders the decision invalid, depends on its materiality. If, for instance the facts found by the tribunal are such as to justify its decision even on a correct interpretation of the statutory criterion, then, normally, ie in the absence of some other review ground there would be no ground for interference.
If applying the correct criterion, there are no facts upon which the decision can reasonably be justified. In the latter type of case, it may justifiably be said that by reason of its error of law, the tribunal “asked itself the wrong questions”, or “applied the wrong test” or “based its decision on some matter not prescribed for its decision”, or “failed to apply its mind to the relevant issues in accordance with the behest of the statute” culminating in its decision being set aside on review.

In cases where the decision of the tribunal is of a discretionary rather than purely judicial nature for example, where it is required to take into account considerations of policy or desirability in the general interest or where opinion or estimation plays an important role, the general approach to ascertaining the legislative intent may be somewhat different.

3.5 DEVELOPMENT OF THE COMMON LAW RULES

Firstly is the expanded view of the concept of unreasonableness, which was judicially initiated in *Theron v Ring van Wellington van die NG Sendingkerk in Suid-Afrika*, where the court held that a contractual tribunal can be subject to a standard of reasonableness: which was adopted by the Labour Court in *Edgars Stores v Director of the CCMA, Mias NO, SACAWU and Matyobeni*. The court agreed that the earlier common law test of “gross unreasonableness”, previously applicable with regard to the judicial review of administrative action, had under the new constitutional order now been replaced by the less stringent test of “unreasonableness”. The court was therefore able to review all acts referred to in section 158(1)(g) of the LRA, on the basis of “unreasonableness”.

The second development is that the *Hira* judgment was handed down before the interim and final Constitutions were operative. Section 39(2) of Act 108 of 1996 mandates the court, when developing the common law, to promote the spirit, purport and objects of the Bill of Rights, including the right to fair administrative action.

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16 *(1976) 2 SA 1 (A).*
17 *(1998) 19 ILJ 350 (LC).*
Therefore, section 158(1)(g) of the LRA must be interpreted to give effect to the former section of the Constitution.

In this context, the Labour Court in *Portnet v La Grange*\(^{18}\) has held that its powers to review dispute resolution functions include section 33 of the Constitution in that the administrative action must be justifiable in relation to reasons given for it.

\(^{18}\) (1999) 20 *ILJ* 916 (LC).
CHAPTER 4
THE CAREPHONE DECISION

4.1 BACKGROUND

An important issue raised by the Labour Court in review applications, was concerned with how far the courts should go in substituting its own view of how particular matters should have been handled for that of commissioners responsible for the initial decision. Mindful of the constraints the courts have generally imposed on themselves when entertaining applications for review, as opposed to appeals, the decisions on review applications highlight the success rate of those who challenged the CCMA which was higher than many had imagined possible.

The overwhelming majority of Labour Court judges took the view that they were not limited to the specific and limited grounds set out in section 145 of the LRA, but could invoke the wider common law and constitutional grounds of review by virtue of section 158(1)(g). This activism of some of the judges was noted with alarm by many.\(^1\) To the more conservative judges in this respect, the principle concerned was that an activist approach could open the proverbial floodgates and paralyze the new dispute resolution system, with the kind of backlogs that the Cheadle Commission intended to avoid when it drafted the 1995 LRA.\(^2\)

The Labour Appeal Court and Parliament are the only two institutions that can reverse this activism. I submit therefore, that this is why the seminal judgment in the Labour Appeal Court case of Carephone v Marcus was awaited with such abated breath. It was generally expected that, by resolving the disputed over the relationship between sections 145 and 158(1)(g) the court would set clear guidelines for future cases.

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1 For example, Judges Revelas, Basson, Landman and acting Judges Tip and Pretorius.
2 For example, Judge Mlambo.
Of the Labour Court judges, Mlambo J was one who steadfastly held the view that applications for review of CCMA arbitrations awards must be brought under section 145. It was therefore fitting that his judgment in the court a quo afforded the Labour Appeal Court the opportunity to settle this debate.

The facts that were before Mlambo J, was that the company had sought to persuade the judge to set aside a commissioner’s decision not to postpone an arbitration hearing. This was the only way it could think of attacking the outcome of the subsequent default proceedings: an order that the individual respondents, eight employees who complained that they had been unfairly dismissed, be collectively paid R480 000. Given the facts, the prospects for the review application were, at best, exceedingly bleak. Carephone had already applied for postponements on several occasions because its attorney had been unavailable. When, finally, a commissioner heard the matter, an attorney belonging to the same firm, applied for yet another postponement because his colleague who handled the case was still unavailable due to illness of his child. The commissioner, quite correctly, noted that the attorney was employed by a larger firm that should have found a substitute, and ordered the proceedings to commence. The attorney and employer representative present then withdrew in spite of a warning that the case would proceed in their absence.

The Labour Court, however sympathetic it might have been to Carephone, would have been hard put, indeed, to justify setting aside the commissioner’s decision, even under section 158(1)(g). Mlambo J nevertheless chose to use the occasion again to express his concern about the lengths to which his judicial brothers and sisters had taken the review process under the latter section. He singled out, especially Standard Bank of SA v CCMA and Checkers v CCMA the effect of which, he said, would “render section145 ineffectual” and this would never have been intended by the legislature. This, he added, could never have been the intention of the legislature when it had approved these unhappily phrased provisions. For this

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3 Carephone v Marcus [1998] 8 BLLR 872 (LC).
5 At 875-876 paras I-A.
reason, he said, he did not intend to follow the 158(1)(g) path. This was the facts that the Labour Appeal Court was presented with.

I submit that the relationship between the former said sections is confused by the fact that section 145 refers specifically to arbitration awards of the CCMA, and is placed at the end of a long list of sections devoted to arbitrations proceedings. It proscribes expressly that an award is “defective”, and liable to be set aside by the Court on certain specified grounds, namely “misconduct”, a “gross irregularity in the proceedings”, or “excess of power by the commissioner”.

On the other hand, section 158(1)(g) is found among the list of powers of the Labour Court. It states that the Court may review “the performance or purported performance of any function provided for in this Act, or any act or omission of any person or body in terms of this Act, on any grounds that are permissible in law”. As arbitration by the CCMA is a function provided for in the LRA, and since the latter section was introduced with the words “despite section 145”, it was generally assumed that it, with its wider scope of review, subsumed the former. The only way to give any meaning to section 145 was to assume that it was intended to lay down specific time limits for bringing applications for the review of CCMA awards.

4.2 THE CAREPHONE DECISION

Froneman DJP, writing for a unanimous Labour Appeal Court began unravelling this legislative tangle by setting the LRA and the institutions it has created in their wider constitutional backdrop. All, he noted, ultimately, must succumb to the Constitution, draw their competencies from it and accept that they are governed by it.

The CCMA said the Court is an organ of state and, as such, bound directly by the Bill of Rights and the statement of basic values and principles governing public administration. What this then in effect means is that, parties who are subject to compulsory arbitration under the auspices of the CCMA are entitled to have their fundamental rights respected, however extensive the powers granted by the LRA to the CCMA may be. These include the right to lawful and fair administrative action that is also “justifiable in relation to the reasons given for it”. The court held, that the
Constitution requires that the process of arbitration for compulsors under the LRA must be:

“fair and equitable; that the arbitrator must be impartial and unbiased, that the proceedings must be lawful and procedurally fair, that the reasons for the award must be given publicity and in writing; that the award must be justifiable in terms of those reasons, and that it must be consistent with the fundamental right to fair labour practices”.6

Ultimately, the Court held that

“there are no express or implied provisions in the LRA to suggest that the powers of a commissioner in compulsory arbitration under the LRA may exceed the constitutional constraints on those powers or may be given in conflict with constitutional values”.7

As Froneman DJP noted, it would have been surprising had there been any such provisions. Taken to its logical conclusion, if there had been, it would have been even more surprising had they not been challenged and set aside as unconstitutional.

So far, the reasoning is indistinguishable from that of most of the judgments that have supported the 158(1)(g) path. Indeed, it is precisely the fact that the CCMA is an organ of state and, thus, bound by the requirements of administrative fairness that induced, inter alia judges Revelas, Basson and Landman and acting judges Tip and Pretorius to assume the Labour Court could not be bound by the limited review grounds in section 145.8 Froneman DJP said, herein lay their error. By assuming that section 145 had to be given the strict interpretation that the High Court had placed on the like provisions of section 33 of the Arbitration Act in cases like Amalgated Textile Workers v Veldspun, the judges of the Labour Court had lost sight of the fact that section 145 occurs in a different constitutional and statutory context and had to be interpreted in line with the new context.

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6 At 1099 paras G-H.
7 At 1100 paras G-J.
8 1994 (1) SA 162 (A).
To interpret section 145 in the way in which the then Supreme Court interpreted section 33 would mean that section 145 would be unconstitutional. So, the courts are bound to interpret it, as they are bound to interpret any legislative instrument, in a manner consistent with the Constitution. On this score Froneman DJP stated as follows:

“It is necessary to interpret s 145 in a manner that is consistent with the Constitution. It is capable of such an interpretation. If the result means that the word ‘despite’ in s 158(1)(g) should be read as subject to, then so be it. It is a lesser evil than ignoring the whole of section 145, including its sensible provisions relating to time limits.”

It is my opinion that what the court is saying accords with the rules of interpretation. A legislative provision that prima facie is unconstitutional will not be so if the courts interpret it in a manner consistent with the Constitution. If the labour courts were to limit the grounds listed in section 145 as the High Court limited the application of section 33, as stated above, the former would be unconstitutional. Because section 145 must be rescued from its inherent unconstitutionality, it cannot be so interpreted. As for the apparent conflict vis à vis sections 145 and 158(1)(g), well, that must disappear if section 145 is properly interpreted.

Mlambo J thus, was correct when he held that the review of arbitration proceedings under the auspices of the CCMA must proceed only in terms of section 145.

The question that remains is, how then must this section be interpreted – or pragmatically put, what review powers does section 145 bestow on the Labour Courts? Froneman’s DJP answer is essentially this: all that are permissible in law. He held thus:

“It appears from a number of decisions of the High Court that the effect of, particularly, the administrative justice section in the Bill of Rights is seen as broadening the scope of judicial review of administrative action. 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. This provision introduces a requirement of rationality in the merits or outcome of

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9 At 1101 paras D-E.
the administrative decision. This goes beyond mere procedural impropriety as a
ground of review, or irrationality only as evidence of procedural impropriety.”

Where section 145 refers to “a gross irregularity in the conduct of the arbitration
proceedings” and “excess of power” it cannot be interpreted, as the High Court has
tended to interpret the like provisions of the Arbitration Act, to mean only procedural
irregularities. Irrational or indefensible decisions are also contemplated. Viewed as
such, this means that section 145 and section 158(1)(g) are, in reality, not in conflict
but for lack of a better word, congruent.

One would by now, have noted that up to this point, Froneman DJP and the judges of
the Labour Court whom his judgment overrules are speaking with the same tongue.
The entire thrust of the judgments in which the Labour Court purported to exercise its
powers in terms of section 158(1)(g) was to broaden the grounds of review to include
irrationality. At this juncture, however, the Labour Appeal Court sounds a cautionary
warning.

“One must be careful not to extend the scope of review for the wrong reasons.”

The court held further that:

“But it would be wrong to read into this section [145] an attempt to abolish the
distinction between review and appeal. According to the The New Shorter
Oxford Dictionary ‘justifiable’ means ‘able to be legally or morally justified, able to
be shown to be just reasonable, or correct; defensible. It does not mean ‘just’,
justified’, or ‘correct’. On its plain meaning the use of the word ‘justifiable’ does
not ask for the obliteration of the difference between appeal and review. Neither
does the LRA itself: it makes a very clear distinction between reviews and
appeals.”

One such wrong reason, as the court alluded to above, is the fact that the Labour
Court has no appeal or original jurisdiction in respect of most of the classes of
disputes, notably dismissals for misconduct and incapacity, that are reserved for the
CCMA. Is it then, unconstitutional that such disputes cannot, in itself, be taken to a
court of law? I submit that it is not, because all that the Constitution requires of

\[10\] At 1101 paras G-I.
\[11\] At 1102 para C.
\[12\] At 1102 paras A-B.
administrative bodies that are entrusted with such powers is that they exercise them in accordance with the fundamental values of accountability, responsibility and openness. On this score Froneman DJP held, that the Constitution does not purport to give reviewing courts the power to perform administrative functions themselves.

Here, of course, lies the danger. The question that inevitably springs to mind, is at what stage can it be said that the Labour Court is, in any given instance, arrogating to itself the responsibility of exercising the CCMA’s functions. Froneman DJP concedes that the test is difficult, even impossible, to formulate with any precision when it comes to attacks on the “substantive rationality” of CCMA awards ie whether the conclusions reached are so aberrant in themselves, or so out of kilter with the facts and the law, that they can be said to be defective in one of the senses contemplated by section 145, properly interpreted. The court noted further that, various words have been used to describe the kind of defects that relate to merits rather than procedure: among them, “reasonableness” (as opposed to “gross unreasonableness”), “rationality” and “proportionality”. But he adds wisely:

“Without denying that the applications of these formulations in particular cases may be instructive, I see no need to stray from the concept of justifiability itself. To rename it will not make matters any easier. It seems to me that one will never be able to formulate a more specific test other than, in one way or the other, 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?\textsuperscript{13} (Emphasis added).

I submit that this latter question is the key to the Carephone judgment. It confirms that the Labour Court is permitted to ask whether a commissioner’s award is justified by the evidence that was led at the hearing and by the law and principles that the latter is required to apply. The common denominator will always be that, the material before commissioners will be based on facts and law. Where there is no basis in fact for the conclusion, it will lack a rational basis. So, too, will it when the facts point obviously to another conclusion. There will be certain decisions that lend themselves to an “objective” evaluation of the link between facts and conclusion. Examples may be whether a person, in fact, was dismissed or when a dismissal occurred. A

\textsuperscript{13} At 1103 paras A-C.
decision based on an incorrect interpretation of the law is also “objectively” discernible and breaks the required logical or “justifiable” connection between facts and conclusion.

A court does not unduly interfere with the exercise of commissioners’ discretion in such cases, because serious errors of law mean that they are not exercising their discretion as required by the LRA ie they are exceeding their powers. Thus mistaken findings that the CCMA had jurisdiction,\textsuperscript{14} or did not need to grant condonation, and a purported exercise of a power which the commissioner did not have, were all errors that require judicial correction.\textsuperscript{15}

However when it comes to “subjective” or value-laden decisions, such as whether dismissal is too severe a penalty, whether a rule that has been broken is reasonable, or whether an employment relationship was “intolerable”, the basis for that decision becomes far less objective. These are the kind of decisions to which Froneman DJP refers when he warns against blurring the distinction between review and appeal. This, he says, is not the intended or actual effect of constitutional review. It is trite law, that a reviewing court, unlike one of appeal, should not enter into the “merits” of the decision. But, in terms of the constitutional requirement of “justifiability”, the position has changed somewhat because as the judge stated:

“[W]hen determining whether administrative action is justifiable in terms of the reason given for it, value judgments will have to be made which will, almost inevitably, involve the considerations of the “merits” of the matter in some way or another. As 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.”\textsuperscript{16}

This proviso is confirmation that, the grounds of review do, indeed, require judges to enter the arena of “the merits”, coupled with a warning that they should be cautious when doing so. It is certainly not a ruling, which some saw as the consequence that would follow if the Labour Court were to be bound by section 145, that an irrational

\textsuperscript{14} \emph{Quality Workwear Manufacturing v Commissioner Adair} [1998] 4 BLLR 419 (LC).
\textsuperscript{15} \emph{Coyler v Essack and Malan v CCMA} [1997] 9 BLLR 1173 (LC).
\textsuperscript{16} At 1102 paras I-J.
award is unassailable if the commissioner conducted the hearing properly. Irrationality remains a ground of review, even if it is now called “unjustifiability”.

Ironically, Mlambo J had himself confirmed this in a judgment handed down about two weeks after his own in the court a quo. This was in *Pep Stores v Advocate AP Lakano*, 17 here the employer attacked a commissioner’s decision on both procedural and substantive grounds. After expressing his disagreement with the judgments that held that section 158(1)(g) subsumed section 145, he stated the following:

“I want to suggest that in addition to procedural defects, section 145 gives the Labour Court the power to enquire whether the award is appropriate within the meaning of section 138(9). The preoccupation of this court in reviewing awards on this basis will be whether there has been a failure of justice. In time the Labour Court will have to establish when justice has failed. For purposes of this judgment I want to suggest that an award will be found to be inappropriate if it is shown that: (1) the commissioner ignored direct evidence placed before him; (2) the commissioner relied on evidence not placed before him; (3) the commissioner committed a serious error of law. Where it is shown that one or more or a combination of these factors is present this Court will review an award of the commission.” 18

Mlambo J goes on to point out that this interpretation of section 145 “diminishes any role whatsoever for section 158(1)(g) in the review of awards of the Commission”. He is, with respect, correct. The prime motivation of those who hold that section 158(1)(g) has any role is to justify resorting to the grounds mentioned by him in *Pep Stores*. In there is no reason to “sneak” them in under the latter section, the whole debate become pointless. He further confirms how close the seemingly divergent judgments were in theory and practice when he singled out *Standard Bank* 19 as an example of how the review grounds he endorses in *Pep Stores* 20 should be applied. He comments on that score as follows:

“In that matter a commissioner reinstated an employee whom he had found to have been deliberately dishonest. Tip AJ found that the reinstatement of a dishonest employee flew in the face of longstanding and consistently applied legal principles, which reinforced the trust element in the employment relationship. Tip AJ confirmed that dishonesty breaches the trust element which

18 At 1542 paras A-C.
19 *Supra.*
20 *Supra.*
in turn destroys the employment relationship. Had the commissioner applied this principle he would not have reinstated the employee, especially in the banking sector. *I agree fully and, with respect, venture to suggest that that matter could and should have been dealt with under section 145.*21 (Emphasis added).

4.3 CAREPHONE DOUBTED

The majority of the Labour Appeal Court in *Toyota SA v Radebe*22 cast serious doubt, on whether the ground of review of an award being justifiable in relation to the reasons given could be found within section 145 of the LRA, or that it could be imported as an independent ground of review. The court, however, stopped short of overruling the Carephone decision. It has however, not taken long to sow renewed confusion, among the masses of judges, about the test to be applied in such matters.

4.4 CAREPHONE NOT FOLLOWED BY SOME OF THE LABOUR COURTS

This confusion alluded to above, was noted, but not dealt with, by Wallis AJ, in *Naraindath v CCMA*.23 In this case it was found that the commissioner had not failed the Carephone test. In *Glaxo Welcome v Mashaba*,24 Marcus AJ was faced with an application for leave to appeal against a judgment he had given earlier in a review application which, as he said, was based squarely on the Carephone test and, therefore, in the light of the remarks in *Toyota*,25 needed to be considered by the Labour Appeal Court. He further noted that Carephone,26 in any event, remained binding in spite of the obiter doubts expressed about its correctness in *Toyota*.27

However in *Shoprite Checkers v Ramdaw*,28 Wallis AJ was confronted with another review application in which he felt that the issue could no longer be swept aside and he took every different view of the Carephone-test and the implications for it of the judgments of the Constitutional Court. The respondents employee’s representative,
invited him to do so, who contended that in the light of what has been said in Toyota\textsuperscript{29} about the Carephone-test,\textsuperscript{30} the court should regard itself as being limited to the strict grounds of review set out in section 145, as discussed in chapter two.

Wallis AJ noted the evident similarities between section 145 and section 33 of the Arbitration Act, and the strict interpretations the courts had given the latter section. He held further that, according to judicial interpretations of this latter Act, errors of fact or law by arbitrators do not amount to reviewable “misconduct” – even if there is no evidence apparent from the record that supports the latter’s award. “Gross irregularity” ordinarily relates only to procedural irregularities. “Excess of power” occurs only when arbitrators stray beyond their terms of reference. This revelation by the judge is not new, for the High Court has justified its approach because arbitration is chosen by parties as a substitute for litigation and they must accordingly live with the errors or even stupidity of the arbitrator, unless the error or stupidity is so gross as to bring it within the terms of the exceptions created by the legislature.

However, the axiomatic nugget of the true question should be whether, by adopting the language of the Arbitration Act in the formulation of section 145, the legislature intended to circumscribe the Labour Court to the same extent as the High Court had chosen to circumscribe itself, when reviewing private arbitration awards. To him, the answer was self-evident and flowed from:

“[The] well established canon of statutory interpretation that where the legislature deliberately includes language in a statute which in the same or similar context had been subject to clear judicial interpretation [the legislature] intends to include such language on the basis that it bears the interpretation already given by it to the courts.”\textsuperscript{31}

He stated further that the court in Carephone had understood that very principle but had gone astray, by noting that CCMA awards had been expressly excluded from the operation of the Arbitration Act, which he found incomprehensible. He further noted that the former’s major concern was what it perceived to be the dubious

\textsuperscript{29} Supra.
\textsuperscript{30} Supra.
\textsuperscript{31} At 853 paras C-D.
constitutionality of a legislative provision that immunized a statutory tribunal from the reach of review on constitutional grounds.

He held further that a decision by a CCMA commissioner is not an administrative act but something which has judicial or quasi-judicial characteristics. The court said:

“Other than the fact that the CCMA is an organ of state acting in terms of statutory authority exercising statutory powers, neither of which is decisive as the Constitutional Court has made clear, I can find no reason to characterize the work of a commissioner of the CCMA presiding over an arbitration in terms of s 136, 138, 139 or 141 of the LRA as being administrative action."32 The fact that the commissioner is not performing judicial functions under the Constitution and does not form part of the judicial arm of the state or come within the judicial process (Carephone para [18]) is neither here nor there. The question is whether the conduct of such an arbitration is administrative action and the answer is that it is not."33

In conclusion then on this score, he declined to follow the justifiable test regarding administrative action which has been adopted in Carephone.

In Volkswagen SA v Brand NO34 it was said that the constitutional barometer which applies to a CCMA arbitration is section 34 of the Constitution. This section reads as follows:

“Everyone has the right to have any dispute that can be resolved by that application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."35

The court said, that if section 33 is not applicable to CCMA awards, it follows that section 145 of the LRA, which is virtually identical to section 33 of the Arbitration Act, ought to be applied in a similar fashion. Generally the High Court’s interpretation of section 33 will inform the interpretation of section 145 of the LRA. In Shoprite Checkers36 it was opined that conduct which under the Arbitration Act warrants the setting aside of an arbitration award is as much conduct which should justify the

32 At 863 paras I-J.
33 At 864 paras A-B.
34 (2001) 22 ILJ 993 (LC).
35 Act 108 of 1996.
36 Supra.
setting aside of an award made by a commissioner acting in terms of section 145 of
the LRA.

Section 33(1) of the latter act permits a court to interfere with an award on grounds
which essentially are directed at a lack of independence, eg bias, corruption,
impartiality and gross irregularities. A court will also interfere if there is a lack of
jurisdiction, arising from various causes, because it destroys the fundamental
requirement that there be a submission to arbitration. In the Volkswagen\textsuperscript{37} case the
court adopted and applied the narrow or traditional test of review in reviewing the
commissioner’s award, giving appropriate deference to factual findings but setting the
award aside for a mistake of law. However, even on this approach, if CCMA awards
fall within section 34 of the Constitution then they must be scrutinised to see whether
the process culminating in the award constitutes a “fair” hearing. It is not difficult to
imagine that the Labour Court will hold that a process in which a decision that is
irrational is handed down, does not constitute a fair hearing.

4.5 CAREPHONE RESTORED BY SHOPRITE CHECKERS v RAMDAW (LAC)

In \textit{Mzeku v Volkswagen SA},\textsuperscript{38} the Labour Appeal Court, considered a review of a
CCMA commissioners award and apparently seemed to use the Carephone test
although this was not clearly formulated here.

In \textit{Shoprite Checkers (LAC)}\textsuperscript{39} the central issue was whether the Carephone-test was
correct. In this latter case, the unanimous court held that the CCMA is a statutory
body and that its decisions and awards were accordingly reviewable according to the
“justifiability” standard prescribed in the interim Constitution. The Labour Appeal
Court criticized this decision in several respects, in particular for purportedly stating
that whether a CCMA arbitration is an administrative act is not a relevant question.

\begin{footnotes}
\item[37] Supra.
\item[38] (2001) 22 ILJ 1575 (LAC).
\item[39] Supra.
\end{footnotes}
However, Zondo JP observed that if the Promotion of Administrative Justice Act (PAJA), applied to arbitration awards by the CCMA commissioners, section 6 of that Act would be applicable to reviews. That section provides that an administrative action may be reviewed if it is “procedurally unfair” or if the action is not “rationally connected to ... the information before the administrator, or the reasons given for it by the administrator”. If, therefore, the PAJA applied to CCMA awards, such awards must be “rationally connected to the reasons given for them”. I submit, that this is precisely what the court meant with the Carephone-test, although in that case the court used the word “justifiable” because that was the word used in the administrative justice provision of the interim Constitution, which was in force at the time.

Although the phrase “justifiable in relation to the reasons given for it” are not carried over to the new wording in section 33(1) of the Constitution, which speaks of rationality, the Labour Appeal Court stated that:

“I am of the view that, although the terms ‘justifiable’ and ‘rational’ may not, strictly speaking be synonymous, they bear a sufficiently similar meaning to justify the conclusion that rationality can be said to be accommodated within the concept of justifiability as used in Carephone.”

Wesley noted that it appears that the Labour Appeal Court have missed the axiomatic nugget of the dictum in Carephone, where Froneman DJP suggested not that the identification of whether an act is administrative action or not is irrelevant, but rather that the formal classification of acts as judicial, quasi-judicial or administrative is not of assistance in determining whether an act constitutes administrative action in terms of section 33 of the Constitution.

Notwithstanding the criticism it leveled at the Carephone-test, the Labour Appeal Court held that there is no sound policy reasons to revisit its decision for the following reasons.

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40 Act 3 of 2000.
41 At 1021 paras I-J.
The Court held that the Carephone-test, while perhaps founded on the wrong grounds, is nevertheless applicable to CCMA arbitrations on the basis of the decision of the Constitutional Court in *Pharmaceutical Manufacturers of SA: In re ex parte Application of the President of RSA.*\(^{43}\) Here it was held that the exercise of all public power should not be arbitrary. This, the court held, means that any decision taken in the exercise of such power must be “rationally related to the purpose for which it was given” and that “the functionary’s decision viewed objectively, [must be] rational”. The Labour Appeal Court held that the test of “justifiability” as formulated in the Carephone-test is materially the same as that of “rationality” as set out in *Pharmaceutical,\(^ {44}\) and accordingly decided that there was “no warrant to tamper with” the Carephone decision.\(^ {45}\)

The Labour Appeal Court, further expressed the view that the PAJA may be applicable to CCMA arbitrations, based on the definitions of “administrative action” and “decision” in that Act. As the PAJA provides that administrative action may be reviewed *inter alia* because a decision is not rationally connected to the information before the decision-maker or the reasons given for it by the decision-maker, a ground of review similar to that in Carephone would thus also be available under the PAJA.\(^ {46}\)

The logical outflow of the Labour Appeal Court’s decision is that the time limits set out in section 145 of the LRA remains. Therefore a review founded on the Carephone test, is a review based on a defect set out in the aforesaid section and must be brought within six weeks of the award. The further implication is that the court has not proclaimed conclusively on whether section 145 is meant to be a comprehensive list of review grounds or not. I submit that it was perceived almost completely that this is the case and the Carephone-test locates “justifiability” in the aforesaid section.

The Labour Appeal Court, however, has suggested that the PAJA may be a source of review grounds in the case of CCMA arbitration, using this escape route as a

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\(^{43}\) 2000 (2) SA 674 (CC).

\(^{44}\) *Supra.*

\(^{45}\) At 1021 paras A-B.

\(^{46}\) At 1024 paras F-G.
reason not to interfere with the Carephone-test even if that decision was wrong. It has been suggested,\(^{47}\) that this suggest that section 145 is not exhaustive. The authors further dissected the Labour Appeal Court in the light of Nicholson’s JA separate judgment in Toyota, where he held that the Carephone-test had inappropriately forced rationality review into section 145. He held further that even if CCMA arbitrations fall within the scope of section 33 of the Constitution, the proper approach would be to accept that rationality review does not form part of section 145 and then ask whether it nevertheless passes constitutional scrutiny utilizing the limitations clause. If, however, section 145 is not exhaustive of the grounds of review of CCMA arbitrations awards then much of the criticism falls away as the need to locate rationality review within section 145 does.

The Labour Appeal Court found that that the award “can be criticized in a number of respects”, but declined to set aside the award. It held that something more is required than, the fact that, an award is “unsatisfactory” in many respects. Adcock Ingram Critical Care v CCMA 44 Miles, SACAWU and Vilikaza\(^ {48}\) held the view that in the equation between findings of fact or law, that something more may be that the difference between the commissioner’s conclusion and the correct conclusion “is so great that it impinges upon the basis norm viz the necessity of a fair trial”. Prima facie this reflects the test for latent irregularity that was set out by Schreiner J in Goldfields Investment,\(^ {49}\) a test expressly followed by the Labour Appeal Court in Cadema Industries v CCMA.\(^ {50}\)

\(^{47}\) Landman and Van Niekerk A-36B.


\(^{49}\) 1938 TPD 551.

\(^{50}\) (2000) 21 ILJ 2261 (LAC).
CHAPTER 5
THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT 3 OF 2000

5.1 ENTER THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT

(a) It has been promulgated to give effect to the right to administrative action that is lawful, reasonable and procedurally fair; the right to written reasons for administrative action as contemplated in section 33 of the Constitution, and to provide for the institutions, procedures and remedies for judicial review of administrative actions. It does, however, not purpose to repeal other legislation providing for the supervision of administrative action. But if not in conflict with the LRA, it may serve as a source of additional review “grounds that are permissible in law” as contemplated in section 158(1)(g) for the review of certain decisions. Unless it constitutes a ruling or an arbitration award, in which case it may not amount to administrative action, whether or not proceedings before the CCMA are subject to the provision of the Promotion of Administrative Justice Act (PAJA) is a matter of some controversy.

(b) There are a number of points at which the provisions of PAJA and the LRA intersect. PAJA regulates administrative action, this means essentially, the conduct of statutory organs. The LRA regulates the actions of the state in its capacity as employer. Many decisions taken by the state in this latter role constitute administrative action. So, apart from the jurisdictional uncertainty created by section 157(2) of the LRA, which confers concurrent jurisdiction on the Labour and High Courts involving the state as employer, there is now also the possibility that such cases could be resolved either in the Labour court under the LRA or the Employment Equity Act (EEA), or in the High Court under the common law or PAJA.
(c) The overlap between PAJA and the LRA in the context of review was noted by the LAC in *Shoprite Checkers v Ramdaw NO*¹ in which Zondo JP said obiter and tentatively that

“Even though the view expressed by this court in *Carephone* that the making of an arbitration award by a CCMA commissioner constitutes an administration action might not be correct, it seems to me that the definition of ‘administration action’ and of ‘decision’ in section 1 of PAJA may be wide enough to include it. I say this despite the reference in the definition of ‘decision’ to a decision ‘of an administrative nature’. It is not necessary to express a final view on this issue in this matter.”

(d) Zondo JP referred to *Carephone* because the central issue in *Shoprite Checkers* was whether the former was correct. In *Carephone* it was held that the CCMA is a statutory body and that its decisions and awards were accordingly reviewable according to the “justifiability” standard prescribed by the interim Constitution. In *Shoprite Checkers* Zondo JP observed that if the PAJA applied to arbitration awards by CCMA commissioners, section 6 of that Act would be applicable to reviews. That section provides that an administrative action may be reviewed if it is “procedurally unfair” or if the action is not “rationally” connected to the information before the administrator, or the reasons given by the administrator. If, therefore, PAJA applied to CCMA awards, such awards must be “rationally connected to the reasons given for them”. This is precisely what the court said in *Carephone*, although in that case the court used the word “justifiable” because that was the word used in the administrative justice provision of the interim Constitution, which was in force at the time. *Shoprite Checkers* left open the question whether the PAJA does in fact apply to decisions and awards of the CCMA.

5.2 *PSA obo HASCKE v MEC FOR AGRICULTURE*

(a) That question came to life in *PSA obo Hascke v MEC for Agriculture*.² Here the applicants sought to set aside a decision by a CCMA commissioner not to condone the late referral of a dispute on the basis that the commissioner had

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² [2004] 8 BLLR 822 (LC).
not provided reasons for her decision, as required by PAJA. The MEC contended *in limine* that insofar as the applicants’ base their case on the PAJA, the latter was premature because in terms of that Act applicants are first required to request reasons, which they had not done. The court requested counsel to prepare argument on these points, and adjourned overnight. The next day respondent’s counsel found that he was arguing against himself and withdrew the point *in limine*. This tasked the court to determine whether the commissioner’s decisions were reviewable in terms of section 145. However, the judge felt that the question of whether PAJA applies to labour matters was important enough to warrant comment.

(b) Pillay J noted that the debate over the grounds of review of CCMA awards began with the judgment in *Carephone*. However, the latter at least settled a long debate over whether the CCMA was to review under the more limited grounds set out in section 145, or whether the Labour Court could invoke the wider common law grounds under section 158(1)(g). The court held that CCMA awards must be reviewed under section 145, but ruled that the grounds set out in that provision incorporated “justifiability”. This settled the law for a while, but the boat was rocked by an obiter remark by Nicholson JA in *Toyota SA Motors v Radebe*.3

(c) Here the judge remarked that *Carephone* might be wrong when it came to the review of CCMA arbitration awards. That comment was jumped on by Wallis AJ when he decided *Shoprite Checkers v Ramdaw*.4 He decided, in effect, that *Carephone* had been overtaken by events, and that it had by then been established that CCMA arbitration awards did not constitute administrative action and could not be reviewed as such. If this finding is correct, the grounds of review set out in PAJA do not apply to arbitration awards, because PAJA is concerned with administrative action. Apart from the aforesaid remarks in *Toyota*, the Labour Courts have expressed the view that arbitration awards were not administrative action in a number of cases, for example *Volkswagen*

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3 Supra.
4 Supra.
According to this view, CCMA awards are reviewable only on the narrow grounds excluding justifiability set out in section 145. As Pillay J correctly remarked in Haschke this remains open. In her view, it should be closed. She pointed out that, before the adoption of the Constitution, the courts relied on administrative law principles to protect employees’ rights. Labour law absorbed the notion of rationality and fair process from this source. However, said the court, the Constitution has radically altered the situation. The rights to fair administrative action and the right to fair labour practices are now entrenched as distinct rights. Subsequently, labour rights were specifically codified in the LRA, BCEA and EEA (there are others for examples the Skills Development Act). Other labour related statutes, the Public Service Act of 1994, the South African Police Service Act 68 of 1995 and the Employment of Educators’ Act 76 of 1998 have also been amended to regulate labour rights in the public sector.

Thus to the extent the PAJA conflicts with them, it must give way. Furthermore, to the extent that the labour laws do not protect labour rights, recourse must be had directly to the constitutional right to fair labour practices. Given this exclusive framework of labour law, Pillay J said that there is no need to rely any longer on administrative law in labour law. In any event, according to the judge, arbitration is not an administrative act. It may have characteristics common to “adjudicative administrative acts”. But arbitration is essentially and alternative to litigation. Simply because the arbitrator acts under the auspices of an administrative organ does not alter arbitrations essential character. It remains arbitration. PAJA cannot therefore apply to arbitrations. It follows that arbitration proceedings must be reviewed under section 145 of the LRA.

Pillay J could discern no difference between rulings, (which in Haschke a ruling of condonation was at issue) and arbitration (which in Carephone a refusal to
postpone an arbitration was at issue) by the CCMA commissioners. The court held that

“The nature and essential content of the process of issuing rulings are similar to arbitration. As such, they too do not amount to administrative action. If this were not so, then the anomaly that arises is that a ruling made in the course of arbitration and which finds itself as one of the grounds of review of an award is tested against section 145, whereas other rulings that are made outside arbitration, such as rulings on condonation are tested against 158(1)(g).”

The court held further that

“Exercising a choice between PAJA and Labour law is linear. Labour law is polycentric. Affirmative action is collective bargaining as a planned progression towards employment equity. Disputes arising from it must be channelled through the carefully constituted procedure of conciliation followed, if necessary by adjudication [or arbitration]. Conciliation seeks to address all interests as opposed to determining rights. Insofar as rights have to be determined by adjudication [arbitration] this is accomplished by specialists who must give effect to the primary objectives of the laws. If the claim succeeds should, as a matter of policy, such individual action be allowed to trump collective bargaining decisions?”

(g) According to Pillay J, the most drastic difference between PAJA and LRA lies in the different standards of review required by the two acts. She said

“the grounds of review under section 145 are misconduct by the commissioner, commission of a gross irregularity, acting ultra vires and improper obtaining of an award. The PAJA grounds of review are a complete codification of the common law grounds of review. Any ground not specifically mentioned has been captured in the catch all phrase that empowers a court to review action that is otherwise unconstitutional or unlawful. Such a comprehensive codification can encourage a mechanical checklist mentality when reviewing awards”.

(h) Pillay J fears that the PAJA should encourage a checklist mentality any more than that encourage by section 145, is unclear. However, it is apparent that her real concern arises from the effect that she thinks it will have on the restraints the courts have traditionally imposed on themselves in review proceedings.

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7 At 826 para 21.
8 At 830 para 41.
9 At 828 paras 28 and 41.
PAJA she observed, not only encourages a mechanistic approach, it also urges a court do delve into the merits of administrative action. This because, as the PAJA requires and the Constitutional Court has observed in *Pharmaceutical Manufactures Association of SA: In re ex parte Application of the President of RSA*,¹⁰ lawful and fair administrative action that must be rational.

(i) The result said Pillay J would be that

> “if PAJA applies to labour law decisions it could widen the door that Carephone opened to the risk of judges substituting their decisions for those with which they simply do not agree. If that happens then the objective of speed and finality of dispute resolution will be thwarted”.¹¹

And further

> “to subject CCMA adjudication to a constitutional test for just administrative action could not only broaden the grounds of review and blur the distinction between appeal and review even further but also cause parallel streams of jurisprudence to develop; one for private and bargaining council adjudication and another for CCMA adjudication; one for High Court decisions, and another for labour law decisions”.¹²

These concerns are real, however the fact remains that the Constitution imposes a rationality requirement on all administrative functionaries. If the argument that CCMA commissioners should be exempted from that requirement is pressed too far some might conclude that they are permitted to act irrationally and arbitrarily. Should irrational awards survive review, the goal of effective resolution of labour disputes would hardly be encouraged.

5.3 **WESTERN CAPE WORKERS ASSOCIATION v MINISTER OF LABOUR**

(a) In this case,¹³ the applicant was a registered trade union since 1997. However, it thereafter defaulted in complying with the numerous requirements imposed on trade unions. Notably the former failed to submit its audited financial

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¹⁰ *Supra.*

¹¹ At 828 para 34.

¹² At 829 para 35.

¹³ *(2005) 26 ILJ 2221 (LC).*
statements annually since 1997. The registrar called upon the applicant and all other interested parties to make representations within 60 days as to why it should not be deregistered. Same invitation was dispatched by letter to the applicant on 7 July 2004 and published in the Government Gazette on 16 July 2004.

(b) On 17 November 2004 the Registrar of Trade Unions informed the applicant that, despite having been given an opportunity to make representations as to why it should not be deregistered, he was not persuaded by same representations he had received. He consequently deregistered the applicant on the 18 November 2004. When acting as he did, he was well within the bounds of exercising a reasonable discretion by cancelling registration as there had been non-compliance with the law for a protracted period of seven years. The applicant was entrusted with public funds and had to account for them publically and properly in terms of the legislation. Pillay J found that the registrar's discretion was unassailable in all the circumstances.

(c) The applicant brought its appeal in terms of section 111 of the LRA, but submitted that this appeal should be dealt in terms of the PAJA. In support of this submission it refers to section 33(3) of the Constitution, pertaining to just administrative action. This section provides that national legislation must be enacted to give effect to these rights.

(d) Pillay J held that the LRA is national legislation designed for labour disputes, including administrative law type disputes arising in labour law. She held further that

"PAJA is also national legislation. However, I have said elsewhere that PAJA does not apply to labour disputes. Section 210 of the LRA makes it clear that if there is any conflict relating to matters dealt with in the LRA between the LRA and the provisions of any other law except the Constitution, the provisions of the LRA must prevail. The procedures, time limits and the requirements of PAJA differ substantially from the LRA. The LRA, for instance, provides a right of appeal to this court against a decision of the registrar, which is a far wider and more generous right than the right

14 Act 108 of 1996.
of review, which is a narrower and more limited right that PAJA offers. The time limits in PAJA are not the same as those contemplated in the LRA, which are tailor made for labour disputes. In all the circumstances PAJA does not apply to this dispute.  

5.4 SA POLICE UNION v NATIONAL COMMISSIONER OF THE SA POLICE SERVICE

(a) In this case, the principal thrust of the union’s challenge before the court was that based on the right to just administrative action. It was contended that because the SAPS is an organ of the state the decision to scrap the 12 hour shift system in favour of the adapted 8-hour shift constituted administrative action. Consequently, the action was reviewable under section 6 of PAJA because relevant considerations were not taken into account, it was procedurally unfair, arbitrary or capricious and irrational. The allegation of procedural unfairness flows from the commissioner’s admitted failure to consult, whereas the allegation of unreasonableness and irrationality arise from the contention that the commissioner neglected to give proper and sufficient consideration to the needs and circumstances of the employees including their family obligations and transport arrangements, as he was required to do in terms of regulations 30 and 31 of GN R389 of Gazette 21088 of April 2000.

(b) In order for the union to succeed on this ground they require to show that their complaint falls within the purview of protection afforded by the right to just administrative action. Since the introduction of a fundamental constitution in 1994 there is no longer any doubt that judicial review of administrative action is part of our constitutional law. Section 33 of the Constitution enshrines the fundamental right to just administrative action. It reads:

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.

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15 At 2223 paras 9-11.
16 (2005) 26 ILJ 2403 (LC).
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 subsection (1) and (2); and

(c) promote an efficient administration.

Here the court, per Murphy AJ, has held that PAJA is the legislation referred to in the aforesaid section.

(c) *Pharmaceutical Manufacturers Association of SA*\(^{17}\) held that under our new constitutional order the control of public power is always a constitutional matter. The implications of same finding were usefully and succinctly explained by the court in *Bato Star Fishing v Minister of Environmental Affairs*\(^{18}\) at paragraph 22 as follows:

“There are now two systems of law regulating administrative action—the common law and the Constitution. The courts’ power to review administrative action no longer flows directly from the common law but from PAJA and the Constitution itself. The ground norm of administrative law is now to be found in the first place not in the doctrine of *ultra vires*, nor in the doctrine of parliamentary sovereignty, nor in the common law itself, but in the provisions of PAJA and the Constitution, and derives its force from the latter. The extent to which the common law remains relevant to administrative review will have to be developed on a case-by-case basis as the courts interpreted and apply the provisions of PAJA and the Constitution.”

(d) Section 6 of PAJA identifies the circumstances in which the review of administrative action may take place. In this regard the Constitutional Court stated that the provisions of section 6 divulge a clear purpose to codify the

\(^{17}\) *Supra.*

\(^{18}\) 2004 (4) SA 490 (CC).
grounds of judicial review and that a cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past. The causes of action prescribed in PAJA are in the main those derived from the common law doctrine of *ultra vires*, natural justice, legality and rationality. Judicial review under PAJA and the Constitution is dependant upon the action qualifying as “administrative action”. In giving meaning to that term under section 33 of the Constitution the court has distinguished between it and other forms of governmental or state action, such as action of a constitutionally empowered legislature - *vide Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council*, 19 or judicial action *vide Nel v Le Roux NO.* 20

(e) In *President of the RSA v SA Rugby Football Union*, 21 the court emphasised that not all conduct of state functionaries entrusted with public authority will fall to be classified as “administrative action”. In that instance it drew a distinction between the constitutional responsibility of cabinet ministers to ensure the implementation of legislation and their responsibility to develop policy and to initiate legislation, the former being justiciable administrative action, the latter not. The court concluded as follows:

“It follows that some acts of members of the executive in both the national and provincial spheres of government will constitute ‘administrative action’ as contemplated by s 33, but not all acts by such members will do so. Determining whether an action should be characterised as the implementation of legislation or the formulation of policy may be difficult. It will depend primarily upon the nature of the power. A series of considerations may be relevant to deciding on which side of the line a particular action falls. The source of the power, though not necessarily decisive, is a relevant factor. So too is the nature of the power, its subject matter, whether it involves the exercise of a public duty, and how closely it is related on the one hand to policy matters, which are not administrative, and on the other hand the implementation of legislation which is. While the subject matter of a power is not relevant to determine whether constitutional review is appropriate, it is relevant to determine whether the exercise of the power constitutes administrative action for the purposes of s 33. These will need to be drawn carefully in the light of the provisions of the Constitution and the overall constitutional purpose of an efficient,

19 1999 (1) SA 374 (CC).
20 1996 (3) SA 562 (CC).
21 1999 (10) BCLR 1059 (CC).
(f) I now turn to determining the meaning of “administrative action”. Section 1(i) of PAJA reads as follows:

“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,

(b) a natural or juristic person other than an organ of state, 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 effect”.

Thereafter follow various specific exclusions including inter alia legislative, judicial and prosecutorial decisions.

(g) Murphy AJ held that in casu the conundrum that needs to be answered was whether the commissioner’s decision to introduce the adapted 8-hour shift constituted administrative action. He held further that this exercise must be determined with reference to the directions of the Constitutional Court and the provisions of PAJA. He further stated that that SAPS is an organ of state within the meaning of section 237 of the Constitution, and that the source of the commissioner’s powers in regard to labour relations is in the express terms of section 24(1) of the SA Police Service Act 68 of 1995.

(h) This latter section empowers the minister to make regulations in relation to the conditions of service of members and labour relations. Acting in terms of these powers, the minister has bestowed the prerogative upon the commissioner to determine working hours, which prerogative he may exercise unilaterally, or bilaterally, in terms of existing contracts of employment or collective agreements, depending on the circumstances. The court held further that the power was indeed derived from a public source, but as the Constitutional Court (see
footnote 36) has indicated, the source of the power, while relevant, is not necessarily decisive; and further that equally, if not more important are the nature of the power, its subject matter and whether it involves the exercise of public duty.

(i) The court held further that there was nothing inherently public about setting the working hours of police officers. Nor was there any public law concern present, and consequently then held that the matter falls more readily within the domain of contractual regulation of private employment relations. It stated further that the nature of the power exercised and the function performed in the setting or agreeing of shift times does not relate to the government’s conduct in its relationship with its citizenry to which it is accountable in accordance with the precepts of representative democracy and governance. It stated further that the powers and functions concerned derive from employment law and are circumscribed by the constitutional rights to fair labour practices and to engage in collective bargaining. It held further as follows:

“One is instinctively drawn to the conclusion that the concept of administrative action is not intended to embrace acts properly regulated by private law. To render every contractual act of an organ of state a species of administrative action carries the risk of imposing burdens upon the state not normally encountered by other actors in the private sphere.”

(j) The court concluded then that the powers and functions involved in switching the shift arrangements are not of a public nature, and that it reside within the commercial or private domain of labour relations. And further that before a decision can fall within the definition of administrative action it has to be one “which adversely affects the rights of any person and which has direct, external legal effect”. The court held that the members of SAPS are not persons outside of the organ of state, but insiders. And the commissioner’s decision is an internal matter of departmental organization, and consequently held that on this ground too, then, the decision is not administrative action.

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22 At 2418 paras D-E.
5.5 **RUSTENBURG PLATINUM MINES v CCMA**

This seminal judgment by the Supreme Court of Appeal\(^\text{23}\) ventured into the field of labour law and criticized the commissioner, the Labour Court and the Labour Appeal Court in its respective judgments. Of note, is the fact that only the Constitutional Court has higher standing than the first mentioned court and this judgment will therefore have to be considered and applied by all lower courts.

As this case was a test case\(^\text{24}\) as held by the court I deem it prudent to discuss this case in detail.

**5.5.1 THE FACTS**

In June 2006 the mine dismissed, Mr Sidumo, (the employee) after founding him guilty in failing to execute his main duty which was access control and to protect the mine’s precious metal product. His duties entailed an individual private search of each person in a cubicle, with close physical inspection, plus a metal detector scan. However, the mine’s losses continued unabated, an in response it mounted video surveillance of employee performance at various points, including that of the employee over a three day period.

This revealed that, of 24 searches in the said period, the latter conducted only one properly in accordance with the obligatory search procedures. This procedures required him to search everyone leaving the redressing section according to the search procedure which was displayed. It was found that on eight persons he conducted no search at all. On fifteen persons the search was not done as aforesaid. The video clip finally revealed that the employee allowed some persons to sign the search register without conducting any search at all.

At an internal appeal hearing, the factual findings and sanction of dismissal were upheld. The appeal chairperson considered alternatives to the dismissal but found

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\(^{24}\) At 241 para 52.
none to be appropriate, after he took the abuse of a position of trust and the seniority of the employee’s position into account.

The employee thereafter referred an alleged unfair dismissal dispute to the CCMA, where the commissioner effectively held that:

- the employee was clearly guilty of misconduct and that the mine followed a fair procedure in dismissing him but that the dismissal was inappropriate;

- the mine had suffered no loss, and the violation of the rule was unintentional or a mistake as argued by the employee;

- the level of dishonesty of the employee was something to consider and that the type of offence committed by the employee did not go into the heard of the employment relationship, which was grounded on trust.

The mine applied to the Labour Court to review the aforesaid award on the basis that:

- there was direct and largely unchallenged evidence that the mine’s yield had been low since May 1998;

- over the surveillance period February to May 2000, the metallic yield created a revenue loss of R500 000 per day;

- that precious metals were discovered on persons during the surveillance and that the mine had experienced theft over the previous 3 to 4 years; and

- the employee was employed to prevent theft and had conducted only a single proper search while under surveillance.

It therefore contended that, the award was not justifiable in relation to the material that was properly placed before the commissioner and his factual conclusions that he arrived at. It contended further that the commissioner’s finding that the misconduct
did not go to the heart of the relationship was irrational and that the latter had therefore been so grossly careless as to have committed misconduct and further that his failure to apply his mind meant that no fair hearing had occurred and that a gross irregularity had been committed and that the absence of a rational connection entailed that he had exceeded his powers.

The review application was unsuccessful and the Labour Court, per Revelas J effectively held that:

- this was a case of poor performance rather than misconduct;
- the employee had a clean record of almost 15 years standing and was not involved in criminal activities and did not commit an transgression that evoked dismissal as opposed to any other sanction;
- the commissioner’s preference for corrective or progressive discipline did not induce a sense of shock;
- the employee was guilty of poor performance or laziness which was which did not justify without prior warning for a first offence after 15 years service;
- there was no evidence that theft had occurred during the employee’s shift;
- the fact that the latter was doing work a more senior employee usually performed was also very significant; and
- in the absence of dishonesty, employees who do perform their duties properly should not automatically attract the ultimate sanction of dismissal on the basis of strict liability, even if they work in a gold mine.

An appeal against the aforesaid court’s decision followed and the Labour Appeal Court held that:
- three of the commissioner’s findings were found wanting but declined to intervene because the three bad reasons had not been the sole basis of the award;

- the commissioner had also applied the Code of Good Practice, schedule 8 to the LRA and found that it is inappropriate to dismiss an employee for a first offence unless the misconduct is serious and of such gravity as to make a continued employment relationship intolerable;

- the commissioner had further relied on the employee’s clean record of 14 years and suggested that a sanction other than dismissal would be appropriate;

- the mine’s review application failed to challenge the commissioner’s reliance on these factors and sustained the latter’s finding that the sanction of dismissal was too harsh; and

- for the mine to contend for the first time in argument that long service was irrelevant to the breach of a core function was impermissible.

The mine was thereafter granted leave to appeal and this was then the conundrum that presented itself before the Supreme Court of Appeal. An attempt to summarize its important findings is set out below.

5.5.2 THE TEST FOR CCMA ARBITRATIONS

The court held that section 158(1)(g) empowered the Labour Court, “despite section 145”, to review the performance of any function provided for in the LRA “on any grounds that are permissible in law” and that this was the status quo until 2002. In 2002 “despite” was replaced with “subject to”. The court held further that the interim Constitution25 provided that the fundamental right to administrative action entitled every person to administrative action which is justifiable in relation to the reasons given for it where any of its rights is affected or threatened.

25 Act 200 of 1993 s 24(d).
The court held that the *Carephone* test had reconciled the aforesaid sections with each other and with the administrative justice provisions of the interim Constitution. It held further that the justifiability component of this test and the fact that this test was applicable to the review of CCMA decisions was accepted by later judgments of the Labour Appeal Court after the decision in *Pharmaceutical* and after the enactment of PAJA.\(^26\)

### 5.5.3 ENTER THE PAJA

The PAJA came into force on the 30 November 2000, and section 6 thereof set out grounds for reviewing administrative action that are more extensive than those contained in section 145(2), inclusive of the ground that the administrative action of the action itself, must be rationally connected to the information before the administrator or the reasons given for it by the latter.

The court found that the Labour Appeal Court in *Shoprite* considered the aforesaid, and accepted that the arbitration awards issued by the CCMA may well attract the application of PAJA, but found it unnecessary to decide the aforesaid issue.\(^27\)

The court held that:

> “In [its] view, PAJA by necessary implication extend the grounds of review available to parties to CCMA arbitrations. In interpreting the LRA, and the impact on it of the later enactment of PAJA, the Constitution obliges us to promote the spirit, purport and objects of the Bill of Rights. This means that, without losing sight of the specific constitutional objectives of the LRA, and the constitutional values it embodies, we must in interpreting it give appropriate recognition to the right to administrative justice under the final Constitution and the legislation that gives effect to it.”\(^28\)

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\(^26\) At 227 para 21.

\(^27\) At 228 para 22.

\(^28\) At 228-229 para 23.
It accordingly held that:

“That obligation did not exempt from its ambit previous parliamentary enactments that conferred rights of administrative review. It extended to all of them. This is so even though the LRA is a specialised statute. Both the Constitution, which required Parliament to give general legislative effect to the right to administrative justice, and the legislation so enacted, superseded the LRA’s specialized enactment within the field.”\(^{29}\)

The court found that:

“a CCMA commissioner’s arbitral decision constitutes administrative action, section 6’s codificatory purpose subsumed the grounds of review in section 145(2), and PAJA’s constitutional purpose must be taken to override that provision’s preceding, more constricted, formulation.”\(^{30}\)

The court found that as the Constitution does not require the legislation enacted, to give effect to the right administrative justice must set out any particular time limits, the different time periods in the LRA and PAJA are set in different fields, acknowledging that particular needs.

**5.5.4 THE CRITICISM OF THE LABOUR APPEAL COURT**

In summary form the court held as follows that:

- the LAC was incorrect when it held that the mine was at fault for not attacking the commissioner’s reliance on the Code of Good Practice and the employee’s clean record in its papers, but only in argument;

- the mine’s true complaint was that the Labour and Appeal courts’ respectively held that those factors insulated the commissioner’s award from their intervention;

- the LAC failed to apply either the *Carephone* test or the test as set out in PAJA, which respectively required the court to discern whether the commissioner’s

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\(^{29}\) At 229 para 24.

\(^{30}\) At 229 para 25.
award to reinstate the employee was rationally connected to the information properly placed before him and to the reasons he gave for it;

- the LAC failed to refer to the aforesaid case our piece of legislation, but applied the incorrect test, when it asked whether or not the commissioner took into account relevant considerations that were capable of justifying the final decision, despite any defective reasons in the award;

- this test was more akin to the test applied in appeal proceedings, rather than the test required in review proceedings;

- the effect of this incorrect approach is that the decisions of commissioners are protected from interference, unless there is absolutely no reason capable of justifying the outcome;

- what the LAC lost from sight, was the fact that it was required to subject the commissioner’s award to process-related analysis, and not to inquire whether his decision was capable of being sustained by recourse to other factors emerging from the record.

5.5.5 THE CORRECT APPROACH

The Supreme Court of Appeal stated that the correct test on review is whether:

- a court applied the Carephone test in the light of PAJA;

- the decision-maker properly exercised the powers entrusted to him or her;

- the scrutiny focused on the process and manner in which the former reached the conclusion;

- the reasons giving were preponderantly bad and that bad reasons is unable to provide a rational connection to a sustainable outcome;
- the court was alive to the fact that this also applies where it is impossible to
distinguish the reasons that significantly influence a decision from those that do
not;

- the court was further alive to the fact that PAJA does not oblige courts to
randomly select reasons to find some sustenance for a decision, despite poor
reasons been relied on;

- the court appreciated the fact that commissioners’ must be careful when
determining whether a workplace sanction imposed by the employer is fair;

- the commissioner must entertain the employer’s sanction with a measure of
defereance;

- the court appreciated the fact that under the LRA it is primarily the function of
the employer to decide on the proper sanction;

- the commissioner need not be persuaded that dismissal is the only fair
sanction, in determining whether a dismissal is fair because the statute requires
only that the employer establish that it is a fair sanction; and

- the fact is further appreciated that although a commissioner may think that a
different sanction would also be fair, does not justify setting aside the
employer’s sanction.

The court concluded then that because of the aforesaid the LAC should have set
aside the commissioner’s award.
CHAPTER 6
CONCLUSION

Section 33 of the Arbitration Act\(^1\) is virtually identical to section 145 of the LRA. The High Court have stressed that by creating the former section the legislature intended to limit judicial interference in the decision of arbitrators to only the most plagrant miscarriages of justice.

By replicating section 33 in section 145, as aforesaid, it seemed at first glance that the legislature intended the Labour Court to adopt the same strict approach when it came to reviewing arbitration awards. But, for reasons best known to themselves, the drafters also conferred on the Labour Courts the powers to review any function performed under the LRA “on any grounds permissible in law” despite section 145.\(^2\)

Carephone\(^3\) settled the long debate over whether the CCMA was subject to review under the more limited grounds set out in section 145 of the LRA, or whether the Labour Court could invoke the wider common law grounds under section 158(1)(g). The court held that CCMA awards must be reviewed under section 145, but ruled that the grounds set out in the provision incorporated “justifiability”. In the Labour Appeal Court in Shoprite Checkers,\(^4\) the court thought that the view expressed in Carephone may not be correct, but in an obiter statement Zondo JP expressed the view that if PAJA were applicable to CCMA awards, the definitions of “administrative action” and of “decision” in section 1 thereof, may be wide enough to include it. The court could however not make a definite pronouncement on the applicability of PAJA to CCMA awards as the dismissal in issue took place prior to the enactment of PAJA.

\(^1\) Act 42 of 1956.  
\(^2\) See s 158(1)(g).  
\(^3\) Supra.  
\(^4\) Supra.
The court further held that the view that the test for review as set out in Carephone, while perhaps based on the wrong grounds, is nevertheless applicable to CCMA arbitrations on the basis of the decision of the Constitutional Court in the Pharmaceutical case. In that case, it was held that the exercise of all public power should not be arbitrary. This, the court held, means that any decision taken in the exercise of such power must be “rationally related to the purpose for which the power was given” and that “the functionary’s decision, viewed objectively [must be] rational”. The Labour Appeal Court held that the test for “justifiability” as espoused in Carephone is materially the same as that of “rationality” as set out in Pharmaceutical and so concluded that there was not necessity to tamper with the Carephone judgment.

The PAJA gives any person the right “to institute action in a court or tribunal for the judicial review of an administrative action”, which court or tribunal has the power to review the administrative action on the grounds set out in section 6 of it. One ground on which the PAJA might conceivable be held inapplicable to CCMA awards is that suggested by both judges Landman and Pillay in the Volkswagen and Hascke cases respectively. That is where the PAJA clashes with section 145 and is to that extent “trumped” by virtue of section 210 of the LRA. However, in terms of the latter, the LRA prevails over other Acts only to the extent that they conflict. Whether the PAJA conflicts with section 145 on anything other than purely procedural points depends on how the substantive provisions of section 145 should be interpreted.

Where the grounds of section 6 of the PAJA, that does not fall the categories of section 145, conflicts with the latter depends on the scope accorded to the notion of “irregularity in the proceedings” in section 145(2)(a)(ii) of the LRA.

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5 Supra.
6 Supra.
7 Supra.
8 Supra.
On the Carephone\textsuperscript{9} test, there is no apparent conflict; on the test suggested by the Labour Court in Shoprite Checkers,\textsuperscript{10} there is clear conflict. In the final analysis, the answer can only be determined once this debate is finally resolved.

Our Constitutional Court has held that under our new constitutional order the control of public power is always a constitutional matter. It further also emphasized that not all conduct of state functionaries entrusted with public authority will fall to be classified as “administrative action”, and as an example draw a distinction between the constitutional responsibility of cabinet ministers to ensure the implementation of legislation and their responsibility to develop policy and to initiate legislation, the former being justiciable administrative action, the latter not.

Our Labour Court has further held that the powers and functions involving in switching shift arrangement in the South African Police Service are not of a public nature, and that it reside within the commercial or private domain of labour relations. And further that before a decision can fall within the definition of administrative action it has to be one which adversely affects the rights of any person and which has direct external legal effect. The Labour Court held further that because in that case the national commissioner’s decision was an internal matter, to set working hours of police officers of departmental organisation, it consequently held that on this ground, too, the decision to change the shift system, was not an administrative action.

The definition of administrative action is defined in PAJA and I submit that it should be used as barometer to check whether the alleged wrong action falls thereunder.

The Supreme Court of Appeal in its recent judgment of Rustenburg\textsuperscript{11} criticised the Labour Appeal Court, the Labour Court and the CCMA for not giving the employer’s sanction a measure of deference; not applying the Carephone\textsuperscript{12} test or the test in PAJA and for applying the incorrect test when it asked whether or not the

\begin{flushleft}
\textsuperscript{9} Supra. \\
\textsuperscript{10} Supra. \\
\textsuperscript{11} Supra. \\
\textsuperscript{12} Supra.
\end{flushleft}
commissioner took into account relevant considerations that were capable of justifying the final decision, despite any defective reasons in the award, respectively.

From the aforesaid, it is clear that the court is allowed to venture beyond the confines of section 145 and to consider grounds of review recognized at common law, in the PAJA and more importantly, by the Constitution.

The only limitations appear in applying the correct review principles as set out in the Supreme Court of Appeal's judgment.
BOOKS


Van Zyl, B; Schlesinger, E and Brand, F *CCMA Rules* 2nd ed (2005) Van Zyl Rudd and Associates, Port Elizabeth


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