

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

Case No: DA2/99

In the matter between

**TOYOTA SOUTH AFRICA MOTORS (Pty)Ltd
Appellant**

and

**DOUGLAS RADEBE
Respondent**

First

**COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION
Respondent**

Second

**P. STONE N.O
Respondent**

Third

JUDGEMENT

ZONDO AJP

Introduction

[1] This is an appeal against a judgement of the Labour Court dismissing an application brought by the appellant to review and set aside an arbitration award by the third respondent in a dispute between the appellant and the first respondent. I do not intend setting out the facts which gave rise to the dispute as those have been set out very well in the judgement of my Colleague, Nicholson JA, which appears after this judgement.

[2] I have had the pleasure of reading my Colleague's judgement. I agree with both his conclusion as well his reasons for that conclusion. However, I consider it appropriate to add to

his reasons. My addition deals with the reasoning of the commissioner which led him to the implied conclusion that the dismissal was unfair.

[3] It appears to be necessary to make the addition that I wish to make in order to demonstrate that the commissioner 's reasoning in this case reveals what Schreiner J, as he then was, would regard as latent gross irregularities. As Schreiner J pointed out, correctly in my view, that is the category of gross irregularities which are only ascertainable from the reasons given by the decision- maker for his decision.

Analysis of the Commissioner's reasoning

[4] A proper analysis of the commissioner's award in this case reveals, in my view, that the main, if not the only, reason why the commissioner made (by implication) the finding that the dismissal was unfair was the commissioner's belief that dismissal was not the only sanction available to the appellant. The questions which arise out of this approach of the commissioner are : What does it mean to say dismissal was not the only sanction available to the appellant? Can it ever be said that dismissal is the only sanction available to an employer in any given case? If yes, when can this be said to be the case?

[5] It must be borne in mind that the commissioner did not qualify what he said in any way by reference to, for example, reasonableness. In other words, the commissioner did not say that he believed that dismissal was not the only sanction reasonably available to the appellant. The commissioner's reasoning needs to be tested.

[6] If an employee is guilty of the most serious misconduct and he has been in the employment of his employer for a short while, would the commissioner find the dismissal of such employee in such a case unfair on the basis that dismissal was not the only sanction available to the employer or would he find the dismissal unfair because the misconduct is the most serious one can think of? If the same employee had a long service such as thirteen years of service, but he had committed the most

serious misconduct imaginable, and the employer dismissed such employee, would the commissioner have found the dismissal unfair on the basis that dismissal was not the only sanction available to the employer or would he say the length of service renders the dismissal unfair even if the misconduct was the most serious one could think of? Here below I consider specific examples.

[7] Let us imagine a case where an employee rapes a female co-employee on the employer's premises (during a night shift) and the employer dismisses the culprit. Would the commissioner find the dismissal unfair because dismissal was not the only sanction available to the employer? To take this one step further, let us imagine that the female employee who is the victim of such a rape happens to be the daughter of the managing director of the employer company. The employee has 13 years of service and has a clean record. If the employer dismissed that employee, would the commissioner find the dismissal unfair because dismissal was not the only sanction available to the employer?

[8] Another example may still be warranted. An employee commits fraud involving an amount of R50 000,00 against his employer. The employee has 13 years of service and has a clean record. Would the commissioner find the dismissal of that employee unfair on the basis that dismissal is not the only sanction available to the employer? Let us take a case where an employee is guilty of murdering one of the managers in a company in circumstances where he has service of 13 years with a clean record but in this case he murdered the manager for absolutely no reason. He has no defence or acceptable explanation for his misconduct. Would the commissioner find his dismissal unfair because dismissal was not the only sanction available to the employer?

[9] I am well aware that the examples I have given are extreme cases. However, I have done this deliberately because not only do I regard the case which the commissioner in this case had to deal with as an extreme one but the commissioner also regarded it as an extreme one. I say this because, in his award, he also said the first respondent's dishonesty was gross, wilful and premeditated.

[10] In my view, gross dishonesty must rank as one of the extreme cases of serious misconduct which an employee may make himself guilty of, and, which an employer may have to deal with, in a workplace. It seems to me that the effect of the commissioner's reasoning is that no matter how serious the misconduct committed by an employee is, an employer cannot dismiss such employee if dismissal is not the only sanction available. In my judgement that is absurd.

[11] Quite apart from the fact that it is not clear when, on the commissioner's reasoning, it can be said that dismissal is the only sanction available in any given case, it is not our law and has never been our law that, if an employer dismisses an employee, he must demonstrate that dismissal was the only sanction available to him if the dismissal is to be regarded as fair. This must not be equated with the principle that dismissal must be a sanction of last resort. That is usually said in the context of the corrective nature of progressive discipline and it has never been suggested that that approach precludes the dismissal of an employee for a first offence where such offence is of a serious nature.

[12] Even the Code of Good Practice on dismissal under the Act contemplates dismissal for a first offence in the last-mentioned situation. The Code goes on to give examples of serious misconduct. One of the examples it gives is that of gross dishonesty. In such a case the Code says dismissal for a first offence would not be inappropriate.

[13] The Commissioner did refer to the provisions of the code which say what I have just said in the preceding paragraph. However, soon after quoting the Code, the commissioner said this was a case of willful and premeditated gross dishonesty, which neither the respondent nor the CCMA should condone. When, later on, the commissioner found the dismissal unfair, one would have expected that, in the light of this statement by him, he would explain how he reconciled such a finding with his acceptance that this was misconduct of a gross nature which had been premeditated, was wilful and which neither the employer nor the CCMA should condone. However, he did not explain this. The result of this is that his implied finding that the dismissal was unfair is left completely unexplained when viewed against that statement.

[14] After carefully considering the commissioner's reasoning and reading his award over and over again, I still have no idea what the commissioner meant by saying dismissal was not the only sanction available to the appellant. The closest I can think of is that he meant that the misconduct committed by the first respondent was not sufficiently serious to justify his dismissal. If that is what he meant, then, in my view, it would contradict his earlier finding that this was a case of gross dishonesty. As the commissioner had described the first respondent's dishonesty as gross, he must have found the misconduct extremely serious.

[15] Furthermore, the commissioner said that the first respondent **"made one error in thirteen years of employment for which he was contrite."** This statement suggests that the commissioner may have seen the length of service of the first respondent as a mitigating factor even in the case of so serious an offence. Although a long period of service of an employee will usually be a mitigating factor where such employee is guilty of misconduct, the point must be made that there are certain acts of misconduct which are of such a serious nature that no length of service can save an employee who is guilty of them from dismissal. To my mind one such clear act of misconduct is gross dishonesty. It appears to me that the commissioner did not appreciate this fundamental point.

[16] I hold that the first respondent's length of service in the circumstances of this case was of no relevance and could not

provide, and should not have provided, any mitigation for misconduct of such a serious nature as gross dishonesty. I am not saying that there can be no sufficient mitigating factors in cases of dishonesty nor am I saying dismissal is always an appropriate sanction for misconduct involving dishonesty. In my judgement the moment dishonesty is accepted in a particular case as being of such a serious degree as to be described as gross, then dismissal is an appropriate and fair sanction.

[17] Another factor which the commissioner seems to have found to be a mitigating factor in addition to long **“clean”** service is that, in the commissioner’s view the first respondent was contrite about his misconduct. There was no basis for that finding. Whether or not the first respondent was contrite depends on whether or not his version or that of the appellant should be accepted as true on whether, when the first respondent finally admitted that his hi-jack story was a lie, it was because, as he has suggested throughout, his conscience got the better of him or whether, as the appellant suggested, he had realised that his story had been discovered to be so highly improbable that he could not persist in it.

[18] The commissioner believed that the reason why the first respondent told the truth when he did was that his conscience got the better of him. A court of appeal or a review court will not lightly overturn a finding of fact made by a trier of fact who has had the benefit of hearing and seeing witnesses in the witness box except in certain defined cases. One of such cases

is where the probabilities clearly point the other way. In my view this is a case where the probabilities in support of the appellant's contention that the reason why the first respondent told the truth was that he realised that the game was up are so overwhelming that this court would be justified in interfering with the commissioner's finding in this regard.

[19] The first respondent had had a lot of opportunity to come clean on his own and tell the truth if his conscience was

troubling him. The accident had occurred around 17h00 or so

on Sunday the 29th June 1997. After a whole night's sleep, he had an opportunity on Monday morning of changing his mind.

He did not. He had the whole day on Monday the 30th June 1997. Still he had not changed his mind. He had another night sleep and an opportunity to reflect on his story and decide not to persist with the story. He did not decide to come clean. On

Tuesday the 1st July 1997 he had the whole day to come clean and yet he still did not do so. He had another night's sleep on Tuesday night so that , first thing on Wednesday morning, he could approach the appellant and, of his own, come clean. He did not do so.

[20] By the time Mr Muller took the first respondent to the spot where he had abandoned the vehicle, the first respondent had not come clean. The first respondent did not on the way to the

place where he had abandoned the car tell Mr Muller the truth. It was only when he was confronted with the reality that the vehicle had been discovered and it was standing in front of the two men with the key in the ignition and he was once again asked to give an explanation that he, for the first time, told the truth. In the light of the above the probabilities overwhelmingly support the version that the first respondent's telling the truth had nothing to do with him being troubled by his conscience and had everything to do with him having realised that his false story had been discovered.

[21] This finding has certain implications for the first respondent. One of these is that, notwithstanding his gross dishonesty and his attempt to defeat the ends of justice with his hi-jack story, the first respondent still continued to be dishonest to the appellant by falsely maintaining that the reason why he told the truth was that his conscience could not let him continue to lie and yet, by saying precisely that, he was still continuing to lie to the appellant.

[22] Not only did the first respondent seek to mislead the appellant in regard to this last mentioned aspect, but, also, he has sought to mislead the Labour Court as well as this Court. I say this because in par 4.10 of his answering affidavit in the review application he repeated his lie about himself having told the truth because he could no longer continue lying.

[23] Quite apart from the first respondent's lie about being contrite and about what prompted him to tell the truth, there is another statement which the first respondent made in the arbitration which, in my judgement, is clearly a lie. In his summary of the first respondent's evidence in the arbitration proceedings, the commissioner says, among other things, that the first respondent testified that “ **he recognised that his company vehicle was a company asset and therefore he**

parked the car in what he considered to be a safe area.”

The commissioner went on to say the first respondent agreed that the keys were in the ignition but testified that the car was locked.

[24] It seems to me that, in giving the evidence referred to immediately above, the first respondent sought to convince the commissioner that he did not intend to place the company vehicle in danger of being stolen. That part of the first respondent's evidence does not make any sense to me. If, indeed, that part of his evidence is true, what, then, was the whole point of driving the vehicle to the spot where he left it and of reporting that it had been hi-jacked? It is clear that the first respondent unashamedly continued with his dishonesty right up to this Court in order to try and protect his interests. In fact the commissioner's finding that the first respondent gave the appearance of a credible and trustworthy witness baffles me. In the circumstances of this case there was simply no basis on which it could be said that the first respondent was contrite nor was there any basis for any

suggestion that the first respondent was a credible witness.

[25] The commissioner also stated that because the appellant had once resorted to the idea of withdrawing the lease benefits of the first respondent, this could be resorted to this time as well so as to ensure that there was no chance of the first respondent causing another accident again. Seeing that evidence had been led that this had been tried before and it did not seem to have contributed in any way to the first respondent correcting his behaviour in regard to driving, the commissioner had no basis for using this measure to avoid confirming that the dismissal was fair.

[26] I have pointed out above that the commissioner found that the misconduct which prompted the appellant to dismiss the first respondent was wilful and premeditated gross dishonesty. In **Chetty's Motor Transport (Pty) Ltd National Transport Commission and another 1972(1) SA156 (N) at 159 D Miller J** expressed the view that, when a decision is described as grossly unreasonable in cases such as the one he had to consider, that means that the unreasonableness of the decision is of such a degree as to be indefensible on any legitimate ground. In the context of this matter I would say that, when it is said that the first respondent was guilty of gross dishonesty, that must mean dishonesty of such a degree (if one can speak of degrees of dishonesty) as to be completely indefensible on any ground. To my mind that is a fitting description for the misconduct of which the first respondent was guilty .

[27] Where an employer has dismissed an employee for such indefensible misconduct and the commissioner accepts that the employee is guilty of such misconduct but nevertheless concludes that the employer acted unfairly in dismissing such employee (and such finding is not based on procedural grounds,) then, in my judgement, the inference is irresistible that the commissioner completely misconceived his functions. Otherwise his conclusion is completely inexplicable. When a commissioner has misconceived his functions in that way, it can be said that the unsuccessful party has not been afforded a fair hearing and that, therefore, a gross irregularity has been committed justifying the reviewing and setting aside of the commissioner's award.

RMM ZONDO
Acting Judge President

NICHOLSON J A

[28] The first respondent was employed by the appellant as a supervisor and assistant manager for some 13 years and during this period maintained a clean disciplinary record. As a term of the first respondent's employment contract he enjoyed lease car benefits which were suspended for a year prior to the second half of 1996. During the period from September 1996 to December 1996 first respondent was involved in four collisions involving the car he drove, pursuant to the said lease scheme, with a repair cost of R 28 956,00.

[29] On 29 June 1997 first respondent was involved in a further accident. He drove the vehicle to a parking area in Amanzimtoti and abandoned it, leaving the keys in the ignition. On the same day he reported the fact that the car had been hi-jacked to the police. On the next day he informed his departmental manager and the appellant's Fleet Division of the said hi-jacking. First respondent admitted that he had lied about the hi-jacking to the appellant's security investigator on 2 July 1997.

[30] The first respondent was charged at a disciplinary enquiry with fraudulent and dishonest behaviour and negligent damage to company property of a substantial nature. He was dismissed on 21 July 1997 and his internal appeal failed on 1 August. The dispute with regard to the dismissal of the first respondent was referred to the second respondent for conciliation and failing that for arbitration by the third respondent in terms of section 191 of the Labour Relations Act, no 66 of 1995 ('the Act'). The third respondent found that the sanction of dismissal was too harsh but imposed a sanction involving his re-employment. This meant that he lost his past benefits, including those accruing from 13 years of service, and he was penalised by a loss of pay prior to the arbitration (some three months salary) and a loss of the car lease benefits that he enjoyed. This re-employment was coupled with a final warning for dishonesty. All these sanctions were imposed in terms of section 193(1)(b).

[31] The appellant unsuccessfully reviewed the arbitration award in the Labour Court in terms of section 145 (2)(ii) and (iii) and section 158(1) of the Act. Section 158(1)(g) provides that the Labour Court can 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'. This form of review was the full form of review previously referred to as common law review. The review mentioned in section 145 was

based on the Arbitration Act, no 42 of 1975, and is of a more limited nature. The decision to invoke both sections was quite understandable given the conflict in the case law as to which section was applicable where a party sought to review an arbitration award. That conflict has now been resolved. It was properly conceded by both counsel that the applicable section for a review of an arbitration award is section 145. See *Carephone (Pty) Ltd v Marcus N.O. and Others (1998) 19 ILJ 1425 (LAC) at 1433 H*. Section 145 reads as follows

“145 Review of arbitration awards

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

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

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

(2) A defect referred to in subsection (1), means-

- (a) that the commissioner-

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

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

- (iii) exceeded the commissioner's powers; or

- (b) that an award has been improperly obtained.

(3) The Labour Court may stay the enforcement of the award pending its decision.

(4) If the award is set aside, the Labour Court may-

- (a) determine the dispute in the manner it considers appropriate; or
- b) make any order it considers appropriate about the procedures to be followed to determine the dispute."

[32] In the *Carephone* decision the court analysed the significance of the constitutional provisions relating to administrative action and their relationship to a review in terms of section 145. The court then held at page 1439 D that

"Accordingly, the only bases for review are (1) that the facts amount to misconduct or gross irregularity or impropriety under s 145(2)(a) (i) -(ii) and s 145(2) (b) of the LRA, or (2) that his actions are not justifiable in terms of the reasons given for them and that he has accordingly exceeded his constitutionally constrained powers under s 145(2)(a) (iii) of the Act."

[33] The third respondent's award was attacked on three bases; namely, that he committed a gross irregularity, that he exceeded his powers as contemplated in section 145(2)(a)(iii) above and that his actions were not justifiable in terms of the reasons given for them and that he accordingly exceeded his constitutionally constrained powers under s 145(2)(a) (iii) of the Act. It is only necessary for the purposes of this appeal to deal with the question of gross irregularity which in my view is decisive. I intend dealing briefly with the last mentioned ground, namely the justifiability of the award, as I have certain misgivings about whether it constitutes an independent ground upon which an award can be attacked. As such it is not part of section 145, which restricts an applicant to misconduct, corruption, gross irregularity and the excess of powers. I am not sure that Froneman DJP was importing the last mentioned ground into section 145 and I believe the mention of it in the passage above was in any event an *obiter dictum*. I have two difficulties with importing this ground into the Act. The first relates to the difference between appeals and reviews and the second relates to the constitutional implications of section 145.

[34] The legislature has determined that there shall be no appeal from the decision of an arbitrator. An attack on an award on the basis that it is not justifiable with regard to the reasons given amounts, to all intents and purposes, to an appeal. Mr Tanner, who appeared for the first respondent, drew attention to the history of the legislation in question. He argued that under the unfair labour practice jurisdiction of the old Act, namely the Labour Relations Act, 28 of 1956 all dismissals and, indeed, all unfair labour practices were heard in the industrial court. This process required that dismissed employees had to finance their own litigation - with legal aid where applicable - in the industrial court. There was an automatic right of appeal to the Labour Appeal Court.

[35] The new Act had changed all that as, broadly speaking, section 191(5)(a) provided for misconduct and incapacity dismissals to be referred to the Commission for Conciliation, Mediation & Arbitration ("CCMA") for arbitration. The legislature decided that such a body should be set up to provide a service for those dismissals. Clearly the establishment of the CCMA involved a number of budgetary decisions. The legislature has decided to confer jurisdiction on the CCMA to arbitrate the dismissals I have mentioned with a limited right of review to the Labour Court. In a perfect society with unlimited resources full rights of appeal should be allowed from every administrative decision. Society has an inbred distaste for the spectre of a remediless recipient of administrative injustice. This distaste is ameliorated in labour law, to some extent one hopes, by the widespread service provided to those with access to the CCMA.

[36] In the *Carephone* decision at page 1427 E-G Froneman

DJP said

"The vast majority of labour disputes, if not successfully conciliated in terms of the Labour Relations Act 66 of 1995 (the LRA), end up in

compulsory arbitration before the Commission for Conciliation, Mediation & Arbitration (the commission). Arbitration is intended to dispose of a dispute finally (s 143(1) of the LRA). Where arbitration is consensual the rationale for this finality, without the further intervention of a court of law, is understandable (*Amalgamated Clothing & Textile Workers Union v Veldspun Ltd* 1994 (1) SA 162 (A) at 169G-H; (1993) 14 ILJ 1431 (A)). In the case of compulsory statutory arbitration the failure to provide for further legal redress may be perceived as unsatisfactory by a losing party. The LRA does not provide for any appeal against an arbitration award made by a commissioner exercising the commission's functions of arbitration in terms of the LRA. It does, however, provide for the review of the award by the Labour Court in certain circumstances.”

[37] In *Carephone* the court considered the background to the powers of review and at page 1434 B - 1435F the following was stated

“[32] But it would be wrong to read into this section an attempt to abolish the distinction between review and appeal. According to The New Shorter Oxford English 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 review and appeal. Neither does the LRA itself: it makes a very clear distinction between reviews and appeals.

.....

[35] When the Constitution requires administrative action to be justifiable in relation to the reasons given for it, it thus seeks to give expression to the fundamental values of accountability, responsiveness and openness. It does not purport to give courts the power to perform the administrative function themselves, which would be the

effect if justifiability in the review process is equated to justness or correctness.

[36] In determining whether administrative action is justifiable in terms of the reasons given for it, value judgments will have to be made which will, almost inevitably, involve the consideration of the 'merits' of the matter in some way or another. As long as the judge determining this issue is aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order.

[37]It seems to me that one will never be able to formulate a more specific test other than, in one way or another, asking the question: is there a rational objective basis justifying the connection made by the administrative decision maker between the material properly available to him and the conclusion he or she eventually arrived at? In time only judicial precedent will be able to give more

specific content to the broad concept of justifiability in the context of the review provisions in the LRA.”

[38] The judgment emphasises that a distinction must be maintained between review and appeal. It may be as well to revisit the test for an appeal on fact. In *R v Dhlumayo 1948 (2) SA 678 (AD)* the Appellate Division, as it then was, set out the principles, which are well known. Certain of them bear repeating

“(3) The trial Judge has advantages - which the appellate court cannot have - in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial. Not only has he had the opportunity of observing their demeanour, but also their appearance and whole personality. This should never be overlooked.

(4) Consequently the appellate court is very reluctant to upset the findings of the trial Judge.

(5) The mere fact that the trial Judge has not commented

on the demeanour of the witnesses can hardly ever place the appeal court in as good a position as he was.

(6) Even in drawing inferences the trial Judge may be in a better position than the appellate court, in that he may be more able to estimate what is probable or improbable in relation to the particular people whom he has observed at the trial.

(8) Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct; the appellate court will only reverse it where it is convinced that it is wrong.

(9) In such a case, if the appellate court is merely left in doubt as to the correctness of the conclusion, then it will uphold it.

(10) There may be a misdirection on fact by the trial Judge where the reasons are either on their face unsatisfactory or where the record shows them to be such; there may be such a misdirection also where, though the reasons as far as they go are satisfactory, he is shown to have overlooked other facts or probabilities.

(11) The appellate court is then at large to disregard his findings on fact, even though based on credibility, in whole or in part according to the nature of the misdirection and the circumstances of the particular case, and so come to its own conclusion on the matter.

(12) An appellate court should not seek anxiously to discover reasons adverse to the conclusions of the trial Judge. No judgment can ever be perfect and all-embracing, and it does not necessarily follow that, because something has not been mentioned, therefore it has not been considered.”

[39] From Dhlumayo’s case *supra* it is clear that the court, in an appeal on fact, will interfere if there are misdirections of fact including the overlooking of other facts and probabilities. This is very similar to the notion that an award can be set aside if it is not justifiable with regard to the reasons given. By referring to gross irregularity in section 145 the legislature is clearly contemplating something far more serious than that. Mistakes of fact and law, subject to certain exceptions, are insufficient grounds for interference.

[40] The reference by Froneman DJP to the constitutional provisions must be seen in the context of the specific grounds for review in section 145. My misgivings relate, therefore, to the notion that the grounds set out in that section are not the

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

[41] Mr van Niekerk, who appeared for the appellant, submitted that a reasoning process can be so flawed and conclusions be drawn which are so unsound that such constitutes a gross irregularity. Schreiner J, as he then was, stated the following in *Goldfields Investment Ltd and Another v City Council of Johannesburg and Another* 1938 TPD 551 at page 560

'It seems to me that gross irregularities fall broadly into two classes, those that take place openly, as part of the conduct of the trial - they might be called patent irregularities - and those that take place inside the mind of the judicial officer, which are only ascertainable from the reasons given by him and which might be called latent Neither in the case

of latent nor in the case of patent irregularities need there be any intentional arbitrariness of conduct or any conscious denial of justice The crucial question is whether it prevented a fair trial of the issue. If it did prevent a fair trial of the issues then it will amount to a gross irregularity. In matters relating to the merits the magistrate may err by taking a wrong one of several possible views or he may err by mistaking or misunderstanding the point in issue. In the latter case it may be said that he is in a sense failing to address his mind to the true point to be decided and therefore failing to afford the parties a fair trial. But that is not necessarily the case. Where the point relates only to the merits of the case, it would be straining the language to describe it as a gross irregularity or a denial of a fair trial. One would say that the magistrate has decided the case fairly but has gone wrong on the law. But if the mistake leads to the court's not merely missing or misunderstanding a point of law on the merits, but to its misconceiving the whole nature of the enquiry, or

of its duties in connection therewith, then it is in accordance with the ordinary use of the language to say that the losing party has not had a fair trial.'

This case has been followed in a long line of cases the latest being *Paper, Printing Wood and Allied Workers Union v Pienaar NO and Others 1993(4) SA 631 (AD) at 638G*.

[42] The attack by Mr van Niekerk on the award was limited to the second category mentioned by Schreiner J namely a latent gross irregularity which arose from the reasons given by the arbitrator. On the authority of the above mentioned judgements the latent gross irregularity had to be such that it prevents a fair trial of the issues.

[43] Theft and fraud have always constituted good grounds for dismissal as they frequently constitute a fundamental breach of the employment contract. The cases have in the past emphasised, with good reason, the breach of the relationship of trust that occurs where an employee is guilty of such a misdemeanour. The employer and employee are parties to an enterprise that produces goods or services which generate profits. If one party is dishonest to such a degree that the enterprise or a part of it is jeopardised then I am sure that

there has been such a fundamental breach. The courts have frequently upheld dismissal for dishonesty see *Sappi Novoboard (Pty) Ltd v Bolleurs (1998) 19 ILJ 784 (LAC) at 786 F, Standard Bank of SA Ltd v Commission for Conciliation, Mediation and Arbitration and Others (1998) 19 ILJ 903 (L C) at 913D, Metcash Trading Ltd t/a Metro Cash and Carry v Fobb and Another (1998) 19 ILJ 1516 (L C)*.

[44] It is not an invariable rule that offences involving dishonesty necessarily incur the supreme penalty of dismissal. The facts of every case must be assessed and the mitigating features taken into account. In *Boardman Brothers v CWIU 1998 (3) SA 53 (SUPREME COURT OF APPEAL) at 59G* Smalberger JA said at 59 G

“I agree that on a conspectus of all the relevant circumstances dismissal was not an appropriate sanction. The employees’ dishonesty was not such as would inevitably call for their dismissal; there were mitigating factors present and the working relationship between the parties did not suffer irreparable damage as a consequence of the employees’ conduct.”

See also *Simba-Quix Ltd v Rampersad and Another* 1993(14) ILJ 1286. *J D Group Ltd v De Beer* (1996) 17 ILJ 1103 (LAC). However, where the dishonesty complained of is gross, dismissal would be an appropriate sanction.

[45] The arbitrator's powers in this instance emanated from section 193 which provides that he can order reinstatement, re-employment or compensation, if he finds that the dismissal is unfair. Despite the specific reference to fairness as the touchstone for an arbitrator's powers Mr van Niekerk submitted that the arbitrator must only interfere if the sanction is one which no reasonable employer would have made. He argued that it was a gross irregularity not to have regard to the 'reasonable employer test'. He referred us to *Nampak Corrugated Wadeville v Khoza* (1999) 20 ILJ 578 (LAC) 584A where this court approved of the so-called 'reasonable employer test'.

[46] Mr Tanner argued that the 'reasonable employer test' was not of application given that the commissioner or the Labour

Court was the sole judge of what was fair in any dismissal. We can only depart from a decision of this court if we are convinced that such decision is clearly wrong. See *Collett v Priest 1931 AD 290 at 301*. In *Bloemfontein Town Council v Richter 1938 AD 195 at page 232* Stratford J.A. said

'The ordinary rule is that this Court is bound by its own decisions and unless a decision has been arrived at on some manifest oversight or misunderstanding, that is, there has been something in the nature of a palpable mistake, a subsequently constituted Court has no right to prefer its own reasoning to that of its predecessors - such preference, if allowed, would produce endless uncertainty and confusion. The maxim 'stare decisis' should, therefore, be more rigidly applied in this the highest Court in the land, than in all others.'

[47] It should be borne in mind that this court in Khoza's case was considering whether the dismissal of the respondent constituted an unfair labour practice. There is no material

difference with an arbitrator in this matter who has to consider whether the dismissal was fair. The reasonable employer test has had a chequered history, which is set out in *P A K le Roux 'The Reasonable Employer Test: Some Reflections' (1990) 4 LLB 29; Brassey The New Labour Law 71-4; Rycroft and Jordaan A Guide to South African Labour Law Second Edition 197-8.*

[48] Its origins are in English statute law and it must be appreciated that the Act is quite differently worded, providing as it does for the arbitrator to decide if a dismissal was fair. In *SA Chemical Workers Union and Others v C E Industrial (Pty) Ltd t/a PANVET (1988) 9 ILJ 639 (IC)* the court held at page 648D - E

“The 'reasonable employer' test is derived from English law where it has a statutory origin in s 57(3) of the Employment Protection (Consolidation) Act of 1978, reading as follows:

'[T]he determination of the question whether the dismissal was fair or unfair, having regard to the reasons shown by the employer, shall depend on whether in the circumstances (including the size and administrative resources

of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and that question shall be determined in accordance with equity and the substantial merits of the case.'

It appears from the commentary of Anderman The Law of Unfair Dismissal 2 ed at 153 that the question is not whether a lesser penalty would have been appropriate or whether a reasonable employer might have considered a lesser penalty appropriate but whether it was within the range of reasonable responses for the employer to dismiss the employee in the circumstances."

[49] What is clear is that the origins of the 'reasonable employer' test in English law is a statutory provision which specifically refers in terms to an employer acting reasonably. In *Tubecon (Pty) Ltd and National Union of Metalworkers of SA (1991) 12 ILJ 437 (ARB)* the arbitrator John Brand rejects the test in ringing terms and at page 445B to 445D says the following

"In my view the reasonable employer approach is not

what is required by the standard IMSSA terms of reference which require me to determine whether the discipline meted out by the company was fair. For the discipline to be fair the rule or norm which is breached must be a fair one; it must in fact have been breached and the sanction applied must be a fair one. Unless one's terms of reference specifically state otherwise there does not seem to be any justification in equity why a sanction should be looked at exclusively through the eyes of an employer. The correct approach it seems to me is to consider whether the sanction is fair having regard to existing industrial relations common law and norms."

See also Brassey The New Labour Law at 71-2 and Employment Law vol 6 no 1 at 11.

[50] I agree with the above sentiments. It seems to me to be significant that a statutory arbitrator is also required to find if a sanction is fair. He is not there to determine if the sanction was one which a reasonable employer would have arrived at. I do not believe that the 'reasonable employer test' is part of our law. As I mentioned above the ordinary rule is that this Court is bound by its own decisions and unless a decision has been

arrived at on some manifest oversight or misunderstanding, something in the nature of a palpable mistake, a subsequently constituted Court has no right to prefer its own reasoning to that of its predecessors. I believe that the application of the reasonable employer test was such a palpable mistake which permits us to overrule it. The failure to take it into account is therefore not a gross irregularity.

[51] I revert now to the question as to whether the third respondent committed a gross irregularity in setting aside the dismissal of first respondent by the appellant. If the above mentioned case law has required that dismissals be upheld where dishonesty has been proved it seems relatively clear that dismissal would be warranted where gross dishonesty is present. In my view the appellant was quite justified in dismissing the first respondent. The question which remains, however, is whether the third respondent misconceived the whole nature of the question of a fair sanction and his duties in connection therewith to such a degree that interference on review was warranted.

[52] During argument examples were bandied around of awards which might constitute gross irregularities in relation to sanction. These examples were presented on the basis that a sanction or lack of it might be so out of kilter with normality that its very imposition might constitute a gross irregularity. In terms of section 138(9) of the Act the commissioner is empowered to make any appropriate arbitration award. It might well be that the commissioner who heard the matter has taken

into account all the evidence and the legal arguments and recorded them in his award. The stage is then set for the commissioner to decide on an appropriate sanction. If he selects a sanction which is grossly inappropriate can the award be set aside? Apart from the quantum leap in the inappropriateness of the punishment the award might be otherwise unimpeachable. Can one still be satisfied that the parties have been afforded a fair hearing? I do not believe so.

[53] If there is a yawning chasm between the sanction which the court would have imposed and that which the commissioner imposed then it would seem to me that a gross irregularity has been committed. The use of the word 'gross' indicates that the irregularity has to be so egregious that a court can conclude that the function of assessing a fair sanction has been misconceived. It is always difficult to define the extent to which the commissioner has to deviate from the normal sanction for such to constitute a 'gross irregularity'. In criminal law, appeal courts interfere with the sentence of a lower court where such induces a sense of shock or there is an alarming or disturbing disparity between the sentence imposed by the trial court and the sentence which the appeal court is minded to impose. A commissioner imposing a sanction in an arbitration in terms of the Act has a similar but not identical role. Variations within the continuum of a fair sanction are to be expected and are acceptable. Where, however, the imposition of a sanction - or, indeed, the failure to impose a sanction - is so egregious that it shocks and alarms the court, then the commissioner has misconceived his duties. One of his duties is to determine a fair sanction and there are parameters within which he can work. If he strays outside those parameters to a significant degree he has failed to afford the aggrieved party a fair hearing. The fact that precise definition is not possible of the degree of error before a gross irregularity is committed, does not mean that the court should not interfere where it is convinced such a gross irregularity has taken place.

[54] The conduct of the first respondent in this matter constituted a fraud on the appellant and in all probability the insurance company which provided cover for the vehicle in question. The fabrication of the story of the high-jacking amounted to defeating the ends of justice and would also involve perjury if false statements were provided to the police.

The abandonment of the vehicle with the keys in the ignition was a gross dereliction of first respondent's duties to the appellant to preserve its property. It is clear that first respondent panicked when he had a further accident after his catalogue of misadventures in the past. He still had considerable time, however, to think over the situation and decide what course of action to take. It would be wrong to impose a sanction on the basis that the car was lost. On the other hand it is a miracle that the vehicle was not stolen given his reckless abandonment of it. This disregard for the rights of the appellant in the vehicle coupled with his gross dishonesty convinces me that the sanction imposed by the third respondent was so egregious and so out of kilter with what this court would have imposed, that it constitutes a gross irregularity.

[55] In the premises I make the following order:

- (1) The appeal succeeds with costs.
- (2) The order of the court *a quo* is set aside and replaced with an order in the following terms:

“(a) The application is granted and the award issued by the third respondent under CCMA case no KN 7065 is hereby reviewed and set aside;

(b) The first respondent is ordered to pay the applicant's costs.”

C.R NICHOLSON

Judge of Appeal

[56] I agree with both judgements.

M.T.R. MOGOENG
Acting Judge of Appeal

Date of hearing:	August 1999
Date of judgement:	3 December 1999
Counsel for Appellant:	G. O. van Niekerk SC
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No appearance for the second and third respondents

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