IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD AT DURBAN)

CASE NO: DA12/00

In the appeal between

SHOPRITE CHECKERS (PTY)LTD **APPELLANT**

AND

A. RAMDAW N.O **1ST RESPONDENT**

MAVIS ZIQUBU **2ND RESPONDENT**

SOUTH AFRICAN COMMERCIAL **3RD RESPONDENT**

CATERING AND ALLIED WORKERS UNION

JUDGEMENT

ZONDO JP

Introduction

[1] The appellant brought an application before the Labour Court for the reviewing and setting aside of an arbitration award which had been issued by the first respondent under the auspices of the Commission For Conciliation,

Mediation and Arbitration ("**the CCMA**") in a dispute between, on the one hand, the appellant and, on the other, the second and third respondents. The dispute was about the fairness or otherwise of the dismissal of the second respondent by the appellant from its employment. The Labour Court dismissed the application with costs. It subsequently granted leave to appeal to this Court. The appellant now appeals against that judgement. Before I proceed with this judgement, I take this opportunity to acknowledge the help that, in deciding this matter, we have derived from the arguments presented by all Counsel who appeared before us. All their arguments were of much benefit to us. In particular this Court wishes to express its sincere gratitude and appreciation to Mr K. Tip SC and Mr A.T. Myburg both of whom appeared as amici curiae at the request of the Court. Their assistance was invaluable.

[2] There is another matter which I would like to deal with at this stage. That is the fact that the record of the arbitration proceedings filed by the appellant or its attorney in this matter is of a very poor quality. There are numerous areas where one is not able to understand exactly what a particular witness was saying or what answers he or she gave to certain questions. There are also numerous areas where there was either a break in

recording or where the record reflects that what was said was inaudible. This will be apparent from the extracts that are quoted later in this judgement. It appears from the appellant's replying affidavit that this is because the recording device was faulty. It is hoped that, in order to avoid the injustice that may result from a record of such poor quality as the one we have in this case, the CCMA will take such steps as may be necessary to ensure that, when there are review applications in respect of arbitration proceedings conducted under its auspices, it will be possible for records of an acceptable quality to be provided to the Labour Court in respect of such arbitration proceedings.

Legal issues

[3] This appeal raises the question whether this Court's decision in **Carephone (Pty) Ltd v Marcus N.O and others (1998) 19 ILJ 1424 (LAC)** is still good law. The question that this Court had to decide in that case was whether or not an arbitration award issued by the CCMA could only be reviewed under the grounds of review provided for in sec 145 of the Labour Relations Act, 1995 (Act NO 66 of 1995) (**"the Act")** or whether it could also be reviewed under sec 158(1)(g) of the Act in which case any ground of review permissible in law could be used.

That question had raised a great deal of controversy soon after the Labour Court became operational. I do not propose to give in this judgement a detailed background to the controversy. This was done in Carephone and in judgements of the Labour Court referred to therein as well as in the judgement of the Court a quo. It will suffice to only make such reference to that background as may be strictly necessary for the proper understanding of this judgement. In this regard it is necessary to quote the provisions of s145 and s158(1) (g) of the Act.

[4] Sec 145 provides 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 for Conciliation Mediation and Arbitration 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".

[5] Sec 158(1)(g) of the Act provides:

> **"The Labour Court may - ....**
>
> **(g) despite section 145, 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."**

[6] It will have been seen above that s 145 specifically refers to the review of CCMA awards and says they may be reviewed on the grounds there set out. When a CCMA commissioner issues an arbitration award, that falls within the ambit of the **"performance or purported performance of [a] function provided for**" in the Act as contemplated by s 158(1) (g) which, on the face of it, would mean that such an award could also be reviewed under s 158 (1) (g). If that were the position, s 145 would be rendered superfluous. That, of course, is a conclusion which would not be arrived at lightly.

[7] Prior to the decision of this Court in Carephone, there was a view that it would be inconsistent with the Constitution to hold that a CCMA award could be reviewed only on the grounds of review set out in s 145. Accordingly, so the view went, the position that had to be taken was one that

would be consistent with the Constitution. Such position was thought to be one in terms of which CCMA awards could be reviewed under both s 145 and s 158(1)(g). The one consideration which counted in favour of the view that s 145 was the only section under which CCMA awards could be reviewed was that the grounds of review contained therein are very limited and this would enhance the expeditious resolution of disputes which is one of the primary objects of the Act. This would come about because on that view the finality of arbitration awards would be strengthened whereas the other view would encourage appeals brought under the guise of reviews. That would operate against the notion of the finality of such awards. Of course, those who advocated the view that the review of CCMA awards was competent under s 158(1)(g) also pointed out that another primary object of the Act was to give effect to the Bill of Rights in the Constitution which contained the administrative justice provisions which, so it was argued, meant that such awards had to be justifiable in relation to reasons given for them failing which they could be set aside on review on that ground alone.

[8] In Carephone this Court decided, per Froneman DJP, with Myburg JP and Cameron JA concurring, that CCMA awards could only be reviewed under s 145 and not under s 158

(1)(g). It also held that the ground of review contained in s 145(2)(a)(iii), namely, that a commissioner exceeded his powers, incorporated the constitutional requirement that an administrative action must be “**justifiable in relation to the reasons given for it”.** This Court held that the issuing of an arbitration award by a commissioner of the CCMA constituted an administrative action as contemplated in s 33 of the Constitution read with item 23 of schedule 6. It held further that the provisions of s 33 read with those of item 23 introduced **“a requirement of rationality in the merit or outcome of the administrative action”** which included an arbitration award. With the decision of this Court in Carephone, rightly or wrongly it was thought that the controversy had been buried.

[9] In **Toyota SA Motors (Pty) Ltd v Radebe & others (2000) 21 ILJ 340** (LAC) this Court expressed misgivings about the correctness of the decision in Carephone. This, together with the judgement of the Constitutional Court in **Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council 1999 (1) SA 374 (CC),** appears to have led the Court a quo to consider it necessary to examine whether Carephone was still good law and still binding on it. The Court a quo came to the conclusion that the judgement of the Constitutional Court

in Fedsure was such as to have removed the very basis on which Carephone had been decided and that Carephone was, therefore, no longer good law and, therefore, no longer binding on it.

[10] The Court a quo's conclusion that Carephone was no longer binding on it was based on the conclusion which it reached that the issuing of an arbitration award by a CCMA commissioner did not constitute an administrative action. In Carephone argument had been presented to this Court that the administrative justice provisions of the Constitution did not apply to the issuing by a CCMA commissioner of an arbitration award in compulsory arbitration proceedings under the Act because that did not constitute an administrative action but was an act of a judicial nature. The Court rejected this argument. Froneman DJP decried the need for the classification of actions into administrative, judicial and quasi- judicial actions and said:"[**i]t would be ironic indeed if [those classifications] are reintroduced at this stage of the development of our law to limit the scope of judicial review of administrative action."**

[11] In Carephone this Court gave two reasons for its rejection of the contention that the issuing of an arbitration award did not constitute an administrative action but a decision

of a judicial nature. It classified the one reason as constitutional, the other as substantive. They are to be found in paragraphs 18 and 19 of that judgement respectively. There this Court said:-

”18 The constitutional answer to this submission is that although the commission or other organs of state may perform functions of a judicial nature they are not courts of law and thus have no judicial authority under the Constitution (ss 165, 166 and 239 of the Constitution). Their judicial functions do not transform them into part of the judicial arm of the state, nor does it make them part of the judicial process (of Bernstein & others v Bester & others NO 1996(2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at paras 95-7).

19 The substantive answer to the argument is to be found in the purpose of the administrative justice section of the Bill of Rights. That purpose is to extend the values of accountability, responsiveness and openness to institutions of public power which might not previously have been subject to those constraints. Courts of law were in any event always subject to the kind of requirements set out in the section. It would simply be

incongruous to free other public institutions exercising judicial functions from those constraints. It is not necessary to seek the origins of those constraints in other provisions of the Bill of Rights, such as the access to justice provisions (s34). Administrative action may take many forms, even if judicial in nature, but the action remains administrative. "

[12] The administrative justice section which this Court had to deal with in Carephone was s 24 of the interim Constitution. In Fedsure the Constitutional Court also had to deal with the same section. However, the provisions of s 33 read with those of item 23 of Schedule 6 to the Constitution are materially similar to those of s 24 of the interim Constitution. In Fedure the Constitutional Court had to consider whether the passing of resolutions relating to rates by a local council constituted an administrative action as contemplated in s 24 of the interim Constitution.

[13] The Constitutional Court did not in Fedsure give a definition of an administrative action. Indeed, it could not have been expected to do so with any degree of precision. However, it did make the observation at 391 F-G that, whilst it might not have served any useful purpose under

the previous legal order to ask whether or not an action of a public authority was administrative, under the new constitutional order that question had to be asked in order to give effect to the provisions of s 24 of the interim Constitution and has to be asked in order to give effect to the provisions of s 33 read with item 23 of Schedule 6 of the final Constitution.

[14] I agree with the above approach by the Constitutional Court. In par 18 of the judgement in Carephone Froneman DJP does not seem to have appreciated that the administrative justice section could only apply if the action in question was an administrative action and that, because of this, a court would have no choice but to have to satisfy itself that such action was an administrative action before it could apply the provisions of the administrative justice section to it. This means that, however regrettable or even unpalatable it may be to have to classify actions according to whether they are administrative, judicial or quasi-judicial, courts have no choice but to classify actions according to such categories in certain circumstances under the new constitutional order in order to give effect to certain constitutional provisions.

[15] Subsequent to the judgements of this Court in Carephone

and Toyota, the Constitutional Court handed down its judgement in **Pharmaceutical Manufacturers of SA: in re Ex Parte President of the RSA 2000 (2) SA 674 (CC)**. On the basis of that judgement Mr Gauntlett, who, together with Mr Wade, appeared for the appellant, submitted that it was no longer of any consequence whether or not Froneman DJP was right in concluding that the issuing of an arbitration award by a CCMA commissioner constituted an administrative action. He submitted that this was so because the Constitutional Court decided in the Pharmaceutical Manufacturers' case that, whenever public power was exercised, it had to be exercised rationally and, if it was exercised irrationally, courts were entitled to intervene. He submitted that there could be no doubt that the CCMA exercised public power when it issued arbitration awards in terms of its compulsory arbitral functions.

[16] In the Pharmaceutical Manufacturers' case the President of the Republic had issued a proclamation in the Government Gazette bringing the South African Medicines and Medical Devices Regulatory Authority Act, 1998 (Act No 132 of 1998) into operation in circumstances where certain regulations and schedules which required to have been promulgated before the Act could come into operation had not yet been promulgated. As a result of the

President's decision to bring that Act into operation in those circumstances, the entire regulatory structure relating to medicines and the control of medicines was rendered unworkable. The first and foremost question that the Constitutional Court had to decide was whether a court had power to review and set aside a decision of the President of the Republic bringing an Act of Parliament into operation. In that case the Constitutional Court decided that such a decision by the President of the Republic could be reviewed by the courts. It held that this was so because such a decision constituted an exercise of public power and all exercise of public power, it continued, was subject to control by the courts.

[17] In par 84 of the judgement in the Pharmaceutical Manufacturer's case, Chaskalson P, who wrote the judgement for the Constitutional Court, quoted with apparent approval, a characterisation of the new constitutional order in our country by Ackerman J in **S v Makwanyane 1995 (30 SA 391** (CC) at par 156 as one **"where State action must be such that it is capable of being analysed and justified."** In that paragraph Ackerman J also said that **"(t)he idea of the constitutional State presupposes a system whose operation can be rationally tested against or in terms of the law.**" In paragraphs 85 and 86 of his

judgement in the Pharmaceutical Manufacturers' case, Chaskalson P had the following to say which, I think, is particularly important:-

"85 It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.

86 The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional

principle."

[18] In the course of par 89 of his judgement Chaskalson P also said: **"What the Constitution requires is that public power vested in the Executive and other functionaries be exercised in an objectively rational manner."** He continued thus in par 90:

"90 Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution and therefore unlawful. The setting of this standard does not mean that the Courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately. A decision that is objectively irrational is likely to

be made only rarely but, if this does occur, a Court has the power to intervene and set aside the irrational decision."

[19] What is clear from the judgement of the Constitutional Court is that:

(1) as long as a particular decision is the result of an exercise of public power, such a decision can be set aside by a court if it is irrational;

(2) the bona fides of the person who made the decision do not by themselves put such a person's decision beyond the scrutiny of the Court;

(3) the rationality of a decision made in the exercise of public power must be determined objectively;

(4) a court cannot interfere with a decision simply because it disagrees with it or it considers that the power was exercised inappropriately;

(5) a decision that is objectively irrational is likely to be made only rarely;

6)decisions [of the Executive and other functionaries] must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with [the requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary].

[20] Having set out above part of what was made clear by the Constitutional Court in the Pharmaceutical Manufacturers' case about the reviewability of decisions made in the exercise of public power on grounds of irrationality, it seems to me that it would also be useful to have regard to what was made clear by this Court in Carephone about the reviewability of CCMA awards on grounds of unjustifiability. In this regard this Court made it clear that:-

(a) the constitutional provision that administrative action must be justifiable in relation to the reasons given for it "**introduces a requirement of rationality in the merit or outcome of the administrative decision - which goes beyond mere procedural impropriety as a ground for review or irrationality only as evidence of procedural impropriety;"** (at par 31 at 1434);

(b) **"it would be wrong to read into the administrative justice section an attempt to abolish the distinction between review and appeal**" (par 32 at 1434);

(c) **"whether administrative action is justifiable in terms of the reasons given for it, value judgements will have to be made which will, almost inevitably, involve the consideration of the merits of the matter in some way or**

another but, 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;"

(d) the question to be asked in order to determine whether or not a decision is justifiable or rational is:**"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?"**

[21] When one has regard to the decision of this Court in Carephone and the decision of the Constitutional Court in the Pharmaceutical Manufacturers' case, what is clear is that the ground of review dealt with in the latter case is that of irrationality whereas the ground of review that was dealt with in the former is that of justifiability. As there can be no doubt that, when the CCMA deals with compulsory arbitrations under the Act, it exercises public power, there can also be no doubt that, in the light of the Pharmaceutitical Manufacturers' case, CCMA arbitration awards can be reviewed and set aside by the Labour Court if they are irrational. This raises the further question of whether the terms **"justifiable"** and **"rational"** bear the same meaning. This question arises because, if they

bear the same meaning, then there seems to be no warrant to tamper with the decision of this Court in Carephone because the rationality ground of review emanating from the decision of the Constitutional Court in the Pharmaceutical Manufacturers' case would then be already accommodated in Carephone. If, however, the two terms do not bear the same meaning and they have totally different meanings, then a need might exist to consider whether Carephone was correctly decided and whether it should be departed from.

[22] In Carephone this Court specifically stated in par 31 that the provision of sec 33 read with item 23(b) of the Constitution that an administrative action must be justifiable in relation to the reasons given for it **"introduces a requirement of rationality in the merit or outcome of the administrative decision. This goes beyond mere procedural impropriety as a ground for review or irrationality only as evidence of procedural impropriety".** In par 37 of Carephone this Court once again referred to rationality. There it was considering such overlap or synonymity as justifiability as a test for review might have with other tests.

[23] In Carephone this Court viewed justifiability in the context of the administrative justice provisions as a kind of rationality. This is apparent from the first part of par 37. That part of par 37 reads thus:-

> "**Many formulations have been suggested for this kind of substantive rationality required of administrative decision**

makers, such as ‘reasonableness’, ‘rationality’, ‘proportionality’ and the like (of eg Craig Administrative law at 337 - 49; Schwarze European Administrative Law (1992) at 677). Without denying that the application of these formulations in particular cases may be instructive, I see no need to stray from the concept of justifiability itself. To rename it will not make matters any easier.”

[24] In the second part of par 37 this Court sought to formulate a test for determining whether or not an arbitration award could be said to meet the test of justifiability required by the provisions of sec 33 read with item 23. In formulating the test this Court once again brought some form of rationality into the test of justifiability. It said:-

“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 arrived at?”

[25] There can be no doubt that in Carephone this Court viewed the concept of justifiability as related, at least to some extent, to the concept of rationality but emphasised, correctly in my view, in the context of the fact

that it was dealing with sec 33 read with item 23 which expressly use the adjective **“justifiable”**, that it should stick to the term **“justifiable”**. In the light of this 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. In this regard I am satisfied that a decision that is justifiable cannot be said to be irrational and a decision that is irrational cannot be said to be justifiable.

[26] In the light of the above it appears to me that Counsel for the appellant was right in his submission that whether or not Carephone was wrongly decided has become largely academic as a result of the judgement of the Constitutional Court in the Pharmaceutical Manufacturers’ case which decided in effect that in our law rationality has become a constitutional requirement for all decisions taken in the exercise of all public power. Irrationality of such decisions is now a ground of review and, quite clearly, the issuing of an arbitration award by a CCMA commissioner under the Act is an exercise of public power and must, therefore, meet the constitutional requirement of rationality. If an award fails to meet this constitutional requirement, it can be set aside on this ground.

[27] There is a further reason why it has become academic whether or not this Court’s decision in Carephone was right. Sec 33(3) of the Constitution provides that national legislation must be enacted to give effect to

everyone's right to administrative action that is lawful, reasonable and procedurally fair. Such legislation has been passed. It is called the Promotion of Administrative Justice Act, 2000 (Act No 3 of 2000) ("**the PAJA"**). Except for sections 4 and 10 of the PAJA, the PAJA came into operation on the 30th November 2000. The purpose of the PAJA is given in that Act as:

> **"(t)o give effect to the right to administrative action that is lawful, reasonable and procedurally fair and to the right to written reasons for administrative action as contemplated in section 33 of the Constitution of the Republic of South Africa, 1996; and to provide for matters incidental thereto".**

The PAJA was passed in order to:-

> **"(P)romote an efficient administration and good governance; create a culture of accountability, openness and transparency in the public administration or in the exercise of public power or the performance of a public function, by giving effect to the right to just administrative action".**

[28] The definition of **"administrative action"** under the PAJA is very wide. In terms of sec 1 of the PAJA an **"administrative action"** is defined as meaning "**any decision taken, or any failure to take a decision by-**

(*a*) an organ of state, when-

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(*b*) a natural or juristic person, other than an organ of 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 legal effect, but does not include-

(*aa*) the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79 (1) and (4), 84 (2) (a), (b), (c), (d), (f), (g), (h), (I) and (k), 85 (2) (b), (c), (d) and (e), 91 (2), (3), (4) and (5), 92 (3), 93, 97, 98,99, and 100 of the Constitution;

(*bb*) the executive powers or functions of the Provincial Executive, including the powers or functions referred to in sections 121 (1) and (2), 125 (2) (d), (e) and (f), 126, 127 (2), 132 (2), 133 (3) (b), 137, 138, 139 and 145 (1) of the Constitution;

(*cc*) the executive powers or function of a municipal council;

(*dd*) the legislative functions of Parliament, a provincial legislature or a municipal council;

(*ee*) the judicial functions of a judicial officer of a court

referred to in section 166 of the Constitution or a Special Tribunal established under section 2 of the Special Investigation Units and Special Tribunals Act, 1996 (Act No. 74 of 1996), and the judicial functions of a traditional leader under customary law or any other law;

(*ff*) a decision to institute or continue a prosecution;

(*gg*) a decision relating to any aspect regarding the appointment of a judicial officer, by the Judicial Service Commission;

(*hh*) any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act, 2000;or

(*ii*) any decision taken, or failure to take a decision, in terms of section 4 (1)".

[29] A **"decision"** is then defined as meaning **"any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to"** - among others,

"(a) making, suspending, revoking or refusing to make an order, award or determination?"

Even though the view expressed by this Court in Carephone that the making of an arbitration award by a CCMA commissioner constitutes an administrative action might not be correct, it seems to me that the definitions of **"administrative action"** and of **"decision"** in sec 1 of the

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. It is sufficient, if it appears that the PAJA may well be applicable to the making of an arbitration award by the CCMA because the question that has arisen in this matter is whether or not there is a warrant to reconsider the decision of this Court in Carephone.

[30] If the PAJA applies to the making of arbitration awards by CCMA commissioners, sec 6 of the PAJA comes into operation. S 6(2)(c) of the PAJA provides that an administrative action may be reviewed if it is **"procedurally unfair".** S 6(2)(f) provides, inter alia, that an administrative action may be reviewed if it:-

> **"(ii) is not rationally connected to -**
>
> **(aa) ....**
>
> **(bb) ....**
>
> **(cc) the information before the administrator**
>
> **(dd) the reason given for it by the administrator"**

The term **"administrator"** is defined in the PAJA as meaning an organ of state or any natural or juristic person taking an administrative action. The grounds of review covered in sec 6(2)(c) and (f)(ii) (cc) and (dd) basically relate to what was said by this Court in Carephone.

[31] It is clear therefore, that, if the position is that the PAJA applies to the making of CCMA awards, then such awards would be required by s 6(2)

(F)(ii)(dd) of the PAJA to be rationally connected to the reasons given for them which is the same as what this Court said in Carephone. If this Court were to re-examine the correctness of its decision in Carephone and come to the conclusion that Carephone was wrongly decided, this would not serve much purpose because justifiability, in so far as it falls within the ambit of rationality, would still be applicable to CCMA arbitration awards. This certainly is because of the decision of the Constitutional Court in the Pharmaceutical Manufacturers' case. It may also be because of the PAJA, if the PAJA applies.

[32] The only importance I can think of as to why it may be thought that it is necessary for this Court to decide whether Carephone was right or wrong may be that in determining that the ground of review of justifiability fell within s 145 (2)(a)(iii) of the Act, Carephone in effect held that the time limit set out in s 145 for the bringing of review applications against CCMA awards would apply to that ground of review as well. In this regard it may be thought that, if the ground of review relied upon is not under s 145, the period within which a review on such ground must be launched is a reasonable time from the day of the issuing of the award and not six weeks as prescribed by s 145. If Carephone stands, the question of whether the six weeks period does or does not apply will not arise. Although the reasoning on which this conclusion was based in Carephone is unsatisfactory, there are, in my view, sound policy considerations which justify that we leave Carephone as it is.

[33] The Carephone debate has been going on for a long time. Nevertheless the labour relations community has for some time now organised its lives and activities on the basis of that judgement of this Court. I accept that some of the criticism against Carephone is justified but, having regard to all the circumstances and in order to bring about certainty and stability in the law in this area, I think that that debate must come to an end. In the light of what has been said above in regard to Carephone and the Pharmaceutical Manufacturers' case and what was said by the Constitutional Court in the latter case, and in the light of the possibility that the PAJA may well be applicable to arbitration awards issued by the CCMA, I am of the view that it would not serve much purpose for this Court to consider whether or not its decision in Carephone was correct and whether or not such decision should be departed from. In those circumstances Carephone stays. This appeal can, therefore, be considered on the basis that, as was decided by this Court in Carephone, CCMA awards can be reviewed and set aside if they are not justifiable in relation to the reasons given for them. With this in mind I now turn to the facts of this appeal.

The facts

[34] The facts in this matter are largely common cause or are not in dispute. What is in dispute are the conclusions to be drawn from those facts and the value judgements that must be made in the light of those facts. The appellant operates a number of well-known retail shops in various parts

of the country. One such shop is situated in Newcastle, Kwa Zulu - Natal. In that shop the appellant employed, among others, one Ms Mavis Ziqubu, the second respondent in this matter, as a part-time cashier. The second respondent was so employed from 1993. By 1998 she had been in the appellant's employ for more or less five years. The second respondent was a member of the South African Commercial Catering and Allied Workers Union ("**the union"**) which is the third respondent in this matter.

[35] On the 1st October 1998 the appellant dismissed the second respondent from its employment after a disciplinary inquiry had found her guilty of certain misconduct. The incident which gave rise to the second respondent's dismissal had occurred on the 9th June 1998 in the appellant's Newcastle store. On the afternoon of that day the second respondent was operating till no 28. A staff member, one Ms Cynthia Lawrence, was told by a supervisor in the store to join the queue leading to the second respondent's till and pay there. Ms Lawrence did as instructed by the supervisor.

[36] Ms Lawrence had six items to pay for. One of these was an extension cord costing R 20,00. According to the second respondent's undisputed evidence, while she was attending to Ms Lawrence, a woman came and shouted at her complaining about a parcel that she apparently had left on the counter which had gone missing. In the process of attending to Ms Lawrence, the second respondent punched R2,00 instead of R20,00 in her

till for the extension cord. She punched the correct prices for the other five items purchased by Ms Lawrence. Later on a security guard at the door of the shop searched Ms Lawrence's parcels, examined the till slip and found that, although the price of the extension cord was R20,00, only R2,00 had been charged for it. This was brought to the attention of the management. Ms Lawrence paid the difference. Subsequently the second respondent was called to a disciplinary inquiry. The charge framed against her was **"gross misconduct in that on the 9th June 1998 you operated till no.28 and rung up R2,00 for an extension cord costing R20,00 which resulted to the company having a loss of R18,00".**

<u>The disciplinary inquiry</u>

[37] In the disciplinary inquiry the second respondent admitted that she had rung R2,00 instead of R20,00 for the extension cord. The security guard who had discovered the discrepancy was called to give evidence. His evidence was that Ms Lawrence came to the staff entrance (where the security guard was posted) and asked the security guard to **"search her"**. He did and he discovered the discrepancy between the price of the extension cord and the price actually paid. He stated that the rest of the items purchased had been correctly charged. He testified that he had asked Ms Lawrence to go back to the till **"to check"**. The contents of the till slip confirmed the discrepancy. He asked his immediate superior to help him but he was not available. He testified that Ms Lawrence had then asked to pay the difference. He had then called the till controller.

The till controller had come and spoken to Ms Lawrence. He did not hear what the two were saying. Thereafter he had seen Ms Lawrence **"swiping her card"** whereafter she **"come back to our office and she went"**.

[38] Asked what the second respondent's reaction was to the discovery of the discrepancy, the security guard testified that the second respondent stated that this had been a mistake. When the second respondent had an opportunity to cross- examine the security guard, she asked him whether, if it had been her intention to steal the extension cord, she would have rung it on the till. The security guard answered this question by saying:- **"the way I think sometimes parcels are not checked properly you wouldnt notice the wrong price and item".** Another question that the second respondent asked the security guard was: **"if the security has to check the parcels one by one or they just look at it".** The answer given was:- **"The law says that we must check one by one. I say this because I see that the item that is not on the slip that used to happen like that".** At this stage the second respondent asked: **"I would like to ask why is it they dont check one by one and sometimes they just look".** The security guard answered: **"It doesn't happen because we are not the same. I check the way I check because of the law".**

[39] The second respondent testified in the disciplinary inquiry that:-

(a) what had happened was a mistake;

(b) she had rung R2,00 instead of R20,00 for the extension cord;

(c) there had been a long queue for her to attend to;

(d) while she was attending to Ms Lawrence, a certain customer came and shouted at her in regard to her lost parcel;

(e) she had no packer and had to do her own packing at the till in addition to operating her till;

(f) it was not **"my aim to underring the item by me may be I was confused so I did it".**

The second respondent was asked by her representative whether she was **"concentrating"** at the time she was ringing Ms Lawrence's items**.** She replied: **"I would say I was but because that customer came she confused me".** It also transpired in her evidence that, although she had not watched the till training video, she had nevertheless received **"lots"** of till training.

[40] Asked whether Ms Lawrence had asked her to ring R2,00 instead of R20,00, the second respondent answered in the negative. She confirmed that she knew that she was required to check the till screen after ringing a price to see if she had rung the correct price. She admitted that she had not followed this procedure when she rang the extension cord. She blamed this on her being confused as a result of the shouting of the customer that came around looking for her parcel and on being busy because she had a long queue to attend to and had no packer to assist her. She said that she did not notice that she had rung a wrong price. Asked

whether it had not been her responsibility to check whether she had rung the correct price, the second respondent replied: **"I told myself this is one of the staff member we are helping each other. I told myself Cynthia will check if the price is wrong or right ...."**

[41] The second respondent was asked whether every time she got confused, she made a mistake. She replied: **"I never had a mistake it has been my first time".** Towards the end of her evidence, the second respondent was again asked to explain why she had rung R2,00 instead of R20,00. She explained: **"The lady came when I was ringing it is whereby I got confused".** She was again asked if she had realised that she had rung a wrong price. To this she replied in the negative. She said that she had only realised that she had rung a wrong price when Ms Lawrence **"come with the security".** The last question that the second respondent was asked was how she felt about having rung R2,00 instead of R20,00. She replied: **"I find myself guilty".**

[42] It is appropriate to state that no evidence was led at the disciplinary inquiry on the importance of the till procedures that must be followed by cashiers nor was any evidence led to show that the appellant had always dealt with acts of underringing by dismissing employees found guilty thereof. During argument presented in the disciplinary inquiry Mr Acker, who was termed the initiator (of the disciplinary proceedings), argued that the second respondent was **"guilty of underringing and defrauding**

the company of R18,00 and was in collusion with the staff member Cynthia Lawrence". He stated that he was basing this on a number of matters. Those matters are reflected in the minutes of the inquiry. One was that the second respondent was an experienced cashier who knew the till procedure. Another was that the second respondent **"was negligent in her till she did not double check the amount rung on the till if she said she was confused. This would have resolved the problem therefore I believe she done it on purpose"** (my emphasis). He gave another factor as being that : **"A mistake of this magnitude cannot happen as only six items have been purchased".**

[43] After argument the inquiry was adjourned. However, before the chairman could give his decision, the inquiry resumed for the purpose of clarifying certain matters. Among other things the chairman asked the second respondent to state the till procedure that she normally followed. The second respondent explained it thus: **"I first look at the items price then I check if the price on the item is correct then ring it on the till".** She was asked if she always did that and she answered in the affirmative. Asked why she had to do that, she answered that it was necessary to do that in order to "**see if I rang the correct price".** She was then again asked by the chairperson how it was possible that she rang R2,00 instead of R 20,00. To this she responded : **"That it means it was a mistake I thought all the zero buttons was pressed. I was confused with the customer that was looking for her parcel".**

[44] A document headed: **"findings"** is to be found at 40-41 of the record**.** At the end of that document appears the name N. Acker. That document is prepared as if reflecting findings. One would assume that those are the findings of the chairman of the disciplinary enquiry. However, the chairman of the disciplinary inquiry was not Mr Acker but a Mr Mazibuko. Mr Acker is reflected in the minutes of the disciplinary inquiry as the initiator of the disciplinary proceedings. At 42-3 of the record there is a document which is headed: **"Finding - Mavis Ziqubu OK Newcastle"**. That document appears to contain the findings and reasons of the chairman of the disciplinary inquiry. I shall approach the matter on the basis that the document at 40-41 is written argument presented at the disciplinary inquiry by the initiator of the proceedings, Mr Acker, and that the document at 42-3 is the finding of the chairman of the disciplinary inquiry as well as his reasons for that finding.

[45] What is important about the initiator's written argument at 40-1 is that it reflects that he argued the case before the chairman of the disciplinary inquiry on the basis that this was not a case of negligent underringing but one of deliberate underringing. What is important about the finding of the chairman of the disciplinary inquiry is that it also reflects that he found the second respondent guilty of collusion - which is an act of misconduct requiring intent as opposed to one based on negligence. In the third paragraph in his finding the chairman said: "**In this particular incident I find a lot of evidence of staff collusion in that [the second respondent]**

colluded with the staff member to defraud the company by ringing R 2,00 instead of R 20,00 for an item". In the second paragraph of the chairman's finding, the chairman said: **"Underringing is a serious offence especially if it involves collusion between the cashier and the party purchasing items at till points".**

[46] What this demonstrates, in my view, is that the two offences were not placed on the same level of seriousness even though both were regarded as serious. It appears that the appellant's attitude as reflected in the attitude of one of its managers, namely, the chairman of the disciplinary inquiry, was that underringing was serious but, when it was intentional, it was more serious. I emphasise that the chairman of the inquiry did not make any finding that the second respondent had been negligent. The chairman of the inquiry imposed the sanction of dismissal.

<u>The internal appeal</u>

[47] An internal appeal was noted on the 1st October 1998 which was the same day on which the chairman of the disciplinary inquiry gave his decision on sanction. The grounds of appeal were that the dismissal was both procedurally and substantively unfair and that the sanction of dismissal was inconsistently applied. The chairman of the appeal was one R. Cotwal. When the chairman of the appeal hearing gave his finding, he said: **"The charge of gross misconduct is correct in the circumstances in that she deliberately rang up a wrong price which was far less than**

the correct price. She rang up R 2,00 instead of R 20,00. <u>This can never be negligence”</u> (My underlining). The internal appeal was dismissed. The finding of the disciplinary inquiry and the dismissal were confirmed.

[48] A strange feature of both the disciplinary inquiry and the appeal hearing is that, although in both instances a case of inconsistency in the application of discipline was presented on behalf of the second respondent, neither the chairman of the disciplinary inquiry nor the chairman of the appeal hearing dealt with this issue in findings and reasons. The case of inconsistent application of discipline was presented on the basis that another employee, one Adelaide, who had underrang an item costing R 13,99 by R10,00 in that she had rung R 3,99, had not been dismissed by the appellant even though she had been found guilty of underringing.

[49] What the record, therefore, reveals is that:

(a) in the disciplinary inquiry the initiator presented the appellants case against the second respondent on the basis that her conduct had been deliberate;

(b) the chairman of the inquiry made a finding that the second respondent’s conduct had been deliberate.

(c) the chairman of the appeal hearing made his findings on the basis that the second respondent's conduct was deliberate and not negligent.

The arbitration proceedings

[50] Subsequent to the outcome of the internal appeal, the second respondent referred a dispute of unfair dismissal to the CCMA for arbitration. The CCMA appointed the first respondent, who was one of its commissioners, to arbitrate the dispute. In the arbitration proceedings the appellant presented its case against the second respondent on the basis that the second respondent's conduct had been deliberate. When he was given an opportunity to make an opening statement outlining his case, Mr Khuboni, who represented the appellant in those proceedings, is recorded as having said:

> **"Thank you commissioner, we are going to seek to prove that ... (break in recording) .... company will seek prove that this was deliberate .... (break in recording ....(inaudible) ... I would like to call that witness. The first witness will show that this was not ... (break in recording) ... witness, the store manager will show you that .... (intervention)".**

[51] In the arbitration proceedings the second respondent's case was that, whilst admitting that she knew the till procedure that she was required to follow, on the occasion of the incident in question, she did not follow the

till procedure. She said that this was because she was confused as she had a long queue to attend to, had no packer to help her and, while she was attending to Ms Lawrence, a customer had approached her and shouted at her in regard to that customer's lost parcel. She said that it was by mistake that she had underrung the price for the extension cord. She was emphatic that she had not done this deliberately. She accepted that she had acted negligently.

[52] The second respondent sought that she be given a warning for her negligence. She also sought to rely on the appellant's previous handling of cases of undertilling and stated that her dismissal would constitute an inconsistent application of discipline. From the beginning of the arbitration, the appellant sought to prove that the second respondent did not act negligently but acted deliberately with the intention to defraud the appellant. As already indicated,
that was revealed already from the opening statement of the appellant's representative.

[53] The appellant called a witness who testified about the till procedures. This was Bityawanthe Ramlakan. This witness was a cash office supervisor. One of the questions that Mr Khuboni asked Ramlakan was whether it was possible **"to ring R 2,00 instead of R 20,00 ... (break in recording) ... following the procedures that you have just mentioned?"** The answer was that a cashier would pick up such a mistake if such cashier followed the normal till procedures.

[54] The appellant's next witness was Mr Neil Acker, the store manager. Mr Khuboni asked Mr Acker how often the store had **"cases of this nature".** The answer appears as **".... (break in recording ... a few cases that we've had in the past ... (inaudible)".** Mr Acker testified, among other things, that Ms Lawrence had been dismissed for collusion. The only person that Ms Lawrence could possibly have colluded with in order for her to be undercharged was the second respondent. It would have been awkward for the appellant to pursue any charge against the second respondent other than one entailing collusion against the second respondent when it had already dismissed Ms Lawrence for collusion.

[55] Under cross-examination Mr Acker was asked whether he believed that there had been collusion between the second respondent and Ms Lawrence. Mr Acker answered in the affirmative. Asked why he thought so, Mr Acker answered:- **"Because, firstly, why didnt they pick up the mistake immediately and in the .... (break in recording) ... cashier is responsible for what is rung up on the till. The staff member is also responsible to make sure that they check the till slip before it is re-verified by the security before they go out of the store to take off any suspicion of theft or any albeit that the cashier that has rung up ... (inaudible)".** This evidence by Mr Acker presents an interesting feature in this matter. It seems to corroborate the second respondent's evidence of her having had an expectation that Ms Lawrence would pick up a

mistake as they were **"helping each other"** as she put it. Mr Acker's evidence seems to provide a basis for the second respondent's expectation because he stated that a staff member also had a responsibility to check his/her slip. This can only mean checking whether the price was correct. It should go without saying that, if a staff member making purchases had such a responsibility, he/she also had a responsibility to disclose any discrepancy he/she picked up.

[56] Mr Acker was asked by the first respondent whether the case could be one of an honest mistake arising out of a cashier ringing up 2 instead of 20. His answer was that this could not have been an honest mistake. Mr Acker was then asked : **"Now if a worker was aware that if she sells to a colleague, a fellow employee, and the security is going to check, do you think the worker will purposely undertill knowing that this is going to get picked up by the security?"** Mr Acker answered:" **If theres collusion at the back door with the security, it would happen and in this particular case what had happened was that morning I had put a new security guard at the staff entrance".** A little while later Mr Acker was asked how often the security guards at the store were changed and he answered; **"We change them on a regular basis. That's up to the security company ... (inaudible).**" No evidence was led to suggest that from morning to the afternoon when the incident occurred, the second respondent would not have become aware that there was a different security guard the door of the store on that day.

[57] Mr Acker also gave evidence that this incident was not the first one by the second respondent. This was directly in conflict with the evidence that the second respondent had given in the disciplinary inquiry where she stated that this was her first offence. It is not clear why she gave this obviously false evidence unless the position is that she did not expect the appellant's representative to be able to prove the contrary. It is difficult to think she could entertain any doubt about this. Mr Acker testified that the second respondent had previous warnings which had been given to her before his time in the store. However, the appellant's representative later conceded that her previous warnings were no longer **"applicable"** because the maximum period that previous warnings were allowed to remain on the file of an employee was four months and such period had long expired in respect of each of the second respondent's warnings.

[58] Mr Acker was also cross-examined on the sanction that the appellant had imposed on other employees who, in the contention of the second respondent's representative, had committed similar offences. Mr Tisheng, the second respondent's representative in the arbitration proceedings, started his cross examination of Mr Acker thus:

> **"Cross-Examination by Mr Tishengs (Inaudible) .... having some big cases with regard to. ... (break in recording) ... out of ... (inaudible) ... five cases you confirmed that its only one dismissal. What about the ... (break in recording) ... (inaudible) ... which were presented by ... (break in recording) ... when you**

talk of final written warning and ... (break in recording) ... for under ringing not the other one which actually was ... (inaudible) ... underringing? Yes ... yes, there has been dismissals. How ... (break in recording) ... what was the reason for the other one to be given a final written warning (break in recording) ... said, no, the reason it was the button of ... (break in recording) ... you say you dont know the reasons for... (intervention) ... yes, that was one of the reasons because if you press a button, okay, that button has got a spring and its got a chipboard and microchip underneath it. (Break in recording) ... that button and you press it, it touches the microchip which registers the till, okey, and you ... (break in recording) ... press that button, it doesnt press the plunger on the microchip to make it register. Thats one of the reasons why 1" on the till didnt work and she rung up R3,00. Are you familiar with the operation of the till, Sir? ... yes, I am.

If a cashier is operating a till, and doesnt ... break in recording) ... theres a mistake, what steps should be taken by the cashier to ... (inaudible) ... that? ... (Break in recording) ... is to check on the console of the till. So when she rings up an item, okay, to find out if she hasnt made a mistake is to check on the console to confirm what shes rung on that till is the actual price of the article because it will ... (break in recording) ... then after her

> **transaction of whatever numerous amount of articles shes purchased through, there is a button that tells you the total transactions. So be it ten articles, it will give you the total rand value of what you punched in for those ten articles and if she does a mental calculation shell be able to check if shes made a mistake or not. Theres a till slip as well which she can check on what shes rung up".**

It is worth noting at this stage that Mr Acker's evidence against the second respondent was in effect that she had acted dishonestly and that this could not have been a case of an honest mistake.

[59] The second respondent then gave evidence in her own defence. She admitted punching R 2,00 instead of R 20,00 for the extension cord. She said that this was a mistake which occurred in the context of her attending to a long queue of customers with no help because she had no packer and, while attending to Ms Lawrence, having to deal with a customer who was shouting at her about her lost parcel. She testified that she did not underring intentionally. She said that she called her supervisor to deal with the customer who was shouting at her and the supervisor solved the customer's problem.

[60] In the first page and a half of his cross-examination of the second respondent, the appellant's representative asked questions clearly calculated to show that the second respondent could not have made a

mistake. The second respondent insisted that this was an honest mistake. In the course of the second respondent's evidence, Mr Khuboni dealt with the second respondent's previous warnings. He said that the maximum period that a warning would **"stay on file"** would be four months.

[61] Mr Khuboni informed the first respondent that one previous warning had been given during May 1997 for incorrect counting of money. He said that another one had been given on the 4th June 1996 for till shortage. Another one was for **"incorrect till procedures"** and had been given on the 5th May 1997. In respect of the last one, namely, **"incorrect till procedures"** a final written warning had been given. Then the transcript reflects that the following transpired between the first respondent and Mr Khuboni:-.

> **"Commissioner: It is more than four months, so its immaterial. Your own submission is that it only stays on file. Previous things has got nothing to do with that because she had a clean record. Mr Khuboni: Correct, what Im trying to show here is the type of person that ... (Inaudible) ... you had five sorry, you had two final written warnings and three written warnings (break in recording) ... to show the arbitrator the type of person that Ms Ziqubu is".**

[62] It is appropriate to record that in the course of her evidence before the

first respondent, the second respondent lied about her previous warnings. She had done the same in the disciplinary inquiry. She said that she had had no previous warnings. It is also important to observe that in the arbitration proceedings the appellant did not dispute the following evidence of the second respondent, namely, that:-

(a) the incident occurred on a busy day;

(b) the second respondent had a long queue of customers to attend to;

(c) while the second respondent was attending to Ms Lawrence, a customer who had left a parcel on the counter came and started arguing with, and shouting at, her;

(d) she had no packer to assist her;

(e) she had called her supervisor to deal with the customer who was shouting at her and the supervisor had resolved that customer's problem.

[63] In addition to the above it also transpired in the arbitration proceedings that the standards set by the appellant were not to the effect that undertilling or a failure by a cashier to follow till procedures always resulted in the dismissal of the cashier who was found guilty thereof. The second respondent's representative indicated that the second respondent deserved a written warning. There was argument presented on behalf of the second respondent that the appellant had not presented any evidence to show that the appellant had counselled the second respondent. This is

true. Mr Khuboni had stated from the bar that the second respondent had been counselled each time she had been given a warning before but what Mr Khuboni said from the bar was not evidence under oath.

[64] When Mr Khuboni presented his argument, he made the point that the evidence presented on the appellant's behalf was credible and was **"that it is not possible to make a mistake"**. Mr Khuboni never argued that, if the commissioner rejected the argument that this was deliberate, he should nevertheless in the alternative find that the dismissal was fair because the negligence was gross. That was never the appellant's case before the first respondent. It would appear that the transcript does not reflect the complete argument on both sides. It is clear that, where the transcript ends, for example, Mr Khuboni must have said more than is reflected in the transcript. It is recorded in the transcript that the tape ended there and no further tapes were provided. If the position is that during argument, Mr Khuboni did present such argument which is not contained in the transcript, the appellant cannot blame anybody because it did not reconstruct the missing part of the evidence. After the transcript had been provided, the appellant must have realised that there were gaps in the transcript which had to be filled in one way or another in order for justice to be done to its case but nevertheless proceeded with the case without filling the gaps. I cannot see how the second respondent can be made to suffer as a result of that omission on the appellant's side.

[65] In his arbitration award, the first respondent stated that the appellant **"had to show on a balance of probabilities that the employee acted fraudulently and in cohoots with Cynthia Lawrence to defraud the company of R 18,00".** He continued: **"I am not satisfied that the employer party discharged this burden of proof sufficiently and I have found the dismissal to be substantively unfair ..."** The first respondent gave the following as some of the reasons for his findings:-

"1. There was no clear evidence to indicate that Cynthia Lourens and the employee planned that Cynthia would make her purchases at the employees till and that the employee will undertill her purchases. It was co-incidental that Cynthia used the employees till as the employer party did not dispute that Cynthia was in another queue when the supervisor announced that staff could use the employees till after 16h00.

2. .....

9. R 2,00 instead of R 20,00 can be an honest mistake. The employee omitted to punch one.

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

9. ...

9. The employer party is not consistent in the

application of its disciplinary code and has given final warnings for similar offences.

9. ...

9. The employee had a clean disciplinary record with 4-5 years service. She is still working part time earning R 146,16 per week. She is married and breadwinner of her family of 3 children.

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

The first respondent then ordered that the appellant reinstate the second respondent retrospectively to the date of dismissal on terms and conditions not less favourable to her than those that governed her employment at the time of her dismissal.

<u>The review application</u>

[66] The appellant was aggrieved by the arbitration award issued by the first respondent. It brought an application in the Labour Court for an order reviewing and setting aside

the arbitration award. The Court a quo dismissed the application with costs. The Court a quo's consideration of the merits of the review application was on the basis that the justifiablity of an arbitration award was not a ground of review on which a CCMA award could be reviewed. However, it held that, had the justifiability of an arbitration award been one of the grounds of review, it would have concluded that the award was reviewable on that ground. Subsequently the Court granted the appellant leave to appeal to this Court, hence this appeal.

The appeal

[67] Before us Mr Gauntlett attacked the first respondent's award on two grounds. I deal with the first one now and with the second one later. The first attack was that the first respondent committed a gross irregularity in that he failed to consider part of the appellant's case that was put before him. Mr Gauntlett submitted that that part of the appellant's case consisted of the appellant's contention that, even if the second respondent was found not guilty of fraud i.e (deliberate underringing), her conduct constituted negligence of such a gross nature that her dismissal was fair. Mr Gauntlett submitted that the first respondent only considered that part of the appellant's case which was to the effect that the second

respondent's conduct constituted fraud and did not consider the other part. This contention is to be found in various paragraphs of the appellant's founding affidavit. I propose to deal with it in the context of dealing with various allegations made by the appellant in the founding affidavit.

[68] In the founding affidavit the appellant stated that the first respondent merely skimmed over certain important issues like the importance of the need for strict compliance by cashiers with the appellant's tilling procedures. Towards the end of par 10.12 the appellant stated: **"Whether or not the origins of Ziqubus actions arose from an honest mistake or from deliberate intent to under-till are irrelevant to the extent that her actual conduct in not following proper till procedures when she was well aware of the procedures and the importance of them is the most important element and the element which led to the [appellant] holding that Ziqubu be dismissed on the grounds of gross misconduct".** From this it seems that the appellant presents its case as being that the true reason why the appellant dismissed the second respondent was her failure to follow proper tilling procedures when she was well aware of their importance to the appellant. There are difficulties with this but I deal with them later.

[69] In par 10.13 of the founding affidavit the appellant makes the submission that the first respondent failed to take into account the importance of the mistake to the appellant and the fact that this importance was clearly known to the second respondent. In par 10.20 the appellant noted that the first respondent had found that the second respondent had been negligent but had taken the matter no further. The question which then immediately arises is: what should the first respondent have said or done further? In the same paragraph, the appellant states what it suggests the first respondent should have done further. It says that the point which it had attempted to raise during the arbitration proceedings was that **"negligence of an employee when working as a cashier amounts to gross misconduct as it is a crucial area wherein procedures are strictly adhered to for very apparent commercial reasons".** It goes on in the same paragraph and says:- **"(N)eglecting to adhere to these procedures amounts to gross misconduct in the broader context of the nature of the [appellants] business".**

[70] In par 10.21 of the founding affidavit the appellant said that its version was that **"(the second respondent's) conduct amounted to more than just a mistake and**

amounted to collusion with another employee Cynthia Lawrence, with intention to defraud. However, in the event of the Court deeming that Ziqubu's error was merely a mistake, I submit that it makes no material difference to the [appellant's] case. It is clear from the [appellant's] evidence that mistakes cannot be tolerated in the cashiering process due to the nature of the applicant's business and the potential losses which may be incurred".

[71] The thrust of the appellant's case, as set out in its founding affidavit, and as presented by Mr Gauntlett was that the mere negligence of the second respondent in not following till procedures when she knew the importance thereof constituted gross misconduct justifying dismissal. In this regard the appellant stated that whether or not the second respondent had acted intentionally or negligently was irrelevant. It complained that, after the first respondent had found that the second respondent had not acted intentionally or deliberately, but had acted negligently, he did not go further and consider the second leg of its case, namely, that the negligence was on its own so gross as to be sufficient to justify the dismissal. What was the second and third respondents' response to this part of the appellant's contentions?

[72] Mr Brassey who, together with Mr du Plessis, appeared for the second and third respondents, disputed the correctness of the appellant's contention that the first respondent had been required in the arbitration proceedings to consider the contention that, even if the second respondent's conduct was not deliberate, it constituted
gross misconduct which rendered the first respondent's dismissal fair. He pointed out that the second and third respondents had in their answering affidavit disputed allegations to that effect. Mr Brassey submitted that, upon a proper reading of such of the record as we have in this case, it was clear that the matter had proceeded before the first respondent only on the basis of whether or not the second respondent's conduct had been deliberate.

[73] A reading of the affidavits in this matter does, indeed, reveal that in the answering affidavit the second and third respondents disputed the allegation that it was part of the appellant's case before the first respondent that, if the second respondent was not guilty of fraud or deliberate conduct in underringing the extension cord, she was, nevertheless, guilty of gross negligence and that such gross negligence rendered her dismissal fair. The second and third respondents stated in the answering affidavit

that the appellant's case in the arbitration was simply that the second respondent had acted deliberately in under-ringing.

[74] This creates a dispute of fact about what the appellant's case was before the first respondent. Unless the second and third respondents' version is wholly untenable or far fetched, their version should prevail in the absence of a request for oral evidence. It certainly is not wholly untennable nor is it far fetched. Accordingly on that basis alone this matter must, therefore, be decided on the basis that it was not the appellant's case before the first respondent that, even if the second respondent was not guilty of fraud, she was guilty of such gross negligence that the sanction of dismissal was fair.

[75] It appears to me that the second and third respondents' version in this regard is supported by the contents of the minutes of the disciplinary inquiry, the findings of the internal appeal hearing as well as the appellant's opening statement in the arbitration proceedings. In this regard the chairman of the disciplinary enquiry had the following to say in paragraphs 2 and 3 of his findings:

> **"Under ringing is a serious offence especially if it involves collusion between the cashier and**

the party purchasing items at till points.

In this particular incident I find a lot of evidence of staff collusion in that [the second respondent] colluded with the staff member to defraud the company by ringing R 2,00 instead of R 20,00 for an item".

[76] In the internal appeal the chairperson of the appeal hearing also dealt with the matter on the basis that the second respondent **"is guilty of collusion as she rang the goods up".** There is also a letter in the record from Mr Niel Acker of the Newcastle Store which he addressed to one Mr Y. Moola in which he referred to the second respondent as a "**casual dismissed due to under-ringing and staff collusion".** The chairman of the appeal hearing said the following in his findings:"**The charge of gross misconduct is correct in the circumstances in that [the second respondent] deliberately rang up a wrong price which was far less than the ----- paid. She rang up R 2,00 instead of R 20,00. This can never be negligence".**

[77] As already indicated above at the commencement of the arbitration proceedings the appellant's representative was given an opportunity to give his opening address **"as to why you say that the dismissal was fair and whats**

in dispute". He then said**: " ... we are going to seek to prove that ... break in recording) ... company will seek to prove that this was deliberate ... (break in recording) ... (inaudible) ... I would like to call that witness".** During argument in the arbitration, he appears to have argued the matter on the basis that the under-ringing was intentional because he is recorded as having said at some stage in his argument that **"... it is not possible to make a mistake ... (break in recording) ... was a credible witness".**

[78] In his cross-examination of the second respondent, Mr Khubone sought to prove that what had occurred was no mistake but that it was intentional. In the light of all of the above, I am of the opinion that the appellant's case in the arbitration was never that, should the first respondent not find that the second respondent had acted fraudulently, he should nevertheless find that she had acted negligently and, that her conduct constituted gross negligence which rendered the dismissal fair. In those circumstances I am of the opinion that the appellant cannot criticise the first respondent for not dealing with a matter which fell outside the issues placed before him by the parties for decision.

[79] Although the first respondent was not asked to find, in the alternative to the allegation of fraudulent conduct, that

the second respondent's conduct constituted gross negligence rendering her dismissal fair, I am of the opinion that he nevertheless did consider whether, if one accepted that the second respondent's conduct was not fraudulent but was negligent, her conduct was such as to render her dismissal fair. It is clear from the reasons for his finding that he considered that there were mitigating factors. In this regard he made mention of the customer who came to the second respondent while the latter was attending to Ms Lawrence and started shouting at her in connection with her lost parcel as well as the fact that it was busy and the second respondent had a long queue to attend to and had to do her own packing as she had no packer. Furthermore the first respondent approached the matter on the basis that the second respondent had no previous warnings (or had a clean record). Whether to approach the matter on this basis was right or wrong is another matter. He also considered that the second respondent was sorry about what she had done. As he found that fraud had not been established, there would have been no reason for him to refer to this factor unless he was considering its impact on the sanction in the light of his finding of negligence.

[80] I do not think that there was sufficient evidence before the first respondent to conclude that the second respondent

acted fraudulently. Certainly not when the evidence that a customer came and shouted at her, and hence distracting her attention while she was attending to Ms Lawrence was not disputed by the appellant. There is no reason why the appellant could not have disputed this evidence if it wanted to because the second respondent's evidence was that she called her supervisor to solve that customer's problem and the supervisor solved the problem. If this did not happen, why did the appellant not call the supervisor to the arbitration to deny that she was ever called by the second respondent to deal with such a problem on that day? In this regard it needs to be pointed out that already in the disciplinary inquiry the second respondent's version included a long queue and a customer that came asking for her parcel and the fact that she had no packer. It also included the statement that she was confused. The inquiry occurred on the 22nd June 1998 whereas the incident had occurred on the 9th June. In the disciplinary inquiry the second respondent specifically said that the customer who was looking for her parcel confused her. (See p 31 of record). Later on (p.32 of the record) she was asked again to explain why she had rung R 2,00 instead of R 20,00 and she answered:- **"The Lady came when I was ringing it is whereby I got confused".**

[81] The second ground on which Mr Gauntlett relied to attack

the first respondent's award was that the first respondent's award was not justifiable in relation to the reasons given for it. This ground of review is based on the judgement of this Court in **"Carephone"**. The Court a quo expressed the view that, if the test were whether the first respondent's conclusion was justifiable, it would have held, in the light of the deficiencies in the first respondent's reasoning, that it was not justifiable.

[82] In considering whether or not the first respondent's award falls to be set aside on the ground that it is not justifiable in relation to the reasons given for it, I consider that one must have regard to the material that was properly available to the first respondent, the decision he took and the reasons that he gave for such decision. As one does this, one must bear in mind what Chaskalson P said in the Pharmaceutical Manufacturers' case, namely, that a decision that is objectively irrational is likely to be made only rarely. Of course, I am saying this in so far as it seems that there is much commonality between justifiability and rationality. One must also bear in mind the importance of maintaining the distinction between appeals and reviews. It must also be borne in mind that the Act contemplates that the disputes that it requires to be referred to arbitration are meant to be put to an end by way of arbitration and that, the dispute resolution

dispensation of the Act-which is meant to be expeditious-would collapse if every arbitration award could be taken on review and set aside. In my view it cannot be inconsistent with the Constitution to seek to promote an expeditious resolution of these disputes.

[83] The decision that is sought to be attacked in this matter is the first respondent’s decision that the dismissal of the second respondent by the appellant was unfair. I have already stated that the appellant presented its case against the second respondent before the first respondent on the basis that the second respondent had deliberately underrung the price of the extension cord and not that she had acted negligently. In fact the first respondent stated in his summary of the appellants evidence before him that the store manager, Mr. Acker, was adamant before the first respondent that the second respondent did not act negligently but that she had acted deliberately. The first respondent found, correctly in my view, that on the evidence presented to him, it had not been shown that the second respondent had acted deliberately. The argument that the first respondent’s award is not justifiable in relation to the reasons given for it was presented on the basis that, even if this was a case of negligence on the second respondent’s part, the negligence was so gross that the award cannot be said to be justifiable. It was also

submitted that the first respondent’s reasoning was so deficient that the award could not be said to be justifiable in relation to the reasons given for it.

[84] I accept that the first respondent’s award can be criticised in a number of respects. However, when all is said and done there are still certain matters which, in my view, save it from being such as to be described as irrational or unjustifiable, even taking into account all that criticism. They are that the incident occurred in circumstances when the second respondent had a long queue to attend to, had no packer to assist her and was confused by a customer who was shouting at her in regard to a lost parcel. The first respondent also took into account that the second respondent was sorry for what she had done. I don’t know how much weight one can place on this factor in this case but I cannot say it was unreasonable of the first respondent to take it into account.

[85] There is also the question of the second respondent’s disciplinary record. In this regard the evidence presented to the first respondent was that the second respondent had previously been issued with written warnings. However, such warnings had “**expired”** or” **lapsed”** because, according to the appellant’s representative in the arbitration, warnings “**stayed on file”** for a maximum

period of four months and that period had long lapsed in respect of the second respondent's warnings at the time of the incident. In the light of this the first respondent approached the matter on the basis that the second respondent had a clean record.

[86] The question which arises in relation to the lapsed warnings issued against the second respondent is whether the first respondent should have taken them into account and, if so, for what purpose they should have been taken into account. As already stated the first respondent disregarded the previous warnings completely and dealt with the second respondent on the basis that she had a clean record. Maybe another approach would have been not to have regard to the lapsed previous warnings but to, nevertheless, have limited regard to an employee's disciplinary record in the sense that one does not have regard to warnings as such but has regard to the fact that in the past such employee has been found guilty of misconduct. In par 10.19 the appellant stated that, although, the second respondent's previous warnings which had been given to the second respondent were **"no longer applicable",** her poor history of past conduct with regard to till procedures could not be ignored. No reason was advanced as to why, if they were not applicable, such warnings should be taken into account.

In par 10.22 of the founding affidavit, the appellant alleged that the second respondent had been subjected to a number of final written warnings and contended that, for that reason, it could not be said that its discipline had not been progressive. This may be so, but as it will become clear later in this judgement, this does not help the appellant's case much.

[87] In dealing with the first respondent's approach to the second respondent's disciplinary record, the Court a quo compared a final warning that has lapsed to a lapsed suspended sentence in criminal matters. It said that just as a lapsed suspended sentence does not extinguish the conviction from a person's criminal record, also the lapsing of a previous warning does not extinguish prior misconduct by the employee concerned.

[88] In this case when the issue of the second respondent's disciplinary record arose before the first respondent, the first respondent put to the appellant's representative what he believed was the effect of the lapsing of the second respondent's warnings. This gave the appellant's representative an opportunity to indicate to the first respondent what the correct approach was that the first respondent should adopt in this regard.The transcript reveals the following exchange between the first

respondent and the appellant's representative on the relevance or materiality or lack thereof of the lapsed warnings of the second respondent:-

> **"<u>Commissioner:</u> It is more than four months, so it's immaterial. Your own submission is that it only stays on file. Previous things has got nothing to do with that because she had a clean record.**
>
> **<u>Mr. Khuboni</u>: Correct, what Im trying to show here is the type of person that ... (inaudible) ... you had five-sorry-you had two final written warnings and three written warnings ... (break in recording) ... to show the arbitrator the type of person that Mrs. Ziqubu is.**
>
> **<u>Commissioner</u>: But she wasnt a dishonest person. If she was dishonest, she should have been fired a long time and see theres in the minutes, there is some indication of the date, so Ill take it off the minutes so as ... (incomplete)".**

Thereafter the transcript shows that there was a break in recording and when the recording resumed, the appellant's representative was cross-examining the second respondent on something else.

[89] If one has regard to the above exchange between the first

respondent and the appellant's representative during the arbitration, what is clear is that the first respondent indicated to the appellant's representative that he thought that, as the warnings had lapsed, the second respondent should be treated as having a clean disciplinary record and that, when the appellant's representative reacted to that, he said that that was correct but what he was seeking to do was to show the type of person that the second respondent was. It is not clear what was meant by this. If the intention was to show what type of a person the second respondent was, the question that arises is: and so what? The transcript does not reveal that during argument before the first respondent the appellant relied on the second respondent's pervious disciplinary record.

[90] In our law there is no statutory provision that deals with what the duration of a disciplinary warning is nor is there a statutory provision that deals with what the effect is in law of the lapsing of a disciplinary warning. An employer and an employee may deal with these matters in their contract of employment. This may also be dealt with in a collective agreement between the employer and a trade union. These matters may also be governed by an established practice in a particular workplace. Depending on what the contract of employment between the parties, or, the applicable collective agreement, provides or what the

established practice is in a particular workplace, the fact that an employee's previous warning has lapsed or expired may well mean in a particular workplace that such employee must be treated as having a clean record when he is next found guilty of misconduct. For reasons that will emerge later in this judgement I am of the view that there is a basis for suggesting that, if anything, the regime that applied to the appellant's workplace is that an employee who is on a current final written warning could be given more final written warnings before he could be dismissed. In other words it was a regime of high tolerance especially in regard to failures by cashiers to follow till procedures - probably where there was no fraudulent conduct involved.

[91] Also it is possible that such employee is not to be treated as having a clean record but some other approach must be adopted. It is for the employer, if he wishes to rely on an employee's previous disciplinary record to prove which regeme applies in the particular work place. If he fails to show this, he cannot complain if a commissioner in the CCMA adopts the approach that, as the warnings of the employee have lapsed, the employee must, for all intents and purposes, be treated as having a clean record.

[92] In this case the appellant did not place any evidence before the first respondent of what the practice was in the

workplace where the second respondent was employed. It also did not show what the contract of employment or the relevant collective agreement provided in this regard. In the light of all of this I do not think that the first respondent can be criticised for approaching the matter on the basis that the second respondent had a **“clean record”** at the time of the incident in question. It was not unreasonable to do so. Once it is accepted that the approach adopted by the first respondent in this regard was not unreasonable, there is no way, in my view, that one can describe as unjustifiable his decision that in this case dismissal as a sanction was too harsh.

[93] There is another factor which makes the appellant’s case more difficult in this regard. That is that in its founding affidavit the appellant seeks to portray the attitude that a failure to follow till procedures on the part of its cashiers is regarded by it as so serious as on its own to justify dismissal without an employee being given the benefit of warnings. That attitude is not borne out by the material that the appellant placed before the first respondent in the arbitration proceedings. That material revealed a different attitude as will be shown below. According to par 10.18 of the founding affidavit:-

(a) on the 12th March 1996 the second respondent was charged with incorrect counting and inaccuracy of till shortages and was issued with a written warning;

(b) on the 14th June 1996 the second respondent had a till shortage of R109,00 and she was issued with a written warning;

(c) on the 13th February 1997 the second respondent was charged with **“till negligence”** for ringing under a wrong department and was issued with a final written warning;

(d) on the 13th February 1997 the second respondent was charged with using incorrect till procedures and was issued with a final written warning;

(e) on the 16th May 1997 the second respondent was charged with using incorrect till procedures and was issued with a final written warning.

In par 10.19 of its founding affidavit the appellant stated :

“I wish to draw the above Honourable Court’s attention to the fact that the charges against [the second respondent] all related to failing to apply correct till procedures.”

[94] It will be seen from what has been set out in the preceding paragraph that the first incident occurred on the 12th March 1996 and that the second incident occurred on the 4th June 1996 which was within a period of four months

and thus before the first written warning could lapse and yet the appellant did not dismiss the second respondent but gave her only a written warning-not even a final written warning. It will also be seen that the three incidents preceding the one that gave rise to this matter occurred on the 13th February 1997 and on the 16th May 1997. Two occurred on the 13th February 1997 and the other one on the 16th May 1997.

[95] It is clear from the above that the incident of the 16th May 1997 occurred within a period of less than four months from the date of the two incidents of the 13th February 1996. This means that,

when the appellant had to decide what sanction it had to impose on the second respondent for the incident of the 16th May 1997-which was one of using incorrect till procedures- the appellant was entitled to deal with the second respondent on the basis that there were two final written warnings against her which had not lapsed. Despite all of this, the appellant did not dismiss the second respondent. On this occasion it imposed a third final written warning.

[96] It is also important to note that the second incident of the 13th February 1997 for which a final written warning was issued against the second respondent involved a failure by

the second respondent to follow correct till procedures. The one of the 16th May 1997 also involved a failure by the second respondent to follow correct till procedures. One would have thought that, since the second respondent was already on a final written warning for the same offence, the appellant would impose the sanction of dismissal. That is not what it did but it imposed another final written warning which raises the question:- when was a final written warning a final written warning in the appellant's workplace in Newcastle?

[97] The appellant did not lead evidence on how many final written warnings an employee in its Newcastle store had to have before he could be dismissed. If the second respondent's disciplinary record is anything to go by, the position is that the appellant's standard is certainly not that a failure to follow till procedures is regarded as so serious that an employee is dismissed for a single act. In fact that disciplinary record reveals that, even when an employee has a current final written warning for failing to follow correct till procedures, dismissal does not necessarily follow if another incident occurs while the previous final written warning is current but instead another final written warning can competently be given. If that is the standard which the appellant has set for its employees in general or its cashiers in particular, then it

seems to me that, the first respondent's decision that dismissal was too harsh a sanction for the second respondent's failure to follow till procedures is quite consistent with the appellant's own standard rather than inconsistent with it. If the first respondent's decision is consistent with the appellant's standard or with how it has disciplined its employees before, then I cannot see how the appellant can complain that the first respondent's decision is unjustifiable.

[98] If it is correct that, generally speaking, an employer is entitled to set its own standards of what behaviour or conduct it expects from its employees and that third parties and courts should not seek to impose their own standards on the employer, which is what the appellant has emphasised in its founding affidavit, then, in my view, an award by a CCMA commissioner which can be shown to be consistent with the employer's standard cannot, generally speaking, be said to be unfair or unjustifiable. In my view that is what happened in this case and the appellant cannot be heard to complain.

[99] Against the way in which the appellant seems to have treated acts of failure to follow till procedures in the past as shown above, it must be borne in mind that at the time when the incident in question occurred, the second

respondent had no current warnings of any nature-not to speak of final written warnings. A period of more than 12 months had lapsed since she had last had to be disciplined.

[100] The first respondent specifically found that the second respondent was negligent. The fact that the first respondent did not impose any sanction eg. final written warning on the second respondent after having found that the second respondent was guilty of negligence does not preclude the appellant from itself imposing a sanction which is short of dismissal. The appellant can certainly impose such sanction on the second respondent. After all discipline in the workplace is the prerogative of the employer.

[101] In my view it is within the contemplation of the dispute resolution system prescribed by the Act that there will be arbitration awards which are unsatisfactory in many respects but which nevertheless must be allowed to stand because they are not so unsatisfactory as to fall foul of the applicable grounds of review. Without such contemplation, the Act’s objective of the expeditious resolution of disputes would have no hope of being achieved. In my view the first respondent’s award cannot be said to be unjustifiable when regard is had to all the

circumstances of this case and the material that was before him.

[102] It was argued on behalf of the appellant that it was competent to bring a review application of a CCMA award under s 158 (1) (g) of the Act. This argument was dealt with in Carephone. There are no sound reasons which justify that we depart from the decision taken by this Court in Carephone on that argument. S 145 provides a specific remedy for the reviewing of specific awards, namely, CCMA awards. It could not have been intended that such awards could also be reviewed under s 158 (1) (g). S 158 (1) (g) must then have been intended for the review of the performance or purported performance of functions under the Act other than CCMA awards. Therefore this contention falls to be rejected. In those circumstances the appeal must fail. In the result the appeal is dismissed with costs including the costs of two Counsel. Such costs will exclude the costs of the second and third respondents' second set of heads of argument.

RMM ZONDO

Judge President

I agree. **I agree**

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M.M. JOFFE **M.T.R. MOGOENG**

Acting Judge of Appeal **Judge of Appeal**

Appearances

For the Appellant: Adv J.J Gauntlett SC (with Adv. Wade)

Instructed by : Deneys Reitz, Durban

For the 1st respondent: no appearance

For the 2nd and 3rd respondents: Adv. M.S.M Brassey SC
(with Adv AJP du Plessis)

Instructed by: Preller Maimane Inc Attorneys

Amici Curiae: Adv K. Tip SC (with Adv. A.T Myburg)

Date of argument:
Date of judgement: