

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

CASE NO: DA 21/99

In the matter between:

SOFTEX MATTRESS (PTY) LTD

Appellant

and

PAPER PRINTING WOOD & ALLIED
WORKERS' UNION

1st Respondent

E. KHAMBULE

2nd Respondent

GJP BLIGNAUT
(in his capacity as Secretary of the Bargaining
Council for the Furniture Manufacturing
Industry of KwaZulu-Natal)

3rd Respondent

MR NQCOBO
(In his capacity as Commissioner of the
Commission for Conciliation, Mediation and Arbitration)

4th Respondent

JUDGMENT

NUGENT, AJA:

- [1] The appellant applied to the Labour Court to review and set aside two decisions, taken by the third and fourth respondents respectively. The application came before Mlambo J, who dismissed it with costs, and the appellant now appeals against that decision.
- [2] The application arose from the dismissal of the second respondent (whom I will refer to as the employee) by the appellant on 28 January 1997, which was confirmed after an internal appeal on 14 February 1997. A little more than a month later, the employee's union declared a dispute with the appellant, alleging that the dismissal was unfair. A meeting was held on 10 April 1997 to consider the issue in dispute, but it still could not be resolved, whereupon the employee invoked the statutory procedure provided for in s.191 of the Labour Relations Act 1995.
- [3] That section entitles a dismissed employee to refer a dispute about the fairness of his or her dismissal to a bargaining council, or the Commission for Conciliation, Mediation and Arbitration (the CCMA) if no council has jurisdiction, which must attempt to resolve the dispute through conciliation. The referral is required to be made within thirty days of the date of the dismissal, but if the employee "shows good cause at any time", the council, or the CCMA, as the case may be,

“may permit the employee to refer the dispute after the 30-day time limit has expired.”

[4] It is not disputed that the dispute in the present case fell within the jurisdiction of the Industrial Council for the Furniture Manufacturing Industry, Natal, which is deemed by s.7 of Schedule 7 to be a bargaining council (and is referred to hereafter as the Council). At the time that is relevant to this appeal, the Council had applied in terms of s.127 to be accredited to perform the function of resolving disputes through conciliation. The application had not yet been approved, but s.21(A)(1) of Schedule 7 permitted the Council to perform that function in the interim.

[5] The secretary of the Council was Mr Blignaut, who is the third respondent. He and a certain Mr Churton, an independent consultant with expertise in that field, had been appointed by the Council to perform the function of dispute resolution. Mr Blignaut had been authorised by the Council to deal with matters ancillary to that function, and in particular to decide on its behalf whether the time limit within which a referral is required to be made ought to be extended in any particular case.

[6] It was submitted in argument that it fell outside the powers conferred on the Council by its constitution to confer that authority upon Mr Blignaut, but in my view that is not correct. Although its constitution permits the Council to appoint committees from amongst its members to perform certain functions that does not purport to be conclusive of the manner in which it is authorised to conduct its business. Furthermore, although the Act authorises a council to extend the relevant time period, it does not expressly, nor by necessary implication, prohibit a council from delegating that power (*Attorney-General OFS v Cyril Anderson Investments (Pty) Ltd* 1965 (4) SA 628 (A) at 639). On the contrary, the matters that are required to be considered when determining whether to accredit a council for the purpose of performing the function of dispute resolution (see in particular ss.127(4)(c) - (g) of the Act) make it clear that the legislature fully intended a council to delegate that function, and by implication, the functions ancillary thereto, to one or more persons acting on its behalf.

[7] In the present case the dispute was referred to the Council on 15 April 1997, which was outside the time limit provided for in s.191. In due course Mr Blignaut decided that good cause had been shown for the referral of the dispute, in circumstances which I will return to

later in this judgment.

[8] Notwithstanding that an attempt to resolve the dispute by conciliation was made, the dispute remained unresolved, and on 8 May 1997 Mr Blignaut issued a certificate to that effect, as contemplated by s.191(5) of the Act. That section provides that if such a certificate is issued, then “the council or the Commission must arbitrate the dispute at the request of the employee.”

[9] The employee duly requested the CCMA to arbitrate the dispute, and the fourth respondent was appointed for that purpose. The arbitration was held on 17 September 1997, and on 10 October 1997 the arbitrator issued an award, declaring that the dismissal of the employee was unfair, and ordering the appellant to reinstate him.

[10] On 23 October 1997, the appellant’s attorneys wrote to Mr Blignaut, informing him that they had been requested by the appellant to advise “on the prospects of them successfully reviewing the decision of the Bargaining Council to condone the late referral of the dispute”, and requesting him to furnish the record of the proceedings, his reasons for granting condonation, and all documents relating to the condonation application. Mr Blignaut replied that no record of the

proceedings was kept, but he furnished copies of the relevant correspondence.

[11] On 23 December 1997 the appellant launched its application to the Labour Court, in which it sought an order setting aside Mr Blignaut's decision that good cause had been shown for the late referral of the dispute to the Council; and for an order setting aside the arbitrator's award.

[12] In response to that application, Mr Blignaut furnished his reasons for acting as he did, and the arbitrator filed the notes that he had made in the course of the arbitration, but neither of them formally opposed the application.

[13] It is convenient to deal with each of the decisions in turn.

THE DECISION OF MR BLIGNAUT

[14] The authority to conduct an arbitration in terms of s.191 of the Act is

dependant upon certain conditions having been fulfilled. The dispute must have been referred to conciliation, and either the conciliator must have certified that the dispute remained unresolved, or a period of thirty days must have expired from the date that it was received by the Commission for Conciliation, Mediation and arbitration ("the CCMA") or a council, as the case may be.

[15] In turn a dismissal dispute may only be referred to conciliation if it is "about the fairness of a dismissal", and is referred to the commission or a council, as the case may be, within 30 days of the date of the dismissal unless the commission or council condones the delay.

[16] It follows that a conciliator has no authority to conduct conciliation proceedings unless either the referral has occurred within the 30 days period or the CCMA or the Council has permitted a later referral which it can do on good cause shown. It follows also that in the case of arbitration, the arbitrator will not have jurisdiction if the 30 days has not lapsed or if no certificate of outcome has been issued.

[17] But while it is necessary for the relevant conditions to have been fulfilled in order for the dispute to be subject to conciliation, and

subject to arbitration thereafter, it does not lie within the power of either of those functionaries to determine authoritatively whether those conditions have been fulfilled. To the extent that a conciliator or an arbitrator is called upon to enquire into whether they have been fulfilled (*Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & Others* (1998) 19 ILJ 892 (LC) esp at 896 F - 897 A) that is dictated by practical prudence rather than by legal necessity, for in neither case will the functionary's decision be decisive of the issue. Their authority to carry out their functions is dependant upon whether the conditions have been fulfilled in fact, and not upon whether either one of them has decided that they have been.

- [18] The principles that apply arose in a different context in *Benicon Earthworks & Mining Services (Edms) (Bpk) v Jacobs NO & Others* (1994) 15 ILJ 801 (LAC). That case concerned the validity of proceedings in the Industrial Court in terms of the Labour Relations Act 28 of 1956, where it was alleged that the conciliation board which had considered the dispute (an essential precondition for the Industrial Court's jurisdiction) had not been properly constituted. I said the following in that case, at 804 A, which in my view is equally applicable to the position of a conciliator or arbitrator under the new

Act:

“The validity of the proceedings before the Industrial Court is not dependent upon any finding which that court may make with regard to the jurisdictional facts, but rather upon their objective existence. Accordingly any conclusion to which the court may come on this issue has no legal significance. As pointed out by Leon J in *Pinetown Town Council*, supra, at 179 B-D :

““Where the jurisdiction of a tribunal is dependent on the existence of a particular state of affairs, it cannot give itself jurisdiction by incorrectly finding that the conditions for the exercise of jurisdiction are satisfied... (A) determination on the jurisdictional facts is always reviewable by the courts because in principle it is no part of the exercise of the jurisdiction but logically prior to it.”

Equally the tribunal cannot deprive itself of jurisdiction by an incorrect finding that the jurisdictional facts do not exist.

In practice, however, a court would be shortsighted if it made no such enquiry before embarking upon its task. Just as it would be foolhardy to embark upon proceedings which are bound to be fruitless, so too would it be fainthearted to abort the proceedings because of a jurisdictional challenge which is clearly without merit. Between these extremes will be cases in which the court is called upon to exercise its judgment as to whether to proceed (at the risk to the parties that the proceedings may prove to be invalid), or to decline to do so until an authoritative ruling has been obtained from a competent court. The court's position in this regard is no different to that of an arbitrator whose jurisdiction is placed in issue (see Mustill & Boyd: Commercial Arbitration 2nd ed pp 574-5).”

[19] No doubt it was to assist an arbitrator to satisfy himself or herself that the necessary preconditions have been fulfilled that the legislature provided for a certificate to that effect to be issued by the conciliator. While it would be prudent for an arbitrator to ensure that such a certificate exists before proceedings with an arbitration, what is decisive is not whether the arbitrator has found that such a certificate has been issued, but rather whether the certificate was issued in fact. Where such a certificate has been issued and on the face of it, it appears to be regular, the commissioner appointed to arbitrate the dispute has jurisdiction to arbitrate the dispute as long as the certificate has not been set aside.

[20] Thus where the validity of the conciliation process is placed in issue, it is not open to the conciliator, or a subsequent arbitrator, to make any authoritative ruling upon the issue, for neither of them can by their own decision create authority that does not exist in fact. It will often be prudent for an arbitrator in that situation to stay the arbitration until the issue has been resolved by a competent court, but even that is not obligatory, though the risk of proceeding is that the arbitration may turn out to have been futile.

[21] It falls within the powers of the Labour Court in terms of s.158 of the

Act to review and set aside a decision by a conciliator to condone the late referral of a dispute if that decision was not lawfully made. The effect of setting aside such a decision would be that the consequences that followed upon that decision (including the conciliation,) would equally be invalid, and liable to be set aside. However, where a certificate of outcome has already been issued, it is essential that that certificate be set aside first before it can be said that the arbitrator has no jurisdiction to arbitrate the dispute because, if it is not set aside, he has jurisdiction. In this it was alleged that Mr Blignaut's decision was invalid and that the arbitration proceedings had, consequently, been invalid too.

- [22] Considerations of practicality, certainty, and finality dictate that a challenge to the exercise of statutory powers should be brought before a court without undue delay. It is well established that proceedings to review the exercise of such powers must be brought within a reasonable time, failing which the remedy might be refused (*Wolgroeiers Afslalers (Edms)(Bpk) v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A)). The effect of the remedy being refused is that the particular decision will acquire validity in fact (albeit not in law), for no reason but that it will no longer be capable of being found to be invalid (*Harnaker v Minister of the Interior* 1965 (1) SA 372 (C) at

381 A-F; *Metal & Electrical Workers Union of SA v National Panasonic Co (Parow Factory)* 1991 (2) SA 527 (C) at 532 I; Baxter: Administrative Law 360).

[23] The rule that review proceedings must be brought within a reasonable time has its source in the inherent jurisdiction of the courts at common law, but the same approach has been adopted in relation to review proceedings governed by statute (*Harnaker's case*, supra, at 380E). It was not disputed that it applies equally to reviews by the Labour Court in terms of s.158 of the Act.

[24] What constitutes a "reasonable time" will necessarily depend upon the nature of the particular statutory power, and the circumstances of the particular case, including any explanation that might be put forward by the applicant. There is thus little to be gained by considering comparative decisions made in a different context (*Setsokeane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie & Another* 1986 (2) SA 57 (A) esp at 86G and 87A).

[25] In my view what must be evaluated in determining what constitutes a "reasonable" time is the nature of the particular statutory power, and the consequences of it being exercised, bearing in mind that the

purpose of the rule is to achieve administrative certainty, which must be evaluated within its particular context.

[26] The decision that is in issue in the present case is required to be made as a prelude to a procedure that is designed to enable labour disputes to be resolved expeditiously and could affect the validity of the entire process. By its very nature, it is a material decision, with immediate and important consequences. It is essential, in my view, that any challenge to its validity must be initiated without any undue delay.

[27] I do not think it is possible to lay down a specific period of time that will be reasonable in every case, for what is reasonable will also depend upon the particular circumstances, and, in particular, upon any explanation for the delay.

[28] In the present case the application to review the decision was launched seven and a half months after the decision was made. In the meantime, the entire process had run its full course. The appellant gave no explanation in its affidavits for why that was permitted to happen.

[29] The proper approach to be taken by a court in matters of this nature was set out by Miller JA in *Wolgroeiërs Afslaers*, supra, at 39 B-D, in the following terms:

“Word beweer dat die aansoekdoener nie binne redelike tyd die saak by die Hof aanhangig gemaak het nie moet die Hof beslis (a) of die verrigtinge wel na verloop van ‘n redelike tydperk eers ingestel is en (b) indien wel, of die onredelike vertraging oor die hoof gesien behoort te word. Weereens, soos dit my voorkom, met betrekking tot (b), oefen die Hof ‘n regterlike diskresie uit, met inagneming van al die relevante omstandighede. (Sien *Shepherd v Mossel Bay Liquor Licensing Board*, 1954 (3) S.A. 852 (K) op bl. 857.)”

[30] In *Setsokosane Busdiens*, supra, at 86 D-E read with 87A, Hefer JA said that the first stage of the enquiry requires a “value judgment” to be made, taking into account all the circumstances, including any explanation that is given by the applicant; and it is only at the second stage of the enquiry (if it becomes necessary) that a discretion is required to be exercised as to whether the undue delay ought to be overlooked. In the exercise of that discretion, any prejudice, or lack of it, to either of the parties might properly play a role, but is not necessarily decisive (*Wolgroeiërs Afslaers*, supra, at 42 C).

[31] The court a quo dismissed the application to review the decision on the ground alone that there had been undue delay, and the learned

judge said the following:

“The fact that there is no time limit within which reviews in terms of section 158(1)(g) may be brought does not mean that the application can be brought even after an unreasonable period has elapsed. One of the objects of the Act is the effective resolution of disputes. An effective dispute resolution system is one that is expedient and ensures the resolution of disputes without delay.

....

In this case the applicant did not issue any objection or legal challenge to Blignaut’s ruling when it was made. The applicant participated in the subsequent arbitration and did not seek a stay or postponement thereof pending any challenge to the conciliation process. It was only after the award was issued that the applicant sought to review the condonation ruling made during the conciliation. This cannot be acceptable. It goes against the objects of effectiveness and expedience which underpin the Act.”

- [32] It was submitted on behalf of the appellant that the learned judge erred, in that in that he did not apply the two-stage enquiry referred to in *Wolgroeiens Afsalers*, supra, but found only that the delay was unreasonable. Although the learned judge did not expressly separate his reasoning into two components, it does not follow that he did not apply his mind to both issues in reaching his decision. Nevertheless, even if he did not, I can find no fault with the conclusion which he reached.

[33] I have already said that in my view a party who wishes to challenge a decision of this nature must act promptly or risk losing the remedy. What will constitute “undue delay” must invariably depend upon the particular circumstances of each case. In the absence of special circumstances or any explanation, in my view a period of seven and half months is quite beyond the reach of what could be considered to be reasonable.

[34] The appellant’s counsel pointed out that the appellant had challenged the validity of Mr Blignaut’s decision at the outset of the arbitration, and submitted that in so doing, it was exhausting the remedies available to it, which was a reasonable precaution to have taken before resorting to a court. Support for adopting that approach was sought in the decision of the Labour Court in Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & Others, *supra*, at 896F - 897A. It was submitted, as I understand it, that it was held in that case that the arbitrator was the proper person to determine the question of jurisdiction. We were also referred to the decision in Dempster v Kahn NO & Others (1998) 19 ILJ1475 (LC) in support of the submission that the appellant was entitled to believe that it might adopt the course that it did, but I do not see how the appellant could have relied upon that decision, which had not yet

been made. The answer to this submission is that that is an explanation which the appellant should have put up in an affidavit explaining reasons for the delay and seeking condonation, it is not the kind of explanation which should be proffered from the Bar.

[35] I have already said that the arbitrator has no power to determine his or her own jurisdiction, and I do not think that *Shoprite Checkers* purported to find otherwise. In that case a dismissed employee referred a dispute to the CCMA for conciliation, out of time. The dispute was not resolved, and it was referred to arbitration. The arbitrator made an award in favour of the employee. The employer applied to set aside the award on various grounds, one of which was that the late referral of the dispute to the CCMA had never been condoned. At paras 20 and 21 Pretorius AJ said the following:

“A CCMA commissioner who seeks to apply the provisions of s 191(2) read with s 191(1) and 190(1) of the LRA is enjoined to make a factual enquiry as to whether the referral is indeed out of time ... Further, s 191(2) enjoins an employee to show good cause before a commissioner may permit her to refer the dispute after the 30-day time limit has expired ... None of the above appears to have been done in this case. This being so, the (conciliator) had no jurisdiction to conciliate the matter. It follows that the arbitrator also had no jurisdiction to deal with the matter.”

[36] As I understand the judgment, the “CCMA commissioner” that was referred to at the commencement of that passage was the commissioner performing the conciliation function, and not the arbitrator. Provided it is borne in mind that the commissioner (in that capacity) is only “enjoined” to embark upon that enquiry by practical considerations, and not as a matter of law, what was said by the learned judge seems to me to be unexceptional. This is, of course, subject to what I have said above about a case where a certificate of outcome had been issued and it had not been set aside and an arbitrator is required to arbitrate a dispute to which such a certificate relates. I have already indicated that a commissioner, or council, to whom a dispute has been referred for conciliation, would be most imprudent if he or she proceeded without first taking steps to enquire into whether he or she had the requisite authority, but I do not think the learned judge suggested that the remedy of a person who is aggrieved at a decision made by the conciliator lies in approaching the arbitrator.

[37] Apart from the fact that the decision in that case does not seem to me to support the appellant’s submission, the added difficulty is that nowhere in the appellant’s affidavits is it alleged that that was the

reason for the delay. Indeed, it gave no explanation at all for the delay, notwithstanding that the issue had pertinently been raised.

[38] Bearing in mind the period of the delay, and the absence of any explanation, in my view the court a quo cannot be faulted for having found that the delay was unreasonable. I can also see no grounds upon which the court ought to have found, in the exercise of its discretion, that the delay should be overlooked.

[39] In those circumstances I see no reason to interfere with its decision.

[40] The learned judge went on to find that, in any event, the decision was properly made by Mr Blignaut, and in my view that portion of its finding can also not be faulted. Although it is not strictly necessary to do so, in view of the conclusion I have reached, because the matter was fully argued I will deal briefly with that issue.

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[41] It is not disputed that the Council authorised Mr Blignaut to make the relevant decision, and I have already found that it fell within the powers of the Council to do so. The remaining submissions made on behalf of the appellant related to the manner in which Mr Blignaut arrived at his decision.

[42] When the dispute was referred to the Council, and came to his attention, Mr Blignaut immediately appreciated that the time limit had expired, and he wrote to the union (with and sent a copy to the appellant) drawing that fact to its attention and requesting it to show “good cause” if the delay was to be condoned. On 23 April 1997 the Union replied, advising that the delay had come about because the dispute “was still being handled internally in terms of the internal procedures of the collective agreement between the parties”, and it attached correspondence to support that allegation.

[43] Upon receiving that explanation, Mr Blignaut decided that the delay should be condoned, and he then notified the parties that a conciliation meeting would be held on 7 May 1997. Some time thereafter he telephoned the CCMA, apparently to seek its views regarding the decision he had taken, and was told by one of the commissioners “on the facts I put to him that he believed that good cause had been shown and the CCMA would probably have dealt with it in the same way.”

[44] On 5 May 1997 Mr Blignaut received a letter from the appellant, informing him that it had advised the Union that good cause did not

exist for the late referral, and it considered the matter closed and would not attend the meeting. Mr Blignaut seems thereupon to have resolved that he should reconsider his earlier decision, for he then wrote to the appellant, informing it that it should attend the meeting “where the issue of ‘good cause’ will be considered by the Council.” He also telephoned the representative of the appellant and urged him to attend so that his representations could be considered.

[45] The appellant’s representative duly attended the meeting. It is not disputed that representations were made by both parties on the question whether good cause existed to condone the delay. According to Mr Blignaut, the appellant “did not deny the constant point made by (the Union) that the parties were acting in accordance with internal procedures.” Mr Churton was also at the meeting, and he expressed the view that good cause for the delay had indeed been shown. After considering what had been said, Mr Blignaut “reaffirmed” his earlier decision, and the meeting proceeded to deal with the merits of the dispute.

[46] It is not necessary for purposes of this appeal to decide whether Mr Blignaut was obliged to solicit and consider the views of the appellant before making a decision that the delay should be

condoned, as submitted on behalf of the appellant, and I have assumed that he was obliged to do so. The appellant's principal submission was that, once having purported to make a decision (albeit that it was invalid) Mr Blignaut was disabled thereafter from reconsidering the matter, with the result that his second decision was also invalid.

[47] Generally, an administrative official may not revisit his or her decision, but that rule is by no means absolute, for the rule is dictated by considerations of finality and administrative efficiency, which are at times best served by permitting the decision to be reconsidered (see Baxter: Administrative Law 372 - 382). However, the rule does not come into play merely upon the completion of the mental process involved in arriving at a decision, but comes into play only when the decision has been pronounced. In *Lek v Estate Agents Board* 1978 (3) SA 160 (C) at 168 C-D Friedman J said the following:

"The common law in respect of judgments of the Court is clear, viz that it is the pronouncement of the decision that is the decisive moment. Until a judgment is pronounced, the Judge may change his mind but, once a judgment has been pronounced, the judge becomes *functus officio*. (See *Estate Garlick v Commissioner for Inland Revenue* 1934 AD 499 at 502.) The same principle applies in the case of decisions taken by a corporate body, ie the latter is not bound by its resolution until it has been

communicated to the person affected.”

[48] That case concerned the decision of a corporate body, but in my view the principle applies equally to the decision of an individual. The underlying reason is perfectly clear: Until such time as the decision has been pronounced, there is no potential for it to have been relied upon, which is the rationale for the existence of the rule (Baxter, *op cit*, 372).

[49] In the present case there is no suggestion that any of the parties were aware that Mr Blignaut had made a decision, let alone that he had pronounced it. It was submitted that his conduct in convening the meeting was a manifestation of the decision he had taken. That act was equivocal, but in any event, not even the appellant could have understood it to mean that a decision had been taken, for its letter, and its subsequent conduct, was inconsistent with such a belief. Indeed, the further submission made on behalf of the appellant, to which I will come, is also in conflict with the suggestion that the appellant was aware that the decision had been made.

[50] For that reason alone, in my view it has not been shown that Mr Blignaut was *functus officio* at the time he made the relevant decision, and it is not necessary to consider whether he might in any

event have been entitled to reconsider it.

[51] It was also submitted that Mr Blignaut was under a duty to disclose to the appellant at the meeting on 7 May 1977 that he had taken a decision at an earlier stage, and that he had taken advice from a commissioner of the CCMA. If neither of those factors resulted in him not exercising an open mind (which the evidence establishes that he did) then in my view they were irrelevant to the exercise of his discretion, and were not required to be disclosed.

[52] As to the merits of his decision, in my view there were ample grounds for Mr Blignaut to have exercised his discretion in the manner in which he did, and his decision does not justify an inference that he did not properly do so.

[53] Accordingly, I agree with the finding of the court a quo that no grounds were shown for setting aside the decision.

THE DECISION OF THE ARBITRATOR

[54] It follows from the earlier findings that there were no grounds for finding that the arbitrator had no jurisdiction to make the award.

[55] It has been held by this court that an award made by an arbitrator may also be set aside if it is not “justifiable in relation to the reasons given for it,” which requires a court to determine “whether the outcome is rationally justifiable” (*Carephone (Pty) Ltd v Marcus NO & Others* (1998) 19 ILJ 1425 (LAC) at para 36). Although doubt was expressed in *Toyota South Africa Motors (Pty) Ltd v Radebe & Others* (2000) 3 BLLR 243 (LAC) at para 40 as to the correctness of that decision, and in *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* (Case No D409/99) Wallis AJ expressed the view that it was wrong, it is not necessary to revisit the issue in the present case. Neither counsel suggested that we should not apply that test, and in any event, in my view the award does not fall to be set aside even on an application of the test adopted in *Carephone*. I might add that counsel’s submissions were confined to persuading us that the award was not “justifiable in relation to the reasons given for it” by the arbitrator.

[56] Before turning to the arbitrator’s award, it is helpful to set out briefly the circumstances in which the dismissal occurred.

[57] According to the record of the internal disciplinary hearing, the

appellant alleged that during the weekend of 7 December 1996 certain bed-sets were stolen from its warehouse. A private investigator was employed, who subjected certain of the security personnel to polygraph tests. The tests pointed to one of them, Mr Riggien, as having knowledge of the theft. Upon further questioning Mr Riggien eventually admitted that he was a party to the theft, and he deposed to an affidavit to that effect. In that affidavit he also implicated the employee, and alleged that the employee had intimidated Mr Riggien into acting as he did. After deposing to that affidavit, Mr Riggien resigned, and did not give evidence, either at the disciplinary enquiry, or at the arbitration.

[58] Disciplinary proceedings were instituted against the employee, it being alleged that he had "(been involved) in the unauthorised removal of company property from the company premises on or about the 7th December 1996". At the disciplinary enquiry, the only evidence implicating the employee was the affidavit that had been deposed to by Mr Riggien, and an allegation by the person who convened the enquiry that the appellant's records reflected a telephone call made by the employee to Mr Riggien on 7 December 1996. The employee denied any involvement in the theft, and protested his innocence.

[59] The evidence presented to the arbitrator was not materially different, except that the employee gave evidence under oath, in which he denied any involvement, and was exposed to cross examination, from which nothing material emerged.

[60] It is not necessary to traverse the award in detail. The arbitrator found that the affidavit of Mr Riggien was an insufficient basis upon which to have found that the employee was a party to the theft, for three reasons, which were expressed by the arbitrator as follows:

“Firstly, Riggien was an accomplice and the evidence of an accomplice should be treated with caution.

Secondly, Riggien never testified in person and Khambule never had the opportunity to challenge Riggien’s evidence.

Thirdly, I find it most improbable that a senior security person would be so easily threatened into jeopardising his job security and betray his employer’s trust.”

[61] In finding that the award did not fall to be set aside, the learned judge said the following:

“A critical element of fair administrative action is that the person performing

the task applied his mind to the matter before him and took account of relevant considerations and evidence placed before him. Whilst it might be possible that based on the same facts someone else would come to a different conclusion, that however is not the test. In my view (the arbitrator) was perfectly entitled to weigh up Riggien's confession and reject it with reasons. His decision and the reasons he gave for it do not support the view that he committed a reviewable irregularity. The review application of (the arbitrator's) award must also fail.

[62] It was submitted in this court that the arbitrator had not been called upon to determine whether the appellant had proved that the employee was guilty of theft, but only whether the appellant had a fair reason for dismissing him. It was submitted too that the reasons furnished by the arbitrator could not justify his conclusion that there were no grounds for dismissal. Whichever approach one takes to the matter, the question remains whether it was fair for the appellant to conclude that the employee was a party to the theft, for it was on those grounds that it decided to dismiss him.

[63] I do not think the arbitrator can be said to have misunderstood the nature of the enquiry. As to the conclusion that he reached, the question to be asked is not whether his conclusion was correct, but rather whether it was capable of being arrived at rationally for the reasons that he gave, or, to put it another way, whether there was "a rational objective basis justifying the connection made by the

(arbitrator) between the material properly available to him and the conclusion he ... eventually arrived at.” (*Carephone*, supra, at para 37).

[64] Essentially, the arbitrator found that the evidence upon which the appellant acted had the inherent potential to be false for two reasons, and in addition was improbable, and thus ought not fairly to have been relied upon in order to found a decision to dismiss, bearing in mind the employee’s denial. The learned judge found that those reasons provided a rationally justifiable basis upon which to reach that conclusion, and I do not think that his finding can be faulted.

[65] In my view there are no proper grounds to interfere with the decision of the court a quo in respect of either of the decisions. Both counsel submitted that the costs should follow the result.

Accordingly, the appeal is dismissed with costs.

R.W. NUGENT
ACTING JUDGE OF APPEAL

R.M.M. ZONDO
JUDGE PRESIDENT

C.R. NICHOLSON
JUDGE OF APPEAL

For the appellant:

Adv. A.I.S. Redding
Instructed by
Deneys Reitz, Durban

For the Respondent:

Adv. R.G. LaGrange
Instructed by
Cheadle Thompson & Haysom, Johannesburg

Date of Hearing:

30 May 2000

Date of Judgment: