

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

CASE NO: JA26/02

In the matter between:

WORKSHOP 510

APPELLANT

and

ANDRIES JOHANNES PRETORIUS

1ST RESPONDENT

**COMMISSIONER E.T. VAN KERKEN
COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

2ND RESPONDENT

3RD RESPONDENT

JUDGMENT

JAFTA AJA

[1] The first respondent was employed as a carpenter by the appellant until August 2000 when his employment was terminated by means of a dismissal. The dismissal followed a disciplinary hearing at which he was found guilty of three charges of gross misconduct. Pursuant to the dismissal, the matter was taken to the Commission for Conciliation, Mediation and Arbitration (the CCMA) for conciliation. When conciliation failed to resolve the dispute, it was then referred to arbitration under the auspices of the Commission.

[2] The arbitration proceedings resumed on 30 April 2001 before the

second respondent. The award was handed down on 10 May 2001 and in terms thereof the dismissal was found to be substantively unfair. The appellant was ordered to pay the sum of R 71995- 00 as compensation to the first respondent. Dissatisfied with the award, the appellant sought to have it overturned in the court a quo. It brought an application for review **“on the grounds set out in section 145 of the Labour Relations Act No. 66 of 1995 as read with the Constitution of the Republic of South Africa and in particular applicant’s right to fair administrative justice”**. A number of specific grounds for review were then set out in the founding affidavit. Such grounds included the allegation that the commissioner’s award was not justified in relation to the reasons given for it. In fact, this was the only ground on which the constitutional complaint relating to the right to fair administrative justice was based.

- [3] The commissioner’s award together with other documents including the record of the disciplinary enquiry were placed before the court a quo. Although the first respondent did not file opposing papers to the review application, he however, lodged an application seeking to have the award made an order of court. Meanwhile the review application was, on the directive of the court a quo, set down for hearing in the opposed motion court. The matter came before **Revelas J** who dismissed the application on 5 December 2001 and made the award an order of court. Pursuant thereto, an application for leave to appeal against the dismissal of the review application was lodged. This application too was dismissed.

However, this court granted the appellant leave to appeal to it on 11 December 2002.

[4] Subsequent thereto the requisite notice of appeal was duly filed wherein the grounds of appeal were set out. The principal basis upon which the judgment of the court a quo was challenged is that it erred in dismissing the review application and that it should have found that the award was *not rationally justifiable* in relation to the reasons given for it. It is worth noting that the above formulation of the test for review was repeatedly stated in the appellant's heads of argument filed in this court. Furthermore, this was the sole ground on the basis of which the commissioner's award was impugned before us. Reliance for the above formulation of the test was placed on two decisions of this court in **Carephone (Pty) Ltd/ Marcus NO & Others (1998) 11 BLLR 1093 (LAC)** and **Shoprite Checkers (Pty) Ltd/ Ramdaw NO & Others [2001] 9 BLLR 1011 (LAC)**.

[5] Before considering whether or not the award should have been set aside on the basis that it is not justifiable in relation to the reasons given for it, I wish to remark briefly on the test as formulated by the appellant. Firstly, it seems to me that the appellant's formulation could give rise to confusion of two different tests emanating from two separate sources. Those tests are commonly known as the justifiability test and the rationality test. The former test has its origins in the **Carephone** decision and is located within s 145 of the Labour Relations Act (the LRA), Act 66 of 1995 read

with s 33 of the Constitution as well as item 23 of Schedule 6. This was indeed confirmed by this court in its later decision in **Shoprite Checkers** (supra). In that matter **Zondo JP** (writing for the court) stated at para [8]:-

“[8] In *Carephone* this court decided, per Froneman DJP, with Myburgh 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’.**

- [6] Therefore in **Carephone**, the justifiability test was firmly anchored in s 145 of the LRA by incorporating the provisions of s 33 of the Constitution together with those of item 23 of Schedule 6 into the LRA. The test derives its formulation from the language employed in s 24 of the Interim Constitution which was reproduced in exact terms in item 23 of Schedule 6. The said item constituted a transitional arrangement pending the enactment of the Promotion of Administrative Justice Act 3 of 2000 which came into operation on 30 November 2000. So, as from 30 November s 33 of the Constitution could no longer be taken to read in the terms set out in

item 23(2)(b) because that item has fallen away.

- [7] On the other hand, the rationality test is firmly placed in the provisions of s 33 itself without any reference to item 23 nor s 145 of the LRA. The latter test was enunciated by the Constitutional Court in **Pharmaceutical Manufacturing of SA: in re: Ex Parte President of the Republic of South Africa 2000 (2) SA 674 (CC)**. In a unanimous judgment in that case **Chaskalson P** (as he then was) stated at paras [85] and [90]:-

“[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...

[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" (Emphasis added but foot notes omitted).

- [8] Whilst in **Shoprite Checkers** this court conceded that the test as formulated in **Carephone** might be incorrect, it however held that that test shall continue to apply. This was the court's view despite the first seeds of doubt regarding the correctness of **Carephone** having been planted in **Toyota South Africa Motors**. In **Shoprite Checkers** the court gave two main reasons for not overturning **Carephone**. Firstly, it said s 6(2) of the Promotion of Administrative Justice Act requires that decisions be rationally connected to the reasons given for them which is similar to the requirement that such decisions must be justifiable in relation to the reasons given, as stated in **Carephone**. It further mentioned that rationality is accommodated in justifiability. Secondly, the court came to the conclusion that there were sound policy

considerations which militated against overturning **Carephone**. In this regard **Zondo JP** concluded by expressing himself as follows at para [33]:-

“[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 judgment 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 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”.

[9] Following **Shoprite Checkers**, I shall approach the present appeal on the basis that the test of justifiability as laid down in **Carephone** applies to it. I believe that considerations which moved for the retention of **Carephone** in **Shoprite Checkers** are still valid. Moreover, we were not addressed by any of the parties on the continued application of the **Carephone** test. Therefore, it would be highly undesirable to tamper with **Carephone** without the benefit of full and proper argument thereon. However, despite the confusing formulation of the test by the appellant, it became apparent during argument before us that the commissioner's award was being challenged on the basis that it is not justifiable in relation to the reasons given for it.

[10] In her detailed and comprehensive award, the commissioner dealt separately with each charge that led to the employee's dismissal. She also analysed and evaluated evidence led by each party before her, either in support or against each charge. She then proceeded to make findings on the acceptance or rejection of such evidence before reaching a conclusion on whether or not a particular charge was sustained by the facts. Full and detailed reasons were given by the commissioner for the findings she made. In respect of the first charge the employee was accused of giving false information to his employer, on 7 August 2000, regarding his state of health in order to mislead the employer. Pursuant to the evaluation and analysis of evidence the commissioner arrived at the conclusion that the evidence led on behalf of the employer fell short of proving the charge. She held that the finding of guilty on that charge, at the disciplinary hearing, was not justified because the employer had failed to prove that the appellant had given false information regarding his state of health in order to mislead it.

[11] Regarding the second act of misconduct, the employee was charged with contravening clause 5.3.20 of the employer's

disciplinary code which provides that '*absence from work for a period not less than three (3) working days without informing the management of the reason for the absence*' constitutes a grade three offence. The code further stipulated that grade three offences could lead to a summary dismissal pursuant to a disciplinary hearing. On the evidence led during the arbitration proceedings, it was common cause that the employee had failed to come to work for three consecutive working days without informing the employer of the reasons for his absence. It was also common cause that previously and a few days before, the employee had consulted a specialist physician regarding his health and that he was hospitalised prior to him resuming duty on 7 August 2000. On that date he asked for and was granted permission to leave early in order to again consult the doctor about his ill-health. He then returned to work on the fourth working day. He did not communicate with his employer during his absence. So, technically he was absent from work for at least three days without communicating the reasons therefor to his employer.

[12] Before the commissioner, the employee primarily raised two contentions in respect of the second charge. He claimed that his interpretation of the relevant clause placed him outside its ambit in that the clause in question allowed for the absence of three working days without being required to communicate with the employer. He stated further that he did not communicate with his employer because the managing director who released him on 7 August already knew that he was absent due to illness and that if they wanted to contact him they could have done so through his cellular phone or his wife at her place of work. The commissioner accepted those contentions by the employee and found that the relevant clause in the code could reasonably be construed in the manner contended for by the employee. She found the clause to be

vague and ambiguous. Consequently, she held that the employer could not dismiss the employee for a violation of an ambiguous provision in the code.

[13] During argument before us Mr Beaton, who appeared for the appellant, submitted that he did not challenge the fact that the clause in question was capable of being interpreted in the manner contended for by the employee. He adopted a narrow attack which was confined to challenging a single finding by the commissioner. Such finding was to the effect that the employee's conduct did not constitute a breach of the relevant clause. In this regard the commissioner has stated, in her award, that the period of absence was within the period for which communication was not required, and the code therefore did not require communication during the employee's absence from work. It would appear that the commissioner adopted the interpretation put on the clause by the employee hence she came to that conclusion. On that interpretation the said conclusion cannot, in my view, be faulted. However, if the interpretation to be accorded to the clause is that the employee who is absent for at least three days is guilty of misconduct, then the commissioner's finding will not be sustainable. Although the commissioner tacitly accepted the employee's interpretation, she did not make a finding as to which of the two was the correct interpretation. This was indeed not necessary because she had already found that the employee could not be dismissed for transgressing an ambiguous code.

[14] Finally, as regards the third charge, the employee was accused of failing to carry out a valid and reasonable instruction given to him by his supervisor relating to the completion of the floor of the Nissan stand. The charge was described as disobedience. After evaluating the relevant evidence, the commissioner found that if the employee were to take an additional four to five hours in order to finish the job he was asked to do, the employee would have been required to work for 12 ½ to 13 ½ hours. As a result she concluded that such long hours were prohibited by law and the instruction itself was unreasonable in the light of the employee's state of health. This finding by the commissioner was challenged before us on the basis that her calculation of the total hours was based on the incorrect premise. It was contended that the employee had admitted at the disciplinary hearing that he could have completed the job at 15h30. This being the time at which he left to consult the doctor after he had been engaged in other work unrelated to the job he was required to do.

[15] It appears to me that it is not necessary to determine whether the commissioner's finding was supported by the established facts simply because the pivotal finding she made in respect of the third charge was that, in terms of the disciplinary code, it was not competent for the employer to impose dismissal as a sanction in the present case. She held the view that in accordance with the code a dismissal could only be imposed for repetition of the same offence and pursuant to a written warning having been previously issued. Mr Beaton did not argue that dismissal was a competent punishment for a first offender who is guilty of a grade two offence. In any event the aforesaid finding by the commissioner was not challenged either in the notice of appeal or in the heads of argument filed in this court.

[16] Therefore, I remain unpersuaded that the award was unjustifiable in relation to the reasons given for it. Instead I have found it to have been impressively reasoned, detailed and comprehensive. Consequently the award is, in my view, sustained by both the facts and the applicable law. I may also add that even if the rationality test was said to be the one applicable to this case, I would still have come to the same conclusion. It follows that the appeal cannot succeed.

[17] In the result the appeal is dismissed with costs.

Jafta AJA

I agree.

Nicholson JA

I agree.

Willis JA

Appellant's counsel:	Adv R.G Beaton
Instructed by:	Yusuf Nagdee Attorney
First respondent:	Mr S Snyman
Instructed by:	Snyman van der Heever Heyns
Date of hearing:	21 August 2003
Date of judgement:	30 September 2003