IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case No: JA 68/99

In the matter between

DE BEERS CONSOLIDATED MINES LIMITED Appellant

and

THE COMMISSION FOR CONCILIATION, 1st Respondent
MEDIATION AND ARBITRATION

COMMISSIONER E. HAMBRIDGE 2nd Respondent

NATIONAL UNION OF METAL WORKERS OF S.A. 3rd Respondent

J. LUTHI 4th Respondent

A. SENTI 5th Respondent

JUDGEMENT

ZONDO AJP

Introduction

[1] This is an appeal against a judgement of the Labour Court in a review application brought for the purpose of setting aside a certain arbitration award which was issued by a commissioner of the Commission for Conciliation, Mediation and Arbitration in

a dispute between the appellant, on the one hand, and, the fourth and fifth respondents, on the other. The appellant carries on the business of exploring, evaluating and mining diamonds. Its head office is situated in Kimberly, Northern Cape Province. The commission is the first respondent. The commissioner who issued the award is the second respondent. The third and fifth respondents are former employees of the appellant. The award was issued in September 1998.

The facts.

[2] The fourth and fifth respondents were employed by the appellant as truck drivers. They were both dismissed by the appellant in May 1998. The reason for their dismissal was that they had been found guilty of fraud. The fraudulent act was that they had claimed overtime pay for nine hours when in fact they had not worked during that time. They had done this by completing forms to the effect that they were entitled to such overtime and they had received payment from the appellant to meet those claims.

[3] The overtime claim arose out of a trip which the fourth and fifth respondents had undertaken on the 9th April 1998 from Kimberly to Kleinzee to transport drilling equipment. The

fourth and fifth respondents had arrived in Kleinzee at about 11h00 on the 9th April. They finished off-loading their trucks at about 13h30. At their request, their supervisor, one Mr Bhika, granted a request from them that, on their way back to Kimberly, they could stay overnight at Port Nolloth. It was later discovered that the two had not driven at all on the 10th April as they were supposed to have done in terms of their arrangement with Mr Bhika. Instead they had left for Kimberly on the 11th April 1998. Despite this, they claimed payment for overtime in respect of the 10th April as well.

[4] The fourth and fifth respondents (also referred to hereinafter as 'employee respondents') were charged with misconduct, found guilty and dismissed. An internal appeal that they initiated was unsuccessful. A dispute about the fairness of their dismissal then arose. They referred the dispute to conciliation. When conciliation failed, the dispute was referred to arbitration under the auspices of the CCMA, the first respondent. The second respondent was appointed to arbitrate it which she did. Pursuant to the arbitration proceedings, the second respondent issued an award to the effect that the dismissal was procedurally fair but substantively unfair. Pursuant to this finding, she ordered the appellant to reinstate the employee respondents in its employment with effect from the date of the award. That means that the reinstatement order was not made retrospective. She also ordered that the appellant should record a final warning against them. It is against that award that the appellant subsequently launched a review application in the Labour Court. It is the judgement handed down by the Labour Court in that application which is now appealed against.

Consideration of the Commissioner’s reasons for the award.

[5] In finding that the dismissal was substantively unfair, the second respondent made a positive finding that the employee respondents were guilty of fraud. It was because in effect she found that dismissal was not an appropriate sanction that she concluded that the dismissal was not substantively unfair.

[6] It appears from a reading of the commissioner’s award that the commissioner perceived the real issue (she refers to it as the most important issue before her) as not only having been whether fraud had been committed, but whether, as a result of such fraud, **“the trust relationship had broken down to such a degree that it [made] continued employment intolerable.”** After saying that this was the most important issue to be decided, she then proceeded to say that she found that **“the trust relationship [had] not broken down to such a degree that it [made] continued employment intolerable.”** At page 7 up to just before the last paragraph of page 8 of the award she proceeded to give her reasons for that finding.

[7] The first reason the commissioner gave for her finding on the extent of the breakdown of the trust relationship is that the fraud was not **“committed within [the fourth and fifth**

respondent's] core functions." She reasoned that the employee respondents were employed as drivers and that the completion of claim forms was very **"much auxiliary to their daily core functions."** This reason is, in my view, irrational and makes no sense. If this reasoning is taken to its logical conclusion, any employee could commit an act of dishonesty with impunity as long as he ensured that he committed it outside of his core functions. Immediately after this, she said: **"Should the truck or the merchandise being transported have been damaged or destroyed or lost, I would have regarded same in a very serious light."** This statement by the commissioner seems to suggest, in the context in which it appears, that in that case that would have convinced her that the trust relationship had broken down to such a degree that continued employment would have been intolerable. This is an extension of the reasoning about core functions which I have dealt with.

[8] The second ground on which the commissioner based her conclusion on the extent of the breakdown of the trust relationship was that a claim for overtime payment in the appellant company was subject to a verification process involving other people before such a claim could be approved and, that, for that reason, the fourth and fifth respondents **"did**

not occupy a position of trust in relation to the completion of their claim forms". Quite frankly I cannot understand what point the commissioner was trying to make in this regard especially if it was intended to be a point which was independent of the point made in the preceding paragraph. The effect of what the commissioner says is either the same as the effect of the preceding paragraph or its effect is that the fact that the appellant had a system for the verification of claims by different officials prevented the trust relationship from breaking down to such a degree as to render continued employment intolerable. This does not make sense and is devoid of any logic.

[9] The last ground relied upon by the commissioner was that it was a mitigation factor in this case that the two employees had long service. One had 13 and the other 18 years of service. While I have no doubt that the commissioner's award cannot stand on the basis of the reasons dealt with already above which the commissioner gave, it is her reliance on the employee respondents' long years of service that I am unable to hold to be unjustifiable or irrational or as constituting a gross irregularity. Even in cases of dishonesty, the length of service of an employee may be taken into account as a mitigating factor in appropriate cases.

[10] In par 15 of the as yet unreported judgement of this Court in **Toyota SA Motors (Pty)Ltd v Radebe & others case no DA2/99**, I said: **"Although a long period of service of any employee will usually be a mitigation factor where such**

employee is guilty of misconduct, the point must be made that there are certain acts of misconduct which are of such a serious nature that no length of service can save an employee who is guilty of them from dismissal. To my mind one such clear act of misconduct is gross dishonesty." I went on to say in par 16 thereof: **"I am not saying that there can be no sufficient mitigating factors in cases of dishonesty nor am I saying dismissal is always an appropriate sanction for misconduct involving dishonesty. In my judgement the moment dishonesty is accepted in a particular case as being of such a serious degree as to be described as gross, then dismissal inter alia, an appropriate and fair sanction."** The appellant relied heavily on the Toyota judgement. I think the difference between Toyota and this case is that having regard to all the circumstances of the case in Toyota the seriousness of the misconduct there was so clear that in my view no reasonable person could in my view have come to the conclusion that the length of service could possibly be sufficient to render the dismissal an unfair sanction. In this case I cannot say the same of this case and in particular about the commissioner's decision to regard the length of service as a mitigating factor.

[11] I have noted what my Colleague, Conradie JA, says about length of service. I do not think for purposes of this case it makes any difference whether what one regards as a mitigating factor is length of service or whether what one regards as providing a mitigation is that, because the employee had been with the employer for a long period without any problems, he is unlikely to repeat his misconduct and therefore should not be dismissed. I do not think that there would be any basis for a suggestion that the commissioner in this case thought that, because the employee respondents had served the appellant for a long time without any problem, they should be given another chance as they were not necessarily likely to repeat the misconduct.

[12] In this case the amount which the employee respondents claimed is not disclosed. What is disclosed is that it was overtime for a period of 9 hours. The record also does not disclose what the hourly rate of pay was for the employee respondents. Accordingly the amount may well have been a negligible amount. I am saying this as a factor that may be responsible for my inability place the misconduct of the employee respondents in the same category as the misconduct of the employee in Toyota. Obviously in each case one must have regard to all the circumstances of the case.

[13] In this case I do not overlook certain matters which the appellant legitimately drew to our attention. These include the fact that, when the employee respondents went out on trips, they would usually be away unsupervised. On those trips they would be responsible for the appellant’s trucks as well as very expensive cargo. This, contended the appellant, placed the employee respondents at a level at which it was entitled to expect a high degree of trust. I understand all of this. Had I been the commissioner who arbitrated the dispute, maybe I would not have taken the length of service as a mitigating factor. But someone else may have done precisely as the commissioner did - namely to take it into account as a mitigating factor. The Labour Court was not hearing the matter as an appeal against the decision of the commissioner. It was hearing it as a review application. I am unable to say that, in taking the length of service as a mitigating factor in the circumstances of this case, the commissioner committed a reviewable irregularity justifying interference with her award.

[14] In my judgement, the appeal ought to fail in the light of the above. I note that my Colleague, Willis JA agrees that on the grounds referred to above the appeal ought to fail but should succeed on another ground. The ground on which my Colleague relies upon for his conclusion that the appeal should succeed is that the commissioner had no power in terms of the Labour Relations Act, 1995 (Act No 66 of 1995) (**"the Act"**) to give a different sanction from that given by the employer just because she thought a different sanction would have been the appropriate one. But that was not the appellant's case if one has regard to the grounds of review on which the appellant relied in its founding affidavit in the review application.

[15] The appellant was obviously aware that it had to state its case clearly so that the respondents, including the employee respondents and the commissioner, would know what case they had to respond to. In paragraphs 6.1 upto 6.12 of the founding affidavit the appellant clearly set out the grounds on which it was asking the Labour Court to review and set aside the commissioner's award. The ground relied upon by my Colleague, Willis JA, was not included as one of the grounds. Despite this, the appellant included this ground in its heads of argument. That was not permissible because it was not part of its case on the record. The ground deals with the statutory powers of commissioners of the CCMA when they arbitrate disputes. Had the commissioner known that the Court might decide the case on the basis of such a ground, she may well have decided to either oppose the application in the Court below or the appeal in this Court or she might have decided that she needed to place before the Court a quo some affidavit. Indeed, the CCMA or its director might have considered that the

matter was of much greater significance than she might have otherwise thought. In that event she might have decided that the CCMA should be represented by Counsel in these proceedings to argue the point of what the statutory powers of commissioners are when they arbitrate disputes. I consider that it is not open to us to rely on such a ground as a basis for our decision.

[16] In the result the order I would make is that the appeal is dismissed with costs.

RMM Zondo

Acting Judge President

CONRADIE JA

[17] The commissioner characterised the misconduct as serious. Despite that, she concluded that the relationship of trust between the appellant and the employees had not broken down. Where an employee has committed a serious fraud one might reasonably conclude that the relationship of trust between him or her and the employer has been destroyed. When the employer then asserts that this has in fact happened, it would be startling to hear a commissioner proclaim that, despite what one might expect and despite what the employer says in fact occurred, the relationship of trust had

not been broken down. Of course, a commissioner is not bound to agree with an employer's assessment of the damage done to the relationship of trust between it and a delinquent employee, but in the case of a fraud, and particularly a serious fraud, only unusual circumstances would warrant a conclusion that it could be mended.

[18] The facts here are not unusual. They are recited by my brother Willis. The frauds by the two employees were committed in the course of a routine activity which they were expected to perform frequently. When the vital question of recidivism is considered, it is relevant to note that neither employee expressed the slightest remorse. At their disciplinary enquiry each put up a defence which was manifestly dishonest. The appellant took the attitude, and I think quite correctly, that this was a further indication that they could no longer be trusted. The commissioner did not say why she thought that their further dishonesty during the disciplinary enquiry was not gravely inimical to the already damaged trust relationship.

[19] What makes the commissioner's finding that the trust relationship had not broken down more startling is that there was uncontested evidence before her that, in the position which the employees occupied, the appellant had to repose a high degree of trust in them. For the most part they worked unsupervised. They carried cargo across

international frontiers. From time to time they carried diamondiferous gravel and ore samples. If any of these were lost, months of exploration might have to be repeated at enormous cost to the appellant. The potential loss from misplaced trust in the honesty of an employee was far greater than that which could have been feared by the employer in *Toyota South Africa Motors (Pty) Ltd v Douglas Radebe and others* (case no.: DA2/99 judgment delivered on 3.12.99).

[20] The commissioner next opined that the fraud (which she had earlier found to be serious) was not really all that serious because it was committed outside the employees' 'core functions'. She thought that their 'core function' was to manipulate the controls of heavy transport vehicles and not to complete overtime returns. This is not correct, but assuming it to be, the notion of a 'core function' can have no utility unless it is used to ascertain whether an employee's functions are such that a repetition of the offence in question is to be feared or not. The core function of a cashier is to handle money, so that an employer might, leaving other factors aside, reasonably fear a repetition of theft on her part. The core function of an office cleaner is not to handle money, yet, if she were caught stealing, it would be fatuous to argue in her favour that that was not her core function. Her core function does not matter. The risk of continuing to employ her, does.

[21] Closely allied to the notion of the employees' core

function not comprising the completion of log books, was the idea that the fact that the fraud could have been detected was also somehow mitigatory. The notion is bizarre. If consistently applied, it would mean that the better an employer's detection system is, the less the prospects of dismissing those caught by the system would be.

[22] The commissioner also misunderstood the significance of the employees' long service. Long service is no more than material from which an inference can be drawn regarding the employee's probable future reliability. Long service does not lessen the gravity of the misconduct or serve to avoid the appropriate sanction for it. A senior employee cannot, without fear of dismissal, steal more than a junior employee. The standards for everyone are the same. Long service is not as such mitigatory. Mitigation, as that term is understood in the criminal law, has no place in employment law. Dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the particular enterprise. That is why supermarket shelf packers who steal small items are routinely dismissed. Their dismissal has little to do with society's moral opprobrium of a minor theft; it has everything to do with the operational requirements of the employer's enterprise.

[23] It is precisely because dismissal for misconduct is rooted in operational requirements and not in the need for punishment that I consider that the following dicta of Zondo AJP in *Toyota* (supra) must be interpreted in context. He said this:

> 'I hold that the first respondent's length of service in the circumstances of this case was of no relevance and could not provide, and should not have provided,

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

I draw attention to the phrase 'in a particular case'. The seriousness of dishonesty – i.e. whether it can be stigmatised as gross or not – depends not only, or even mainly, on the act of dishonesty itself but on the way in which it impacts on the employer's business.

[24] The employees *in casu* were not dismissed in order to punish them. They were dismissed because the employer was not prepared to run the risk of employing them any longer once they had been shown to be dishonest. Long service is, of course, not entirely irrelevant It is relevant in determining whether an employee is likely to repeat his misdemeanour. An employee who has long and

faithfully served his employer has shown that he has little propensity for offending. That historical experience may persuade an employer to accept the risk of continuing to employ him now that it is known that he is not as honest as had been thought. Depending on the circumstances, long service may be a weighty consideration. But the risk factor is paramount. If, despite the *prima facie* impression of reliability arising from long service, it appears that in all the circumstances, particularly the required degree of trust and the employee's lack of commitment to reform, continued employment of the offender will be operationally too risky, he will be dismissed.

[25] This brings me to remorse. It would in my view be difficult for an employer to re-employ an employee who has shown no remorse. Acknowledgement of wrong doing is the first step towards rehabilitation. In the absence of a recommitment to the employer's workplace values, an employee cannot hope to re-establish the trust which he himself has broken. Where, as in this case, an employee, over and above having committed an act of dishonesty, falsely denies having done so, an employer would, particularly where a high degree of trust is reposed in an employee, be legitimately entitled to say to itself that the risk of continuing to employ the

offender is unacceptably great.

[26] In the circumstances of this case I consider it to have been irrational for the commissioner to have found that the employees did not commit the dishonesty within the scope of their core functions, that their long service availed them, or that they were entitled to profit from the fact that their dishonesty might readily have been detected by the employer. She misunderstood the concept of a core function and the role of long service in mitigation. She gave no thought to the moral opprobrium attaching to employees who knew that their fraud could, by an analysis of the print-outs of a device attached to one of the trucks, readily be detected, and nevertheless committed it.

[27] In the circumstances of this case, I consider that it was irrational to have relied on the employees' long service for having found their dismissal unfair. In my judgment the commissioner has 'ignored or misapplied legal principles to an extent that is inappropriate or unreasonable.' (See *Standard Bank of South Africa Ltd v CCMA & others* (1998) 19 ILJ 903 (LC)) By doing so, she failed to make a rational connection between the material available to her and the conclusion which she reached. (*Carephone (Pty) Ltd v Marcus N.O. & others* (1998) 19 ILJ 1425 (LAC) at para. [24]). The award should therefore have been set aside by the court *a quo*.

The appeal succeeds with costs. The order of the court *a quo* is set aside and replaced by an order reading –

'the arbitrator's award is set aside with costs'

____

CONRADIE JA

Willis JA

[28] I have had the benefit of reading the judgements prepared by my learned brothers Zondo AJP and Conradie JA. I agree with the order proposed by Conradie JA.

[29] My reasons follow.

[30] The two employees to whom this appeal relates had both been truck drivers in the employ of the appellant. One of them had 18 years of service with this employer, the other had 13 years. One had a clean disciplinary record. The other had a final written warning for an unrelated form of misconduct. They had falsely claimed nine hours' overtime for 10th April, 1998 when they had not in fact worked on that particular day. The day was Good Friday. For this they were dismissed.

[31] The reason the claims were for "overtime" was that the

employees would have been paid for 10th April, 1998, this being a public holiday. In other words, they submitted a claim as though they had worked on Good Friday when, in fact, they had not.

[32] It is common cause that these two worked on 9th April, 1998 and on 11th April, 1998. The 11th April, 1998 was what is colloquially known as "Easter Saturday" although in the ecclesiastical calendar it is known as " Holy Saturday", "Easter Saturday" being the Saturday that follows " Easter Monday. " They submitted their claims for the period 9th-11th April, 1998.

[33] Although these false claims amount to fraud as a matter of law, not too much should be concluded from this fact. What one is really dealing with here is a form of *furtum temporis.* The misconduct falls into much the same league as the case where a middle manager telephones his employer on a particular day claiming a day's sick leave on the basis that he had " indigestion" whereas the real reason is that he wished to watch the television broadcast of an important rugby match being played in New Zealand at the time. It is not morally much

different from the situation where a manager is given a credit card to be used strictly for purposes of entertaining customers but , on a single occasion, uses the card to entertain his wife on their wedding anniversary. And what about the manager who extends his lunch until 4pm not because he is doing business all through this lunch but because he is thoroughly enjoying himself? I am not convinced that even a majority of employers would dismiss the rugby enthusiast, the amorous husband or the lunch-time reveller.

[34] This misconduct, although it amounts to fraud was not committed as part of a sustained, systematic, skilfully executed scheme: the nightmare of all employers.

[35] On the other hand, it will normally be unfair to require an employer to retain in its employment someone correctly found to have been guilty of misconduct involving dishonesty and whom it does not trust.(See, for example, **Anglo American Farms t/a Boschendal Restaurant v Komjwayo** (1992) 13 ILJ 573 (LAC) at 589B-591A and the authorities therein cited.)

[36] The employer claimed that, given the peculiar nature of the diamond industry in which it operates, it needed to maintain an especially strict policy with regard to any dishonesty on the part of its employees in order to protect its

viability. It requires a certain boldness to trivialise this concern. Timidity can, of course, be a disadvantage in those entrusted with the exercise of power. Nevertheless, we are dealing here with an employer that employs in excess of twenty thousand people, that has a annual turnover of several billion rand, that earns the country billions of rands of foreign exchange every year and which pays the state in excess of a billion rand in tax every year. Every South African has, in a certain sense, an interest in the continued viability of this employer. On the other hand, the principle of equality before the law requires that the same principles and rules of law apply equally to all employers, regardless of size, importance or influence.

[37] This case illustrates very well**,** in my respectful view , why the majority judgement in **County Fair Foods (Pty) Ltd v Commission for Conciliation Mediation & Arbitration & Others** (1999) 20 ILJ 1701 (LAC) correctly defers to employers in cases where there is considerable doubt or a divergence of reasonable opinion as to the appropriate sanction. I shall develop my reasoning later.

[38] The arbitrator took into account the fact- complex. She took into account the employer's concern not to be accused of inconsistency when it came to dealing with other cases of fraud. She rightly said that one must look not merely at the label or rubric of the misconduct but the underlying factual substratum. She had regard to the disciplinary records of the employees as well as their length of service . She also regarded the fact that the employees did not occupy a position of trust and the fact that the misconduct " was not committed within their core functions" as relevant. I disagree with this last conclusion. This would not justify interfering with her award.

[39] The arbitrator also found that the employer had paid insufficient regard to the provisions of Item 3 in Schedule 8 of

the LRA. Presumably she was referring to the benefits of counselling.

[40] The overall impression, upon reading the award, is of a humane, compassionate, intelligent person, honestly trying to apply her mind to the issues. Ordinarily, one cannot reasonably expect much more from an arbitrator. The appellant, however, alleges

in its application to review the award that the decision was, *inter alia*,“unjustifiable”.

[41] The Court *a quo (per* Seady AJ) said as follows:

> “ It is not for the Labour Court to decide whether the arbitrator was correct, but whether the award is justifiable. There is a rational objective basis justifying the connection made by the arbitrator between the material before her and the conclusion she reached. The outcome can be sustained by the facts found and the law applied.”

[42] I agree with the Court *a quo* that if one is to apply the test as to whether or not there is a rational objective basis justifying the connection made by the arbitrator between the material before her and the conclusion she reached, as set out in

Carephone (Pty) Ltd (1998) 19 ILJ 1425 (LAC) at 1435A-F, then one cannot interfere with the decision of the arbitrator.

[43] The decision of the arbitrator to impose a final written warning in the light of the totality of the evidence rather than decide in favour of dismissal is one which I am satisfied a number of reasonable people would have considered fair. This was the same view of the Court *a quo.* Accordingly, one can hardly find that her decision was unjustifiable in the sense that it was somehow irrational.

[44] In my view, the basis for setting aside the award lies elsewhere.

[45] Section 193 (1) (a) of the LRA provides that:

> "**If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may-**
>
> **(a) order the employer to reinstate the employee from any date not earlier than the date of dismissal;"**

[56] Clearly, a finding by the arbitrator that a dismissal is unfair is a condition precedent for ordering reinstatement. Put differently, this means that unless the arbitrator can make a positive conclusion that a dismissal was unfair , he or she does not have the power to order reinstatement.

[47] A certain amount of confusion may have arisen in connection with this issue by reason of the provisions of section 192(2) of the LRA which provides that:

> "**If the existence of the dismissal is established, the employer must prove that the dismissal is fair."**

[48] It is important to remember that once the facts are established , it is , ultimately, a matter of opinion whether a dismissal is fair or not. It was Terence who exclaimed with time-honoured eloquence and perspicacity, "*Quot homines, tot sententiae!* " Opinions, even among reasonable men and women, may differ.

[49] It is facts and not opinions which are proven. An opinion, by definition, is not something which is proven (q.v. The Oxford Dictionary).

[50] The *onus* is thus on the employer to prove the facts upon which it relies for the dismissal. If the facts upon which the

employer relies are not proven at the end of the arbitration proceedings, then *cadit quaestio*, the employer has failed to prove the fairness of the dismissal. On the other hand, if the employer does prove the facts upon which it relies, then the arbitrator must make a determination as to whether or not the dismissal is unfair and only if the arbitrator is so satisfied may he or she order reinstatement. The arbitrator is not at large to substitute what he or she considers to be a fair sanction in the circumstances. This intention of the legislature is plain from a reading of section 193 as a whole. Moreover, an opinion that finds a particular decision unfair or not is, qualitatively, different from one concerned with whether it is fair or not. One hardly need be a master of language to understand that to find the something is not unfair is not the same as finding it is fair.

[51] There must, in other words, be a degree of deference towards an employer's decision. To say this is not to resurrect the " reasonable employer " test. It means that the arbitrator must take into account the prevailing norms and values of our society , paying particular regard to the norms and values of the industrial relations community as a whole and, having done so, may only interfere with the employer's decision to dismiss if satisfied that the decision was unfair.

[52] I understand Kroon AJ and Ngcobo AJP, as he then was, to be saying much the same in **County Fair Foods (Pty) Ltd v**

Commission for Conciliation Mediation & Arbitration & Others (*supra*) at 1707G-I and 1713J-1714B respectively. I agree with their views.

[53] I respectfully disagree with the minority judgement of Conradie JA where he said that the appeal had to fail if it could not be concluded that the decision of the arbitrator was irrational (at 1716I). It is important to note that the **Carephone** judgement extended the scope of review (see p1434B [para 31] and 1434E [para33] of the judgement). It did not purport to limit the already clearly understood grounds of review to be found in section 145 of the LRA. Conradie JA nevertheless agrees that deference should be shown towards the disciplinary sanctions imposed by employers (see at 1717G).

[54] Despite what was said in the **Carephone** judgement at 1439C (para 53), I do not believe that it was intended to convey that in every case which may come before the Labour Courts, the only test for whether an arbitrator, acting as such in terms of the LRA, exceeded his powers is whether or not his actions are justifiable in terms of the reasons given for them. In

Amalgamated Clothing & Textile Workers Union v Veldspun Ltd 1994 (1) SA 162 (A); (1993) 14 ILJ 1431 (A) at 169C and 1435E respectively the court said at that an arbitrator exceeds his powers by " making a determination outside the terms of the submission". Although in **Carephone** it is said at1432J-1433A (para 25) that the meaning accorded to the corresponding section in the Arbitration Act No.42 of 1965 " cannot be taken over without qualification", it came to this conclusion because it criticised this interpretation as being "a narrow and unconstitutional basis of review." This clearly indicates, once again, that the intention of the Court in the **Carephone** case was to extend or widen the existing test for the review of arbitration awards given under the provisions of the LRA rather than limit or restrict it. In other words, the **Carephone** test added to, and did not subtract from, the **Veldspun** test. The **Veldspun** test of " making a determination outside the terms of the submission" (or referral in the case of arbitrations being conducted in terms of the LRA) remains, in my respectful view, good law when it comes to considering whether an arbitrator has exceeded his powers. What was said at 1439B [para 53] of the **Carephone** case

must be understood in relation to the facts of that specific case.

[55] In my view, in ordinary rule that in voluntary (or consensual) arbitrations (historically there were only voluntary (or consensual) arbitrations) there is no power to review an award on the basis of a *bona fide* mistake of fact or law does cannot apply to reviews in terms of section 145 (2) (a) (iii) of the LRA. In **Dickenson & Brown v Fisher's Executors** 1915 AD 166 at 174 the *ratio* for this rule is given by Lord Halsbury in **Caledonian Railway Co v Turcan** (1898 AC 256): "The parties have *selected* the arbitrator as judge of fact and law, and if he be ever so erroneous in the decision at which he has arrived it is conclusive upon the parties....; his award is final, and whether it be right or wrong in point of law, it is a matter with which I am not entitled to deal." (my emphasis). In the same case Lord Herschell said and is so quoted in the **Dickenson & Brown** case (*supra*) as saying " The arbitrator whether he has decided rightly or wrongly is supreme. There is no power to review his decision, whether he made a mistake in law or whether he has made a mistake in fact." The clear intention of the LRA is that commissioners of the CCMA

appointed to arbitrate labour disputes are not supreme and there are various obvious reasons why this should not be so.

[56] It is in my view fundamentally important to accept that very different principles of law from those applicable to voluntary (or consensual) have to apply to compulsory arbitrations despite their similarities in form.

[57] Although, in my view , the facts of this case differ in certain important respects from those in the as yet unreported case of **Toyota South Africa Motors (Pty) Ltd v Radebe & Others** (DA2/99), I need to record that, for the above reasons, I obviously disagree with Nicholson JA when he says therein:

> " It seems to me to be significant that a statutory arbitrator is also required to find if a sanction is fair".

[58] This does not appear in the LRA and *Mr Khumalo* who appears for the respondent concedes that this is so.

[59] In the **Toyota** judgement, Nicholson JA refers , with approval, to the award of John Brand reported in **Tubecon (Pty) Ltd and National Union of Metal workers of SA**

(1991) 12 ILJ 437 (ARB) at 445B to 445D. A few points need to be noted in regard thereto:

(i) An IMSSA arbitration is a voluntary referral to arbitration which is qualitatively different from one held in terms of a referral to the CCMA;

(ii) The IMSSA terms of reference specifically required an arbitrator to determine whether the dismissal was fair;

(iii) The approach which Brand suggests is substantially the same as that to which I refer above, i. e. it is normative, taking into account a broad spectrum of societal opinion.

[60] The hoary, old fear that it will be white, male capitalists who will set the standard for unfair dismissals may be put to rest. Any dismissal offensive to the norms and values which we share collectively, and as a fair-minded people, will be unfair. Despite the differences which arise from culture, tradition, history, class and gender interests etc, it

seems to me to be obvious that we, as a society, share a large degree of consensus on basic values: our achievements as a society would not have been possible without it. In my view, our on-going success as a society depends on our extending this process still further.

[61] Apart from a strictly literal interpretation of subsections 192(2) and 193 (1) (a) of the LRA, there are, to the extent that there are any residual ambiguities, policy considerations which, in my view, require the above approach:

(i) Although the principle of control has long been accepted, the best of our legal tradition is averse to the second- guessing by outsiders of decisions of those who have been entrusted to make them. This applies in criminal law to courts of appeal considering sentence by a lower court, in administrative law to the review of decisions of tribunals and state officials, in property law to the decisions of owners of immovable property as to the design of buildings to be erected thereupon, in family law to the decision of a husband and wife as to their choice of matrimonial regime and so on;

(ii) There is too much confusion in the industrial relations

community as to when a decision to dismiss is likely to be interfered with. Such uncertainty is corrosive of economic growth, job creation and the expansion of opportunities to empower the ordinary people of the land.

(iii) The resources of the state are limited. They are, moreover, not abundant. It seems that too much time and too much of the state's financial resources are being taken up at the CCMA with disputes over allegedly unfair dismissals. It seems to be fair to take judicial notice of the fact that the CCMA risks drowning in a sea of such disputes. Overwhelmingly, these relate to dismissals for misconduct.

(iv) The time of talented trade union officials absorbed in representing members who have been dismissed for misconduct should be set free to concentrate on improving the quality of life of their members.

(v) A more relaxed approach by the CCMA to employer's disciplinary decisions will encourage employers

themselves to become more relaxed. I am convinced that fears of being overturned and fears that they will be accused of “inconsistency” encourage a great many employers to “ do it by the book” when it comes to discipline. The milk of human kindness does not flow in such situations. A compassionate exercise of a discretion in favour of an employee does not necessarily amount to inconsistency.

[62] Although the arbitrator does not pertinently state that she perceived her function as one of having to determine a fair sanction, it is clear from her award as a whole that this is the position. Indeed, she could not have made the award she did unless this were the case.

[63] In my view, the arbitrator in this particular case misconceived her powers and, in this case, in so doing, exceeded them. In this sense, the award is unjustifiable. For this reason, the award stands to be set aside in terms of section 145 of the LRA.

[64] I would nevertheless urge the employer to reconsider its decision to dismiss these two employees on compassionate grounds.

DATED AT JOHANNESBURG THIS DAY OF MARCH 2000.

N.P.WILLIS
JUDGE OF APPEAL

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Date of hearing : 7 March 2000
Date of Judgement : 3 March 2000