IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN

CASE NO : C 360/99

In the matter between:

DEON COX	**Applicant**
And	
COMMISSION FOR CONCILIATION MEDIATION & ARBITRATION(CCMA)	**First Respondent**
COMMISSIONER ADV W F MARITZ	**Second Respondent**
PERMOSEAL (PTY) LTD	**Third Respondent**
CHEMICAL ENERGY, PAPER, PRINTING, WOOD AND ALLIED WORKERS UNION (CEPPWAWU)	**Fourth Respondent**

JUDGMENT

WAGLAY J

[1] This is an application in terms of s145 of the Labour Relations Act (the Act) whereby the Applicant seeks to have reviewed and set aside the arbitration award handed down by the Second Respondent in his capacity as a Commissioner of the First Respondent.

[2] The Third Respondent, employer of the Applicant opposes the application.

[3] As background, the Applicant was employed by the Third Respondent in the capacity

of an assistant dispatch worker. He was also a senior shop steward of the Trade Union (who is surprisingly sited as the 4th Respondent in these proceedings).

[4] On 28 August 1998, Applicant was charged with five counts of misconduct relating to dishonesty in that he claimed to have been ill on 25 August 1998 when he had in fact attended 4th Respondent's offices, and that he had thereafter dishonestly claimed a days sick leave. Further, it was alleged that on 27 August 1998 Applicant had been insubordinate to a member of management in that he had walked out of a counselling session, despite the request of his senior not to do so.

(The parties have for the sake of convenience referred to the charges preferred against the Applicant as the "sick leave charge" and the "insubordinate charge").

[5] On 5 and 9 October 1998 an internal disciplinary hearing was held which was chaired by an independent party in that the chairperson was not an employee of the Third Respondent and although the chairperson was a labour relations specialist he was not a person ordinarily employed by the Third Respondent to attend to their labour related matters.

[6] The chairperson was only entitled to make a recommendation on the evidence presented to him at the disciplinary hearing, this he did sometime after the evidence and arguments were presented to him. His recommendation was that the charges preferred against the Applicant were essentially only two (as recorded in paragraph [4] above) and that the Applicant was guilty on the sick leave charge because he claimed sick leave (i.e a day off on the grounds of illness) without being sick and that the Applicant was also guilty of the "Insubordinate Charge". The chairperson also stated that the charges jointly amounted to a dismissable offence adding that because he also found that the employment relationship between the Applicant and the Third Respondent (Applicant's employer) had broken down irretrievably, Applicant be dismissed on two weeks notice.

[7] The Third Respondent then and on 20 October 1998 dismissed the Applicant on one months notice. The Applicant was not offered an opportunity to appeal against the findings of the disciplinary hearing.

[8] The Applicant thereafter referred the matter to the First Respondent (the CCMA) for conciliation and then for arbitration. The dispute was arbitrated on 4 March, 6 April, 19 and 29 May 1999. At the arbitration the Third Respondent was required to prove that the dismissal of the Applicant was both substantially and procedurally fair.

[9] After the hearing of the evidence and argument, the Second Respondent found that the dismissal of the Applicant was both substantively and procedurally fair. It is this finding that the Applicant seeks to review and set aside. The basis upon which Applicant seeks the above order is that the Second Respondent's decision was not rationally justifiable in relation to the evidence presented to him at the arbitration – this basis has commonly become known as the test set out in the judgement of Carephone (Pty) Ltd v Mracus N O and others (1998) 19 ILJ 1425 (LAC).

[10] Although the decision in Carephone has engendered much debate and not followed in the matter of Shoprite Checkers (Pty) Ltd v Ramdaw & others (2000) 21 ILJ 1232 (LC) until the Labour Appeal Court revisits the Carephone judgement it is unlikely that there will be any uniform application as to the proper test in matters relating to a review of a CCMA arbitration award.

[11] Having considered both of the above judgements and the reservation expressed by the Labour Appeal Court about the Carephone judgement in the matter of Toyota South Africa (Pty) Ltd v Radebe and others (2000) 21 ILJ 340 (LAC) I am left with little option but to enter this debate.

[12] In almost every application that seeks to review and set aside an arbitration award handed down by the CCMA the Applicants argue that unless the award handed down is justifiable in relation to the evidence

presented to the arbitrator at the arbitration hearing, such award must be liable to be reviewed and set aside. This argument is premised on the test formulated in the matter of Carephone where Froneman DJP stated:

" It seems to me one will never be able to formulate a more specific test than, in one way or another, asking the question: Is there a rational objective basis justifying the connection made by the administrative decision maker between the material properly before available to him and the conclusion he or she eventually arrived at?"

[13] Arguing on the basis of the above test Applicants microscopically analyse the evidence presented at the arbitration and attempt to convince this Court that on a proper analysis of the evidence the award handed down was incorrect and therefore this Court should set aside the award. The effect of adopting such an approach is that this Court is being called upon to consider the merits of the decision arrived at by the arbitrator – if this Court is to accept such approach then it will be performing an appeal function under the guise of review. This is neither tenable nor authorised by the Labour Relations Act (LRA) nor what was intended by the Carephone judgement.

[14] The test as set out in Carephone does not seek to broaden the scope of review to the extent that the distinction between an appeal and review is blurred or rendered meaningless. What it does hold (and I paraphrase here) is that an arbitration award handed down by the CCMA must be logically connected to the evidence presented at the arbitration – in other words the question is not whether the decision of the arbitrator is right but whether the arbitrator arrived at a decision based on the evidence presented to him.

[15] The problem with the Carephone judgement is that the test it laid down, as recoreded above, is based on the premise that the CCMA in performing its functions as an arbitrator performs an administrative function and is therefore obliged to comply with the Constitutional provisions relating to fair administrative action. Having regard to the recent decision of the Constitutional Court in Fedsure Life Insurance Ltd v Greater Johannesburg Transitional Council and others 1999 (1)SA 374(CC) I share the views expressed by Wallis AJ in Shoprite Checkers that the CCMA in exercising its arbitration function is not an administrative body

as held by Carephone. Consequently as the very rationale for the test as set out in the Carephone judgement is now held by the Constitutional Court to be incorrect, this Court is entitled not to follow that decision.

[16] Although I find that I am not obliged to follow the test as set out in Carephone it does not mean that I agree with the decision in Shoprite Checkers. While I am broadly in agreement with the judgement in Shoprite Checkers particularly in so far as it properly hold that s 145 (2) of the LRA should be interpreted no differently to how one would interpret s 33 (1) of the Arbitration Act to say that the interpretation accorded to s 33(1) by the High Court and the Supreme Court of Appeal should continue to apply, I have difficulty in accepting.

[17] Since this Court is empowered in terms of the LRA to exercise powers of review it should not adopt an approach that would undermine the confidence in this Court's ability to control and examine powers exercised by bodies whose decision this Court is allowed to review.

[18] Firstly therefore as s 145(2) of the LRA mirrors s 33(1) of the Arbitration Act, as I have stated earlier, the interpretation accorded to the one section should be no different to the other. Insofar as what interpretation should be accorded to s 145(2)(a)(ii) and (iii) of the LRA and s 33(1)(b) and (c) of the Arbitration Act is concerned I agree with what is set out in paragraphs [51] and [53] of the Shoprite Checkers judgement at page 1247. I however disagree with the interpretation accorded to s 145(2)(a)(i) of the LRA and s 33 (1)(a) of the Arbitration Act in the same judgement (see paragraphs [49] and [50] at pages 1246 and 1247). The last mentioned sub-sections deal with the misconduct committed by the arbitrator in respect of his duties as such.

[19] Shoprite Checkers relying on the various authorities cited therein holds that if an award handed down by the arbitrator is wrong in law or if the award is not based on evidence presented at the arbitration it is not open for this Court to interfere with such an award because being wrong in law or arriving at a decision in the

absence of evidence could be a mistake and a mistake cannot be interpreted to impute misconduct as provided in the sub-sections referred to above. On a superficial level this reasoning is sound but on a careful analyses this approach appears to me to be nothing short of constituting a recipe to perpetuate injustice. If a mistake in law or in fact cannot constitute misconduct then this Court cannot interfere with an award notwithstanding the consequences arising therefrom. This is unduly harsh on a party who is on the receiving end of the prejudicial consequences that follow upon a mistake. A party who I may add, no doubt, participated in the process to ensure that justice will be served. What must such a party think about a Court which tells him notwithstanding the arbitrator's mistake this Court cannot interfere with the award. I accept that some mistakes may be of no consequence but what about the situation where but for the mistake the award may have been a totally opposite one.

[20] Justice cannot be seen to be done by categorising the decision(s) made by the arbitrator. What is required is for this Court to formulate a test that is neither superficial, formalistic or too fluid, particularly in dealing with reviews based on s 145(2)(a)(i) of the LRA or s 33(1)(a) of the Arbitration Act. In this respect I believe that the proper test when dealing with these sub-sections is the test similar to the one laid down in the Carephone judgement. I say this notwithstanding the fact that I do not consider myself bound to that judgement. Although the test as set out in Carephone is premised on an erroneous ground and further in my view incorrectly said to fall within the ambit of s 145(2)(a)(iii) it sets out properly the duty of the arbitrator with regard to how the arbitrator's decision is required to be arrived at. It does not, nor should it be seen to constitute a new, separate or a Constitutional ground of review but should be seen to hold that if an arbitrator fails to arrive at a decision based on the evidence properly before him then it must be said that he has committed a misconduct in relation to his duties or to put it differently on issues of merit if a decision of an arbitrator has no logical relation to the evidence presented to him then he has failed to apply his mind to the matter and therefore he can be said to have committed misconduct as provided for in s 145(2)(a)(i) of the LRA or s 33(1)(a) of the Arbitration Act. Similarly when an arbitrator makes a decision which is wrong

in law, this Court must be able to interfere with such an award, however in this instance the Court must only interfere where it feels satisfied that the only reason that the arbitrator arrived at a decision which is wrong in law, is because he failed to apply his mind to the law in question. He would have failed to apply his mind to the law in question only if there is no dispute about the law having regard to decisions handed down by this Court or the Labour Appeal Court.

[21] I believe that the above test would give effect to both s 33(1)(a) of the Arbitration Act and s 145(12)(a)(i) of the LRA. The fact that such an approach may not stem Applicants seeking to appeal against an arbitration award in the guise of a review is not a ground to refuse to apply this test. While it does place a more onerous burden on this Court to consider the evidence and the merits it still does not change the process from a review to one of appeal because this Court will not consider whether the decision is correct or not but only whether the decision is based on the evidence presented at the arbitration.

[22] Secondly why the above test is the one that should apply in review sought under s 145 (2)(a)(i) of the LRA and s 33(1)(a) of the Arbitration Act is because this Court was not simply established as a Court of Law but a Court of Law and Equity (s 151(1) of the LRA). This Court must in exercising its jurisdiction based on law and equity ensure that equal weight is given to both these factors when interpreting any section of law it is required to interpret. In the circumstances even if I am bound by judgements of the Supreme Court of Appeal with regard to the test that I may be obliged to apply bearing in mind the similarity of s 145(2)(a) of the LRA and s 33(1) of the Arbitration Act, as these decisions are based purely in law and since this Court is also one of equity I am entitled to broaden such interpretation as long as such interpretation does not negate the legal provisions set out in the statutes.

[23] Finally with respect to the test applicable I believe it necessary to make some comment on the voluntary and

non voluntary nature of arbitration. This Court has, notwithstanding the similarity in the wording of s 145(2) of the LRA and s 33(1) of the Arbitration Act adopted the view that the test applicable to review based on the above mentioned sections are different, while this decision may to some extent be based on the judgement of Carephone there are no grounds to treat reviews based on either of these sections differently. To set a test simply on the basis of a voluntary nature of the arbitration is to impose a penalty on parties who seek to achieve the very purpose of the LRA and do so by relieving the State from providing that service. I fail to see why parties should be prejudiced simply because they took it upon themselves to meet the obligations set out in the LRA. This becomes even more untenable when the LRA itself seeks to promote processes agreed to by the parties themselves and give such agreements the force of law.

[24] Turning then to the merits of the matter, prior to the arbitration hearing taking place the parties concluded a pre-arbitration minute and with regard to the sick leave charge recorded the following:

"Whether Cox[Applicant] was at FAMSA or the Union [Forth Respondent] or both, or neither, is irrelevant because he was repeatedly dishonest in relation to his absence from work on 25 August 1998."

[25] I do not, for purposes of this judgement, intend setting out all the evidence presented save to state that on the sick leave charge the Second Respondent (the Commissioner) held that the test to be applied was whether the Applicant , in his own mind believed that he was ill on the day in question due to being incapacitated due to stress as he had claimed. The Second Respondent found that on the evidence presented there could be no suggestion that the Applicant considered himself to be incapacitated by stress with the concomitant need to visit FAMSA due to illness. This he found inter alia, on the basis that Applicant had made the appointment to visit FAMSA some two weeks prior to the date in question and the fact that Applicant's claim that receiving an interdict on the morning of the date in question was the "final straw" which resulted in Applicant being(becoming) ill was false because the Applicant had telephoned his

immediate superior and claimed to be ill at 07h50 but only received the interdict at approxiamately 09h00.

[26] The further evidence led by the Applicant on the sick leave charge was also considered by the Second Respondent and rejected so far as it did not give credence to Applicant's claim that he believed he was ill on the day in question. The Second Respondent's findings cannot be faulted either on the test that he applied in determining this issue or on the grounds that his decision bore no relation to the evidence presented at the arbitration hearing. The Second Respondent went beyond what was required of him and gave a thorough analysis of the evidence presented and arrived at a decision based thereon. It is a decision which I find cannot be interfered with on any basis whatsoever.

[27] With regard to the insubordination charge, the Applicant' s submission was that the Second Respondent failed to access the evidence of Jacobs properly and took into account evidence that was not led at the arbitration (that of Barodien) but at the disciplinary hearing consequently the decision is liable to be reviewed and set aside. Without deciding whether the Second Respondent was correct to consider the evidence of Barodien which was led at the disciplinary hearing but not at the arbitration hearing I find that even if Barodien's evidence is disregarded in toto it does not assist the Applicant. The decision arrived at by the Second Respondent was not based simply on what Barodien had said at the disciplinary hearing but on all of the evidence presented at the arbitration hearing. With regard to the assessment of Jacobs evidence this Court cannot substitute its assessment of the evidence to that of Second Respondent to do so would be to consider the matter as if it was an appeal rather than a review. All I need to be satisfied is that the Second Respondent did in fact consider Jacob's evidence and it is clear that not only does he access the evidence of Jacobs but also sets out why he finds Jacobs evidence acceptable, he then considers the evidence of Matthews and again sets out why her evidence was unacceptable. For Applicant to suggest that Second Respondent's assessment of Matthews evidence was incorrect is again nothing short of requiring this Court

to consider the matter as if the Court is confronted with an appeal. This of course this court cannot do. When assessing the evidence of the witnesses there are a number of factors which may influence the Commissioner not least of all the credibility of the witness and the witness's demeanour when evidence is given, in this respect a Court on review cannot substitute its assessment of the witness purely on what is recorded in a transcript. A court on review cannot interfere with an assessment of a Commissioner unless it is so patent that there is no logical connection between the assessment of the evidence by the Commissioner in relation to the evidence presented. Again this is not the case in the present matter. The award sought to be reviewed by the Applicant, having regard to the transcript of the proceedings, displays a thorough appreciation by the Second Respondent of the evidence presented at the arbitration proceedings, a proper evaluation thereof and a decision which is logically connected in relation thereto. In the circumstances Applicant's submission that the decision of the Commissioner in finding that the Applicant had committed the misconduct of insubordination be set aside and reviewed is also without merit.

[28] The further issues raised by the Applicant are also without merit. The fact that the Second Respondent did not consider the dismissal to be procedurally unfair because the Applicant was not allowed to appeal despite provisions in the collective agreement/ disciplinary code for such appeal cannot be a basis for a review particularly since Second Respondent noted the employers claim for refusing an appeal which was that having regard to the nature of the charges and the fact that the Applicant's case had been heard by an independent person, there was no one in the Company who was qualified to deal with the appeal. Furthermore however had the Second Respondent found that appeal had to be granted and failure to do so constituted an unfair procedure in effecting a dismissal it would not have made any difference as the Second Respondent states in his award:

" I do not regard the fact that there was no appeal as constituting an unfair procedure. Even if that was so this is a matter in which I would not grant the Applicant compensation for procedural defect of that nature."

In this respect all I need to determine is whether or not he considered the matter and arrived at a decision based on the evidence presented. Quite clearly he did and consequently there is no basis on which this court can interfere with Second Respondent's decision.

[29] Applicant's final attack on the award was that the Second Respondent committed a gross irregularity because he failed to enquire whether or not dismissal of the Applicant was fair. The basis for this submission by the Applicant is that the Second Respondent was required , once he found that the Applicant had committed the misconduct complained of , to consider inter alia , the Applicant's length of service with his employer, the fact that the Applicant was experiencing matrimonial problems and the fact that he had a clean disciplinary record. The Second Respondent in his award does not indicate that he considered the above factors however this is understandable. It is understandable because the Second Respondent in fact found that the relationship between the Applicant and his employer (the Third Respondent) had irreversibly broken down. Where the relationship between an employer and employee has broken down, especially as a result of the misconduct and the subsequent hearing in respect thereof as happened in the present matter, I see no reason for a Commissioner in the position of the Second Respondent to consider the issues relating to "mitigating circumstances" . The best of "mitigating circumstances" cannot restore a broken down relationship and the finding of the Second Respondent in this respect was not inappropriate let alone capable of being set aside or reviewed.

[30] In the circumstances and having regard to the record of the arbitration hearing, the award of the Second Respondent and the reasons therefore I am satisfied that there is no reason whatsoever for this Court to interfere with the award handed down by the First Respondent.

[31] Finally with regard to costs, based on the fact that there appears to be some confusion with regard to the test

applicable to reviews, I have decided that this is not an appropriate matter in which costs should follow the result.

[32] In the result the application is dismissed with no order as to costs.

WAGLAY J

Judgement reserved.

For the Applicant: J Whyte of Chennels Albertyn Attorneys

For the Respondent: D. Loxton of Findlay & Tait Attorneys

Date of Judgement: 02..10. 2000