**IN THE LABOUR COURT OF SOUTH AFRICA**

**HELD AT BRAAMFONTEIN** **CASE NO JR221/01**

In the matter between:

**TRANSWERK** Applicant

and

**IMSSA** First Respondent

**R ESSACK** Second Respondent

**TECHNICAL WORKERS UNION on behalf of PIENAAR AND SMIT** Third Respondent

**JUDGMENT**

**FREUND A J:**

**INTRODUCTION**

1 On 25 July 2000 the applicant (Transnet Limited trading as "Transwerk") and the third respondent (the Technical Workers Union, acting on behalf of two of its members, Messrs Pienaar and Smit) submitted a dispute for arbitration by the second respondent (Ms R Essack). Clause 2 of the arbitration agreement

between the parties provided as follows:

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"2. The issue which the arbitrator will be asked to decide is whether in the arbitrator's opinion based on evidence presented in the arbitration:

2.1.1 there is fair cause to find that an unfair labour practice had been committed against Mr Pienaar and Mr Smit;

2.1.2 whether the company is obliged to remunerate Mr Pienaar and Mr Smit on the level for which they applied. (Retrospectively)."

2 The second respondent heard evidence and argument from the parties and on 22 November 2000 she handed down her award. In this application the applicant applies to review and set aside the second respondent's award.

**THE FACTUAL BACKGROUND**

3 The proceedings before the second respondent were not tape recorded. The second respondent's handwritten notes have been made available but these notes are not easy to read and the applicant has taken no steps to have them typed. Mr Maleka, who appeared on behalf of the applicant when the application was argued before me, waived reliance on any ground of review requiring the court to consider what evidence

was or was not before the second respondent. He was content to

argue the application on the basis of the correctness of the facts as found by the second respondent in her award. His submission was that, accepting the correctness of all the factual findings made by the second respondent, her award fell to be reviewed and set aside.

4 From the second respondent's award, the following material facts in relation to the underlying dispute are apparent:

4.1 During the period September/October 1997, the applicant advertised two "110 level" (i.e. middle management) posts, for the positions of operational manager and customer services manager. The advertisement stated that these posts were "110 B" and "110 C" posts respectively, i.e. that they had grade levels "B" and "C" attached to them. These grade levels implied, to those conversant with the applicant's remuneration policies, particular levels of remuneration.

4.2 However, at the time that the posts were advertised, the applicant (Transnet Ltd) had already issued an internal directive to its business units (such as Transwerk) directing them no longer to apply the previously applicable policy of linking pay levels in respect of managerial staff to grade levels such as "110 B" or

"110 C". In terms of the new policy, all appointments to managerial posts (including the middle management "110" group) were to be made at the minimum salary scale for that group, with movement thereafter being based on individual performance evaluations.

4.3 Messrs Pienaar and Smit applied for and were interviewed for the two posts concerned. They considered the posts to constitute promotions and they anticipated that, if appointed, they would receive the remuneration levels traditionally associated with a 110 B and 110 C graded job. They were unaware when interviewed of the internal directive to change the remuneration policy.

4.4 Messrs Pienaar and Smit were selected for the positions and asked to sign letters of appointment for their new positions. The letters of appointment set out the relevant job titles and specified the applicable total annual salary package. These salary packages were below the salary packages which would have been applicable in terms of the previous job grading system.

4.5 On 14 January 1998 Messrs Pienaar and Smit signed their respective letters of appointment.

4.6 Messrs Pienaar and Smit testified that before signing their letters of appointment they had raised with their superior, one Mr Susan, their concern that the letters of appointment did not correctly reflect the remuneration they had expected. They were still unaware of the change of policy. They testified that Mr Susan had urged them to sign the letters of appointment so as not to lose their appointments. According to the award "both applicants believed that Mr Susan would "fix up the error"". (According to the second respondent's notes of Mr Pienaar's evidence, Pienaar actually testified that "(Mr Susan) said don't worry - they will fix it later". Her notes also show that Mr Smit testified that when he raised his concern that the "levels (were) not correct", Mr Susan said "HR will fix it".)

4.7 Mr Susan stated in his evidence that, when Mr Pienaar and Mr Smit queried their letters of appointment, he responded by saying that "we will enquire and see if it can be rectified". However, he testified that he did not promise anything. He testified that upon investigation of the situation he had learnt of the applicant's policy to abolish the old job levels and that he ultimately spelt this all out clearly to Mr Pienaar and Mr Smit.

**THE AWARD**

5 After setting out her summary of the evidence, the second respondent proceeded to analyse the evidence. She held that the applicant had made a "mistake" in its advertisement of the jobs. Although the second respondent does not state this in terms, it is clear that the "mistake" to which she refers is the fact that the jobs were advertised as "110 B" and "110 C" jobs, which implied specific levels of remuneration, when the applicant's policy at the time was no longer to peg managerial salary levels to job grades of this type.

6 The second respondent then posed the following question:

> "Did the Company, by not including the specific levels and any change to remuneration, in its letters of appointment, in fact rectify its error?"

(I should mention that the second respondent's notes suggest that it was the applicant's defence before her that it had "rectified its error" in the letters of appointment.)

7 In the next portion of her award she analysed the letters of appointment. Although she does not say this in terms, I find that the tenor of her award is to answer the question posed by her

and quoted above in the negative.

8 The second respondent went on to say the following:

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"Prior to the enquiries made by the applicants, no attempt was made by management to notify the men of the error and it was only as a result of their endeavours that the reality emerged. And such emergence was indeed a slow and painful (for the applicants) process. The only evidence of management making a structured attempt to inform the applicants appears in a letter dated 23rd of November 1998 ...".

9 She held that the applicant, being the party guilty of committing a blatant error in the advertisement, had been under a duty to correct its error in a formal, direct and honest manner. She found that it had failed in this regard.

10 The second respondent was also critical of the disparity of treatment between Mr Pienaar and Mr Smit, on the one hand, and one Mr Slabbert, on the other hand. She held that the applicant's treatment was:

"... in sharp contradiction to the appointment of a Mr Slabbert who was appointed at a much higher salary than the entrance level of R 127 000, in July 2000. How Mr Strydom *(sic) (should presumably read* "*Slabbert*"*)* qualified for the distinction was not satisfactorily explained ...".

11 The second respondent was not impressed by the manner in

which the two employees' grievance had been rejected by the chief executive manager of Transwerk, Mr C Smit. The essence of the letter rejecting the grievance was the following:

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"By accepting your letter of appointment, the signing of the memorandum of agreement for middle management by you and by taking up your new post you have indicated to me that you accepted the conditions coupled to the post which includes the salary.

In view of the above I can unfortunately not review your salary."

12 The second respondent commented:

"I cannot accept the deadly cold tone and attitude of Mr Smit's letter which takes it for granted that the signing of the letters of appointment meant acceptance of the salary scale."

13 The second respondent concluded that the applicant "failed in its duty to Mr Pienaar and Mr Smit". She then went on to consider what compensation should be awarded and made an order that they each be paid R 30 000 as compensation and that their salary levels be increased.

**GROUNDS OF REVIEW**

14 In his heads of argument on behalf of the applicant, Mr Maleka sought to rely on two grounds of review. The first was that "the

second respondent committed gross irregularity". The second was that "the award was not justifiable or rational, having regard to the material placed before her and the conclusion arrived at by her".

15 It is necessary to determine whether these grounds of review can be relied upon at all in the circumstances of the present application.

**Gross irregularity**

16 This case concerns an arbitration award made by an arbitrator appointed in accordance with the constitution of a bargaining council. It does not concern an alleged defect in arbitration proceedings conducted under the auspices of the Commission for Conciliation, Mediation and Arbitration ("CCMA") and section145 of the Labour Relations Act 66 of 1995 ("the LRA") therefore has no application. As is correctly recognised by the applicant in its replying affidavit, this application is governed by s33 of the Arbitration Act 42 of 1965. (See *Portnet (a division of Transnet Ltd) v Finnemore and Others* [1999] 2 BLLR 151 (LC); *Seardel Group Trading (Pty) Ltd t/a the Bonwit Group v Andrews NO and Others* [2000] 10 BLLR 1219 (LC).)

17 Section 33(1) of the Arbitration Act provides:

"(1) Where -

(a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or

(b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or

(c) an award has been improperly obtained,

the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside."

18 It is clear that if second respondent "has committed any gross irregularity in the conduct of the arbitration proceedings" her decision is reviewable in terms of s33(1)(b) of the Arbitration Act.

19 Mr Maleka submitted that the second respondent's reasoning in her award was so flawed as to disclose a "latent gross irregularity". In this regard he relied upon the decision of the Labour Appeal Court in *Toyota SA Motors (Pty) Ltd v Radebe and Others* (2000) 21 ILJ 340 (LAC) in which the following passage by Schreiner J, as he then was, in *Goldfields Investment Ltd and Another v City Council of Johannesburg and Another* 1938 TPD 551 at 560 was cited with approval:

"It seems to me that gross irregularities fall broadly into two classes, those that take place openly, as part of the conduct of the trial - they might be called patent irregularities - and those that take place inside the mind of the judicial officer, which are only ascertainable for the reasons given by him and which might be called latent .... Neither in the case of latent nor in the case of patent irregularities need there be any intentional arbitrariness of conduct or any conscious denial of justice .... The crucial question is whether it prevented a fair trial of the issue. If it did prevent a fair trial of the issues then it will amount to a gross irregularity. In matters relating to the merits the magistrate may err by mistaking or misunderstanding the point in issue. In the latter case it may be said that he is in a sense failing to address his mind to the true point to be decided and therefore failing to afford the parties a fair trial. But that is not necessarily the case. Where the point relates only to the merits of the case, it would be straining the language to describe it as a gross irregularity or a denial of a fair trial. One would say that the magistrate has decided the case fairly but has gone wrong on the law. But if the mistake leads to the court's not merely missing or misunderstanding a point of law on the merits, but to its misconceiving the whole nature of the enquiry, or of its duties in connection therewith, then it is in accordance with the ordinary use of the language to say that the losing party has not had a fair trial."

20 It is clear that, if a "latent gross irregularity" as contemplated in the above passage can be shown, the second respondent's award falls to be reviewed and set aside. I shall consider below whether this has been shown.

**Justifiability and rationality**

21 I turn now to consider whether it is open to this court to set aside the second respondent's award if it should be shown that the

award was not "justifiable" or "rational".

22 *Carephone (Pty) v Marcus NO and Others* (1998) 19 ILJ 1425 (LAC) was a case concerning the review of an award made by a commissioner of the CCMA. It was held by the Labour Appeal Court that the applicant was confined to the review grounds provided for in s145(2) of the LRA. However it was also held that, where a commissioner exceeds the constitutional constraints on his or her powers on arbitration, this can be reviewed by the Labour Court under s145(2)(a)(iii) (which permits review on the basis that the commissioner exceeded his or her powers). At paragraph 31 of his judgment in *Carephone*, Froneman DJP stated:

> "The peg on which the extended scope of review has been hung is the constitutional provision that administrative action must be justifiable in relation to the reasons given for it (s33 and item 23(b) of schedule 6 to the Constitution). This provision introduces a requirement of rationality in the *merit or outcome* of the administrative decision. This goes beyond mere procedural impropriety as a ground for review, or irrationality only as evidence of procedural impropriety."

23 Froneman DJP elaborated further as follows (in paragraph 37):

> "... It seems to me that one will never be able to formulate a more specific test other than, in one way or another, asking the question: is there a rational objective basis justifying the connection made by the administrative decision-maker between

the material properly available to him and the conclusion he or she eventually arrived at?"

24 In *Shoprite Checkers (Pty) Ltd v Ramdaw NO and Others* (2001) 22 ILJ 1603 (LAC) the Labour Appeal Court reaffirmed the approach adopted in *Carephone* in respect of reviews, in terms of s145 of the LRA, of arbitration awards by CCMA commissioners.

25 In *Stocks Civil Engineering (Pty) Ltd v Rip NO and Another* [2002] 3 BLLR 189 (LAC), the Labour Appeal Court recently had to consider a review of what is referred to in the judgment as a "private" arbitration. In a minority, concurring judgment Van Dijkhorst AJA stated as follows (in paragraphs 23 and 24):

"[23] The question which arises is whether, if these arbitrations are reviewable, the Arbitration Act or the principles applicable in reviews under the LRA should govern the proceedings. One line of thought is that as section 33(1) of the Arbitration Act and section 145 of the LRA are virtually the same, this Court and the Labour Court should apply the same norm under both, *viz* that of rational justifiability laid down in *Carephone (Pty) Ltd v Marcus NO & Others* (1998) 19 ILJ 1625 (LAC) (now since this matter was heard redefined by this Court as rationality in *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* 2001 (4) SA 1038 (LAC) paragraph 25). This approach is to be found in *Transnet v HOSPERSA* (1999) 20 ILJ 1293 (LC) paragraph 15; *NUM v Brand NO & Another* (1999) 8 BLLR 849 (LC) paragraph 14 and *Orange Toyota (Kimberley) v Van der Walt & Others* [2001] 1 BLLR 85 (LC). The other line of thought is that whatever the test may be for matters falling under the LRA regime, private arbitrations are to be reviewed (also in the Labour Court) in terms of the norms laid down in section 33(1) of the Arbitration Act. The latter view was expressed in *Eskom v Hiemstra NO & Others* (1999) 20 ILJ 2362 (LC) and *Seardel Group Trading (Pty) Ltd t/a Bonwit Group v*

*Andrews NO & Others* [2000] 10 BLLR 1219 (LC).

[24] In my view the latter is the correct approach. Private arbitrations are subject to the Arbitration Act 42 of 1965. Section 40 provides for an exception where an Act of parliament expressly or by implication excludes its operation. An example is section 145 of the LRA. There is no such exception in the case of private arbitrations. Considerations of expediency based upon the fact that the arbitration provisions of the LRA coincide with those in the Arbitration Act and that it would be preferable for Labour Courts to apply one test throughout, cannot override the clear provisions of the Arbitration Act. I do not share the view of Molahledi AJ in the *Orange Toyota* case (*supra)* paragraph 13 that the Arbitration Act is to be read subject to the Constitution and that therefore the test for reviews of the CCMA arbitration awards set out in the *Carephone* judgment would equally apply to reviews in terms of section 33 of the Arbitration Act. The important difference between the two types of arbitration is that CCMA arbitrations were held to be by an organ of state to which the constitutional precepts for just administrative action applied, whereas private arbitrations are not. This arbitration therefore has to be evaluated against the norms laid down in section 33(1) of the Arbitration Act as if this were a High Court doing likewise." (My emphasis)

26 In the majority judgment, Zondo JP (with whom Comrie AJA concurred) stated as follows (at paragraph 73):

"As the arbitration in this matter was a private arbitration as opposed to a compulsory arbitration provided for under the Labour Relations Act 66 of 1995 ("the Act"), the provisions of section 145 would ordinarily not be applicable with the result that the award would fall outside the ambit of the decision of this Court in *Carephone (Pty) Ltd v Marcus NO and Others* (1998) 19 ILJ 1425 (LAC)."

27 However, Zondo JP went on to find that the terms of reference which were agreed to between the parties in the relevant arbitration agreement were such that the arbitrator was obliged

to give a rational decision. Accordingly, if the arbitrator had given a decision which was irrational or unjustifiable, his award would be reviewable on the basis laid down in *Carephone*.

28 In my view the decision by the Labour Appeal Court in *Rip* is authority for the proposition that, subject to any ground of review which may flow from the terms of reference of the relevant arbitration agreement, a "private" arbitration award is not susceptible to review on the *Carephone* basis. I am bound by this.

29 Does it make any difference if the arbitration is conducted by an arbitrator appointed by a bargaining council and, to this extent, is not a "private" arbitration?

30 In *Shoprite Checkers supra* the Labour Appeal Court had cause to consider the judgment of the Constitutional Court in *Pharmaceutical Manufacturers of SA: In re Ex Parte President of the RSA* 2000 (2) SA 674 (CC). In paragraphs 17 and 18 of his judgment in *Shoprite Checkers*, Zondo JP referred to paragraphs 84, 85, 86 and 89 of the judgment of Chaskalson P (as the then was) in the *Pharmaceutical Manufacturers* case. In my view it is necessary for me to quote only paragraphs 84 and 85 thereof:

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"[84] In *S v Makwanyane* Ackermann J characterised the new constitutional order in the following terms:

'We have moved from a past characterised by much which was arbitrary and unequal in the operation of the law to a present and a future in a constitutional State where State action must be such that it is capable of being analysed and justified rationally. The idea of the constitutional State presupposes a system whose operation can be rationally tested against or in terms of the law. Arbitrariness, by its very nature, is dissonant with these core concepts of our new constitutional order.'

Similarly, in *Prinsloo v Van der Linde and Another* this Court held that when Parliament enacts legislation that differentiates between groups or individuals it is required to act in a rational manner:

'In regard to mere differentiation the constitutional State is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest "naked preferences" that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional State.'

[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 standard demanded by our Constitution for such action."

31 At paragraph 19 of his judgment in *Shoprite Checkers*, Zondo JP continued as follows:

"What is clear from the judgment of the Constitutional Court is that:

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

irrational;

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

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

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

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

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

32 At paragraphs 25 and 26 of his judgment, Zondo JP continued as follows:

"[25] There can be no doubt that in *Carephone* this court viewed the concept of justifiability as related, at least to some extent, to the concept of rationality but emphasized, correctly in my view, in the context of the fact that it was dealing with s33 read with item 23 which expressly use the adjective 'justifiable', that it should stick to the term 'justifiable'. In the light of this I am of the view that, although the terms 'justifiable' and 'rational' may not, strictly speaking, be synonymous, they bear a sufficiently similar meaning to justify the conclusion that rationality can be said to be accommodated within the concept of justifiability as used in *Carephone*. In this regard I am satisfied that a decision that is justifiable cannot be said to be irrational and a decision that is irrational cannot be said to be justifiable.

[26] In the light of the above it appears to me that counsel for the appellant was right in his submission that whether or not *Carephone* was wrongly decided has become largely academic as

a result of the judgment of the Constitutional Court in the *Pharmaceutical Manufacturers*' case which decided in effect that in our law rationality has become a constitutional requirement for all decisions taken in the exercise of all public power. Irrationality of such decisions is now a ground of review and, quite clearly, the issuing of an arbitration award by a CCMA commissioner under the Act is an exercise of public power and must, therefore, meet the constitutional requirements of rationality. If an award fails to meet this constitutional requirement, it can be set aside on this ground."

33 I am, with respect, not certain that the concept of "rationality" as referred to by the Constitutional Court in the *Pharmaceutical Manufacturers*' case is the same as the concept of "justifiability" as referred to in the *Carephone* case (and in item 23 of schedule 6 to the Constitution). It seems to me that the Constitutional Court may have had in mind a "rationality" test that is less demanding of the executive and other functionaries than the *Carephone* "justifiability" test. However, in my view I am bound by the findings of the Labour Appeal Court in *Shoprite Checkers* that "rationality can be said to be accommodated within the concept of justifiability as used in *Carephone*" and that "a decision that is justifiable cannot be said to be irrational and a decision that is irrational cannot be said to be justifiable". In my view I am also bound by the Labour Appeal Court's finding that "as long as a particular decision is the result of an exercise of public power", such a decision can be set aside by a court if it is "irrational" (in the sense that the Labour Appeal Court construed

that term).

34 It therefore appears to me that, if the award made by the second respondent was "the result of an exercise of public power", I am required by *Shoprite Checkers* to hold that it is reviewable on a justifiability/ rationality test.

35 In my view the onus to place before this court facts sufficient to show that the second respondent's award was the result of an exercise of public power lay on the applicant. I am not satisfied that the applicant has discharged this onus.

36 Firstly, the applicant has not shown that the LRA required the present dispute to be referred to arbitration, i.e. that this was a compulsory arbitration. In this regard it is relevant to refer to certain provisions of the LRA.

37 Section 51 of the LRA confers on bargaining councils dispute resolution functions comparable in some respects to those of the CCMA.

38 Sections 51(2)(a)(i) and (ii) provide:

"(i) The parties to a council must attempt to resolve any dispute between themselves in accordance with the constitution of the council.

(ii) For the purposes of sub-paragraph (i), the parties to a council include the members of any registered trade union or registered employers' organisation that is a party to the council."

Whilst s51(2)(a) (which must be read with s30(1)(i) and (j)) permits resolution of disputes between parties to a council by arbitration, it does not require this.

39 Section 51(3) provides:

"(3) If a dispute is referred to a council in terms of this Act and any party to that dispute is not a party to that council, the council must attempt to resolve the dispute -

(a) through conciliation; and

(b) if the dispute remains unresolved after conciliation, the council must arbitrate the dispute if -

(i) this Act requires arbitration and any party to the dispute has requested that it be resolved through arbitration; or

(ii) all the parties to the dispute consent to arbitration under the auspices of the council."

40 Section 51(6) provides:

"A council may enter into an agreement with the Commission or an accredited agency in terms of which the Commission or accredited agency is to perform, on behalf of the council, its dispute resolution functions in terms of this section."

41 Section 52 provides:

"(1) With a view to performing its dispute resolutions functions in terms of section 51(3), every council must -

(a) apply to the governing body of the Commission for accreditation to perform those functions; or

(b) appoint an accredited agency to perform those of the functions referred to in section 51(3) for which the council is not accredited.

(2) The council must advise the Commission in writing as soon as possible of the appointment of an accredited agency in terms of subsection (1)(b), and the terms of that appointment."

42 The applicant did not disclose in its founding affidavit how or why the present dispute was referred to the second respondent for arbitration. However, the arbitration agreement, which is an annexure to the founding affidavit, does record the following:

"This dispute has been lodged in accordance with clause 13.4 of the Constitution of the Transnet Bargaining Council. Conciliation proceedings were unsuccessful."

The constitution of the council was not placed before me. Although this is not expressly stated in the affidavits, I believe that the applicant and the third respondent are, in all probability, parties to the Transnet Bargaining Council. If so, it would appear that the arbitration was conducted pursuant to s51(2)(a)(i) of the

LRA, i.e. that it was an arbitration permitted, but not compelled, by the LRA. The applicant has, in any event, not shown that the aforegoing is not correct.

43 In my view an arbitration conducted between the parties to a bargaining council in accordance with an arbitration clause contained in the constitution of that council (and not in accordance with any statutory obligation under the LRA to arbitrate) cannot be regarded as "the result of an exercise of public power". I can understand the force of an argument that arbitration compelled by a statute (such as the LRA) is not voluntary and that an arbitration award made pursuant to such an arbitration is the result of an exercise of public power. See *Total Support Management v Diversified Health Systems (SA)* 2002 (4) SA 667 (SCA) at 674 para 26. However, where the arbitration is not required by statute but is the consequence of an agreement between the relevant parties, I do not think that it can fairly be said that the arbitration award is the result of an exercise of public power. In my view, such an arbitration is essentially "private" (as referred to in *Rip*.) See the *Total Support Management* judgment *supra* at 673 paras 24 and 25.

44 Furthermore, sight should not be lost of the fact that the

rationality test propounded by the Constitutional Court in the *Pharmaceutical Manufacturers* case was based on the idea that "the constitutional State" presupposes a system whose operation can be rationally tested. Where an arbitrator is appointed by parties to a bargaining council to arbitrate a dispute which the LRA does not required to be arbitrated, I do not think that the arbitrator can be considered to form part of "the State". The position of such an arbitrator is, in my view, fundamentally different from the position of a commissioner appointed by the CCMA (which is clearly an organ of state) to arbitrate an arbitration which, in terms of the LRA, is compulsory. (It is not necessary for me, for the purposes of this judgment, to consider whether an arbitrator appointed by a bargaining council to arbitrate in a compulsory arbitration can be regarded as an organ of state or whether an award by such an arbitrator is the result of the exercise of public power.

45 My conclusion that the second respondent's award is not the result of an exercise of public power is reinforced in the present matter by the nature of the issue which she was asked to decide (quoted in the first paragraph of this judgment). The first question which she was required to decide was whether, in her opinion based on the evidence presented in the arbitration,

"there is fair cause to find that an unfair labour practice had been committed against Mr Pienaar and Mr Smit". Counsel representing both parties were in agreement that these terms of reference did not confine the second respondent to applying the LRA. In particular, it was agreed that the second respondent was not limited to determining whether a residual unfair labour practice as contemplated in item 2(1)(b) of schedule 7 to the LRA had been committed. (That provision defines as a residual unfair labour practice "any act or omission that arises between an employer and an employee involving ... the unfair conduct of the employer relating to the promotion, demotion or training of an employee or relating to the provision of benefits to an employee".) The issue before the second respondent was therefore not an issue which the LRA requires to be resolved by arbitration.

46 In my view it follows from what I have stated above that the rationality test laid down by the Constitutional Court in the *Pharmaceutical Manufacturers*' case, as interpreted by the Labour Appeal Court in the *Shoprite Checkers* case, does not apply. In my view this case is indistinguishable from the "private arbitration" which formed the subject matter of the *Rip* decision.

47 It is also necessary to deal with a submission made by Mr Maluleka, on behalf of the applicant, that the applicant is entitled to rely upon s6(2) of the Promotion of Administrative Justice Act, No 3 of 2000 (hereinafter "the PAJA"). That section provides:

"A court or tribunal has the power to judicially review an administrative action if -

...

(f) the action itself -

(i) ...

(ii) is not rationally connected to -

(aa) the purpose for which it was taken;

(bb) the purpose of the empowering provisions;

(cc) the information before the administrator; or

(dd) the reasons given for it by the administrator.

(g) ..."

48 In my view the PAJA cannot be relied upon by the applicant in the present matter because the award in the present case does not amount to "administrative action" as contemplated in that Act. To constitute "administrative action" in terms of s1 of the PAJA, the relevant decision must be a decision taken when exercising a public power or performing a public function. As referred to above, I do not believe that the second respondent's award was made in the exercise of a public power or whilst performing a

public function. Furthermore, to constitute "administrative action" the action must amount to a "decision" as that term is defined in s1 of the PAJA. The definition of "decision" makes clear that the term relates only to "any decision of an administrative nature ...". I do not think that the second respondent's award amounts to a decision "of an administrative nature". See *Total Support Management, supra,* at 673 paragraphs 23 to 25; *Patcor Quarries CC v Issroff & Others* 1998 (4) BCLR 467 (SE) at 479E-F; *Seardel Group Trading (Pty) Ltd t/a The Bondwit Group v Andrews NO & Others* (2000) 21 ILJ 1666 (LC) at paras 36-38.

49 In *Volkswagen SA (Pty) Ltd v Brand NO & Others* (2001) 22 ILJ 993 (LC) Landman J stated the following (at para 53):

> "I should add that there are two other reasons why the PAJ is not applicable to this review. In the first place it does not seem that the PAJ repeals section 145 of the LRA. Secondly, assuming that it does, the Act, strange but true, does not apply, as far as the Labour Court is concerned, until rules have been promulgated. See s7(4) of the PAJ. The Labour Court is not a high court although it has a similar status and standing. Mr Wallace, who is a member of the Rules Board, stated that rules had not yet been drafted."

50 The *Volkswagen* case was a review of an award by a CCMA commissioner. However, in my view the same reasoning applies to the present case. It is in my view doubtful, to say the least,

that the PAJA repeals s33 of the Arbitration Act. However, assuming that it does, it appears that the rules contemplated in s7(4) of the PAJA have still not come into operation. I respectfully concur with Landman J that the consequence of this is that the Labour Court is not entitled at this stage to apply the provisions of the PAJA.

51 I do not think that the finding by the Labour Appeal Court in *Shoprite Checkers supra* (at para 29) that "the PAJA may well be applicable to the making of an arbitration award by the CCMA" requires me to find that the PAJA does apply *in casu*. Firstly, the Labour Appeal Court did not find that the PAJA is in fact applicable to the making of an arbitration award by the CCMA. Secondly, for the reasons referred to above I believe that an arbitration award by an arbitrator appointed by a bargaining council in a non-compulsory arbitration is in any event distinguishable from an arbitration award made in a compulsory arbitration by a CCMA commissioner. Even if the PAJA applies to CCMA commissioners' awards, I do not think that it applies to an award by an arbitrator appointed by a bargaining council in the circumstances referred to above.

52 Mr Maleka also submitted on behalf of the applicant that the

second respondent's terms of reference entitle this court to apply the *Carephone* test, on the same basis as was done in the majority judgment in *Rip*. I do not agree. In *Rip*, clause 2.1 of the arbitration agreement provided:

> "The arbitrator shall in relation to the applicant's alleged unfair dismissal claim, have powers equivalent to that (*sic*) of a Judge in the Labour Court. In addition the rules of the Labour Court will be applicable..."

Zondo JP held (at paragraph 80) that it was implicit in a judge's powers that a judge's decision must be rational or justifiable. He therefore found that the powers conferred by the terms of reference on the arbitrator bound the arbitrator to give a rational decision. If the decision was irrational or unjustifiable, the arbitrator had exceeded his powers within the meaning of that phrase as used by the Labour Appeal Court in *Carephone*.

53 The terms of reference in the present case are, in my view, distinguishable. Clause 3 of the arbitration agreement provides:

> "We agree that the arbitrator will have the power to decide upon the procedure which she will follow at the hearing of this matter."

No provision in the agreement is analogous to the provision in the agreement in the *Rip* case conferring "the powers equivalent

to that of a judge in the Labour Court" or providing that "the rules of the Labour Court will be applicable". I do not think that the definition of the issue in clause 2 of the arbitration agreement in the present case justifies an inference that the parties intended to limit the powers of the second respondent in the manner in which the powers were held to have been limited in the arbitration agreement applicable in the *Rip* case.

54 I conclude, therefore, that neither the "justifiability" test laid down in *Carephone*, nor the "rationality" test laid down in *Shoprite Checkers* can be relied upon as a potential ground of review in the present application.

55 However, in case I am wrong in this regard, I shall also refer below to my views in relation to the "justifiability" and "rationality" of the second respondent's award.

**APPLYING THE LAW TO THE FACTS**

56 I can understand the force of some of the criticisms made by the applicant against the second respondent's award. For example, the second respondent does not appear to have afforded any significant weight to the consideration that Messrs Pienaar and Smit, having signed the letters of appointment, should not be

permitted to challenge the payment of salaries in accordance with those letters of appointment as an unfair labour practice. Had I been sitting as the arbitrator or in an appeal I might well have reached a different conclusion.

57 However I am not satisfied that the second respondent's reasoning was so flawed as to disclose a "latent gross irregularity", in the sense in which that phrase is utilised in the *Goldfields Investment* case *supra*. To adapt the language used in the *Goldfields Investment* case, this is a case in which the second respondent may perhaps have gone wrong on the law, but in my view she did not misconceive the whole nature of the enquiry, or her duties in connection therewith. She applied her mind to the facts. She noted that the origin of the dispute lay in the applicant's mistake when advertising the jobs. She found that, being the party guilty of committing a blatant error in the advertisement, the applicant had been under a duty to correct its error in a formal, direct and honest manner. She found that it had failed in this regard. Although she does not say so in terms, it is necessarily implicit in her award that she concluded that there was fair cause to find that an unfair labour practice had been committed by the applicant against Messrs Pienaar and Smit. She therefore directed the applicant to remunerate Messrs

Pienaar and Smit in the manner she considered appropriate. Whether she was right or wrong in reaching her conclusion, I do not think that it can be said that she misconceived the whole nature of the enquiry or misconceived her duties in connection therewith. It follows that in my view she did not commit any gross irregularity in the conduct of the arbitration proceedings, as contemplated in s33(1)(b) of the Arbitration Act.

58 If my analysis of the law above is correct, this is a sufficient basis to dismiss the application. However, if I am wrong in concluding that the "justifiability" and/or "rationality" tests do not apply, I think it appropriate to mention that, even on these tests, I do not think that the applicant should succeed. In my view there was a rational objective basis justifying the connection made by the second respondent between the material properly available to her and the conclusion that she eventually arrived at. Mr Maleka conceded, in my view correctly, that the second respondent was not merely bound to apply the common law on contract. Even if, contractually, Messrs Pienaar and Smit had no basis to complain about the remuneration that they received, it was open to the second respondent to determine whether the failure to pay them in accordance with the expectation created by the advertisement constituted an unfair labour practice. It is implicit in the second

respondent's award that she found that the expectations of higher salaries held by Messrs Pienaar and Smit were entirely understandable, having regard to the manner in which the jobs had been advertised and the failure by anyone on behalf of the applicant prior to their appointments to inform them about the applicant's change in remuneration policy. The second respondent was of the view - which I cannot find to be irrational or unjustifiable - that this had, as a matter of fairness, given rise to an obligation on the part of the applicant to correct its error in a formal, direct and honest manner. She also found, in my view not irrationally, that the applicant did not do this. In these circumstances I do not think that it can be said that there was no rational objective basis upon which she was entitled to conclude that the second respondent had committed an unfair labour practice. It is my view, therefore, that it has not been shown that the second respondent's award is reviewable on the basis of a "justifiability" or "rationality" test.

59 For the above reasons, the application is dismissed, with costs.

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A J FREUND
ACTING JUDGE OF THE LABOUR COURT

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| G | : | 23 May 2002 |
| NT | : | |
| NT | : | Adv I V Maleka instructed by Tshiqi Attorneys |
| ESPONDENT | : | Adv Hutchinson, instructed by Fluxman Rabinowitz Raphaely Weiner Inc |

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