IN THE LABOUR COURT OF SOUTH AFRICA

(HELD IN PORT ELIZABETH)

CASE NO: P257/06

In the matter between:

THE SOUTH AFRICAN POLICE SERVICE	**APPLICANT**
And	
THE SAFETY AND SECURITY BARGAINING COUNCIL	**FIRST RESPONDENT**
L VERMAAK N.O	**SECOND RESPONDENT**
J NEL	**THIRD RESPONDENT**

JUDGMENT

AC BASSON, J

1] This was an application to review and set aside the arbitration proceedings conducted under the auspices of the Safety and Security Bargaining Council (hereinafter referred to as "SSSBC") at Port Elizabeth on 20 February 2006 before the Second Respondent (hereinafter referred to as "the Commissioner"). The Applicant in this

matter, the South African Police Service (hereinafter referred to as "the SAPS"), prays for an order declaring that the decision of the SAPS refusing the request of the Third Respondent to be transferred (hereinafter referred to as "Nel") was not in breach of the provisions of the Transfer Policy of the SAPS *alternatively*, for an order that the matter be reheard by a Commissioner other than the Second Respondent.

2] Nel is a superintendent employed as the Sub-section Head Absenteeism Management at the Provincial Office in Zwelitsha. This office is the Head Office for the Eastern Cape Province. Nel is the manager and the administrator dealing mostly with leave and absenteeism within the SAPS. He has at least 14 years' experience and holds a diploma and a B-Tech degree. It is common cause that Nel suffers from a disease which requires him to receive medical attention in Port Elizabeth. The SAPS submitted that it tried to accommodate Nel by granting him additional sick leave.

3] In November 2005 Nel applied for a promotion. It is common cause that he was promoted.

4] On behalf of the SAPS it was argued that this position of Nel is of critical importance to the SAPS due to the wide-spread abuse of sick leave of members of the SAPS. During 1997 a decision was taken by the Eastern Cape Provincial Executive Council to relocate the SAPS Provincial Head Office including all employees from Port Elizabeth to Bhisho (also referred to as the Zwelitsha office). The purpose of the relocation was to transform and restructure the SAPS in terms of Resolution 7 of 2002 and to ensure that it became more representative in terms of race, gender and skills. The effect of Resolution 7 of 2002 was to ensure that resources and employees were transferred from more affluent to poorer areas. Because of resistance to this move and to avoid being transferred, some employees adopted a strategy claming to be ill in circumstances where they were either not ill or not too ill to work. During the relocation process, the critical departments such as the human Resource Management Department (hereinafter referred to as “the HRM”) in which Nel worked, and which had to facilitate the relocation of other employees in other departments, were given priority and were moved first. The relocation commenced from December 2002.

5] It was the case for the SAPS that Nel had resisted this move and that

he had made representations in this regard. Nel did not take up his position despite an instruction to do so. More specifically Nel was instructed in January and 3 May 2004 to take up his post by no later than February and 1 July 2004 respectively. Despite these instructions Nel still failed to take up the post. Pursuant to the instructions to take up his post, Nel and three other employees declared a dispute with the SSSBC regarding the instruction to relocate to Bhisho. The arbitration was decided against the employees on the basis that the arbitrator lacked jurisdiction to hear the matter.

6] On 23 July 2004 Nel was again instructed to take up his post. He and three other employees brought an urgent application to the Labour Court to interdict their relocation to Bhisho. The application was dismissed.

7] Nel and the three employees reported for duty at the Bhisho office on 28 July 2004 but did not return to work after that. Instead on 29 July 2004 all employees (including Nel) submitted medical certificates. Nel stated that he suffered from arthritis. On 18 August 2004, Nel was once again instructed in writing to attend work. Nel did not report for duty and on 14 October 2004 the SAPS informed him that it was

contemplating suspending his salary and invited him to make representations as to why this should not happen.

8] The SAPS conducted an investigation into sick leave abuse in the SAPS and found that sick leave abuse was indeed rife in the province to the extent that some police officers who claimed to be too ill to work was actually running their own businesses. Absenteeism also had a direct effect on crime and the costs of paying these employees per month were in the region of R7 million per month. The investigation also revealed that absenteeism had increased in response to Resolution 7 of 2002.

9] Nel returned to work after he was informed that his salary would be suspended. He further pleaded guilty to charges of abuse of sick leaving during a disciplinary hearing.

10] On 22 September 2004, 20 days after he undertook to report for duty and remain in service in the Bhisho Office, Nel applied for a transfer citing medical reasons. Nel claimed that he needed to be close to his Rheumatologist who had her offices in Port Elizabeth. Nel further claimed that he did not have access to such a specialist in East

London and Zwelisha.

11] The SAPS rejected the application for a transfer. The reason given was that it was not in the interests of the SAPS to approve the transfer. Nel then applied for a cross-transfer which was also rejected. The dispute was then referred to the SSSBC.

THE COLLECTIVE AGREEMENT ON TRANSFER POLICY AND PROCEDURES 5 of 1999 (hereinafter "the Policy")

12] The dispute that was referred to the SSSBC is one regarding the interpretation and application of a collective agreement in respect of transfer policies and procedures (no 5 of 1999). It is common cause that transfers within the SAPS are governed by a collective agreement.

13] **Clause 2 of the Policy:** In terms of this procedure, every employee may, in principle be transferred. However, in considering this transfer certain considerations will be taken into account before a final decision is reached. These considerations include that there must be a valid and sufficient reason to transfer or not to grant a transfer to an

employee *(clause 2.1*); the interest of the service (*clause 2.2*); the interests of the individual employee whose transfer is being considered *(clause 2.3)* the employee's career development (*clause 2.4*); the availability of a suitable vacant post in which the employee may be transferred *(clause 2.5)*; and the availability of funds (*clause 2.6).*

14] **Clause 10 of the Policy:** Clause 10 of the Policy sets out the procedure that will apply in respect of transfers. More in particular, clause *10.2.3.4* requires that the Provincial or Divisional Commissioner concerned or his delegates must consider the application after considering various issues. These include whether the transfer will be in the *interest of the service and/or the employee. Clause 10.2.5* of the Policy requires that should the Commissioner be of the opinion that the transfer will not be in the interest of the service and/or the employee, the transfer must not be approved and the required notice must be submitted in writing stating briefly the reasons for the decision. I have already pointed out that it was the case for the SAPS that the transfer could not be approved in light of the interests of the SAPS.

THE AWARD

15] The Commissioner identified the dispute as one regarding the interpretation and application of the collective agreement (to which reference has been made in the aforegoing paragraphs). More in particular, the Commissioner had to decide whether or not the SAPS had complied with the provisions of the collective agreement (5 of 1999).

16] In his award, the Commissioner sets out the relevant facts and more particularly the fact that the main reason for Nel's request to remain in Port Elizabeth was the fact that he suffered from Arthritis which caused him severe pain. It was also recorded that Nel needed medical treatment from the only Rheumatologist in the Eastern Cape which is based in Port Elizabeth.

17] The Commissioner identified clauses 2 and 10(2) of the Policy as critical to the present dispute. I will return to these clauses herein below.

18] Director De Klerk who testified on behalf of the SAPS confirmed at the

arbitration hearing that Nel had difficulty to travel and that, because of the geographical area, Nel had to travel long distances. He also confirmed that it is in the interest of Nel to approach his condition with empathy and understanding. De Klerk, however, also confirmed that the cross transfer was not granted as the person who would have been transferred into the position of Nel was not qualified to do the work of Nel and that, because of time constraints, the Department was not in a position to train a new incumbent. De Klerk also confirmed that Nel was the most experience person in the province to do the work. De Klerk also confirmed that Nel's work was regarded as very important in light of the fact that the SAPS was experiencing major problems with the unauthorized sick leave and which had a severe impact on the finances of the SAPS.

19] The Commissioner accepted that Nel had a valid and sufficient reason to be transferred but also accepted that the SAPS had an equally valid and sufficient reason not to grant the transfer.[1] It was further accepted by the Commissioner that the interests of the employee and the employer should determine whether or not a transfer should be granted if none of the other barriers set out in clauses 2.4 and 2.6 of

1 At page 10 of the award.

the policy is not present. The Commissioner concluded that since the transfer would be at no cost to the state and the fact that there was no evidence that a funded vacancy was not available, the dispute only needed to be decided on the respective interests of the SAPS and Nel. The Commissioner then concluded that Nel had an interest to be transferred because the transfer would alleviate the need for him to travel and would place him near his doctor but also accepted that it was equally in the interest of the SAPS that Nel remain in his current position due to his experience and skill and the importance of the job that he was doing.[2] The interests of both the employee and the employer carries equal weight according to the Commissioner if regard is had to clause 10.2 and 10.2.3.4 of the Policy. Clause 10.2.3.4 requires the Provincial Commissioner to consider "*whether the transfer will be in the interest of the service and/or the employee;..*" The Commissioner again confirmed that if it was the intention of the drafter of the Policy not to place the interests of the employee and the employer on an equal footing *"[t]he drafters could have simply stated that the interests of the State would be paramount".*

20] The Commissioner then proceeded to conclude that the interests of

2 Ibid.

Nel outweighed that of the SAPS and further stated that the SAPS can appoint and train another person to fill Nel's vacant position. The fact that Nel cannot be transferred in light of the fact that he was promoted in the meantime and that the condition of this new position was that he would remain the promoted position for 24 months, was rejected by the Commissioner on the basis that he had to consider the position as it was at the time when the decision not to transfer was taken. The Commissioner then concluded that the transfer was in breach of the policy and ordered the transfer of Nel to Port Elizabeth.

EVALUATION

21] The SAPS sought to review this award on the following grounds.

(i) The Commissioner failed to apply the collective agreement correctly;

(ii) Nel was estopped from seeking to be transferred as subsequently to his transfer he was promoted and undertook to remain that post for 24 months.

(iii) The Commissioner failed to apply his mind as to whether there was a funded, vacant post at the level of superintendent.

(iv) The award is unjustifiable in that it interferes with a rational decision of the SAPS.

22] *Clause 10.2.3* requires that the Provincial or Divisional Commissioner to consider various factors in deciding whether or not to approve a transfer. In terms of *clause 10.2.3.4* it must be considered whether the transfer will be "*in the interest of the service and/or the employee*". In terms of *clause 10.2.5* the transfer "*must"* not be approved if the Commissioner (of the SAPS) is of the view that it will not be in the interest of the Service and/or the employee. On behalf of the SAPS it was submitted that it is clear from the policy that it does not require a balancing of the employee's interests and that of the SAPS. Should it be found in terms of *clause 10.2.5* that a transfer is not in the interest of either of the SAPS or the employee; the transfer must not be approved. It was accordingly submitted on behalf of the SAPS that the Commissioner incorrectly believed that the collective agreement required a balancing act of the two competing interests.

23] Whether or not the policy requires a balancing act between the different or competing interests is not patently clear from the Policy. What is, however, clear is that *clause 10.2.5* expressly states that a

transfer *must not* be approved if such a transfer is not in the interest of either of the SAPS and the employee. The evidence clearly supports that the transfer was not in the interest of the SAPS. In this regard De Klerk testified that Nel's work was of critical importance to the SAPS and that he was the most experienced person in the province in the work that he was doing. The evidence of De Klerk supports the conclusion and, I must point out, it was accepted by the Commissioner, that the SAPS had a valid and sufficient reason not to transfer Nel. What the Commissioner seems to conclude is that Nel's reasons to be transferred outweighed that of his employer (the SAPS).

24] In considering the question before this Court which is whether or not to review the decision, it should be borne in mind that this is a reviewing court and not a court of appeal. The question is thus not whether or not the Commissioner came to the correct decision or whether this Court agrees with the decision in the sense whether or not the decision is correct, but whether or not the decision is rational in the sense that it is a decision to which a rational decision maker could have arrived at.[3] I am of the view that the decision arrived at is not

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3 *Sidumo & Others v Rustenburg Platinum Mines Ltd & Others* (2007) 20 *ILJ* 2405 (CC): "*The standard of review*
[105] As stated earlier,108 section 3 of the LRA provides, inter alia that its provisions must be interpreted in compliance with the Constitution. Section 145 therefore must be read to ensure that

rational simply because the Commissioner misconstrued his duties as a Commissioner. The Commissioner clearly was of the view that where there are two competing interests both of which are equally valid and sufficient for purposes of arriving at a decision contemplated in terms of the Policy, he as the Commissioner is entitled to make a decision in terms of the Policy which he thinks is correct. In other words, the Commissioner was of the view that it falls within his powers to decide which interest should prevail notwithstanding the fact that they carry equal weight and notwithstanding the fact that the employer

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administrative action by the CCMA is lawful, reasonable and procedurally fair
….
[107] The reasonableness standard was dealt with in Bato Star. In the context of section 6(2)(h) of PAJA, O'Regan J said the following: "[A]n administrative decision will be reviewable if, in Lord Cooke's words, it is one that a reasonable decision maker could not reach."
[108] This Court recognised that scrutiny of a decision based on reasonableness introduced a substantive ingredient into review proceedings. In judging a decision for reasonableness, it is often impossible to separate the merits from scrutiny. However, the distinction between appeals and reviews continues to be significant.
[109] Review for reasonableness, as explained by Professor Hoexter, does threaten the distinction between review and appeal. The Labour Court in reviewing the awards of commissioners inevitably deals with the merits of the matter. This does tend to blur the distinction between appeal and review. She points out that it does so in the limited sense that it necessarily entails scrutiny of the merits of administrative decisions. She states that the danger lies, not in careful scrutiny, but in "judicial overzealousness insetting aside administrative decisions that do not coincide with the judge's own opinions." This Court in Bato Star recognised that danger. A judge's task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.
[110] To summarise, Carephone held that section 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that section 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in Bato Star: ***Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?*** *Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair."* Own emphasis.

came to a rational yet different decision. In these circumstances I am of the view that the Commissioner had completely misconstrued his powers as an arbitrator and as a result came to a decision which no reasonable decision maker could have arrived at. In coming to this decision, the Commissioner failed to evaluate whether or not the decision by the SAPS was a rational decision and failed to consider the material evidence of De Klerk to the effect that Nel's position was crucial and that there was no possibility of a cross-transfer and that these factors gave rise to a decision which may be rationally justified by the decision maker (the employer).

25] It should also be pointed out that the initial dispute that was referred to the SSSBC was an unfair labour practice dispute. The nature of the dispute before the SSSBC was amended to reflect that the dispute was one about the interpretation and application of the collective agreement. The Commissioner then formulated the question which he had to decide as follows: "*I need to decide whether or not the respondent [SAPS] complied with the provisions of collective agreement 5 of 1999 when the transfer request of the applicant [Nel] was denied. I further need to decide what the appropriate relief should be in the event of a finding that the respondent did not comply with the*

collective agreement in question." The Commissioner was therefore required to consider whether or not there was compliance with the Policy. Apart from the fact that the Commissioner was clearly of the view that he could substitute a decision of an employer without even considering whether or not that decision was rational, the Commissioner also failed to properly consider the express provisions of the Policy which states that a transfer *must* be refused if it is not in the interest of *either* the SAPS and the employee. On the face of it the decision of the SAPS was in accordance with the express provisions of the Policy which instructs the decisionmaker to refuse a transfer if it is not in the interest of either the SAPS or the employee.

26] In general it is accepted that this court will only interfere in a decision to transfer in exceptional circumstances. See *SAPU v SAPS & Others* [2004] 6 BLLR 567 (LC) at paragraph [29] where the Court held as follows:

> *"Where the transfer of a government official was, on the facts of the case, in the interest of the department concerned, and where the decision to transfer was not influenced by any arbitrary attitude or actuated by bias or*

malice or by any ulterior or improper motive on the part of the transferring authority it did not lie with the court to interfere."

27] There was no suggestion on the papers that there was any bias or malice present on the part of the decision makers who refused to approve the transfer. Neither was there a suggestion that Nel was not afforded an opportunity to make representations before a decision was made nor that Nel was not given reasons for the decision. It was also not the evidence that the SAPS did not have a valid operational reason for the decision. In fact, the Commissioner accepted that the SAPS had valid and sufficient reason not to approve the transfer of Nel. It was merely the Commissioner's view that Nel's interests carried more weight. On the face of it, it therefore appears that the procedures as set out in the Policy were followed when the decision to refuse the transfer was made. I should also point out that there was no adverse finding made by the Commissioner to the effect that the Policy was not followed. As already pointed out, the Commissioner's award seems to hinge on the fact that Nel's reasons for the transfer were more meritorious than the reasons advanced by SAPS why the transfer had to be rejected.

28] Apart from the aforegoing, it further appears that the Commissioner did not give any consideration to the fact that the SAPS has, in terms of the Policy, a discretion to approve a transfer (in the interest of the SAPS) which discretion has to be exercised rationally and without any bias or *mala fides*. Employees do not have a right to be transfered in terms of the Policy. The Policy also does not give an employee a right to be transferred, nor does it contain an undertaking that employees will not be transferred. The policy merely confirms that, "*in principle, every employee can be transferred*" but that certain considerations must be taken into account before a final decision is taken (*clause 2*). A discretion is clearly afforded the employer which discretion may not be arbitrarily taken without due consideration to the factors set out in the Policy. It goes without saying that the decision may not be taken in a bias manner or *mala fide*. There is no suggestion on the papers that the decision makers did not take into account the considerations that are listed in the policy. The case of Nel appears to rest on the fact that his interests were more compelling and outweighed those of his employer (answering affidavit paragraph 3.5). I have already pointed out that there is no suggestion from the Commissioner's award that the decision which refused the transfer was mala fide or that the

decision maker was biased. There is also no suggestion that the decision taken by the SAPS was irrational; that irrelevant considerations have been taken into account or that relevant considerations have been ignored by the decision maker. The Commissioner was merely of the view that Nel had more compelling reasons to be transferred and that his interests outweighed those of the SAPS. In coming to this decision the Commissioner effectively stepped into the shoes of the decision makers and usurped the roll as the employer. Once the Commissioner did this, he then proceeded to impose his own value judgment as to the correctness of the decision of the SAPS to refuse the transfer. The question which the Commissioner should have asked is not whether he would have approved the transfer in the particular circumstances but whether or not the SAPS had followed the procedure as set out in the Policy. I have already pointed out that there is no indication that the SAPS did not apply the policy in arriving at the decision. In fact, all indications are that the SAPS did apply the Policy in arriving at the decision not to approve the transfer and in applying the Policy, the SAPS refused the transfer in the interests of the SAPS. This is not a case where the SAPS did not have a valid operational reason to refuse the transfer. In fact, I have already pointed out that the Commissioner had accepted

that the SAPS had a valid reason to refuse the transfer. Once the Commissioner had accepted this, it was not, in my view, in the absence of any other considerations (such as bias or mala fides) for the Commissioner to usurp the managerial power of the SAPS and substitute the decision with one which he (the Commissioner) considered to be the better decision. Some authority for this conclusion may be found in the decision of *Sidumo & Others v Rustenburg Platinum Mines Ltd & Others* (2007) 20 *ILJ* 2405 (CC). Although this decision dealt with the review powers of the Labour Court in the context of an unfair dismissal case, the comments made by Judge Ncgobo is, in my view, valid in the context of this case. In this case the Constitutional Court confirmed that, although the Commissioner hears a dispute *de novo*, he or she does not start with a blank page and determine afresh what the appropriate sanction for a dismissal is. The Commissioner's starting-point is the employer's decision to dismiss and the Commissioner's task is not to ask what the appropriate sanction in his or her opinion is, but whether the employer's decision to dismiss is fair.[4] In the present case the

4 "[177] Equally true is that when an employer determines what is an appropriate sanction in a particular case, the employer may have to choose among possible sanctions ranging from a warning to dismissal. It does not follow that all transgressions of a particular rule must attract the same sanction. The employer must apply his or her mind to the facts and determine the appropriate response. It is in this sense that the employer may be said to have discretion.

Commissioner was faced with a rational decision, the fact that the Commissioner was of the view that where there are two conflicting (but equally valid) interests, the one carries in his opinion more weight than the other, amounts to a gross irregularity in the proceedings and a complete misconception of his duties as an arbitrator. This resulted in a decision which is not reasonable in the sense that it is not a decision that a reasonable Commissioner would have arrived at. In the

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[178] But recognizing that the employer has such discretion does not mean that in determining whether the sanction imposed by the employer is fair, the commissioner must defer to the employer. Nor does it mean that the commissioner must start with bias in favour of the employer. What this means is that the commissioner, as the CCMA submitted, does not start with a blank page and determine afresh what the appropriate sanction is. The commissioner's starting-point is the employer's decision to dismiss. The commissioner's task is not to ask what the appropriate sanction is but whether the employer's decision to dismiss is fair.

[179] In answering this question, which will not always be easy, the commissioner must pass a value judgment. However objective the determination of the fairness of a dismissal might be, it is a determination based upon a value judgment. Indeed the exercise of a value judgment is something about which reasonable people may readily differ.

[180] But it could not have been the intention of the law-maker to leave the determination of fairness to the unconstrained value judgment of the commissioner. Were that to have been the case the outcome of a dispute could be determined by the background and perspective of the commissioner. The result may well be that a commissioner with an employer background could give a decision that is biased in favour of the employer, while a commissioner with a worker background would give a decision that is biased in favour of a worker. Yet fairness requires that regard must be had to the interests both of the workers and those of the employer. And this is crucial in achieving a balanced and equitable assessment of the fairness of the sanction.

[181] These considerations imply certain constraints on commissioners. However, what must be stressed is that having regard to these considerations does not amount to deference to the employer's decision in imposing a particular sanction. As COSATU put it, what is required of a commissioner is to take seriously the reasons for the employer establishing the rule and prescribing the penalty of dismissal for breach of it. Where an employer has developed and implemented a disciplinary system, it is not for the commissioner to set aside the system merely because the commissioner prefers different standards. The commissioner should respect the fact that the employer is likely to have greater knowledge of the demands of the business than the commissioner.

[182] However, such respect for the employer's knowledge is not a reason for the commissioner to defer to the employer. The commissioner must seek to understand the reasons for a particular rule being adopted and its importance in the running of the employer's business and then weigh these factors in the overall determination of fairness."

event I am of the view that the award falls to be reviewed. In this regard I am also in agreement with the following *dictum* from the decision in *Basson v Provincial Commissioner (Eastern Cape) Department of Correctional Services* (2003) 24 *ILJ* 803 (LC) where the Court emphasized the principle that Courts should be hesitant to interfere with executive and administrative[5] decisions. As long as the decision falls within the authority of the functionary and viewed objectively is rational, a Court should not interfere simply because it disagrees with the decision. I am of the view that this principle applies equally if not more so, to Commissioners asked to consider decisions made by employers especially that of public functionaries in respect of transfers:

> *"The court are, generally, wary and reluctant to interfere with the executive or other administrative decisions taken by executive organs of government or other public functionaries, who are statutorily vested with executive or administrative power to make such decisions, for the smooth and efficient running of their administrations or otherwise in the public*

5 It is accepted for purposes of this judgment that the decision to transfer does not constitute an administrative decision. See *Hlope & Others v Minister of Safety and Security & Others* (2006) 27 *ILJ* 1003 (LC).

interest. Indeed, the court should not be perceived as having assumed the role of a higher executive or administrative authority, to which all duly authorized executive or administrative decisions must also be referred for ratification prior to their implementation. Otherwise, the authority of the executive or other public functionaries, conferred on it by the law and/or the Constitution, would virtually become meaningless and irrelevant, and be undermined in the public eye. This would also cause undue disruptions in the state's administrative machinery.

These administrative decisions shall only fall within the purview of judicial review and be set aside, where they are found to be patently arbitrary or capricious, objectively irrational, or actuated by bias or malice, or by other ulterior or improper motive.

In Pharmaceutical Manufacturers' Association of SA & others: In re Ex Parte Application of the President of the RSA & others 2000 (3) BCLR 241 (CC), the Constitutional Court held at para 90 that:

> *'What the Constitution requires is that public power vested in the executive and other functionaries be exercised in an objective rational manner....*

Rationality in this sense is a minimum threshold requirement

applicable to the exercise of all public power by members of the executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution, and therefore unlawful. The setting of this standard does not mean that the courts can or should substitute their opinions as to what is appropriate, for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a court cannot interfere with the decision simply because it disagrees with it, or considers that the power was exercised inappropriately. A decision that is objectively irrational is likely to be made only rarely but if this does occur, a court has the power to intervene and set aside the irrational decision.'

The objective rationality theory expressed in the Pharmaceutical Manufacturers' case was cited with approval by Zondo JP in Shoprite Checkers (Pty) Ltd v Ramdow NO & others (2001) 22 ILJ 1603 (LAC), where the learned A judge

president stated, inter alia at para 82.

' *[O]ne must bear in mind ... that a decision that is objectively irrational is likely to be made only rarely. Of course, I am saying this insofar as it seems that there is much commonality between justifiability and rationality.' "*

29] In light of the aforegoing it is not necessary to consider the remaining grounds of review.

30] Should this Court substitute the decision of the Commissioner with one of its own? Although this Court has a discretion to do so, I am of the view that this Court should not substitute the award but that the matter should be referred back to the First Respondent to be heard by a different commissioner. As I am of the view that it is not in the interest of fairness to make a cost order I make no order as to costs.

31] In the event the following order is made:

1. The arbitration proceedings conducted under the auspices of the First Respondent at Port

Elizabeth dated 14 May 2006 under case number PSSS 221/08/06 before the Second Respondent is reviewed and set aside.

2. The dispute is referred back to the First Respondent for a rehearing by a Commissioner other than the Second Respondent.
3. There is no order as to costs.

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AC BASSON, J

For the Applicant: A Smit from Bowman Gilfillan Attorneys

For the Respondent: M Grobler

Instructed by: J Gruss Attorneys
Date of Application: 28 Augustus 2007

Date of Judgement: 16 April 2008