

**THE POWERS OF THE LABOUR COURT TO REVIEW
ARBITRATION AWARDS OF THE COMMISSION FOR
CONCILIATION, MEDIATION AND ARBITRATION:
A COMPARATIVE STUDY**

by

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I declare that THE POWERS OF THE LABOUR COURT TO REVIEW ARBITRATION AWARDS OF THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION: A COMPARATIVE STUDY is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

MRS SA BEZUIDENHOUT

DATE

SUMMARY OF THESIS

THE POWERS OF THE LABOUR COURT TO REVIEW ARBITRATION AWARDS OF THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION: A COMPARATIVE STUDY

A critical and in-depth discussion of the powers of the labour court to review arbitration awards of the Commission for Conciliation, Mediation and Arbitration, the application of the author's findings relating to common-law, legislation and case law and a critical analysis thereof. Special reference is made to the provisions of sections 145 and 158(1)(g) of the Labour Relations Act 66 of 1995 including, in particular, the alternative application thereof in practice and scope for improvement in order to address potential prejudice to parties occasioned by the compulsory nature of (certain) dispute resolutions. This thesis incorporates a comparative study of the British and German labour law systems with reference to the relevant appeal and/or review procedures (as applied in their tribunals/courts), together with a discussion and application of certain other provisions relevant to South Africa labour law.

KEY TERMS

- South African Labour Law
- Labour Relations Act 66 of 1995
- Sections 145 and 158(1)(g) compared
- Dispute resolution
- Compulsory arbitration
- Review procedure
- Labour Court
- Labour Appeal Court
- British Labour system
- German Labour system

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AUTHOR'S NOTES:

The law is stated as at 30 November 2004.

Summary of thesis has been limited to 150 words in order to comply with prescribed requirement.

1. Unless stated to the contrary, reference to “sections” will mean provisions of the Labour Relations Act 66 of 1995.
2. The Labour Relations Act 66 of 1995 will be referred to as “the LRA” whereas references to the Labour Relations Act 28 of 1956 will be “the LRA, 1956”.
3. “s” refers to “section”; “ss” refers to “sections”; “subs” refers to “subsection”; “subss” refers to “subsections” and “r” refers to “rule”.
4. Although, in certain instances, provisions of the LRA apply to both the Commission for Conciliation, Mediation and Arbitration (“the CCMA”) and bargaining councils, I have discussed such provisions with reference to the CCMA only.
5. The masculine includes the feminine and *vice versa*.
6. S 158(1)(g) is initially discussed in its unamended form (i.e. “*despite* s 145”) whereafter the amendment will be addressed. The initial discussion is necessary as, in my opinion, the amendment was the result of various conflicting decisions referred to in detail in this work.
7. “Bill” refers to the Superior Courts Bill [B – 2003] which will repeal numerous sections of the LRA, namely ss 151-156; 159-160; 163-178; 180–184. S 52 of the Bill also provides for the deletion of subss (1) and (2) from s 157 of the LRA, and the repeal of s 77 of BCEA. However, for purposes of this thesis, these ss are still considered and discussed, which will go some way in explaining why they are to be repealed.

THE POWERS OF THE LABOUR COURT TO REVIEW ARBITRATION AWARDS OF THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION: A COMPARATIVE STUDY

CHAPTER 1 - INTRODUCTION

Although on the face of it the powers of the Labour Court to review arbitration awards of the Commission for Conciliation, Mediation and Arbitration (hereinafter referred to as “the CCMA”) should not be a problem, experience in practice dictates otherwise.

1.1 JURISDICTION

The Labour Court (hereinafter referred to as “the LC”) and the Labour Appeal Court (hereinafter referred to as “the LAC”) are creatures of Statute established by the Labour Relations Act 66 of 1995 (hereinafter referred to as “the LRA”), which came into operation in November 1996¹.

The LC, a court of law and equity, has the same status as a Provincial Division of the High Court² (hereinafter referred to as “the HC”) with national jurisdiction³. Apart from having concurrent jurisdiction⁴ with the HC in respect

¹ It was hoped that the problems experienced by the LC’s predecessor, the Industrial Court (hereinafter referred to as “the IC”), would be eradicated by the creation of the LC and the LAC. However, as appears from the provisions of *The Superior Courts Bill* (tabled in *Parliament* in August 2003 and discussed in Chapter 7), the creation of the aforesaid courts did not have the desired effect.

² S 151.

³ S 156.

⁴ S 157(2)(a)-(c) which afford the LC concurrent jurisdiction with the HC in respect of any alleged or threatened violation of any fundamental right entrenched in the Constitution arising from employment and labour relations or the application of any law for the administration of which the minister is responsible or in respect of any dispute over the constitutionality of any, or any

of any alleged or threatened violation of any fundamental right⁵ entrenched in Chapter 2 of the Constitution of the Republic of South Africa Act 108 of 1996 (hereinafter referred to as “the Constitution”) (other than the entrenched labour rights in s 23 of the Constitution⁶) and certain disputes involving the State in its capacity as employer, the LC has, in terms of s 157(1)⁷, exclusive jurisdiction⁸

threatened, executive or administrative act or conduct by the State in its capacity as employer. In *Fredericks & others v Member of the Executive Council Responsible for Education and Training in the Eastern Cape Province & others* (2001) 22 ILJ 2603 (E) (hereinafter referred to as “*Fredericks*”), the Bisho High Court had to decide whether an issue which is manifestly a labour dispute and falls squarely within the provisions of the LRA and the jurisdiction of the LC, should be tried by the HC, simply on the grounds that the dispute also embraces certain violations of the employees’ constitutional rights. White J held, *inter alia*, that on reading the LRA as a whole, it is manifest that the legislature intended to establish the LC as a specialist court to hear and resolve labour disputes and that, as a result, s 157(2) must have been intended to afford the LC exclusive jurisdiction not only in respect of labour disputes, but also in respect of the constitutional issues arising from such disputes (2618 B-D). Conversely, in *Ntabeni v MEC for Education, Eastern Cape* (2001) 22 ILJ 2619 (Tk) which involved the ‘deemed’ dismissal of an educator in terms of the Employment of Educators Act 76 of 1998, the Transkei High Court in a judgment by Mbenenge AJ accepted jurisdiction to consider a dispute which involved the alleged violation of the educator’s constitutional rights and his right to fair administrative action (2626 C). In terms of s 77(3) of the Basic Conditions of Employment Act 75 of 1997 (hereinafter referred to as “the BCEA”) the LC has concurrent jurisdiction with the civil courts to hear and determine any matter arising from the contract of employment. This concurrent jurisdiction (as opposed to an exclusive jurisdiction) conferred on the LC implies that an employee has a choice in respect of contractual disputes, whether to approach the LC or the civil courts.

⁵ In *Walters v Transitional Local Council of Port Elizabeth* (2000) 21 ILJ 2723 (LC), at 2727A, Landman J states that a “‘fundamental right’ includes those rights set out in the ‘Bill of Rights’” (Chapter 2 of the Constitution). This case dealt with, *inter alia*, s 157(2).

⁶ Du Toit D, Bosch D, Woolfrey D, Godfrey S, Rossouw J, Christie S, Cooper C, Giles G with Bosch C *Labour Relations Law* Fourth Edition (2003) Butterworths (hereinafter referred to “du Toit *et al* 4th ed”), at 143, state that “[r]ights to which the LRA does not give effect may therefore be subject to concurrent jurisdiction but the Labour Court has exclusive jurisdiction in respect of fundamental labour rights”. In *Denel Informatics Staff Association v Denel Informatics (Pty) Ltd* (1999) 20 ILJ 137 (LC), Basson J held that it is clear that “such concurrent jurisdiction of the LC and the (former) Supreme Court (now the HC) pertains to those fundamental rights which are *not* entrenched in terms of s 27 of the interim Constitution, that is, in terms of s 23 of the present Constitution at 140 [18] F-G.

⁷ Refer also to mention of s 157(1) in Chapter 5 at 129.

⁸ Interestingly, in *Fedlife Assurance Ltd v Wolfaardt* (2001) 22 ILJ 2407 (SCA), the Supreme Court of Appeal (hereinafter referred to as “the SCA”), by a majority of four to one (Froneman AJA dissenting), delivered a decision likely to have far-reaching implications by ruling that the common-law rights and remedies for breach of contract have not been abolished by s 157(1). The SCA held that a claim by a dismissed employee for relief for the premature termination of his fixed-term contract of employment for operational reasons, is not a matter falling exclusively within the jurisdiction of the LC in terms of s 157(1) and that a common-law action for damages for breach of contract may still be brought in the High Court (2417 H). Nugent AJA delivering the majority judgment held, at 2417 I-J, that s 157(1) does not purport to confer exclusive jurisdiction upon the LC generally in relation to matters concerning the relationship between employer and employee. In a dissenting judgment, Froneman AJA, at 2424 B-C, found the matter to fall exclusively within the jurisdiction of the LC and held that the LC already has competence to award damages for breach of contract within the ambit of the LRA (s 158 (1)(a)(vi) read with s 195). However, according to du Toit *et al* 4th ed, at 143, “[t]he High Court, accordingly, retains its common-law jurisdiction, not only in contractual disputes but also, it would seem, in the protection of fundamental rights not regulated by the LRA”. Fabricius cautions that it must be remembered that

over all matters which are to be determined by the LC in terms of the LRA or any other law⁹, save where provided for to the contrary in the LRA and subject to the Constitution and s 173¹⁰. The LC's jurisdiction is therefore limited only by the LRA itself, the LAC and the Constitution.

The Cape Provincial Division in *NAPTOSA and others v Minister of Education, Western Cape, and others*¹¹ in dealing with, *inter alia*, the validity of a clause in teachers' re-employment contracts held¹² that, although the LC would have jurisdiction over this dispute, the HC also had jurisdiction to deal with the subject matter of the dispute with regard to the alleged unfair labour practice. Conradie J (with Jali J concurring) held that "[t]o grant relief which would encourage the development of two parallel systems would in my view be

'jurisdiction' is an expression which is used in a variety of senses and takes its colour from its context (Fabricius HJ "*The Exclusive Jurisdiction of the Labour Court*" 1998 ILJ 431 at 432; hereinafter referred to as "Fabricius"). Fabricius, at 433, is of the opinion that 'exclusive jurisdiction' does not mean what it may at first sight appear, but submits that 'exclusive jurisdiction' with its procedural component means that the body of first instance is made peremptory, and so is the body of the final instance. In other words, the jurisdiction of the LC is not said to be exclusive where disputes must first be referred to specified mediation, conciliation or arbitration bodies, or where certain acts must be performed by administrative officials, before the LC may be approached (for example, dispute resolutions – Chapter VII, s 141(1) and s 145(1); unfair dismissals – Chapter VIII, s 191(5)(b) and s 191(6)). Fabricius then distinguishes circumstances where the LC has exclusive jurisdiction in the sense that it is the body or organ that must be approached at first instance. Consequently, once the LC has been approached as the body or organ of first instance, it assumes jurisdiction to the exclusion of any other court.

⁹ For example, a reference to 'court' in the Insolvency Act 24 of 1936 must, for purposes of the winding-up of a council by reason of insolvency, be interpreted as referring to the LC according to s 60 of that Act – Fabricius at 435. Also, s 77(l) of the BCEA grants the LC exclusive jurisdiction to try certain matters arising from that Act. Du Toit *et al* 4th ed, at 144-146, group "any other law" as follows, namely s 3 of the Protected Disclosures Act 26 of 2000 (protected disclosure); s 6 read with s 1 of the Defence Special Tribunal Act 81 of 1998; ss 74(2), 77(1) read with 77A, 77(2) and 80 of the BCEA; s 9 of the Employment Equity Act 55 of 1998 (hereinafter referred to as "the EEA"); s 35 of the Occupational Health and Safety Act 85 of 1993; ss 21, 26(3) and 31 of the Skills Development Act 97 of 1998.

¹⁰ S 173 deals with the exclusive jurisdiction of the LAC. Refer to footnotes 16 and 17 *infra*.

¹¹ 2001 (2) SA 112 (C). In 1997 the Department of Education dismissed temporary teachers as part of a realization scheme and then re-employed them on fixed terms contracts receiving salaries only (without other benefits such as, *inter alia*, pension fund memberships, service bonuses and paid sick leave). Some 15 months later the applicants sought orders declaring this clause void, that they were entitled to all benefits afforded to educators and that the unilateral change of service benefits of temporary teachers constituted an unfair labour practice in terms of s 23(1) of the Constitution. The application was dismissed, *inter alia*, because of the substantial delay in instituting proceedings and, with regard to the alleged unfair labour practice, the court pointed out that although it had jurisdiction to adjudicate the matter, a remedy should in the first instance have been sought under the LRA at 115 I.

¹² *Ibid* at 120 B-C.

singularly inappropriate”¹³.

According to *du Toit et al*¹⁴ the LC has no jurisdiction over issues covered by collective agreements; nor to adjudicate a dispute which the LRA requires to be arbitrated (s 157(5)); nor to determine delictual claims (except to grant relief against criminal or delictual actions committed in furtherance of a strike); nor to determine contractual disputes other than those arising from the contract of employment. S 157(4)(a) also provides that, except in appeal and review matters, the LC *may* refuse to determine any disputes if it is not satisfied that an attempt has been made to resolve the dispute through conciliation. However, the LC may grant relief pending referral to conciliation or arbitration in exceptional circumstances and on proof of urgency¹⁵.

1.2 THE LABOUR APPEAL COURT (LAC)

The LAC is established¹⁶ as a superior court of law and enquiry and is the final court of appeal in respect of all judgments and orders made by the LC in respect of the matters within its exclusive jurisdiction. The LAC has authority, inherent powers and standing (in relation to matters under its jurisdiction) equal to that which the SCA has in relation to matters under its jurisdiction. The jurisdiction of the LAC is dealt with under s 173¹⁷.

1.3 THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION (CCMA)

Chapter VII of the LRA establishes the CCMA as an autonomous, statutory

¹³ *Ibid* at 123 B.

¹⁴ *Du Toit et al* 4th ed at 146-147.

¹⁵ *Du Toit et al* 4th ed at 147.

¹⁶ S 167.

¹⁷ S 173 provides that, subject to the Constitution and despite any other law, the LAC has exclusive jurisdiction to hear and determine all appeals against the final judgments and orders of the LC; to decide any question of law reserved in terms of s 158(4) and to decide a matter which any two judges of the LAC agree is the decision of the court. Also, in terms of s 175 the LAC may sit as a court of first instance if the Judge President so directs, in which case the LAC is entitled to make any order that the LC would have been entitled to make.

agency with juristic personality¹⁸ with its independence, jurisdiction and governance regulated by various sections¹⁹.

It has national jurisdiction with offices in all nine provinces²⁰. The CCMA enjoys immunity from liability for acts or omissions in good faith²¹, but is “not protected against liability under the general constitutional right to fair administrative action”²².

The functions of the CCMA are provided for in s 115 and according to s 115(1), the CCMA²³ must attempt to resolve, through conciliation, a dispute referred to in terms of the LRA. If the dispute remains unresolved after conciliation, the CCMA must arbitrate the dispute if the LRA requires arbitration²⁴ and any party to the dispute has requested that the dispute be resolved through arbitration²⁵, or all the parties to a dispute in respect of which the LC has jurisdiction, consent to arbitration under the auspices of the commission²⁶.

A referral to the CCMA must, in the event of dismissal disputes, take place within 30 days of the date of dismissal or of the employer making a final

¹⁸ S 112 establishes the CCMA as a juristic person.

¹⁹ Ss 113-114, 116, 118, 119 and 121. S 113 deals with the independence of the CCMA; s 114 delineates the jurisdiction and offices of the CCMA; s 116 deals with the governing body of the CCMA, while s 118 deals with the appointment, qualifications and duties of the director of the CCMA; s 119 provides for the appointment of an acting director and s 121 deals with the establishment of committees to assist the CCMA.

²⁰ S 114(1).

²¹ S 126(2).

²² Du Toit D, Woolfrey D, Murphey J, Godfrey S, Bosch D & Christie S *Labour Relations Law* Third Edition (2000) (hereinafter referred to as “du Toit *et al* 3rd ed”) at 560. S 33 of the Constitution deals with just administrative action.

²³ Disputes (set out in s 51(1)) between parties who fall within the registered scope of bargaining councils are referred to such councils for conciliation and arbitration (ss 28(1)(c)(d) and 51(2)(3)(4)).

²⁴ The LRA compels arbitration by the CCMA in respect of certain disputes (dependent on the nature of the dispute) under prescribed circumstances, including (in general terms) the failure by an employer to reach consensus with a workplace forum relating to a joint decision-making matter (s 86(4)), the referral of a dispute by a party in an essential service precluded from strike or lock-out (ss 74(1)(3) and (4)), unfair dismissal disputes and disputes about alleged unfair labour practices (s 191(1)(4)(5)(a)(i). Refer to discussion in Chapter 3 at 40-44 *infra*.

²⁵ Ss 115(1)(b)(i) and 133(2)(a).

²⁶ Ss 115(1)(b)(ii), 133(2)(b) and 141(1). In terms of s 51(6) the CCMA may, *inter alia*, enter into an agreement with a bargaining council in terms of which the CCMA is to perform, on behalf of the council, its dispute resolution functions in terms of s 51.

decision to dismiss or uphold the dismissal²⁷ and, in the event of an alleged unfair labour practice, within 90 days of such act or omission or of the date on which the employee became aware of it²⁸; or on good cause shown, after expiry of the relevant time limit²⁹ or, if termination by notice, once the employee has received that notice³⁰. Should the dispute not be resolved by conciliation³¹ or if a period of 30 days has elapsed³² since the receipt of the referral, the CCMA, or the council, must arbitrate³³ the dispute at the request of the employee provided, however, that the dispute concerns an allegation of an unfair dismissal related to misconduct or incapacity; an alleged constructive dismissal including one based on an allegation that the employee was provided with substantially less favourable conditions or circumstances at work after a s 197 or 197A transfer (except where an automatically unfair dismissal is alleged in terms of s 187); an allegation that the employee does not know the reason for dismissal or that the dispute concerns an unfair labour practice³⁴.

1.4 CONCILIATION-ARBITRATION (CON-ARB)

However, despite any provision in the LRA, in terms of the recently introduced

²⁷ S 191(1)(b)(i).

²⁸ S 191(1)(b)(ii).

²⁹ S 191(2). According to Meyer, N in *"The Jurisdiction of CCMA Commissioners at conciliation proceedings"* 2002 CLL 31 (hereinafter referred to as "Meyer") "[i]n the context of unfair dismissal cases, one of the most often recurring [jurisdictional] disputes ... deal with the question of whether or not the person claiming unfair dismissal referred the dispute to the CCMA within the required 30 day period and whether or not condonation should have been applied for", at 31. Van Kerken, E in *"Some Jurisdictional Issues Concerning Arbitration of Labour Disputes by the CCMA"* 2000 ILJ 39 (hereinafter referred to as "van Kerken"), at 46-51, set out other jurisdictional requirements (in order to arbitrate a dispute) which include, *inter alia*, the existence of an arbitral dispute (in terms of the LRA or BCEA) which must be of mutual interest between the parties, with the CCMA itself having jurisdiction to arbitrate (as opposed to a council or an accredited agency) the dispute. Further, a dismissal or a residual unfair labour practice dispute must be referred to arbitration by an employee (as defined in s 213 and presumption of employee in s 200A of the LRA and s 83A of the BCEA).

³⁰ S 191(2A).

³¹ According to Meyer, at 32, the nature of the conciliation process is "aimed at the resolution of the dispute through negotiation and compromise rather than through 'judicial' or 'quasi-judicial' procedures".

³² S 191(5).

³³ S 136(1) provides that the CCMA must appoint a commissioner to arbitrate a dispute if a certificate has been issued stating that the dispute remains unresolved and if any party to the dispute, within 90 days after the date on which that certificate was issued, requests that it be resolved through arbitration. Condonation may be allowed on good cause shown.

³⁴ S 191(5)(a)(i)-(iv).

s 191(5A)³⁵, if the CCMA certifies that a dispute remains unresolved, the arbitration must commence *immediately* after the conciliation meeting if the dismissal dispute or the unfair labour practice dispute relates to any reason pertaining to probation (arbitration in these disputes are compulsory³⁶) or if the dispute relates to one contained in the abovementioned s 191(5)(a), unless one of the parties objects to this. The LRA thus provides for a joint conciliation and arbitration process in these disputes³⁷. Albertyn S³⁸ aptly describes con-arb as “two discreet processes joined in time”³⁹.

According to du Toit *et al*⁴⁰ con-arb is similar to med-arb⁴¹ where the parties, assisted by a third party, first attempt to reach settlement through negotiation failing which they may request the third party to arbitrate the dispute. This approach has various advantages including, *inter alia*, parties retaining “ownership of the outcome if mediation fails”⁴²; reducing the costs significantly as no time is wasted between the two processes and time may also be used more productively as the parties may agree that some evidence be allowed in both conciliation and arbitration. The con-arb process is governed by r 17(8)⁴³ which provides that the provisions of the LRA and the CCMA Rules applicable to (respectively) conciliation and arbitration apply, subject to the changes

³⁵ S 191(5A) inserted by s 46(g) of the Labour Relations Amendment Act 12 of 2002 (hereinafter referred to as the “LRAA, 2002”).

³⁶ S 191 (5A)(a)(b) and r 17(3) of the CCMA Rules. S 191(5A) must be read together with r 17 of the CCMA rules.

³⁷ Referred to as “con-arb”.

³⁸ Albertyn S “*The New CCMA Rules*” 2002 ILJ 1715 (hereinafter referred to as “Albertyn”).

³⁹ *Ibid* at 1725. According to McGregor (McGregor M *UNISA Tutorial Letter* MLALW2-X/103/2001 at 89 in a discussion prior to amendments) (hereinafter referred to as “McGregor”) these amendments were the result of problems experienced in practice, namely the parties’ failure to, in many instances, attend conciliation meetings. The separation of conciliation and arbitration resulted in lengthy delays and proved costly. As a further consequence, the workload of the CCMA increased unnecessarily. Further, government was of the opinion that con-arb would lead to better quality, efficiency and cost-effectiveness of dispute resolution by the CCMA. The time lag between conciliation and arbitration would be removed. It was further foreseen that less complex cases could be resolved in a single hearing. It was hoped that parties would no longer be able to ignore the conciliation process (McGregor at 90). Albertyn, at 1720, also states that “[a]lthough two distinct processes, the amendments were introduced to try to address the problems experienced with long delays between conciliation and arbitration”.

⁴⁰ Du Toit *et al* 4th ed at 107-8.

⁴¹ Mediation-arbitration.

⁴² Du Toit *et al* 4th ed at 108.

⁴³ R 17(8) of the CCMA Rules. The CCMA Rules have been published in terms of s 115(2A).

required by the context. Thus contrary to compulsory con-arb where no objection can be lodged (in disputes relating to probation), where a party objects⁴⁴ to con-arb in all other dismissal and unfair labour practice disputes, the conciliation⁴⁵ and arbitration proceedings must be “severed and conducted as two distinct and separate processes”⁴⁶.

1.5 PRE-DISMISSAL ARBITRATION

Reference must also be made to another form of arbitration namely *pre-dismissal arbitration*⁴⁷ in cases of alleged misconduct or incapacity introduced in s 188A⁴⁸. According to Landman J⁴⁹, these new procedures “seem to have their origins in the predicament which often faces small and medium size employers on disciplinary procedure”. An employer may, with the consent of the employee⁵⁰, approach the CCMA to conduct this pre-dismissal arbitration at

⁴⁴ The referral form to conciliation (LRA Form 7.11) provides a space for the applicant to sign indicating his/her objection, whereas an employer (respondent) must file papers objecting to con-arb at least 7 days prior to the date of the con-arb (r 17(2)). In terms of r 17(1) the CCMA must give 14 days notice of the con-arb (as with ordinary conciliation). In terms of r 3 ‘days’ are “calendar days” meaning ‘consecutive days’ (as opposed to ‘working days’), excluding the first day and including the last, (except for excluding the last day when it falls on a Sunday or a public holiday).

⁴⁵ R 12 provides for a pre-conciliation procedure in terms of which the CCMA may contact the parties (by telephone or other means) to attempt to resolve the disputes “speedily and at nominal cost” (*Rules of the CCMA and the Labour Courts with Explanatory Notes* Fouché M (2003) Butterworths Lexis Nexis (hereinafter referred to as “explanatory notes to the CCMA Rules”) at 14. According to Albertyn, at 1718, this “pre-conciliation contact is utilized to great effect by the CCMA to try to settle disputes, particularly those involving domestic works, without having to convene a formal conciliation” failing which the conciliation will proceed in the normal course.

⁴⁶ Explanatory notes to the CCMA Rules at 20.

⁴⁷ According to Landman J (“*Pre-dismissal arbitration: The new procedures of s 188A of the Labour Relations Act*” 2002 CLL 71; hereinafter referred to as “Landman on s 188A”), at 71, pre-dismissal arbitration is “something new” and that it is “a little like having a TV umpire decide whether a batsman is out before the ball has been delivered”. The learned judge then states that “[o]n the other hand it is not unlike a LBW decision which requires an umpire to gauge whether the ball, which has not struck the wickets, would have done so save for the interposition of the batsman’s pad”.

⁴⁸ S 188A was inserted by s 43 of the LRAA, 2002.

⁴⁹ Landman on s 188A at 71.

⁵⁰ S 188A(4) provides that where an employee earns less than the statutory minimum prescribed in terms of s 6(3) of the BCEA (presently R115 572 per annum), the employee must consent to the pre-dismissal arbitration after having been advised of the alleged misconduct/incapacity. However, where an employee earns more than the statutory minimum, he may consent to the pre-dismissal arbitration in his contract of employment. According to Landman on s 188A, at 72, this could also be done by way of “an appropriate collective agreement which has the affect of amending the contract of employment of persons subject to it”. According to Basson Annali, Christianson Marylyn, Garbers Christoph, Le Roux PAK, Mischke Carl & Strydom EML *Essential Labour Law* Volume 1 Third Edition (2002) Labour Law Publications (hereinafter referred to as

either the CCMA offices or the employer's premises⁵¹. The arbitrator then has all the powers conferred on a commissioner read with the changes required by the context⁵².

An arbitrator conducting a pre-dismissal arbitration must, in the light of the evidence presented and by reference to the criteria of fairness, direct what action, if any, should be taken against the employee⁵³. Landman J states that the arbitrator may make "any appropriate arbitration award in terms of the LRA" and a "domestic or agreed disciplinary code, including, but not limited to, a direction that gives effect to any collective agreement, the provisions and primary objects of the LRA"⁵⁴.

This arbitration direction (award) is also final and binding and the sections with regard to variation and rescission, review of arbitration awards and the exclusion of the Arbitration Act also apply to pre-dismissal arbitration⁵⁵.

The question arises whether an employer must accept this pre-dismissal arbitration award or whether an employer can reject the award or impose a lesser sanction. According to Landman J⁵⁶ it is "unlikely that an employer would be bound by a direction to the extent that the employer may not impose a lesser sanction". However, conversely du Toit *et al*⁵⁷ are of the opinion that the final and binding nature of an arbitration award "suggests that the employer retains no discretion in the matter" and that "[t]hese and other questions,

"Basson *et al* 3rd ed"), at 364, the "rationale for the distinction is that employees earning less than [R115 572 p.a.] are usually in a weak bargaining position when concluding contracts of employment and might be forced to agree to pre-dismissal arbitration against their will".

⁵¹ Clause 6 of LRA Form 7.19.

⁵² S 188A(7) which refers to powers conferred on a commissioner by s 142(1)(a)-(e), (2) and (7)-(9). S 188A(6) also provides that s 138, read with the changes required by the context, applies to pre-dismissal arbitration.

⁵³ S 188A(9).

⁵⁴ Landman on s 188A at 73.

⁵⁵ S 188A(8) provides that the provisions of ss 143-146 apply to pre-dismissal arbitration awards.

⁵⁶ Landman on s 188A at 73. Landman J further states that "it seems in accordance with the spirit if not the letter of the section that an employer would not be permitted to impose a greater sanction, assuming the arbitrator does not direct termination of the employment".

⁵⁷ Du Toit *et al* 4th ed at 127.

however, remain to be clarified in practice”. Thus it seems as if a dissatisfied employer or employee may (only) take the direction (award) on review to the LC in terms of s 145. Landman J is also of the opinion⁵⁸ that the employee is probably also not entitled to a “further hearing before the employer makes a decision on the strength of the direction”. As Landman J correctly points out⁵⁹, the LRA was not amended in order to correspond with s 188A in that the “aggrieved employee [still] has the right to refer a dispute about his or her alleged unfair dismissal to ... the CCMA, ... notwithstanding the pre-dismissal arbitration. This seems contrary to the spirit of the provision.” Therefore time will tell whether s 188A is a viable option⁶⁰.

1.6 FINALITY OF AWARDS AND REVIEW OF AWARDS

An arbitration award issued by a commissioner is final and binding⁶¹ and may be made an order of the LC in terms of s 158(1)(c)⁶². However, a party wishing to enforce an award may now also do so if the director has certified the award in terms of s 143(3). The question thus arises whether s 158(1)(c) still serves any purpose in view of the less costly and quicker procedure introduced by way of the amended s 143. Du Toit *et al*⁶³ raise the question whether enforcement of an arbitration award in terms of s 158 is possible after certification of the award, in terms of s 143(3), by the CCMA director.

⁵⁸ Landman on s 188A at 74.

⁵⁹ *Ibid* at 74.

⁶⁰ According to Albertyn, at 1729, s 188A is only likely to become a “viable option if the awards delivered are appropriate, coherent and correct and if employers obtain the necessary consent to the process”.

⁶¹ S 143(1). Refer also to statement by Ngcobo AJP in footnote 66 hereunder. In terms of s 28 of the Arbitration Act 42 of 1965 (hereinafter referred to as the “Arbitration Act”), an arbitration award is final and not subject to an appeal (unless the arbitration agreement provides otherwise).

⁶² However, it seems as if this procedure no longer has to be followed as s 143 (amended by s 32 of the LRA, 2002) now provides that an arbitration award (excluding an advisory arbitration award) is final and binding and may be enforced as if it were an order of the LC provided the director of the CCMA has certified the arbitration award (r 40 of the CCMA Rules sets out this procedure and LRA Form 7.18 is used to certify a CCMA arbitration award). R 143(4) further provides that if a party fails to comply with an arbitration award that orders the performance of an act, other than the payment of an amount of money, any other party to the award may enforce it by way of contempt proceedings instituted in the LC.

⁶³ Du Toit *et al* 4th ed at 148 and their footnote 507.

According to Schooling⁶⁴ s 143 now serves to streamline the procedure for the enforcement of arbitration awards and in the process alleviates the pressure placed on the LC as, after certification, a warrant of execution can be issued and the award enforced in the normal course. This also assists with costs and constitutes a more expeditious procedure.

In *Gois t/a Shakespeare's Pub v Van Zyl & others*⁶⁵ wherein Waglay J, in considering the CCMA's jurisdiction to rescind an award certified in terms of s 143(3), commented that "the purpose of the amended s 143 was to simplify the process of executing CCMA awards" and that the "amendments arose out of the recognition that the process in terms of s 158(1)(c) was cumbersome" and that the "LC can now be omitted from the process of enforcing CCMA awards"⁶⁶. Waglay J also stated that an arbitration award is "not transformed into a court order as a result of the certification process"⁶⁷ and that "the process of certification is merely designed to streamline the execution process"⁶⁸. S 158(1)(c) is thus not superfluous and may be of assistance to the party seeking to enforce a CCMA arbitration award under circumstances where certification is refused or delayed.

According to du Toit *et al*⁶⁹ once the award has been made an order of court, "it cannot be reviewed although the decision in terms of s 158(1)(c), making the award an order of court, is appealable". There is, however, an exception to this rule, namely advisory arbitration awards (which are not final awards) which

⁶⁴ Schooling H "Certification of CCMA awards" 2003 (October) CLL 28 (hereinafter referred to as "Schooling"), at 28.

⁶⁵ (2003) 24 ILJ 2302 (LC) (hereinafter referred to as "*Shakespeare's Pub*"). In this case an award in favour of the respondent employee was certified in terms of s 143(3) and a writ of execution was issued by the LC pursuant thereto. The employer brought an application for rescission in terms of s 144. The CCMA, however, held, at 2304 A, that it did not have jurisdiction to hear the application as the award had been certified in terms of s 143(3). The employer requested reasons from the CCMA and simultaneously concluded an agreement with the employee not to proceed until the issue of the CCMA's jurisdiction had been resolved. When the CCMA confirmed its lack of jurisdiction and the employee reneged on the agreement, the employer launched an urgent application to the LC. The LC held that the CCMA was wrong and that the "only appropriate forum to which to apply to rescind a CCMA award, whether certified or not, is the CCMA".

⁶⁶ *Ibid* at 2303 G-H; 2308 [21] G.

⁶⁷ *Ibid* at 2309 [24] A.

⁶⁸ *Ibid* at 2308 [22] I.

⁶⁹ Du Toit *et al* 4th ed at 141.

may be obtained with regard to, *inter alia*, whether a person is an employee⁷⁰ and recommendations made during the conciliation process⁷¹. The LRA contains no right of appeal against arbitration awards of CCMA commissioners⁷², but limits dissatisfied parties to review by the LC. The LRA does, however, make provision for one exception in s 24(7)⁷³. A review relates to the manner in which a tribunal came to its conclusion rather than with a result, whereas an appeal is concerned with the correctness of the result⁷⁴.

The powers of the LC are defined in s 158 and the review powers⁷⁵ of the LC⁷⁶ are provided for in sections 145 – review of statutory, compulsory CCMA arbitration awards, 158(1)(g) – “*subject to s 145*”⁷⁷ review of performance or

⁷⁰ S 200A(3) of the LRA read with s 6(3) of the BCEA and s 83A(3) of the BCEA read with s 6(3) of the BCEA.

⁷¹ Ss 64(2) and 135(3)(c). Parties are not bound to abide by advisory arbitration awards. S 135 deals with the resolution of disputes through conciliation and s 135(3)(c) provides that once a dispute has been referred to the CCMA, the appointed commissioner must determine a process to attempt to resolve the dispute, which may include making a recommendation to the parties, which may be in the form of an advisory arbitration award; s 64(2) provides that where the issue in dispute concerns a refusal to bargain, an advisory award is required in terms of s 135(3)(c) prior to notice of a proposed strike or lock-out being given.

⁷² Ngcobo J in *County Fair Foods (Pty) Limited v CCMA and others* (1999) 20 ILJ 1701 (LAC) (hereinafter referred to as “*County Fair Foods*”), at 1712 [28] I-J, stressed the great “caution” which commissioners must exercise when they consider the fairness of the sanction imposed by the employer as “[g]iven the finality of the awards and the limited power of the LC to interfere with the awards, commissioners must approach their function with caution. They must bear in mind that their awards are final – there is no appeal against their awards” (my emphasis).

⁷³ S 24(7) allows appeals to the LC against arbitration awards relating to the interpretation or application of a closed shop agreement (s 25(3)(c) and (d)) or an agency shop agreement (s 26(3)(d)).

⁷⁴ Refer to discussion on distinction between appeals and reviews in Chapter 2 at 24-29 *infra*.

⁷⁵ Refer to discussion of the review powers of the LC in Chapter 5 at 103 *et seqq infra*.

⁷⁶ In *Fredericks*, White J, at 2611 A, excluded the jurisdiction of the High Court in review of arbitration awards under the LRA and stated that the LC has exclusive jurisdiction to review such awards.

⁷⁷ The wording in s 158(1)(g) was amended by s 36(b) of the LRAA, 2002 by, *inter alia*, changing the word “*despite*” s 145 to “*subject to*” s 145. My emphasis indicating interpretive problems created by these words. There appears to be a conflict between s 145 and the unamended s 158(1)(g) (i.e. *despite* s 145) and the relationship between them has been problematic since the inception of the LRA when s 158(1)(g) stated “*despite* s 145 ...”. The *New Shorter Oxford English Dictionary* defines “*despite*”, *inter alia*, as “notwithstanding” and “in spite of”, while “(in) spite of” is defined as, *inter alia*, “notwithstanding” (The *New Shorter Oxford English Dictionary* Volumes 1 & 2 Fourth Edition (1993) at 647 and 2991). This appears to indicate that s 145 does not limit or qualify s 158(1)(g) and that notwithstanding the limited grounds of review in s 145, the provisions of s 158(1)(g) may also be relied upon to review decisions of commissioners’ arbitration awards. In *Shoprte Checkers (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & others* (1998) 19 ILJ 892 (LC) (hereinafter referred to as “*Shoprte v CCMA*”), Pretorius AJ also referred to the dictionary meaning of ‘despite’, and in his view “giving these words their proper meaning has the result that the legislature must be presumed to have intended that notwithstanding the

purported performance of any function provided for in the LRA on any grounds that are permissible in law, 158(1)(h) – review of a decision or act by the State in its capacity as employer and 157(3) – review of arbitration awards in disputes that may be referred to arbitration in terms of the LRA but which have been arbitrated under the Arbitration Act.

Ss 145 and 158(1)(g) are distinguishable in two important respects: firstly, s 145 specifies a six weeks time limit⁷⁸ within which the application must be brought, while s 158(1)(g) specifies no time limit, and secondly, s 145(2) defines specific procedural grounds upon which the review may be brought⁷⁹, while s 158(1)(g) states the grounds as “any permissible in law.”

1.7 ISSUES FOR DISCUSSION

For purposes of this discussion, various issues will be addressed including whether:

- S 145 or s 158(1)(g) governs review of CCMA arbitration awards;
- The general review provided for in s 158(1)(g) applies to arbitration awards;

provisions of s 145 an application for the review of an arbitration award of a commissioner may also be brought under the provisions of s 158(1)(g)” at 898 D-E. *Consequently, the substitution of “despite” with “subject to” appears to be deliberate as, I submit, is apparent from my detailed discussion hereunder (in Chapter 5 infra) relating to the applicability of either s 145 or (unamended) s 158(1)(g) in reviews of CCMA arbitration awards which resulted in numerous conflicting decisions. Thus, the unamended s 158(1)(g) still merits discussion prior to a discussion of the amended s 158(1)(g) (Chapter 5 at 140-144 infra).*

⁷⁸ The time limits prescribed by the Arbitration Act (*and consequently by the LRA*) are of importance as arbitration is designed to be expeditious and final. In the words of Davis J in *Coetzee v Paltex 1995 (Pty) Ltd* 2003 (1) SA 78(C), at 83 H-I, “[g]iven that the very nature of arbitration is designed to be expeditious and final, the time limits prescribed in the [Arbitration] Act are of importance for they guarantee a major advantage of arbitration, namely that an arbitrator’s award ... is final”. Thus an application for setting aside an arbitration award (on grounds that it had been improperly obtained as a result of false evidence) had to be made within 6 weeks after the publication of the award, failing which a “rather more comprehensive explanation is required” to apply successfully for an extension of time (in terms of s 38 of the Arbitration Act). (However, the respondent failed to do this and an extension of time could thus not be granted to have the arbitration award set aside.)

⁷⁹ S 145(2) provides that an award may be defective if the commissioner misconducted him-/herself in relation to his/her duties as an arbitrator, or if he/she had committed a gross irregularity in the conduct of the proceedings or if he/she had exceeded his/her powers or if the award was improperly obtained.

- S 158(1)(g) overrides s 145;
- A party wishing to review a CCMA arbitration award can elect which section to utilize (a wider (s 158(1)(g) rather than a narrower s 145 approach);
- The amended s 158(1)(g) (“*subject to s 145*”) excludes its applicability to reviews of arbitration awards;
- The wider interpretation of the LC’s review powers in terms of s 158(1)(g), approximates powers of appeal;
- It is fair that pre-dismissal arbitration awards are binding and subject to the same stringent grounds of review. This raises yet a further question, namely whether an employer is bound by the award⁸⁰;
- With regard to con-arb and notwithstanding any procedural rules which may have been introduced⁸¹, it is fair that the same commissioner who conducted the conciliation immediately thereafter conducts the arbitration. Although protection is provided I submit that the average employee will neither be aware of nor appreciate his rights in this regard and will therefore be faced with a commissioner who has an intimate knowledge of the matter. This cannot be right, especially if regard is had to the provisions of CCMA r 16⁸² which, *inter alia*, prohibits the disclosure of conciliation proceedings during any subsequent proceedings.

In this regard Jammy J in *Hofmeyr v Network Healthcare Holdings (Pty)*

⁸⁰ Refer to discussion in Chapter 1 at 9-10.

⁸¹ I have assumed for purposes of this discussion that all commissioners are obliged to inform parties to an arbitration that they may object to the arbitration being conducted before the same commissioner who attended to the conciliation (see, for example, s 136(2)(3); s 191(5A)(c) read with CCMA r 17(2)).

⁸² CCMA r 16 provides that:

“(1) Conciliation proceedings are private and confidential and are conducted on a without prejudice basis. No person may refer to anything said at conciliation proceedings during any subsequent proceedings, unless the parties agree in writing.

*Ltd*⁸³ interpreted CCMA r 16 and confirmed that conciliation proceedings before the CCMA are without prejudice. Accordingly, anything that is said (or not said) or transpires in conciliation proceedings is private and confidential and may not be disclosed in subsequent legal proceedings⁸⁴. In a contradictory ruling, which I respectfully disagree with, Pillay J held in *Kasipersad v Commission for Conciliation, Mediation and Arbitration & others*⁸⁵ that “[t]he prohibition against reference to statements made at the conciliation during any subsequent proceedings and the prohibition against the commissioner or any other person testifying about the conciliation process conflicts with the right of the applicant to administrative justice and the power of this court to review the performance of any function by the CCMA”⁸⁶;

- The Constitution has an effect on the LC and impacts on its powers of review;
- A rigid time limit in s 145 infringes the constitutional right of access to the courts;
- S 158(1)(g) allows the LC to venture beyond the confines of s 145 and consider grounds of review recognized at common-law and, more importantly, the Constitution;
- The Promotion of Administrative Justice Act 3 of 2000 (hereinafter referred to as “the PAJA”⁸⁷) impacts on the CCMA and the review powers of

(2) No person, including a commissioner, may be called as a witness during any subsequent proceedings in the Commission or in any court to give evidence about what transpired during conciliation.”

⁸³ [2004] 3 BLLR 232 (LC). During a conciliation meeting of an alleged unfair dismissal, the employer (Network Healthcare Holdings (Pty) Ltd, hereinafter referred to as “Network”) did not dispute that it was the employer. However, in subsequent proceedings this was raised as a point *in limine*. Hofmeyr attempted to estop Network from denying the employment relationship on the basis of, *inter alia*, the fact that Network did not object thereto at the conciliation meeting.

⁸⁴ At 233 [6]; [7].

⁸⁵ (2003) 24 ILJ 178 (LC).

⁸⁶ At 181 [5] F-G.

⁸⁷ Refer to discussion of Act in Chapter 6 *infra*.

the LC;

- A commissioner is entitled to go beyond the formal declaration of a dispute (as there are no agreed terms of reference in respect of compulsory arbitration), in order to dispose of disputes fairly and quickly in terms of s 138(1), without being subject to review;
- The same issues, determining factors and tests as laid down from time to time by the courts in arbitration matters will be adopted by the LC insofar as reviews of CCMA arbitration awards are concerned;
- The LC will apply the same review tests when faced with an application for review of an arbitration award resulting from a voluntary process (where reviews are conducted in accordance with the provisions of the Arbitration Act), as opposed to one resulting from a compulsory process⁸⁸ (where reviews are conducted in accordance with the provisions of the LRA);
- S 141(1) arbitrations are reviewable in terms of the Arbitration Act or the LRA⁸⁹;
- For reviews resulting from private (agreed) arbitration, jurisdiction vests in the HC and/or LC;
- Bargaining council arbitration awards are reviewed in terms of the review procedure for compulsory arbitration or whether the awards will be reviewed in terms of the Arbitration Act bearing in mind that collective agreements (which are agreed to by both parties) often determine the conduct of bargaining council arbitrations;

⁸⁸ Refer to discussion in Chapter 3 at 40-44 *infra* for more detailed discussion on compulsory arbitrations. Arbitration by the CCMA is compulsory in respect of certain disputes whereas parties can agree to voluntary arbitration as provided for in ss 115(1)(b)(ii), 133(2)(b) and 141(1). The LC will, in terms of s 157(3), also have the power of review insofar as voluntary arbitrations under the Arbitration Act is concerned.

⁸⁹ See discussion on s 141 (voluntary) arbitrations in Chapter 3 at 43 *infra*.

- It is fair that s 145 deals only with review of arbitration proceedings under the auspices of the CCMA (compulsory) and stipulates limited grounds of review⁹⁰ while it seems as if an award emanating from private arbitration, may be reviewed under the wider review section, namely, s 158(1)(g)⁹¹;
- The limited grounds of review sufficiently protect the parties where councils and private agencies are accredited⁹² by the governing body of the CCMA⁹³ to perform conciliation and arbitration of certain disputes⁹⁴;
- The LC should be allowed wider review powers bearing in mind the compulsory nature of CCMA arbitration awards⁹⁵;
- It is fair that in instances where parties are compelled to proceed to arbitration, they are not allowed to appeal to a higher authority, for example the LC, should they not be satisfied with the award;
- S 158(1)(c)⁹⁶ still serves any purpose in view of the less costly and quicker procedure introduced by way of the amended s 143⁹⁷.
- It is fair that in certain instances (only) parties have some protection in the arbitration process whereas in other instances the protection does not apply, for example, in terms of s 141(1) the CCMA will arbitrate a dispute which the LC would ordinarily adjudicate where all the parties consent (in writing) to such jurisdiction of the CCMA to arbitrate the dispute⁹⁸. In this instance, s 141(6) empowers the commissioner to make any order which

⁹⁰ Refer to footnotes 79 *supra* and 594 *infra* for limited grounds of review contained in s 145(2).

⁹¹ Refer to Chapter 1 at 13 *supra* and Chapter 5 *infra* for a full discussion of the distinction between ss 145 and 158(1)(g).

⁹² S 127.

⁹³ S 116(1): The acts of the governing body of the CCMA are regarded as acts of the CCMA.

⁹⁴ Certain disputes are excluded in s 127(2).

⁹⁵ Refer to footnote 88 *supra*.

⁹⁶ In terms of s 158(1)(c), the "LC may make any arbitration award ... an order of court".

⁹⁷ Discussed at 10-11 *supra*.

⁹⁸ Also, in terms of s 191 (12) if an employee is dismissed for operational reasons following a consultation procedure in terms of s 189 that applied to that employee *only*, the employee may elect to refer the dispute either to arbitration or to the LC.

the LC could have made. Although the arbitration agreement is binding in terms of s 141(4) any party may apply to the LC *at any time*⁹⁹ to vary it or set it aside, which the court may do on good cause¹⁰⁰. Also, in terms of subs 5(a), where a party commences proceedings in the LC (despite the arbitration agreement), these may be stayed¹⁰¹ and the dispute remitted to the CCMA or alternatively, with the consent of the parties and where it is expedient to do so, the LC may proceed to arbitrate the dispute (although order must correspond to award that an arbitrator could have made). The issue raises the question whether the review grounds applicable to private (voluntary) arbitration will be applied to reviews of voluntary (s 141(1)) arbitrations or whether the grounds of review of compulsory CCMA arbitration awards (either s 145 or s 158(1)(g) – to be discussed hereafter) will be applied.

Notwithstanding the amendment to s 158(1)(g), I still deem it necessary to discuss the aforesaid subs prior to the amendment thereof as the LC has, on a

⁹⁹ My emphasis as I submit that it is unfair that this right (i.e. to vary or set aside an arbitration agreement in terms of s 141(4)) be conferred (only) on parties consenting to voluntary arbitration and not when parties are forced into compulsory arbitration. I respectfully submit that this right should (especially) be conferred on parties in compulsory arbitrations, i.e. the aforesaid right vests in parties who have agreed to approach the CCMA, as opposed to the higher authority (the LC), whereas, in instances where parties are compelled to submit to CCMA arbitration, no such right is provided for.

¹⁰⁰ The wording in s 141(3)(4)(5) (in amended form) closely resembles s 3 of the Arbitration Act which provides for the binding effect of an arbitration agreement and for the power of the court in relation thereto, namely;

- “(1) Unless the agreement otherwise provides, an arbitration agreement shall not be capable of being terminated except by consent of all the parties thereto.
- (2) The court may at any time on the application of any party to an arbitration agreement, on good cause shown –
- (a) set aside the arbitration agreement; or
 - (b) order that any particular dispute referred to in the arbitration agreement shall not be referred to arbitration; or
 - (c) order that the arbitration agreement shall cease to have effect with reference to any dispute referred.”

This is despite the fact that s 146 of the LRA excludes the operation of the Arbitration Act from arbitrations under the auspices of the CCMA.

¹⁰¹ In *Nick's Fishmonger Holdings (Pty) Ltd v De Sousa* 2003 (2) SA 278 (SECLD), Kroon J held, *inter alia*, that “an arbitration clause does not oust the jurisdiction of the court ... and is no automatic bar to legal proceedings in respect of disputes covered by the [arbitration] agreement”. A court has a “discretion whether to call a halt to the proceedings, to permit the arbitration to take place or to tackle the dispute itself” at 282 A-B. The learned judge further stated that a defendant wishing to invoke the arbitration agreement has the option of using one or two methods to stay the legal proceedings – “[e]ither he must apply for a stay of the proceedings under s 6 of the Arbitration Act ... or he must file a special plea requesting a stay under the common-law, at 281 A-C.

number of occasions, been required to decide, *inter alia*, whether review applications can be brought in terms of either s 145 or s 158(1)(g), or whether such applications can only be instituted in terms of s 145, resulting in contradictory judgments which culminated in the important LAC decision of *Carephone (Pty) Ltd v Marcus NO & others*¹⁰². Prior to a discussion of *Carephone* and important post-*Carephone* decisions, a number of cases which preceded *Carephone* highlighting the controversy surrounding the relationship between these two sections will be discussed. This discussion will include a consideration of the two schools of thought amongst the judiciary, namely Judges Mlambo and Revelas (pro s 145) and Judges Pretorius and Tip, later joined by Revelas who switched sides (pro s 158(1)(g)).

I will thereafter consider the impact of the aforesaid amendment of s 158(1)(g) (“*subject to*” s 145) on reviews of CCMA arbitration awards¹⁰³ and whether it resolves the confusion.

¹⁰² (1998) 19 ILJ 1425 (LAC) (hereinafter referred to as “*Carephone*”). Refer to Chapter 5 at 114-120 *infra* for detailed discussion of *Carephone*.

¹⁰³ Refer to discussion in Chapter 5 at 140-144 *infra*.

CHAPTER 2 – THEORETICAL FOUNDATION

2.1 ARBITRATION

Arbitration was statutorily recognized in South Africa by the Arbitration Act and may be defined as follows:

- “A procedure in terms of which a dispute is referred to a person or tribunal, *chosen by the parties to a dispute*¹⁰⁴, for the final adjudication of that dispute, instead of having recourse to a court of law”¹⁰⁵;
- Harms defines arbitration as a procedure whereby a dispute between parties is determined extracurially¹⁰⁶;
- In *Deutsch v Pinto & another*¹⁰⁷, (quotation from *The Law of Arbitration in South Africa*): “An arbitration is the reference of a dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner, by a person or persons other than a court of competent jurisdiction”¹⁰⁸;
- According to Wood¹⁰⁹ arbitration is “the enforcement stage of an industrial relations system predominantly concerned with the search for voluntary agreement by the parties”¹¹⁰. In discussing the difference between the adversarial and inquisitorial approaches¹¹¹ to arbitration proceedings, Wood stated that the investigative arbitration process is more flexible and that “the freedom from rigid precedent has been shown to be particularly valuable, enabling legal rules to be applied with greater attention given to

¹⁰⁴ My emphasis indicating voluntariness of arbitration process.

¹⁰⁵ Coaker JF & Zeffert DJ *Wille & Millin’s Mercantile Law of SA* (1984) at 643.

¹⁰⁶ Harms LTC *Amler’s Precedents of Pleadings* Third ed (1989) at 25.

¹⁰⁷ (1997) 18 ILJ 1008 (LC) (hereinafter referred to as “*Deutsch v Pinto*”).

¹⁰⁸ *Ibid* at 1012 B-C - Landman AJ quoted from Jacobs *The Law of Arbitration in South Africa* (Juta 1977) at 1 citing Halsbury (para 501).

¹⁰⁹ Referred to by Clark, at 622 (Clark J “*Arbitration in Dismissal Disputes in SA & the UK: Adversarial & Investigative Approaches*” (1997) 18 ILJ 609; hereinafter referred to as “Clark”) as one of the doyens of UK voluntary arbitration.

¹¹⁰ Clark at 622.

¹¹¹ The accusatorial or adversarial approach has been described as a process of prosecution and defence. The judge acts as an impartial umpire who allows the facts to emerge from this procedure. An inquisitorial or investigative approach, on the other hand, has been described as an inquiry to the facts by the judge who takes the initiative in conducting the case (*Oxford Dictionary of Law* Fourth Edition (1997) at 7 and 235).

the context and needs of the particular parties concerned ... [p]erhaps above all, an arbitrator is freer to resist the pervasive pressure of legal processes which tend to divert attention from the central issues”¹¹².

Clark also examined the balance between the adversarial or accusatorial and inquisitorial or investigative approaches to arbitration proceedings highlighting the advantages and pre-conditions of an investigative¹¹³ approach to arbitration¹¹⁴. Clark mentioned that the disadvantages of investigative arbitration, namely inconsistency and the absence of cross-examination and appeal to a higher judicial body (often regarded as fundamental legal rights), can be deemed just as much an advantage as a disadvantage, for example, in terms of informality, accessibility, cost, finality and speed of resolution¹¹⁵.

Brand has also noted that the “technical justice” provided by the adversarial approach may be outweighed by the greater “material justice” afforded by the investigative one¹¹⁶ where the arbitrator can ensure that all relevant evidence is properly presented and tested (thus ensuring that material justice is done)¹¹⁷.

In dealing with arbitration in terms of the Arbitration Act, the then Appellate Division (hereinafter referred to as “the AD”) in *Amalgamated Clothing & Textile Workers Union v Veldspun Ltd*¹¹⁸, the AD endorsed a very narrow test of review¹¹⁹ and held that where parties agree to refer a matter to arbitration, unless the submission provides otherwise, they implicitly, if not explicitly,

¹¹² Clark at 623.

¹¹³ Clark, at 610, intentionally used the term “investigative” rather than “inquisitorial” as it signals a conception of the role of the arbitrator which is more that of an impartial investigator of the facts of the case aiming to settle a dispute on the basis of agreed rules than that of the dictatorial inquisitor imposing his or her own rules and decisions.

¹¹⁴ Clark at 622.

¹¹⁵ *Ibid* at 622.

¹¹⁶ *Ibid* at 623.

¹¹⁷ Refer to Chapter 4 at 65-67 *infra* for a discussion on the United Kingdom “investigative” arbitration approach.

¹¹⁸ (1993) 14 ILJ 1431 (A) (hereinafter referred to as “*Veldspun*”).

¹¹⁹ *Ibid* at 1435 B.

abandon the right to litigate in courts of law¹²⁰ and accept that they will be finally bound by the decision of the arbitrator¹²¹. The AD then stated that there are many reasons for commending such a course, especially in the labour field where it is frequently advantageous to all parties and in the interests of good labour relations to have a binding decision speedily and finally made¹²². The AD held that the parties must put up with the downside of the process, which according to Grogan¹²³, might include the odd mistake by an arbitrator.

According to Clark, in the 1980's and early 1990's, "voluntary arbitration conducted outside a statutory framework" in South Africa had developed into "one of the most important and increasingly preferred means" of settling labour disputes, especially individual rights disputes relating to dismissals concerning the conduct or capability of individual employees¹²⁴. Most arbitrations were conducted under collectively agreed procedures by private agencies¹²⁵ prior to the promulgation of the LRA.

In the absence of agreement between the parties, however, a system of compulsory arbitration was introduced in the LRA for the determination of disputes relating to dismissals for conduct and incapacity¹²⁶ and disputes about alleged unfair labour practices¹²⁷. Consequently, arbitration in terms of the LRA is defined by Brand as a compulsory process by which an arbitrator appointed by the CCMA, a bargaining or statutory council, or an accredited

¹²⁰ With respect, I submit that this is acceptable where parties voluntarily agree to arbitration. However, I respectfully submit that this is unacceptable and unfair where parties are statutorily forced into compulsory arbitration.

¹²¹ *Ibid* at 1435 H-I.

¹²² *Ibid* at 1435 I-J. Goldstone JA further states that, in his opinion, "the courts should in no way discourage parties from resorting to arbitration and should deprecate conduct by a party to an arbitration who does not do all in his power to implement the decision of the arbitrator promptly and in good faith" at 1435 J-1436 A.

¹²³ Grogan "*Defective Decisions*" 1998 EL 4 (hereinafter referred to as "Grogan"), at 4-5.

¹²⁴ Clark at 614. However, I again stress that this arbitration was voluntarily agreed to.

¹²⁵ For example, IMSSA, the Independent Mediation Service of South Africa. Clark at 616 states that the success rate of those agencies were around 70% in resolving disputes while statutory dispute resolution processes conducted by conciliation boards only resulted in a 20% success rate.

¹²⁶ S 191; Thompson Clive & Benjamin Paul *South African Labour Law* Volume 1 (hereinafter referred to as "Thompson & Benjamin"), at AA2-172.

¹²⁷ In terms of the LRAA, 2002, s 191 now deals with disputes about unfair dismissals and unfair labour practices.

agency hears the parties' respective cases and then determines the dispute between them. The process is subject to review in the [LC], but not to appeal"¹²⁸.

In *Shoprite Checkers (Pty) Ltd v Ramdaw & others*¹²⁹, Wallis AJ, in discussing the intention of the legislature with regard to the scope and effect of s 145, quoted from the explanatory memorandum, highlighting the reasons why compulsory arbitration was introduced: "A major change introduced by the draft Bill concerns adjudicative structures... By providing for the termination of dismissal disputes by final and binding arbitration, the draft Bill adopts a simple, quick, cheap and non-legalistic approach to the adjudication of unfair dismissal... In order for this alternative process to be credible and legitimate and to achieve the purposes of legislation, it must be cheap, accessible, quick and informal. These are the characteristics of arbitration... By providing for the determination of dismissal disputes by final and binding arbitration, the draft Bill adopts a simple, quick, cheap and non-legalistic approach to the adjudication of unfair dismissal"¹³⁰.

According to Mullins¹³¹, if regard is had to the fact that "arbitration" is by definition a voluntary process, it seems as if this term may be a "misnomer for arbitration under the auspices of the CCMA"¹³².

This unanimous judgment by the AD in *Veldspun* is, with respect, acceptable where parties voluntarily agree to arbitration. However, when dealing with compulsory arbitrations by the CCMA in respect of certain disputes, to use the words of Landman J in *Reunert Industries (Pty) Ltd t/a Reutech Defence*

¹²⁸ Basson Annali, Christianson Marylyn, Garbers Christoph, Le Roux PAK, Mischke Carl & Strydom EML *Essential Labour Law* Volume 1 Second Edition (2000) (hereinafter referred to as "Basson *et al* 2nd ed"), at 187.

¹²⁹ (2000) 21 ILJ 1232 (LC) (hereinafter referred to as "*Shoprite v Ramdaw*"). Refer to discussion of LC decision in Chapter 5 at 125-128 *infra* and the LAC decision in Chapter 5 at 130-140 *infra*.

¹³⁰ *Ibid* at 1249 G-I.

¹³¹ Mullins A "*The Labour Court: powers of review*" 1997 CLL 11 (hereinafter referred to as "Mullins").

¹³² Mullins at 16. I fully agree with Mullins' statement.

*Industries v Naicker & others*¹³³, we are not dealing with “classical arbitration, i.e. a voluntary submission to arbitration, [but] we are dealing with judicial power entrusted to an administrative body which is to be exercised without the submission of a respondent to the jurisdiction of the commission and generally without the right to appeal from such a decision”¹³⁴.

The main difference between arbitrations generally and compulsory arbitrations as prescribed in the LRA is therefore the element of voluntariness which is absent in the latter¹³⁵. The question however remains, whether it is fair and just that in instances where parties are statutorily compelled to follow the arbitration route, there should not be some right of recourse by an aggrieved party extending further than a mere right of review as currently provided for.

2.2 DISTINCTION BETWEEN APPEAL AND REVIEW

The question often arises whether a party wishing to have the judgment of a lower court set aside is obliged to proceed by way of appeal or by way of review. Generally, an appeal involves a re-hearing on the merits and is limited to the evidence or information before the lower tribunal¹³⁶ and the only

¹³³ (1997) 18 ILJ 1393 (LC) (hereinafter referred to as “*Reunert Industries*”). The various grounds for setting aside an award in terms of s 145 were discussed in some detail by the LC in *Reunert Industries*. The parties had limited the issues in dispute before the commissioner and the only question to be decided was whether the employee was guilty of the offence complained of (being drunk on duty and therefore fired). The LC found that the commissioner had committed a gross irregularity and had exceeded her powers by ordering reinstatement as the parties had agreed that if the commissioner found the employee guilty, the parties would accept the dismissal. Refer to discussion of *Reunert Industries* in Chapter 5 at 107-108 *infra*.

¹³⁴ *Reunert Industries* at 1396 B-C.

¹³⁵ A CCMA arbitration award is final and binding and *no right of appeal lies against an award which can only be taken on review*. Section 28 of the Arbitration Act similarly states that, unless the arbitration agreement provides otherwise, an award shall be final and not subject to appeal and each party to the reference shall abide by and comply with the award in accordance with its terms. In terms of s 31 of the Arbitration Act, an award may on application to a court of competent jurisdiction be made an order of court and may be enforced in the same manner as any judgment or order.

¹³⁶ In the much-quoted judgment of Innes CJ in *Johannesburg Consolidated Investment Company v Johannesburg Town Council* 1903 TS 111 (hereinafter referred to as “*Johannesburg Consolidated*”), the learned judge stated, at 114–115, that the procedure for review differs in several respects from the procedure by way of appeal, for example, an appellant comes into court upon a record of the case in the court below, and by that record he is bound; he cannot take advantage of any circumstance which does not appear upon or cannot be deducted from the

question is whether the decision was wrong in fact and/or law and the appeal court may revisit the decision. An appeal is therefore concerned with the correctness of a result and an appeal court has unlimited powers to interfere with the decision appealed against. A review on the other hand, involves a limited re-hearing (in terms of certain defined grounds of review) and the question is rather whether the procedure adopted was formally correct¹³⁷. A review is thus confined to the manner or procedure in which a tribunal comes to its decision rather than with a result. In the words of the (then) Appellate Division: “Daar is dus ‘n beroep op die algemene beginsel dat ‘n hof hom nie met die vraag van *hoe* ‘n liggaam, met diskresie bekleed, sy bevoegdheid uitgeoefen het, kan inlaat nie, maar slegs met die vraag *of* die liggaam sy diskresie wel uitgeoefen het; dat dit gaan oor die *wyse* waarop die handeling tot stand gekom het en nie oor die *inhoud* van die handeling nie; of, anders gestel, dat ‘n hof hom nie met die ‘meriete’ van ‘n uitoefening van ‘n diskresie sal inlaat nie”¹³⁸.

Ngcobo AJP in *County Fair Foods* also stated that the distinction between a review and an appeal must still be maintained notwithstanding the constitutional imperatives. “The reviewing court is concerned with the manner in which the commissioner comes to a conclusion. It does not concern itself with the result. The scope of review of awards of commissioners must, therefore, be viewed against this important distinction.”¹³⁹

record. On the other hand, the litigant who seeks to have a case reviewed depends upon irregularities which need not necessarily appear upon the face of the record. If they do not so appear, he is at liberty by affidavit to bring the facts upon which he relies to the notice of the Supreme Court. He is not bound by the record in the way in which an appellant is.

¹³⁷ In *Tikly & others v Johannes NO & others* 1963 (2) SA 588 (T), at 590 F, Trollip J held, at 591 A, that the word “appeal” can have different connotations and the learned judge defined a “review” as a limited re-hearing with or without additional evidence or information to determine, not whether the decision under appeal was correct or not, but whether the arbitrators had exercised their powers and discretion honestly and properly. Also, in *S v Mohamed* 1977 (2) SA 531 (A), at 538 F, Trollip JA defined a review as a limited re-hearing, with or without additional information, to determine, not whether the magistrate’s decision was right or wrong, but whether he exercised his powers and discretion honestly and properly.

¹³⁸ *Theron en andere v Ring van Wellington van die NG F Sendingkerk in Suid-Afrika* 1976 (2) SA 1 (A), at 13 F-G.

¹³⁹ *County Fair Foods* at 1712 [26] G.

In dealing with s 21A¹⁴⁰ of the Labour Relations Act 28 of 1956¹⁴¹ (hereinafter referred to as “the LRA, 1956”) Nicholas AJA delivering an unanimous judgment in *National Union of Textile Workers v Textile Workers Industrial Union*¹⁴² held that the meaning of the word “appeal” must be determined in the light of the context in which it appears in the LRA, 1956¹⁴³ and that the legislature could not have intended the word “appeal” to mean appeal in the ordinary strict sense¹⁴⁴. The learned judge then held that it is equally clear that the legislature could not have intended the word “appeal” to mean review¹⁴⁵ because if “appeal” means review, every review of a deemed decision will be successful in that it would by definition not be a decision properly considered and, held the judge, the legislature could not have intended such a nonsensical result¹⁴⁶.

The distinction between an appeal and review is thus more difficult than appears at first glance and it has even been held by de Villiers CJ in *Klipriver Licensing Board v Ebrahim*¹⁴⁷ that the words “appeal” and “review” are in some Acts “employed as interchangeable terms”¹⁴⁸. However, the distinction is aptly formulated by Cheadle AJ in *Coetzee v Lebea NO & another*¹⁴⁹:

“The fact that a reviewing court may have come to a different result if the matter had been brought on appeal can never be, on its own, a basis for attacking the process of reasoning. If it did, then the distinction between appeal and review would be obliterated. And whatever effect the constitutional entrenchment of the right to administrative justice may have on our common-law, it does not mandate a destruction of the distinction between

¹⁴⁰ S 21A of the LRA, 1956 conferred upon a registered trade union which felt aggrieved by the refusal of its application for admission as a party to an industrial council a right to appeal to the IC.

¹⁴¹ This Act was repealed by the LRA.

¹⁴² 1988 (1) SA 925 (AD).

¹⁴³ *Ibid* at 926 G.

¹⁴⁴ *Ibid* at 927 F.

¹⁴⁵ *Ibid* at 927 I.

¹⁴⁶ *Ibid* at 927 J–928 A.

¹⁴⁷ 1911 AD 458.

¹⁴⁸ *Ibid* at 462.

¹⁴⁹ (1999) 20 ILJ 129 (LC).

these two remedies. What then distinguishes the two remedies when it comes to applying them to the reasoning process employed by a tribunal? ... [T]he seeds of the distinction lie in the phrase so commonly used to describe a process failure in the reasoning phase of a tribunal's proceedings – *'the failure to apply one's mind'*. That test is different from the one that applies to an appeal – namely, whether another court could come to a different conclusion. Accordingly, once a reviewing court is satisfied that the tribunal has applied its mind, it will not interfere with the result even if it would have come to a different conclusion. The best demonstration of applying one's mind is whether the outcome can be sustained by the facts found and the law applied. *The emphasis is on the range of reasonable outcomes not on the correct one.*¹⁵⁰

It is important to differentiate between an appeal and a review as the LRA does not permit an appeal from an arbitrator's award as its aim was to provide for a simple, expeditious, inexpensive and non-legalistic approach to the resolution to unfair dismissals. The explanatory memorandum¹⁵¹ states that the absence of an appeal from the arbitrator's award speeds up the process and frees it from the legalism that accompanies appeal proceedings¹⁵².

In *Shoprite v Ramdau*, Wallis AJ also quoted from the explanatory memorandum highlighting the temptation to provide for appeals because "dismissal is a very serious matter, particularly given the lack of prospects of alternative employment in the present economic climate. However, this temptation must be resisted as appeals lead to records, lengthy proceedings, lawyers, legalism, inordinate delays and high costs. Appeals have a negative

¹⁵⁰ *Ibid* at 133 C-G; my emphasis indicating reluctance of review courts to interfere with the result.

¹⁵¹ Prior to the promulgation of the LRA, a Ministerial Legal Task Team was appointed in August 1994 to overhaul the laws regulating labour relations in South Africa. The Task Team produced a draft Bill accompanied by a detailed explanatory memorandum (hereinafter referred to as "the explanatory memorandum") for discussion and negotiation by the social partners to reach consensus on a new labour relations dispensation for South Africa.

¹⁵² Thompson & Benjamin at AA 2–172.

impact on reinstatement as a remedy, they undermine the basic purpose of the legislation and they make the system too expensive for individuals and small business.”¹⁵³

Wallis AJ emphasized that the aim of the legislature was to ensure that, as far as possible, arbitration awards made by commissioners under the LRA would exhibit a high degree of finality and would only be interfered with in very limited circumstances¹⁵⁴. In support of this contention, Wallis AJ stated that not only did the legislature make it perfectly clear that there should be no appeal from decisions by commissioners but that it was also the manifest intention that the scope for review of such decisions would be narrower¹⁵⁵ than that attendant upon even a review under the common-law (which has been broadened in the past 15 years)¹⁵⁶.

Wallis AJ stated that the intention appears to have been that, of the three types of review identified by Innes CJ in *Johannesburg Consolidated*¹⁵⁷, it was review of the first type that was intended, not a common-law review, which is a review of the second type¹⁵⁸. Wallis AJ stated that this interpretation was in line with the approach of Nicholson JA in *Toyota SA Manufacturing (Pty) Ltd v Radebe & others*¹⁵⁹ (hereinafter referred to as “Radebe”) because in upholding the review in that case Nicholson JA relied upon the test for gross irregularity laid down by Schreiner J (as he then was) in *Goldfields Investment*

¹⁵³ *Shoprite v Ramdaw* at 1249 I–1250 A.

¹⁵⁴ *Ibid* at 1250 B–C.

¹⁵⁵ This seems to be opposite to *Carephone* in which the justifiability test broadened the basis of the review grounds in cases of compulsory arbitration.

¹⁵⁶ *Shoprite v Ramdaw* at 1250 C.

¹⁵⁷ In *Johannesburg Consolidated* Innes CJ, at 111–112, identified three types of review, namely firstly, review by summons being review of the proceedings of inferior courts (civil and criminal) in respect of grave irregularities or illegalities occurring during the course of such proceedings; secondly, review by motion being review of the performance of statutory duties imposed on a public body and thirdly, a wider power specially given under particular statutes enabling the review court to exercise the powers of a court of appeal or review or even of a court of first instance. With regard to the second type of review mentioned, Innes CJ, at 115, stated that this is no special machinery created by the legislature but that it is a right inherent in the court which has jurisdiction to entertain all civil causes and proceedings arising within the Transvaal.

¹⁵⁸ *Shoprite v Ramdaw* at 1250 E.

¹⁵⁹ (2000) 21 ILJ 340 (LAC) . Refer to discussion in Chapter 5 at 113-114 *infra* for LC decision of *Radebe* and the LAC discussion at 121-125 *infra*.

*Ltd & another v City Council of Johannesburg & another*¹⁶⁰ which was, as Corbett CJ pointed out in *Hira & another v Booyesen & another*¹⁶¹, a case dealing with the first and narrowest species of review and not a common-law review¹⁶².

Mullins, in discussing *Johannesburg Consolidated* and *Hira's* case concluded that the term “review” can thus can have different meanings, depending on the context and the nature of the body or tribunal which is to be reviewed and the legislative intent¹⁶³.

In *Deutsch v Pinto*, Landman AJ compared the nature of the CCMA's compulsory arbitration function to statutory bodies, and held that the law regarding reviews of such statutory bodies complements the law regarding arbitration¹⁶⁴ and referred to the AD decision of *Hira's* case. Although *Hira's* case concerned a misconstruction of an enabling statute and not whether the decision was against the weight of the evidence, Landman AJ nevertheless stated that the general rule is clear – a court of review will be inclined to exercise a supervisory function unless it is by law excluded from doing so¹⁶⁵.

However, Landman AJ then pointed out that the Constitution has been enacted since *Hira's* case and that the CCMA is probably an administrative organ for purposes of the Constitution¹⁶⁶.

¹⁶⁰ 1938 TPD 551.

¹⁶¹ 1992 (4) SA 69 (A) (hereinafter referred to as “*Hira's* case”). In *Hira's* case the AD, at 93 D–F, discussed the position in South Africa regarding common-law review and Corbett CJ stated, *inter alia*, that where the tribunal exercises powers or functions of a purely judicial nature, as for example where it is merely required to decide whether or not a person's conduct falls within a defined and objectively ascertainable statutory criterion, then the court will be slow to conclude that the tribunal was intended to have exclusive jurisdiction to decide all questions, including the meaning to be attached to the statutory criterion, and that a misinterpretation of the statutory criterion will not render the decision assailable by way of common-law review. In a particular case it may appear that the tribunal was intended to have such exclusive jurisdiction, but then the legislative intent must be clear.

¹⁶² *Ibid* at 87 A.

¹⁶³ Mullins at 13.

¹⁶⁴ *Deutsch v Pinto* at 1014 B-C.

¹⁶⁵ *Ibid* at 1014 C-D.

¹⁶⁶ *Ibid* at 1014 F.

2.3 THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA ACT 108 OF 1996

Reference must be made to the new constitutional dispensation if regard is had to Chapter 1 of the LRA. In terms of s 1(a), the purpose of the LRA is to advance economic development, social justice, labour peace and the democratization of the workplace by fulfilling the primary objects of the LRA, which are, *inter alia*, to give effect to and regulate the fundamental rights conferred by s 23¹⁶⁷ of the Constitution. Section 3 enjoins us to interpret the provisions of the LRA with a view to giving effect to its primary objects, in compliance with, *inter alia*, the Constitution.

Thus the Constitutional imperatives, particularly the fundamental rights provisions (especially the right to fair labour practices), and the fact that all law must be interpreted in a way which promotes the “spirit, purport and objects of the Bill of Rights” must be an overriding consideration in any review by the LC.

The vexing question plaguing the courts, namely whether review applications of CCMA arbitration awards must be brought in terms of either s 145 (narrow grounds) or s 158 (1)(g)¹⁶⁸ (wider grounds) has resulted in contradictory judgments. The overriding consideration for extending the review grounds to s 158(1)(g) had been the concern that it would violate and be inconsistent with the Constitution to hold that a CCMA arbitration award could be reviewed only on the (limited) grounds set out in s 145. In *Pep Stores (Pty) Ltd v Laka NO & others*¹⁶⁹ Mlambo J held that the limiting effect of s 145 on the grounds of review infringes the constitutional right to just administrative action in

¹⁶⁷ S 23 of the Constitution which is in the Chapter on Fundamental Rights in the Constitution, entrenches the following rights; everyone has the right to fair labour practices; workers have the right to form and join trade unions, to participate in its activities and to strike; (while) employers have the right to form and join employers' organizations and to participate therein; workers and employers have the right to organize and bargain collectively; national legislation may recognize union security arrangements contained in collective agreements subject to a limitation complying with s 36(1) of the Constitution.

¹⁶⁸ Subsection prior to amendment, see author's notes.

¹⁶⁹ (1998) 19 ILJ 1534 (LC) (hereinafter referred to as “*Pep Stores*”).

s 33(1)¹⁷⁰ of the Constitution, but that it constitutes a justifiable limitation under s 36(1)¹⁷¹ of the Constitution¹⁷². In *Ntshangane v Speciality Metals CC*¹⁷³ Mlambo J, also expressed the view that the requirement of “gross irregularity” in s 145 and s 33(1)(b) of the Arbitration Act “which limit judicial review of arbitration proceedings and awards to narrower grounds” clearly constitute a statutory limitation of the constitutional right to administrative justice “which in a sense permit judicial review on the basis of mere unreasonableness”¹⁷⁴. However, this limitation of judicial review to narrow grounds “passes the test of a reasonable and justifiable limitation which does not completely negate the right to administrative justice”¹⁷⁵.

The position thought to be consistent with the Constitution was one in terms of which CCMA awards could be reviewed under both s 145 and s 158(1)(g), as per the LAC in the important LAC judgment of *Shoprite v Ramdaw*¹⁷⁶. Those in favour of reviewing CCMA arbitration awards under s 158(1)(g) also pointed out that a primary object of the LRA was to give effect to the Bill of Rights in the Constitution which contains the administrative provisions (s 33(1)¹⁷⁷ read with item 23(2)(b) of Schedule 6¹⁷⁸ of the Constitution) which meant that such

¹⁷⁰ Refer to footnote 667 *infra* for a recordal of s 33 of the Constitution.

¹⁷¹ S 36 of the Constitution reads as follows:

“36 Limitation of rights

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the *limitation is reasonable and justifiable* in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution no law may limit any right entrenched in the Bill of Rights.”

¹⁷² *Ibid* at 1544 A. However, in the LAC decision of *Carephone*, Froneman DJP held that s 145 was not unconstitutional (refer to discussion in Chapter 5 at 116 *infra*).

¹⁷³ (1998) 19 ILJ 584 (LC) (hereinafter referred to as “*Ntshangane*”).

¹⁷⁴ *Ibid* at 593 [37] G-J.

¹⁷⁵ *Ibid* at 594 [38] A-C.

¹⁷⁶ *Shoprite Checkers (Pty) Ltd v Ramdaw NO & others* (2001) 22 ILJ 1603 (LAC) (hereinafter referred to as “*Shoprite v Ramdaw*”) at 1608 G. Refer to Chapter 5 at 130-140 *infra* for a detailed discussion of the LAC judgment of *Shoprite v Ramdaw* (the LC decision is discussed at 125-128 *infra*).

¹⁷⁷ S 33(1) of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

¹⁷⁸ Schedule 6, item 23 (2)(b) of the Constitution provides that s 33(1) and (2) must be regarded to read as follows: “every person has the right to lawful administrative action where any of their rights

awards had to be justifiable in relation to reasons given for them, failing which they could be set aside on review on that ground alone. This was held not to be a ground for review in terms of s 145.

Consequently, CCMA arbitration awards were reviewed on the wider common-law and constitutional grounds of review by virtue of s 158(1)(g) which resulted in effectively bypassing the limiting effect of s 145 allowing for “review in terms of the common-law as developed by the Constitution”¹⁷⁹ and allowing an examination of whether the commissioner’s decision is justifiable in relation to the reasons given for it. In *Deutsch v Pinto* dealing with an application to make an award an order of court, Landman AJ stated that the imperative to supervise the tribunal is more important in a compulsory situation than in a voluntary one and that the Constitution, giving citizens a right to lawful administrative action in accordance with a fair procedure, must necessarily impact on the extent of the right of review¹⁸⁰. Landman AJ also stated that the CCMA is “probably an organ of the state for purposes of the Constitution” (in terms of s 239 of the Constitution) and that the CCMA “meets the description of an ‘independent and impartial tribunal or forum’” (in terms of s 34 of the Constitution)¹⁸¹.

Interestingly, Landman AJ said that there is a second supervisory measure¹⁸² which the LC has in regard to a compulsory award of a CCMA commissioner and that is the power conferred by s 158(1)(a)(iv) to grant a declaratory order. If the award or action taken by a commissioner is a nullity the LC would be entitled to declare it to be such. In most cases, however, the award

or interests is affected or threatened; procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened; be furnished with reasons in writing for administrative action which affects any of their rights or interests unless the reasons for that action have been made public; and administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened”.

¹⁷⁹ Whittear – Nel N “*Carephone (Pty) Ltd v Marcus NO & others*” 1999 ILJ 1483 at 1484.

¹⁸⁰ *Deutsch v Pinto* 1014 F-G.

¹⁸¹ *Ibid* at 1012 C-D.

¹⁸² Landman J, *ibid* at 1012 F-G, stated that the LC may not consider an appeal against an award of a CCMA commissioner, but that it has “various supervisory powers” which include the powers of review; to grant a declarator; to rescind an award in the case of fraud; and to enforce/not to enforce an award.

will not be a nullity but merely voidable. In such a case a declaratory order on its own will generally not suffice¹⁸³.

In *Kynoch Feeds (Pty) Ltd v CCMA & others*¹⁸⁴ Revelas J came to a similar conclusion based on the fact that arbitrations under the auspices of the CCMA constitute administrative action¹⁸⁵, and held that, given the provisions of s 3 of the LRA which provide for an interpretation of the LRA in accordance with the Constitution, the right to just administrative action takes precedence over the provisions of s 145¹⁸⁶.

The one consideration which counted in favour of the view that s 145 was the only section under which CCMA awards could be reviewed was that the grounds of review contained therein are very limited and this would enhance the expeditious resolution of disputes, which is one of the primary objects of the Act. This would come about because on that view the finality of arbitration awards would be strengthened, whereas the other view would encourage appeals brought under the guise of reviews. This would operate against the notion of the finality of such awards¹⁸⁷.

2.4 THE ARBITRATION ACT 42 OF 1965

S 146 expressly excludes the operation of the Arbitration Act in respect of arbitrations under the auspices of the CCMA. However, the grounds for review of an arbitration award set out in s 145¹⁸⁸ seem to be borrowed from s 33¹⁸⁹ of the Arbitration Act providing for the setting aside of private arbitration awards.

¹⁸³ *Ibid* at 1014 I-J.

¹⁸⁴ (1998) 19 ILJ 836 (LC) (hereinafter referred to as "*Kynoch Feeds*").

¹⁸⁵ *Ibid* at 847 J.

¹⁸⁶ *Ibid* at 848 B-D.

¹⁸⁷ *Shoprite v Ramdaw* (LAC) at 1608 H.

¹⁸⁸ Refer to footnote 79 *supra*.

¹⁸⁹ Ss 33(1)–(4) of the Arbitration Act provide that where any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or 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(ies), make an order setting the award aside. The application must be made within six weeks after the publication of the award to the parties.

Consequently, the LC (initially) accepted that the review powers conferred by s 145 “were to be given the same meaning as the corresponding powers of review conferred upon the High Court in terms of s 33 of the Arbitration Act”¹⁹⁰. Various cases have mentioned the correlation between the two sections, for example *Standard Bank of SA Ltd v CCMA & others*¹⁹¹, *Abdull & another v Cloete NO & others*¹⁹² and *Fredericks*¹⁹³ case.

The reference to the Arbitration Act was criticized by Froneman DJP in the landmark decision on reviews of CCMA arbitration awards in *Carephone* when he blamed the reliance placed on decisions interpreting the corresponding section (33) in the Arbitration Act, as “bedevil[ing] the interpretation of s 145 and has led to the conclusion that it provides for a narrow and unconstitutional basis of review”¹⁹⁴ (notably the decision of *Veldspun*)¹⁹⁵.

Private Arbitrations

In *Shoprите v Ramdaw*, Wallis AJ explained that the simple and obvious reason why the Arbitration Act is excluded in respect of arbitrations under the auspices of the CCMA is that the LC is given jurisdiction in respect of such matters to the exclusion of the High Court¹⁹⁶. Wallis AJ also pointed out

Where corruption is alleged, such application shall be made within six weeks after the discovery of the corruption and not later than three years after the award. The court may, if it considers that the circumstances so require, stay enforcement of the award pending its decision; if the award is set aside the dispute shall, at the request of either party, be submitted to a new arbitration tribunal constituted in the manner directed by the court. (The LRA in s 145(4)(a) also specifically provides that if the award is set aside, the LC may determine the dispute in the manner it considers appropriate.)

¹⁹⁰ *Shoprите v Ramdaw* at 1248 I-J.

¹⁹¹ (1998) 19 ILJ 903 (LC) at 907 B-C (hereinafter referred to as “*Standard Bank v CCMA*”) where Tip AJ stated that s 145 reproduces in substance the provisions of s 33(1) of the Arbitration Act, which provides for the setting aside of awards made in arbitrations conducted under that Act. Tip AJ then stated that the latter section has been interpreted to mean that the grounds for setting aside awards are limited to the statutory grounds set out in the section.

¹⁹² (1998) 19 ILJ 799 (LC), at 803 C, where Pretorius AJ stated that there is well-known authority in our law to the effect that the provisions of s 33(1) of the Arbitration Act, which are similar in their terms to the provisions of s 145(2) of the LRA, are to be construed on a strict and narrow basis.

¹⁹³ White J, at 2610 J, held that the power of the LC to review arbitration awards is similar to that afforded a HC in terms of the Arbitration Act.

¹⁹⁴ *Shoprите v Ramdaw* at 1432 I-J.

¹⁹⁵ Refer to Chapter 2 at 21 and 23 *supra* for discussion on *Veldspun*.

¹⁹⁶ *Shoprите v Ramdaw* at 1251 D.

that if the parties do not wish to arbitrate before a commissioner of the CCMA, they are free to agree upon alternative dispute resolution procedures and thereby to avoid that fate¹⁹⁷. If they do so their arbitrations will be subject to the provisions of the Arbitration Act and the awards made therein will be subject to review under s 33(1) of that Act. However, such awards will then be reviewed by the LC in terms of s 157(3) of the LRA¹⁹⁸.

The explanatory memorandum also states¹⁹⁹ that one of the (LRA) Bill's central themes is its recognition of privately agreed procedures and that if these exist, the parties are not required to follow the statutory procedures²⁰⁰. A dispute will proceed through the mechanisms agreed to by the parties which will prevent time consuming and costly duplication of procedures for the parties and relieve the CCMA of a significant percentage of disputes.

However, the issue of the absence of voluntariness in compulsory arbitrations cannot be over-emphasized and reviews of arbitrations under the Arbitration Act should be distinguished from reviews of compulsory arbitration awards. In fact, one would expect a more liberal approach insofar as reviews of compulsory arbitrations, as opposed to voluntary arbitrations, are concerned. Landman J in *Reunert Industries* notes that, although decisions interpreting the Arbitration Act might "provide useful guidance"²⁰¹, it has to be borne in mind that civil court judgments under s 33 of the Arbitration Act deals with voluntary arbitrations. The learned judge then observes that the "implied premise of voluntary arbitration that the parties sacrifice a right of appeal in favour of choosing their judge does not apply in a compulsory situation"²⁰².

¹⁹⁷ Similarly, du Toit *et al* 3rd ed, at 607, state that private dispute resolution agreements may designate arbitration of all disputes which would otherwise be subject to the jurisdiction of the CCMA or the LC. The learned writers, at 606, also state that any employment dispute may be referred to private arbitration and Mullins, at 15, states that there is a wide range of matters which are arbitrated privately which may be referred to arbitration in terms of the Act.

¹⁹⁸ *Shoprite v Ramdaw* at 1251 H-I.

¹⁹⁹ Thompson & Benjamin at AA2 – 171.

²⁰⁰ *Ibid.*

²⁰¹ *Reunert Industries* at 1395 E.

²⁰² *Ibid* at 1395 F.

Although s 146 excludes the application of the Arbitration Act from any arbitration conducted under the auspices of the CCMA, s 157(3) provides that the LC has jurisdiction when an arbitration is conducted under the Arbitration Act in respect of any dispute that may be referred to arbitration in terms of the LRA. In *Manaka and others v Air Chefs (Pty) Ltd*²⁰³ the applicant, in terms of s 157(3), applied to have an IMSSA²⁰⁴ arbitration award (in terms of the Arbitration Act) made an order of the LC. The respondent opposed on the basis that the court had no jurisdiction to make a private arbitration award an order of court. Brassey AJ held that, for purposes of s 157(3), it is enough for the dispute to be cognizable under the LRA at the outset and that it is not necessary for the dispute to remain cognizable under the LRA throughout its currency²⁰⁵. Accordingly, the dispute must be one that may be referred to arbitration in terms of the LRA. Brassey AJ found in favour of the applicant. Thus, “despite an agreement to oust the jurisdiction of the CCMA, the LC (and not the High Court) has jurisdiction to enforce or review a private arbitration award in a dispute capable of being arbitrated in terms of the LRA”²⁰⁶ and this includes review of bargaining council arbitration proceedings in terms of the Arbitration Act²⁰⁷.

Consequently, the LC will be called upon to review arbitration awards emanating from two different processes, namely, one voluntary in terms of the Arbitration Act and one compulsory in terms of the LRA. Of immediate concern is whether the LC applies the same tests in respect of both compulsory and voluntary arbitrations. Mlambo J in *Ntshangane* expressed the view that:

“[i]t is correct that the arbitrations conducted under the Arbitration Act are voluntary. On the other hand arbitrations conducted under the CCMA are obligatory but are specifically provided for

²⁰³ (1999) 20 ILJ 388 (LC) (hereinafter referred to as “*Manaka*”).

²⁰⁴ The Independent Mediation Service of South Africa.

²⁰⁵ *Manaka* at 389 I-J.

²⁰⁶ Du Toit *et al* 4th ed at 141.

²⁰⁷ *Ibid* at 157

review in terms of s 145. In other words the Labour Court is given power to use the same standard regarding arbitrations conducted under the Arbitration Act as well as those conducted under the CCMA. In other words the court in reviewing arbitration awards will have to apply uniform standards and indeed I cannot imagine that the legislature would have intended that one set of arbitration proceedings or awards be subjected to a less stringent review scrutiny than the others”²⁰⁸.

However, the LAC in *Stocks Civil Engineering (Pty) Ltd v Rip NO & another*²⁰⁹ considering whether, insofar as the review of private arbitration awards is concerned, the Arbitration Act or the principles applicable to reviews under the LRA should govern the proceedings, confirmed the view expressed in *Eskom v Hiemstra NO & others*²¹⁰ and *Seardel Group Trading (Pty) Ltd t/a The Bonwit Group v Andrews NO & others*²¹¹, namely that private arbitrations are to be reviewed (also in the LC) in accordance with the provisions of s 33(1) of the Arbitration Act²¹².

I respectfully submit that, at the very least, the grounds for review in the case of compulsory arbitrations, where the parties have no choice in the matter, should be wider²¹³.

Of interest is Wallis AJ’s comments in this regard in *Shoprite v Ramdaw*, namely “[a]lthough arbitration under the auspices of the CCMA is generally, although not exclusively²¹⁴ compulsory, the review powers vested in the LC are “the same in either event”²¹⁵. He goes on to state that compulsory arbi-

²⁰⁸ *Ntshangane* at 593 [34] C-E.

²⁰⁹ [2002] 3 BLLR 189 (LAC) (hereinafter referred to as “*Stocks v Rip*”).

²¹⁰ (1999) 20 ILJ 2362 (LC).

²¹¹ (2000) ILJ 1666 (LC) (hereinafter referred to as “*Seardel Group*”).

²¹² *Stocks v Rip* at 197 [23].

²¹³ Refer to Chapter 8 at 161-163 *infra* for a discussion of the inequality of the employment relationship and the exclusion of an appeal procedure.

²¹⁴ Parties may consent to arbitration under the auspices of the CCMA.

²¹⁵ *Shoprite v Ramdaw* at 1251 E-F.

tration is not a novelty (long-established feature of legislation dealing with expropriations and valuations for rating purposes and in the field of labour relations, in respect of public service employees (prior to LRA) where they were denied the right to strike).

Du Toit *et al* state that voluntary arbitration is usually a product of collective bargaining and that it has long been held by South African courts and in other jurisdictions that it is not appropriate for the courts to disturb that relationship by inserting its own opinion²¹⁶. The writers further state that the consequences of parties' own agreement as to process, issues and decider are that, except in special circumstances, they must abide by the outcome of their chosen process²¹⁷. In referring to the *Veldspun* judgment, the learned writers stated that the AD, under the LRA, 1956, refused to intervene even when enforcement could, but did not necessarily lead an employer to illegality²¹⁸.

Bargaining Council Arbitrations

It is also noted by du Toit *et al*²¹⁹ that since the insertion of s 51(8) by the LRAA, 2002 which extends, *inter alia*, s 146 (which excludes the operation of the Arbitration Act to CCMA arbitrations) to bargaining council arbitrations unless otherwise agreed, “[m]ost, if not all, bargaining council arbitrations are conducted under the LRA and not the Arbitration Act”. Also, the CCMA normally makes the provisions of s 146 applicable to bargaining councils when accrediting them in terms of s 127(6)²²⁰. The learned writers are of the opinion that a test of *rationality* could be read into the review of bargaining council arbitrations, even in terms of the Arbitration Act, on the grounds that councils exercise a public function²²¹.

²¹⁶ Du Toit *et al* 3rd ed at 623.

²¹⁷ *Ibid* at 623.

²¹⁸ *Ibid* at 623.

²¹⁹ *Ibid*

²²⁰ *Ibid* at 158

²²¹ *Ibid*.

However, in contrast and prior to the introduction of s 51(8), Basson J, in *Seardel Group* had to decide whether the LRA or the Arbitration Act applied to reviews of bargaining council arbitration awards. The learned judge held that the Arbitration Act applied to reviews of bargaining council awards²²². I respectfully submit that the learned judge may have come to a different conclusion had s 51(8) been in existence at the time.

The LAC in *Reddy v KwaZulu-Natal Department of Education and Culture & others*²²³ (judgment delivered by Zondo JP with Comrie AJA and Jappie AJA concurring) confirmed the LC's decision to set aside a bargaining council arbitration award and also had no hesitation in finding that the arbitration conducted by the relevant bargaining council²²⁴ to which the provisions of the LRA applied "had not been a private arbitration"²²⁵. The award and the arbitration proceedings were therefore reviewable under s 158(1)(g) and not under the narrow grounds set out in s 33 of the Arbitration Act.

²²² At 1671 G-H. The learned judge relied on s 40 of the Arbitration Act which provides that the Arbitration Act shall apply to every arbitration under any law passed before or after the commencement of the Arbitration Act, as if the arbitration were pursuant to an arbitration agreement and as if that other law were an arbitration agreement provided that the Arbitration Act is not, *inter alia*, specifically excluded in the other law. Basson J mentioned, at 1669 H-J, that s 146 specifically excludes the Arbitration Act from arbitrations under the CCMA, but no similar exclusion exists with regard to arbitrations conducted under the auspices of a bargaining council and this argument is "strengthened by the circular provisions of s 157(3) ... which refer back to the Arbitration Act". Basson J noted the compulsory element to bargaining council arbitrations, but stated, at 1670 H, that "the basis remains that of consensual collective agreement pursuant to which arbitrations under the auspices of a bargaining council are conducted" and consequently held that the Arbitration Act applied to these reviews.

²²³ (2003) 24 ILJ 1358 (LAC) (hereinafter referred to as "*Reddy's case*").

²²⁴ In this instance, the Education Labour Relations Council. The appellant employee had applied for a post of school principal. A staff selection committee supported the application but the governing body did not. The governing body, however, failed to give its recommendation (of a certain Mr P) to the Education Department. Hence the post remained vacant. The appellant referred a dispute to the relevant bargaining council and when the dispute was not resolved, it was referred to arbitration by agreement. The arbitrator found in favour of the employee and awarded him R100 000 compensation (against the department). However, the LC set aside the award whereafter the appellant was granted leave to appeal against the LC judgment and the LAC confirmed the LC's decision. (The LAC found that the department was the appellant's employer and not the school or the governing body and that it was not the department that perpetrated the unfair discrimination found by the arbitrator.)

²²⁵ 1358 H-I; 1364 H-I.

CHAPTER 3 – THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION

3.1 COMPULSORY ARBITRATION

The CCMA was designed as a one-stop shop for resolving disputes, as per the explanatory memorandum²²⁶. If commissioners' attempts to resolve disputes by conciliation fail, the LRA compels arbitrations by the CCMA²²⁷ in respect of certain disputes in specified circumstances²²⁸, for example:

- If an employer fails to reach consensus with a workplace forum relating to a joint decision-making matter, and there is no agreed procedure in terms of referring the dispute to arbitration²²⁹.
- The referral to the CCMA (if no council has jurisdiction), of a dispute by a party engaged in an essential service precluded from participating in a strike or a lockout. If the dispute remains unresolved after conciliation, any party may request the CCMA to resolve the dispute through arbitration²³⁰.
- An unfair dismissal dispute²³¹ or disputes about alleged unfair labour practices²³² (if no council with jurisdiction) where a certificate has been issued stating that the dispute remains unresolved or if thirty days have expired since the CCMA received the referral and the dispute remains unresolved²³³. The CCMA must arbitrate the dispute at the request of the employee if the alleged reason for the dismissal relates to conduct or capacity (unless the employee participates in an unprotected strike); con-

²²⁶ Thompson and Benjamin at AA 2-171.

²²⁷ Refer to Chapter 1 at 4-6 *supra* for discussion on the CCMA.

²²⁸ Other disputes are adjudicated by the LC (refer to graph in Chapter 4 at 90 and 91 *infra*).

²²⁹ S 86(4).

²³⁰ Ss 74(1)(3) and (4).

²³¹ S 191.

²³² Prior to the inclusion by the LRAA, 2002 of alleged unfair labour practice disputes in s 191, these disputes were dealt with in terms of Schedule 7, items 3(1)(b) and 3(4)(b).

²³³ S 191(5).

structive dismissal including where the employer provided the employee with substantially less favourable conditions at work after a s 197 or 197A transfer (unless automatically unfair dismissal); if the reason is unknown or if the dispute concerns an alleged unfair labour practice²³⁴.

In *Fidelity Guards Holdings (Pty) Ltd v Epstein NO & others*²³⁵, the jurisdictional question which the appeal raised, related to the identification and determination of the true conditions which must exist under the LRA before a dispute in respect of which an “unresolved outcome certificate” can be arbitrated or adjudicated²³⁶.

Zondo JP held that, where the power to be exercised is statutory, the existence of the jurisdictional fact(s) underlying the exercise of such power, lies within the four corners of the statute providing for such power, i.e. the provisions of such statute require to be considered carefully to determine what the necessary jurisdictional fact(s) is (are)²³⁷.

Applying this to the case in question (dispute about unfair dismissal), Zondo JP dealt with ss 191(1)–(5)²³⁸, 135(5)²³⁹, 136(1)²⁴⁰, 157(4)(b)²⁴¹ and concluded that the language employed by the legislature in s 191 is such that, where a dispute about the fairness of a dismissal²⁴² has been referred to the CCMA or a council for conciliation and a certificate has been issued in terms of s 191(5) stating that such dispute remains unresolved or where

²³⁴ S 191(5)(a)(i)–(iv).

²³⁵ (2000) 21 ILJ 2382 (LAC) (hereinafter referred to as “*Fidelity Guards*”).

²³⁶ *Ibid* at 2384 H.

²³⁷ *Ibid* at 2385 E-F.

²³⁸ Refer to Chapter 1 at 5-6 *supra*.

²³⁹ S 135(5) says that when conciliation has failed, or at the end of the thirty-day period or any further period agreed between the parties, the commissioner must, *inter alia*, issue a certificate stating whether or not the dispute has been resolved.

²⁴⁰ S 136(1) provides that if the LRA requires a dispute to be resolved through arbitration, the CCMA must appoint a commissioner to arbitrate that dispute if a commissioner had issued a certificate stating that the dispute remains unresolved; and within ninety days after the date on which that certificate was issued, if any party to the dispute has requested that the dispute be resolved through arbitration. Non-observance of the timeframe may be condoned on good cause shown.

²⁴¹ S 157(4)(b) states that a certificate issued by a commissioner or a council stating that a dispute remains unresolved is sufficient proof that an attempt has been made to resolve that dispute through conciliation.

²⁴² This will now also apply to an alleged unfair labour practice in terms of the amended s 191.

a period of thirty days has lapsed since the council or the CCMA received the referral for conciliation and the dispute remains unresolved, the council or the CCMA, as the case may be, has jurisdiction to arbitrate the dispute, unless the certificate of outcome has been set aside²⁴³.

However, despite subs (5)(a) or (5A), the director, on application by either party, must refer the dispute to the LC if the director deems it appropriate²⁴⁴ after considering the reason for dismissal, whether there are questions of law raised by the dispute, the complexity of the dispute, whether there are conflicting arbitration awards that need to be resolved and the public interest. The director may decide to refer the dispute to the CCMA for arbitration instead of to the LC for adjudication²⁴⁵ and the director's decision is final and binding²⁴⁶. No person may apply for review of the director's decision until the dispute has been arbitrated/adjudicated, as the case may be²⁴⁷.

The only recourse open to a party challenging a commissioner issuing a certificate where a conciliation meeting is scheduled outside the 30-day period, would be to have the certificate itself reviewed and set aside by the LC in terms of s 158(1)(g)²⁴⁸.

- The LRA provides for con-arb where the CCMA must arbitrate a dispute immediately after a failed conciliation meeting if the dismissal or unfair labour practice dispute relates to any reason pertaining to probation (compulsory arbitration immediately), or if the dispute relates to s 191(5)(a), unless one of the parties objects to this²⁴⁹.

- In terms of s 188A, an employer may also approach the CCMA (with the

²⁴³ *Fidelity Guards* at 2387 C-F.

²⁴⁴ S 191(6).

²⁴⁵ S 191(8).

²⁴⁶ S 191(9).

²⁴⁷ S 191(10).

²⁴⁸ De Villiers I "Behind closed doors: Reviewing the conduct of CCMA commissioners" 2001 CLL 71 at 72.

²⁴⁹ See discussion on con-arb in Chapter 1 at 6-8 *supra*.

consent of the employee) to conduct a pre-dismissal arbitration in cases of alleged misconduct or incapacity, which arbitration award is also final and binding²⁵⁰.

- The CCMA has jurisdiction to arbitrate a dispute which a party is entitled to refer to the LC for adjudication, if all the parties consent²⁵¹ to such arbitration²⁵². Hence, the instances referred to in s 191(5)(b)²⁵³ where an employee may refer the dispute to the LC for adjudication, may also be arbitrated by the CCMA when the parties agree thereto. Also in terms of s 191(12) if an employee is dismissed by reason of the employer's operational requirements following a consultation procedure in terms of s 189 that applied to that employee only, the employee may elect to refer the dispute either to arbitration or to the LC²⁵⁴. The commissioner may then make an award that the LC could have made²⁵⁵. The arbitration agreement in terms of s 141(1) may, on application to the LC at any time, be varied or set aside on good cause shown²⁵⁶.

- If there is a dispute only about the entitlement to severance pay in terms of s 41 of the BCEA, the employee may refer the dispute to the CCMA, if no

²⁵⁰ See discussion of pre-dismissal arbitration in Chapter 1 at 8-10 *supra*.

²⁵¹ Ss 115(1)(b)(ii); 133(2)(b) and 141(1).

²⁵² For example, in *Masondo v Crossway* (1998) 19 ILJ 171 (CCMA) the parties consented to arbitration in terms of s 141(1) as the allegation of unfair discrimination fell outside the jurisdiction of the CCMA. However, in *PUSEMO & others v P&O Ports Stevedoring SA (Pty) Ltd* (2001) 22 ILJ 2506 (CCMA), the CCMA commissioner ruled that the CCMA had no jurisdiction to arbitrate interest disputes (in this case a wage dispute), even with the consent of the parties in terms of ss 115(1)(b) and 141(l). He held, at 2507 A, that it was implicit in s 64 (dealing with the right to strike and recourse to lock-out) that interest disputes were part of the power-play allowed by law. Therefore, held the commissioner, the LC lacked jurisdiction to adjudicate a wage dispute. Consequently, the provisions of s 141(1) could not be applied to confer jurisdiction on the CCMA to arbitrate the dispute, even though all the parties agreed to arbitration.

²⁵³ Instances where an employee may refer a dispute to the LC for adjudication are stipulated in s 191(5)(b)(i)-(iv), namely where the alleged reason for the dismissal is automatically unfair; based on the employer's operational requirements; the employee's participation in an unprotected strike; or because the employee refused to join, was refused membership of or was expelled from a trade union party to a closed shop agreement. S 191(11) provides that such referral to the LC must be made within ninety days of the issue of the certificate that the dispute remains unresolved. Non-observance may be condoned by the LC on good cause shown.

²⁵⁴ S 191(12) was added by LRAA, 2002.

²⁵⁵ S 141(6).

²⁵⁶ S 141(4). Refer also to discussion of s 141 in Chapter 1 at 16-18 *supra*.

council with jurisdiction, for conciliation and if unresolved, arbitration²⁵⁷.

- In *Minister of Safety and Security v Safety and Security Sectoral Bargaining Council and others*²⁵⁸ Revelas J found that the CCMA has jurisdiction to conciliate and arbitrate disputes concerning the dismissal of employees by the SAPS²⁵⁹, notwithstanding the fact that the relevant regulations describe an internal disciplinary appeal as being “final and binding”²⁶⁰.

According to Froneman DJP in *Carephone*, the vast majority of labour disputes, if not successfully conciliated in terms of the LRA, end up in compulsory arbitration before the CCMA²⁶¹.

3.2 POWERS OF THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION

Section 39(1) of the Constitution stipulates that when interpreting the Bill of Rights, a court, tribunal or forum must, *inter alia*, promote the values underlying an open and democratic society based on human dignity, equality and freedom and s 39(2) stipulates that when interpreting any legislation, and when developing the common-law²⁶² or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

²⁵⁷ Ss 41(6)(b),(8) and (10) of the BCEA.

²⁵⁸ (2001) 22 ILJ 2684 (LC). The question which Revelas J ultimately had to decide was whether the regulations for the South African Police Services (hereinafter referred to as “the SAPS”) preclude an employee dismissed by the SAPS from referring a dismissal dispute to the CCMA before exhausting the internal procedures available, such as lodging an appeal at 2686 D-E.

²⁵⁹ *Ibid* at 2688 G-H.

²⁶⁰ *Ibid* at 2686 A (2.2).

²⁶¹ *Carephone* at 1427 F.

²⁶² Waglay B in “*The Proposed Re-organization of the Labour Court and the Labour Appeal Court*” 2003 ILJ 1223 (hereinafter referred to as “Waglay”), at 1224, criticizes the common-law relating to employment as one of the “sources of law that gave a perverted legitimacy to [apartheid]” and states “[t]he common-law, presented by some as one of the most important innovations of what is often called ‘western civilization’, despite claims made by some of its apparent adaptability, was for centuries unable to fashion any employee rights for workers generally. Workers’ free expression, association and collective action were outlawed and brutally suppressed”. Waglay, at 1225, also criticizes the common-law as knowing and respecting “the individual as a free agent” but that it “knows the *collective* as (only) a conspiracy or an unruly mass with at best a suspect common purpose. These collective features of labour relations are not only unknown to the common-law lawyer’s way of thinking but also patently unlawful under the common-law”. Waglay, at 1224, is of

In *Mkhize v CCMA & another*²⁶³, Zondo J held that, although there is no definition of a tribunal and forum in the Constitution, there can be no doubt that the CCMA is a tribunal or forum such as envisaged in s 39 of the Constitution and consequently, when performing its arbitration functions under the LRA, the CCMA must comply with Ss 39(1) and (2) of the Constitution²⁶⁴.

3.3 ARBITRATION PROCEEDINGS

Commissioners²⁶⁵ have specific duties and considerable general powers to resolve disputes through conciliation and arbitration²⁶⁶. S 138 stipulates general provisions for arbitration and the commissioner may conduct the

the opinion that it “might properly be said that the common-law in relation to labour matters would not survive in the foreseeable future, warts and all”.

I respectfully disagree and align myself with the view expressed by Chaskalson P in *Pharmaceutical Manufacturers Association of SA & another: In re ex parte President of the Republic of South Africa & others* 2000 (2) SA 674 CC (hereinafter referred to as “*Pharmaceutical Manufacturers Association*”), at 696 [44] B-C, namely that there is only one system of law which is shaped by the Constitution (“the supreme law”) and all law, including the common-law, “derives its force from the Constitution and is subject to constitutional control”.

²⁶³ 2001 (1) SA 338 (LC); Facts: This was an application for the review and setting aside of an award by a commissioner of the CCMA. The applicant had been dismissed following a disciplinary hearing. A recording device had been placed in a public telephone used by the applicant and the conversations revealed damning evidence against him. During arbitration proceedings before the CCMA the applicant submitted that the aforesaid evidence was inadmissible because it had been obtained in violation of his constitutional right to privacy. The commissioner refused to consider the constitutional argument on the admissibility of the evidence on the grounds, firstly, that he had no constitutional jurisdiction, which jurisdiction lay with the High Courts and secondly, that he was directed by s 138(1) to decide the dispute fairly and quickly. The commissioner dismissed the applicant’s claim of unfair dismissal. Hence the review. The review application succeeded, the reasoning being as follows:

- (a) The CCMA was a ‘tribunal or forum’ in the context of s 39 of the Bill of Rights and therefore had the power and the obligation to apply the provisions of the Bill of Rights. The admissibility or otherwise of the telephone evidence was fundamental to the success or failure of the applicant’s claim of unfair dismissal. If the commissioner had considered it, he might well have found that the evidence was inadmissible, in which case the applicant would have won. The commissioner had erred in not considering whether or not the evidence was inadmissible in view of the provisions of the Bill of Rights.
- (b) Speed in the resolution of disputes is not the only purpose of s 138(1). Fairness is another one. Accordingly s 138(1) could not have been the basis for the commissioner’s decision. The decision of the commissioner was therefore set aside and the dispute was remitted back to the CCMA to be dealt with by the same commissioner who had previously dealt with it.

²⁶⁴ *Ibid* at 344 C-D.

²⁶⁵ Grogan, at 4, states that unless the parties agreed to private arbitration under the Arbitration Act, the CCMA would supply arbitrators, who would exercise their powers, not under agreed terms of reference, but under the LRA itself.

²⁶⁶ Ss 142(1)-(6) provide that a commissioner may, in appropriate circumstances, *inter alia*, question people, issue subpoenas and call for documents, administer an oath, enter business premises (with the permission of the director) and private residential premises (with the permission of the LC); seize documents and call for expert witnesses.

arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, and deal with the substantial merits with the minimum of legal formalities²⁶⁷. The commissioner may make any appropriate arbitration award in terms of the LRA²⁶⁸ except when the statute specifically limits the jurisdiction²⁶⁹.

The commissioner must give brief reasons for the decision²⁷⁰. The reasons need be no more than a summary of the issues, evidence, argument, factual findings and the decision itself²⁷¹. In terms of s 115(2)(cA)(iii)(bb) the CCMA may make rules regulating the practice and procedure at arbitration proceedings. The commissioner must also take into account any relevant code of good practice that has been issued by NEDLAC²⁷² or any other guidelines issued by the CCMA²⁷³.

In terms of s 117(6) the governing body must prepare a code of conduct for the commissioners and ensure that they comply with the code of conduct in performing their functions. The purpose of the Code of Conduct for Commissioners (hereinafter referred to as “the commissioners’ code”) is to, *inter alia*, provide guidance to all commissioners on matters of professional conduct and practice generally²⁷⁴. The commissioners’ code emphasizes integrity and independence and they may be removed from office for serious misconduct, incapacity, or a material violation of the code²⁷⁵.

With regard to the question of legal representation at the CCMA, ss 135(4)²⁷⁶,

²⁶⁷ S 138(1).

²⁶⁸ S 138(9).

²⁶⁹ Ss 193–196 stipulate remedies for unfair dismissals and unfair labour practices, limits on compensation (which is in addition to any other amount(s) to which the employee is legally entitled) and severance pay. It also states that compensation is in addition to any other amount.

²⁷⁰ S 138(7)(a).

²⁷¹ Du Toit *et al* 3rd ed at 595.

²⁷² National Economic Development and Labour Council.

²⁷³ S 138(6); S 203(3); *Reunert Industries* at 1396 D.

²⁷⁴ Article 1.2 of the commissioners’ code.

²⁷⁵ S 117(7).

²⁷⁶ S 135(4) provides that a party to the conciliation proceedings may appear in person or be represented only by a director or employer of that party, or by any member or official of that party’s registered trade union or employer’s organization.

138(4)²⁷⁷ and 140²⁷⁸ (prior to the repeal thereof²⁷⁹) provided for representation in conciliation and arbitration proceedings. Item 27 of Schedule 7²⁸⁰ provided that until such time as rules made by the CCMA in terms of s 115(2A)(m)²⁸¹ came into force, ss 135(4), 138(4) and 140(1) would remain in force as if not repealed, and any reference in item 27 to these sections is a reference to the sections prior to amendment²⁸².

A commissioner has no discretion to permit any person other than those listed in that section to appear or act as a representative even if the other parties do not object²⁸³. With regard to aforesaid sections, the provisions whereof were carried forward into r 25 of the CCMA rules²⁸⁴, a further question arises namely whether it is fair that parties' right to legal representation is limited or qualified where compulsory arbitration is prescribed.

According to Le Roux²⁸⁵ one of the reasons why the right of parties to be represented by legal practitioners (in CCMA proceedings) was limited, is to

²⁷⁷ Section 138(4) provides that in any arbitration proceedings before the CCMA, a party to the dispute may appear in person or be represented only by a legal practitioner, a director or employee of the party, or any member or official of that party's registered trade union or employers' organization.

²⁷⁸ S 138(4) is qualified by s 140 which excludes legal representation if the arbitration relates to the fairness of a dismissal and the alleged reason for dismissal relates to the employee's conduct or capacity. However, if the commissioner and all the other parties consent thereto, or if the commissioner concludes that it is unreasonable to, *inter alia*, expect a party to deal with the dispute without legal representation, legal representation may be permitted.

²⁷⁹ Ss 135(4), 138(4) and 140(1) are qualified in the LRA stating that they will "remain in force as long as the [CCMA] does not make rules on representations in proceedings before it".

²⁸⁰ Part H of Schedule 7 deals with transitional provisions arising out of the application of the LRAA, 2002.

²⁸¹ My emphasis - according to Le Roux this reference appears to be an error as item 27(1)(a) should have referred to s 115(2A)(k) which entitles the CCMA to make rules relating to the right of any person to represent any party in conciliation or arbitration proceedings. As it proved impossible to reach consensus (in the Governing Body of the CCMA) in formulating less stringent rules relating to legal representation, the "[r]ules promulgated in terms of s 115(2A) were published without any detailed regulation of the right to representation" and r 25 is the "only rule" relating to this issue (Le Roux on legal representation at 12).

²⁸² Schedule 7, item 27(1)(a).

²⁸³ *Government Notice: Labour Relations Act 66 of 1995 Rules Regulating the Practice and Procedure for resolving disputes through Conciliation and at Arbitration Proceedings* (2000) 21 ILJ 866 at 880.

²⁸⁴ These rules were promulgated by Government Notice R 1448 in GG 25515 of 10 October 2003 as corrected by GN 1512 in GG 25607 of 17 October 2003.

²⁸⁵ Le Roux PAK "*The right to legal representation at the CCMA: The LRA, the CCMA Rules and the Labour Court*" September 2003 CLL 11 (hereinafter referred to as "Le Roux on legal representation").

give effect to an important aim of the LRA to resolve unfair dismissal disputes as cheaply and expeditiously as possible. "It was felt that the presence of lawyers would lead to overly technical and lengthy processes."²⁸⁶

This denial of legal representation resulted in NEDLAC²⁸⁷ attempting to amend the abovementioned sections and extending the right to legal representation to the "most common dismissal disputes"²⁸⁸. Le Roux then submits that "it soon became clear that this issue could not easily be resolved at NEDLAC and a compromise was reached in terms of which the issue of legal representation would be considered and determined by the Board of Governors of the CCMA and regulated in rules to be promulgated by the CCMA"²⁸⁹. Hence the amendment to s 115 by the inclusion of the new s 115(2A) which enables the CCMA to make such rules.

In particular s 115(2A)(k) entitles the CCMA to make rules regulating the right of any person or category of persons to represent any party in any conciliation or arbitration proceedings and s 115(2A)(m) allows the CCMA to make rules regulating all other matters incidental to performing the functions of the CCMA. As a result, ss 135(4), 138(4) and 140(1) were deleted from the LRA²⁹⁰.

Item 27 further provides that a bargaining council may be represented in arbitration proceedings in terms of s 33A by a person specified in s 138(4) or by a designated agent or official of the council, and representation in s 191 disputes about dismissals must be determined by s 138(4) read with s 140(1) while representation in unfair labour practice disputes must be determined by s 138(4). Then, in terms of item 27(2), s 138(4) does NOT apply to a pre-dismissal arbitration (despite item 27(1)(a)).

²⁸⁶ *Ibid* at 11.

²⁸⁷ NEDLAC established by s 2 of the National Economic, Development and Labour Council Act 35 of 1994.

²⁸⁸ Le Roux on legal representation at 12.

²⁸⁹ *Ibid*.

²⁹⁰ *Ibid*.

As stated in footnote 281 *supra*, r 25 is the only rule²⁹¹ relating to the issue of representation in con-arb²⁹², conciliation and arbitration proceedings and it deals with objections to a representative appearing before the CCMA²⁹³. R 25, *inter alia*, quotes ss 135(4), 138(4) and 140(1) verbatim. It thus appears that the provisions of these sections either still apply *per se* or through the equivalent wording in the new rules. Consequently, the right to representation has not been extended by s 115(2A)(k) and it is hoped that the CCMA will (again) amend (and clarify) the rules relating to representation (as r 25 merely reiterates the deleted ss 135(4), 138(4) and 140(1)). The right to legal representation should be addressed and resolved once and for all as it has been a problem since the days of the IC as (again) identified by Mlambo J in *Pep Stores*²⁹⁴.

In *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau & others*²⁹⁵ the court was, amongst other things, required to consider the constitutionality of s 140(1). Landman J emphasized the fundamental distinction drawn by s 34 of the Constitution between courts and tribunals and expressed the opinion that “whereas s 34 read with the emphasis on the right to access to a civil court, may well imply a right to legal representation, the same cannot be said about access to an appropriate, impartial tribunal”²⁹⁶. He therefore found that there was no implicit right of legal representation insofar as a tribunal was concerned²⁹⁷.

Notwithstanding the aforesaid, I am of the opinion that parties’ election insofar as legal representation is concerned should not be interfered with. I respect-

²⁹¹ R 13(1) states that the parties must attend conciliation in person, irrespective of whether they are represented. However, r 13(1) then refers to r 25(1)(a).

²⁹² R 17(6) and (7) relate to representation in con-arb proceedings. However, both subsections refer to r 25 and are therefore subject to r 25.

²⁹³ R 25 appeared in Government Gazette 25515 of 10 October 2003 and states in subs (2) that if a party to the dispute objects to the representation of another party to the dispute or the commissioner suspects that the representative of a party does not qualify in terms of the LRA, the Commissioner must determine this issue. R 25 was corrected by GN R1748 of 5 December 2003 and by GN R530 of 30 April 2004 (Thompson and Benjamin AA 4-21).

²⁹⁴ Refer also to discussion in Chapter 5 at 100 *infra*.

²⁹⁵ (2003) 24 ILJ 1712 (LC) (hereinafter referred to as “*Netherburn Engineering*”).

²⁹⁶ *Ibid* at 1728 H-I.

²⁹⁷ *Ibid* at 1728 I-J.

fully agree with MacMillan²⁹⁸ (discussing United Kingdom tribunals²⁹⁹) that the involvement of lawyers “of itself” does not result in a departure from the ideal of the speedy resolution of disputes³⁰⁰. Even if it is an accepted fact that, in matters where legal representation is involved, it will take longer to resolve disputes, I submit that the freedom of *choice* insofar as legal representation is concerned, comprehensively outweighs any inconvenience which may be caused by more lengthy proceedings.

²⁹⁸ MacMillan JK “*Employment Tribunals: Philosophies & Practicalities*” 1999 (March) *The Industrial Law Journal* 33 (hereinafter referred to as “MacMillan”).

²⁹⁹ Refer to discussion in Chapter 4 *infra*.

³⁰⁰ MacMillan at 42.

CHAPTER 4 – COMPARATIVE STUDY

Ss 39(1)(b) and (c) of the Constitution provide that, when interpreting the Bill of Rights, a court, tribunal or forum “*must* consider international law and *may* consider foreign law”. S 232 of the Constitution, in turn, refers to customary international law as “law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament”. Insofar as the interpretation of *any* legislation is concerned, s 233 of the Constitution prescribes that “every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law”.

The difference between public international law and foreign law is apparent from s 39(1) of the Constitution and it is equally clear that the instruction to consider these two laws is different - international law *must* be considered whereas foreign law *may* be considered. Hopkins refers to foreign law as “the judgments of domestic courts in other states (like the United States of America and Canada)”; while public international law is “best identified with reference to its sources”³⁰¹. These sources are identified in article 38(1) of the Statute of the International Court of Justice as “international conventions and treaties; customary rules of international law; the general principles of law accepted by most civilized nations; the judicial decisions of international courts and tribunals; and the teachings and writings of qualified public international law jurists”³⁰².

In *South African National Defence Union v Minister of Defence*³⁰³ O’Regan J³⁰⁴, with reference to s 39 of the Constitution and, more in particular, s 39(1)(b), expressed the view that the conventions and recommendations of the International Labour Organization³⁰⁵ “are important resources for considering the meaning and

³⁰¹ Hopkins K “*International Law in South African Courts*” 2001 (December) *De Rebus* 25 (hereinafter referred to as “Hopkins”).

³⁰² Referred to by Hopkins at 26.

³⁰³ 1999 (4) SA 469 (CC).

³⁰⁴ *Ibid* at 483 [25] D.

³⁰⁵ In *Business South Africa v Congress of South African Trade Unions & another* (1997) 18 ILJ 474 (LAC), Myburgh JP held that the primary objects of the LRA include “giving effect to and regulating the fundamental rights conferred by s 27 of the [interim] Constitution and giving effect to

scope of [for purposes of this decision] ‘worker’ as used in s 23 ...” of the Constitution. The same judge, in *National Union of Metalworkers of SA & others v Bader Bop (Pty) Ltd & another*³⁰⁶ confirmed the aforesaid conventions and recommendations (of the ILO) as an important source of international law³⁰⁷.

Du Toit *et al*³⁰⁸ acknowledge the “considerable influence” which the ILO Fact-Finding and Conciliation Commission to South Africa had insofar as the drafting of the LRA was concerned. The Ministerial Legal Task Team appointed by the Cabinet in July 1994 to overhaul the laws regulating labour relations was assisted throughout by the ILO which provided resources and three international experts to work with the team. The Task Team also consulted international experts within the ILO³⁰⁹. One of the primary objects of the LRA is to give effect to South Africa’s obligations as a member state of the ILO and it ensures compliance with ILO Conventions 87 and 98. “It also complies with the findings and, where appropriate, gives effect to the recommendations of the ILO.”³¹⁰

Foreign law, as opposed to international law, *may* be considered in the interpretation of the Bill of Rights and, with this in mind, I have selected the German and the British legal systems³¹¹ by way of a comparative study with the applicable South African law, more in particular the review or similar powers, insofar as arbitration awards are concerned, of the relevant courts in these systems. In discussing final and binding arbitration for the determination of dismissal disputes, the explanatory memorandum states that the “benefits of arbitration over court adjudication have been shown in a number of international studies”³¹².

obligations incurred by the Republic as a member state of the International Labour Organization” at 493 A-B. (The 1996 Constitution entrenched similar provisions concerning labour relations in s 23.). The International Labour Organization is hereinafter referred to as “the ILO”.

³⁰⁶ 2003 (3) SA 513 (CC).

³⁰⁷ *Ibid* at 532 [28] F.

³⁰⁸ Du Toit *et al* 4th ed at 200.

³⁰⁹ Thompson & Benjamin at AA 2-163.

³¹⁰ *Ibid* at AA 2-165.

³¹¹ It was not deemed necessary to, for purposes of this thesis, consider *European Community law* and the *European Convention on Human Rights*.

³¹² Thompson & Benjamin at AA 2-172.

4.1 BRITISH LEGAL SYSTEM³¹³

In England, as in South Africa, disputes are not only resolved in courts and there are various tribunals with a status lower than ordinary courts that deal with such matters³¹⁴. Some of these tribunals have been created by Acts of Parliament while others exist because of the “need for a forum in which complaints about members can be aired and, if necessary, members can be sanctioned for infringing the rules”³¹⁵. With the exception of the Lands Tribunal, these “inferior tribunals” are not presided over by “judicial appointees as in the ordinary courts”³¹⁶. Wheeler, with reference to *Attorney General v BBC* [1981], remarks that Lord Scarman distinguished between the ordinary courts and certain tribunals as follows:

“I would identify a court in (or ‘of’) law i.e. a court of judicature, as a body established by law to exercise, either generally or subject to defined limits, the judicial power of the state. In this context judicial power is to be contrasted with legislative and executive (i.e. administrative) power. If the body under review is established for a purely legislative or administrative purpose, it is part of the legislative or *administrative* system, even though it has to perform duties which are *judicial in character*.”³¹⁷

A distinction is drawn between administrative, employment and domestic tribunals and I will briefly deal with administrative and domestic tribunals before dealing with the important employment tribunals.

³¹³ Acts of Parliament have been obtained from the website (www.hmsso.gov.uk/acts) and printed under the superintendence and authority of the Controller of HMSO being the Queen’s Printer of Acts of Parliament (the legislation is subject to Crown Copyright protection).

³¹⁴ Wheeler J *The English Legal System* (2002) Pearson Education Limited (hereinafter referred to as “Wheeler”) at 264.

³¹⁵ *Ibid.*

³¹⁶ *Ibid.*

³¹⁷ *Ibid.*, my emphasis indicating similarity with CCMA arbitrator, which also performs duties which are “judicial in character”.

4.1.1 Administrative Tribunals

Many administrative tribunals have been established by statute³¹⁸ “in response to a perceived need to have a review process that is quite separate from and independent of government”³¹⁹. Their function is to deal “quickly and cheaply with grievances against government departments and other agencies of the state” and their procedure is “far less formal than in the ordinary courts”. Although individuals were originally expected to go without legal representation in very straightforward cases, in more complex matters (Land Tribunal and Income Tax cases) “legal representation may be advisable unless the complainant is particularly articulate and competent”³²⁰.

An *error of law* committed by an administrative tribunal *may* result in a right of *appeal* to the High Court (hereinafter referred to as “the HC”) if so provided by the statute which created such tribunal. Alternatively, if an error of law has been committed in respect of an individual or if such individual is of the opinion that the principles of natural justice were not applied in his case, the Administrative Court can be approached for a *judicial review*. This constitutes a *review* of the decision-making process and not an appeal. Even if a right of appeal has been provided for in an Act of Parliament, the HC may still consider a claim for judicial review if this is “advantageous” to the complainant³²¹.

4.1.2 Domestic Tribunals

Wheeler states that this category is really a “convenient ‘hold all’” for all tribunals other than administrative or employment tribunals including “tribunals ranging from disciplinary and grievance committees at the workplace to the

³¹⁸ There are nearly 70 of these tribunals and in fact, they “deal with more cases annually than the ordinary courts and collectively they are responsible for administering the system of administrative justice that obtains in England and Wales”. Wheeler at 265.

³¹⁹ Wheeler at 265.

³²⁰ The informal approach is, of course, as in dispute resolution conducted under the auspices of the CCMA.

³²¹ Wheeler at 266.

disciplinary committees established by organizations such as the Law Society, Bar Council³²², and disciplinary bodies of universities and trade unions which deal with allegations of infringements of rules (which can result in expulsion). The organizations concerned usually establish the disciplinary tribunals with their jurisdiction arising out of the “deemed contract of membership”³²³.

Other tribunals are also statutorily created, for example, the Professional Conduct Committee of the General Medical Council established by the Medical Act 1978 (exercising a disciplinary function over doctors) and the Solicitors’ Disciplinary Tribunal established by the Solicitors Act 1974 (dealing with misconduct by members of the profession). Other Acts of Parliament have also established disciplinary tribunals for dentists and opticians³²⁴.

4.1.3 Employment Tribunals

Employment tribunals are statutorily created and were initially known as “industrial tribunals” created by s 12 of the Industrial Training Act 1964³²⁵ “to adjudicate over the legality of industrial training levies”³²⁶. However, the jurisdiction of the industrial tribunal was extended and the Donovan Commission (in 1968) stated that the only other functions (apart from hearing *appeals* from assessment to training levy under the 1964 Act) were “to determine entitlement to a redundancy payment under the Redundancy Payments Act 1965, to resolve disputes over the failure to provide, or the accuracy of, a written statement of terms and conditions of employment, certain appeals under the Selective Employment Payments Act 1966 and the determination of whether work was “dock work” for the purposes of the Docks and Harbours Act 1966 ..., also a small jurisdiction in the area of terms and conditions and compensation for loss of office in local government and related

³²² *Ibid* at 273.

³²³ *Ibid* at 274.

³²⁴ *Ibid*.

³²⁵ Employers were compelled to provide funding for industrial training in order to improve skills levels by the Industrial Training Act 1964. Wheeler at 267.

³²⁶ Wheeler at 267.

occupations”³²⁷.

Over the years the jurisdiction of the employment tribunals was expanded through legislation allowing employees to approach employment tribunals in order to resolve various employment disputes, for example, the Wages Act 1986 (since consolidated in the Employment Rights Act 1996³²⁸) provided for relief in the event of unauthorized wage deductions and the Employment Rights Act 1996 allows, *inter alia*, pregnant women relief when their right to alternative employment, in the event of a suspension, is infringed³²⁹. The “diverse nature” of employment tribunals’ jurisdiction appears, as per Wheeler³³⁰, from the above. The diversity and extent of the main jurisdictions have been summarized by Holland & Burnett³³¹ as will appear from the following chart:

A summary chart of the main jurisdictions						
Jurisdiction	Source	Service condition	Time limit for IT application	Extension of time	ACAS involvement	Maximum Award
Unfair dismissal	ERA 1996, S 94	1 Year	3 months from EDT	‘not reasonably practicable’	Yes	£61,300 unless re-employment ordered
Redundancy payment	ERA 1996, s 135	2 Years	6 months from RD	‘just and equitable’	Yes (since 1 October 1998)	£7,800
Deductions from wages	ERA 1996, Part II	Nil	3 months from payday	‘not reasonably practicable’	Yes	Unlimited
Racial discrimination	RRA 1976	Nil	3 months from act complained of	‘just and equitable’	Yes	Unlimited
Sex discrimination	SDA 1975	Nil	3 months from act complained of	‘just and equitable’	Yes	Unlimited

³²⁷ MacMillan at 34.

³²⁸ Hereinafter referred to as “the ERA, 1996”. Wheeler at 269.

³²⁹ Wheeler at 269.

³³⁰ *Ibid* at 270.

³³¹ Holland J & Burnett S *Employment Law* (2004) Oxford University Press (hereinafter referred to as “Holland & Burnett”) at 378.

Jurisdiction	Source	Service condition	Time limit for IT application	Extension of time	ACAS involvement	Maximum Award
Equal pay	Equal Pay Act 1970	Nil	6 months after termination	None	Yes	Unlimited
Disability discrimination	DDA 1995	Nil	3 months from act complained of	'just and equitable'	Yes	Unlimited
Breach of contract	ITA 1996, s 3 and 1994 Order	Nil	3 months from EDT	'not reasonably practicable'	Yes	£25,000

MacMillan further states that legal representation³³² (in industrial tribunals) was unusual and appeals (by way of case stated to the Queen's Bench Division of the HC) were "rare" – neither the Employment Appeal Tribunal (hereinafter referred to as the Appeal Tribunal³³³) nor its predecessor, the National Industrial Relations Court, existed³³⁴. The Donovan Commission, in referring to industrial tribunals, stated that they were "easily accessible, informal, speedy and inexpensive"³³⁵.

S 1 of the Employment Rights (Dispute Resolution) Act 1998³³⁶ renamed "industrial tribunals" to "employment tribunals"³³⁷. Wheeler states that employment tribunals "now³³⁸ have the power to determine over 50 different types of complaint arising from the employment relationship" and hearings are

³³² Refer to discussion of legal representation (or lack thereof) in South Africa in Chapter 3 at 46-50 *supra*.

³³³ Prior to the creation of the Appeal Tribunal, *appeals* were heard by a judge of the High Court and, while it existed, the National Industrial Relations Court (obtained from website www.employmentappeals.gov.uk "Employment Appeal Tribunal – What is the EAT?") (hereinafter referred to as "Appeal Tribunal web discussion").

³³⁴ MacMillan at 34.

³³⁵ *Ibid*. The explanatory memorandum to the LRA had similar objectives in mind by "providing for the determination of dismissal disputes by final and binding arbitration" (Thompson & Benjamin at AA 2-172). Refer also to discussion in Chapter 2 at 27-28 relating to, *inter alia*, the legalism inherent in appeal proceedings.

³³⁶ Hereinafter referred to as "the ER(DR)A, 1998". Interestingly, MacMillan, at 33, says that this name change is "arguably the single greatest mark which that ... piece of legislation will leave on the system".

³³⁷ Employment tribunals are supported by the Employment Tribunal Service, an executive agency of the Department of Trade and Industry, and which operates from "34 permanent offices across Britain". Wheeler at 267.

³³⁸ An opinion expressed in 2002.

conducted at numerous locations across Britain to accommodate the needs of employers and employees³³⁹.

There are material differences between the two legal systems and, at the outset, I mention a few examples, namely, redundancy in terms of the LRA is regarded as a dispute where the reason for dismissal is based on the employer's operational requirements³⁴⁰ and may, after conciliation, be referred to the LC for adjudication³⁴¹. The same observation applies in respect of a dismissal resulting from an employee's pregnancy, intended pregnancy or any reason related thereto³⁴². A similar dispute(s) is, however, capable of adjudication by an employment tribunal³⁴³ and is therefore not accorded the same status, insofar as the court/tribunal of first instance is concerned.

In South Africa an employee can, irrespective of period of employment (even applicants and probationary employees are accommodated), lodge a claim, in some form or another, whereas in Britain an employee must have at least one year continuous service before he can lodge an unfair dismissal claim and two years service for a redundancy payment.

As is the case with the CCMA, the employment tribunals are not required to strictly comply with the rules of evidence and their procedural rules and forms

³³⁹ Wheeler at 267.

³⁴⁰ S 191(5)(b)(ii).

³⁴¹ However, in terms of s 191(12) (inserted by the LRAA, 2002) where a single employee is dismissed for operational reasons, he may choose whether to refer the dispute to arbitration or to the LC. S 189A was also introduced by the LRAA, 2002 for dismissals based on operational requirements by employers with more than 50 employees and an entirely new procedure is created for disputes about procedural fairness in these dismissals because, in terms of s 189A(18), the LC may not adjudicate a dispute about the procedural fairness of a dismissal based on operational requirements in any dispute referred to it in terms of s 191(5)(b)(ii). In terms of s 189A(13) a consulting party alleging procedural unfairness may approach the LC by way of *application* and not *referral*. Du Toit *et al*, at 426, allege that the purpose hereof is "presumably to simplify and expedite the resolution of disputes about procedural fairness" because, unlike a referral, an application considers argument on paper without necessarily leading evidence (although oral evidence may be heard where facts are in dispute and "the result including costs, may be much as before" [LC r 7(7)].

³⁴² S 187(1)(e) read with s 191(5)(b)(i).

³⁴³ Part X (for example, ss 99 and 105) and Part XI of the ERA, 1996 deal with, *inter alia*, unfair dismissals by reason of pregnancy and redundancy and the employees' resultant rights on dismissal and including referrals to employment (industrial) tribunals.

have also been simplified. An applicant lodges a claim by way of a specified form (Form IT 1) and the respondent must reply within 21 days (Form IT 3)³⁴⁴. Should an applicant's prospects of success not be reasonable, he may be required to introduce a deposit of £500.00 before being allowed to continue with the application. Costs can be awarded under certain circumstances, namely where a party proceeds with an application notwithstanding having been warned that the case has no reasonable prospects of success and a party's conduct. However, notwithstanding the aforesaid and unlike in civil actions, the loser is not, as a matter of course, ordered to pay the successful party's costs³⁴⁵.

In terms of s 162 of the LRA the LC may, with reference to the requirements of the law and fairness, make a costs order. In considering such order, the LC may take into account whether the matter ought to have been referred to arbitration in terms of the LRA (and, if so, the extra costs incurred in referring the matter to the LC) and the conduct of the parties (in proceeding with or defending the matter before the LC and during the proceedings).

Insofar as the CCMA is concerned, the commissioner may not make an order for costs unless a party, or the person who represented that party, acted in a frivolous or vexatious manner by proceeding with or defending the dispute or in its conduct during the arbitration proceedings³⁴⁶. S 138(10) has been amended in order to provide that the commissioner may make an order for costs according to the requirements of law and fairness and in accordance with rules made by the CCMA in terms of s 115(2A)(j) and having regard to any relevant Code of Good Practice issued by NEDLAC in terms of s 203 and any relevant guideline issued by the CCMA.

The requirement of a deposit referred to above seems to be analogous with, in certain courts, the requirement to provide security for costs. A similar

³⁴⁴ Duddington J *Employment Law* (2003) Pearson Education Limited (hereinafter referred to as "Duddington") at 3.

³⁴⁵ *Ibid* at 4.

³⁴⁶ S 138(10).

provision, however, does not appear in the LRA and, there is also no provision for the establishment of security for costs in the CCMA.

The requirements for a costs order, however, appear to be very similar in both the CCMA and LC on the one hand and the British employment tribunals on the other hand. The requirement for a deposit in Britain does have the benefit of serving as a caution to an irresponsible applicant at an early stage but, on the other hand, can serve as a deterrent, and, in many instances, effectively stop an applicant from pursuing what he perceives to be a legitimate claim.

The ILO Recommendation 119 on the Termination of Employment at the Initiative of the Employer was incorporated in the Industrial Relations Act 1971 by way of the inclusion of the right not to be unfairly dismissed. The new Labour Government in 1974 repealed the aforesaid Act and replaced it with the Trade Union and Labour Relations Act 1974 which provided for unfair dismissal provisions with the right to complaint to an industrial tribunal. These provisions were again re-enacted and the ERA 1996 now contains the aforesaid provisions³⁴⁷ and, amongst other things, deals with termination of employment³⁴⁸; right not to be unfairly dismissed³⁴⁹; remedies for unfair dismissal³⁵⁰; redundancy payments and the right on dismissal by reason of redundancy³⁵¹.

Apart from the ERA, 1996, other statutes³⁵² also contain provisions in terms whereof claims can be brought before employment (industrial) tribunals, for example, s 290 of the Trade Union and Labour Relations (Consolidation) Act 1992 (c.52)³⁵³ mentions specific claims which “could be the subject of in-

³⁴⁷ Wheeler at 268.

³⁴⁸ Ss 86-93 of the ERA, 1996.

³⁴⁹ Ss 94-110 of the ERA, 1996.

³⁵⁰ Ss 111-132 of the ERA, 1996.

³⁵¹ Ss 135-139 and ss 162-165 of the ERA, 1996.

³⁵² Du Toit *et al*, at 365, remark that, unlike in the countries that South African labour lawyers “have traditionally looked to”, individual employment rights have, in the LRA, been included in a statute devoted primarily to the regulation of collective employment relations. In other countries separate statutes govern individual employment relations and collective employment relations.

³⁵³ Hereinafter referred to as “the TULR(C)A, 1992”.

dustrial tribunal proceedings”, namely, the right of a trade union member not to be unjustifiably disciplined; refusal of employment or service of employment agency or action short of dismissal on grounds related to union membership; time off for trade union duties and activities; unreasonable exclusion or expulsion from union where employment subject to union membership agreement; failure to consult trade union representative on proposed redundancies and entitlement under protective award.

Wheeler observes that (alleged) unfair dismissals constitute the majority of all claims at the tribunals³⁵⁴ (which correspond with disputes deliberated by the CCMA).

Advisory, Conciliation and Arbitration Service and the Central Arbitration Committee

However, some unfair dismissal complaints are resolved at an earlier stage, namely by way of *conciliation* under the auspices of the Advisory, Conciliation and Arbitration Service (hereinafter referred to as “ACAS”)³⁵⁵. ACAS is a statutory body with the following general functions, namely conciliation in industrial and collective (employers and unions) disputes; preparation of codes of practice (e.g. Code on Disciplinary Grievance Procedures); designation of an independent expert to prepare a report in equal value claims and the provision of information and advice on employment matters³⁵⁶.

A further committee, the Central Arbitration Committee (hereinafter referred to as “the CAC”) was established in 1976 to supersede the Industrial Court³⁵⁷. Rideout states that the CAC did not significantly change the structure of the

³⁵⁴ Wheeler at 268.

³⁵⁵ In very general terms, the United Kingdom’s ACAS can be compared with the South African CCMA.

³⁵⁶ Duddington at 4.

³⁵⁷ Rideout RW “*What shall we do with the CAC?*” The Industrial Law Journal 2002 (March) 1 (hereinafter referred to as “Rideout”) at 6.

Industrial Court. The change was “apparently designed to suggest modernization, to permit assimilation of the CAC into a system which included ACAS and significantly to upgrade the administration”³⁵⁸. With this change, voluntary arbitration virtually disappeared from the CAC and “[t]his function was passed to ACAS which had its own panel of arbitrators”³⁵⁹.

S 259(1) of the TULR(C)A, 1992 provides for the continuation of the CAC³⁶⁰ and s 259(3) stipulates that “ACAS shall provide for the [CAC] the requisite staff (from among the officers and servants of ACAS)” and s 260 of the TULR(C)A, 1992 (amended by s 24 of the Employment Relations Act 1999) provides for the appointment of the CAC members, the chairman and deputy chairman/chairmen by the Secretary of State after consulting, *inter alia*, ACAS. The CAC deals with disputes and other matters pertaining to collective aspects of employment law and functions as a permanent body independent of government, employers and unions. The CAC also provides *voluntary arbitration* in industrial disputes³⁶¹.

According to Clark, there has been jurisprudential and public policy debate in both South Africa and the United Kingdom regarding the use of arbitration in the resolution of dismissal disputes³⁶². Although the “historical and political contexts of the debates are quite different, the underlying arguments for the increased use of arbitration over a more court like adjudication process are remarkably similar”³⁶³ in the two legal systems. Labour arbitration in the UK dates from the “passing of the Employment Protection Act 1975 and the establishment of ACAS as a state funded body formally independent of government”³⁶⁴. Since the mid-1970s labour disputes or any matter related thereto are referred by ACAS for settlement by arbitration³⁶⁵. Chapter IV of

³⁵⁸ *Ibid* at 6.

³⁵⁹ *Ibid* at 7.

³⁶⁰ According to Rideout, at 2, the CAC’s “arbitral function as the Industrial Court was ... effectively destroyed by the failure of the ACAS, after 1976, to refer cases to it”.

³⁶¹ Duddington at 5.

³⁶² Clark at 609.

³⁶³ *Ibid*.

³⁶⁴ Clark at 617 (referred to in footnote 109 *supra*).

³⁶⁵ *Ibid* at 617.

the TULR(C)A, 1992 deals with the functions of ACAS and states that it is “the general duty of ACAS to promote the improvement of industrial relations”³⁶⁶.

In terms of s 210 of the TULR(C)A, 1992, ACAS *may*, where a trade dispute³⁶⁷ exists or is apprehended, at the request of one or more of the parties to the dispute, *offer the parties assistance* to attempt to bring about a “settlement” by way of “*conciliation* or by other means, and may include the appointment of a person other than an officer or servant of ACAS to offer assistance to the parties”³⁶⁸. Interestingly, s 212 of the TULR(C)A, 1992 provides that where a trade dispute exists or is apprehended, ACAS may, at the request of one or more of the parties to the dispute and with the *consent of all the parties to the dispute*³⁶⁹, refer to arbitration all or any of the matters to which the dispute relates, by one or more arbitrators appointed by ACAS³⁷⁰

³⁶⁶ S 209 of the TULR(C)A, 1992. Prior to the amendment of s 209 by s 26 of the Employment Relations Act 1999, the section contained the following additional wording, namely “in particular to encourage the extension of collective bargaining and the development and, where necessary, reform of collective bargaining machinery”.

³⁶⁷ “Trade dispute” (in Part IV which also contains ss 210 and 212) is defined in s 218(1) of the TULR(C)A, 1992 as meaning “a dispute between employers and workers, or between workers and workers, which is connected with one or more of the following matters –

- (a) terms and conditions of employment, or the physical conditions in which any workers are required to work;
- (b) engagement or non-engagement, or termination or suspension of employment or the duties of employment, of one or more workers;
- (c) allocation of work or the duties of employment as between workers or groups of workers;
- (d) matters of discipline;
- (e) the membership or non-membership of a trade union on the part of a worker;
- (f) facilities for officials of trade unions; and
- (g) machinery for negotiation or consultation, and other procedures, relating to any of the foregoing matters, including the recognition by employers or employers’ associations of the right of a trade union to represent workers in any such negotiation or consultation or in the carrying out of such procedures”.

³⁶⁸ The CCMA can similarly render assistance other than conciliation and arbitration of disputes and is authorized to, for instance, provide advice or training relating to the primary objects of the LRA (s 115(3)) and assist with pre-dismissal arbitrations (s 188A). This advisory function of the CCMA corresponds with s 213 of the TULR(C)A, 1992 which provides that “ACAS may give employers, employers’ associations, workers and trade unions such advice as it thinks appropriate on matters concerned with industrial relations or employment policies”. In terms of subs (3), “ACAS may also publish general advice on matters concerned with industrial relations or employment policies, including any of the matters referred to above”. (Refer also to Chapter 1 at 11-12 *supra* for South Africa’s position with regard to CCMA advisory awards.)

³⁶⁹ My emphasis indicating voluntariness of British arbitrations in labour disputes as opposed to South African compulsory arbitrations. Consequently, the issues surrounding compulsory arbitrations, including the absence of an appeal therefrom and the (un)fairness thereof, are not applicable to British arbitrations.

³⁷⁰ S 212(1)(a) of the TULR(C)A, 1992.

or ACAS may refer it to the CAC³⁷¹. Where more than one is appointed, ACAS must appoint one of them to act as chairman³⁷². In exercising its functions under s 212, ACAS must also consider the likelihood of the dispute being settled by conciliation³⁷³. This is unlike the situation in South Africa where arbitration can only follow on (failed) conciliation.

Where agreed arbitration procedures for negotiation or settlement of disputes exist, ACAS will not refer a dispute to arbitration unless no settlement was reached³⁷⁴ or if, in ACAS' opinion, there exists a special reason which justifies arbitration under s 212 as an alternative to those procedures³⁷⁵. Unlike the CCMA which defers to privately agreed arbitration proceedings (including those stipulated in collective agreements), it seems as if ACAS retains discretion in allowing such proceedings. However, there are further similarities between the two legal systems, namely, the exclusion of the general provisions contained in Part I of the (UK) Arbitration Act 1950 (c.27) to arbitrations conducted by ACAS under s 212 of the TULR(C)A, 1992³⁷⁶, and ACAS giving employers, employers' associations, workers and trade unions such advice as it thinks appropriate on matters concerned with industrial relations or employment policies³⁷⁷. Also, the ACAS Codes of Practice which embodies good industrial relations practices in matters of employee conduct and capability are similar to Schedule 8 – Code of Good Practice: Dismissal, of the LRA³⁷⁸.

Interestingly, the ER(DR)A, 1998 (which changed the name of “industrial tribunals” to “employment tribunals”) also provides “*an ACAS scheme of*

³⁷¹ S 212(1)(b) of the TULR(C)A, 1992.

³⁷² S 212(4)(a) of the TULR(C)A, 1992.

³⁷³ S 212(2) of the TULR(C)A, 1992. This section may be compared to s 138(3) of the LRA stating that if all the parties consent, the commissioner may suspend the arbitration proceedings and attempt to resolve the dispute through conciliation.

³⁷⁴ S 212(3)(a) of the TULR(C)A, 1992.

³⁷⁵ S 212(3)(b) of the TULR(C)A, 1992.

³⁷⁶ S 212(5) of the TULR(C)A, 1992. Similarly s 146 of the LRA excludes the whole of the Arbitration Act from arbitrations conducted under the auspices of the CCMA.

³⁷⁷ S 213 of the TULR(C)A, 1992.

³⁷⁸ Clark at 619.

*arbitration as an alternative” to the employment tribunals*³⁷⁹, by the insertion of a new s 212A into the TULR(C)A, 1992³⁸⁰. Lewis remarks that the new structure of s 212 of the TULR(C)A, 1992 is thus “s 212 as originally enacted, which provides the statutory framework under which ACAS arranges *voluntary arbitrations*; s 212A, which provides the framework in primary legislation for the ACAS *arbitral alternative* to the tribunals; and s 212B which allows ACAS to appoint arbitrators in relation to exempted dismissal procedures”³⁸¹. Lewis says that the theory is that “[e]ither way, disputes are to be resolved speedily, efficiently and economically”³⁸².

Lewis states that this section provides “no right of appeal from the arbitrators’ award in England and Wales”³⁸³. S 212A(6) of the TULR(C)A, 1992 provides that “nothing in the Arbitration Act 1996 (c.23)³⁸⁴ shall apply to an arbitration conducted in accordance with a scheme having effect by virtue of an order under [s 212A]”. However, the subs further provides that the order embodying the scheme may provide for the application of any provision of Part I of the (UK) Arbitration Act “to the extent defined in the order”³⁸⁵. Lewis then remarks that ss 67 and 68 of the (UK) Arbitration Act “set out grounds of ‘serious irregularity’ for legally challenging arbitration awards in the ordinary courts, including exceeding jurisdiction and powers, failure to deal with ‘all’ the issues that were put, and uncertainty or ambiguity as to the effect of an award”³⁸⁶.

In discussing the adversarial and investigative traditions, Clark remarks that there is a “duality of approaches” in both South Africa and the United

³⁷⁹ Lewis R “*Recent Legislation: The Employment Rights (Dispute Resolution Act 1998)*” 1998 (September) *Industrial Law Journal* 214 (hereinafter referred to as “Lewis”), at 214.

³⁸⁰ S 212A(1) of the TULR(C)A, 1992 provides that “ACAS may prepare a scheme providing for arbitration in the case of disputes involving proceedings, or claims which could be the subject of proceedings, before an employment tribunal arising out of a contravention or alleged contravention of Part X of the ERA, 1996 (unfair dismissal); or any enactment specified in an order made by the Secretary of State”.

³⁸¹ Lewis at 216.

³⁸² *Ibid* at 214.

³⁸³ *Ibid* at 218.

³⁸⁴ Hereinafter referred to as the “(UK) Arbitration Act”.

³⁸⁵ *Ibid*.

³⁸⁶ *Ibid*. Lewis then observes that because the (UK) Arbitration Act does not apply to Scotland, it was “thought necessary to provide a right of appeal in Scotland either to the Court of Session or the [Appeal Tribunal] as may be specified in the order” (TULR(C)A, 1992 s 212A(7)).

Kingdom, to the resolution of individual employment disputes, “often coexisting side by side, albeit with different mixes and consequences”³⁸⁷. In the United Kingdom *industrial tribunals*, although having some investigative elements, adopt an essentially *adversarial* approach (with a “legal chair, court like layout, reference to case law and legal precedent, cross-examination of witnesses on oath, and legal representation in around half the cases”) while *ACAS arbitration* is conducted in an essentially *investigative*³⁸⁸ manner, with the “arbitrator chosen for knowledge of industrial relations rather than the law, a committee room layout, the application of industrial relations standards, no cross-examination or legal oaths, and representation by personnel managers and employee representatives”, and seldom by lawyers³⁸⁹.

The industrial relations climate and the tradition from which conciliation and arbitration come “are clearly different in South Africa and the United Kingdom” and, contrary to the investigative approach to ACAS arbitration, “the *adversarial* approach to arbitration is more strongly rooted in South Africa than the investigative approach”³⁹⁰. Butler³⁹¹ states that South African civil procedure reveals many of the worst features of an unreformed English-style adversarial system and that those features have had a severely negative

³⁸⁷ Clark at 621.

³⁸⁸ According to Clark, at 621, the main components of the United Kingdom investigative approach (in addition to the conduct of arbitration proceedings) are the *voluntary* (my emphasis) nature of arbitration, a requirement to have first exhausted internal company procedures and conciliation or mediation, pre-established and agreed terms of reference, prior completion and exchange of statements of case plus documentation, the publication by ACAS of generalized codes of practice, advisory handbooks, and guidance notes (for parties, conciliators and arbitrators) making explicit the criteria and procedures to be adopted, and, finally, a pool of arbitrators with the impartiality, knowledge or skill, courtesy and trust of the parties.

³⁸⁹ Clark at 621. Clark, at 619, states that although legal representation is allowed in ACAS arbitration proceedings, it is “rare” and this is reinforced by ACAS’s own guidance leaflet stating “there should be no need for parties to be represented by a solicitor or counsel”. (Refer to the South African position on legal representation in Chapter 3 at 46-50 *supra*.)

³⁹⁰ Clark at 622. Clark, at 616 and 622, states that the adversarial approach to arbitration is more strongly rooted in South Africa than the investigative approach, the reasons being (argued by Lotter and Mosime and approved by Clark) that most arbitrators prefer to use the accusatorial method for social and political reasons, namely, given the volatile industrial relations climate in South Africa, arbitrators are loath to be seen as partial, something that could easily follow after rigorous cross-examination of a witness by an arbitrator. Any move to increase the use of an investigative approach would clearly have to bear this consideration in mind.

³⁹¹ Butler, David “A New Domestic Arbitration Act for South Africa: What happens after the adoption of the *Uncitral Model Law for International Arbitration?*” 1998 Stell LR (hereinafter referred to as “Butler”).

effect on South African arbitration practice³⁹². He states that modern arbitration statutes emphasize party autonomy³⁹³ and giving the arbitral tribunal adequate powers to conduct the arbitration effectively³⁹⁴. Rigid and detailed statutory rules on arbitral procedure undermines the flexibility of the arbitral process because it results in those rules being applied automatically, instead of the arbitral tribunal "trying to design a procedure tailor-made for the needs of the particular dispute"³⁹⁵. Therefore, the legislature should strive towards cost-effective and expeditious arbitration proceedings and, as per Clark, the strengths of the investigative approach, namely, time, cost and "equity towards the unrepresented applicant, deserve serious consideration given the apparent intention behind the statute [the LRA] and the current build up of cases"³⁹⁶

Although I have expressed reservations pertaining to the right of recourse (limited right of review) for an aggrieved party in compulsory arbitrations, it may be a proposition in South Africa to strive towards a more investigative approach in arbitration proceedings (as in the United Kingdom) because, in the words of the United Kingdom Justice Committee³⁹⁷, an investigative

³⁹² Butler at 6. According to Butler, at 11, South African parties and arbitrators with experience as to how an arbitration should be conducted, particularly if that experience has been obtained in international arbitration, will normally be aware of the benefits of having the arbitration conducted under a set of rules which empowers the arbitrator to depart considerably from the ordinary adversarial procedures used in the courts and in traditional formal arbitration hearings in this country.

³⁹³ "Party autonomy" is described in the (UK) Arbitration Act in the general note to s 1 dealing with s 1(b) that the principle of party autonomy recognizes that the arbitration process is primarily created by the parties in their contract and therefore, in the first instance, it is for the parties to decide how their arbitration should be conducted, unless the public interest dictates otherwise and subject to the mandatory provisions of that Act (s 4(1) and Schedule 1 of the (UK) Arbitration Act, 1996.) Section 1(b) of the (UK) Arbitration Act, 1996 provides that the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest.

³⁹⁴ Butler at 6. Refer to Chapter 1 at 16 *supra* and Chapter 3 at 45-46 *supra* for a discussion of s 138(1) of the LRA. Ss 34 and 38 of the (UK) Arbitration Act, 1996 deal with procedural and evidential matters and general powers exercisable by the tribunal. S 34(1) states that the tribunal shall decide all procedural and evidential matters (described in this section), subject to the right of the parties to agree any matter. Unless the parties have agreed on the arbitral tribunal's powers, s 38(1) stipulates such powers for the purposes of and in relation to the proceedings. S 38(3) deals with the power of the tribunal to order a claimant to provide security for the costs of the arbitration.

³⁹⁵ Butler at 6.

³⁹⁶ Clark at 622.

³⁹⁷ Industrial tribunals were established in the 1960s in the United Kingdom to give employers and employees the best possible opportunity of arriving at an amicable settlement of their differences and were meant to be easily accessible, informal, speedy and inexpensive (Clark at 611).

approach is more likely to “achieve a result that seems to be just”³⁹⁸ if the parties are not equally well represented or unrepresented, or do not have equal access to resources³⁹⁹. Even so, the question surfaces whether the absence of a court-like adjudicative procedure in compulsory arbitrations should not be compensated for by extending the grounds of review provided for in s 145(2)⁴⁰⁰.

To continue with employment tribunals, they are the “forum in which most legal disputes between employer and employee are resolved” and only the employee can institute proceedings although the employer can thereafter counter-claim⁴⁰¹. Every employment tribunal consists of a legally qualified chairperson⁴⁰² and two laypersons representing the employer’s side and the employee’s (trade union) side respectively. However, in some cases, the Chairperson can sit alone where, for example, the parties give written consent; breach of contract claims or where either of the parties has indicated that they do not intend contesting the proceedings⁴⁰³.

As in South Africa, not only a *fair reason* for dismissal is required, but a *fair procedure* also has to be followed. A further point of similarity is the distinction of some reasons for dismissal as automatically unfair including pregnancy related dismissals. However, unlike in the LRA, a distinction is drawn between wrongful dismissal (a claim with breach of contract as cause of action) and unfair dismissal (a claim based on statute)⁴⁰⁴.

However, the tribunals did not achieve these objectives and the Justice Committee was established in 1986 to make proposals for reform of these tribunals which would enable them to achieve their original objectives.

³⁹⁸ Clark at 612.

³⁹⁹ The persistent inequality between the parties, i.e. the imbalance of power between employers and employees, is one of the central themes of labour law. Refer to Chapter 8 at 161 *infra* for Kahn-Freund’s discussion on the ‘so-called freedom of the contract of employment’.

⁴⁰⁰ Refer to footnote 79 *supra* for s 145(2) grounds of review.

⁴⁰¹ Brown T, Mortlock H, Rankin C and Phillips AT *Employment Tribunal Claims* (2000) The Stationery Office Norwich (hereinafter referred to as “Brown *et al*”) at 1.

⁴⁰² He must have 7 years, or more, experience. The chairperson must be a barrister or solicitor and is appointed by the Lord Chancellor (Wheeler at 271).

⁴⁰³ Brown *et al* at 2.

⁴⁰⁴ Duddington at 180.

As stated above, unfair dismissal claims⁴⁰⁵ are the most common type of claim brought in employment tribunals by employees provided they have “more than one year’s continuous employment with the same employer or with an associated employer”⁴⁰⁶. Ss 98(1) and (2) of the ERA, 1996 stipulate (only) *five fair reasons* why an employee can be dismissed, namely:-

- redundancy;
- conduct of employee which justifies dismissal, for example, failure to obey reasonable orders, dishonesty, fighting, etc.;
- capability, including incapability on grounds of ill health or poor performance and may even include the lack of the proper skills and qualifications;
- some other substantial reason of a kind justifying dismissal (known as “SORS”⁴⁰⁷), not falling within the other categories, but which reasons still justify dismissal⁴⁰⁸;
- where there is a statutory bar to the individual being employed in a particular capacity.

An employee’s claim for unfair dismissal will succeed should an employer fail to show that the dismissal was for any of the aforesaid reasons⁴⁰⁹. The employment tribunal only has to consider the issue of *reasonableness* once the employer has brought the dismissal within the list of the five reasons.

⁴⁰⁵ In South Africa, employees’ right not to be unfairly dismissed is provided for in s 185 of the LRA together with the right not to be subjected to unfair labour practices.

⁴⁰⁶ *Brown et al* at 3; redundancy, two years employment required. This is contrary to the position in South Africa where the LRA and EEA caters for probationary employees and (even) applicants for employment. Perhaps South Africa should rather follow the United Kingdom’s example in this regard and only allow employees to institute unfair dismissal claims after one years continuous employment.

⁴⁰⁷ *Brown et al* at 3.

⁴⁰⁸ *Du Toit et al*, at 377 and 402, point out that South Africa has ratified the ILO Termination of Employment Convention 158 of 1982, with s 188 reproducing the substance of the ILO Convention (prescribing three fair reasons for dismissal, namely relating to the employee’s conduct, capacity or based on the employer’s operational requirements). *Du Toit et al* remark that the United Kingdom, “by contrast, has not ratified the Convention but enacted similar provisions creating an additional category of ‘other substantial reason’ to cater for instances where the reason for dismissal does not relate directly to the employee’s conduct, capability or qualifications: [s 98(1), (2), Employment Relations Act, 1996]”.

⁴⁰⁹ *Duddington* at 199. Once the employer has proved one of the 5 “potentially fair” reasons, the action moves on to the question of “reasonableness” prescribed in s 98(4) of the ERA, 1996 – the employment tribunal must be “satisfied that the employer acted reasonably in treating *that* reason as a sufficient reason for dismissing the employee” (*Duddington* at 199).

There are therefore three possibilities, namely, “if the employer fails to show that the reason was one of the potentially fair reasons, the employee’s claim will normally succeed; if the reason was one which is automatically unfair, the employee’s claim will automatically succeed; and if the employer shows that the reason was for one of the potentially fair reasons, the action continues to the reasonableness stage”⁴¹⁰.

Employment tribunals appear very similar in many respects to the “labour courts” found in other European countries and can “no longer be regarded as purely administrative tribunals”⁴¹¹. A conciliation procedure is provided for failing which a tribunal hearing follows, i.e. a copy of the application to the employment tribunal is sent to “ACAS which is legally obliged to try to find an agreed settlement through conciliation (without the need for a tribunal hearing)”⁴¹².

In an apparent attempt to reduce the workload of employment tribunals and contrary to South African labour law, s 13 of the ER(DR)A, 1998 (by the insertion of s 127A in the ERA, 1996) provides for the reduction (in certain instances) of the “compensatory award included in the award of compensation for unfair dismissal” if an internal appeal procedure (against the dismissal) has been provided (and written notification thereof given to the employee) but the employee failed to follow the same. Where such procedure exists and the employer prevents the employee (complainant) from appealing in accordance with this procedure, a supplementary award⁴¹³ will be included in the final order. It may be an idea to introduce a similar provision (pre-arbitration dismissal already exists⁴¹⁴) in order to alleviate the burden on the CCMA.

Similarly, another penalty unknown to South African labour law, is the awarding of an extra two weeks’ pay compensation in the event of an

⁴¹⁰ Duddington at 200.

⁴¹¹ Wheeler at 271.

⁴¹² *Ibid.*

⁴¹³ S 127A(4) stipulates that the “amount of such a reduction or supplementary award shall not exceed the amount of two weeks’ pay”.

⁴¹⁴ Refer to discussion in Chapter 1 at 8-10 *supra*.

employer failing to provide a written statement of the reasons for dismissal within 14 days from request⁴¹⁵.

A tribunal decision (once given) can be challenged in two ways, namely:-

- it can be *reviewed* by the tribunal; or
- it can be taken on *appeal* to the Appeal Tribunal⁴¹⁶.

Review

An important aspect of the LRA is the (limited) right of *review* granted to a party challenging CCMA arbitration awards. In Britain, however, *judicial review* in employment law only finds (very) limited application, namely where the decision was made by a public body or where an employee or employer has the right to refer disputes (relating to the employment relationship) to a disciplinary or other body established by statute⁴¹⁷.

It should be noted that mere clerical mistakes which occur in a tribunal decision may, at any time, be addressed and corrected by the tribunal Chairperson (“the slip rule”)⁴¹⁸. These mistakes are, however, restricted to clerical mistakes and arithmetical errors⁴¹⁹.

However, the tribunals have a “more extensive power” to *review their own* decisions in certain circumstances⁴²⁰, namely:-

- a wrong decision resulting from a tribunal staff error;
- where notice of the proceedings or the hearing was not received by a party;
- where the decision was made in the absence of a party;

⁴¹⁵ S 92 of the ERA, 1996.

⁴¹⁶ Holland & Burnett at 377.

⁴¹⁷ *Ibid* at 231 referring to the definition contained in *McLaren v Home Office* [1990] ICR 824.

⁴¹⁸ *Brown et al* at 77.

⁴¹⁹ *Ibid*.

⁴²⁰ *Ibid*.

- where new evidence has become available (after the hearing), the existence whereof could not have been reasonably known or foreseen at the time of the hearing;
- where the interests of justice require a review (for example, where a procedural error has led to an erroneous decision or where false evidence, by the applicant, has resulted in a compensatory award)⁴²¹.

The application for review can be submitted orally (at the hearing) or in writing (to the tribunal) within 14 days from the date of despatch of the decision to the parties (an extension may be allowed)⁴²². The application must contain the grounds on which the application for a review is based, failing which the

⁴²¹ Brown *et al*, at 126, with reference to *The Industrial Tribunals (Constitution & Rules of Procedure) Regulations 1993* (No. 2687):

“Review of tribunal’s decision

11 -

- (1) Subject to the provisions of this rule, a tribunal shall have power, on the application of a party or of its own motion, to review any decision on the grounds that -
 - (a) the decision was wrongly made as a result of an error on the part of the tribunal staff;
 - (b) a party did not receive notice of the proceedings leading to the decision;
 - (c) the decision was made in the absence of a party;
 - (d) new evidence has become available since the conclusion of the hearing to which the decision relates, provided that its existence could not have been reasonably known of or foreseen at the time of the hearing; or
 - (e) the interests of justice requires such a review.
- (2) A tribunal may not review a decision of its own motion unless it is the tribunal which issued the decision.
- (3) A tribunal may only review a decisions of its own motion if, within the period beginning with the date of the hearing and ending with the fourteenth day after the date on which the decision was sent to the parties, it has sent notice to each of the parties explaining in summary form the ground upon which and reasons why it is proposed to review the decision and giving them an opportunity to show cause why there should be no review.
- (4) An application for the purposes of paragraph (1) may be made at the hearing. If no application is made at the hearing, an application may be made to the Secretary at any time from the date of the hearing until 14 days after the date on which the decision was sent to the parties and must be in writing stating the grounds in full.
- (5) An application for the purposes of paragraph (1) may be refused by the President or by the chairman of the tribunal which decided the case or by a Regional Chairman if in his opinion it has no reasonable prospect of success.
- (6) If such an application is not refused under paragraph (5) it shall be heard by the tribunal which decided the case, or -
 - (a) where it is not practicable for it to be heard by that tribunal; or
 - (b) where the decision was made by a chairman acting alone under rule 13(8), by a tribunal appointed by either the President or a Regional Chairman.
- (7) On reviewing its decision a tribunal may confirm the decision, or vary or revoke the decision under the chairman’s hand; and if it revokes the decision, the tribunal shall order a re-hearing before either the same or a differently constituted tribunal.”

Brown *et al* at 77.

⁴²² *Ibid.*

application will in all likelihood be refused on the basis that there is no reasonable prospect of success⁴²³.

This review process is used to remedy “minor slips discovered shortly after the hearing”. It is *not* an “alternative to an appeal” and any complaint about the reasoning which resulted in the decision, must go to the Appeal Tribunal⁴²⁴.

Similarly, any order made by the Appeal Tribunal may, on application or of its own motion, be *reviewed* and revoked or varied on the grounds that:-

- “the order was wrongly made as the result of an error on the part of the tribunal or its staff;
- a party did not receive proper notice of the proceedings leading to the order;
or
- the interests of justice require such review”⁴²⁵.

This application for review must also be made within 14 days of the “date of the order” and a “clerical mistake in any order arising from an accidental slip or omission may at any time be corrected by, or on the authority of, a judge or member”⁴²⁶.

It should be noted that the aforesaid review process will be conducted by the *same* tribunal which has handed down the decision in respect of which the application for review has been lodged. The reviews provided for in the LRA are not lodged and dealt with by the same tribunal (CCMA) and are disposed of by the LC.

⁴²³ *Ibid.*

⁴²⁴ Holland & Burnett at 378.

⁴²⁵ R 33 of the “*Employment Appeal Tribunal Rules 1993*” (obtained from the website www.employmentappeals.gov.uk) (hereinafter referred to as the “Appeal Tribunal Rules”).

⁴²⁶ *Ibid.*

Appeal

An *appeal* against a decision of an employment tribunal⁴²⁷ can be lodged with the Appeal Tribunal (originally established by the Employment Protection Act 1975, but now governed by the Employment [formerly “Industrial”] Tribunals Act 1996⁴²⁸). This tribunal is located in London⁴²⁹ and has the status of a division of the High Court (notwithstanding its title) because it is presided over by a High Court judge and is a superior court of record⁴³⁰. Appeals are confined to *points of law*⁴³¹ (in order to limit the number of appeals) and the appellant must therefore show that the tribunal went wrong in law⁴³².

⁴²⁷ The Appeal Tribunal also deals with appeals from decisions of the Certification Officer and the CAC (r 3(c) and (d) of the Appeal Tribunal Rules).

⁴²⁸ Hereinafter referred to as “the ETA, 1996”.

⁴²⁹ S 20(2) of the ETA, 1996 provides that the “Appeal Tribunal shall have a central office in London but may sit at any time and in any place in Great Britain”.

⁴³⁰ S 20(3) of the ETA, 1996 (Wheeler at 272).

⁴³¹ According to the Appeal Tribunal web discussion, an appeal may lie against a decision of the Certification Officer on a point of fact as well.

⁴³² Wheeler at 272.

S 21 of the ETA, 1996 deals with the jurisdiction of the Appeal Tribunal and provides as follows:

“21 –

(1) An appeal lies to the Appeal Tribunal on any *question of law* arising from any decision of, or arising in any proceedings before, an industrial tribunal under or by virtue of –

- (a) the Equal Pay Act 1970,
- (b) the Sex Discrimination Act 1975,
- (c) the Race Relations Act 1976,
- (d) the Trade Union and Labour Relations (Consolidation) Act 1992,
- (e) the Disability Discrimination Act 1995, or
- (f) the Employment Rights Act 1996.

(2) No appeal shall lie *except to the Appeal Tribunal* from any decision of an industrial tribunal under or by virtue of the Acts listed in subsection (1) (my emphasis).

(3) Subsection (1) does not affect any provision contained in, or made under, any Act which provides for an appeal to lie to the Appeal Tribunal (whether from an industrial tribunal, the Certification Officer or any other person or body) otherwise than on a question to which that subsection applies.”

However, s 291 of the TULR(C)A, 1992 also specifically provides for a right of *appeal* from an industrial tribunal to the Appeal Tribunal in respect of:

- (1) *any question of law or fact* arising from a decision of, or arising in proceedings before, an industrial tribunal under s 174 (right not to be unreasonably excluded or expelled from trade union);
- (2) *any question of law* arising from a decision of, or arising in proceedings before, an industrial tribunal under any other provision of the TULR(C)A, 1992; and
- (3) no other appeal lies from a decision of an industrial tribunal under the TULR(C)A, 1992; and s 11 of the [1992 c.53] Tribunals and Inquiries Act 1992 (appeals from certain tribunals to the HC or Court of Session) does not apply to proceedings before an industrial tribunal under the TULR(C)A, 1992.

Brown *et al*⁴³³ identify:-

- a “question of law” as:
 - a misdirection, misapplication or misunderstanding of the law;
- and
- an “error of law” as, for example:
 - a perverse decision of the tribunal, i.e. a decision for which there is no evidence in support; or
 - bias on the part of the tribunal, i.e. because it is a breach of the rules of natural justice.

Wheeler, in referring to *The Post Office v Lewis* [1997]⁴³⁴ remarks that the Court of Appeal made it clear that where a decision of an employment tribunal was neither perverse nor affected by an error of law, it was not permissible for the Appeal Tribunal to interfere.

An appeal application (from an employment tribunal decision) must be accompanied by, *inter alia*, a copy of the “extended written reasons for the decision or order of that tribunal”⁴³⁵, and must be instituted within “42 days from the date on which the extended written reasons for the decision or order of the employment tribunal were sent to the appellant”⁴³⁶. Decisions of employment tribunals, when sent to the parties, are accompanied by an explanatory advice as to how forms can be obtained for purposes of an appeal⁴³⁷.

The parties are also advised that the Appeal Tribunal will not intervene if a decision was properly reached on the facts of the case. It is only under exceptional circumstances that new points of law, not raised at the employment tribunal, can be argued at the Appeal Tribunal⁴³⁸.

⁴³³ Brown *et al* at 77-78.

⁴³⁴ Wheeler at 273.

⁴³⁵ R 3(1)(c) of the Appeal Tribunal Rules.

⁴³⁶ R 3(3)(a) of the Appeal Tribunal Rules.

⁴³⁷ Holland & Burnett at 378.

⁴³⁸ *Ibid.*

The Appeal Tribunal is headed by a President who is a High Court judge and unless the original decision was made by the employment tribunal Chairman sitting alone, the presiding judge will have two laypersons with him in deciding the appeal. These laypersons can outvote the presiding judge⁴³⁹.

Interestingly, the Appeal Tribunal will, if at all possible, and if it appears that there is a “reasonable prospect of agreement being reached between the parties”, endeavour to facilitate a settlement by, for example, “adjourning any proceedings or otherwise”⁴⁴⁰.

A further appeal on a point of law from the decision of the Appeal Tribunal to the Court of Appeal⁴⁴¹ is possible with the permission of that court and only, very occasionally, can there be a “further appeal on a *point of law* to the House of Lords but again only with the permission of the House of Lords”⁴⁴².

⁴³⁹ Wheeler at 272.

S 28 of the ETA, 1996 deals with the composition of the Appeal Tribunal and provides:

“28 –

- (1) The Appeal Tribunal may sit, in accordance with directions given by the President of the Appeal Tribunal, either as a single tribunal or in two or more divisions concurrently.
- (2) Subject to subsections (3) to (5), proceedings before the Appeal Tribunal shall be heard by a judge and either two or four appointed members, so that in either case there is an equal number –
 - (a) of persons whose knowledge or experience of industrial relations is as representatives of employers, and
 - (b) of persons whose knowledge or experience of industrial relations is as representatives of workers.
- (3) With the consent of the parties, proceedings before the Appeal Tribunal may be heard by a judge and one appointed member or by a judge and three appointed members.
- (4) Proceedings on an appeal on a question arising from any decision of, or arising in any proceedings before, an industrial tribunal consisting of the person mentioned in s 4(1)(a) alone shall be heard by a judge alone unless a judge directs that the proceedings shall be heard in accordance with subsections (2) and (3).
- (5) Where a Minister of the Crown so directs in relation to any proceedings on grounds of national security, the proceedings shall be heard by the President of the Appeal Tribunal alone.”

⁴⁴⁰ R 36 of the Appeal Tribunal Rules.

⁴⁴¹ S 37 of the ETA, 1996 deals with appeals from the Appeal Tribunal and provides that:

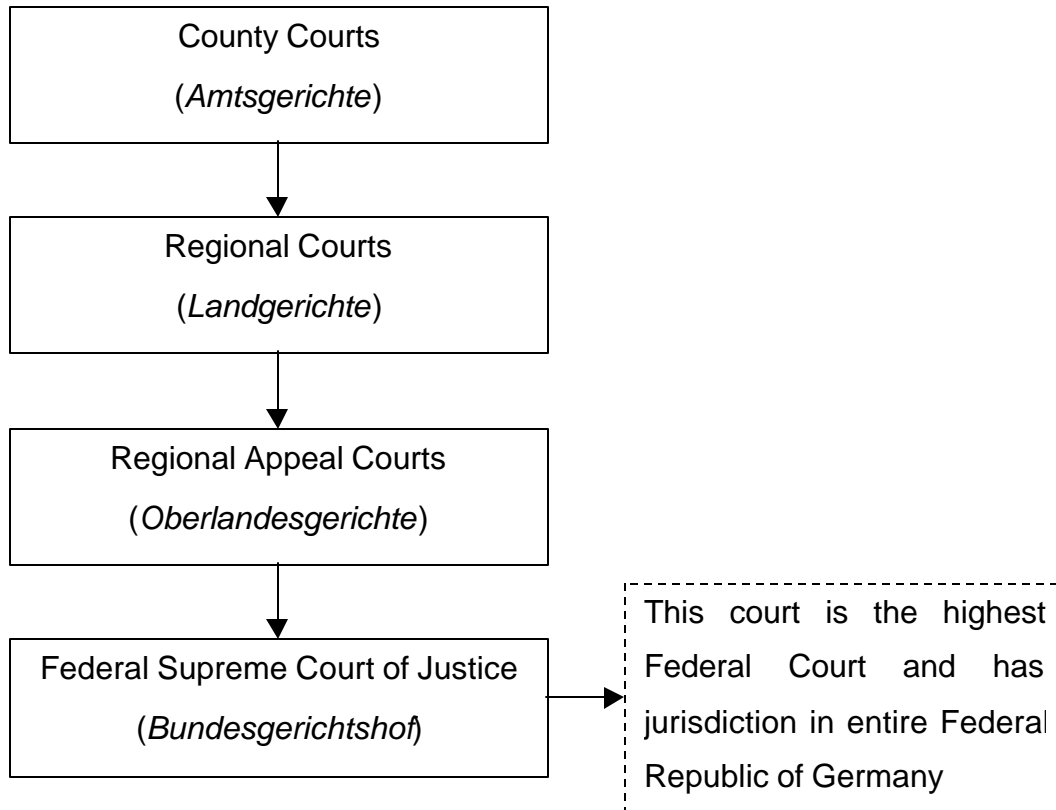
“37 -

- (1) Subject to subsection (3), an appeal on any question of law lies from any decision or order of the Appeal Tribunal to the relevant appeal court with the leave of the Appeal Tribunal or of the relevant appeal court.
- (2) In subsection (1) the “relevant appeal court” means –
 - (a) in the case of proceedings in England and Wales, the Court of Appeal, and
 - (b) in the case of proceedings in Scotland, the Court of Session.
- (3) No appeal lies from a decision of the Appeal Tribunal refusing leave for the institution or continuance of, or for the making of an application in, proceedings by a person who is the subject of a restriction of proceedings order made under section 33.”

⁴⁴² Wheeler at 273.

4.2 GERMAN LEGAL SYSTEM

The German court structure is “complex”⁴⁴³ due to the specialization and decentralization which have evolved in (federal) Germany (and the codification of German law) while attempting to maintain the independence of the *Länder* (territories) in legal and court matters⁴⁴⁴. This system is credited with making justice, especially at lower levels, “more accessible” and with introducing a “much quicker process”. Courts of final instance are located throughout Germany which avoids “overcentralisation of legal affairs” in any one city⁴⁴⁵. The court structure, simplified, is as follows⁴⁴⁶:



⁴⁴³ Foster N & Sule S *German Legal System & Laws* Third Edition (2002) Oxford University Press (hereinafter referred to as “Foster & Sule”), at 66.

⁴⁴⁴ *Ibid.*

⁴⁴⁵ *Ibid* at 75.

⁴⁴⁶ Graph prepared by the writer with reference to Freckmann A and Wegerich T *The German Legal System* (1999) Sweet and Maxwell Limited London (hereinafter referred to as “Freckmann & Wegerich”), at 131.

The abovementioned courts are courts of “ordinary jurisdiction” and labour jurisdiction does not attach to the ordinary jurisdiction, but is an autonomous branch of the judiciary⁴⁴⁷ organized into three levels, namely, the labour courts (*arbeitsgerichte*), the regional labour court (appeal) (*landesarbeitsgericht*), and finally the Federal Labour Court (*Bundesarbeitsgericht*)⁴⁴⁸. The labour courts are the courts of first instance having “exclusive subject-matter jurisdiction over all disputes arising from the employment relationship regardless of the value of the matter in dispute”⁴⁴⁹.

Labour courts constitute one of five different hierarchies of courts with their own specific jurisdiction which have been established in Germany⁴⁵⁰ in order to deal with specialized subjects. The further four hierarchies are courts of ordinary or regular jurisdiction (*ordentliche gerichte*); administrative courts (*verwaltungsgerichte*); social courts (*sozialgerichte*) and revenue or finance courts (*finanzgerichte*)⁴⁵¹. Also, arbitration tribunals (*schiedsgerichte*) provide for the “private resolution of legal disputes, which are used extensively in commercial law”⁴⁵². These tribunals are subject to the provisions of the Civil Code of Procedure and the legality of their decisions can be subjected to judicial review⁴⁵³.

Labour courts are the most important institutions for purposes of dispute resolution in Germany and have a long history. Industrial courts (*gewerbegerichte*) were constituted by statute in 1890. The labour courts, by name (*arbeitsgerichte*), came into being in 1926 (to deal with both individual and collective labour disputes⁴⁵⁴) and the labour court system currently has jurisdiction in respect of virtually any legal dispute relating to employment

⁴⁴⁷ Freckmann & Wegerich at 132.

⁴⁴⁸ Refer also to graph by Schneider at 85 *infra*.

⁴⁴⁹ Lingemann S, von Steinau-Steinrück & Mengel A *Employment & Labor Law in Germany* (2003) C.H. Beck München (hereinafter referred to as Lingemann *et al*), at 76.

⁴⁵⁰ Foster & Sule, at 67, remark that courts dealing with specialized subjects have also developed, to a lesser extent, in France and the United Kingdom. South Africa, on the other hand, appears to be moving away from the specialized labour court concept if regard is has to the imminent introduction of the Superior Courts Bill (refer to discussion of Bill in Chapter 7 *infra*).

⁴⁵¹ Foster & Sule at 67-68.

⁴⁵² Freckmann & Wegerich at 131-132.

⁴⁵³ *Ibid* at 132.

⁴⁵⁴ Foster & Sule at 546.

relationships⁴⁵⁵. The labour courts' jurisdiction is founded on a 1953 "statute law" which has undergone relatively few changes⁴⁵⁶. Labour courts are governed by the Labour Courts Act (*Arbeitsgerichtsgesetz: Arb GG*⁴⁵⁷) and labour law courts of first instance in the Federal Republic of Germany, in 2002, were estimated to number 123 and para 2 of the *Arb GG* "directs all disputes involving labour matters to these courts"⁴⁵⁸.

Labour courts consist of both professional and lay judges, with the latter being nominated by trade unions and employers' associations in the respective judicial districts⁴⁵⁹. Although in the normal course the professional judges take the lead in the proceedings, the lay judges have the same rights and powers. Both the labour courts and the regional labour courts (appeal) (*landesarbeitsgerichte*⁴⁶⁰) consist of one professional judge and two lay judges⁴⁶¹.

However, prior to this stage being reached, the employee is entitled, but not obliged, to lodge a complaint directly to the establishment's authority. If unsuccessful, the complaint may be lodged with the *works council*⁴⁶² (if it exists it must be heard before every dismissal⁴⁶³) and if the employee is still not satisfied and the conflict is one of rights, he may finally involve the labour

⁴⁵⁵ Schneider M "Employment Litigation on the Rise? Comparing British Employment Tribunals & German Labor Courts" Comp. Labor Law & Pol'y Journal 2001 [Vol 22:261] 261 (hereinafter referred to as "Schneider"), at 263.

⁴⁵⁶ *Ibid* at 264.

⁴⁵⁷ Hereinafter referred to as "the *Arb GG*".

⁴⁵⁸ Foster & Sule at 546. Like in South Africa and Britain, most disputes relate to dismissals "more frequently than anything else" (Foster & Sule at 546).

⁴⁵⁹ Lingemann *et al* at 76.

⁴⁶⁰ There are different translations of "*landesarbeitsgerichte*", namely:

- "labour court of appeal" (Schneider at 268);
- "regional labour courts" (Foster & Sule at 547); or
- "state labour courts" (Lingemann *et al* at 76).

⁴⁶¹ Lingemann *et al* at 76.

⁴⁶² Works councils in Germany are exclusively made up of employee representatives ("unlike many other countries") and act as counterparts of management with members elected four yearly by secret ballot by all employees of the establishment (industrial unit, plant, office), as per Weiss M and Schmidt M *Labour Law & Industrial Relations in Germany* Third revised edition (2000) Kluwer Law International (hereinafter referred to as "Weiss & Schmidt"), at 188.

⁴⁶³ Lingemann *et al* at 26.

court. As the employee is not obliged to follow this course, he may, from the outset, approach the labour court direct⁴⁶⁴.

An arbitration committee, constituted and operational at the workplace, (consisting of a number of members appointed by the employer, an equal number appointed by the works council, and a neutral president) plays a limited role in that, should the employer and the works council disagree on the justification of the complaint, the works council may appeal to the arbitration committee. Where the complaint relates to a *conflict of interests*, the arbitration committee's decision supercedes any agreement between the employer and the council. In the case of a conflict of interest, either party may lodge an *appeal* with the labour court on the basis that the arbitration committee has exceeded its jurisdiction⁴⁶⁵. If it involves a *conflict of rights*, however, the committee's decision *only* serves as a recommendation to the employer and the works council as to how the case should be settled. The latter court cannot annul the committee's decision and is mainly allowed to consider whether the committee has exceeded its jurisdiction⁴⁶⁶.

The legislature intended the arbitration committee to operate rapidly and on a flexible basis and very few procedural rules are prescribed. In the majority of cases professional labour judges serve as committee presidents and the procedure used in labour courts is normally adopted.

There are two forms of labour disputes, namely disputes between the employer and employees (individually or collectively) and judicial investigations⁴⁶⁷ (a form of investigation procedure, before the labour courts, to establish general guidelines on co-determination amongst others⁴⁶⁸). Unilateral termination by an employer is severely restricted by the Protection Against Dismissal Act of 1969

⁴⁶⁴ Weiss & Schmidt at 133.

⁴⁶⁵ *Ibid.*

⁴⁶⁶ *Ibid* at 200.

⁴⁶⁷ Foster & Sule at 546.

⁴⁶⁸ *Ibid* at 547.

(*Kündigungsschutzgesetz – KSchG*)⁴⁶⁹ and dismissal will only be effective on one of three grounds explicitly provided for in para 1(2) of the *KSchG*⁴⁷⁰, namely, conduct-related dismissals (i.e. relating to the employee’s workplace misconduct); dismissal for person-related reasons (i.e. employee’s inability to do the work) and for operational reasons⁴⁷¹.

Representation at the level of labour courts (*arbeitsgerichte*) is allowed (although not compulsory) by either an attorney or a representative of either a union or employer organization. However, some form of representation is compulsory before the regional courts (para 11 II *Arb GG*)⁴⁷².

A complaint may be filed with the labour court within three weeks of receiving the dismissal notice⁴⁷³ and a two-step procedure follows. Firstly, an *informal hearing* (*Gütertermin*) which includes a form of *conciliation* takes place very shortly after the filing of the action⁴⁷⁴.

⁴⁶⁹ Hereinafter referred to as “the *KSchG*”. This Act applies in favour of employees employed for more than 6 months in firms with more than five employees (Foster & Sule at 536).

⁴⁷⁰ Lingemann *et al* at 27; also providing a translation, at 128, of paras 1(1) and (2) of the *KSchG*, namely:

“Chapter 1. General Dismissal Protection

§ 1. Socially Unjustified Dismissals

(1) The termination of the employment relationship of an employee who has been employed in the same works or the same company without interruption for more than six months is legally invalid if it is socially unjustified.

(2) A dismissal is socially unjustified if it is not due to reasons related to the person, the conduct of the employee, or to compelling operational requirements which preclude the continued employment of the employee in the works ...”

⁴⁷¹ Lingemann *et al* at 26-27.

⁴⁷² Foster & Sule at 74 and 547.

⁴⁷³ Lingemann *et al*, at 76, observe that the employee must “petition the labour court to find that the employment relationship has not been dissolved legally by termination”. Lingemann *et al*, at 131, translated the relevant para in the *KSchG* as follows:

“§ 4 Seeking Redress in the Labor Court

Where an employee wishes to assert a claim that his dismissal is socially unjustified, he must petition the Labor Court within three weeks after receiving the termination notice to find that the employment relationship has not been dissolved due to the termination. If § 2 is the case, the petition shall seek a finding that the modified working conditions are socially unjustified. Where an employee has submitted an objection to the works council (§ 3), he should include the position of the works council with the complaint. To the extent the dismissal requires the approval of an authority, the time period for seeking redress in the Labor Court shall commence only once the employee has been notified of the decision of such authority.”

⁴⁷⁴ Foster & Sule at 546-547.

Dismissal proceedings are initiated (“mandated by law”) with the *conciliatory hearing* before the presiding judge (not the full panel of judges)⁴⁷⁵. This informal solution (para 54 *Arb GG*) is thus attempted by the judge and “most cases are settled at this stage” as the judge informs the parties “of the likely result if the matter went to a full hearing”⁴⁷⁶. The primary goal of the conciliation meeting is “to come to an amicable settlement”⁴⁷⁷. If conciliation fails the matter is heard before the labour court (*arbeitsgerichte*) (in practice this usually means that a new court date is scheduled and legal briefs submitted in preparation of the hearing⁴⁷⁸).

Should an employee’s complaint be upheld, the “right to continued employment” is a natural consequence. The successful employee, however, may elect not to enforce the judgment and enter alternative employment. Prior to judgment either party may, where dismissal is ruled to be unjust, apply for termination of the employment relationship and the employee may be given monetary compensation. This is normally the case as strained relations are not compatible with continued employment⁴⁷⁹.

Once judgment is handed down para 64 of the *Arb GG* provides for an *appeal* to the regional labour court (appeal) (*landesarbeitsgericht*) only in respect of claims exceeding a certain amount⁴⁸⁰ and covers questions of *fact and law*. These courts of second instance have “exclusive jurisdiction” to hear appeals from decisions of the labour courts of first instance⁴⁸¹.

A small number of cases (approximately 5%) proceed to appeal⁴⁸². A *final* (restricted) *appeal on points of law only* lies to the Federal (Supreme) Labour Court (*Bundesarbeitsgericht* para 72 *Arb GG*) with compulsory representation

⁴⁷⁵ Lingemann *et al* at 77.

⁴⁷⁶ Foster & Sule at 547. South Africa may wish to follow a similar approach.

⁴⁷⁷ Lingemann *et al* at 77.

⁴⁷⁸ *Ibid.*

⁴⁷⁹ Foster & Sule at 547.

⁴⁸⁰ For the appeal to be allowed, the value of the matter in dispute must exceed 600 Euro (para 64(2)(b) *Arb GG*).

⁴⁸¹ Weiss & Schmidt at 123.

⁴⁸² *Ibid.*

by a lawyer (para 11 II *Arb GG*) and again only 5% of cases are appealed⁴⁸³. The Federal (Supreme) Labour Court is the final court of appeal and rules (“upon special admission”) on appeals from the final decisions of the regional labour courts (*landesarbeitsgerichte*)⁴⁸⁴. Decisions of the regional labour court may only, under specific conditions, be *appealed* to the Federal (Supreme) Labour Court, which comprises of different divisions, called “senates”⁴⁸⁵, with each senate consisting of three professional judges and, despite hearing points of *law* only, “still retains the lay element of two judges”⁴⁸⁶. However, the “professional element has more weight” since the Federal (Supreme) Labour Court focuses exclusively on questions of *law* (and not fact)⁴⁸⁷. Further, a Great Senate (*grosser Senat*) of the Federal (Supreme) Labour Court (*Bundesarbeitsgericht*) has been established to “oversee legal unity and the development of labour law (para 45 *Arb GG*)”⁴⁸⁸, i.e. to discuss and decide on points of law and to avoid inconsistency in important legal principles and conflicting decisions” in the different hierarchies of courts (*Grundgesetz* Article 95(3))⁴⁸⁹.

If a senate of the Federal (Supreme) Labour Court wishes to hand down a contradictory judgment (from another senate or the Great Senate itself), the matter must be referred to the Great Senate. Matters of fundamental importance may also be referred to the Great Senate “provided that this seems necessary as to the development of the legal system or in order to guarantee uniformity of decisions”⁴⁹⁰. This power (in relation to the development of the legal system) means that “in fact, the [Great] Senate is, within narrow limits, entrusted with tasks similar to those of the legislator”⁴⁹¹.

⁴⁸³ *Ibid.*

⁴⁸⁴ Lingemann *et al* at 76.

⁴⁸⁵ Weiss & Schmidt at 123.

⁴⁸⁶ Foster & Sule at 74.

⁴⁸⁷ Weiss & Schmidt at 123.

⁴⁸⁸ Foster & Sule at 74.

⁴⁸⁹ *Ibid* at 74 and 75.

⁴⁹⁰ Weiss & Schmidt at 123.

⁴⁹¹ *Ibid.*

The sequence of appeals within the labour court system normally leads to the Federal (Supreme) Labour Court having the final say in labour law matters⁴⁹². However, even the Federal (Supreme) Labour Court's decisions can be challenged for lack of compatibility with the Federal Constitution as all courts are subject to the provisions of the Constitution⁴⁹³. A complaint of unconstitutionality may then be lodged with the Federal Constitutional Court.

However, finally, if a "subject matter is governed not only by German law but also by law of the European Economic Community, and if the latter plays a determining role in deciding the case at stake, labour courts of first instance and [regional] labour courts may, and the Federal Labour Court shall, in accordance with Article 234 EC Treaty, refer any doubts as to the interpretation of Community law to the European Court of Justice in Luxembourg for a preliminary ruling. The decision of the European Court of Justice is, due to the principle of supremacy of ECC Law, binding on German labour courts of all instances as well as for the Federal Constitutional Court"⁴⁹⁴.

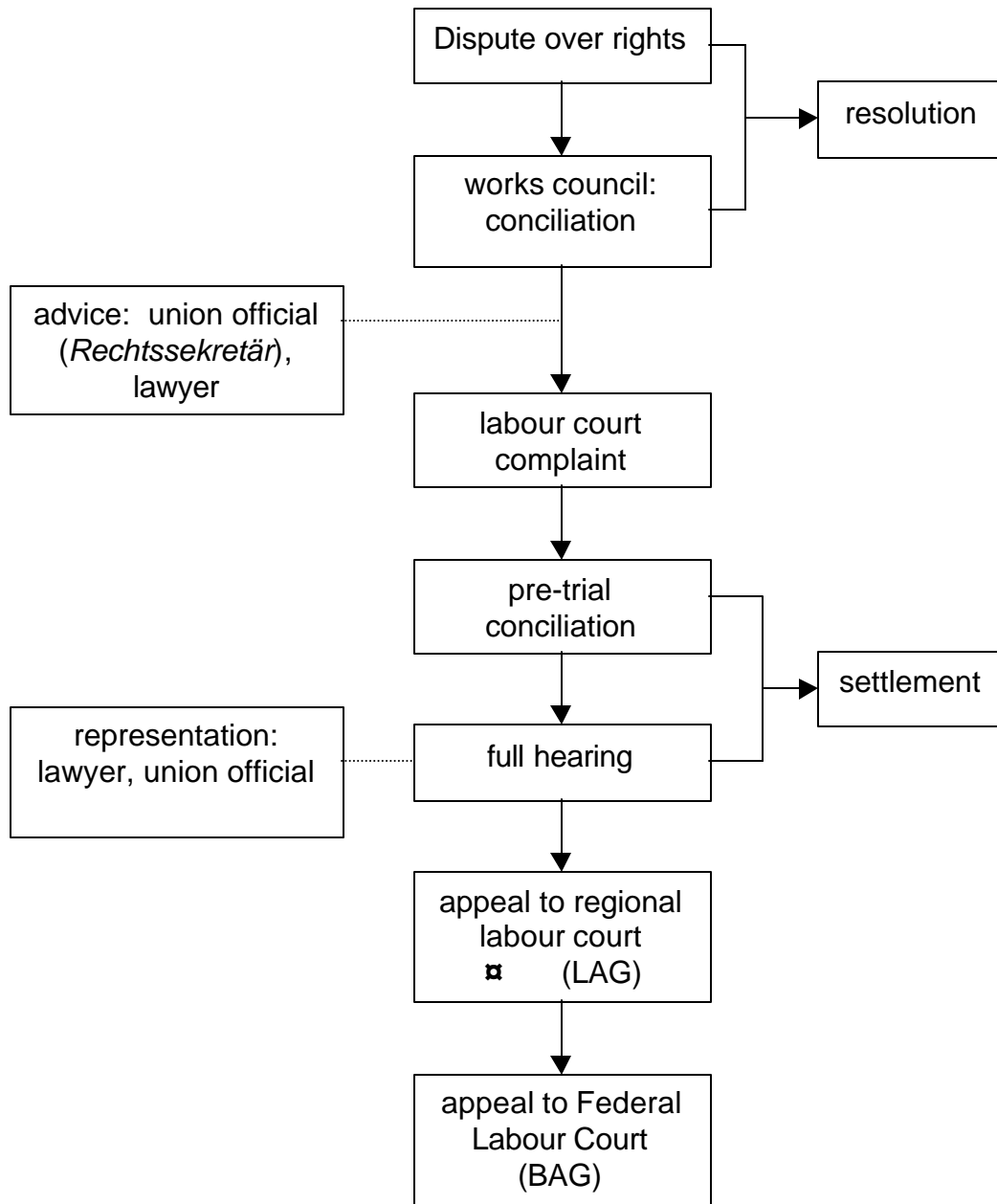
The main stages of conflict resolution in Germany are depicted in the following graph⁴⁹⁵:

⁴⁹² *Ibid.*

⁴⁹³ *Ibid.*

⁴⁹⁴ *Ibid* at 124. It was not deemed necessary to, for purposes of this thesis, consider European Community Law (refer to footnote 311 *supra*).

⁴⁹⁵ Schneider at 268.



LAG: *Landesarbeitsgericht* #

BAG: *Bundesarbeitsgericht*

▣ Changed in accordance with Foster & Sule's translation of '*landesarbeitsgericht* (i.e. Schneider referred to "appeal to labour court of appeal (LAG)").

Refer to footnote 460 *supra* for different translations of '*landesarbeitsgericht*.'

With the exclusion of certain professions, *arbitration* is not allowed insofar as *rights* disputes between employer and employee are concerned⁴⁹⁶. Employees must therefore, as a last resort, approach the labour courts⁴⁹⁷. Immediately before the hearing the professional judge and the parties are obliged to meet in order to discuss pre-trial settlement options. Only in the event of this failing, the trial hearing will commence⁴⁹⁸.

Decisions of labour courts can thus be taken on *appeal* to the Labour Court of Appeal (*landesarbeitsgericht*) on both *points of law* or *points of fact*. The Federal (Supreme) Labour Court (*Bundesarbeitsgericht*) can only hear *appeals* on legal grounds⁴⁹⁹.

There are many common features of German labour courts and British employment tribunals and the process of both jurisdictions contain important similarities⁵⁰⁰. The panel of both the tribunals and labour courts is made up of a professional lawyer and two lay judges and both the tribunals and the labour courts are “highly accessible” which result in lower costs (compared to ordinary courts)⁵⁰¹. Neither the tribunals nor the labour courts require representation of the parties who can bring the case on their own⁵⁰².

The major advantages of both German and British institutions are “easy accessibility, informality, speediness and cheapness”⁵⁰³.

⁴⁹⁶ *Ibid* at 269. Foster & Sule, at 546, remark that there is a “statutorily provided procedure introduced for parties to collective agreements which provides that the parties may submit a dispute to arbitration (paras 4 and 101 *et seq* Arb GG)”. Foster & Sule, at 74, also record that “for an indefinite time, some former rules from the DDR still apply in the new *Bundesländer*. The *Gesetz über die Errichtung und das Verfahren der Schiedsstellen für Arbeitstrecht* of 29 June 1990 (GBl, DDR 505) provides that in businesses with more than 50 employees, it is compulsory that an arbitration panel must consider a matter before resorting to the courts. Appeals against the decision can be made to the Labour Court”.

⁴⁹⁷ Schneider at 269.

⁴⁹⁸ *Ibid*.

⁴⁹⁹ *Ibid*.

⁵⁰⁰ *Ibid* at 274. Foster & Sule also state, at 538, that the “Protection from Dismissal Act (*KSchG*) is the equivalent of the unfair dismissal provisions in the UK”.

⁵⁰¹ Schneider at 274-275.

⁵⁰² *Ibid* at 275.

⁵⁰³ *Ibid*.

The lay members' role is to ensure communication of complicated legal matters, to the parties, in laymen's terms and to "enhance the perceived fairness of the hearing"⁵⁰⁴ which will ensure the parties' acceptance of the decision.

Schneider seems to capture the essence of the proceedings in Germany in a nutshell (which, at the same time, emphasizes the similarity with the process of the employment tribunals) by referring to the "tribunal-like court proceedings"⁵⁰⁵. Parties are better disposed to accept a negative outcome if the procedure is perceived by them as fair and legitimate ("the theory of procedural justice")⁵⁰⁶. Schneider refers to survey studies which have revealed that parties more readily accept a procedure as *fair* if they are treated in a dignified manner; allowed to state their case; if the ruling is based on all the relevant facts and passed impartially and, in the last instance, if a decision "*can be corrected by some appellate authority*"⁵⁰⁷. The conclusion is drawn that "[t]ribunal-like proceedings" appear to comply with all these requirements⁵⁰⁸.

By way of comparison, it is expedient to also refer to Schneider's graph⁵⁰⁹ of the main stages of the resolution of disputes over rights in Britain:

⁵⁰⁴ *Ibid.*

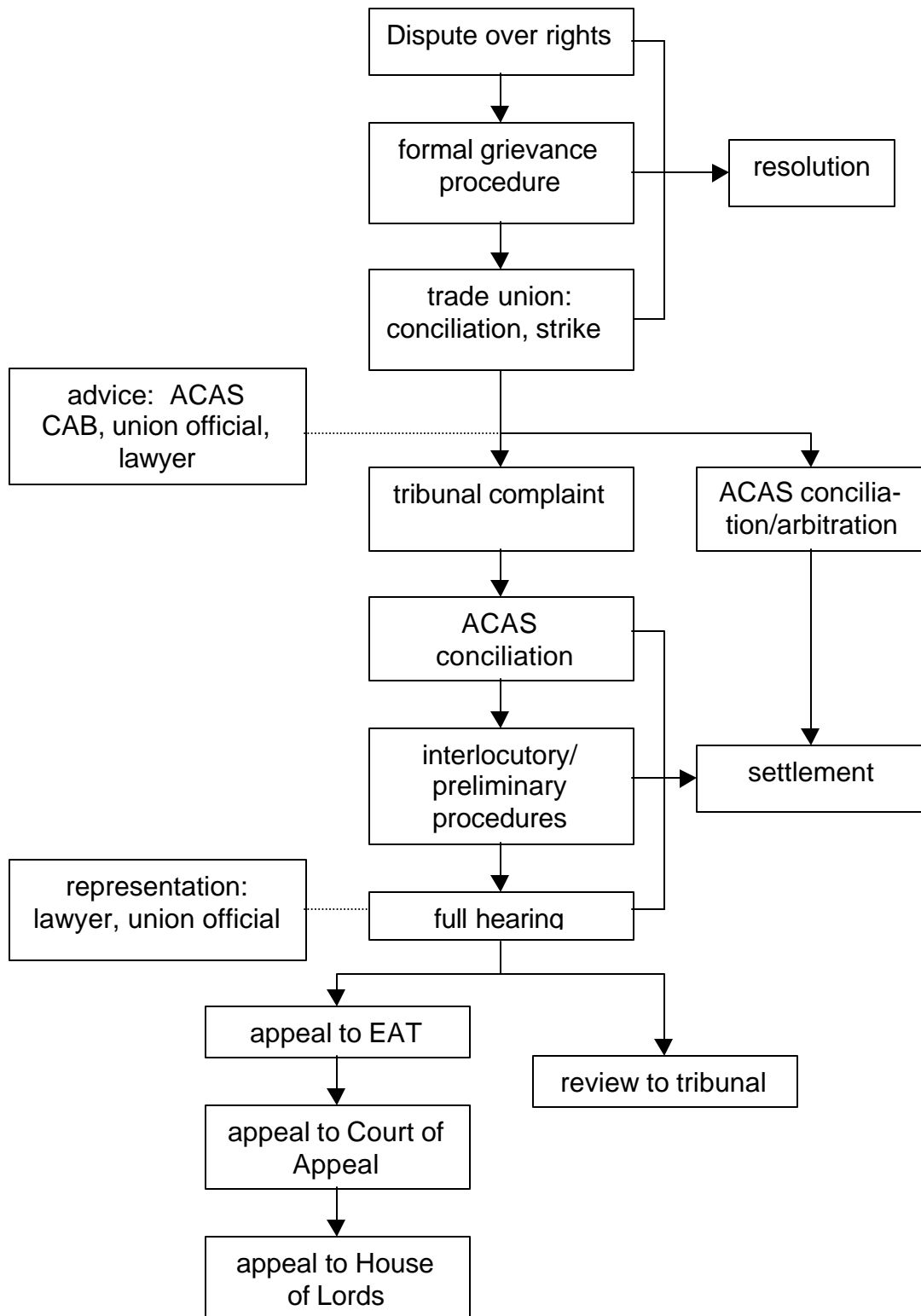
⁵⁰⁵ *Ibid.*

⁵⁰⁶ *Ibid.*

⁵⁰⁷ *Ibid* at 275-276. My emphasis to distinguish from review authority.

⁵⁰⁸ *Ibid* at 276.

⁵⁰⁹ *Ibid* at 267.



ACAS: Advisory, Conciliation and Arbitration Service
 CAB: Citizens' Advice Bureau
 EAT: Employment Appeals Tribunal

Unlike in Germany, the British system of conflict resolution allows (the ACAS) employers and employees to submit their case to arbitration⁵¹⁰ - should the dispute not be resolved at the workplace, it can either follow ACAS arbitration or employment tribunal proceedings⁵¹¹. Where, in Germany, *obligatory mediation* takes place when the parties meet to discuss pre-trial settlement options, *conciliation* must be attempted in Britain by the ACAS. As in Germany a full hearing only follows failure of this attempt⁵¹².

As opposed to an appeal (Germany) allowed in respect of either *legal* or *factual* issues, in Britain the parties can approach the tribunal for *review* of its decision (for example, that new evidence has come to light since the hearing)⁵¹³. A party can *appeal* to the Appeal Tribunal, followed by Court of Appeal and, finally, the House of Lords on *points of law only*⁵¹⁴. This has resulted in the employment tribunal being accused of having become “legalistic”⁵¹⁵ which is contrary to the “idea of an informal and non-legalistic forum for worker complaints”⁵¹⁶ and is in sharp contrast to the German labour law (court) system where parties are not only allowed to appeal *points of law* but also “a *first-instance decision on points of fact*”⁵¹⁷.

I have, for purposes of comparison with the British and German labour law systems, prepared the following graph which must be read in conjunction with the graphs prepared by Schneider⁵¹⁸:

⁵¹⁰ *Ibid* at 269.

⁵¹¹ Refer to discussion at 64-65 *supra*.

⁵¹² Schneider at 269.

⁵¹³ *Ibid*.

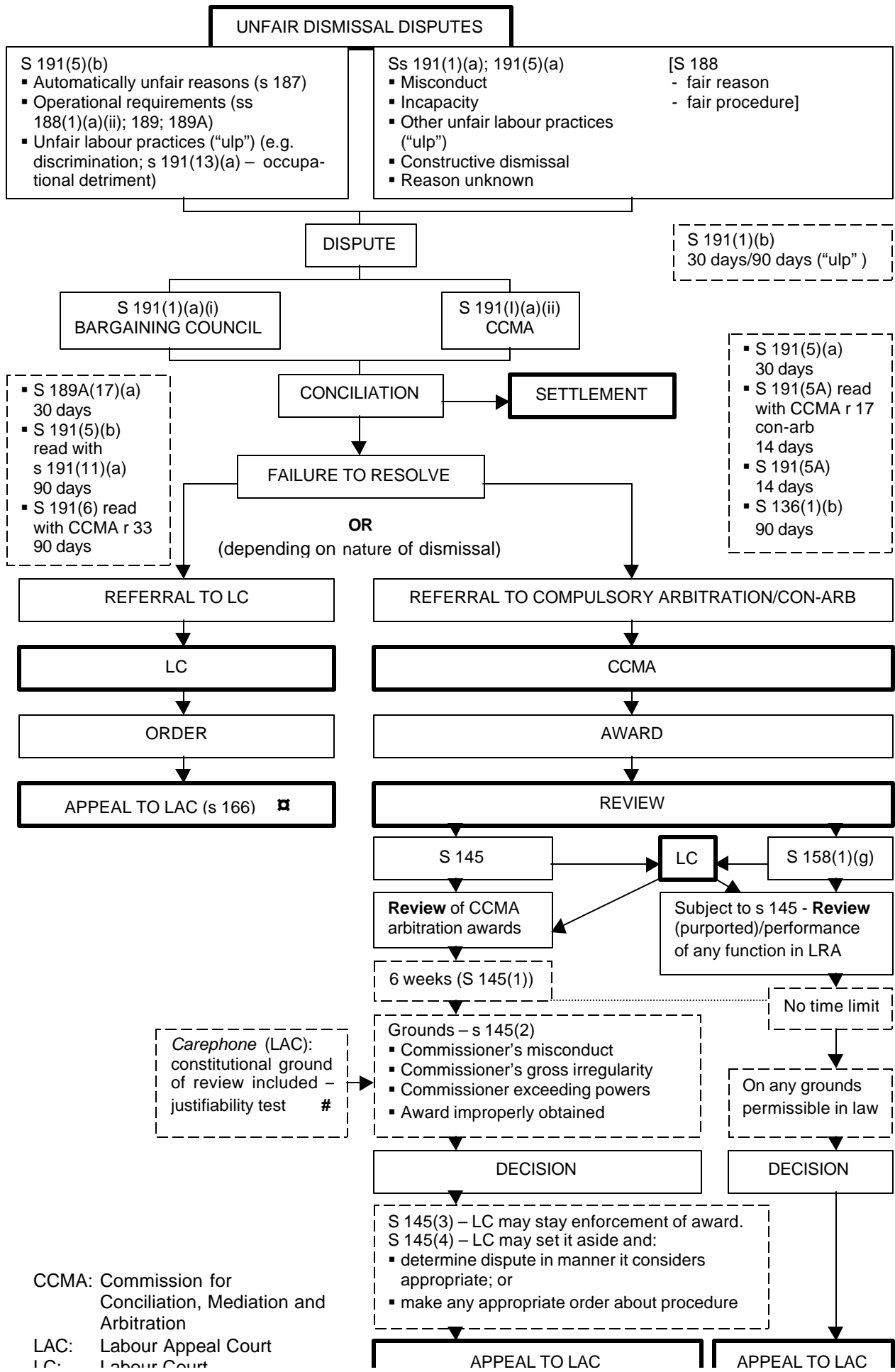
⁵¹⁴ Schneider at 269.

⁵¹⁵ *Ibid* at 276.

⁵¹⁶ *Ibid*.

⁵¹⁷ *Ibid*.

⁵¹⁸ *Ibid* at 267 and 268.



NOTES:

- **Certain sections referred to by way of example only.**
- Condonation (on good cause shown) can be granted if time limits not complied with, for example, ss 189A(17)(b); 191(2); 191(11)(b); r 5(1) of LAC rules.
- The LAC is the final court of appeal in respect of all judgments and orders made by the LC in respect of the matters within its exclusive jurisdiction (s 167(2)); the LAC may also sit as a court of first instance (s 175).
- # Discussed in detail in Chapter 5 at 118-120 *infra*.
- S 191(6) provides that “despite subsections (5)(a) or (5A), the *director* must refer the *dispute* to the Labour Court, if the *director* decides, on application by any party to the *dispute*, that to be appropriate after considering -
 - (a) the reason for *dismissal*;
 - (b) whether there are questions of law raised by the *dispute*;
 - (c) the complexity of the *dispute*;
 - (d) whether there are conflicting arbitration awards that need to be resolved;
 - (e) the public interest.
 - (7) When considering whether the *dispute* should be referred to the Labour Court, the *director* must give the parties to the *dispute* and the commissioner who attempted to conciliate the *dispute*, an opportunity to make representations.
 - (8) The *director* must notify the parties of the decision and refer the *dispute* –
 - (a) to the Commission for arbitration; or
 - (b) to the Labour Court for adjudication.
 - (9) The *director’s* decision is final and binding.
 - (10) No person may apply to any court of law to review the *director’s* decision until the *dispute* has been arbitrated or adjudicated, as the case may be.
- Although not reflected in the graph, the CCMA also plays an advisory role (e.g. s 115(3)); the CCMA is also empowered to conduct pre-dismissal arbitration (s 188 A).

An important point of departure, present in all of the legal systems discussed, is compulsory mediation, which must first take place whereafter a hearing (or compulsory arbitration in South Africa) will be proceeded with only if the conciliation attempt has failed.

In South Africa the parties can apply to the LC for a *review* of the tribunal's (i.e. CCMA) award/decision. Although the *review* process corresponds with that of Britain in name, the grounds for review appear to be wider than that of the British system. An important distinction, however, is that the review in Britain, is to the tribunal of first instance as opposed to South Africa where the review application is made to the LC (i.e. from the "tribunal" (CCMA) to the LC). An appeal then lies against the review decision of the LC to the LAC whereas, in Britain, an appeal against a tribunal decision may be made to the Appeal Tribunal, thereafter to the Court of Appeal and finally, to the House of Lords on *points of law only*.

In Germany a review procedure is not provided for but, as detailed above, decisions of a Labour Court, *both on legal and factual issues* may be made to the Labour Court of Appeal and, subsequently, on legal grounds only, to the Federal (Supreme) Labour Court.

The criticism levelled at the British employment tribunals, namely that it has become "legalistic"⁵¹⁹ does, in my opinion, not apply to the South African labour law system but, by the same token, South African labour law does not compare favourably with that of Germany where, as discussed in detail above, parties are also entitled to "appeal a first instance decision on points of fact"⁵²⁰.

Although, unlike the abovementioned foreign labour law systems, "lay judges" do not, by law, form part of the LC (panel). I do not, unlike Schneider⁵²¹,

⁵¹⁹ Schneider at 276.

⁵²⁰ *Ibid.*

⁵²¹ *Ibid* at 274-275.

regard this requirement as a *sine qua non* for the proper conduct of a (labour related) dispute or the “perceived fairness”⁵²² of the hearing.

⁵²² *Ibid* at 275.

CHAPTER 5 – REVIEWS IN TERMS OF SOUTH AFRICAN LAW

5.1 OVERVIEW OF LABOUR RELATIONS PRIOR TO THE LABOUR RELATIONS ACT 28 OF 1956

South African statutory dispute settlement machinery originated with the Industrial Conciliation Act of 1924⁵²³ which was the direct forefather of the Industrial Conciliation Act of 1956⁵²⁴, later renamed in 1979 to become the Labour Relations Act of 1956⁵²⁵. This legislation accorded recognition to trade unions representing white workers, while a separate system for black workers was created⁵²⁶.

The Industrial Conciliation Act of 1956 and subsequent amendments provided for conciliation of disputes between employers and employees and/or their respective representatives before any legal industrial action could be instituted. Parties declaring a dispute had to refer it to an industrial council or, where no council had jurisdiction, application for a conciliation board had to be made. It was believed that subsequent meetings within or under the auspices of industrial councils and meetings between the parties on conciliation boards

⁵²³ The Industrial Conciliation Act of 1924 was one of the results of the 1922 “rebellion” (strike) which has been described by Basson *et al* at 8 as one of the “watershed” moments of South African labour history. This strike was caused by various factors, including the Mines and Workers Act of 1911 reserving 32 types of work for white workers, an economic depression after the First World War, a large foreign debt, rising costs of living and the mines responding by rationalizing workers (Basson *et al* at 8).

⁵²⁴ Industrial Conciliation Act 28 of 1956.

⁵²⁵ The Labour Relations Act 28 of 1956.

⁵²⁶ The Nationalist Government amended the Industrial Conciliation Act in 1956 to exert even greater control over black workers. According to Basson *et al* 2nd ed, at 8–9, a strike in Natal by black workers over wages in 1973 spread to other areas bringing industry throughout South Africa to a standstill demonstrating the powerful position black workers were occupying in industry. This led to the passing of the Bantu Labour Relations Regulation Act 48 of 1953 (hereinafter referred to as “the Bantu Act”) which created a system of labour laws for black workers. In terms of the Bantu Act, a system was created whereby black employees and individual employers could negotiate wages and terms of employment at plant level through so-called liaison and works committees. However, these committees were initiated and controlled by management and thus never really worked. The Bantu Act was repealed by the Labour Relations Amendment Act 57 of 1981.

would in most instances lead to a resolution of the dispute⁵²⁷. The options of mediation and arbitration were also provided for and in 1956, the Industrial Tribunal was established⁵²⁸. These options were provided as alternatives to strike action in cases where the parties were unable to settle disputes among themselves but it was *not compulsory*⁵²⁹.

Black unionism pressures increased resulting in the appointment by the Government of the Wiehahn Commission of Inquiry⁵³⁰. The recommendations⁵³¹ to the Government in 1979 were to “change the face of South African industrial relations and labour law for all time”⁵³². The Wiehahn Commission also recommended the establishment of an Industrial Court to, *inter alia*, relieve pressure on the ordinary courts. As a result of this recommendation the Industrial Court was established. Another important change introduced on the recommendation of the Wiehahn Commission was the introduction of the definition of an unfair labour practice.

5.2 THE LABOUR RELATIONS ACT 28 OF 1956

5.2.1 Status of the Industrial Court

Section 17 of the LRA, 1956 dealt with the establishment and functions of the IC. With regard to the identity and status of the IC, a unanimous AD in *SATOA v President IC* held that “it is certainly not a division of the Supreme Court for it is not mentioned in the first schedule of the Supreme Court

⁵²⁷ Bendix Sonia *Industrial Relations in South Africa* Fourth Edition (2001) (hereinafter referred to as “Bendix”), at 563.

⁵²⁸ The Industrial Tribunal was the predecessor of the IC established by s 17 of Act 28 of 1956 when its short title was ‘The Industrial Conciliation Act’ (*SA Technical Officials’ Association v President of the Industrial Court* (1985) 6 ILJ 186 (A) at 189 E (hereinafter referred to as “*SATOA v President IC*”).

⁵²⁹ My emphasis indicating voluntariness of process.

⁵³⁰ Hereinafter referred to as “the Wiehahn Commission”.

⁵³¹ According to Basson *et al* 2nd ed, at 9, the most momentous recommendation that the Wiehahn Commission made was perhaps that freedom of association be extended to cover all persons irrespective of their race or sex. Trade unions representing black workers could now also use the machinery of the Industrial Conciliation Act, 1956 (amended in 1979 and renamed the LRA, 1956). Job reservation was also done away with.

⁵³² Basson *et al* 2nd ed at 9.

Act...⁵³³ Nor is it an “inferior court” as defined by s 1 of the Supreme Court Act, for it is not required to keep a record of its proceedings”⁵³⁴. In dealing with the functions of the IC, the AD held that it is reasonably clear that the IC performs functions of different kinds of categories⁵³⁵ and in dealing with s 17(11)(a)⁵³⁶ of the LRA, 1956, the AD stated that when considering the implications of the use of the word “court” in “IC” and its use in s 17(11)(a) to describe a function of the “court”, one must bear in mind that “a body which is empowered to perform functions that a court of law performs is not on that account necessarily to be regarded as a court of law when it performs such functions”⁵³⁷. The status and true identity of a body such as the IC is not determined simply or exclusively by the nature or type of the functions it performs⁵³⁸. Thus, the AD held that the IC, in making a determination under s 17(11)(f)⁵³⁹, does not sit as a court equivalent to or to be equated with the SC⁵⁴⁰, even when it discharges functions of a judicial nature⁵⁴¹.

5.2.2 Appeals and Reviews in terms of the LRA, 1956

In *SATO v President IC* it was also contended that the LRA, 1956 excluded any right to take the proceedings or decisions of the IC on review before the SC based on the reasoning that s 76(10) of the LRA, 1956 provided for the finality and binding nature of a determination made by the IC and that s 17(21) of the LRA, 1956, which afforded a limited right of appeal from the IC to the AD of the SC, supported such an implication⁵⁴². However, the AD *rejected* this contention as the IC did not sit as a court equivalent to the SC and held

⁵³³ Supreme Court Act 59 of 1959 (hereinafter referred to as “the SC Act”).

⁵³⁴ *SATO v President IC* at 188 H-I. Note: Rule 16 of the Rules of the IC changed this and required the IC to keep records, but that was not the position at the time when proceedings in *SATO v President IC* were commenced.

⁵³⁵ *SATO v President IC* at 190 A.

⁵³⁶ S 17(11)(a) of the LRA, 1956 provided that it was a function of the IC, within the statutorily defined limitations, to perform all the functions which a court of law could perform.

⁵³⁷ *SATO v President IC* at 190 C-D.

⁵³⁸ *Ibid* at 190 E.

⁵³⁹ S 17(11)(f) of the LRA, 1956, stipulated it to be a function of the IC to make determinations in terms of s 46.

⁵⁴⁰ *SATO v President IC* at 192 E. This is contrary to the LC which is accorded equivalent status as a provincial division of the HC in s 151 of the LRA.

⁵⁴¹ *Ibid* at 192 F.

⁵⁴² *Ibid* at 192 F-H.

that it can therefore be reviewed by the SC⁵⁴³. The SC thus retained its power to review IC decisions.

Of interest to our present discussion is two statements by the AD namely, the mention of an amendment contained in the Labour Relations Amendment Act⁵⁴⁴ which provided for a right of appeal from the IC to the SC⁵⁴⁵ and secondly, mention of the appointment by the Minister of Manpower of members of the IC “by reason of their knowledge of the law”⁵⁴⁶ and the fact that they are not required to be judges or ex-judges or advocates or persons having special knowledge of industrial matters or industrial law⁵⁴⁷ (a similar provision is contained in s 117⁵⁴⁸ of the LRA). A right of appeal existed in terms of the LRA, 1956, but was regretfully not carried forward to the LRA, notwithstanding the fact that arbitration is compulsory in certain instances and that the stringent requirements imposed on judicial officers insofar as their qualifications are concerned, do not apply to the CCMA commissioners⁵⁴⁹. The question (again) arises whether it is fair that no appeal lies against compulsory arbitration awards by CCMA commissioners.

The 1988 amendments⁵⁵⁰ to the LRA, 1956 established a LAC⁵⁵¹ consisting of six separate divisions⁵⁵². The LAC had the powers and functions to decide any *question of law* reserved in terms of s 17(21)(a)⁵⁵³ or any *appeal* referred

⁵⁴³ *Ibid* at 186 H.

⁵⁴⁴ Labour Relations Amendment Act 51 of 1982.

⁵⁴⁵ *SATO v President of IC* at 193 A-B. However, the AD held that it was common cause that this could not affect the decision in the case.

⁵⁴⁶ Goldstone JA in *Veldspun*, at 1439 I, also referred to this.

⁵⁴⁷ *SATO v President of IC* at 191 E-F; s 17(1)(b) of the LRA, 1956.

⁵⁴⁸ S 117(1) of the LRA provides that the governing body of the CCMA must appoint as many adequately qualified persons as it considers necessary to perform the functions of commissioners.

⁵⁴⁹ *Ibid*.

⁵⁵⁰ Labour Relations Amendment Act 83 of 1988.

⁵⁵¹ Parties dissatisfied with decisions of the IC with regard to s 46(9) (unfair labour practice disputes) could appeal, firstly, to the LAC against the decision and then, if still unhappy, to the former AD. Complete records of the IC trial was placed before the LAC and the court could then re-examine the case on its merits and decide what the outcome should have been in the light of the proven facts. If it came to the conclusion that the IC's decision was wrong (i.e. incorrect legal finding or incorrect factual finding), it could overturn the decision and replace it with its own decision. No such right of appeal exists against the decision of a CCMA commissioner.

⁵⁵² S 17A of the LRA, 1956. The area of jurisdiction of the LAC was set out in a schedule to the RLA, 1956.

⁵⁵³ S 17(21)(a) of the LRA, 1956 entitled the IC, of its own motion or at the request of any party, to

to in s 17 (21A)⁵⁵⁴. On appeal, the LAC could confirm, vary or set aside the order or decision appealed against or make any other order or decision, including an order as to costs according to the requirements of the law and fairness⁵⁵⁵. In *H L van den Berg (Pty) Ltd t/a Metpress Manufacturing v Steel Engineering & Allied Workers Union of SA & others*⁵⁵⁶ an appeal to the LAC in terms of s 17(21A) was held to be an appeal in the narrow sense of a rehearing on the merits but limited generally to the evidence or information on which the decision on appeal was given⁵⁵⁷. However, the court held, as a result of the wording of s 17 (21A)(c)⁵⁵⁸, the LAC had wider powers than a SC on appeal, having the opportunity to make a fresh determination on the evidence placed before the court below and to exercise its discretion as to what is fair and reasonable in the circumstances⁵⁵⁹.

In the important judgment of *Shoprite v RamdawWallis AJ* referred to, *inter alia*, *SATO A v President IC* and held that the CCMA as a body and commissioners as part of the body have much in common with the old IC⁵⁶⁰ which was characterized as an administrative tribunal having wide-ranging powers of investigation⁵⁶¹. This being so, the question remains whether the LRA should not have retained the same or a similar provision as s 17(21A) of the LRA, 1956 where parties are forced to proceed by way of arbitration?

⁵⁵⁴ reserve for the decision of the LAC any question of law.
S 17(21A) of the LRA, 1956, provided that any party in a dispute before the IC in terms of s 46(9) (alleged unfair labour practices) could, within a prescribed time and manner, appeal to the LAC against the decision of the IC in regard to that dispute or any order as to costs.

⁵⁵⁵ S 21A(c) of the LRA, 1956.

⁵⁵⁶ (1991) 12 ILJ 1266 (LAC) (hereinafter referred to as "*H L van den Berg*").

⁵⁵⁷ *Ibid* at 1267 D-E.

⁵⁵⁸ Refer to footnote 554 *supra*.

⁵⁵⁹ *H L van den Berg* at 1267 E-F.

⁵⁶⁰ Interestingly, in *Liberty Life Association of Africa v Kaggelhoffer & others* 2001 (3) SA 1094 (hereinafter referred to as "*Kaggelhoffer*") it was held, at 1096 E, that in terms of item 22(5) in Part E of Schedule 7 to the LRA, an appeal from an industrial court after the commencement of the LRA must be made to the present LAC. Item 22(6) provides that no appeal lies against any judgment or order given or made by the present LAC in determining any appeal brought in terms of item 22(5). The court further held, at 1107 D, that the High Court had retained its common-law powers of review in respect of IC proceedings with regard to the transitional provisions in the schedule to the LRA.

⁵⁶¹ *Shoprite v Ramdaw* at 1258 H-I.

The proceedings of the IC could also be brought under review before the LAC. The question whether the LAC alone had the right to review proceedings of the IC had been the subject of conflicting decisions⁵⁶². However, in *Foskor* it was held that where an application for review was based on common-law grounds of review, the SC retained jurisdiction⁵⁶³.

With regard to arbitration, the LRA, 1956 provided for statutory voluntary arbitration⁵⁶⁴ and for statutory compulsory arbitration⁵⁶⁵. Section 45 permitted an industrial council⁵⁶⁶ or conciliation board⁵⁶⁷ to refer a dispute to arbitration

⁵⁶² In *Foskor v Schoeman NO & others* (1989) 10 ILJ 861 (T) (hereinafter referred to as "*Foskor*"), the court held, at 861 G-H, that the reference in s 17B(2) of the LRA, 1956 to s 24 of the SC Act does not elevate the IC to the status of a court of law, i.e. a SC or a lower court. Section 17B(2) gives the LAC a right of review in certain limited, specifically mentioned circumstances. From this it cannot be deduced that the LAC alone has acquired the right to review the proceedings of the IC. If an application for review is based on one of the grounds enumerated in s 24 of the SC Act, the LAC will have jurisdiction, but where an application for review is based on common-law grounds of review, the SC clearly retains jurisdiction. Similarly, in *Photocircuit SA (Pty) Ltd v De Klerk NO & others* (1989) 10 ILJ 634 (C), the court held, at 634 I-635 A, that there was no ouster of the SC review jurisdiction by the LAC because the powers of review of the LAC were more limited than that of the SC. The court then held that it is well-established principle that where the SC has not been deprived of jurisdiction but there is another court which has jurisdiction, the SC has concurrent jurisdiction. The court reasoned that had the LRA, 1956 intended that the SC should not have had concurrent jurisdiction with the LAC to review decisions of the IC, it would have said so. But in *Paper Printing, Wood & Allied Workers Union v Pienaar NO & others* (1991) 12 ILJ 308 (T) (hereinafter referred to as "*PPWAWU v Pienaar*"), the court held, at 308 H-I, that there was such an ouster on the grounds that it would be anomalous to find that the self-same act or decision can give rise to a review in two courts, one consisting of a judge, the other of a judge and two assessors, that the two courts are both accountable to the same appeal court but that different legal principles should apply, depending on the applicant's choice of forum. If the legislature's intention had been to retain the existing review proceedings, it would not have introduced a procedure containing limited grounds of review.

⁵⁶³ *Foskor* at 861 H.

⁵⁶⁴ In terms of s 45 of the LRA, 1956.

⁵⁶⁵ In terms of s 46 of the LRA, 1956.

⁵⁶⁶ Industrial councils were formed in terms of s 18 of the LRA, 1956 and were permanent bilateral bodies consisting of representatives from one or more employer(s), or one or more registered employer organization(s) together with any registered trade union or group of registered trade unions, who, as a whole, enjoyed equal representation on the council (s 21(1)(a)). S 27A of the LRA, 1956 prescribed the settlement of disputes by an industrial council where no agreement between the parties to an industrial council provided otherwise. Industrial councils had to endeavour to prevent disputes from arising; to settle disputes which arose; and generally had to regulate matters of mutual concern to employers and employees and their organizations (s 23(1) of the LRA, 1956).

⁵⁶⁷ Unlike an industrial council, a conciliation board had no permanent status and also no regulatory or peacekeeping function. In terms of s 35 of the LRA, 1956, it was appointed on an *ad hoc* basis to consider and possibly settle a particular dispute in any undertaking, industry, trade or occupation in any area. As with an industrial council, a conciliation board could only deal with a dispute between employer and employee, their respective organizations, or a combination of them. It could not deal with a dispute between, for example, one trade union and another. Once a conciliation board had settled the dispute or once its term had expired, whichever occurred first, the board was

by a single arbitrator, a number of arbitrators plus an umpire, or by the IC⁵⁶⁸. Failure to either agree on the method of arbitration or the appointment of the arbitrator(s) within 14 days from the date of the decision to refer the dispute to arbitration resulted in the arbitration being conducted by the IC⁵⁶⁹. The powers and functions of the arbitration(s) were also regulated⁵⁷⁰. Representation at voluntary arbitrations was dealt with in s 45(9) which section was subsequently made applicable to compulsory arbitrations too⁵⁷¹. Mlambo J in *Pep Stores*⁵⁷² referred to the problems created by legal representation in the IC (“[t]echnicalities became the order of the day”) and held that the drafters of the LRA thus had to come up with a dispensation that recognized those problems and sought to avoid them.

As stated, s 46 of the LRA, 1956 also provided for compulsory arbitration of disputes between certain parties. This section applied to what is known as “essential services”, which definition included local authorities and the providers of light, power, water, sanitation, passenger transportation or fire extinguishing services⁵⁷³. The Minister was empowered to extend this list to employers and employees engaged or employed in connection with the supply, distribution, processing, canning or preserving of any perishable foodstuffs, or the supply or distribution of petrol or other fuels for use by local authorities or the providers of essential services⁵⁷⁴. The compulsory arbitration provisions were invoked when an industrial council or a conciliation

discharged (ss 42(1) and (2) of the LRA, 1956). The conciliation board also consisted of an equal number of representatives of the employer and employee parties to the dispute.

⁵⁶⁸ S 45(1) of the LRA, 1956.

⁵⁶⁹ S 45(8) of the LRA, 1956.

⁵⁷⁰ S 45(10) of the LRA, 1956.

⁵⁷¹ S 45(9) entitled an individual to present his or her case or to be represented by any other individual who is a party to the dispute; or by one or more members, office-bearers or officials of a trade union or employer’s organization which is a party to the dispute. If the party to the dispute was a trade union or employers’ organization representation could be by one or more of its members, office-bearers or officials; or by one or more members, office-bearers or officials of any other trade union or employers’ organization which is a party to the dispute. Representation by legal practitioners or members, office-bearers or officials of a trade union or employers’ organization who were not a party to the dispute, could take place unless a party objected in writing as soon as practicable before the commencement of the proceedings (s 45(9)(c)). S 45(9) was made applicable to compulsory arbitrations too (s 46(9)(e)).

⁵⁷² *Pep Stores* at 1539 A.

⁵⁷³ S 46(1)(b).

⁵⁷⁴ S 46(7)(a)(i) and (ii).

board had failed to settle a dispute within the designated time period⁵⁷⁵ between employers and employees in the essential services.

Arbitration awards were final and binding on the parties to the dispute as well as on the employers and employees who were members of organizations and/or unions which were parties to the dispute⁵⁷⁶.

Parties to a dispute could also agree to submit that dispute to private arbitration which could take place without the intervention of an industrial council or conciliation board, which made resolution of the dispute within a relatively short period possible. Many recognition agreements opted for private arbitration but a drawback is that private arbitration awards are not self-enforcing in the same way as a judgment of the IC. Where a party refuses to submit to the arbitral award, the other party would have to apply to a court of competent jurisdiction for an order that the award be made an order of court enforceable in the same manner as any judgment or order to the same effect⁵⁷⁷.

The explanatory memorandum states that contrary to initial intentions, the adjudication of unfair dismissal disputes under the LRA, 1956 had become highly legalistic and inaccessible and that it could take up to three years before an unfair dismissal case was finally determined by the AD. Consequently the system lacked legitimacy and failed as a credible alternative to resolving dismissal disputes through power⁵⁷⁸. Mlambo J, in *Pep Stores* held that the legislature, in enacting the LRA, was acutely aware of the problems that beset the previous dispensation⁵⁷⁹ and pointed out that under the LRA, 1956, the process from the date of dismissal through conciliation to determination, was “very dilatory”, taking up to two years (and sometimes more), to be finally determined by the IC. Also, because there was a general

⁵⁷⁵ S 46(2) of the LRA, 1956.

⁵⁷⁶ Ss 49(1) and 50(1) of the LRA, 1956.

⁵⁷⁷ S 31 of the Arbitration Act.

⁵⁷⁸ Thompson and Benjamin at AA2–172.

⁵⁷⁹ *Pep Stores* at 1539 A.

appeal provision, the majority of IC determinations were taken on appeal to the LAC resulting in a further waiting period⁵⁸⁰.

5.3 THE LABOUR RELATIONS ACT 66 OF 1995

The LRA repealed the LRA, 1956 with effect from 11 November 1996. The LRA attempted to speed up dispute settlement and to relieve the IC of much of its burden by separating unfair dismissals from other unfair labour practices⁵⁸¹ and by subjecting most of these to conciliation and arbitration by the CCMA or by accredited bargaining councils or their agents. The broad definition of an unfair labour practice in the LRA, 1956 was supplemented by very clear directions regarding unfair dismissals and residual unfair labour practices were provided for in Schedule 7⁵⁸² to the LRA (however, now provided for in s 191). The IC was renamed as the LC and was accorded superior status with its decisions subject only to one level of appeal, namely the LAC⁵⁸³. Thus, in *Kem-Lin Fashions v Brunton & another*⁵⁸⁴ the LAC held that there was no appeal from the LAC to the SCA⁵⁸⁵ and that r 18 of the Constitutional Court (hereinafter referred to as “CC”) rule was not applicable (r 18 deals with appeals to the CC from all courts, other than the SCA). Joffe AJA considered s 167(3) of the LRA and equated the powers of the LAC with that of the SCA stating that it is “inconceivable that a judgment of a court of equal authority can be taken on appeal to a court of equal authority and standing”⁵⁸⁶.

However, the SCA, in *Chevron Engineering (Pty) Ltd v Nkambule & others*⁵⁸⁷

⁵⁸⁰ *Ibid* at 1539 C-E: Mlambo J stated that one was faced with the prospect of disputes taking not less than three years to be finally resolved after an appeal with an even (considerably) longer waiting period if there was an appeal to the then AD.

⁵⁸¹ However, unfair labour practice disputes were included in s 191 by the LRAA, 2002.

⁵⁸² Schedule 7 items 2 and 3.

⁵⁸³ S 166.

⁵⁸⁴ 2002 23 ILJ 882 (LAC) (hereinafter referred to as “*Kem-Lin Fashions*”).

⁵⁸⁵ At 883 J (as continued at 884).

⁵⁸⁶ *Ibid*.

⁵⁸⁷ (2003) 24 ILJ 1323 (SCA) (hereinafter referred to as “*Chevron*”). The SCA had to determine whether, on a proper interpretation of item 22(6) of Schedule 7, an appeal did lie to the SCA from all decisions by the LAC given in terms of item 22(5), i.e. when hearing appeals from the IC, at 1331 D.

ruled that an appeal lies against a decision of the LAC and that “it does not require leave to do so”⁵⁸⁸. Also, the CC in *National Education Health and Allied Workers Union v University of Cape Town & others*⁵⁸⁹ (judgement delivered by Ngcobo J) held⁵⁹⁰ that an appeal from the LAC on a constitutional matter does lie to the SCA⁵⁹¹, but that there is nothing which prevents a litigant from appealing directly to the CC⁵⁹² although the CC will be “slow to hear appeals from the LAC unless they raise important issues of principles⁵⁹³”, as in the present case.

The statutory review powers of the LC are provided for in sections 145⁵⁹⁴ – review of statutory, compulsory arbitration awards issued under the auspices

⁵⁸⁸ *Ibid* at 1336 [20] B.

⁵⁸⁹ (2003) 24 ILJ 95 (CC) (hereinafter referred to as “*NEHAWU v Cape Town University*”).

⁵⁹⁰ *Ibid* at 97 J–98 A; 108 [22] C.

⁵⁹¹ At 107 E–F, Ngcobo J stressed that a constitutional matter is not within the exclusive jurisdiction of the LC. “The provisions of the LRA which give the LAC a status equal to that of the SCA and constitute it as the final court of appeal can have no application in constitutional matters.”

⁵⁹² In terms of s 167(6)(b) of the Constitution read with s 16(2) of the Constitutional Court Complementary Act 13 of 1995 and r 18.

⁵⁹³ At 98 F. *It is believed that when the Superior Courts Act is promulgated, these uncertainties will be statutorily addressed.* Refer to discussion of Bill in Chapter 7.

⁵⁹⁴ As the applicability of s 145 and/or s 158(1)(g) to review of CCMA arbitration awards has created confusion and contradictory LC judgments, both sections are now quoted in full:

“145: Review of arbitration awards

(1) Any party to a *dispute* who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award –

- (a) within six weeks of the date that the award was *served* on the applicant, unless the alleged defect involves corruption; or
- (b) if the alleged defect involves corruption, within six weeks of the date that the applicant discovers the corruption.

(1A) The Labour Court may on good cause shown condone the late filing of an application in terms of subs (1); (s (1A) was inserted by the LRAA, 2002).

(2) A defect referred to in subsection (1) means –

- (a) that the commissioner –
 - (i) committed misconduct in relation to the duties of the commissioner as an arbitrator;
 - (ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
 - (iii) exceeded the commissioner’s powers; or
- (b) that an award has been improperly obtained.

(3) The Labour Court may stay the enforcement of the award pending its decision.

(4) If the award is set aside, the Labour Court may –

- (a) determine the dispute in the manner it considers appropriate; or
- (b) make any order it considers appropriate about the procedures to be followed to determine the dispute.”

“158: Powers of Labour Court

(1) The Labour Court may –

- (g) *subject* to s 145, review the performance or purported performance of any function provided for in *this* Act on any grounds that are permissible in law.”

of the CCMA; 158(1)(g)⁵⁹⁵ – “*subject to*” s 145 (unamended s 158(1)(g) read “*despite s 145*”)⁵⁹⁶, review of “performance or purported performance of any function provided for in the LRA on any grounds that are permissible in law”⁵⁹⁷; 158(1)(h) – review of any decision or act by the State in its capacity as employer and 157(3) – review of arbitration awards in disputes that may be referred to arbitration in terms of the LRA but which have been arbitrated under the Arbitration Act. An almost identical section to s 158(1)(g) is to be found in s 77(2) of the BCEA where the LC is given express authority to review any action taken in terms of the BCEA on any grounds that are permissible in law⁵⁹⁸.

5.3.1 Section 145 v (unamended) section 158(1)(g) (“*despite s 145*”)⁵⁹⁹

As stated above⁶⁰⁰, both ss 145 and 158(1)(g) make provision for review applications⁶⁰¹. However, a review in terms of s 145 is limited both insofar as time and grounds of review⁶⁰² are concerned. S 158(1)(g)⁶⁰³ on the other

⁵⁹⁵ *Ibid.* Refer to discussion of s 145 v (amended) s 158(1)(g) at 140-144 *infra*.

⁵⁹⁶ My emphasis highlighting the problems created by these words. *The unamended s 158(1)(g) still merits discussion as, in my opinion, the conflicting decisions referred to hereunder resulted in the amendment thereof.* S 158(1)(g) prior to its amendment read as follows: “*despite section 145, review the performance or purported performance of any function provided for in this Act or any act or omission of any person or body in terms of this Act on any grounds that are permissible in law.*” In addition to “*despite*” s 145 being substituted by “*subject to*” s 145, the words “or any act or omission of any person or body in terms of *this Act*” have also been deleted in amended subsection.

⁵⁹⁷ An example of this is found in *Shakespeare’s Pub* (discussed in Chapter 1 at 11 *supra*) where Waglay J held that a ruling of a CCMA commissioner disposing of a rescission application amounts to a ‘performance, or purported performance of a function’ provided for in the LRA and is therefore reviewable in terms of s 158(1)(g) at 2307 [13] F-G.

⁵⁹⁸ *Upon promulgation of the Superior Courts Act, s 77 of BCEA will be repealed.* See Author’s note.

⁵⁹⁹ Refer to discussion of s 145 v (amended) s 158(1)(g) (“*subject to s 145*”) at 140-144 *infra*.

⁶⁰⁰ Refer also to Chapter 1 at 12-13 *supra*.

⁶⁰¹ According to Du Toit *et al* 3rd ed in order to establish grounds for review, an applicant must show that the commissioner did not consider relevant issues in accordance with law and natural justice. (Du Toit D, Woolfrey D, Murphey J, Godfrey S, Bosch D & Christie S *The Labour Relations Act of 1995* Second Edition (1998) Butterworths at 358; hereinafter referred to as “*Du Toit et al (1998)*”).

⁶⁰² Refer to Chapter 1 at 13 *supra*. It is submitted that in terms of s 145 the LC has the power to, *inter alia*, refer the matter back to the CCMA or to make another award, should it deem it appropriate. Mullins, at 16, suggests that if additional evidence has been brought to the attention of the LC or the arbitrator has erred on a material question of law, the LC may consider it appropriate to determine the dispute itself without referring it back to the CCMA.

⁶⁰³ The unamended s 158(1)(g) is broadly stated and provides for the extension of the power of review to the full range of tasks and functions performed by any person or body in terms of the LRA, and seems to include the process of compulsory arbitration awards. The grounds under this

hand, is more relaxed with no six-week time limit and provides for review on “any grounds permissible in law”.

As the result the LC has been approached, on more than one occasion, to rule whether review applications can be brought in terms of s 145 and/or s 158(1)(g). Before discussing the important LAC decision of *Carephone*⁶⁰⁴ and the post-*Carephone* decisions⁶⁰⁵, and the amended s 158(1)(g)⁶⁰⁶ it is necessary to first discuss certain of the contradictory LC decisions on this question.

5.3.1.1 Pre-*Carephone* Decisions favouring s 145

In one line of decisions, the LC took the view that the words “despite s 145” in s 158(1) limit the review of CCMA arbitration awards to s 145 only. In *Edgars Stores (Pty) Ltd v Director, CCMA*⁶⁰⁷, Revelas J, in relying to a great extent on the *Veldspun* judgment, took a different approach to the meaning of these words and interpreted s 158(1)(g) to exclude its application in terms of arbitration proceedings although the court accepted that s 158(1)(g) had the effect of extending the LC’s power of review. The learned judge held that in her view “the phrase ‘despite s 145’ found in s 158(1)(g) should be construed to mean nothing more than ‘despite *the review of arbitrators’ awards on very narrow grounds in terms of s 145*”⁶⁰⁸. All other acts (which are not arbitrators’ awards) can be reviewed on any basis permissible in law, that is, on the wider basis permissible such as on the basis of ‘unreasonableness’⁶⁰⁹.

section are “any permissible in law”. Nicholson JA in *Radebe* stated, at 347 H, that this form of review was the “full form of review previously referred to as common-law review”. S 158(1)(g) thus allows for wider grounds of review, while s 145 is limited to alleged defects in the proceedings at arbitrations.

⁶⁰⁴ Discussed at 115-120 *infra*.

⁶⁰⁵ Discussed at 120-140 *infra*.

⁶⁰⁶ Discussed at 140-144 *infra*.

⁶⁰⁷ (1998) ILJ 350 (LC) (hereinafter referred to as “*Edgars Stores*”).

⁶⁰⁸ Emphasis added by Revelas J.

⁶⁰⁹ *Ibid* at 358 D-E.

Revelas J⁶¹⁰ asked the following question in support of a (narrow) interpretation in favour of only applying s 145 to reviews of CCMA arbitration awards: “[t]he question should be asked why the [LRA] specifically provides for review on a narrower basis when it comes to arbitrators’ awards conducted under the auspices of the [CCMA] when such awards can, in any event, be set aside on a much wider basis? There was, in other words, no need to include s 145 in the Act, because once the wider grounds of review are allowed, these would automatically include the narrower grounds of misconduct, gross irregularity, and the like.”⁶¹¹

In *Pep Stores* Mlambo J considered two applications, namely one to make an award an order of court (in terms of s 158(1)(c)) the other, to review and set aside the (same) award. Mlambo J was of the opinion that s 158(1)(g) does not apply to reviews of these awards stating that “[t]he provision for a time frame in s 145 is an important confirmation of the legislative objective of finality in dispute resolution” and since s 158(1)(g) has no time frame, it can “therefore have no role in the review of awards as s 145 provides for this”⁶¹².

In discussing s 138(9)⁶¹³, the learned judge stated that an award will be appropriate when the commissioner did not commit any misconduct in relation to his duties; did not commit any gross irregularity in the conduct of the arbitration proceedings; did not exceed his/her powers; and if it is not obtained in any improper manner⁶¹⁴. Mlambo J, in discussing s 145 dealing with reviews of CCMA arbitration awards suggested that, in addition to

⁶¹⁰ Note, however, that Revelas J later changed her view and held that s 158(1)(g) could be applied to CCMA arbitration reviews. Refer to discussion of *Kynoch Feeds* at 113 *infra*.

⁶¹¹ *Edgars Stores* at 358 E-F. Froneman DJP in *Carephone* (LAC), at 1433 F, also stated that if reviews of arbitration awards in terms of s 158(1)(g) were allowed, s 145 would be rendered superfluous (refer to discussion at 116 *infra*).

⁶¹² *Pep Stores* at 1543 A-B.

⁶¹³ S 138(9) provides that the commissioner may make any appropriate arbitration award in terms of the LRA, including, but not limited to, an award that gives effect to any collective agreement or to the provisions and primary objects of the LRA, and an award that includes, or is in the form of, a declaratory order.

⁶¹⁴ *Ibid* at 1542 A.

procedural defects, s 145 also gives the LC the power to enquire whether the award is appropriate within the meaning of s 138(9)⁶¹⁵.

In *Reunert Industries*⁶¹⁶ the LC was called upon to review a CCMA arbitration award on the grounds that the award was defective in the sense required by s 145⁶¹⁷. Landman J analyzed the provisions of s 145(1) relating to the court's power to review and set aside a defective award emanating from the CCMA and extensively considered the types of defects that can be occasioned by a commissioner, namely, misconduct, gross irregularity and exceeding one's powers as a commissioner⁶¹⁸.

With regard to misconduct, Landman J concluded that the applicable principles are basically a summary of those formulated by the courts in the interpretation and application of s 33 of the Arbitration Act. It therefore provides little scope for overturning the decision of an arbitrator because it is wrong in law or based on an incorrect finding of the facts. Further comments of the court in *Reunert Industries* can be constructed as permitting the setting aside of awards in terms of s 145 on grounds of misconduct in circumstances not provided for in s 33 of Arbitration Act. The court's argument seems to be based on three premises, namely that (a) unlike most arbitrations undertaken in terms of the Arbitration Act, arbitration in terms of the LRA is not voluntary in nature (b) arbitration is at heart a judicial one (c) the CCMA is a creature of statute and its functions are set out in the LRA.

In discussing *Reunert Industries*, Le Roux⁶¹⁹ stated that it can now be said

⁶¹⁵ *Ibid* at 1542 B.

⁶¹⁶ Refer to footnote 133 *supra*. The dispute before the CCMA commissioner involved an unfair dismissal. The parties limited the dispute to the question whether the employer had proved the employee's intoxication on a balance of probabilities. The employee did not place the adequacy of the sanction of dismissal in dispute. However, the commissioner found that the employee had been unfairly dismissed and reinstated him. On review, the LC found that the commissioner had exceeded her powers by considering the adequacy of the sanction and consequently had committed a gross irregularity by failing to hear the parties on the issue (1394 B).

⁶¹⁷ *Reunert Industries* at 1393 I.

⁶¹⁸ *Ibid* at 1394 A.

⁶¹⁹ Le Roux PAK "*The CCMA reviewed: the Labour Court lays down the law for commissioners*" 1998 CLL 61 (hereinafter referred to as "Le Roux on the CCMA").

that in at least certain circumstances, the commissioner will not be the sole decider of legal questions, e.g. where the arbitrator makes an *error of law* in determining whether the CCMA has jurisdiction, the LC will intervene, even if the mistake is *bona fide* – on the basis that this is a form of misconduct⁶²⁰. According to Le Roux, this argument can be taken further. Not only is the jurisdiction of the CCMA determined by statute, but also its powers and the way in which it must operate. With reference to an excerpt from the *Reunert Industries* judgment, indicating that the new constitutional dispensation seems to indicate that a citizen is entitled to be given a decision in accordance with the law (unless they voluntarily elect arbitration), the author also addresses the possible intervention of the LC in the event of the commissioner committing an *error of law* in applying or interpreting a provision of the LRA, on the ground that this constitutes misconduct. Therefore, it can be expected that in the event of compulsory arbitration, a citizen is entitled to expect that the tribunal shall know and apply the law correctly. If Le Roux’s argument is accepted by the court, the potential to set aside incorrect, even *bona fide* findings of law, is clearly enhanced (bearing in mind that the question whether a dismissal, on a given set of facts, is fair or unfair and in accordance with the Code of Practice set out in Schedule 8 to the LRA, can be regarded as a question of law)⁶²¹.

Thus, Le Roux expresses the opinion that s 145, as interpreted in *Reunert Industries*, provides significant scope for overturning decisions on the basis of procedural irregularities, misconduct on the part of the arbitrator, and incorrect findings of law. It does not appear to provide much of a basis for overturning decisions on “questions of fact” for example, where a party feels that the commissioner’s factual findings are not supported by the evidence⁶²².

The provisions of s 145 have also been discussed and applied in a number

⁶²⁰ *Ibid* at 63.

⁶²¹ *Ibid* at 63.

⁶²² *Ibid* at 68.

of other decisions. In general, it seems as if the LC has followed the approach of its predecessors in interpreting and applying s 33 of the Arbitration Act and has not been willing to intervene and overturn a decision on its merits⁶²³. In *National Entitled Workers Union v John & another*⁶²⁴ the LC, dealing with a s 145 review application, indicated that it would have reached a different decision from that of the commissioner (dismissal was found to be both procedurally and substantively unfair, (altered) re-employment ordered), but refused to set it aside. The court found that the commissioner had not acted unreasonably and that there also had not been any gross irregularity in the proceedings. Consequently, the court was still unwilling to intervene as it was not hearing an appeal where it could overturn the decision on the basis that it was wrong. It could only set aside the award if a defect in the proceedings (as discussed by the court) was found to be present. With reference to “excess of power”, the court held that it was when the commissioner strays from the ambit of his/her jurisdiction or makes a ruling or awards a remedy, which is beyond his or her powers (as in *Reunert Industries*).

Section 145 was also relied upon to set aside an award in *SASKO (Pty) Ltd v Buthelezi & another*⁶²⁵, on the basis that he had accepted jurisdiction for an alleged unfair labour practice (failure to promote), whereas the dispute related to racial discrimination with the result that the CCMA had no jurisdiction. The failure of the commissioner to make this distinction and his acceptance of jurisdiction amounted to a defect within the meaning of s 145. Also, the commissioner ignoring certain evidence placed before him by the employer, amounted to misconduct in that it was grossly unreasonable and constituted a defect within the meaning of s 145(2). According to Le Roux, the latter aspect of this decision is interesting in that it is at least arguable that this was a mistake of fact and therefore not a ground for setting aside an award on the grounds of misconduct. The LC appears to have taken the

⁶²³ *Ibid* at 64.

⁶²⁴ [1997] BLLR 1623 (LC).

⁶²⁵ [1997] 12 BLLR 1639 (LC).

view that the commissioner's conduct amounted to misconduct on the basis that the commissioner had simply ignored the evidence. However, if the commissioner had considered the evidence and mistakenly rejected it, this would not have constituted misconduct within the meaning of s 145(2)⁶²⁶.

Mlambo J in *Ntshangane*⁶²⁷ also considered the question whether the LC could review CCMA arbitration awards in terms of s 158(1)(g) and expressed the view that "the appropriate interpretation of s 158(1)(g) should be that *in addition to the courts review power of CCMA arbitration awards*, the court is also empowered to review anything else performed in terms of the Act"⁶²⁸. The LC could thus not review CCMA arbitration awards in terms of s 158(1)(g), but in terms of s 145. In arriving at this conclusion, Mlambo J referred to the statement of Landman J in *Deutsch v Pinto*⁶²⁹ that the LC has a supervisory role towards CCMA arbitrations, but expressed the view that such supervisory role does not lay arbitration awards open to "any conceivable line of attack under the guise of review in terms of s 158(1)(g)" as this would result in "encouraging even the most spurious application which has no merit whatsoever but having the sole purpose to frustrate a successful party at arbitration"⁶³⁰. Thus, an arbitrator's award "should as far as possible bring finality to the resolution at hand and should *not be open to attack in a court of law on a very wide basis*"⁶³¹.

Ntshangane summarizes the position well and of particular interest is the argument considered by Mlambo J⁶³² that, because parties have *no choice* but to submit to the jurisdiction and consequent arbitration of the CCMA, the LC should, in reviewing CCMA arbitration awards, "have the widest review power possible, and the suggestion is that such wide review power would come under s 158(1)(g)". Mlambo J questioned whether s 158(1)(g) was

⁶²⁶ Le Roux on the CCMA at 65.

⁶²⁷ Refer to discussion in Chapter 2 at 31 *supra*.

⁶²⁸ *Ntshangane* at 586 J (on 587); 594 [41] G-H (my emphasis).

⁶²⁹ Refer to footnote 182 *supra*.

⁶³⁰ *Ntshangane* at 594 [39] C-E.

⁶³¹ *Ibid* at 593 [38] B (my emphasis).

⁶³² *Ibid* at 591 [26] H-I.

“capable of such interpretation relating to arbitration awards” because it would then mean that the LC would be able to review CCMA arbitration awards “on any ground”⁶³³. The learned judge then stated that “[a]t first glance” arbitration proceedings and awards fall under the broad category of s 158(1)(g) but Mlambo J then asks the important question, namely, “why then did the legislature see fit to make provision for the review of only arbitration proceedings and awards in s 145”⁶³⁴.

Mlambo J then states that if both sections are applicable to review of CCMA arbitration proceedings and awards, s 145 (containing narrow review grounds) will “completely be ignored and parties will seek to review every conceivable award in terms of s 158(1)(g)” thereby rendering s 145 “ineffectual in that it will never be used”⁶³⁵. Further, the learned judge states that he “cannot fathom that it was the legislative intent to specify review grounds of CCMA arbitration proceedings and awards in terms of s 145 and then to render same open to review on unlimited grounds in another section, namely s 158(1)(g)”⁶³⁶. Mlambo J then expressed the view that there are important policy considerations “why this cannot be the situation”, namely “the final and binding effect of arbitration awards (s 143 of the Act) and the need for effective and final resolution of labour disputes (s 1(d)(iv) of Act)”⁶³⁷.

5.3.1.2 Pre-Carephone Decisions favouring s 158(1)(g)

Although it was unnecessary to decide whether a CCMA arbitration award can be reviewed on the wider grounds set out in s 158(1)(g), Landman AJ, in *Deutsch v Pinto* held that “[i]t seems that having regard to the right in s 33 of the Constitution ... to lawful and fair administrative action that the wider grounds may be relied upon”⁶³⁸.

⁶³³ *Ibid* at 591 I-J.

⁶³⁴ *Ibid* at 592 [27] A.

⁶³⁵ *Ibid* at 592 [27] A-C.

⁶³⁶ *Ibid* at 592 [27] B.

⁶³⁷ *Ibid* at 592 [28] C-D.

⁶³⁸ *Deutsch v Pinto* at 1013 D-F.

In another line of decisions, the LC took the view that the words “despite s 145” in s 158(1)(g) do not limit the review of CCMA arbitration awards to s 145 thus allowing reviews in terms of s 158(1)(g). In *Standard Bank v CCMA*⁶³⁹, Tip AJ reviewed and set aside the commissioner’s award in terms of s 158(1)(g). Tip AJ found that where a commissioner misconstrues oral or documentary evidence or has ignored or misapplied relevant legal principles in an arbitration to an extent that it is inappropriate or unreasonable, the commissioner had failed in the task assigned under the LRA and that an aggrieved party alleging an unjustifiable⁶⁴⁰ award would not be without a remedy, notwithstanding the more narrow ambit of the grounds contained in s 145⁶⁴¹. This remedy, the court held, was a review and the ambit of the review must necessarily be correspondingly broad and the court considered that this was precisely what s 158(1)(g) contemplated⁶⁴². The court accordingly held that the broad approach had to be adopted by the court to review awards of the CCMA.

This approach was also adopted in *Shoprite v CCMA*⁶⁴³, where Pretorius AJ held that review of a CCMA arbitration award may be founded on the provisions of s 158(1)(g)⁶⁴⁴ and that the words “despite s 145” means “notwithstanding the provisions of s 145”⁶⁴⁵.

In *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation & Arbitration & others*⁶⁴⁶ Gon AJ applied the provisions of s 158(1)(g) in considering a review of a CCMA arbitration award.

⁶³⁹ Refer to footnote 191 *supra*.

⁶⁴⁰ In *Standard Bank v CCMA*, Tip AJ, at 907 F-H, referred to s 33(1) read with item 23(2)(b) of the Constitution and its entrenchment of the right to administrative action that is lawful, procedurally fair and justifiable in relation to the reasons for the action and held that a statutory arbitration under the LRA is by virtue of its origin an administrative act performed by a statutorily created tribunal.

⁶⁴¹ *Ibid* at 907 H-I.

⁶⁴² *Ibid* at 905 F.

⁶⁴³ Refer to footnote 77 *supra*.

⁶⁴⁴ *Ibid* at 898 A.

⁶⁴⁵ *Ibid* at 898 D-E.

⁶⁴⁶ (1998) 19 ILJ 327 (LC).

The *Edgars Stores* approach⁶⁴⁷ was short-lived, because in *Kynoch Feeds*⁶⁴⁸, Revelas J distinguished the *Veldspun* matter (relied on by her in *Edgars Stores*) dealing with arbitrations under the Arbitration Act “where parties agree upon the arbitrator and the arbitration process itself”, from the (imposed) arbitration process in terms of the LRA⁶⁴⁹. The learned judge decided that her decision in *Edgars Stores* was “wrong”⁶⁵⁰ and departed from her views expressed in the *Edgars Stores* case⁶⁵¹. The alternative approaches adopted by the LC seeking to define the relationship between s 145(2)(a) & (b) and s 158(1)(g) were canvassed. Revelas J traced her own history of first adopting and then rejecting the view that s 158(1)(g) applied only to administrative acts other than arbitrators’ awards⁶⁵². Under this view, s 145 applied to CCMA arbitration for sound policy reasons, “particularly in the field of labour where it is advantageous to all parties and in the interests of good labour relations to have a binding decision made finally and expeditiously”⁶⁵³. Revelas J later changed her view, holding that arbitration is an administrative action to which s 158(1)(g) applies and that s 145 has no application. Acknowledging the increased interference with commissioner awards that this broader review entailed (in terms of s 158(1)(g)), Revelas J felt that all interested parties would be better served if a strong body of guidelines and principles to be followed by CCMA commissioners were developed⁶⁵⁴.

In the LC decision of *Radebe*⁶⁵⁵ Revelas J heard an application for review in terms of s 158(1)(g). *Radebe* was employed by Toyota as a supervisor and assistant manager for thirteen years and had a clean disciplinary record. He enjoyed lease car benefits (which had been suspended for a year). He was involved in four collisions with the leased car resulting in high repair costs.

⁶⁴⁷ Refer to discussion at 105-106 *supra*.

⁶⁴⁸ Refer to discussion in Chapter 2 at 33 *supra*.

⁶⁴⁹ *Kynoch Feeds* at 847 D-E.

⁶⁵⁰ *Ibid* at 838 A.

⁶⁵¹ In *Shoprite v CCMA* Pretorius AJ, at 898 H, expressed the view that this interpretation of Revelas J “puts an undue strain on the ordinary language of s 158(1)(g) and is incorrect”.

⁶⁵² *Ibid* at 846 E-F.

⁶⁵³ *Ibid* at 847 A.

⁶⁵⁴ *Ibid* at 848 E.

⁶⁵⁵ Refer to discussion in Chapter 2 at 28 *supra*.

When involved in a further accident, instead of reporting the accident he drove the car to a parking area, abandoned the car with the keys in the ignition and reported to the police, his departmental manager and Toyota's fleet division that the car had been hijacked. Three days later he admitted that he had lied about the hijacking. At a disciplinary inquiry he was dismissed, his internal appeal failed and he referred a dispute about the fairness of his dismissal to the CCMA. The CCMA found the dismissal too harsh a sanction, ordered his re-employment⁶⁵⁶ and imposed a final warning for dishonesty⁶⁵⁷.

The standard of review applied by Revelas J was that "*the award must be justifiable in relation to the reasons given for it*"⁶⁵⁸ and the LC held that before a CCMA arbitration award can be set aside, it must be shown to be so "grossly unreasonable", that it does not satisfy the requirements of s 33⁶⁵⁹ of the Constitution⁶⁶⁰. Revelas J indicated that when applying the review test as set out in s 158(1)(g), s 145 "should serve as a reminder that review proceedings under s 158(1)(g) should not be regarded as appeal proceedings. What is intended in this section is a review"⁶⁶¹. The application for review was unsuccessful and the matter was taken on appeal⁶⁶².

5.3.1.3 *Carephone (Pty) Ltd v Marcus NO & others*

The matter was, at long last, referred to the LAC. The latter court attempted⁶⁶³ to clarify the position relating to the contradictory LC judgments concerning the applicability of either s 145 or s 158(1)(g) to reviews of

⁶⁵⁶ *Radebe* at 1612 G.

⁶⁵⁷ *Ibid* at 1612 H.

⁶⁵⁸ *Ibid* at 1615 C.

⁶⁵⁹ Refer to footnote 667 *infra* for a recordal of s 33 of the Constitution.

⁶⁶⁰ *Radebe* at 1615 B.

⁶⁶¹ *Ibid* at 1615 D.

⁶⁶² The LAC decision in *Radebe* is discussed in Chapter 5 at 121-125 *infra*. The appeal was successful and the LC's order set aside and replaced. The review was thus upheld.

⁶⁶³ The words "attempted to clarify" are used because subsequent decisions, namely *Radebe* and *Shoprife v Ramdaw*, at 125-128 *infra*, cast doubt on the decision in *Carephone*, although *Carephone* was a LAC decision.

CCMA arbitration awards in the watershed case of *Carephone* in which it, *inter alia*, ruled that:-

- s 158(1)(g) is not applicable in the context of the review of CCMA arbitration awards; and
- in order to ensure that s 145 complies with the Constitution, the wording “despite s 145” must be read as “subject to” the provisions of s 145 as this is a “lesser evil than ignoring the whole of s 145, including its ... time-limits”⁶⁶⁴. (Froneman DJP delivered the judgment with Myburgh JP and Cameron JA Concurring.)

5.3.1.3(a) Labour Court Decision of *Carephone*

Carephone's legal representatives had on two occasions requested a postponement of the arbitration hearing due to their unavailability. On the third request for postponement, the commissioner refused it, whereupon *Carephone*'s representative left the arbitration hearing despite a warning that the matter would continue. The arbitration hearing then proceeded in their absence and an award was made whereby *Carephone* was ordered to pay compensation (± R480 000 for eight employees) for unfair dismissal. The applicant (*Carephone*) then approached the LC to review the decision of the commissioner refusing the postponement. While the review had been sought under s 145, it was argued that the court should consider applying the “wide” grounds contained in s 158(1)(g). Mlambo J refused and favoured the view that s 158(1)(g) was not applicable to arbitration awards and s 145 alone governs the review of CCMA arbitration awards. According to Grogan, Mlambo J was “one of the minority of the LC bench to cling persistently to the view that applications for review of CCMA arbitration awards must be brought under s145”⁶⁶⁵.

5.3.1.3(b) Labour Appeal Court decision of *Carephone*

It is fortunate that the (ongoing) debate relating to the appropriate test for

⁶⁶⁴ *Carephone* at 1433 G.

⁶⁶⁵ Grogan J “‘Justifiability’ is the key – Review judgments reviewed” (1998) Vol 14(5) EL 4, at 4.

reviewing CCMA arbitration awards was addressed in the unanimous decision of the LAC in *Carephone*. The relationship between s 145 and s 158(1)(g) was considered and the LAC held that **s 158(1)(g) is not applicable in the context of arbitration awards** (s 158(1)(g) should therefore be interpreted as simply providing for the court's residual powers of review in cases not covered by s 145 or s 158(1)(h)). Froneman DJP stated that the effect of allowing the review of CCMA arbitration awards in terms of s 158(1)(g) would be to render s 145 superfluous⁶⁶⁶. The learned judge held that s 145 was not unconstitutional and that it must be interpreted in accordance with the Constitution.

In reaching this conclusion, the court had to answer two questions: firstly, whether s 33⁶⁶⁷ of the Constitution was applicable to arbitration awards conducted under the auspices of the CCMA, and secondly, whether the stricter grounds of review in s 145 were in conflict with s 33.

In answering the first question, the court rejected the argument that s 33 was not applicable to CCMA arbitration awards because such compulsory arbitrations are judicial in nature, and thus fall outside the ambit of "administrative action". The LAC held that the issuing of an arbitration award by a commissioner of the CCMA constituted an administrative action as contemplated in s 33 of the Constitution read with item 23(2) of Schedule 6⁶⁶⁸. It held further that this introduced "a requirement of

⁶⁶⁶ *Carephone* at 1433 E. Revelas J shared the same opinion in *Edgars Stores*, at 358 E-F, holding that there would have been no need for s 145, if the wider grounds of review (in terms of s 158(1)(g)) were allowed as these would automatically also include the narrower grounds of s 145 (refer to footnote 79 *supra*).

⁶⁶⁷ S 33 of the Constitution deals with just administrative action and provides that:

"(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons."

⁶⁶⁸ Item 23(2) of Schedule 6 provides that:

"23(2) Until the legislation envisaged in sections 32(2) and 33(3) of the new Constitution is enacted - ...

(b) section 33(1) and (2) must be regarded to read as follows:

Every person has the right to –

(a) lawful administrative action where any of their rights or interests is affected or threatened;

(b) procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened;

rationality in the merit or outcome of the administrative decision”⁶⁶⁹ which included an arbitration award. Froneman DJP held that, although the CCMA performs many functions, some of which are judicial in nature, the CCMA did not function as a court, and therefore had no judicial authority under the Constitution⁶⁷⁰ holding that “[a]dministrative action may take many forms, even if judicial in nature, but the action remains administrative”⁶⁷¹. The court found that the CCMA was a public institution created by Statute and exercising public powers and functions. Consequently, it is an “organ of State” in terms of the Constitution and thus bound directly by the Bill of Rights and the basic values and principles governing public administration, including s 33 read with item 23(2) of Schedule 6, which provides for just administrative action⁶⁷². Thus provisions governing its function must be interpreted in this Constitutional context and parties subject to compulsory arbitration under the auspices of the CCMA are entitled to have their fundamental rights respected (including the right to lawful and fair administrative action that is also “justifiable in relation to the reasons given for it”⁶⁷³).

Froneman DJP held that “[t]he Constitutional imperatives for compulsory arbitration under the LRA are thus that the process must be fair and equitable; that the arbitrator must be impartial and unbiased; that the proceedings must be lawful and procedurally fair; that the reasons for the award must be given in writing; that the award must be justifiable in terms of those reasons; and that it must be consistent with the fundamental right to fair labour practices”⁶⁷⁴. He found that should a commissioner exceed his/her constitutional powers, for example by making an award

-
- (c) be furnished with reasons in writing for administrative action which affects any of their rights or interests unless the reasons for that action have been made public; and
 - (d) administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened.”

⁶⁶⁹ *Carephone* at 1434 B.

⁶⁷⁰ *Ibid* at 1431 F.

⁶⁷¹ *Ibid* at 1431 I.

⁶⁷² *Ibid* at 1430 D-G; 1431 F-I.

⁶⁷³ Item 23(2)(d) of Schedule 6 of the Constitution.

⁶⁷⁴ *Carephone* at 1431 J–1432 A.

which is not justifiable in relation to the reasons given for it, it can be reviewed under s 145, in particular s 145(2)(a)(iii). It is therefore not necessary to resort to s 158(1)(g) to achieve this end⁶⁷⁵.

In dealing with the constitutional requirement that “administrative action must be justifiable in relation to the reasons given for it”, Ngcobo J in *County Fair Foods* held that it “means no more than that the decision of the commissioner must be supported by the facts and the applicable law. The reviewing court must ask itself whether the award can be sustained by the facts and the applicable law. If the award can be sustained by the facts and the law, interference with the award is not warranted. If it cannot, interference is warranted”⁶⁷⁶.

On the second question, the court held that s 145 was not in conflict with s 33 of the Constitution. Froneman J came to this conclusion on the basis that there is nothing in the LRA that permits a commissioner in arbitration proceedings to exceed the bounds of “constitutional constraints” in the Constitution and that the words of the LRA must be read “in a manner consistent with the Constitution”⁶⁷⁷ and not in a way that would render s 145 “superfluous”⁶⁷⁸.

In addition to the more traditional and limited grounds for review (for example, bias, procedural irregularities and corruption) as set out in s 145, the LAC also formulated a test for the standard to be used in determining whether or not there is a ground for reviewing a decision of a CCMA commissioner, namely **the justifiability or rationality test, namely, “is there a rational objective basis justifying the connection made by [the commissioner] between the material properly available and the conclusion eventually arrived at?”**⁶⁷⁹ (hereinafter referred to as

⁶⁷⁵ *Ibid* at 1432 H.

⁶⁷⁶ *County Fair Foods* at 1712 [27] H-I.

⁶⁷⁷ *Carephone* at 1433 G.

⁶⁷⁸ *Ibid* at 1433 E.

⁶⁷⁹ *Ibid* at 1435 E-F.

“justifiability test”). This results in a wide test for review. The LAC thus held that the ground of review contained in s 145(2)(a)(iii), namely that a commissioner exceeded his/her powers, incorporated the constitutional requirement that an administrative action must be “justifiable in relation to the reasons given for it”.

The court accordingly found that the only bases for review are: (1) that the facts amount to misconduct or gross irregularity or impropriety under s 145(2)(a)(i)-(ii) and s 145(2)(b) of the LRA, or (2) that his actions are not justifiable in terms of the reasons given for them and that he has accordingly exceeded his constitutionally constrained powers under s 145(2)(a)(iii) of the LRA⁶⁸⁰.

However, the LAC went to some lengths to insist that the distinction between an appeal and review remained valid. The court realized that by extending the grounds for review to include “justifiability” (resulting in value judgments) there was a danger of “obliterating” the distinction⁶⁸¹. Froneman DJP regarded the consideration of the “merits” of a matter in some way or another as (almost) inevitable but not an obstacle, provided the presiding officer considered the merits in order to determine whether the outcome is rationally justifiable, and not to substitute his/her own opinion on the correctness thereof⁶⁸². However, Garbers states that there is little doubt that the subsequent application in practice of this wider (justifiability) test for review “confirms the existence of what we may call a ‘90% right of appeal’ against CCMA awards”⁶⁸³. (The result hereof is that a commissioner’s award dealing with for example, an alleged unfair dismissal can now be overturned on the basis that it is not “justifiable”.)

Froneman DJP did, however, issue a caution: “[o]ne must be careful not

⁶⁸⁰ *Ibid* at 1439 C.

⁶⁸¹ *Ibid* at 1434 D.

⁶⁸² *Ibid* at 1435 B-C.

⁶⁸³ Garbers C “*The demise of the ‘reasonable employer’ test*” 2000 CLL 81 at 82 (hereinafter referred to as “Garbers”).

to extend the scope of review for the wrong reasons. One such wrong reason would be the fact that the LC has no original or appeal jurisdiction in respect of the matters specified to be conciliated and arbitrated under the auspices of the commission and to compensate for this by an extended review”⁶⁸⁴.

The justifiability test was held by the LC to have become a basis of review in terms of s145, for example in *Nel v Ndaba & others*⁶⁸⁵, Marcus AJ stated that “the test for review in terms of s 145 of the Act has been authoritatively settled by the LAC in *Carephone*”⁶⁸⁶.

5.3.1.4 ***Carephone (Pty) Ltd v Marcus NO & others* Revisited**

Subsequent decisions, discussed hereunder, unfortunately ensured that the “certainty” created by *Carephone*, was short-lived.

In *Nampak Corrugated Wadeville v Khoza*⁶⁸⁷ and *County Fair Foods*⁶⁸⁸, the LAC revived the so-called “reasonable employer test”, the practical implication of which is that where the employer can show that the sanction it imposed fell within a range of reasonable sanctions, and the commissioner finds that sanction to be unfair, the award of the commissioner becomes reviewable (a CCMA commissioner is disallowed from second-guessing the employer when determining the fairness of a dismissal or the appropriateness of the sanction for misconduct). Rather, as was said by Ngcobo AJP in *County Fair Foods* (relying on his own judgment in *Nampak*): “[t]he mere fact that the commissioner may have imposed a somewhat different sanction than the employer would have, is no justification for interference by the commissioner”⁶⁸⁹. Thus,

⁶⁸⁴ *Carephone* at 1434 F.

⁶⁸⁵ (1999) 20 ILJ 2666 (LC).

⁶⁸⁶ *Ibid* at 2699 I-J.

⁶⁸⁷ (1999) 20 ILJ 578 (LAC) (hereinafter referred to as “*Nampak*”).

⁶⁸⁸ Refer to footnote 72 *supra*.

⁶⁸⁹ *Ibid* at 1713 E.

commissioners should show deference to disciplinary sanctions imposed by employers⁶⁹⁰.

According to Garbers, *Nampak* and *County Fair* set the stage for the LAC judgment in *Radebe*, because not only was the reasonable employer test revived, but “the seeds of confusion about the meaning and import of the judgment in *Carephone* were sown”⁶⁹¹.

One of three issues considered by the LAC in *Radebe* was the implication and applicability of the *Carephone* “justifiability” test for review. Nicholson JA, *inter alia*, expressed misgivings about the correctness of the *Carephone* decision. The learned judge rejected the “reasonable employer test” revived in *Nampak* and *County Fair* (“palpable mistake”⁶⁹²) and set aside the commissioner’s award (as it displayed a latent gross irregularity), but expressed grave doubts about the existence of the broad justifiability test for review enunciated in *Carephone*. However, Nicholson JA left the question open.

The learned judge stated that he had certain misgivings about whether the justifiability of the award constitutes an independent ground upon which an award can be attacked⁶⁹³. “As such it is not part of s 145, which restricts an applicant to misconduct, corruption, gross irregularity and the

⁶⁹⁰ *Ibid* at 1717 G.

⁶⁹¹ Garbers at 82.

⁶⁹² *Radebe* at 354 D.

⁶⁹³ However, Nicholson JA, notwithstanding his “misgivings” in *Radebe*, now seems to accept “justifiability” as a review in *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp & others* (2002) 23 ILJ 863 (LAC) where he states, at 868 [19] A-C: “Arbitration awards issued by the CCMA may be reviewed on any of the grounds set out in s 145 ... more especially where the commissioner had committed a gross irregularity in the conduct of the arbitration proceedings. The decision of the arbitrator can also be set aside if it is *not rationally related* to the purpose for which the power was given from an objective view ...or if it is *not justifiable as to the reasons given*” (referring to *Shoprite v Ramdaw* (LAC); *Pharmaceutical Manufacturers’ Association and Carephone*). Nicholson JA then continued, at 868 C-D: “[b]y rational I understand that the award of an arbitrator must not be arbitrary and must have been arrived at by a reasoning process as opposed to conjecture, fantasy, guesswork or hallucination. Put differently the arbitrator must have applied his mind seriously to the issues at hand and reasoned his way to the conclusion. Such conclusion must be justifiable as to the reasons given in the sense that it is defensible, not necessarily in every respect, but as regards the important logical steps on the road to his order”.

excess of powers”⁶⁹⁴. Nicholson JA had reservations as to whether Froneman DJP imported this last-mentioned ground into s 145 and he even considered that such test was “*obiter dictum*”⁶⁹⁵. He further stated that he has two difficulties with importing this ground into the LRA, namely, firstly the difference between appeals and reviews and then secondly the constitutional implications of s145”⁶⁹⁶.

Unfortunately, the LAC did not overturn the *Carephone* decision as Nicholson JA indicated that it was not necessary for the purposes of that judgment to decide the issue, but expressed doubts as to whether justifiability could be an independent ground of review as it would, for all intents and purposes, constitute an appeal⁶⁹⁷. He noted that an appeal on fact was similar to review on the basis that an award is not “justifiable with regard to the reasons given.” Nicholson JA held that a *gross irregularity* would be committed by a commissioner “[i]f there is a yawning chasm between the sanction which the court would have imposed and that which the commissioner imposed”⁶⁹⁸. Since the LAC was of the opinion that the sanction imposed by the commissioner (third respondent) was “so egregious and so out of kilter”⁶⁹⁹ with what the LAC would have imposed, it constituted a “gross irregularity”. Hence the appeal succeeded and the LC’s order was set aside and replaced.

Garbers felt that the *Radebe* judgment (LAC) is fundamentally flawed and that it displays a “misconception of what *Carephone* and the Constitution [are] all about”⁷⁰⁰. He expressed the view that all of the arguments raised by Nicholson JA could be challenged⁷⁰¹. Interestingly, he argues that *Carephone* did not introduce a new ground for review but simply reminded us of the overriding importance of the Constitution and the effect the

⁶⁹⁴ *Ibid* at 348 I.

⁶⁹⁵ *Ibid* at 349 (first line).

⁶⁹⁶ *Ibid* at 349 (top).

⁶⁹⁷ *Ibid* at 349 A.

⁶⁹⁸ *Ibid* at 355 A.

⁶⁹⁹ *Ibid* at 355 H.

⁷⁰⁰ Garbers at 84.

⁷⁰¹ *Ibid* at 85.

Constitution has on the interpretation of ordinary pieces of legislation such as the LRA⁷⁰². He stated that although *Carephone* can be criticized in some respects, it is difficult to fault it in terms of its approach to its interpretation of s 145 and in general.

Garbers reminds us of a number of fundamental truths about the CCMA, s 145 and the role of the Constitution and points to some serious weaknesses in the judgment, namely:

- The CCMA is an administrative tribunal and as such bound, in principle, to the Constitution;
- The CCMA is a creature of statute (s 115(4) (tells it what to do). Although the CCMA is afforded discretion to make decisions about its jurisdiction and powers, the exercise of that discretion is subject to review on the ground of “excess of powers” (s 145);
- S 39 of the Constitution expressly enjoins courts to take the Constitution into consideration when interpreting legislation such as the LRA. It is an accepted principle of the interpretation of legislation under a supreme Constitution that a court shall first strive to give meaning to a statutory provision in a way which accords with the Constitution before it finds an infringement of basic rights;
- This is exactly what the court in *Carephone* did (said it is possible to interpret s 145 to accord with the Constitution);
- The court in *Carephone* never imported an “independent” ground for review into s 145 as the LAC in *Radebe* would have it. According to Garbers, the court in *Carephone* simply recognized that the CCMA, in terms of exercising its powers, can only do what the law tells it to do, that the law includes the Constitution and that the powers of the CCMA

⁷⁰² *Ibid* at 82.

are also delimited by constitutional reality⁷⁰³. Garbers is of the opinion that there is nothing wrong with it;

- If the drafters of our Constitution have thought it wise to include a broad right to lawful and fair administrative action and application of that right in practice would mean a blurring of the distinction between appeals and reviews, then so be it. It is not for the LAC to, in effect, ignore the Constitution behind the guise of the intention of the legislature;
- S 145 makes it clear only that irregularities have to be gross before they constitute a reviewable defect. This section does not say that the “excess of powers” as a ground for review necessarily has to be gross;
- To view the remarks in *Carephone* about the justifiability test being part of s 145 as *obiter*, is wrong. In *Carephone* s 145 was interpreted in a certain fashion and the court came to its decision using that interpretation. As such it is binding and has to be followed;
- Garbers states that one cannot help but feel “disappointed” that Nicholson JA uses the distinction between an appeal and review as the overarching argument against *Carephone*. Garbers states that, although both Nicholson JA and Zondo AJP rely on the distinction between an appeal and a review to attack *Carephone*, there is nothing in that judgment, which indicates what the difference is. Garbers states that they found themselves squarely in the province of an appeal and it seems that Zondo AJP’s judgment seems to be a fine example (despite the fact that he wants it rejected) of application of the wide test for review laid down in *Carephone*;
- Earlier it was pointed out that the LC, when it first heard the application for review, applied the wide *Carephone* test for review but the

⁷⁰³ *Ibid* at 86.

application was dismissed. Now, ironically, Garbers states, we have a LAC who rejects the wide test, applies a presumably narrower test, but the application succeeds. Thus, Garbers holds, the judgment of the LAC is inherently contradictory⁷⁰⁴.

According to Sharpe a substantial majority of awards are upheld as justifiable under *Carephone* and the cases tend to fall into 3 categories⁷⁰⁵:

- The easy cases where the decision is correct and the LC dismisses the application, or the award is not justifiable. (Examples abound of easy cases where the award is correct and upheld as justifiable);
- The harder cases where the award is wrong but justifiable – LC judges appreciate the distinction between review under the “justifiability” standard and appeal. In these cases the court has refused to set aside an award, even though it would have reached a different outcome from the commissioner, for example *Metro Cash & Carry Ltd v Le Roux*⁷⁰⁶;
- The misapplication cases where the award, wrong or right, is set aside, because of the court’s misapplication of the standard – “judges do not seem properly to distinguish between review and appeal or otherwise to fully appreciate the spirit of the *Carephone* decision”⁷⁰⁷. According to Sharpe, *Radebe* falls into this category.

The misgivings of Nicholson JA in *Radebe* may have been well founded in view of the LC decision in *Shoprite v Ramdaw*. Although sitting as a court of first instance (bound by the decisions of the LAC), Wallis AJ found it necessary to review the law regarding reviews and to examine whether *Carephone* was still good law and binding on it, especially in the light of the

⁷⁰⁴ *Ibid* at 87.

⁷⁰⁵ Sharpe CW “*Reviewing CCMA Arbitration Awards: Towards Clarity in the Labour Courts*” 2000 ILJ 2160 at 2165 (hereinafter referred to as “Sharpe”).

⁷⁰⁶ Case No P146/98, as referred to in Sharpe at 2167.

⁷⁰⁷ Sharpe at 2168.

doubt cast by the “misgivings” of Nicholson JA in *Radebe* (which Wallis AJ accepted as “amply justified”⁷⁰⁸) and judgments by the CC in *Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others*⁷⁰⁹ and *Pharmaceutical Manufacturers Association*⁷¹⁰. Shoprite dismissed an employee (cashier) for gross misconduct after ringing up an item which was priced at R20,00 for R2,00. After conciliation, the dispute was arbitrated by the CCMA. The commissioner believed the employee’s version (interrupted while ringing up items and that she had made a mistake) and ordered reinstatement retrospectively to the date of dismissal on terms and conditions not less favourable to her than those that governed her employment at the time of her dismissal. Shoprite was aggrieved by the arbitration award and brought an application in the LC for an order reviewing and setting aside the arbitration award.

Wallis AJ found that there was no justification for the commissioner’s conclusion (i.e. that she was guilty of carelessness, “a mistake”), as opposed to “very serious misconduct” in the LC’s opinion⁷¹¹, but as he was not sitting as a court of appeal, he could not reconsider and overrule the findings of fact (as a court of review, his functions were more limited)⁷¹². The learned judge further found that the “initially erroneous approach [of the commissioner] was compounded by further errors”⁷¹³ and that the commissioner’s decision that the dismissal was an excessive sanction and consequently unfair, was wrong⁷¹⁴. Was the arbitration award thus capable of being corrected on review?

The learned judge, *inter alia*, dealt with the *Carephone* standard of review (justifiability test), Nicholson JA’s reservations expressed on the standard of review and the CC judgments mentioned above. In essence the court found

⁷⁰⁸ *Shoprite v Ramdawat* 1260 A. Refer to discussion in Chapter 2 at 23 *supra*. The LAC judgment is discussed at 130-140 *infra*.

⁷⁰⁹ (1999) (1) SA 374 (CC) (hereinafter referred to as “*Fedsure*”).

⁷¹⁰ Refer also to footnote 262 *supra*.

⁷¹¹ *Shoprite v Ramdawat* at 1241 H-I.

⁷¹² *Ibid* at 1241 B-C.

⁷¹³ *Ibid* at 1241 I.

⁷¹⁴ *Ibid* at 1243 A.

that, as a result of the *Carephone* judgment, the grounds of review expressly provided for in s 145 were sidelined and a constitutional basis for review, not provided for in the LRA, was introduced. That was wrong and, in any event, it did not result from a proper process of constitutional reasoning⁷¹⁵. The correct process would be to start with the interpretation of s 145 and, in the event of doubt as to its meaning (not conceded), the court should select that interpretation which accords with constitutional values (see s 36 of the Constitution and s 3 of the LRA)⁷¹⁶.

Although Wallis AJ did not treat *Carephone* as *obiter* (suggested by Nicholson JA) as “hitherto it has not been so treated by this court”⁷¹⁷, he did state that “even if the decision in *Carephone* is not *obiter*”⁷¹⁸, he was not obliged to follow it, since, *inter alia*, the CC judgment in *Fedsure* resulted in removing the very basis on which *Carephone* had been decided (the justifiability test enunciated in *Carephone* - i.e. that s 145(2)(a)(iii) includes the meaning that a CCMA arbitration award can be taken on review “if the commissioner’s actions are not justifiable in terms of the reasons given for them” - is based upon an approach to the expression “administrative action” in the Constitution which has subsequently been rejected by the CC). Hence, the view that a CCMA arbitration award can be reviewed on the grounds that it is not justifiable in terms of the reasons given for it, is incorrect⁷¹⁹.

Accordingly, the LC held that the decision in *Carephone* on this point is no longer authoritative and that *Carephone* was therefore no longer good law and consequently no longer binding on it, and that the LC was not obliged to follow it. The LC therefore found that the only grounds of review available to the applicant in the case under discussion were those contained in s 145 of the LRA⁷²⁰. Thus, in terms of *Shoprite v Ramdau*, the mere fact that the commissioner’s decision is not justifiable on all the facts placed before him,

⁷¹⁵ *Ibid* at 1255 E-F.

⁷¹⁶ *Ibid* at 1255 F-G.

⁷¹⁷ *Ibid* at 1256 G-H.

⁷¹⁸ *Ibid* at 1260 B.

⁷¹⁹ *Ibid* at 1260 A.

⁷²⁰ *Ibid* at 1260 C.

does not constitute a ground for review. It must be shown that the commissioner's award is so unreasonable as to be "indefensible on any legitimate ground", i.e. that no reasonable commissioner could in the proper exercise of his functions have arrived at that award (based on the facts before him)⁷²¹.

The judge's consideration of the merits of the review application was on the basis that the justifiability of an arbitration award was not a ground of review on which a CCMA award could be reviewed. For purposes of review, he would have to be satisfied at the least that deliberate wrongdoing was either the only possible conclusion or so overwhelmingly probable that the failure to reach it indicated the presence of reviewable irregularity⁷²² and that was not possible on the facts. Consequently, the LC dismissed the application with costs.

*The LC was of the opinion that, had the justifiability of an arbitration award been the test for review, it would have concluded that the award was reviewable on that ground*⁷²³. Thus, on the facts, the LC held that the commissioner's decision was indeed not justifiable on all the material placed before him, but that that was not the test in review proceedings. Subsequently, the LC granted Shoprite (appellant) leave to appeal to the LAC. However, before discussing this important decision of the LAC, mention must be made of a few other cases.

In the light of the recent pronouncements by the CC, the LC in *Cox v CCMA & others*⁷²⁴ reconsidered the test (for the standard of review of CCMA arbitration awards in terms of s 145) as enunciated by the LAC in *Carephone* and concluded that the CCMA, in exercising its arbitration function, was not acting as an administrative body. The LC proposed the adoption of a test (similar to

⁷²¹ *Ibid* at 1261 G.

⁷²² *Ibid* at 1241 C-D.

⁷²³ *Ibid* at 1261 E-F; my emphasis, highlighting fact that although the LAC held that the justifiability of an arbitration award was a test for review, it was not followed by the LC and the award was upheld (i.e. found to be not reviewable).

⁷²⁴ (2001) 22 ILJ 137 (LC).

the *Carephone* test) applicable to the review of arbitration awards both under s 145 of the LRA and s 33(1)(a) of the Arbitration Act.

In *Zimema v CCMA*⁷²⁵, the LC held that the CCMA was an organ of State and that the *Carephone* test was binding. However, the LC found that the CCMA, when conducting internal disciplinary proceedings against one of its own employees, was not carrying out an administrative act capable of review.

5.3.1.5 The Promotion of Administrative Justice Act 3 of 2000 – Treatment in *Volkswagen v Brand*

In *Volkswagen SA (Pty) Ltd v Brand NO & others*⁷²⁶ the court investigated what the correct test was to review CCMA arbitration awards. Landman J held that the *Carephone* test for the review of CCMA arbitration awards was no longer applicable⁷²⁷ since the passing of the PAJA. However, Landman J found that the PAJA itself did not apply for the following reasons: firstly, because the PAJA was concerned with administrative action which an arbitration award was not; secondly, it did not seem that the PAJA repealed s 145, and thirdly, assuming that it did, the PAJA did not apply, as far as the LC was concerned, until rules had been promulgated and no such rules had been drafted⁷²⁸.

Section 7(4) of the PAJA read with s 7(3) provide that, until the promulgation of rules of review under the PAJA, only the High Court and the CC have jurisdiction to hear reviews brought under that Act. However, in terms of s 157(1), the LC has exclusive jurisdiction in respect of matters that have to be considered by it and s 210 states that if a conflict arises between the LRA and the provisions of any other law (save the Constitution), the LRA prevails.

⁷²⁵ (2001) 22 ILJ 254 (LC).

⁷²⁶ (2001) 22 ILJ 993 (LC) (hereinafter referred to as "*Volkswagen v Brand*").

⁷²⁷ *Ibid* at 995 B.

⁷²⁸ *Ibid* at 994 I-J; 1008 [53] E-F.

“It would appear then that s 7(4), insofar as it attempts to remove the LC’s jurisdiction, would be overruled”⁷²⁹.

Landman J preferred and followed the reasoning in *Shoprite v Ramdaw*, holding that the work of a CCMA commissioner presiding over an arbitration in terms of ss 136, 138, 139 or 141 was not administrative action⁷³⁰. The court was of the view that the constitutional niche which applies to CCMA awards is s 34 of the Constitution which provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or, where appropriate, another independent and impartial tribunal or forum. It follows, said the court, that s 145 which is virtually identical to s 33 of the Arbitration Act, must be applied in the same manner⁷³¹.

The PAJA is discussed in more detail in Chapter 6 *infra*.

5.3.1.6 *Shoprite Checkers (Pty) Ltd v Ramdaw NO & others (Labour Appeal Court)*

Once again, the issue of review of CCMA arbitration awards came before the LAC in *Shoprite v Ramdaw (LAC)* when it had to consider, *inter alia*, whether the LC was correct in holding that the *Carephone* case had been overruled by the decisions of the CC. The appeal raised the question whether *Carephone* is still good law. The LAC considered that, although *Carephone* was in certain respects unsatisfactory, there were sound reasons to leave *Carephone* as it is. The result, said the Court, is that review of CCMA awards should be brought in terms of s 145 and within the six week period stipulated in that section. It held that it is not competent to review a CCMA award in terms of s 158 (1)(g)⁷³².

⁷²⁹ Wesley M “Review of CCMA Arbitration Awards *Shoprite Checkers (Pty) Ltd v Ramdaw NO & others*” 2001 ILJ 1515 (hereinafter referred to as “Wesley”), at 1519.

⁷³⁰ *Volkswagen v Brand* at 995 B-C.

⁷³¹ *Ibid* at 995 C-D.

⁷³² *Shoprite v Ramdaw (LAC)* at 1604 I-J. The LC judgment is discussed at 125-128 *supra*.

Zondo JP (with Mogoeng JA and Joffe AJA concurring) remarked that the CC in *Fedsure* dealt with the same administrative section (s 24 of the interim Constitution) as the court in *Carephone* and that the CC had to consider whether the passing of resolutions relating to rates by a local council constituted an administrative action as contemplated in s 24. Zondo JP held that the provisions of s 33 read with those of item 23 of Schedule 6 to the Constitution (dealt with in *Carephone*) are materially similar to those of s 24 of the interim Constitution⁷³³. However, the CC did not give a definition of an administrative action although it did make the observation that, whilst it might not have served any useful purpose under the previous legal order to ask whether or not an action of a public authority was administrative, under the new constitutional order that question had to be asked in order to give effect to the provisions of s 24 of the interim Constitution and has to be asked in order to give effect to the provisions of s 33 read with item 23 of Schedule 6 of the final Constitution⁷³⁴.

Zondo JP agreed with this approach of the CC and held that Froneman DJP in *Carephone* does not seem to have appreciated that the administrative justice section could only apply if the action in question was an administrative action and that, because of this, a court would have no choice but to have to satisfy itself that such action was an administrative action before it could apply the provisions of the administrative justice section to it⁷³⁵.

Zondo JP then dealt with the judgment of the CC in *Pharmaceutical Manufacturers Association* (handed down after the *Carephone* and *Radebe* decisions). After discussing the CC judgment, Zondo JP stated⁷³⁶ that the following was clear from that judgment:-

- 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;

⁷³³ *Ibid* at 1610 D.

⁷³⁴ *Fedsure* at 391 F-G; *Shoprite v Ramdaw* (LAC) at 1610 E-G.

⁷³⁵ *Shoprite v Ramdaw* (LAC) at 1610 H.

⁷³⁶ *Ibid* at 1612 E-H.

- 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;
- the rationality of a decision made in the exercise of public power must be determined objectively;
- a court cannot interfere with a decision simply because it disagrees with it or it considers that the power was exercised inappropriately;
- a decision that is objectively irrational is likely to be made only rarely;
- 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.

Having set out the CC decision with regard to the reviewability of decisions made in the exercise of public power on grounds of irrationality, the learned judge then discussed *Carephone's* decision regarding the reviewability of CCMA awards on grounds of unjustifiability⁷³⁷. He then held that it is clear that the ground of review dealt with in the CC case (*Pharmaceutical Manufacturers Association*) is that of irrationality whereas the ground of review that was dealt with in *Carephone* is that of justifiability⁷³⁸.

Whether *Carephone* wrongly decided - academic:

The LAC mentioned two reasons why it was academic whether or not *Carephone* was wrongly decided, namely:

⁷³⁷ *Ibid* at 1612 J.

⁷³⁸ *Ibid* at 1613 E.

- Irrationality of public decision – a ground of review:

The issuing of an award by a CCMA commissioner under the LRA is an exercise of public power and must therefore meet the constitutional requirements of rationality, failing which it can be set aside⁷³⁹ (as per the CC in *Pharmaceutical Manufacturers Association* which decided, in effect, that *rationality has become a constitutional requirement in our law* for all decisions taken in *the exercise of all public power* and that irrationality of such decisions is now a ground of review).

The LAC examined *Carephone* and concluded that the term “justifiable” (used in *Carephone*), although not synonymous with the term “rational”, bears 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*. A decision that is justifiable cannot be said to be irrational and a decision that is irrational cannot be said to be justifiable⁷⁴⁰. (Froneman DJP emphasized that even though “justifiable” is (somewhat) related to “rationality”, s 33 read with item 23 expressly use the adjective “justifiable”).

- Treatment of the PAJA:

The court noted that the PAJA had partly come into operation and that it was passed in order to promote an efficient administration and good governance; and to create a culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function, by giving effect to the right to just administrative action.

Zondo JP then discussed the definitions of “administrative action” (wide) and “decision” in s 1 of the PAJA concluding that the definitions “*may be wide enough*” [emphasis added] to include the (perhaps incorrect) view of *Carephone* and that the making of a CCMA arbitration award constitutes

⁷³⁹ *Ibid* at 1614 I.

⁷⁴⁰ *Ibid* at 1614 F-G.

an administrative action⁷⁴¹. However, unfortunately, the court did not find it necessary to express a final view on this.

According to Zondo JP, if the PAJA were to apply to the making of arbitration awards by CCMA commissioners, s 6 of the PAJA comes into operation⁷⁴², providing, *inter alia*, that an administrative action may be reviewed if it is procedurally unfair⁷⁴³, or if it is not rationally connected to the information before the administrator; or the reasons given for it⁷⁴⁴.

Zondo JP stated that these review grounds “basically relate to what was said by this court in *Carephone*⁷⁴⁵ and it “would not serve much purpose” to conclude that *Carephone* was wrongly decided “because justifiability, insofar as it falls within the ambit of rationality, would still be applicable to CCMA arbitration awards”⁷⁴⁶.

In view of its decision to leave *Carephone* untouched, the LAC held that it would approach the appeal on the basis that a CCMA award will be reviewed and set aside if it is not justifiable in relation to the reasons given for it⁷⁴⁷.

The court was of the view that it is within the contemplation of the dispute-resolution system of the LRA that there will be arbitration awards that are unsatisfactory in many respects but which nevertheless must be allowed to stand because they are not so unsatisfactory as to fall foul of the applicable grounds of review. Without such contemplation, the LRA’s objective of the expeditious resolution of disputes could have no hopes of being achieved⁷⁴⁸. Zondo JP then stated that the first respondent’s (commissioner’s) award cannot be said to be unjustifiable when regard is had to all circumstances of this case and the material that was before him.

⁷⁴¹ *Ibid* at 1616 B-C.

⁷⁴² *Ibid* at 1616 E.

⁷⁴³ S 6(2)(c).

⁷⁴⁴ S 6(2)(f)(ii)(cc) and (dd).

⁷⁴⁵ *Shoprite v Ramdaw* (LAC) at 1616 G.

⁷⁴⁶ *Ibid* at 1616 H-I.

⁷⁴⁷ *Ibid* at 1617 F.

⁷⁴⁸ *Ibid* at 1636 H-I.

The appellant attacked the commissioner's award on two grounds; namely:

- The commissioner committed a gross irregularity in that he failed to consider part of the appellant's case that was put before him. He only considered that part which was to the effect that the employee's (second respondent) conduct constituted fraud and did not consider whether, even if the second respondent was not guilty of fraudulent (i.e. intentional) underringing⁷⁴⁹, her conduct constituted gross negligence so that her dismissal was fair⁷⁵⁰. The court found that this was not the appellant's case at the arbitration⁷⁵¹ and that the appellant's case was that the second respondent had acted deliberately and that it could "not have been an honest mistake"⁷⁵². In any event, the court found that the commissioner had considered this and found that the employee's dismissal was nevertheless unfair⁷⁵³. However, the court did state that the transcript does not reflect the complete argument on both sides but that "the appellant cannot blame anybody because it did not reconstruct the missing part of the evidence"⁷⁵⁴, and the appellant must have realized there were gaps in the transcript which had to be filled in one way or another in order for justice to be done to its case, but nevertheless proceeded with the case without filling the gaps⁷⁵⁵.
- The commissioner's award was not justifiable in relation to the reasons given for it⁷⁵⁶. In applying this test, Zondo JP was of the opinion that he must have regard to the material that was properly available to the commissioner, the decision he took and the reasons given for the decision. In doing so, Zondo JP said that one must bear in mind what Chaskalson P said in *Pharmaceutical Manufacturers Association*, namely that a decision that is objectively irrational is likely to be made only rarely.

⁷⁴⁹ Facts of *Shoprite v Ramdawat* 126 *supra*.

⁷⁵⁰ *Shoprite v Ramdawat* (LAC) at 1627 F-G.

⁷⁵¹ *Ibid* at 1626 C.

⁷⁵² *Ibid* at 1622 B; 1623 F; 1624 I; 1626 B; 1631 I-J.

⁷⁵³ *Ibid* at 1605 E.

⁷⁵⁴ *Ibid* at 1626 B.

⁷⁵⁵ *Ibid* at 1626 E.

⁷⁵⁶ *Ibid* at 1631 C.

The learned judge then referred to the “commonality between justifiability and rationality”. It was further held that the distinction between an appeal and review must be borne in mind and that the dispute-resolution dispensation of the LRA (meant to be expeditious) “would collapse if every arbitration award could be taken on review and set aside”. Zondo JP stated that it is not inconsistent with the Constitution to promote an expeditious resolution of labour disputes⁷⁵⁷.

Although the LAC accepted that the commissioner’s award could be criticized in a number of respects, the award could not be described as irrational or unjustifiable (even taking into account all that criticism)⁷⁵⁸.

In the course of deciding this, the court considered the effects of a lapsed disciplinary warning. The court, *inter alia*, held that the commissioner treated the employee, whose warnings had lapsed, as having a clean record and that the commissioner’s approach was not unreasonable and therefore could not be described as unjustifiable. (It appeared to the Court that an employee at Shoprite could be given more than one final written warning for failing to follow correct corporate procedures.)⁷⁵⁹

Finally, Zondo JP held that although the *Carephone* debate has been going on for a long time, the labour relations community has nevertheless for some time now organized its lives and activities on the basis of that judgment⁷⁶⁰. This is true because Wallis AJ, in the LC decision of *Shoprite v Ramdaw* stated that in preparing the judgment, he referred to every (reported) decision of the LC since *Carephone* and in “virtually everyone the court has referred to one or other of the leading passages from *Carephone*”, and in some at least, “there is reference only to the broader ground of review enunciated in that judgment”⁷⁶¹.

⁷⁵⁷ *Ibid* at 1605 F-G; 1631 G.

⁷⁵⁸ *Ibid* at 1632 B-C.

⁷⁵⁹ *Ibid* at 1605 I-J.

⁷⁶⁰ *Ibid* at 1617 C. Zondo JP accepted that some of the criticism against *Carephone* is justified but, having regard to all the circumstances and *in order to bring about certainty and stability in the law in this area*, thought that the debate must come to an end.

⁷⁶¹ *Shoprite v Ramdaw* at 1254 E-F.

In the light of what has been said above, the learned judge was of the view that it would not serve much purpose for the LAC to consider whether or not its decision in *Carephone* was correct and whether or not such decision should be departed from". In those circumstances "*Carephone stays*". This appeal can, therefore, be considered on the basis that, as was decided by this court in *Carephone*, CCMA awards can be reviewed and set aside if they are not justifiable in relation to the reasons given for them⁷⁶².

It was argued on behalf of the appellant that it was competent to bring a review application of a CCMA arbitration award under s 158(1)(g). Zondo JP held that as s 145 provides a specific remedy for the reviewing of CCMA awards, s 158(1)(g) must then have been intended for the review of the performance of purported performance of functions under the Act other than CCMA awards. Therefore this contention was rejected⁷⁶³. In the circumstances, the appeal, the court held, must fail. Thus, the commissioner's award and the order of reinstatement stands.

5.3.1.7 Criticism of *Shoprite Checkers (Pty) Ltd v Ramdaw NO & others* (Labour Appeal Court)

As stated above⁷⁶⁴, the CCMA commissioner, in determining the unfair dismissal of a part-time cashier of Shoprite, concluded that Shoprite had not shown a fair reason for the dismissal and consequently ordered her reinstatement whereafter Shoprite applied to the LC to have the award reviewed and set aside⁷⁶⁵. The LC found that *Carephone* was wrongly decided and declined to follow it. Thus, the LC held, Shoprite had not shown that the award ought to be set aside and dismissed the review application. Hence Shoprite's appeal to the LAC which overruled the LC's decision with regard to the applicability of *Carephone*.

⁷⁶² *Ibid* at 1617 E-F.

⁷⁶³ *Ibid* at 1637 A-B.

⁷⁶⁴ Refer to discussion of LC decision of *Shoprite v Ramdaw* at 125-128 *supra*.

⁷⁶⁵ Shoprite belatedly argued that the commissioner's decision also amounted to a gross irregularity as envisaged in s 145(2)(ii), but the LC also rejected this argument.

Although Zondo JP found in favour of *Carephone*, only time will tell whether the LAC has in fact put to rest this controversy which has raged since the inception of the LRA. However, in my opinion, this is not the end of the matter for the following reasons:

- Although the LAC held that “*Carephone* stays” and consequently the justifiability test, the appeal nevertheless failed although the court a quo, when reviewing the award, expressed the view that if the test were whether the commissioner’s conclusion was justifiable, it would have held in the light of the deficiencies in the commissioner’s reasoning, that it was not justifiable. Had the LC thus applied the *Carephone* justifiability test⁷⁶⁶, the commissioner’s award would have been set aside by the LC.
- The LAC framed the central legal issue to be decided as whether *Carephone* “is still good law”⁷⁶⁷. Wesley states that it is rather surprising then that the decision turns “not on the correctness of that decision, but the prior question of whether, even if the decision is incorrect, it would be advisable to reconsider it”⁷⁶⁸.
- The LAC, although criticizing *Carephone*⁷⁶⁹, held that it would be inappropriate to revisit *Carephone* for three reasons:
 - The court expressed the view that the test for review set out in *Carephone*, while perhaps based on the wrong grounds, is nevertheless applicable to CCMA arbitrations on the basis of the

⁷⁶⁶ Refer to discussion of the “justifiability test” at 118-120 *supra*.

⁷⁶⁷ *Shoprite v Ramdaw* (LAC) at 1607 D-E.

⁷⁶⁸ Wesley at 1516.

⁷⁶⁹ For example, the LAC in *Carephone* stated that whether a CCMA arbitration is an administrative act is not a relevant question. This was contradicted in *Shoprite v Ramdaw* by the LAC’s referral to the Constitution itself distinguishing between administrative and other acts. This is important because administrative acts gain special protection under s 33 of the Constitution. Wesley, at 1516, is of the opinion that it appears as if the LAC in *Shoprite v Ramdaw* may have been incorrect in its assessment of the *dictum* in *Carephone* because Froneman DJP suggested, not that the identification of whether an act is administrative action or not is irrelevant, but rather that the formal classification of acts as judicial, quasi-judicial or administrative is not of assistance in determining whether an act constitutes administrative action in terms of s 33 of the Constitution.

decision of the CC in *Pharmaceutical Manufacturers Association*⁷⁷⁰. The LAC held that “justifiability” as espoused in *Carephone* bears a sufficiently similar meaning to that of “rationality” as set out in *Pharmaceutical Manufacturers Association* to justify the conclusion that “rationality” can be accommodated within the concept of “justifiability” as used in *Carephone*⁷⁷¹. Hence the LAC’s ruling that the question whether or not *Carephone* was wrongly decided has “become academic”⁷⁷².

The LAC held that “rationality” has become a constitutional requirement for all decisions taken in the exercise of all public power and irrationality of such decisions is now a ground of review. The LAC held that the issuing of a CCMA arbitration award constitutes an exercise of public power and must therefore meet this constitutional requirement of rationality, failing which, it can be set aside on this ground⁷⁷³.

- Although the court expressed the view that the PAJA’s definitions of “administrative action” and “decision” “*may be wide enough*”⁷⁷⁴ to include CCMA arbitrations, it declined to express a final view on the correctness of its interpretation of the PAJA as it was only considering whether it ought to reappraise *Carephone*. The court suggested that as the PAJA⁷⁷⁵ may be applicable to CCMA arbitrations, it would not interfere with *Carephone* even if that decision was wrong.

⁷⁷⁰ The CC held that the exercise of all public power should not be arbitrary, meaning that any decision taken in the exercise of such power must be “rationally” related to the purpose for which the power was given and that the decision, viewed objectively, must be rational.

⁷⁷¹ *Shoprite v Ramdaw* (LAC) at 1614 F-G.

⁷⁷² *Ibid* at 1614 H.

⁷⁷³ *Ibid* at 1614 H-J.

⁷⁷⁴ If PAJA is held to be applicable to CCMA arbitrations, this effectively means that the review grounds in s 145(2) is not exhaustive because PAJA, as a statute, may then provide alternative grounds of review. Hopefully, the LAC will provide a definite answer as to the applicability of the PAJA to CCMA arbitrations in the near future.

⁷⁷⁵ The PAJA provides that administrative action may be reviewed, *inter alia*, if a decision is not rationally connected to the information before the decision-maker or the reasons given for the decision. Consequently, if the PAJA applies to CCMA arbitration awards a similar ground of review to that in *Carephone* would thus also be available under the PAJA. However, as I am of the

The LAC also made no mention of Landman J's (valid) concerns in *Volkswagen v Brand* as to the applicability (and rejection) of the PAJA to CCMA arbitrations⁷⁷⁶.

- The court held that in order to bring about “certainty and stability in the law” *Carephone* stays. With respect, this approach is unusual as established legal principles should not be sacrificed in an attempt to introduce “certainty and stability” in the law. In fact, the approach may create problems as the LC, bearing in mind the LRA's objective of expeditious dispute resolution, may be inclined to lower the standard of review by allowing CCMA arbitration awards to stand which might otherwise have been reviewed. Only time will tell whether this LAC decision will survive the scrutiny of the SC judges of Appeal should similar disputes serve before them.
- *Notwithstanding the amendment to s 158(1)(g) (“subject to s 145 ...”), the LAC in Reddy's case neither refers nor acknowledges the amendment*⁷⁷⁷.

5.3.2 S 145 v (amended) s 158(1)(g) (“*subject to s 145*”)

In the LAC decision of *Radebe*, Nicholson JA stated that the form of review provided for in s 158(1)(g) (“on any grounds that are permissible in law”) was “the full form of review previously referred to as common-law review”⁷⁷⁸. The present-day position in regard to common-law review was formulated in *Hira's*⁷⁷⁹ case and summed up by Corbett CJ as follows⁷⁸⁰:

opinion that *PAJA does not apply* (refer to Chapter 6 at 155-156) this argument is rendered irrelevant.

⁷⁷⁶ Refer to discussion at 129-130 *supra*.

⁷⁷⁷ Refer to discussion of *Reddy's* case at 142-143 *infra*.

⁷⁷⁸ *Radebe* at 347 [31] H.

⁷⁷⁹ Refer to footnote 161 *supra*.

⁷⁸⁰ *Hira's* case at 93 A-94 A.

- Persons affected, generally speaking, by the failure to perform or wrong performance of a statutory duty or power can approach the court by way of common-law review;
- The grounds upon which the Court may interfere under these circumstances are limited if the aforesaid duty/power is essentially a decision-making one once the tribunal has taken a decision.

In *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd*⁷⁸¹ the court ruled that, "in order to establish review grounds, it must be shown that the president failed to apply his mind to the relevant issues in accordance with the 'behests of the statute and the tenets of natural justice' ... Such failure may be shown by proof, *inter alia*, that the decision was arrived at arbitrarily or capriciously or *mala fide* or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the president misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforestated"⁷⁸²;

- If the complaint relates to a material error of law, reviewability of the decision will, in principle, depend upon whether the tribunal was intended, by the legislature, to have exclusive authority to decide the question of law concerned;
- Where the powers or functions are of a purely judicial nature, the court will be reluctant to rule that the tribunal is intended to have exclusive jurisdiction to decide all questions;

⁷⁸¹ 1988 (3) SA 132 (AD).

⁷⁸² *Ibid* at 152 A-E.

- Where the question of interpretation does not exclusively fall under the jurisdiction of the tribunal, the decision may be invalid subject to the materiality thereof;
- Where the decision of the tribunal is discretionary a different approach may be required in order to establish the legislature's intent.

In *Johannesburg Consolidated Investment*⁷⁸³ Innes CJ stated that the grounds upon which a review may be claimed under the common-law are “somewhat wider” than those which alone would justify a review of judicial proceedings and where there was a statutory prohibition against an appeal a clear line of distinction needs to be drawn between the appeal and review proceedings.

The confusion created by s 158(1)(g) (which applied “despite s 145”) could not be resolved by *Carephone* and subsequent decisions⁷⁸⁴ and it was left to the legislature to intervene by substituting the words “subject to 145” for the words “despite s 145” in order to clarify the position. The amendment corresponds with the interpretation placed on “despite s 145” by the unanimous LAC decision of *Carephone* where Froneman DJP held that, if the result of an “attempt to interpret s 145 in a manner which is consistent with the Constitution” is to read s 158(1)(g)⁷⁸⁵ as “subject to s 145” (instead of “despite s 145”) “then so be it. It is a lesser evil than ignoring the whole of s 145, including its sensible provisions relating to time-limits”⁷⁸⁶.

The legislature must have taken note of the criticism levied against s 158(1)(g) and the statement by Froneman DJP and accordingly amended the section to read: “subject to s 145, review the performance of purported performance of any function provided for in *this* Act on any grounds that are permissible in law”. HOWEVER, this is not the end of it all as, in the 2003 LAC decision of

⁷⁸³ Refer to footnote 136 *supra*. Repeated by Corbett CJ in *Hira's* case at 86 A.

⁷⁸⁴ Refer to discussion at 120 *et seqq supra*.

⁷⁸⁵ Referring to the unamended s 158(1)(g).

⁷⁸⁶ *Carephone* at 1433 [28] G.

*Reddy's case*⁷⁸⁷ (dealing with an arbitration award by a bargaining council accredited in terms of the LRA and which award was held by Zondo JP *not* to be a private arbitration⁷⁸⁸), Zondo JP found that the second respondent (the arbitrator) was “performing functions in terms of the Act when he conducted the arbitration and issued the award” and that (and now comes the important statement) “[i]n terms of s 158(1)(g) the [LC] is given power, *despite s 145*, to review the performance or purported performance of any function provided for in this Act *or any act or omission of any person or body in terms of this Act* on any grounds that are permissible in law”⁷⁸⁹. Hence, “*the arbitration proceedings, or the award issued pursuant thereto, can be reviewed under s 158(1)(g) ... and is not confined to the narrow grounds set out in s 33 of the Arbitration Act*”⁷⁹⁰. Even if it is assumed that the review proceedings were instituted prior to the amendment of s 158(1)(g) (i.e. “*subject to s 145*”) and that Zondo JP therefore, for purposes of his judgment, considered the aforesaid section in its unamended form, I still find it surprising that, as the amendment had taken effect prior to the date of the judgment, he had not at least acknowledged the said amendment.

If Zondo JP had in fact elected to disregard the amendment, which I hasten to concede seems unlikely, his decision will have the following result:-

- bargaining council reviews must take place in terms of s 158(1)(g);
- the newly inserted s 51(8), *inter alia*, makes the provisions of s 146 (exclusion of the Arbitration Act), and also the provisions of s 145 (review of arbitration awards) applicable to bargaining council arbitrations;
- consequently bargaining council arbitrations should be reviewed in accordance with the provisions of s 145;

⁷⁸⁷ Refer to facts of *Reddy's case* in footnote 224 *supra*.

⁷⁸⁸ *Reddy's case* at 1358 H-I; 1364 H-I.

⁷⁸⁹ *Ibid* at 1365 [17] A-B.

⁷⁹⁰ *Ibid* at 1365 A (my emphasis).

- however, Zondo JP's ruling brings the review of these bargaining council arbitrations under s 158(1)(g);
- bargaining council arbitration awards can therefore be reviewed under wider powers of review as opposed to CCMA arbitrations which fall to be reviewed under s 145.

If the amendments (to ss 51(8) and 158(1)(g)) applied to the *Reddy* case, the LAC should, with respect, have found that:-

- s 51(8) introduced the provisions of s 145 for purposes of review of bargaining council awards;
- s 158(1)(g) was made *subject to* s 145;
- for purposes of review the provisions of s 145 therefore applied.

CHAPTER 6 – PROMOTION OF ADMINISTRATIVE JUSTICE ACT 3 OF 2000

The PAJA came into operation on 30 November 2000 (excluding ss 4 and 10) and was enacted in consequence of s 33(3)⁷⁹¹ of the Constitution which requires national legislation to be enacted to give effect to everyone's right to administrative action that is lawful, reasonable and procedurally fair, and to the right to written reasons for administrative action as contemplated in ss 33(1) and (2) of the Constitution⁷⁹²; and to provide for matters incidental thereto. "The enactment of the PAJA has the effect that the interim or transitional wording of ss 33(1) and (2) in item 23(2)(b) of Schedule 6 to the Constitution 1996 falls away and is replaced by the final wording ..."⁷⁹³ In *Metcash Trading Ltd v Commissioner, South African Revenue Service & Another*⁷⁹⁴, Kriegler J, in referring to common-law judicial review stated that it is now "buttressed" by the right to just administrative action under s 33 of the Constitution, and "fleshed out" in the PAJA⁷⁹⁵.

The PAJA was enacted in order to promote an efficient administration and good governance, and to create a culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function, by giving effect to the right to just administrative action. In the words of Chaskalson P in *Pharmaceutical Manufacturers Association* "[w]hilst there is no bright line between public and private law, administrative law, which forms the core

⁷⁹¹ S 33(3) of the Constitution provides that:

National legislation must be enacted to give effect to these rights, and must –

- (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
- (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
- (c) promote an efficient administration.

Item 23(3) of Schedule 6 to the Constitution further provides that the legislation envisaged in s 33(3) must be enacted within 3 years of the date on which the Constitution took effect.

⁷⁹² Refer to footnote 667 *supra* for a recordal of s 33(1) and (2).

⁷⁹³ *Volkswagen v Brand* at 995 A.

⁷⁹⁴ 2001 (1) SA 1109 (CC).

⁷⁹⁵ *Ibid* at 1130 D-E. In *Schoonbee & others v MEC for Education, Mpumalanga* 2002 (4) SA 877 Moseneke J, at 882 G, stated that the PAJA "contains in great part what one may regard as partial codification of administrative law with specific reference to administrative actions". Also in *Cronje v United Cricket Board of South Africa* 2001 (4) SA 1361 TPD, Kirk-Cohen J, at 1381 A, stated that "[o]ne may assume that [the PAJA] did not diminish the ambit of administrative action as it existed prior to its promulgation".

of public law, occupies a special place in our jurisprudence. It is an incident of the separation of powers under which courts regulate and control the exercise of public power by the other branches of government. It is built on constitutional principles which define the authority of each branch of government, their inter-relationship and the boundaries between them”⁷⁹⁶.

Chaskalson P also referred to the SCA judgment of *Commissioner of Customs and Excise v Container Logistics (Pty) Ltd; Commissioner of Customs and Excise v Rennies Group Ltd t/a RenFreight*⁷⁹⁷ where Hefer JA (delivering the judgment) expressed the opinion that judicial review under the Constitution and under the common-law are different concepts⁷⁹⁸. However, Chaskalson P took a different view and stated that “[t]he control of public power by the Courts through judicial review is and always has been a constitutional matter. Prior to the adoption of the interim Constitution this control was exercised by the courts through the application of common-law constitutional principles. Since the adoption of the interim Constitution such control has been regulated by the Constitution which contains express provisions dealing with these matters. The common-law principles that previously provided the grounds for judicial review of public power have been subsumed under the Constitution and, insofar as they might continue to be relevant to judicial review, they gain their force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts”⁷⁹⁹.

I deem it prudent to discuss the PAJA, more in particular s 6 thereof, as the grounds of review provided for in that section are, in my opinion, extremely wide and can, if the PAJA applies, be relied upon in instances where s 145 of the LRA is not of assistance to a litigant. Therefore the question arises whether the PAJA applies to the making of arbitration awards by CCMA commissioners. The grounds of review provided for in s 6 are as follows:

⁷⁹⁶ *Pharmaceutical Manufacturers Association* at 696 [45] C-D.

⁷⁹⁷ 1999 (3) SA 771 (SCA).

⁷⁹⁸ *Pharmaceutical Manufacturers Association* at 692 C.

⁷⁹⁹ *Ibid* at 692 [33] E-G.

“6.

- (1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.
- (2) A court or tribunal has the power to judicially review an administrative action if -
 - (a) the administrator who took it –
 - (i) was not authorized to do so by the empowering provision;
 - (ii) acted under a delegation of power which was not authorized by the empowering provision; or
 - (iii) was biased or reasonably suspected of bias;
 - (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
 - (c) the action was procedurally unfair;
 - (d) the action was materially influenced by an error of law;
 - (e) the action was taken –
 - (i) for a reason not authorized by the empowering provision;
 - (ii) for an ulterior purpose or motive;
 - (iii) because irrelevant considerations were taken into account or relevant considerations were not considered;
 - (iv) because of the unauthorized or unwarranted dictates of another person or body;
 - (v) in bad faith; or
 - (vi) arbitrarily or capriciously;
 - (f) the action itself –
 - (i) contravenes a law or is not authorized by the empowering provision; or
 - (ii) is not rationally connected to –
 - (aa) the purpose for which it was taken;
 - (bb) the purpose of the empowering provision;
 - (cc) the information before the administrator; or
 - (dd) the reasons given for it by the administrator;
 - (g) the action concerned consists of a failure to take a decision;
 - (h) the exercise of the power or the performance of the function authorized by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person

could have so exercised the power or performed the function;

or

- (i) the action is otherwise unconstitutional or unlawful.
- (3) If any person relies on the ground of review referred to in subsection (2)(g), he or she may in respect of a failure to take a decision, where –
- (a) (i) an administrator has a duty to take a decision;
 - (ii) there is no law that prescribes a period within which the administrator is required to take that decision; and
 - (iii) the administrator has failed to take that decision,
- institute proceedings in a court or tribunal for judicial review of the failure to take the decision on the ground that there has been unreasonable delay in taking the decision; or
- (b) (i) an administrator has a duty to take a decision;
 - (ii) a law prescribes a period within which the administrator is required to take that decision; and
 - (iii) the administrator has failed to take that decision before the expiration of that period,
- institute proceedings in a court or tribunal for judicial review of the failure to take the decision within that period on the ground that the administrator has a duty to take the decision notwithstanding the expiration of that period.”

As stated above, the PAJA is the result of s 33 of the Constitution which section only applies to conduct defined as “administrative action”. In terms of s 1 of the PAJA an “administrative action”⁸⁰⁰ is a decision, or the failure to take a decision by, *inter alia*,

⁸⁰⁰ S 1 of PAJA defines “administrative action” as:

“(A)ny decision taken, or any failure to take a decision, by –

(a) an organ of State, when –

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of State, when exercising a public power or performing a public function in terms of an empowering provision,

which adversely affects the rights of any person and which has a direct, external legal effect ...”

“Decision” is then defined as meaning “any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to, *inter alia*, making, suspending, revoking or refusing to make an order, award or determination”.

an organ of state whereas “organ of state”⁸⁰¹ is given the meaning⁸⁰² assigned to it in s 239 of the Constitution, namely:-

- (a) any department of state or administration in the national, provincial or local sphere of government; or
- (b) any other functionary or institution –
 - (i) exercising a power or performing a function in terms of the Constitution or of a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation,

but does not include a court or a judicial officer.

In the important judgment of *Carephone* it was held by Myburgh JP, Froneman DJP and Cameron JA that the CCMA is an “organ of state” and that its proceedings amount to “administrative action” for purposes of the Constitution⁸⁰³. However, the PAJA had not yet come into effect at the time.

Like all new legislation the PAJA has given rise to different interpretations for example Landman J⁸⁰⁴ in *Volkswagen v Brand*⁸⁰⁵ stated that:-

- an arbitration award was not an administrative action and hence the PAJA did not apply;
- it did not seem that the PAJA repealed s 145; and
- if it did however, the PAJA did not apply as s 7(4) of the PAJA read with s 7(3) provide that, until the promulgation of rules of review under the PAJA, only the HC and the CC have jurisdiction to hear reviews brought under the PAJA (and not the LC).

Mention must also be made of the LC decision of *Shoprite v Ramdaw*⁸⁰⁶ in which

⁸⁰¹ S 8(1) of the Constitution states that the Bill of Rights (which includes s 33) applies to all law and binds the legislature, the executive, the judiciary and all organs of state.

⁸⁰² S 1 of the PAJA.

⁸⁰³ *Carephone* at 1430 D-G; 1431 F-I.

⁸⁰⁴ *Volkswagen v Brand* at 994 I-J.

⁸⁰⁵ Refer to discussion in Chapter 5 at 129-130 *supra*.

⁸⁰⁶ Refer to discussion in Chapter 5 at 125-128 *supra*.

Wallis AJ criticized *Carephone* and stated that the LAC was wrong to introduce a constitutional basis for review (i.e. the justifiability test⁸⁰⁷) as it was not provided for in the LRA and it “[did] not flow from a proper process of constitutional reasoning”⁸⁰⁸. Wallis AJ stated that the view in *Carephone* (i.e. an award can be reviewed if not justifiable in terms of the reasons given for it) is “incorrect”⁸⁰⁹. However, although Wallis AJ (obviously) did not treat *Carephone* as *obiter*, he did rule that he was “not obliged to follow it” as the CC judgment of *Fedsure* removed the very basis on which *Carephone* had been decided (i.e. *Carephone*’s “view rests upon an approach to the expression ‘administrative action’ in the Constitution which has been rejected by the Constitutional Court and cannot therefore be regarded as authoritative”⁸¹⁰. Consequently, the LC rejected the incorporation of the constitutional review ground of justifiability into the (limited) review grounds stipulated in s 145.

However, an appeal was lodged to the LAC⁸¹¹ which rejected the view expressed by Wallis AJ and held that although “some of the criticism against *Carephone* is justified”, “*Carephone* stays” and that “CCMA awards can be reviewed and set aside if they are not justifiable in relation to the reasons given for them”⁸¹². Zondo JP, in arriving at this decision, also stated that “*in the light of the possibility that the PAJA may well be applicable to arbitration awards issued by the CCMA*”⁸¹³, it was not necessary “to consider whether or not its decision in *Carephone* was correct and whether or not such decision should be departed from”⁸¹⁴.

⁸⁰⁷ Refer to discussion in Chapter 5 at 118-119 *supra*.

⁸⁰⁸ *Shoprte v Ramdaw* at 1255 E.

⁸⁰⁹ *Ibid* at 1260 [91] A.

⁸¹⁰ *Ibid* at 1260 [91] A-C.

⁸¹¹ Refer to discussion of the LAC decision of *Shoprte v Ramdaw* in Chapter 5 at 130-140 *supra*.

⁸¹² *Shoprte v Ramdaw* (LAC) at 1617 [33] C; E-F.

⁸¹³ Zondo JP did state, at 1616 [30] F-G, that “grounds of review covered in s 6(2)(c) and (f)(ii)(cc) and (dd) [of the PAJA] basically relate to what was said by this court [LAC] in *Carephone*”. These subsections of s 6 provide that:

“(2) A court or tribunal has the power to judicially review an administrative action if - ...

(c) the action was procedurally unfair ...

(f) the action itself - ...

(ii) is not rationally connected to - ...

(cc) the information before the administrator; or

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

⁸¹⁴ *Shoprte v Ramdaw* (LAC) at 1617 [33] D-E.

Zondo JP also held that “[a]s there can be no doubt that, when the CCMA deals with compulsory arbitrations under the Act, it exercises public power, there can also be no doubt that, in the light of the *Pharmaceutical Manufacturers [Association]* case, CCMA arbitration awards can be reviewed and set aside by the Labour Court if they are irrational”⁸¹⁵. With regard to *Carephone*’s “justifiability” and *Pharmaceutical Manufacturers Association*’s “rationality” as a “constitutional requirement for all decisions taken in the exercise of all public power”⁸¹⁶, Zondo JP was 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*”⁸¹⁷. Thus, CCMA arbitration awards are subject to the constitutional review ground as, in handing down the awards, the CCMA exercises a public power. Although Zondo JP further stated that *Carephone* “might not be correct” in holding that the making of a CCMA arbitration award constitutes an administrative action, he expressed the view that the “definitions of ‘administrative action’ and of ‘decision’ in s 1 of the PAJA *may be wide enough to include it*”⁸¹⁸.

Unfortunately the LAC did not rule upon the applicability of the PAJA to the making of arbitration awards by CCMA commissioners. Zondo JP stated: “[i]t is not necessary to express a final view on this issue in this matter”⁸¹⁹ and that it is “sufficient if it *appears that the PAJA may well be applicable*”⁸²⁰ to the making of an arbitration award by the CCMA because the question that has risen in this matter is whether or not there is a warrant to reconsider the decision of this court in *Carephone*”⁸²¹.

For purposes of this discussion, it is important to again refer to the LC decision of *Shoprite v Ramdaw*. Wallis AJ found support for his said contentions from, *inter alia*,

⁸¹⁵ *Ibid* at 1613 [21] E-G.

⁸¹⁶ *Ibid* at 1614 [26] H.

⁸¹⁷ *Ibid* at 1614 [25] F-G.

⁸¹⁸ *Ibid* at 1616 [29] B-D (my emphasis).

⁸¹⁹ *Ibid* at 1616 [29] C-D.

⁸²⁰ My emphasis.

⁸²¹ *Shoprite v Ramdaw* (LAC) at 1616 [29] D.

the reservations expressed by Nicholson JA in the LAC decision of *Radebe*, as to the applicability of the *Carephone* “justifiability” test for review (as an independent ground upon which an award can be attacked⁸²²). Nicholson JA even considered that such test (enunciated in *Carephone*) was “*obiter dictum*”⁸²³. Unfortunately, the LAC (in *Radebe*) did not overturn the *Carephone* decision as it was “not necessary” for the purposes of that judgment to decide the issue⁸²⁴.

Of importance to my discussion of the PAJA is the statement by Wallis AJ that arbitration is not administrative action:

“Other than the fact that the CCMA is an organ of state acting in terms of statutory authority and exercising statutory powers, neither of which is decisive as the Constitution Court has made clear, I can find no reason to characterize the work of a commissioner of the CCMA presiding over an arbitration in terms of s 136, 138, 139 or 141 of the LRA as being administrative action. The fact that the commissioner is not performing judicial functions under the Constitution and does not form part of the judicial arm of the state or come within the judicial process (*Carephone* para [18]) is neither here nor there. The question is whether the conduct of such an arbitration is administrative action and the answer is that it is not.”⁸²⁵

Landman J⁸²⁶ in *Volkswagen v Brand* agreed with these sentiments expressed by Wallis AJ and also reiterated that the CC, in *Fedsure*⁸²⁷ and *Pharmaceutical Manufacturers Association*⁸²⁸ accepted the need to distinguish between instances where the actions of organs of state constitute administrative action and those where they do not in order to give effect to the express language of the Constitution⁸²⁹.

⁸²² *Radebe* at 348 I.

⁸²³ *Ibid* at 349 (first line).

⁸²⁴ *Ibid* at 349 A.

⁸²⁵ *Shoprite v Ramdaw* at 1259 [90] H-J.

⁸²⁶ *Volkswagen v Brand* at 1009 [59] F-H.

⁸²⁷ Refer to Chapter 5 at 126 *supra*.

⁸²⁸ Refer to footnote 262 and Chapter 5 at 126 *supra*.

⁸²⁹ *Volkswagen v Brand* at 1009 [58] D-F.

In *Netherburn Engineering* Landman J (again) noted that the CCMA is an organ of the state and not a court of law⁸³⁰. However, Landman J applied s 34⁸³¹ of the Constitution and stated that the CCMA is also an “appropriate independent and impartial tribunal or forum for deciding, *inter alia*, disputes regarding certain alleged unfair dismissals that can be resolved by the application of law in a fair public hearing”. He further stated that arbitration employed by the CCMA derives its origin from the LRA and that neither the Arbitration Act nor the common-law of arbitration apply. In the learned judge’s words:

“Arbitration involves the reference of a dispute between two or more parties for determination after a quasi-judicial hearing of all sides by a person other than a court of competent jurisdiction. Arbitration of misconduct dismissal disputes is compulsory, unless agreed otherwise. The parties do not choose the arbitrator although they have the right to request a senior instead of an ordinary commissioner to preside over the proceedings. See s 137 of the LRA. Consistent with the notion of arbitration, a CCMA commissioner is obliged to adhere to the requirements of natural justice.”⁸³²

Landman J further stated that “[u]ndoubtedly the CCMA performs some functions that are of an administrative nature” *but questioned whether “its arbitration function [can] be described as a administrative act or function”*⁸³³. In answering this question, Landman J referred⁸³⁴ to the LAC judgment of *Shoprite v Ramdawe* where Zondo JP expressed a view about the nature of CCMA arbitration in the context of the PAJA, namely, *inter alia*, that it is “sufficient if it *appears that the PAJA may well be applicable*” to the making of CCMA arbitration awards as the definitions of

⁸³⁰ *Netherburn Engineering* at 1723 B-C; 1726 G.

⁸³¹ In *Volkswagen v Brand*, at 995 C-D; 1009 [60] H-I, Landman J also expressed the view that the constitutional niche which applies to CCMA awards is s 34 of the Constitution which provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. It follows, said Landman J, at 995 C-D, that s 145 must be applied in the same manner as s 33 of the Arbitration Act, as the sections are virtually identical.

⁸³² *Netherburn Engineering* at 1723 C-F.

⁸³³ *Ibid* at 1726 G-H (my emphasis).

⁸³⁴ *Ibid* at 1726 H-1727 A.

“administrative action” and “decision” in s 1 of the PAJA “may be wide enough to include it”⁸³⁵.

However, Landman J treated this statement as “an *obiter* remark”⁸³⁶ and preferred the view expressed by Wallis AJ referred to above (that arbitration is not administrative action) and he also referred to his own judgment in *Volkswagen v Brand*⁸³⁷.

The PAJA was also dealt with by the SCA in the matter of *Total Support Management (Pty) Ltd & another v Diversified Health Systems (SA) (Pty) Ltd & another*⁸³⁸ where Smalberger ADP, in an unanimous decision, held, *inter alia*, that it is “only administrative action which is subject to the administrative justice right in s 33(1)”⁸³⁹ and that the emphasis is not on the position occupied by the functionary but on the nature of the power exercised by him⁸⁴⁰. It was accordingly held that, as arbitration arises through the exercise of private, as opposed to public powers, it does not fall within the ambit of “administrative action”. Smalberger ADP then advanced the following reasons⁸⁴¹, namely:-

- arbitration takes place in response to an agreement between parties in terms whereof they abide by a process which results in a decision by an arbitrator that is binding on the parties;
- the aforesaid process results in the determination of the substantive rights of the parties to the arbitration;

⁸³⁵ *Shoprite v Ramdaw* (LAC) at 1616 [29] B-D and quoted in *Netherburn Engineering* at 1726 H-1727 A.

⁸³⁶ *Netherburn Engineering* at 1727 A-C.

⁸³⁷ In *Volkswagen v Brand*, at 995 B-C, Landman J followed the LC decision of *Shoprite v Ramdaw* holding that *the work of a commissioner of the CCMA presiding over an arbitration in terms of the LRA was not administrative action*.

⁸³⁸ 2002 (4) SA 661 (SCA) (hereinafter referred to as “*Total Support Management*”).

⁸³⁹ *Ibid* at 673 C.

⁸⁴⁰ In *President of the Republic of South Africa & others v South African Rugby Football Union & others* 2000 (1) SA (CC), the CC, at 67 [141] A-B, also held that “[i]n s 33 the adjective ‘administrative’ ... is used to qualify ‘action’ ... [w]hat matters is not so much the functionary as the function. The question is whether the task itself is administrative or not”.

⁸⁴¹ *Ibid* at 673 [24] E-H.

- the parties agree to the arbitrator or determine the method in terms whereof the arbitrator is selected;
- in terms of the arbitration process the rights of the parties are impartially determined with reference to a dispute formulated at the time of appointment of the arbitrator.

According to Smalberger arbitration is a form of private adjudication and the arbitrator performs a judicial, as opposed to an administrative function, and decisions made therefore do not amount to administrative action. Consensual arbitration accordingly “is not a species of administrative action”⁸⁴² and s 33(1) of the Constitution finds no application. However, *statutorily imposed arbitrations* “may be different”⁸⁴³ and the decision in the *Veldspun*⁸⁴⁴ case may, in the context of compulsory, as opposed to consensual arbitrations, have to be revisited⁸⁴⁵.

I am of the opinion that the PAJA does *not* apply to the proceedings of the CCMA for the following reasons:-

- the primary objects of the LRA are detailed in s 1 and include giving effect to and regulating the fundamental rights conferred by s 23 of the Constitution;
- s 23 entrenches the right to, *inter alia*, fair labour practices;
- in terms of s 3 of the LRA it must be interpreted by, amongst other things, giving effect to its primary objects (and) in compliance with the Constitution;
- just as the PAJA was promulgated to give effect to s 33 of the Constitution, the LRA gives effect to s 23 thereof;

⁸⁴² *Ibid* at 674 A.

⁸⁴³ *Ibid* at 674 B.

⁸⁴⁴ Refer to discussion of *Veldspun* in Chapter 2 at 21-22 *supra*.

⁸⁴⁵ *Total Support Management* at 674 B.

- s 210 of the LRA specifically provides that, in the event of conflict (excluding the Constitution), the provisions of the LRA will prevail unless expressly amended by another Act;
- the PAJA does not expressly amend the LRA (if the PAJA was meant to apply, it would have repealed the provisions of s 145 as its application would have rendered s 145 superfluous);
- the LRA is not in conflict with the Constitution.

I find support for my contention in the matter of *Volkswagen v Brand* where Judge Landman commented, insofar as s 145 of the LRA is concerned, that *the PAJA “did not seem”*⁸⁴⁶ to have repealed s 145. I must, however, take issue with his choice of words as s 210 is quite emphatic in that it requires any Act, the PAJA in this instance, to *expressly* amend the LRA.

⁸⁴⁶ *Volkswagen v Brand* at 994 I-J; 1008 [53] E-F.

CHAPTER 7 – IMPACT OF THE SUPERIOR COURTS BILL ON ADJUDICATION OF LABOUR MATTERS

The Bill, tabled in Parliament during August 2003, has as its object the rationalization and consolidation of the laws relating to the CC, the SCA and the HCs⁸⁴⁷ in a single Act of Parliament for purposes of the establishment of a judicial system as envisaged in Chapter 8 (ss 165–180) of the Constitution⁸⁴⁸ (dealing with courts and the administration of justice). Of importance is the proposed merger of the LC and LAC with the HC and the SCA⁸⁴⁹, respectively (the LC and LAC will be abolished and the HC and SCA will now also have jurisdiction in respect of labour matters)⁸⁵⁰. In my opinion, the predicament currently faced by prospective litigants will be successfully addressed by the Bill in that there will be clarity insofar as the court of jurisdiction is concerned⁸⁵¹.

The proposals relating to “labour matters”⁸⁵² (broadly defined) may, in particular, severely impact on labour adjudication as it refers to “any justiciable matter” arising from labour legislation. Strydom E comments that the proposals in this regard “stem from the problems that disputing parties have been experiencing when referring their labour disputes for adjudication by either the [LC] or the [LAC]”⁸⁵³.

⁸⁴⁷ CC, SCA and HCs, hereinafter collectively referred to as “Superior Courts” in accordance with the Bill.

⁸⁴⁸ Memorandum on the Objects of the Superior Courts Bill, 2003, paras 1 and 2 (hereinafter referred to as “the memorandum on the Bill”) and s 2 of the Bill.

⁸⁴⁹ S 14(1)(b) of the Bill provides that an appeal against any HC decision in respect of labour matters will lie directly to the SCA without first going to a full bench of the HC (as required in terms of s 14(1)(a) for any other appeal).

⁸⁵⁰ The memorandum on the Bill at para 2.5.

⁸⁵¹ In the past litigants had to decide between, for example, the HC and the LC as court of first instance (refer to Chapter 1 at 1-4 *supra*); see also contradictory judgements of *Kem-Lin Fashions; NEHAWU v Cape Town University* and *Chevron* regarding a further appeal from the LAC to the SCA (refer to Chapter 5 at 102-103 *supra*).

⁸⁵² “Labour matters” defined in the Bill as meaning “any justiciable matter arising out of the application (or the interpretation) of the LRA, the BCEA, the Unemployment Insurance Act 30 of 1966, the Skills Development Act 97 of 1998, the EEA, the Occupational Health and Safety Act 85 of 1993, the Compensation for Occupational Injuries and Diseases Act 130 of 1993 and any other Act the administration of which has been assigned to the Cabinet member responsible for labour”.

⁸⁵³ Strydom E “*Changing the Labour Court – The Superior Courts Bill 2003*” 2003 CLL 21 (hereinafter referred to as “Strydom”), at 21.

There is, however, a cautionary note, namely that this Bill seeks to address similar, if not the same, problems which resulted in the establishment of the IC, the LC and the LAC. The IC, which had as its (main) objective the easing of pressure on the ordinary courts⁸⁵⁴, failed miserably in the adjudication of unfair dismissal disputes under the LRA, 1956 which became highly legalistic and inaccessible and could take up to three years to finalize⁸⁵⁵. As the result the legislature, by introducing the LRA, made a further attempt to redress these problems and, *inter alia*, created the LC⁸⁵⁶. However, the LC also failed to resolve labour disputes expeditiously and in the words of Ngcobo J in the CC judgement of *NEHAWU v Cape Town University* “by their very nature labour disputes must be resolved expeditiously and be brought to finality so that the parties can organize their affairs accordingly. They affect the economy and labour peace. It is in the public interest that labour disputes be resolved speedily by experts appointed for that purpose”⁸⁵⁷. Thus, the LRA also did not have the desired effect and, “seven years after their establishment, the [LCs] have failed to live up to expectations”⁸⁵⁸.

The LCs therefore experienced the same problems as those visited upon the IC. Strydom remarks “[t]here is often no consistency in the judgements by the [LCs] with the result that it has become difficult for disputing parties to try and anticipate the probable outcome of their dispute. Disputing parties frequently have to wait for months before their cases are heard or for decisions to be handed down”⁸⁵⁹.

The Bill as stated above, is a further attempt in addressing these problems and, although the legislature’s previous attempts have not been successful, the following problems which played a major role in the downfall of the IC and the LC should not be encountered (as per Strydom⁸⁶⁰):-

- the HC, unlike the LC, seems to be able to retain its judges;

⁸⁵⁴ Refer to discussion in Chapter 5 at 95 *supra*.

⁸⁵⁵ Refer to discussion in Chapter 5 at 101-102 *supra*.

⁸⁵⁶ Refer to discussion in Chapter 5 at 102 *supra*. The IC was renamed as the LC and was accorded superior status with only one level of appeal, the LAC.

⁸⁵⁷ At 98 E–F.

⁸⁵⁸ Strydom at 22.

⁸⁵⁹ *Ibid*.

⁸⁶⁰ *Ibid*.

- the LC has been unsuccessful in attracting judges “with the required knowledge and expertise in labour law”⁸⁶¹; Waglay also states that “[a]pparently, one of these negative consequences is that the [LC] has not in the last three years drawn to the ranks of judges candidates suitable for appointment”⁸⁶²;
- the problematic issue of concurrent jurisdiction of the LC and the HC will no longer be a factor⁸⁶³;
- the recent decision of the CC⁸⁶⁴, namely that the SCA has jurisdiction to hear an appeal on a constitutional issue will no longer be in conflict with the LRA⁸⁶⁵ which provides that the LAC is the final court of appeal in respect of all judgments and orders made by the LC.

What is not certain, however, is whether the Bill has effectively addressed all the problems of the past and in this regard the following issues may still pose a problem (as highlighted by Waglay):-

- the HC, even before the proposed merger with the LC, also experiences lengthy delays, backlogs and congested court rolls⁸⁶⁶;
- judges, with specialist knowledge of labour law, are required to preside in labour matters as collective labour is “alien to the way of thinking of a common-law [HC] judge[s]”⁸⁶⁷ (s 12(2) of the Bill provides that, should it become apparent during the course of the hearing of any matter that it is concerned with or may be a labour matter, the mere fact that the majority of judges hearing that matter does not appear on the panel of judges referred to in subs (3) will not invalidate the hearing or any ensuing judgment).

⁸⁶¹ *Ibid.*

⁸⁶² Waglay at 1228.

⁸⁶³ Refer to discussion in Chapter 1 at 1-4 *supra*.

⁸⁶⁴ *NEHAWU v Cape Town University*.

⁸⁶⁵ S 167(2).

⁸⁶⁶ Waglay at 1228.

⁸⁶⁷ Waglay at 1225.

The Bill is not beyond reproach and will require further consideration and amendment in order to ensure that, insofar as labour matters are concerned, the HC and SCA do not suffer from the same shortcomings as the IC, the LC and the LAC. Notwithstanding the aforesaid, there is every reason to be positive about the relevant provisions of the Bill as, even if promulgated in its draft form, the potential pitfalls are not serious and can be remedied, over a period, by way of (relatively) simple amendments.

CHAPTER 8 – CONCLUSION

According to Kahn-Freund⁸⁶⁸ the relationship between employers and employees is one of inequality, namely the relationship between a bearer of power and one who is not⁸⁶⁹. Notwithstanding the so-called freedom of the contract of employment, and the consensus which is deemed to form the basis of it, it cannot be denied that its inception is "an act of submission" and its operation "a condition of subordination"⁸⁷⁰. The main object of labour law is to be a countervailing force to counteract the inequality of bargaining power which is inherent in the employment relationship⁸⁷¹.

Bearing in mind the already unbalanced nature of a contract of employment and the compulsory arbitration, with a limited right of review only, I am of the opinion that the (limited) review procedure is not sufficient to redress the prejudice which may be suffered by a party in respect of a decision which does not allow for review. An aggrieved party ought not to be deprived of access to justice to redress a wrong determination under circumstances where he, as opposed to voluntary arbitration, has been compelled to resolve a dispute forced upon him by statute⁸⁷².

There have been dramatic developments in South African law and labour law, in particular, has shown great progress as summarized in the words of Waglay J: "[l]egislative developments since the late 1970s have fundamentally altered labour relations both in the individual and in the collective sphere. In law the 1970s is the very recent past. In South Africa today, the late 1970s seem light years ago"⁸⁷³. Waglay J advanced the following reasons for this progress, namely, we now have a society founded on the principle of substantive equality as opposed to a society where "the criminal and systematic denial of the humanity and rights of the

⁸⁶⁸ Davies Paul & Freedland Mark *Kahn-Freund's Labour and the Law* Third Edition London Stevens & Sons 1983 (hereinafter referred to as "Kahn-Freund").

⁸⁶⁹ *Ibid* at 18.

⁸⁷⁰ *Ibid* at 18.

⁸⁷¹ *Ibid* at 18.

⁸⁷² Du Toit *et al* (1998) at 357. In *National Union of Mineworkers v Brand NO & another* (1999) 20 ILJ 1884 (LC), at 1888 I-1889, A Gon AJ held that there is no reason why a process to which parties have voluntarily agreed and where parties can agree to the identity of the arbitrator, the procedures to be followed, the powers of the arbitrator and the appeal process, should be treated the same way as the compulsory procedures of the CCMA.

⁸⁷³ Waglay B at 1224.

majority”⁸⁷⁴ was commonplace (*everyone* is now enjoying all of the rights set out in the Constitution). Developments in labour relations also played a significant role in this⁸⁷⁵.

South Africans, I am sure, fervently wish that the huge political and social strides made since 1994, also carried forward into the legal system and including numerous (and far-reaching) legislative enactments, will continue at the same (rapid) pace. After all, Aggrey Klaaste, when he was appointed editor of *The Sowetan* newspaper in 1988 (believing that South Africa was heading for civil war) launched a nation-building initiative through his newspaper as he sensed “a holding of angry breath in the black community and a frightening swing to the right among whites. I [Klaaste] can feel in my bones the silent preparation by blacks for the inevitable explosion. Somebody has to do something to stop this madness”⁸⁷⁶. I am satisfied that this madness has been addressed, and that South Africa has been turned away from the brink of disaster, by amongst other things, the introduction of the Constitution (entrenching, *inter alia*, fundamental human rights). As a consequence, labour law and the practice thereof have evolved by carrying forward the objectives of the Constitution into labour legislation and have implemented legislation through, *inter alia*, (subsequent) court decisions.

Is it too much to hope that these giant strides (which have elevated South Africa, in the eyes of the world, to a true “rainbow nation”), can also in a small way impact on the rights of labour law litigants so as to allow them the ultimate (legal) right of appeal in compulsory arbitration? In the process, there is no reason why South Africa cannot become a world leader in labour relations (facilitated by its labour laws).

In conclusion, I submit that the compulsory nature of the provisions of the LRA insofar as the resolution of the majority of disputes is concerned, should be

⁸⁷⁴ *Ibid.*

⁸⁷⁵ Refer to footnote 262 *supra* for discussion of Waglay J’s criticism of the role of the common-law in propping up the apartheid system.

⁸⁷⁶ *Obituary*, Arena The Magazine for the Alumni & friends of the University of the Witwatersrand October 2004 Volume II Number 35, at 38.

tempered by allowing an aggrieved party maximum protection, which can be assured by either allowing a right of appeal or widening the grounds of review provided for in s 145. Grounds of appeal should obviously not be unlimited and can be allowed in accordance with appeal grounds generally in force in South African law.

The Superior Courts Bill, in aiming to, *inter alia*, consolidate the laws relating to the CC, the SCA and the HCs (and in the process merging the LC and LAC with the HC and SCA) in a single Act of Parliament, may point the way in this regard. It may be an idea to consider introducing a requirement for security for costs (appeal) along the lines of the deposit which may be imposed in British labour law in order to avoid unnecessary appeals.

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