JUSTIFIABILITY AS GROUNDS FOR THE REVIEW OF LABOUR ARBITRATION PROCEEDINGS

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ABSTRACT

This thesis focuses on the review of labour arbitration awards given under the auspices of the following bodies: the Commission for Conciliation, Mediation and Arbitration ("CCMA"), bargaining councils, statutory councils, accredited private agencies and private arbitration tribunals. The general grounds of review applicable to the arbitration awards of each body are set out. Against this background, the case of *Carephone (Pty) Ltd v Marcus NO & Others* (1998) 19 *ILJ* 1425 (LAC) is analysed and the principles pertaining to the justifiability test are clarified. The judicial rationale for the application of the test to CCMA arbitration proceedings and criticisms of the test are then examined.

Currently the justifiability test applies in the review of CCMA proceedings only, so the judicial reasoning for the rejection of justifiability as a ground for private arbitration review is examined. Three approaches are suggested for the application of the justifiability test in private arbitration review. First it is proposed that the Arbitration Act could be interpreted to include the justifiability test under the statutory review grounds. Failing the acceptance of this approach, the second submission is that arbitration agreements could be interpreted to include an implied term that the arbitrator is under a duty to give justifiable awards. A third suggestion is that the law should be developed by attaching an *ex lege term* to all arbitration agreements requiring arbitrators to give justifiable awards.

In the final chapter, the requirement of justifiability in awards given under the auspices of collective bargaining agents and accredited private agencies highlights the incongruity in applying the justifiability test in CCMA arbitration review and in rejecting this test in private arbitration review.

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Veldspun (Pty) Ltd v Amalgamated Clothing and Textile Workers Union of South Africa 1992 (3) SA 880 (E)
Ventersdorp Town Council v President Industrial Court & Others (1992) 13 *ILJ* 1465 (LAC)
Venture Motor Holdings Ltd t/a Williams Hunt Delta v Biyana & Others (1998) 19 *ILJ* 1266 (LC)
Vista University v Botha (1997) 18 *ILJ* 1040 (LC)
Volkswagen SA (Pty) Ltd v Brand NO & Others (2001) 10 LC 9.5.3 (Viewed at www.irnetwork.co.za on 24 August 2003)

W

Wanenburg v Motor Industry Bargaining Council & Others (2001) 22 *ILJ* 242 (LC)
Waverley Blankets v CCMA & Others (2000) 21 *ILJ* 2497 (LC)
West End Diamonds Ltd v Johannesburg Stock Exchange 1946 AD 910
Wilkins NO v Voges 1994 (3) SA 130 (A)
Wood v Griffith (1818) All ER 294 (LC Ct), 36 ER 291

Z

Zaayman v Provincial Director: CCMA Gauteng & Others (1999) 20 *ILJ* 412 (LC)
Zantsi v Council of State, Ciskei 1995 (4) 615 (CC)
Zimema v CCMA [2001] 2 BLLR 251 (LC)

STATUTES CONSULTED

Arbitration Act 42 of 1965

Arbitration Act of the Cape of Good Hope, Act 29 of 1898

Arbitration Act of Natal, Act 24 of 1898

Arbitration Ordinance of the Transvaal, Ordinance 24 of 1904

Arbitration Proclamation of South-West Africa, Proclamation 3 of 1926

Basic Conditions of Employment Act 75 of 1997

Constitution of the Republic of South Africa Act 200 of 1993

Constitution of the Republic of South Africa Act 108 of 1996

Employment Equity Act 55 of 1998

Extension of Security of Tenure Act 62 of 1997

Labour Relations Act 28 of 1956

Labour Relations Act 66 of 1995

Labour Relations Amendment Act 12 of 2002

National Economic, Development and Labour Council Act 35 of 1994

Prescription Act 68 of 1969

Promotion of Administrative Justice Act 3 of 2000

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

Public Service Act 103 of 1994

ABBREVIATIONS

A	Appellate Division
AJ	Acting Judge
AJA	Acting Judge of Appeal
All ER	All England Reports
All SA	All South African Law Reports
BCLR	Butterworths Constitutional Law Reports
BLLR	Butterworths Labour Law Reports
C	Decision of Cape of Good Hope Provincial Division
CC	Decision of Constitutional Court
CCMA	Commission for Conciliation, Mediation and Arbitration
CJ	Chief Justice
D	Decision of Durban and Coast Local Division
E	Decision of Eastern Cape Provincial Division
ed	editor
ER	English Reports
et al	and others
HC	High Court
IC	Industrial Court
ILJ	*Industrial Law Journal*
J	Judge or Justice
JA	Judge of Appeal
LAC	Decision of Labour Appal Court
LAWSA	*The Law of South Africa*
LC	Decision of Labour Court
LRA	Labour Relations Act
N	Decision of Natal Provincial Division
NLR	Natal Law Reports
OPD	Orange Free State Provincial Division Reports
O	Decision of Orange Free State Provincial Division
s	section
SA	South African Law Reports
SALJ	South African Law Journal
SAJHR	South African Journal of Human Rights
SC	Cape Supreme Court Reports
SCA	Decision of Supreme Court of Appeal
Stell LR	Stellonbosch Law Review
SWA	Decision of South West Africa Supreme Court
T	Decision of Transvaal Provincial Division
THRHR	*Tydskrif vir Hedendaagse Romiens-Hollandse Reg*
TPD	Decision of Transvaal Provincial Division
W	Decision of Witwatersrand Local Division
WLD	Witwatersrand Local Division Reports

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CHAPTER ONE

INTRODUCTION

1.1 General Purpose of Study

Arbitration is arguably the most common form of dispute resolution in the labour context. Labour arbitration proceedings are conducted under the auspices of a variety of bodies: the Commission for Conciliation, Mediation and Arbitration ("CCMA"), bargaining councils, statutory councils, accredited private agencies and private arbitration tribunals. The degree to which disputant parties are compelled to partake in labour arbitration proceedings varies. Each of the arbitrating bodies can be placed on a continuum ranging from those dealing with strictly compulsory proceedings, at one extremity, to those dealing with strictly voluntary proceedings at the other extremity. CCMA arbitration is the leading example of the former while private arbitration is its counterpart at the opposite end of the continuum. Bargaining councils, statutory councils and accredited agencies are characterised by varying degrees of compulsion and thus lie between these two extremities.

Common to the arbitration proceedings conducted by all of these bodies is the general rule that the resultant arbitration awards are subject to limited review, but not subject to appeal. The distinction between appeals and reviews is that appeals concern whether the conclusion of the decision-maker is correct on the merits, while reviews concern the manner in which the decision-maker reached the conclusion.[1] These procedures may be co-extensive,[2] yet they are essentially different in nature.

Private arbitration proceedings are reviewed in terms of s33 of the Arbitration Act.[3] Review of the proceedings conducted by the CCMA and bargaining councils is provided for in s145 of the Labour Relations Act ("LRA").[4] The grounds for

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1 *Coetzee v Lebea NO & Another* (1999) 20 *ILJ* 129 (LC) at 133A-B; *County Fair Foods (Pty) Ltd v CCMA & Others* (1999) 20 *ILJ* 1701 (LAC) at 1712G-H.

2 *Coetzee v Lebea NO & Another supra* at 133B-C. The Labour Court recognized that this is particularly the case where the subject of the review is the very process of reasoning of the commissioner.

3 Act 42 of 1965.

4 Act 66 of 1995.

statutory council review and those for accredited agency review are not mentioned expressly in either statute.

Section 33[5] and s145[6] are virtually identical in wording. Despite this similarity, the courts have interpreted the grounds of review slightly differently. The most significant difference lies in the application of the justifiability test, enunciated in the in the case of *Carephone (Pty) Ltd v Marcus NO & Others*.[7] This test applies in the review of CCMA arbitration proceedings, but does not apply in private arbitration review. Justifiability is an essential requirement in the current constitutional dispensation, as the democratic order is based on a culture of justification.[8] This is a significant shift from the former regime of parliamentary sovereignty, where State power was left unchecked. Accountability, openness and responsiveness are now founding values of the South African Constitution.[9] The Constitution is committed to controlling power exercised by the State, as well as that exercised between private individuals.[10]

This dissertation aims to fulfil four primary objectives. First, it sets out the general principles concerning the review of arbitration proceedings conducted under the auspices of the dispute resolution bodies identified above. Secondly, it aims to clarify the principles relating to the justifiability test and to discuss the comments on and criticisms of this test. Thirdly, it provides a framework within which the justifiability test ought to be applied to the review of private arbitration proceedings. Lastly, it attempts to discern the review provisions applicable to arbitration proceedings conducted under the auspices of collective bargaining agents and accredited private agencies, and to determine whether the justifiability test applies to the review of these arbitral bodies.

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5 Arbitration Act.
6 LRA.
7 *Carephone (Pty) Ltd v Marcus NO & Others* (1998) 19 *ILJ* 1425 (LAC) at 1435C-E.
8 Mureinik, E 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *SAJHR* 31 at 32.
9 Section 1 of the Constitution of South Africa Act, Act 108 of 1996 ("the Constitution").
10 Section 8 of the Constitution.

1.2 Sources

This study focuses on the judicial interpretation and application of the review provisions in the LRA and in the Arbitration Act. As such, case law was the most pertinent resource for the research conducted. Discussions concerning the CCMA, collective bargaining agents and accredited agencies are based largely on the judgments of the Labour Court and Labour Appeal Court. In contrast, private arbitration is rooted in Roman and Roman-Dutch authorities. These authorities, as well as High Court precedent in relation to the colonial arbitration legislation and the current Arbitration Act were consulted. Internet case law resources were also utilised to ensure that the information provided here is consistent with the latest judicial pronouncements. Literary works of a number of academics were also considered.

The nature of the topics dealt with in this thesis required research in various fields of law, particularly alternate dispute resolution, labour law, administrative law, constitutional law and the law of contract. This thesis reflects the law stated in the sources available to me at 31 October 2003.

1.3 Structure of the Study

The thesis is divided into four sections. Section A sets out general information to provide the background for the sections that follow. Chapter One contains brief introductory remarks. Chapter Two provides an overview of the nature of the arbitral bodies that will be considered in the study. This gives the context within which arbitration review is discussed.

The subsequent sections detail the review provisions applicable to each arbitration tribunal. As the primary body involved in compulsory dispute resolution in the labour context, the CCMA is discussed first. An analysis of private arbitration review follows, as it represents the epitome of consensual arbitration proceedings.

Arbitration under collective bargaining agents and accredited agencies is then discussed in light of the two extremities on the continuum of compulsion.

Section B concerns the review of CCMA arbitration proceedings. Chapter Three describes the general principles of review in terms of s145 of the LRA. Chapter Four continues to focus on the justifiability test. The *Carephone* case is discussed in detail, as is the correct interpretation of the justifiability test. The judicial comments and criticisms are expressed and the accepted basis for the application of the justifiability test is set out.

Section C is structured in a similar fashion to Section B, yet it deals with the review of private arbitration proceedings. In Chapter Five, the general review principles in terms of s33 of the Arbitration Act are examined. The judiciary has rejected the application of the justifiability test to private arbitration proceedings. The basis for this conclusion is discussed in chapter Six. Chapter Six goes on to put forward three possible methods of developing the law to allow review for justifiability in private arbitration awards.

Section D relates to other arbitral bodies in the labour context, namely bargaining councils, statutory councils and accredited agencies. The focus in Chapter Seven is two-fold: firstly, the statutory provisions applicable to the review proceedings in respect of each body are determined and secondly, the application of the justifiability test in such reviews is discussed. This chapter highlights the incongruent effect of relying too heavily on the extent of compulsion in arbitration proceedings in order to endorse or reject the application of the justifiability test in the review of such proceedings.

CHAPTER TWO

NATURE OF ARBITRAL BODIES

2.1 Introduction

In the labour context, arbitration is a useful means of dispute resolution. In the interests of good labour relations, it is advantageous to have a final and binding decision, which is speedily made.[11] Four categories of arbitration tribunals will be dealt with in this thesis. Three of these tribunals are used strictly in the labour context: the Commission for Conciliation, Mediation and Arbitration ("CCMA"), arbitration tribunals under the auspices of collective bargaining agents and private agencies accredited by the CCMA to perform arbitral functions in the labour setting. The fourth forum is the unaccredited private arbitrator or arbitration panel. While private arbitrators are employed in arbitration proceedings concerning virtually any subject matter, they have also been employed extensively in the labour context. These private arbitrators need not be accredited by the CCMA to perform their dispute resolution functions.

This chapter describes the nature of each of these bodies in a fair amount of detail. These specific characteristics are particularly relevant to the application of the justifiability test in the review of awards arising from the arbitration proceedings conducted under each forum.

2.2 The Commission for Conciliation, Mediation and Arbitration

The CCMA was statutorily established as a simple mechanism for effective labour dispute resolution.[12] The Labour Relations Act ("LRA") sets precise guidelines as to the manner in which the CCMA is to be regulated and the manner in which its proceedings are to be conducted. This statutory regulation is indicative of the State control over CCMA arbitration proceedings, disputant parties having relatively less power over the proceedings.

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11 *Amalgamated Clothing & Textile Workers Union of SA v Veldspun* (1993) 14 *ILJ* 1431 (A) at 1435I-J.

12 Preamble to the Labour Relations Act 66 of 1995.

2.2.1 The Nature of the CCMA

The CCMA is a juristic person.[13] It is independent of the State, of any political party, trade union, employer, employers' organization and of any federation of trade unions or employers' organizations.[14] It is under a statutory imperative to maintain offices in each of the nine provinces of the Republic of South Africa,[15] thus enhancing accessibility to justice for all parties to employment relationships. A governing body, consisting of an independent chairperson, 9 members and a director, governs the CCMA.[16] The chairperson and members are nominated by NEDLAC[17] and appointed by the Minister of Labour for a period of 3 years.[18] The members represent organized labour, organized business and the State in equal parts.[19] The governing body then appoints the director.[20]

The CCMA is designed to be self-regulating in that it may make rules concerning its fees, policies, procedures, practices and any other matter incidental to the performance of its functions.[21] It must perform a number of compulsory functions in terms of the LRA.[22] Its primary function is to conciliate any dispute referred to it in terms of the LRA, failing which it must arbitrate the matter if such is required by the LRA or if all parties to a dispute under the jurisdiction of the Labour Court have so consented. The CCMA is required to perform specific functions and has the option of performing certain other functions that need not be discussed here.[23]

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13 Section 112 of the LRA.
14 Section 113 of the LRA.
15 Section 114(3) of the LRA.
16 Section 116(1) of the LRA. Section 116(2)(b)(ii) of the LRA goes on to state that the director may not vote at meetings of the governing body.
17 "NEDLAC" is defined in s213 of the LRA as the National Economic Development and Labour Council established in terms of s2 of the National Economic, Development and Labour Council Act 35 of 1994.
18 Section 116(2) of the LRA.
19 Section 116(3) of the LRA.
20 Section 118(1) of the LRA.
21 Sections 115(2)(cA) and 115(2A) of the LRA.
22 Section 115(1) of the LRA.
23 See s115(1), s115(2), s115(3), s127, s132, s142A, s148, s149 and s150 of the LRA.

The CCMA is state-financed, firstly by the Executive, using moneys from public funds and secondly, by money appropriated to the CCMA by the Legislature from time to time.[24] It also receives funds from the fees payable through the use of the CCMA,[25] from grants, donations, bequests and income earned on surplus money invested by the Commission.[26] As a result, recourse to the CCMA dispute resolution mechanisms is free of charge to individual disputants.

2.2.2 Dispute Jurisdiction

The territorial jurisdiction of the CCMA encompasses all provinces of South Africa.[27] The LRA provides a limited set of disputes over which the CCMA has jurisdiction. Generally, more sensitive and more serious issues are reserved for adjudication by the Labour Court, while the CCMA is charged with the duty of resolving common labour disputes. More specifically, the CCMA is authorized to resolve disputes referred to the CCMA in terms of the LRA,[28] and those concerning matters of mutual interest.[29]

When considering the disputes referred to the CCMA in terms of the LRA, Du Toit *et al* provide a useful distinction between disputes concerning the application and interpretation of the LRA, and specific disputes with prescribed procedures.[30] Examples of the former category are disputes concerning the interpretation or application of the LRA in relation to the freedom of association (conciliation jurisdiction only)[31] and those concerning the interpretation or application of the LRA provisions concerning organizational rights.[32] Examples of the latter category are refusals of parties to closed shop agreements to admit registered trade unions

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24 Sections 122(1)(a) and (b) of the LRA.
25 See also s123 of the LRA.
26 Sections 122(1) (c), (d) and (e) of the LRA.
27 Section 114(1) of the LRA.
28 Section 133(1)(b) of the LRA.
29 Section 133(1)(a) read with s134 of the LRA.
30 Du Toit, D *et al* Labour Relations Law: A Comprehensive Guide (3 ed)at 563.
31 Section 9 of the LRA.
32 Section 22(1) of the LRA. For other disputes falling into this category, see s22(1), s24(6), s45(1)-(5) read with s44(2), s63, s94 and s147(1)(a) of the LRA.

to the agreement,[33] unfair labour practice disputes[34] and unfair dismissal disputes.[35]

As stated above, disputes of mutual interest may also be referred to the CCMA for arbitration, whether the parties to the dispute are collective bargaining agents or employers and employees.[36] Du Toit *et al* suggest that this category of disputes incorporates disputes arising from other labour law statutes,[37] employment-related disputes arising from non-labour statutes[38] and common law claims.[39]

Where a dispute falls within the jurisdiction of the Labour Court, the disputant parties may consent to the jurisdiction of the CCMA. In these cases, the CCMA is obliged to conduct the necessary arbitration hearing.[40]

2.2.3 The Arbitrator: Commissioners of the CCMA

2.2.3.1 Appointment of Commissioners

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33 Section 26(11) of the LRA.

34 Section 191(5)(a)(iv) of the LRA.

35 Section 191(5)(a)(i) – (iii) of the LRA. For other disputes falling within this category, see s16(6), s21(4), s61(10), s62, s69(8), s64(2) read with s135(3)(c), s74(1)-(4), s86(7), s89 and s141(1) of the LRA.

36 Section 133(1)(a) read with s134 of the LRA.

37 For example, the dispute resolution jurisdiction of the CCMA in disputes arising under the Employment Equity Act (s10 of the Employment Equity Act 55 of 1998).

38 For example, disputes referred in terms of s8(3) of the Extension of Security of Tenure Act 62 of 1997: see *Armscor v Murphy NO* 1999 (4) SA 755 (C).

39 Du Toit, D *et al* at 564-566 (Also see *Jacot-Guillarmod v Provincial Government, Gauteng* (1999) 20 *ILJ* 1689 (T), where the CCMA was found to have no jurisdiction in a matter arising from a contract). Du Toit *et al*'s proposition that the CCMA has a residual all-encompassing dispute jurisdiction is unconvincing for two reasons. Firstly, the CCMA is a creature of statute, with no inherent jurisdiction. It is confined to the jurisdiction that the Legislature has defined in the LRA and other applicable statutes, and that which the Courts interpret these statutes to include. The CCMA cannot possess a residual jurisdiction outside the legal bounds so laid down. Grogan also holds this opinion, stating that where the CCMA commissioners resolve disputes not provided for in the LRA, they act *ultra vires* (Grogan, J Workplace Law (7 ed) at 382). The second point I wish to make is that the CCMA is already over-worked and understaffed (Brand, J "CCMA: Achievements & Challenges – Lessons from the First Three Years" (2000) 21 *ILJ* 77). Until the workload that is currently the responsibility of the CCMA is dealt with effectively and efficiently, the average citizen will not be served in extending the scope of CCMA jurisdiction.

40 Section 115(1)(b)(ii) and s133(2)(b) of the LRA.

Adequately qualified commissioners and senior commissioners perform the dispute resolution functions of the CCMA.[41] The CCMA governing body appoints these commissioners for a fixed period, either on a full-time or part-time basis.[42] When appointing commissioners, the governing body is required to heed the requirements that the CCMA be independent, competent and representative of race and gender.[43] Commissioners must act in accordance with the code of conduct prepared by the governing body of the CCMA,[44] which emphasizes integrity and independence.[45] This is reflected in the grounds for removal of a CCMA commissioner, namely serious misconduct, incapacity and material violation of the code of conduct.[46]

On referral of a dispute, the CCMA is obliged to appoint a commissioner to conciliate the matter.[47] Where a post-conciliation certificate indicates that the matter has not been resolved, and if any party to the dispute requests the arbitration within 90 days of failure at conciliation, an arbitrating commissioner must be appointed.[48] The CCMA is also obliged to appoint a commissioner to arbitrate where all parties to a dispute falling within the jurisdiction of the Labour Court have consented in writing.[49]

The parties to a dispute have a limited influence on the appointment of the commissioner. While the arbitrating commissioner may be the same commissioner that attempted to conciliate the dispute,[50] a party may object to such arbitrating

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41 Section 133(1) and s117)2)(a)(ii) of the LRA.
42 Section 117(1) and s117(2)(a) and (b) of the LRA.
43 Section 117(2)(d) of the LRA.
44 Section 117(6) of the LRA.
45 Du Toit, D *et al op cit* at 560.
46 Section 117(7) of the LRA.
47 Section 135(1) of the LRA.
48 Section 136(1) of the LRA. This sub-section also stipulates the time limits for a request that the dispute be resolved through arbitration.
49 Section 133(2)(b) read with s135 and s141 of the LRA.
50 Section 136(2) of the LRA.

commissioner.[51] In these circumstances, the CCMA must appoint another commissioner to arbitrate the matter.[52]

Parties to any dispute may also make a written request that their stated preference of commissioner be taken into account, to the extent that it is reasonably practicable in all the circumstances to do so.[53] In these cases, all the disputant parties must agree to a list of a maximum of five preferable arbitrating commissioners, and the list must be submitted to the CCMA once conciliation fails.[54]

Finally, any party to the dispute may apply to the CCMA director that a senior commissioner be appointed to arbitrate.[55] The director's decision is final and binding, and is based on the nature of the questions of law raised, the complexity of the dispute, whether there are conflicting arbitration awards that are relevant to the dispute and the public interest in the matter.[56]

2.2.3.2 Powers of Commissioners

Section 142 of the LRA sets out the various powers which commissioners hold in attempting to resolve disputes between parties. Commissioners may subpoena any person to give information at either the conciliation or arbitration of a dispute.[57] Persons believed to have possession of any book, document or object, may also be subpoenaed for questioning or to produce such items.[58] In addition, experts may be subpoenaed to give evidence that is relevant to the dispute.[59]

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51 Section 136(3) of the LRA.
52 Section 136(4) of the LRA.
53 Section 136(5)(a) of the LRA.
54 Section 136(5)(b) of the LRA.
55 Section 137 of the LRA.
56 Section 137(c) of the LRA.
57 Section 142(1)(a) and s142(2) of the LRA.
58 Section 142(1)(b) of the LRA.
59 Section 142(1)(c) of the LRA.

In resolving disputes, commissioners may administer oaths or accept affirmations to witnesses.[60] They are empowered to call for question any person who is present at the conciliation or arbitration.[61] However, evidential laws concerning privilege in a court of law apply equally to evidence given in CCMA proceedings.[62] A commissioner may find a person in contempt of the CCMA in limited circumstances, such as where a witness refuses to take an oath or affirmation.[63] Any such contempt may be referred by the CCMA to the Labour Court for an appropriate order.[64]

Subject to certain qualifications,[65] commissioners may exercise general powers of search and seizure. These are to enter and inspect certain premises,[66] to examine, seize or demand the production of any relevant book documents or objects that is on that premises[67] and to take relevant statements from any willing person at such premises.[68] The commissioner may then inspect and retain the books, documents and objects produced or seized by the CCMA for a reasonable period.[69] Owners and occupiers of property that the commissioner is authorized to inspect are required by law to provide the commissioner with the facilities to enter premises for inspection and seizure.[70]

2.2.4 The Nature of CCMA Proceedings

Numerous forms of dispute resolution processes are conducted under the auspices of the CCMA, taking the form of either conciliation or arbitration proceedings. These will be discussed below.

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60 Section 142(1)(e) of the LRA.
61 Section 142(1)(d) of the LRA.
62 Section 142(6) of the LRA.
63 Section 142(8) of the LRA.
64 Sections 142(9)-(12) of the LRA.
65 Section 142(3) and s142(5) of the LRA.
66 Section 142(1)(f)(i) of the LRA.
67 Section 142(1)(f)(ii) of the LRA.
68 Section 142(1)(f)(iii) of the LRA.
69 Section 142(1)(g) of the LRA.
70 Section 142(4) of the LRA.

2.2.4.1 Conciliation

Conciliation is generally the process whereby CCMA commissioners assist the disputant parties to isolate the issues in dispute in order to consider alternatives and reach an appropriate settlement agreement.[71] This may also take the form of a fact-finding enquiry or the making of recommendations in an advisory arbitration award.[72] In determining the procedure, it is important for the commissioner to bear in mind the purpose of facilitating effective dispute resolution by the parties themselves.

On referral of a dispute to the CCMA, and provided the CCMA has the necessary jurisdiction,[73] a commissioner is appointed to conciliate the matter.[74] Should the attempt at conciliation prove unsuccessful, or if the dispute has not been resolved at the end of a 30-day period,[75] the commissioner must issue a certificate stating that the dispute could not be resolved.[76] The certificate constitutes sufficient proof that an attempt has been made at conciliating a particular dispute,[77] this being a prerequisite for CCMA arbitration of that dispute.[78]

2.2.4.2 Pre-dismissal Arbitration

In terms of the most recent amendments to the LRA, employers may, with the consent of the employee in question, request that the CCMA[79] conduct a pre-

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71 Du Toit, D *et al op cit* at 578.
72 Section 135(3) of the LRA; Basson, A *et al* Essential Labour Law: Collective Labour Law (3 ed) at 358.
73 Grogan, J *op cit* at 383, citing *Trees v TA Securities* Labour Court case number JA 10/98, undated and unreported.
74 Section 135(2) of the LRA. This period may be extended by consent of all the parties to the dispute.
75 Or such extended period as parties have agreed.
76 Section 135(5)(a) of the LRA.
77 Section 157(4)(b) of the LRA.
78 Sections 115(1)(a) and (b), s133 and s136(1)(a) of the LRA. Note the comment of Du Toit, D *et al op cit* at 578.
79 Or accredited bargaining council or private agency.

dismissal arbitration into the allegations concerning the employee's conduct or capacity and which gives rise to the proposed dismissal.[80]

As in post-dismissal arbitration, these arbitration proceedings must be conducted in terms of s138 of the LRA,[81] and the commissioners are granted the same arbitral powers.[82] The directives of commissioners in pre-dismissal arbitrations are also subject to the same constraints,[83] and must state the type of action that should be taken against the employee, if any, when applying the yardstick of fairness.[84]

The LRA is silent as to whether a party aggrieved by a commissioner's pre-dismissal arbitration award can refer the matter to the CCMA thereafter. Grogan suggests that the directive given by a commissioner in a pre-dismissal arbitration is final and binding and cannot be undone by another commissioner.[85] I agree with this contention, particularly in light of the LRA aim of expediency in dispute resolution. I submit, however, that the Labour Court may review such directives in terms of s145, as with any other CCMA arbitration award.

2.2.4.3 Other Arbitration Proceedings

The Arbitration Act[86] does not apply to arbitration hearings conducted under the auspices of the CCMA.[87] The LRA contains lengthy provisions to regulate CCMA arbitration proceedings, the details of which are described below.

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80 Section 188A(1) of the LRA.
81 Section 188A(6) of the LRA.
82 Section 188A(7) of the LRA.
83 Section 188A(8) of the LRA.
84 Section 188A(9) of the LRA.
85 Grogan, J *op cit* at 115.
86 Arbitration Act 42 of 1965 ("Arbitration Act).
87 Section 146 of the LRA.

2.2.4.3.1 Con-Arb

A recent addition to the LRA makes provision for the expedited procedure of Con-Arb in certain disputes concerning dismissal.[88] Con-Arb is a procedure whereby the dispute is arbitrated immediately after the conciliation has proved unsuccessful, and the commissioner has issued a certificate stating that the dispute remains unresolved.[89]

2.2.4.3.2 Arbitration of disputes referred to the CCMA in terms of the LRA

A CCMA arbitration is a hearing *de novo* of all the issues in dispute, unless parties agree to the contrary.[90] The commissioner has a statutory discretion to conduct the arbitration hearing in a manner appropriate to resolve the dispute fairly and quickly, provided the substantial merits of the dispute are heard with the minimum of legal formalities.[91] However, the commissioner must adhere to the rules of natural justice.[92] The commissioner will usually hear the testimonies of the disputant parties and other witnesses, and hear closing arguments by the parties.[93]

To avoid complicating the matter with technicalities, the commissioner may adopt a more active, inquisitorial approach in the proceedings than a judge in a court of law.[94] However, the volatile nature of labour relations often leads to the arbitrator adopting a more traditional, passive approach to conducting the hearing, as he or she will try to avoid seeming partial or bias towards any particular party.[95]

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88 Section 191(5A) of the LRA.
89 Section 191(5A) of the LRA.
90 *Gibb v Nedcor Ltd* (1998) 19 *ILJ* 364 (LC); Du Toit, D *et al op cit* at 592; Grogan, J *op cit* at 385.
91 Section 138(1) and (2) of the LRA.
92 Du Toit, D *et al* at 592; Grogan, J *op cit* at 385.
93 Section 138(2) of the LRA.
94 Du Toit, D *et al op cit* at 591.
95 Brand, J *et al* Labour Dispute Resolution at 141.

Commissioners are bound to follow any codes of good practice issued by NEDLAC or guidelines published by the CCMA that are relevant to matters being considered in the arbitration proceedings.[96] They must also follow any provisions laid down in the LRA for specified types of disputes,[97] and all legal principles of South African law.[98]

It is clear from this brief expose that in CCMA arbitrations, the LRA regulates the issues that would be agreed upon by parties and specified in an arbitration agreement in a private arbitration held in terms of the Arbitration Act.[99] The imperatives set out in the LRA generally give the commissioners a wide discretion to ensure that CCMA proceedings are fair and just.

2.2.4.3.3 Compulsory or Voluntary Arbitration?

Certain labour disputes must be arbitrated by the CCMA, while in other matters, the parties to the dispute may elect to refer the matter to the CCMA by consent. Both instances will be discussed briefly below.

2.2.4.3.3.1 Compulsory Arbitration

Certain matters are reserved for adjudication by the CCMA.[100] For example, unfair dismissal disputes must be referred to the relevant bargaining council, failing the existence of such, to the CCMA and not to the Labour Court or any other forum.[101] These arbitration proceedings are compulsory in terms of the LRA.

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96 Section 138(6) of the LRA.
97 For example, sections 139, 140 and 141 of the LRA.
98 *Le Roux v CCMA & Others* (2000) 21 *ILJ* 1366 (LC) at 1373B-H.
99 See below at 2.4.1.
100 See above 2.2.2.
101 Section 191(1)(a) of the LRA.

It is noteworthy that employers and employees involved in essential services[102] and maintenance services[103] are prohibited from participating in strikes and lock-outs.[104] If a dispute of mutual interest cannot be resolved by agreement between the parties, they are compelled to partake in arbitration proceedings,[105] either under the auspices of the CCMA.[106] The CCMA commissioner must attempt to settle the dispute through conciliation.[107] Should the dispute remain unresolved, the matter must be arbitrated by a commissioner once a certificate to this effect is issued and on the request of a disputant party.[108]

2.2.4.3.3.2 Voluntary Arbitration

Disputes that ordinarily fall under the jurisdiction of the Labour Court may be referred by consent of the parties to the CCMA for arbitration, provided conciliation by the Commission has failed.[109] In these circumstances, the commissioner is not limited to the usual remedies, and may make any order that the Labour Court would have authority to make in the circumstances.[110] Consensual arbitration by the CCMA is limited to rights disputes,[111] those being disputes concerned with the established legal rights of employers and employees rather than the negotiation of new rights (so-called disputes of interest).[112]

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102 An "'essential service", as defined in s213 of the LRA, includes services the interruption of which endangers life, personal safety or health of the whole or any part of the population, the Parliamentary service and the South African Police Service.

103 Section 75(1) of the LRA defines a "maintenance service" as one where "the interruption of that service has the effect of material physical destruction to any working area, plant or machinery".

104 Sub-sections 65(1)(d)(i) and (ii) of the LRA. In terms of s70(2) of the LRA, the Essential Services Committee is required to investigate disputes as to whether a service can be categorized as "essential" or "maintenance".

105 Sections 74 and 75 of the LRA.

106 Or bargaining council with the relevant jurisdiction: s74(1) and s75(7) of the LRA. This discussion is restricted to arbitration under the CCMA, although the provisions apply equally to arbitration under bargaining councils.

107 Section 74(3) of the LRA.

108 Section 136(1) of the LRA.

109 Section 141(1) of the LRA.

110 Section 141(6) of the LRA.

111 Du Toit, D *et al op cit* at 589.

112 Grogan, J *op cit* at 285-6.

Voluntary arbitration proceedings by the CCMA are reviewable by the Labour Court, although the applicable grounds of review are unclear.[113] The question is whether the private arbitration grounds of review, or the CCMA review grounds apply to voluntary proceedings. While the focus of this dissertation is on compulsory arbitration, I submit that voluntary referrals to CCMA arbitration be reviewed in terms of the LRA, in the same manner that awards from compulsory hearings are reviewed.[114] The relevant statute applicable in the review of the arbitral proceedings is determined largely by the nature of the process as either statutory or voluntary. However, s145 of the LRA seems absolute. It states that "any party to a dispute who alleges a defect in any arbitration proceedings" under the auspices of the CCMA must be reviewed in terms of the LRA.[115]

2.3 Bargaining Agents

The current bargaining council system is the successor of the industrial councils. These statutory forums were established to promote centralised labour bargaining on an industry level, as opposed to bargaining on an enterprise level.[116] The system entails a collaborative effort of industrial partners to regulate relations between management and the labour force in various employment sectors. It marks a shift from the past adversarial nature of bargaining to a more conciliatory process based on the exercise of power through collective bargaining.[117] These councils may also provide dispute resolution mechanisms for matters arising between the council parties.

2.3.1 Nature of Centralised Bargaining

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113 Section Du Toit, D *et al op cit* at 589 and 623; *Department of Labour v Cowling NO* D498/98.

114 Sections 145(1) and (2) of the LRA.

115 Section 145(1) read with s145(2) of the LRA.

116 Du Toit, D *et al op cit* at 184-186; Basson, A *et al op cit* at 76. See also s1 of the LRA. Note the statements of Grogan that plant-level bargaining may occur directly between employers and trade unions or through workplace forums. However, where parties fall within the jurisdiction of a bargaining council, the collective agreements will take precedence over plant-level agreements (Grogan, J *op cit* at 303).

117 Du Toit, D *et al op cit* at 159.

In general, parties are not compelled to participate in centralised bargaining.[118] It is essentially a voluntary process, whereby parties exercise their relative economic powers.[119] However, the LRA favours collective bargaining and provides a number of incentives to encourage employment parties to do so.[120] In addition, the legitimate endeavours of collective bargaining forums enjoy the support of the courts, which acknowledge the role they play in the promotion of good labour relations.[121]

The centralised bargaining system can be divided into two arenas, the public domain and the private domain. An over-arching council in the public service, the Public Service Co-ordinating Bargaining Council ("PSCBC"), was established in terms of the LRA. This central council may establish further bargaining councils for particular sectors in the public service.[122] The private component of the system is comprised of two structures, namely bargaining councils and statutory councils. Each is governed by similar rules and procedures, yet the former is a voluntary association while the latter is established compulsorily.

2.3.2 Nature of Bargaining Councils in the Private Sector

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118 Du Toit, D *et al op cit* at 185; Basson, A *et al op cit* at 76. The compulsory establishment of statutory councils and councils in the public service are examples of exceptions to the general voluntary nature of collective bargaining. See Du Toit, D *et al op cit* at 167 footnote 40 for other examples.

119 *National Police Services Union & Others v National Negotiating Forum & Others* (1999) 20 *ILJ* 1081 (LC) at 1095D-E.

120 For example, trade unions that are party to councils are entitled to access and stop-order rights (s18(1) and s19). Parties to councils may set the threshold of representation for obtaining organizational rights and may determine issues that may not be the subject of a strike or lock-out (s28(1)(i)). Councils may develop policies for NEDLAC (s28(1)(h)). They may also apply for accreditation from the CCMA in order to perform dispute resolution functions (s51 and s52): Du Toit, D *et al op cit* at 34 and at 185 footnote 109. See *National Police Services Union v National Negotiating Forum* (1999) 20 *ILJ* 170 (LC).

121 *Building Industry Bargaining Council Cape of Good Hope (Boland Area) v Hatlin t/a The Homestyles Co* [2001] 8 BLLR 895 (LC) at 901B-C; *Adonis v Western Cape Education Department* (1998) 19 *ILJ* 806 (LC) at 813A.

122 Councils that have been established include the General Public Service Sectoral Bargaining Council (GPSSBC), the Education Labour Relations Council (ELRC), the Safety and Security Sectoral Bargaining Council (SSSBC) and the Public Health and Welfare Bargaining Council (PH&WBC).

Bargaining councils in the private sector are formed voluntarily between one or more registered trade union and one or more registered employers' organisation for the purpose of self-governance over a particular sector of the economy and geographical area.[123]

The parties of the proposed bargaining council must be sufficiently representative of the sector and area proposed.[124] The term "sufficiently representative" is not defined in the LRA.[125] The parties negotiate and agree on the terms of a constitution for the council.[126] There is no obligation to assent to the establishment of a bargaining council or to agree on a proposed constitution. However, a refusal to agree on the establishment of a council amounts to a refusal to bargain,[127] and parties may resort to the use of industrial action to compel each other to bargain.[128]

The council is established when its constitution is accepted and the Registrar of Labour Relations accepts that the registration[129] application complies with the

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123 Section 27(1) of the LRA. Van Jaarsveld, F and Van Eck, S *Principles of Labour Law* (2 ed) at 296. Note that a bargaining council may be established for more than one sector (s27(4)) and that parties may be admitted to the council at a later stage(s56). Note, too that the State may be party to a bargaining council if it is an employer in the sector and area of a bargaining council (s27(2)).

124 Section 29(11)(b)(iv) of the LRA.

125 In relation to the meaning of "sufficient representation" for organizational rights, see *SACTWU v Sheraton Textiles (Pty) Ltd* [1997] 5 BLLR 662 (CCMA); *UPUSA v Komming Knitting* [1997] 4 BLLR 508 (CCMA); *NUMSA v Feltex Foam* [1997] 6 BLLR 798 (CCMA). In these matters, the commissioners found that sufficient representation implies something less than a majority.

126 See s30 of the LRA, which sets out the provisions relating to the constitution of a bargaining council. Certain information must be included in the constitution and the council's constitution may take precedence over the provisions of the LRA (*Portnet v La Grange & Others* (1999) 20 *ILJ* 916 (LC)).

127 Section 64(2)(a)(ii) of the LRA.

128 Basson, A *et al op cit* at 77.

129 See s29 of the LRA for the provisions governing registration of a bargaining council. Provision is made for objections by any person to the establishment of the bargaining council, in certain limited circumstances. NEDLAC must consider the appropriateness of the sector and area in respect of which the bargaining council is to be established. It must also demarcate the appropriate sector and area in respect of which the bargaining council should be registered. This ensures that the centralised bargaining system is organised systematically, thus avoiding fragmentation in the system (Basson, A *et al op cit* at 90). If all the requirements for registration are met, the Registrar will issue a certificate of registration.

LRA.[130] Once properly established, the bargaining council obtains legal personality as a body corporate.[131] It assumes the usual characteristics of a legal persona such as the powers to litigate and acquire property,[132] and obtains all the powers, functions and duties conferred by the LRA to be performed within its registered scope.[133]

The functions and powers of bargaining councils fall into three main categories, namely the facilitation of collective bargaining, the resolution of disputes and the general regulation of matters of mutual interest.[134] The latter category of miscellaneous functions includes the promotion of training schemes, the establishment and administration of pensions, the provision of industrial support services and the development of proposals on policy and legislation for submission to NEDLAC.[135]

2.3.2.1 Collective Bargaining and Collective Agreements

The primary function of bargaining councils is to facilitate collective bargaining and labour peace through the negotiation of collective agreements.[136] Parties may make any arrangements they wish, subject to the law.[137] While the collective agreements generally concern terms and conditions of employment and other matters of mutual interest[138] to the parties,[139] dispute resolution procedures often

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130 Section 27(1) of the LRA. See s29(11) of the LRA for the requirements of which the Registrar must be satisfied before registering a council. NEDLAC also plays a role in the registration process to ensure that the centralized bargaining system is organized systematically, thus avoiding fragmentation in the system (s29(8)).

131 Section 50(1) of the LRA.

132 Section 50(2)-(4); *NIC Printing & Newspaper Industry v Copystat Services (Pty) Ltd* 1980 (3) SA 631 (W); *NIC Leather Industry of SA v Parshotam & Sons (Pty) Ltd* 1984 (1) SA 277 (D).

133 Section 50(2) of the LRA.

134 Section 28(1) of the LRA; Du Toit, D *et al op cit* at 189-192.

135 These functions fall beyond the scope of this thesis. See s28(1)(f)-(l) of the LRA.

136 Sections 28(1)(a), (b) and (c) of the LRA. Van Jaarsveld, F and Van Eck, S *op cit* at 297 and 303.

137 *Bargaining Council for Hairdressing & Cosmetology Trade (Pretoria) v Smit t/a Hair Mistique* (2002) 11 LC 1.1.1 at paragraph [12] (viewed at **www.irnetwork.co.za** on 24 August 2003)

138 Matters of mutual interest include matters such as the training of employees and the establishment and administration of pension funds: See Basson, A *et al op cit* at 81.

form the subject matter of such, and thus it is important to consider the nature of these collective agreements.

Contrary to the usual state of affairs, parties to the agreement are not the only parties that may be forced to abide by the agreement. Subject to the bargaining council constitution, collective agreements bind the parties to the agreement (who are also parties to the bargaining council) and, insofar as it is applicable, they bind the members of those parties.[140] Parties to the bargaining council may also be bound by collective agreements if they are not party to such agreement, but if the constitution so provides.[141]

The collective agreement may be extended to those who are not party to the agreement or the council but are within the registered scope of the bargaining council.[142] Such extension may occur on request where one or more registered trade union representing the majority of the members of all trade union parties at the council and one or more registered employers' organisation employing the majority of the employees employed by the members of the employers' organisations at the council, vote in favour of the extension.[143]

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139 Section 213 of the LRA. Employer parties to collective agreements must fulfil a number of duties: see s13(2), s25(1), s204 and s205 of the LRA.

140 **Section 31 of the LRA states:**
"Subject to the provisions of section 32 and the constitution of the bargaining council, a collective agreement concluded in a bargaining council binds-
(a) the parties to the bargaining council who are also parties to the collective agreement;
(b) each party to the collective agreement and the members of every other party to the collective agreement in so far as the provisions thereof apply to the relationship between such a party and the members of such other party; and
(c) the members of a registered trade union that is a party to the collective agreement and the employers who are members of a registered employers' organisation that is such a party, if the collective agreement regulates-
(i) terms and conditions of employment; or
(ii) the conduct of the employers in relation to their employees or the conduct of the employees in relation to their employers."

141 *ibid.*

142 Section 32(1) of the LRA. The Minister must satisfy him- or herself of the requirements set out in s32(3) and s32(5) before the collective agreement will be extended to non-parties.

143 Section 32 (1) of the LRA. The extension of collective agreements to non-parties does not infringe the constitutional right to engage in collective bargaining (s23(5) of the Constitution), as it promotes equality in the registered sector and area of the bargaining

Extension of the collective agreement is permitted to prevent unfair competition that non-party employers may pose to employers who are party to the bargaining council. This occurs where employers increase profit margins by offering less favourable terms and conditions of employment to employees.[144] In addition, by extending collective agreements in this way, standards for employers and employees that do not bargain collectively are established,[145] as non-parties are placed on an equal footing with signatories to the agreement.[146] The will of the majority is permitted to prevail over that of the minority.[147] Thus, the extension of these agreements to non-parties advances the LRA object of orderly collective bargaining, particularly at the sectoral level.[148]

The constitution of the council must provide for a procedure whereby non-parties may apply for an exemption from such extensions of collective agreements.[149] An exemption will not be granted purely to enhance the efficiency or profitability of an individual employer; in the particular circumstances of the case, the employer must suffer substantial detriment in order for the exemption to be granted.[150]

It may not be fair and equitable to extend collective agreements to all employers and employees in the registered sector of a council. As such, the Minister may not extend an agreement to specified non-parties within the registered scope of the council in certain limited circumstances:[151] where an exemption from the collective

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council and ensures fair labour practices: See Basson, A *et al op cit* at 89-90. Note the procedural aspects of extending agreements in s32 of the LRA.

144 *Kem-Lin Fashions CC v Brunton & Another* [2001] 1 BLLR 25 (LAC) at 31F-32B; *Armstrong Interiors v Furniture, Bedding & Upholstery Industry Bargaining Council* (2001) 22 *ILJ* 552 (BCA) at 555C.

145 Basson, A *et al op cit* at 89-90.

146 *Kem-Lin Fashions CC v Brunton & Another supra* at 32J-33B, cited in *National Entitled Workers Union & Others v Metal & Engineering Industries Bargaining Council (Transvaal Region) & Others* (2001) 22 *ILJ* 2689 (LC) at 2691A-B.

147 *Kem-Lin Fashions CC v Brunton & Another supra* at 31D-E.

148 Section 1 of the LRA; *Kem-Lin Fashions CC v Brunton & Another supra* at 31F-32B.

149 Section 30(1)(k) of the LRA.

150 *Armstrong Interiors v Furniture, Bedding & Upholstery Industry Bargaining Council supra* at 555A and 555H-I. The exemption must be fair to both the employer and the employees (at 556A-B).

151 Section 32(3)(d) of the LRA.

agreement has been granted,[152] where no provision is made in the agreement for an independent body to determine appeals against the refusal or withdrawal of a non-party's application for exemption,[153] where the agreement does not state criteria that this independent body will use to determine the appeal,[154] where the agreement discriminates against non-parties[155] and where extension of the agreement will result in the parties to the council having minority membership.[156]

2.3.3 Dispute Resolution Function

The dispute jurisdiction of bargaining councils is limited, both in terms of the parties over which the council has jurisdiction and the types of disputes councils may determine.

A bargaining council exercises its powers over employers and employees in its registered sector and area only.[157] This includes all employers and employees within the registered sector and area, regardless of whether they are members of a bargaining agent that is party to the council.[158] Thus, one must consider the following categories of disputants: council parties, parties that are not party to the council and parties that do not fall within the scope of the council.

While certain disputes are expressly excluded from the scope of bargaining councils,[159] others must be referred to a council with the appropriate jurisdiction. Issues of collective bargaining and individual employment rights are generally left

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152 Section 30(1)(k) of the LRA.
153 Section 32(3)(e) of the LRA.
154 Section 32(3)(f) of the LRA.
155 Section 32(3)(g) of the LRA.
156 Sections 32(3)(b) and (c) of the LRA. See also s32(5) and s32(3)(a) read with s32(1) of the LRA.
157 *Photocircuit SA (Pty) Ltd v De Klerk NO & Others* (1991) 21 *ILJ* 289 (A); *Baderbop (Pty) Ltd & Another v National Bargaining Council* [2001] 11 BLLR 1209 (LC) at 1211B-C. The registered scope of a bargaining council may be varied (s58). Disputes over the jurisdiction of bargaining councils must be referred to the CCMA (s62).
158 Section 51(2)(b) of the LRA; Basson, A *et al op cit* at 81.
159 See, for example, s16, s21 and s45 of the LRA (For a full list, see Du Toit, D *et al op cit* at 603 and 605).

to the council to conciliate.[160] The conciliatory jurisdiction of councils includes disputes regarding the freedom of association,[161] those that form the subject matter of proposed industrial action,[162] and those concerning severance pay.[163] Where conciliation fails in certain disputes, councils are empowered to arbitrate the matter.[164] These disputes include disputes in essential services[165] and unfair dismissals.[166] In addition, the LRA sets out certain disputes where parties may, by collective agreement, consent to the jurisdiction of a council.[167]

The identity of the disputant parties is pertinent in determining which arbitral forum will resolve the dispute. Disputant parties may be divided into three categories, namely parties to the council, parties that are not members of the council but which fall within the registered scope of the council and parties that do not fall within the registered scope of the council (and are not party to the council).

Council parties are compelled to attempt to resolve disputes in accordance with the relevant bargaining council constitution.[168] Councils may design any appropriate procedures that are efficient and cost-effective in the resolution and prevention of disputes.[169] The constitution must set out the procedure to be followed in disputes between council parties,[170] as well as disputes between bargaining agents or their respective members in the workplace.[171] It must also provide for the arbitral determination of any dispute concerning the interpretation or application of the constitution[172] and disputes concerning any dispute on matters of mutual interest

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160 Du Toit, D *et al op cit* at 605.
161 Section 9(1)(a) of the LRA.
162 Section 64(1)(a) of the LRA.
163 Section 41 of the Basic Conditions of Employment Act 75 of 1997 ("BCEA"). See also s33A(4)(a) and s33A(7) , 74(1)(a) and s191(1)(a) of the LRA.
164 Section 51 of the LRA.
165 Section 74 of the LRA.
166 Section 191 of the LRA. See also s33A(4)(a), s33A(7), s74(1)(a) and s191(1)(a) of the LRA.
167 See, for example, disputes concerning workplace forums in terms of s94 of the LRA.
168 Section 51(2)(a)(i) of the LRA.
169 *Wanenburg v Motor Industry Bargaining Council & Others* (2001) 22 *ILJ* 242 (LC) at 250I-J and 251C-D.
170 Section 30(1)(i) of the LRA. See also s51(9) of the LRA.
171 Section 30(1)(j) of the LRA.
172 Section 30(1)(h) of the LRA.

between council parties.[173] Private-sector bargaining councils are empowered to establish and administer a fund to be utilised for the dispute resolution function.[174] They may also apply to the governing body of the CCMA for a financial subsidy to perform the dispute resolution duties, or to train persons to perform those duties.[175]

Where a dispute is referred to the council in terms of the LRA, but a party to the dispute is not a party to the council, the council must nonetheless attempt to resolve the dispute through conciliation on referral of the matter by the non-party.[176] Should conciliation prove unsuccessful, the council may arbitrate the matter if all the parties consent to arbitration under the auspices of the council, or if the LRA requires the dispute to be arbitrated and any party to the dispute has so requested.[177] Thus, disputant parties who are not parties to the council still have a choice in which arbitral body will adjudicate the dispute. They are not forced into submitting to the jurisdiction of the council, as they may nonetheless have recourse to the CCMA.

In order to fulfil the arbitral function, bargaining councils must apply for accreditation from the governing body of the CCMA, as a means of authorisation to fulfil dispute resolution functions itself.[178] Accreditation ensures that the dispute resolution services offered by a council meet the standards of the CCMA, and that the council will be able to settle disputes effectively.[179] Where the LRA so permits,

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173 Section 51(2)(a)(i) of the LRA. Also see s51(1) of the LRA; *Kem-Lin Fashions CC v Brunton & Another supra* at 35I-J; *SALSTAFF on behalf of Bezuidenhout v Metrorail* (2001) 22 *ILJ* 1924 (BCA) at 1926I-J.

174 Section 28(1)(d) and (e) of the LRA.

175 Section 132(1) of the LRA.

176 Sections 51(2)(b) and s51(3)(a) of the LRA.

177 Section 51(3)(b) of the LRA.

178 Section 52(1)(a) and s127 of the LRA. *SALSTAFF on behalf of Bezuidenhout v Metrorail supra* at 1926H-I; *Public Service Association on behalf of Putter & Others v Department of Agriculture* (2001) 22 *ILJ* 568 (BCA) at 573C. In *Mandhla v Belling & Another* [1997] 12 BLLR 1605 (LC) at 1608F-G, the Court states that every council must be accredited before it can perform any dispute resolution functions in terms of s51. This is incorrect, as accreditation is peremptory only in cases where the LRA requires a council to arbitrate the matter and a party to the dispute is not a party to the council. As stated in *Putter's* case (at572G-H), the statement in *Mandhla v Belling* is probably too widely phrased.

179 Section 127(4)(a)-(d) of the LRA.

the accredited council may charge a fee for performing these functions.[180] Accredited councils either appoint individuals as permanent commissioners, or contract them on an *ad hoc* basis to settle disputes on behalf of the bargaining council.[181] The council may give these individuals the powers of CCMA commissioners in order to settle the disputes.[182]

If the council is not accredited, it must appoint an accredited private agency to perform the dispute resolution functions.[183] Failing the appointment of a private agency, the council may request that the CCMA resolves the dispute for a fee.[184]

It is also arguable that the council may perform an arbitral function under the Arbitration Act, provided the parties to the dispute have consented in a written agreement.[185] One should note that accreditation is only required where a party to the dispute is not a party to the council and the dispute is referred to the council in terms of the LRA. Thus, provided the constitution of collective agreement of a bargaining council does not provide otherwise, disputes between council parties may be resolved without accreditation from the CCMA.

Where a dispute is referred to a bargaining council, but one or more parties to the dispute does not fall within the registered scope of the council, the matter must be referred to the CCMA.[186]

2.3.4 Nature of Bargaining Councils in the Public Service

180 Section 128(1) of the LRA.
181 Du Toit, D *et al op cit* at 601.
182 Section 128(3)(a)(i) read with s142 of the LRA.
183 Sections 52(1)(b) and 52(2) of the LRA.
184 Sections 51(6) and s147(2)(b) of the LRA. These functions may not be entrusted to the CCMA, unless its director has been consulted and its governing body has so agreed (S51(7) and s30(5) of the LRA. The requirement that the Director be consulted is subject to the other provisions of the LRA). The CCMA may also be required to fulfil dispute resolution functions where the council fails to secure accreditation and does not appoint an accredited private agency (s147(8); Du Toit, D *et al op cit* at 601).
185 Grogan, J *op cit* at 300. See, however, *Building Industry Bargaining Council (East London) v Naidoo t/a Dev's Construction Trust & Another* [2000] 8 BLLR 898 (LC) at 900A; *Bargaining Council for the Furniture Manufacturing Industry v Unique Kitchen Designs* (2000) 21 *ILJ* 419 (CCMA) at 423J-424A.

Although many similarities between bargaining councils in the public sphere and those in the private sphere do exist,[187] the LRA makes special provision for bargaining councils in the public service. "Public service" is defined as the national departments, provincial administrations, provincial departments and organisational components contemplated in section 7 (2) of the Public Service Act.[188] However, it excludes members of the South African National Defence Force, the National Intelligence Agency and the South African Secret Service.[189] The State is the employer in these cases, and thus the State fills the shoes that employers' organisations wear in the private sector.[190]

The Public Service Co-ordinating Bargaining Council ("PSCBC") was established as a bargaining council for the public service as a whole.[191] The establishment of this council was compulsorily imposed by the LRA. It is the co-ordinating council in matters relating to more than one sector in the public service, and acts as bargaining council in sectors where no bargaining council exists.[192] The Education Labour Relations Council, the National Negotiating Forum and the central chamber of the Public Service Bargaining Council are the founding parties to the PSCBC.[193]

The employee and employer representatives of these parties were invited by the CCMA to a meeting to agree on the content of the constitution of the PSCBC.[194] The LRA directs that the PSCBC constitution must include the same provisions as is

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187 Such as the establishment of the bargaining council through the adoption of a constitution and registration, see s36(1) and s29(16) of the LRA and Items 2(1) and 2(4) of Schedule 1 to the LRA, and ss37(3) and (4) of the LRA.

188 Act 103 of 1994; s213 of the LRA.

189 Section 213 of the LRA. See *Natal Sharks Board v SACCAWU and Others* (1997) 1 LC 4.5.1. (viewed at www.irnetwork.co.za 24 August 2003).

190 Sections 30(2)(a) and 32(9)(a) of the LRA.

191 Section 35 of the LRA.

192 Du Toit, D *et al op cit* at 186.

193 Item 2(3) of Schedule 1 to the LRA. Each of these bodies is established as a bargaining council for its particular sector in the public service (Item 3(1)-(3) of Schedule 1 to the LRA). Also see item 20 of Schedule 7 to the LRA.

194 Section 36(1) of the LRA; Item 2(1) of Schedule 1 to the LRA.

required of its private sector counterparts,[195] as well as provision for the procedure to be followed when establishing councils for particular sectors of the public service.[196] This constitution then had to be registered with the Registrar.[197]

The functions of the PSCBC include matters regulated by uniform rules, norms and standards applicable throughout the public service, matters concerning the terms and conditions of employment of two or more sectors of the public service and matters assigned to the State as an employer in the public service, provided the matter is not assigned to the State as an employer in another sector.[198]

The PSCBC also controls the existence of other bargaining councils in the public sector.[199] It may designate a particular sector of the public service for the establishment of a bargaining council,[200] and must establish this bargaining council in terms of its constitution.[201] The PSCBC may also vary, amalgamate or disband any of these councils.[202]

Where a council is to be established in a designated sector of the public service, parties in that sector must attempt to agree on the terms of a constitution. Where they cannot agree, the Registrar will determine its contents.[203] Once established, the council has exclusive jurisdiction in matters specific to that sector, if the State, as employer, has the authority to conclude collective agreements and resolve labour disputes.[204]

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195 Item 2(2) of Schedule 1 to the LRA; Section 30(2) of the LRA. The constitution of the PSCBC need not provide for representation of small and medium enterprises (s30(2)(b)).

196 Section 30(3) of the LRA. Section 30(4) states that the constitution may also include provisions for the establishment and functioning of chambers of a bargaining council on national and regional levels.

197 Item 2(6) of Schedule 1 to the LRA and s29(16) of the LRA.

198 Section 36(2) of the LRA.

199 It does so in terms of its constitution and by resolution (s37). Such resolution must accompany any application to register or vary the registration of such bargaining council (s37(4)).

200 Section 37(1)(a) of the LRA.

201 Section 37(2) of the LRA.

202 Section 37(1)(b) of the LRA.

203 Section 37(3) of the LRA.

204 Section 37(5) of the LRA.

Collective agreements concluded in the context of public service bargaining councils may be extended in the same manner as the extension of collective agreements in the private sector.[205] Similarly to private sector bargaining councils, the constitution of public service bargaining councils must comply with the provisions of the LRA.[206] If parties cannot reach agreement on the contents of the constitution, the Registrar may direct its content.[207] The collective agreements and constitutions that public bargaining councils conclude will contain provisions relating to the resolution of disputes, which are substantially similar to those described above in relation to private bargaining councils.[208]

2.3.5 Nature of Statutory Councils

Statutory councils were born of a compromise between trade unions that desired a nation-wide collective bargaining system, and employers that feared that such system would impose a compulsion to negotiate.[209] Unlike the bargaining councils, the establishment of statutory councils is compulsory, and the powers and scope of such councils are limited.[210]

Where no bargaining council exists for a particular sector and area in the private domain, one or more representative trade union or representative employers' organisation may apply to the Registrar for the establishment of a statutory council in that sector and area.[211] The threshold for representation is different to that of bargaining councils. In the case of the latter, parties must be "sufficiently representative". In the context of statutory councils, "representative" refers to one or more registered trade union or registered employers' organisation that

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205 Section 32(9) of the LRA. Section 32(9)(b) of the LRA sets out the inapplicable provisions.
206 Section 36(1) read with Item 2(2) Schedule 1 and s37(3) of the LRA.
207 Section 37(3) of the LRA.
208 Section 51 of the LRA.
209 Van Jaarsveld, F and Van Eck, S *op cit* at 306; Grogan, J *op cit* at 302-303.
210 Van Jaarsveld, F and Van Eck, S *op cit* at 306; Grogan, J *op cit* at 303.
211 Section 39(2) of the LRA. For procedural aspects of this application, see s39(3) read with s29(2)-(10) and s39(4)-(6) of the LRA. Also see s41(6)-(7) and s47 for the procedure where no trade union or employers' organisation exists for that sector and area. This procedure requires that nominations be considered in appointing suitable representatives where no bargaining agent exists.

represents or employs 30% of the employees in that sector and area.[212] Parties may be regarded as representative in respect of a whole area, even if a trade union or employers' organisation that wishes to be party to the council has no members in part of that geographical area.[213]

Statutory councils that are not adequately representative in the registered scope may nonetheless submit a collective agreement to the Minister in respect of the primary functions of the statutory council.[214] The Minister may promulgate these recommendations as a determination if certain factors have been considered in making the recommendations.[215]

The requirements necessary for the establishment of a statutory council are:[216] that no registered bargaining council exists for that sector and area,[217] that interested parties have had an opportunity to object,[218] that NEDLAC or the Minister has demarcated the appropriate sector and area for registration of the bargaining council[219] and that the applicant is representative as described above, as well as for the area and sector demarcated by NEDLAC or the Minister.[220] If these requirements are present, the Registrar must establish the statutory council.[221]

Registered trade unions and registered employers' organisations in that sector and area are invited to attend a meeting to discuss the establishment of the council.[222] Interested parties in the sector and area are also invited to nominate

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212 Sections 39(1) and (2)of the LRA.
213 Section 49(1) of the LRA.
214 Section 44(1) of the LRA read with s54(4) of the BCEA.
215 Section 44(2) of the LRA read with s54(3) of the BCEA. See also s44(3)-(5) of the LRA. These considerations are the same as those applying to recommendations of the Employment Conditions Commission, established in terms of the BCEA. The factors include the ability of employers to carry on their businesses successfully, conditions of employment and wage differentials and inequality.
216 Sections 40(1) and s39(2)-(6) of the LRA.
217 Section 39(2) of the LRA.
218 Sections 39(3) and s39(4)(b)(i) read with ss29(3)-(6) of the LRA.
219 Sections 39(3) and s39(4)(b)(i) read with ss29(8)-(10) of the LRA.
220 Sections 39(1) and 39(4)(b)(ii) of the LRA.
221 Section 40(1) of the LRA.
222 Section 40(2)(a) of the LRA.

representatives for the council.[223] At the meeting, a CCMA commissioner facilitates agreement on the identity of the bargaining agents that will be parties to the statutory council, as well as a constitution for that council.[224] The proposed constitution must comply with the same requirements as a bargaining council constitution.[225] Once the Minister has approved the agreement, the Registrar is directed to register the statutory council.[226]

Where there is no consensus on these issues, the CCMA commissioner must hold separate meetings with the trade unions and the employers' organisations in order to determine the parties to the council and the number of representatives of each party.[227] These are then registered as the parties to the statutory council.[228] However, if the parties still cannot reach agreement, the Minister must allocate an even number of appropriate trade unions and employers' organisations as parties to the council.[229]

If the registered trade unions cannot reach agreement on the allocation of representatives of each employee party to the council, the Minister must determine such allocation according to proportional representation.[230] Likewise, if the registered employers' organisations cannot agree on the allocation of the employer representatives, the Minister must determine the allocation according to proportional representation and taking into account the interests of small and medium enterprises.[231]

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223 Section 40(2)(b) of the LRA.
224 Section 40(3) of the LRA.
225 Section 40(3)(b) read with s30 of the LRA.
226 Sections 40(4)-(5) and 40(7) of the LRA. Note s40(6) for provisions concerning the procedure where the Minister does not approve the agreement.
227 Section 41(1) of the LRA. Note that a similar procedure applies where a trade union or employers' organization withdraws from the statutory council and parties cannot agree on the identity of the parties and the allocation of representatives to the council (s46 read with s41 of the LRA).
228 Section 41(2) of the LRA.
229 Sections 41(3) and (4) of the LRA. In making this decision, the Minister must take into account the primary objects of the LRA, the diversity of the registered trade unions and employers' organizations in that sector and area and the principle of proportional representation (Section 41(3) read with s40(5) of the LRA).
230 Section 41(5)(a) of the LRA.
231 Section 41(5)(b) of the LRA.

Bearing in mind any agreements and ministerial decisions made in this process, the Registrar is then required to adapt the model constitution provided in the LRA,[232] to certify it and to register the statutory council in the same way as a bargaining council is registered.[233] Thus, parties may be forced to become members of the statutory council by ministerial determination, and as such, are compelled to bargain collectively.

Once established, statutory councils have the status of a body corporate.[234] As with bargaining councils, the parties to the council are not liable for the obligations and liabilities of the council by virtue of their membership.[235] The office-bearers and officials of the council do not incur personal liability for loss resulting from acts performed in good faith by such persons.[236] The council must keep accounting records that must be audited annually.[237]

Statutory councils have narrower powers and functions than bargaining councils, although parties to the council may, in terms of the council's constitution, enjoin it to perform any other bargaining council functions.[238] Councils are required to render dispute resolution services, if they are duly accredited.[239] They are involved in the promotion and establishment of training and education schemes,[240] as well as the establishment and administration of other benefits such as medical aid, pensions, sick leave and provident funds.[241]

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232 The model constitution is set out in Schedule 9 to the LRA.
233 Sections 41(8) and 42 of the LRA. Thereafter, any registered trade union or employers' organization may apply for admission as a party to the council (s56(1) of the LRA).
234 Section 50(1) of the LRA.
235 Section 50(3) of the LRA.
236 Section 50(4) of the LRA.
237 See generally, s53 of the LRA. See also s54 for duties to keep other records and provide the Registrar with information.
238 Section 43(2) read with s28 of the LRA.
239 Section 43(1)(a) read with s51 of the LRA.
240 Section 43(1)(b) of the LRA.
241 Section 43(1)(c) of the LRA.

Collective agreements should be concluded to aid the furtherance of the functions mentioned above.[242] These agreements bind the same categories of parties as bargaining council collective agreements, and may also be extended to non-parties.[243] Designated agents may be appointed to promote, monitor and enforce these collective agreements.[244]

Generally, the provisions applicable to bargaining councils in respect of dispute resolution and accreditation apply equally to statutory councils.[245] The council may delegate this function to a committee, consisting of an equal number of employer and employee representatives.[246]

The model constitution for statutory councils is to prevail, subject to agreement of the council parties and to ministerial decisions made in the process of establishing the party.[247] It states that the council must appoint a panel of conciliators and a panel of arbitrators.[248] Parties to a dispute may then agree that a specific member of the panel resolves the dispute, or, if there is no such agreement, the secretary of the council must appoint the conciliator or arbitrator.[249] The model constitution also states that the same legislative provisions as relate to CCMA arbitration proceedings will regulate the arbitration proceedings and powers of the arbitrators.[250] No provision is made for the review of statutory council awards.

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242 Section 43(1)(d) of the LRA. Disputes concerning whether a bargaining agent/individual falls within the scope of the council and disputes concerning whether an arbitration award, collective agreement of age determination binds a particular bargaining agent/individual must be referred to the CCMA (s62). Interpretation and application disputes must also be referred to the CCMA, as with bargaining councils (s63).

243 Section 43(3) read with s31 and s32 of the LRA.

244 Section 43(3) read with s33 of the LRA.

245 Section 43(1)(a) read with s51 of the LRA. Note that s51(8) of the LRA, which states that s142A and s143-146 apply to bargaining councils only. Statutory councils are not provided for. In addition, s51(9) applies only to bargaining councils. It states that bargaining council parties may establish dispute resolution procedures for any dispute contemplated in s51.

246 Section 55 of the LRA.

247 See s40(4) and s41(8)(a) read with s207(3). The model constitution is set out in Schedule 9 to the LRA.

248 Item 11(1) of Schedule 9 to the LRA.

249 Item 11(4) of the Schedule 9 to the LRA.

250 Item 13(5) of Schedule 9 to the LRA, read with s138 and s142 of the LRA.

2.4 Accredited Private Agencies

Councils must be accredited by the CCMA in order to arbitrate matters where one of the disputant parties is not a party to the council.[251] A bargaining council may of its own accord enter into an agreement with an accredited agency that the agency will perform its dispute resolution functions in terms of s51 of the LRA.[252] Where a bargaining agent is not accredited, an accredited private agency must be appointed to resolve disputes where a disputant party is not a party to the council and the dispute is referred to the council in terms of the LRA.[253] The Labour Court has held that the appointment of an individual will not satisfy this provision of the LRA, as it requires an accredited agency to be appointed.[254]

The governing body of the CCMA will grant accreditation after consideration of various factors, including whether the services provided meet the standards of the CCMA, whether the agency is able to perform the dispute resolution functions effectively, whether conciliators and arbitrators will be independent and competent, whether an acceptable code of conduct and disciplinary procedure governs the conciliators and arbitrators and whether the service is broadly representative of South African society.[255]

Once accredited, agencies may charge a fee for resolving disputes, provided commissioners are likewise permitted to do so.[256] Agencies may also apply to the CCMA for a financial subsidy.[257]

Accreditation may be acquired for the conciliation and/or arbitration of labour disputes.[258] Agencies may arbitrate disputes referred by councils in terms of the

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251 Section 52(1)(a) of the LRA.
252 Section 51(6) of the LRA.
253 Section 52(1)(b) of the LRA. Failing the appointment of a private agency, the council may request that the CCMA resolves the dispute for a fee: Sections 51(6) and s147(2)(b) of the LRA.
254 *Mandhla v Belling & Another supra* at 1608G-H.
255 Section 127(4) of the LRA.
256 Section 128(1) of the LRA.
257 Section 132(1)(b) of the LRA.

LRA, with certain exceptions.[259] Accredited agencies have limited jurisdiction in that they arbitrate disputes on behalf of councils – thus, they have the same jurisdiction as these councils. The exceptions relate to disputes reserved for adjudication by the CCMA or Labour Court.[260] Examples of disputes they may not arbitrate include disputes concerning the disclosure of information,[261] disputes concerning the exercise of organisational rights[262] and workplace forum disputes.[263]

Agencies accredited by the CCMA may confer various powers on the arbitrators and conciliators in its employ.[264] Such powers are based on those bestowed on CCMA commissioners, and include the powers to subpoena witnesses,[265] to administer oaths and affirmations[266] and to make findings that a party is in contempt of the agency.[267]

2.5 Private Arbitration

Private arbitration is a form of dispute resolution proceedings, whereby a third party or arbitration panel is elected by the disputant parties to hear the matter and after consideration of the all evidence, gives a final and binding decision.

Formerly, private arbitration was regulated in terms of the common law.[268] In modern times, arbitration has been regulated by various pieces of legislation. At first, provincial statutes governed arbitration proceedings.[269] In *Nkuke v Kindi*,[270]

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258 Section 127(1) of the LRA.
259 Section 127(2) of the LRA.
260 Basson, A *et al op cit* at 352.
261 Section 16 of the LRA.
262 Section 21 and s22 of the LRA.
263 Section 94 of the LRA.
264 Section 128(3)(b) of the LRA.
265 Section 142(1)(a) of the LRA
266 Section 142(1)(e) of the LRA. Also see s142(1)(b)-(d), s142(2) and s142(7) of the LRA.
267 Section 142(8)-(9) of the LRA.
268 Van Jaarsveld, F and Van Eck, S *op cit* at 456.
269 Arbitration Act of the Cape of Good Hope, Act 29 of 1898; Arbitration Act of Natal, Act 24 of 1898; Arbitration Ordinance of the Transvaal, Ordinance 24 of 1904; Arbitration Proclamation of South-West Africa, Proclamation 3 of 1926.

the court stated that the Cape Arbitration Act[271] did not repeal the common law, but rather it provided a more efficient means of submitting disputes to arbitration and enforcing awards made by arbitrators. This applies equally to the current Arbitration Act,[272] which is the national legislation that repealed the provincial statutes and currently regulates private arbitration proceedings.[273]

Although CCMA arbitration is now the routine method of accessing this form of alternate dispute resolution in labour matters, private arbitration has been used increasingly in industrial disputes.

2.5.1 Nature of Private Arbitration

The term "arbitrators" literally means "accepted persons, who have accepted discretion to pronounce a decision".[274] It follows then that private arbitration is built on the fact that it is consensual in nature: Parties to the dispute must agree on the referral of the dispute to arbitration. In practice, this is obviously dependent on the wide discretion left to the parties to determine the exact regulation of their own arbitration proceedings.

The submission to arbitration is incorporated in an arbitration agreement, which often is concluded on an *ad hoc* basis, when the dispute arises. Such agreements deal solely with the dispute at hand and any dispute not provided for in terms of the agreement will be excluded from the referral to arbitration.[275] Alternatively, parties may agree that all or specific future disputes which arise between them be

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270 *Nkuke v Kindi* 1912 CPD 529 at 532.

271 Act 29 of 1898.

272 *Hyperchemicals International (Pty) Ltd & Another v Maybaker Agrichem (Pty) Ltd & Another* 1992 (1) SA 80 (W) at 98.

273 Section 42 of the Act; *Independent Municipal & Allied Trade Union v Northern Pretoria Metropolitan Substructure & Others* 1999 (2) SA 228 (T) at 238A-B.

274 Voet at 735; In Roman-Dutch times, a distinction existed between *arbitrators* and *arbiters*, the former referring to third parties who amicably settle disputes without having regard to the law (similar to modern-day mediators) and the latter referring to those obliged to decide disputes between litigants in terms of the law and the deed of submission. See Van Leeuwen at 413; Huber at 93.

275 Brand J, *et al op cit* at 131.

referred to arbitration in terms of an automatic arbitration agreement, or in terms of an arbitration clause in another contract.[276]

In both international practice[277] and South African law,[278] private arbitration proceedings may not be initiated or conducted against a person who is not party to the arbitration agreement. The agreement must be recorded in writing in order for the Arbitration Act to apply.[279] An agreement will, however, give rise to enforceable contractual obligations in terms of the common law, regardless of whether the Act applies. The agreement need not be signed by the parties, provided that they have adopted the agreement and acted on it.[280]

The arbitration agreement plays a central role in that the parties to the dispute agree explicitly on the issues in dispute, the identity and powers of the arbitrator, the procedure to be followed at the hearing and any other terms they so wish. Where the agreement is silent on an issue, the basic provisions set out in the Arbitration Act will apply.[281]

The arbitration agreement is a legally binding document. Generally, the arbitration agreement may only be terminated by consent of all the parties to such agreement.[282] The High Court also has the power, on application by any of the parties and on good cause shown, to set aside an arbitration agreement, to order that a particular dispute not be referred to arbitration and to order that an arbitration agreement shall cease to have effect with reference to any dispute referred.[283]

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276 For example, an employment contract.
277 Brown, H & Marriott, A *ADR Principles and Practice* at 52.
278 See Butler, D & Finsen, E *Arbitration in South Africa: Law & Practice* at 23, where they state that there is no provision in South African law for the joinder of parties to an arbitration.
279 Section 1 of the Arbitration Act.
280 *Fassler, Kamstra & Holmes v Stallion Group of Companies (Pty) Ltd* 1992 (3) SA 825 (W) at 828.
281 Brand J, *et al op cit* at 131; Section 1 of the Arbitration Act.
282 Section 3(1) of the Arbitration Act.
283 Section 3(2) of the Arbitration Act.

The arbitration proceedings are generally held in private.[284] The only individuals present at the hearing are the arbitrator, the disputant parties and, if the parties have agreed that representatives be permitted, their representatives. Other individuals may be present with the consent of all parties to the dispute. Witnesses should not be permitted in the hearing before they give evidence, as their presence may influence the evidence they give.

As stated above, parties may agree on a specific procedure to be followed in the hearing, or they may choose to allow the arbitrator to direct the form of the proceedings. The only constraint is that principles of natural justice and legitimacy must be recognized.[285] The procedure is generally less formal than that of a court of law and thus allows for amicable and speedy resolution of disputes.

Unlike some foreign jurisdictions,[286] the constitutional right of access to court[287] and the general principles of contract[288] in South African law dictate that parties may not oust the jurisdiction of the courts in its entirety.[289] Parties are not permitted to agree to exclude the powers of the court as laid down in the Arbitration Act. For example, they may not exclude the jurisdiction of the courts to set aside the arbitration agreement[290] or to appoint an arbitrator where parties cannot agree to the identity of the arbitrator themselves.[291]

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284 Brand, J *et al op cit* at 143; Butler, D & Finsen, E *op cit* at 21.

285 Brown, H & Marriott, A *op cit* at 53.

286 See Brown, H & Marriott, A *op cit* at 54 footnote 24 where they state that certain arbitral parties in Switzerland are permitted in terms of Article 192 of the Swiss Act to exclude the jurisdiction of the courts to set aside an award.

287 Section 34 of the Constitution of the Republic of South Africa Act 108 of 1996 "the Constitution").

288 Christie, RH *The Law of Contract in South Africa* (3 ed) at 389.

289 *Hyperchemicals International (Pty) Ltd & Another v Maybaker Agrichem (Pty) Ltd & Another supra* at 99.

290 Section 3(2)(a) of the Arbitration Act.

291 Section 12(1)(a) of the Arbitration Act. For other instances of the jurisdiction of the courts in terms of the Arbitration Act, see s3, s6, s7, s8, s10(3), s12, s13, s16, s20, s21, s31, s32, s33, s35, s36 and s38 of the Act.

2.5.2 Dispute jurisdiction

There is no territorial restriction on private arbitrators. They may arbitrate matters anywhere in the country (or overseas), provided they have been appointed by the parties to do so. Virtually any dispute may be referred to a private arbitrator for adjudication.

In terms of the common law, cases concerning *restitutio in integrum* may not be submitted to arbitration due to the necessity of such relief being based on the jurisdiction of the magistracy.[292] Matters excluded from the scope of private arbitration in terms of the Arbitration Act are any matrimonial disputes or matters incidental to such disputes, and any matters relating to status.[293] Any labour dispute may be referred to private arbitration, including those that do not fall within the jurisdiction of the CCMA, a bargaining agent or the Labour Court.[294]

The only other direct limitation on a private arbitrator's jurisdiction to arbitrate is the arbitration agreement. Arbitrators are confined to the determination of the issues referred to them. Should they make awards on any matter beyond the scope of the issues stated in the agreement, the award may be set aside in terms of the Arbitration Act.[295]

This jurisdiction is clearly wider than that of the CCMA, which is confined to specific labour disputes. Parties are free to refer labour disputes to private arbitration, despite the CCMA having concurrent jurisdiction. Parties may prefer to utilize private arbitration where, for example, they wish to elect a particular arbitrator, rather than having a CCMA commissioner appointed for them.[296]

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292 Voet *Digest* 3, 2, 13, 5; Voet at 743-4.

293 Section 2 of the Arbitration Act; *Clark v African Guarantee & Indemnity Co Ltd* 1915 CPD 68 at 77 in relation to Section 7 of Act 29 of 1898.

294 Du Toit, D *et al* at 606.

295 Section 33(1)(b) of the Arbitration Act.

296 Section 136(1) of the Labour Relations Act. In terms of s136(5) of the Labour Relations Act, parties may request that the CCMA take into account their stated preference when appointing a commissioner.

However, where parties refer a labour matter to private arbitration, the Labour Court, rather than the High Court, will have jurisdiction in the review of the award or in other matters arising incidental to the arbitration.[297]

2.5.3 Powers of the arbitrator

Formerly, the powers of arbitrators lay solely within the constraints of the arbitration agreement.[298] However, the Arbitration Act now sets out the various powers of a private arbitrator or arbitration tribunal.[299] These powers may be altered by consent of the parties, and such alterations must be duly recorded in the arbitration agreement.[300] While the LRA contains more detail in regard to commissioners' powers than its Arbitration Act equivalent, these provisions encompass the same general scope.

The Arbitration Act states that an arbitration tribunal may exercise the following powers on application by any party to the dispute: Arbitrators may require that discovery of documents be made by a party, subject to any legal objection,[301] that pleadings or statements of claim and defence be delivered, and that amendments to such pleadings be permitted.[302] Arbitrators may also require that a party be allowed to inspect any goods or property involved in the dispute,[303] and have the authority to inspect the goods or property themselves.[304] Further, arbitrators may summons witnesses to give evidence at the arbitration,[305] and may appoint a commissioner to take evidence from a person not present at the hearing and forward the evidence to the arbitrator, as if the court appointed the commissioner.[306]

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297 Section 157(3) of the Labour Relations Act.
298 Voet *Digest* IV, 21, 8.
299 Section 14 of the Arbitration Act.
300 *ibid.*
301 Section 14(1)(a)(i) of the Arbitration Act.
302 Section 14(1)(a)(ii) of the Arbitration Act.
303 Section 14(1)(a)(iii) of the Arbitration Act.
304 Section 14(1)(b)(vi) of the Arbitration Act.
305 Section 16 of the Arbitration Act.
306 Section 14(1)(a)(iv) of the Arbitration Act.

Arbitrators may determine the time and venue of the arbitration proceedings.[307] During the proceedings, they may administer oaths or take affirmations of the parties and witnesses giving evidence.[308] Subject to legal objection, arbitrators may examine the witnesses and the parties, and may require that they produce any books, documents or things as could be compelled on the trial of an action.[309] Such legal objections include the exercise of the right to remain silent in fear of self-incrimination and legal privilege. In addition, arbitrators may receive evidence given by affidavit, if the parties so consent or on an order of court.[310]

2.6 Conclusion

The dispute resolution system for labour matters is complex. The primary arbitral mechanism, the CCMA, was structured on the private arbitration system already in place. While the CCMA is an independent, juristic body, it is subject to substantial State control through the provisions laid down in the LRA. CCMA arbitration proceedings are generally compulsory in initiation and are regulated statutorily. The disputant parties have little input in the identity of the commissioner selected to hear their matter, as commissioners are appointed by the CCMA.

The LRA also provides for collective bargaining agents, which play a vital role in the resolution of limited labour disputes. Council parties to these bargaining agents are obliged to follow the dispute resolution procedures provided by the bargaining agent. The bargaining agent does, however, have territorial jurisdiction over all employers and employees within its scope. Bargaining agents accredited to perform dispute resolution functions may appoint a permanent arbitration panel, or they may appoint arbitrators on an *ad hoc* basis. The influence of the individual parties on the appointment of the arbitrator, the powers of the arbitrator and the regulation of the proceedings depends largely on the constitution of the bargaining

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307 Section 14(1)(b)(i) of the Arbitration Act.
308 Section 14(1)(b)(ii) of the Arbitration Act.
309 Section 14(1)(b)(iii) and s14(1)(b)(iv) of the Arbitration Act.
310 Section 14(1)(b)(v) of the Arbitration Act.

agent and its collective agreements. Unaccredited bargaining agents must refer the dispute to accredited private agencies or the CCMA. While the LRA does not make express provision for arbitration by unaccredited private arbitrators, it is possible that matters could be referred to such arbitrators.

It is significant to note that public sector bargaining councils and statutory councils are established compulsorily. Parties are forced to join the council and submit to its practices, whether or not they wish to do so. In contrast, private sector bargaining councils are established voluntarily and parties submit to the jurisdiction of the council at their own will.

While parties may elect to refer disputes to private accredited agencies, unaccredited agencies have been used increasingly in the labour context. Private arbitration proceedings are marked with the distinctive characteristic of voluntariness. The initiation and procedural aspects of the proceedings, the appointment of the arbitrator and the powers of the arbitrator are governed mainly by consent of the parties. The Arbitration Act provides minimal regulations to ensure that the standards of justice are met.

The combination of arbitral mechanisms in the labour context affords all varieties of disputant parties the option of arbitration proceedings, rather than court proceedings. The forums all achieve the same purpose, yet they were established at different times and possess distinguishing characteristics. This has led to a system where the rationale for the application of legal principles to one forum may not apply in the same way to the other forums.

CHAPTER THREE

REVIEW OF ARBITRATION PROCEEDINGS CONDUCTED UNDER THE COMMISSION FOR CONCILATION, MEDIATION AND ARBITRATION "CCMA")

3.1 Introduction

Commissioners of the Commission for Conciliation, Mediation and Arbitration ("CCMA") are required to give their arbitral decisions in a written and reasoned award. These arbitration awards are final and binding. They may not be appealed but are subject to limited grounds of review set out in the Labour Relations Act ("LRA").[311] The grounds of review are: misconduct of the arbitrator, gross irregularities in procedure, *ultra vires* acts and improperly obtained awards. These review provisions are virtually identical to the grounds of review applicable to private arbitration.[312] The most noteworthy difference in the review of these two varieties of arbitration proceedings is that the so-called "justifiability test" applies only in CCMA review.[313] This chapter discusses the principles developed by the courts in interpreting the statutory review grounds applicable to CCMA arbitration awards.

3.2 The Commissioner's Arbitration Award

After consideration of all the evidence adduced at an arbitration hearing, CCMA commissioners make findings of fact and apply the law in order to give decisions on the issues in dispute. These findings must be set out in a written award that is signed.[314] The award must contain brief reasons for the decision and must be clear and unambiguous.[315] The commissioner may make any appropriate award,[316] including awards that give effect to any collective agreement, those that give effect to the provisions and primary objects of the LRA and declaratory orders.[317] An

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311 Section 145(2) of the LRA.

312 Section 33(1) of the Arbitration Act 42 of 1965.

313 *Carephone (Pty) Ltd v Marcus NO & Others* (1998) 19 *ILJ* 1425 (LAC).

314 Section 138(7)(a) of the LRA. The award need not contain full reasons (*Coetzee v Lebea NO & Another* (1999) 20 *ILJ* 129 (LC)).

315 Du Toit, D *et al* Labour Relations Law: A Comprehensive Guide (3 ed) at 595-596 state that a vague or unclear award will be unenforceable, unless the commissioner cures the ambiguity or error by varying the award, in terms of s144(b) of the LRA.

316 Section 138(9) of the LRA.

317 *ibid.*

order of costs may also be made, provided it is in accordance with the requirements of law, fairness and the rules of the CCMA.[318]

The LRA limits the remedies that a commissioner may grant in disputes concerning unfair dismissals and unfair labour practices. While a commissioner may generally make any reasonable order including re-instatement, re-employment or compensation,[319] an order of re-instatement or re-employment must be made in certain circumstances.[320] Re-instatement and re-employment may be granted with effect from any date, provided it is no earlier than the date of dismissal.[321] Any compensation granted must be just and equitable in the circumstances and may not exceed the equivalent of 12 month's remuneration.[322] These limitations to compensation apply in addition to amounts that the employee is entitled in terms of any law, collective agreement or employment contract.[323]

3.3 Contesting a CCMA Arbitration Award

CCMA arbitration awards are final and binding. They are not subject to appeal, and as a result, courts may not enter into the merits of the dispute in order to substitute their own opinions.[324] The Labour Court may, however, review defective awards on limited statutory grounds.[325] The Court has been at pains to maintain the distinction between appeals and reviews in regard to CCMA arbitration awards.[326] The LRA aim to promote effective dispute resolution is the principal motive for

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318 Section 138 (10) of the LRA.
319 Sections 193(1) and (4) of the LRA.
320 Section 193(2) of the LRA.
321 Sections 193(1)(a) and (b) of the LRA.
322 Sections s194(1) and (4) of the LRA. See also s187 and s194(3) of the LRA.
323 Section 195 of the LRA.
324 *Carephone (Pty) Ltd v Marcus NO & Others supra*; *County Fair Foods (Pty) Ltd v CCMA & Others* (1999) 21 *ILJ* 1701 (LAC) at 1706D-F and 1712G-H; *Purefresh Foods (Pty) Ltd v Dayal & Another* (1999) 20 *ILJ* 1590 (LC); *Smuts v Adair* (1999) 20 *ILJ* 931 (LC) at 938B.
325 Section 145(2) of the LRA; *Ensign Brickford SA (Pty) Ltd v Shongwe NO & Others* (2001) 22 *ILJ* 146 (LC) at 152F; Van Jaarsveld, F & Van Eck, S Principles of Labour Law (2 ed) at 428-9.
326 *Carephone (Pty) Ltd v Marcus NO & Others supra; County Fair Foods (Pty) Ltd v CCMA & Others supra*; *Purefresh Foods (Pty) Ltd v Dayal & Another supra.*

confining the remedies of aggrieved parties.[327] The finality of CCMA awards and the limits on the Labour Court's review powers require that commissioners exercise their functions with caution.[328]

The review grounds applicable to private arbitration awards under the Arbitration Act and those applicable to CCMA awards under the LRA are substantially similar – in form, and in judicial interpretation and application.[329] The significant difference between these grounds of review is that the justifiability test applies only in CCMA review. This test, laid down in the contentious case of *Carephone (Pty) Ltd v Marcus NO & Others*,[330] requires that CCMA awards are justifiable in relation to the reasons given for them.[331]

3.3.1 Procedure for setting aside an Award

Section 145(1) of the LRA sets out the following procedure to be followed when applying for the review of a CCMA arbitration award. The aggrieved party must apply to the Labour Court within 6 weeks of the date that the award is delivered to the disputant parties.[332] The only exception to this rule is where the applicant wishes rely on a review ground that relates to corruption. In such instances, the application must be made within 6 weeks of the date that the applicant discovers the corruption.[333] The Labour Court may condone late filing of an application for review on good cause.[334] In the application, the aggrieved party must allege a defect in the arbitration proceedings, as defined in s145(2) of the LRA. These grounds of review will be discussed below.

3.3.2 Statutory Grounds of Review

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327 *Edgars Stores (Pty) Ltd v Director, CCMA & Others* (1998) 19 *ILJ* 350 (LC) at 359B-E; *Librapac CC v Moletsane NO & Others* (1998) 19 *ILJ* 1159 (LC) at 1162G.
328 *County Fair Foods (Pty) Ltd v CCMA & Others supra* at 1712J.
329 Section 33(1) of the Arbitration Act.
330 *Carephone (Pty) Ltd v Marcus NO & Others supra.*
331 For a full discussion, see 4.4 below.
332 Section 145(1)(a) of the LRA.
333 Section 145(1)(b) of the LRA.
334 Section 145(1A) of the LRA.

There was formerly judicial confusion as to the LRA review provision applicable to defective CCMA awards.[335] The uncertainty arose due to the existence of a general review provision in s158(1)(g) of the LRA, and its reference to the review provision relating specifically to CCMA awards in s145. Prior to the 2002 amendments to the LRA, s158(1)(g) stated that "despite s145" the Labour Court could review all acts and omissions performed in terms of the LRA. The Labour Appeal Court settled the issue, holding that s158(1)(g) bestows wide powers on the Labour Court to review all functions other than the arbitral function reviewable in terms of s145.[336] This conclusion was endorsed by the legislature in the LRA amendment to s158(1)(g), which now reads that "subject to s145" the Court may review all functions performed in terms of the LRA.[337] Thus, s145 of the LRA, and not s158(1)(g), applies to the review of CCMA arbitration awards.

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335 In support of the application of s158(1)(g), see *Kynoch Feeds (Pty) Ltd v CCMA & Others* (1998) 19 *ILJ* 836 (LC); *Morningside Farm v Van Staden NO & Another* (1998) 19 *ILJ* 1204 (LC); *Rustenburg Platinum Mines Ltd (Rustenburg Section) CCMA & Others* (1998) 19 *ILJ* 327 (LC); *Standard Bank of SA Ltd v CCMA & Others* (1998) 19 *ILJ* 903 (LC); *Shoprite Checkers (Pty) Ltd v CCMA & Others* (1998) 19 *ILJ* 890 (LC); *Toyota SA Manufacturing (Pty) Ltd v Radebe & Others* (1998) 19 *ILJ* 1610 (LC) at 1614I. For discussions on the single application of s145 see *Reunert Industries (Pty) Ltd t/a Reutech Defence Industries v Naicker & Others* [1997] 12 BLLR 1632 (LC); *Edgars Stores (Pty) Ltd v Director, CCMA & Others supra* at 358B-359F; *Free State Buying Association Ltd t/a Alpha Pharm v SA Commercial Catering & Allied Workers Union & Another* (1998) 19 *ILJ* 1481 (LC) at 1481J-1482A; *Metcash Trading Ltd t/a Metro Cash & Carry v Fobb & Another* (1998) 19 *ILJ* 1516 (LC); *Pep Stores (Pty) Ltd v Laka NO & Others* [1998] 9 BLLR 952 (LC).

336 *Carephone (Pty) Ltd v Marcus NO & Others supra*, confirmed in *County Fair Foods (Pty) Ltd v CCMA supra* at 1705.

337 Section 158(1)(g) of the LRA states that the Labour Court may "subject to section 145, review the performance or purported performance of any function provided for in *this Act* on any grounds that are permissible in law." This includes all common law grounds for the review of administrative decisions: *Juggath v Shanker NO and Another* (1999) 2 BLLR 141 (LC) at 141, cited in *Sun International (SA) Ltd t/a Morula Sun Hotel and Casino v CCMA & Others* (1999) 8 LC 1.11.32 (viewed at www.irnetwork.co.za on 11 November 2003); *Toyota SA Motors (Pty) Ltd v Radebe & Others* (2000) 21 *ILJ* 340 (LAC) at 347H-348A, cited in *Stocks Civil Engineering (Pty) Ltd v Rip NO & Another* (2002) 23 *ILJ* 358 (LAC) at 378I-J.

In review proceedings, the onus is on the applicant to prove a defect in the CCMA arbitration award.[338] A reviewable defect is defined as follows:

> "**145. Review of arbitration awards**
>
> (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."

Certain policy considerations come into play in the interpretation of s145(2). The general nature of CCMA arbitration as a compulsory course of action has resulted in the courts finding that these review grounds need not be narrowly construed.[339] Other factors relevant to this conclusion include the history of labour dispute resolution in South Africa, the necessity of a fast and effective dispute resolution process, the supervisory role played by the Labour Court in relation to the CCMA and the objects set out in the Labour Relations Act.[340] One must also bear in mind that the respondent in CCMA arbitration proceedings does not submit to the process voluntarily and that the right of appeal is statutorily excluded.[341]

In addition, the interpretation of s145(2) is influenced by case law concerning private arbitration, as the Labour Court has often utilized these cases in discerning the principles applicable to CCMA review. The general principles of legal interpretation require that this case law apply only insofar as it is consistent with

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338 Section 145(1) of the LRA. *Free State Buying Association Ltd t/a Alpha Pharm v SACCAWU & Another supra* at 1484B.

339 *Standard Bank of SA Ltd v CCMA & Others supra* at 907E- 907F.

340 *Pep Stores (Pty) Ltd v Laka NO & Others supra* at 956H-958E; *Abdull & Another v Cloete NO & Others* (1998) *ILJ* 799 (LC) at 804J.

341 *Reunert Industries (Pty) Ltd v Naicker & Others supra* at 1635 E-I.

the objects of the LRA, and the intention of the Legislature in providing for this form of dispute resolution.[342]

The interpretation and application of the review grounds will be discussed in detail below. The review categories are not mutually exclusive; one act or omission may fall under more than one ground of review. No attempt has been made to compile an exhaustive list of instances justifying review under each of the bases. Indeed, such a list would lead to stagnancy in the law and injustice would no doubt result.

3.3.2.1 Section 145(2)(a)(i): Misconduct of the Commissioner

A CCMA award is defective, and thus reviewable, where commissioners commit misconduct in relation to their arbitral duties.[343] There is little case law regarding the instances of misconduct.[344] This may be a direct result of the uncertainty surrounding this review ground, or may be due to the statutory regulation of the duties of commissioners and the commissioners' knowledge of these duties.

The breadth of this ground of review hinges on the nature of the arbitral duties and powers of commissioners.[345] A distinction has been made between the substantive and the procedural duties of an arbitrating commissioner.[346] An example of a substantive duty is the duty to seek a lawful, just, fair and proper decision.[347] One the other hand, procedural duties of a commissioner concern the duty to comply with the provisions of the LRA and the principles of natural justice. While the substantive duties relating to the assessment of the evidence and the reasoning

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342 *Reunert Industries (Pty) Ltd v Naicker & Others supra* at 1634G-H and at 1635E-B; *Moloi v Euijen NO & Another* (1997) 18 *ILJ* 1372 (LC); *Mutual & Federal Insurance Co Ltd v CCMA & Others* [1997] 12 BLLR 1610 (LC); *Abdull & Another v Cloete NO & Others supra.*

343 Section 145(2)(a)(i) of the LRA.

344 Du Toit, D *et al op cit* at 618.

345 *Reunert Industries (Pty) Ltd v Naicker & Others supra* at 1634C-E.

346 *ibid.*

347 *ibid.* Note that the Court did not consider it necessary that commissioners in fact "achieve" lawful, just, fair and proper decisions.

process are considered instances of misconduct,[348] these irregularities have also been dealt with under the review ground of gross irregularities in proceedings.[349]

What then is "misconduct" in relation to these duties? The ordinary meaning is attributed to this term.[350] It was authoritatively defined in *Dickenson & Brown v Fisher's Executors*[351] as the existence of some wrongful, improper or *mala fide* conduct on the part of the commissioner, and involves some degree of personal turpitude.[352] A gross mistake of fact or law may be evidence of misconduct in the part of the commissioner.[353] Gross carelessness[354] and gross negligence[355] may also indicate misconduct on the part of the commissioner. The English law concept of legal misconduct concerns a failure to conduct the arbitration proceedings in terms of the legal obligations imposed on arbitrators,[356] and need not involve any moral turpitude.[357] Misconduct in this sense is not reviewable in South African law.[358]

The Labour Court relies heavily on private arbitration case law in defining the term "misconduct", but it has taken account of contextual differences between CCMA and private arbitration in rejecting the private arbitration principle that an

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348 *Pep Stores (Pty) Ltd v Laka NO & Others supra* at 956A-B.

349 Such transgressions may amount to a gross irregularity in proceedings as the reasoning of the award may be so flawed that one must conclude that a fair hearing was not held (*Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp & Others* (2002) 23 *ILJ* 863 (LAC) at 868D-E).

350 *Reunert Industries (Pty) Ltd v Naicker & Others supra* at 1634H.

351 *Dickenson & Brown v Fisher's Executors* 1915 AD 166 at 175-6.

352 *Reunert Industries (Pty) Ltd v Naicker & Others supra* at 1635B-C; *Abdull & Another v Cloete NO & Others supra* at 805A; *Mutual & Federal Insurance Co Ltd v CCMA supra.*

353 *Reunert Industries (Pty) Ltd v Naicker & Others supra* at 1636C.

354 *Reunert Industries (Pty) Ltd v Naicker & Others supra* at 1636C-D; *Abdull & Another v Cloete NO & Others supra* at 803A-E.

355 Du Toit, D *et al op cit* at 617.

356 *Hyperchemicals International (Pty) Ltd & Another v Maybaker Agrichem (Pty) Ltd & Another* 1992 (1) SA 80 (W) at 94.

357 *In re Hall and Hinds* (1841) 133 ER 987 at 989, cited in Cowling, MG "Finality in Arbitration" 1994 SALJ 306 at 307; Butler, D & Finsen, E Arbitration in South Africa: Law & Practice at 292. This description of legal misconduct echoes of the review ground allowing awards to be set aside where there is a gross irregularity in the arbitration proceedings (s33(1)(b) of the Arbitration Act).

358 *Reunert Industries (Pty) Ltd v Naicker & Others supra* at 1635C-E. See, however, *Mthembu & Another v CCMA & Others* (1997) 2 LC 1.4.27 (viewed at www.irnetwork.co.za on 24 August 2003), where the Court states that legal misconduct is a defect contemplated in s145(2) of the LRA. There Court does not give any reasoning for this assertion, nor does it discuss the legal principles in this regard.

arbitrator that makes a *bona fide* mistake of law is not guilty of misconduct.[359] The new constitutional dispensation is said to require that decisions made as a result of a statutorily bestowed power must be given in accordance with the law, and that those summoned to appear before bodies such as the CCMA may expect that the law be recognized and applied correctly.[360] Commissioners are bound to follow and apply judgments of the Labour Court in terms of the general South African system of precedent.[361] As a result, *bona fide* errors of law in CCMA awards are reviewable.[362] One should note, however, that errors of fact, whether *bona fide* or otherwise, are not reviewable.[363]

However, where a commissioner is mistaken in law, the award will only be set aside if the error resulted in an injustice being done.[364] Injustice is considered to occur when a party is deprived a fair hearing, or where commissioners fail to apply their minds to the matters before them, by ignoring evidence or relying on evidence not adduced.[365] Commissioners may reject the application of an established legal principle, if brief and succinct reasons are given for such rejection.[366]

Having determined the general interpretation of "misconduct", it is necessary to investigate the kinds of conduct that are reviewable on this basis. Commissioners may commit misconduct in relation to any of their legal duties. For example, misconduct arises where commissioners fail to apply their minds responsibly and

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359 *Reunert Industries (Pty) Ltd v Naicker & Others supra* at 1635E; *Standard Bank of SA Ltd v CCMA & Others supra* at 910H-J; *Pep Stores (Pty) Ltd v Laka NO & Others supra* at 960A-C. However, see *Le Roux v CCMA & Others* (2000) 21 *ILJ* 1366 (LC) at 1371G, where the Court stated that "in general" parties are bound by the commissioner's decision despite a *bona fide* error of fact or law. The Court does not consider the case law on this point. In this regard, also see *NEWU v John & Another* (1997) 2 LC1.9.1 (viewed at www.irnetwork.co.za on 24 August 2003), where the Court cites the private arbitration principles in relation to *bona fide* errors in awards, but does not apply them.

360 *Reunert Industries (Pty) Ltd v Naicker & Others supra* at 1636A-B.

361 *Le Roux v CCMA & Others supra* at 1373B-H.

362 *Pep Stores (Pty) Ltd v Laka NO & Others supra* at 960A-C.

363 *Mthembu & Another v CCMA & Others supra*, citing *Reunert Industries (Pty) Ltd v Naicker & Others supra.*

364 *Purefresh Foods (Pty) Ltd v Dayal & Another supra* at 1596G-H.

365 *University of the North v Nthombeni & Another* Labour Court Case no J630/97, unreported, as confirmed in *Purefresh Foods (Pty) Ltd v Dayal & Another supra* at 1596G-I.

366 *Standard Bank of SA Ltd v CCMA & Others supra* at 915C-D.

fairly to the issues before them.[367] This is a breach of the duty to determine the dispute fairly and quickly, and in relation to the substantial merits of the dispute.[368]

Misconduct is committed when commissioners do not make notes at the arbitration hearing and give faulty awards as a result of this ineptitude.[369] In *Consolidated Wire Industries (Pty) Ltd v CCMA & Others*,[370] the Court observed that the commissioner had stated in his award that the fourth respondent testified at the hearing, when in fact it was common cause that he did not. The Court acknowledged that such circumstances amount to misconduct, be it as a direct result of the error or due to the lack of note keeping by the commissioner and resultant inaccurate award.[371]

Commissioners may also be guilty of misconduct if they misconstrue oral or documentary evidence adduced at an arbitration hearing.[372] Where relevant legal principles are ignored or misapplied, commissioners also fail to act in accordance with their duties and may be taken on review.[373]

An instance of gross misconduct is where a commissioner charged with the duty of determining the fairness of a dismissal allows new charges to be introduced by the employer at the arbitration hearing.[374] The commissioner must only take account of the events of which the employer had knowledge at the time of dismissal. This excludes subsequent actions by the employee, as well as conduct of which the employer was unaware when the employee was dismissed.[375]

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367 *Abdull & Another v Cloete NO & Others supra* at 802I-803B.
368 Section 138(1) of the LRA.
369 *Consolidated Wire Industries (Pty) Ltd v CCMA & Others* (1999) 20 *ILJ* 2602 (LC) at 2608A-B.
370 *Consolidated Wire Industries (Pty) Ltd v CCMA & Others supra* at 2607J– 2608A.
371 *ibid.*
372 *Metcash Trading Ltd t/a Metro Cash & Carry v Fobb & Another supra.*
373 *Standard Bank of SA Ltd v CCMA & Others supra* at 910H-J and at 914J-915B.
374 *Mndaweni v JD Group t/a Bradlows & Another* (1998) 19 *ILJ* 1628 (LC) at 1631D-E.
375 *Mndaweni v JD Group t/a Bradlows & Another supra* at 1631A-B.

3.3.2.2 Section 145(2)(a)(ii): Gross irregularities in proceedings

Formality in CCMA arbitration proceedings is sacrificed to some extent in pursuit of the speedy, yet fair, resolution of disputes.[376] In order to further these aims, s138(1) of the LRA requires that a commissioner deal with the merits of the dispute with a minimum of legal formalities. However, certain basic principles of fair procedure must be upheld to ensure that CCMA arbitration proceedings are just.[377] It follows that a CCMA arbitration award may be set aside if the commissioner commits a gross irregularity in the conduct of the proceedings.[378]

Here again, the Labour Court relies on the principles developed in private arbitration case law in the interpretation of this review provision.[379] The phrase "gross irregularity" is given the ordinary meaning used in South African law.[380] It is concerned with an irregularity in the process or method utilized to conduct the arbitration proceedings, rather than in the outcome or result thereof.[381] Gross irregularities occur patently, as in a refusal to hear evidence, or latently, as in cases where the reasoning is so flawed that one must conclude that the hearing was not fair.[382]

The irregularity must be serious – it must result in the aggrieved party failing to have his case fully and fairly determined.[383] An objective test is applied to ascertain

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376 *Karos Leisure (Pty) Ltd t/a Movenpick v CCMA & Others* (1999) 8 LC 1.11.52 at paragraph [4] (viewed at www.irnetwork.co.za on 24 August 2003).

377 *ibid.*

378 Section s145(2)(a)(ii) of the LRA.

379 *Moloi v Euijen NO & Another supra*; *Mutual & Federal Insurance Co Ltd v CCMA & Others supra*; *Reunert Industries (Pty) Ltd v Naicker & Others supra*; *Abdull & Another v Cloete NO & Others supra.*

380 *Reunert Industries (Pty) Ltd v Naicker & Others supra* at 1636E.

381 *Bester v Easigas (Pty) Ltd & Another* 1993 (1) SA 30 (C) at 42-3; *Ellis v Morgan; Ellis v Desai* 1909 TS 576 at 581; *Goldfields Investment Ltd & Another v City Council Johannesburg & Another* 1938 TPD 551; *R v Zackey* 1945 AD 505 at 509; *Ventersdorp Town Council v President Industrial Court & Others* (1992) 13 *ILJ* 1465 (LAC) at 1476; *Mutual & Federal Insurance Co Ltd v CCMA & Others supra* at 1614A-B; *Purefresh Foods (Pty) Ltd v Dayal & Another supra* at 1594H-J.

382 *Crown Chickens (Pty) Ltd v Kapp & Others supra* at 868DF-E; *Karos Leisure (Pty) Ltd v CCMA & Others supra* at paragraph [4].

383 *Goldfields Investment Ltd & Another v City Council Johannesburg & Another supra* at 560; *Ventersdorp Town Council v President Industrial Court & Others supra* at 1476;

whether the irregularity will amount to a miscarriage of justice. Injustice in this sense refers to whether the aggrieved party was prejudiced in being prevented a fair and complete trial.[384] The aggrieved party must show that it was in fact prejudiced by the irregularity.[385]

The commissioner need not act with any moral turpitude in committing the irregularity. A *bona fide* error in procedure may nonetheless result in the award being set aside on review.[386] Where commissioners do act with malice in committing the gross irregularity, it is probable that they will be guilty of misconduct as well as the commission of a gross irregularity in terms of s145(2)(a)(ii).[387]

The principles of natural justice are paramount in ensuring that a fair hearing is conducted. The right to be heard is a pillar of natural justice. A prime example of a gross irregularity is thus the failure by a commissioner to acknowledge and apply the *audi alteram partem* rule.[388] This notion carries even greater weight in the new constitutional dispensation, which is based on a justiciable Bill of Rights.[389]

Bester v Easigas (Pty) Ltd & Another supra at 43; *Reunert Industries (Pty) Ltd v Naicker & Others supra* at 1636F; *Moloi v Euijen NO & Another supra* at 1377A-B; *Legal Aid Board v John NO & Another* (1998) 19 *ILJ* 851 (LC) at 856C; *Maarten & Others v Rubin NO & Others* (2000) 21 *ILJ* 2656 (LC) at 2659A.

384 *Benjamin v Sobac SA Building & Construction* 1989 (4) SA 940 (C) at 971B-D; *Mutual & Federal Insurance Co Ltd v CCMA & Others supra* at 1616G.

385 *Afrox Ltd v Laka & Others* (1999) 20 *ILJ* 1732 (LC) at 1745I-J. The requirement of a fair hearing is in line with s34 of the Constitution, which entrenches the right of access to court including the right to a fair hearing.

386 *Benjamin v Sobac SA Building & Construction supra* at 971B-D; *Goldfields Investment Ltd & Another v City Council Johannesburg & Another supra* at 560; *Ventersdorp Town Council v President Industrial Court & Others supra* at 1476; *Coyler & Essack NO v CCMA* [1997] 9 BLLR 1173 (LC); Du Toit, D *et al op cit* at 618.

387 *Reunert Industries (Pty) Ltd v Naicker & Others supra* at 1636F-G.

388 *S v Nel* 1991 (1) SA 730 (A) at 750; *Reunert Industries (Pty) Ltd v Naicker & Others supra* at 1636G; *Coyler v Essack NO & Others supra; Malan v CCMA & Another* [1997] 9 BLLR 1173 (C) at 1178D-E and at 1180E; *AA Ball (Pty) Ltd v Kolisi & Another* (1998) 19 *ILJ* 795 (LC) at 798A.

389 *Coyler v Essack NO & Others supra; Malan v CCMA & Another supra* at 1178F. See s33-s35 of the Constitution.

Parties to the arbitration must be permitted to lead relevant evidence on all the issues in dispute. In *Legal Aid Board v John NO & Another*,[390] the Court stated that the first consideration is whether the evidence that the commissioner refused to hear is relevant. Relevancy involves whether two facts are so related to each other that according to the common course of events one fact, either taken by itself, or in connection with other facts, proves or renders probable the past, present or future existence or non-existence of the other.[391] The Court held that the applicant was deprived a full and fair hearing when the commissioner refused to hear relevant evidence as to a motor allowance scheme, particularly after the second respondent had had an opportunity to do adduce such evidence.[392] The corollary is that where an issue is not in dispute, the commissioner may legitimately make a ruling that evidence will not be heard on that point.[393]

Where the commissioner gives the parties an opportunity to make further representations on a particular point, and then makes a decision without considering these representations, a gross irregularity is committed.[394] Another form of gross irregularity is where the commissioner raises a matter after the proceedings have been closed and fails to afford either party the opportunity of making representations in relation to that matter.[395]

Parties must be given the opportunity of calling witnesses to support their version of the facts. A gross irregularity is committed where the commissioner refuses to allow a witness to give evidence.[396] In addition, each party has the right to challenge the evidence of the other side. A gross irregularity may occur where the commissioner refuses to allow a party the opportunity to put a contradictory

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390 *Legal Aid Board v John NO & Another supra* at 854F. This approach was also applied in *Afrox Ltd v Laka & Others supra* at 1744H.
391 *R v* Katz 1946 AD 71 at 78; See also *Legal Aid Board v John NO & Another supra* at 854F.
392 *Legal Aid Board v John NO & Another supra* at 856B-C.
393 *Moloi v Euijen NO & Another supra* at 1376H-1377B.
394 *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA & Others supra* at 336D.
395 *AA Ball (Pty) Ltd v Kolisi & Another supra* at 797E.
396 *Consolidated Wire Industries (Pty) Ltd v CCMA & Others supra* at 2608B-C.

version to a particular witness,[397] or to test the evidence given.[398] When a witness gives incongruous evidence, putting the contradictory version to the witness is considered one of the best ways to impeach the credibility of such witness.[399] As a result, it is procedurally unfair to disallow a party from doing so.

A party who is prejudicially forbidden from making a closing argument at the arbitration proceedings may also apply to have the award set aside.[400] This is based on the importance of allowing each party an opportunity to address the decision-maker on its respective case.[401] Any prejudice that results from a failure to allow closing addresses will render the proceedings improper and unfair.[402]

Commissioners commit gross irregularities where they misconceive the entire nature of the arbitration enquiry and their duties in that regard.[403] For example, a commissioner must narrow the issues in dispute in order to advance expedited dispute resolution. However, as illustrated in *Solomon v CCMA & Others*,[404] commissioners must exercise this function properly in order to ensure due process, as issues incorrectly narrowed down may result in a party failing to lead evidence that is material to the case.

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397 *Mutual & Federal Insurance Co Ltd v CCMA & Others supra* at 11615A-B; *Karos Leisure (Pty) Ltd v CCMA & Others supra* at paragraph [6], citing *B & D Mines (Pty) Limited v Sebotha NO and Another* [1998] 6 BLLR 573 (LC) at 574I–575H.

398 *SA Cleaning Services Ltd v Steel Mining and Commercial Workers Union & Others* (2000) 9 LC 1.11.18 at paragraph [8.2] (viewed at www.irnetwork on 24 August 2003). Note that the Court included a proviso that the award is only reviewable if the commissioner prohibits the other party from testing the evidence and then bases his or her decision on such testimony.

399 *Mutual & Federal Insurance Co Ltd v CCMA & Others supra* at 1614I-J; *Maarten & Others v Rubin NO & Others supra* at 2665H.

400 *Mutual & Federal Insurance Co Ltd v CCMA & Others supra* at 1616A, applied in *Karos Leisure (Pty) Ltd t/a Movenpick v CCMA & Others supra* at paragraph [8].

401 *Mutual & Federal Insurance Co Ltd v CCMA & Others supra* at 1616B-F.

402 *Mutual & Federal Insurance Co Ltd v CCMA & Others supra* at 1617C.

403 *Abdull & Another v Cloete NO & Others supra* at 805B-C.

404 *Solomon v CCMA & Others* (1999) 20 *ILJ* 2960 (LC) at 296D-2967I; *SA Revenue Service v CCMA & Others* (2001) 22 *ILJ* 1680 (LC) at 1687H-J; *Sun Couriers (Pty) Ltd v CCMA & Others* (2002) 23 *ILJ* 189 (LC) at 195H.

Where commissioners are given a discretion in terms of the LRA, this discretion must be exercised judicially.[405] In *Coin Security Group (Pty) Ltd v Mshengu & Others*,[406] the Court held that the commissioner had not acted irregularly in refusing a postponement, as he took a particular view of the matter and gave corresponding reasons for the decision – thus exercising the discretion not to postpone the matter judicially.

Another recognized irregularity is where a commissioner fails to administer an oath or affirmation to the witnesses before they give their testimony.[407] In addition, commissioners that fail to advise a witness to leave the hearing while other witnesses are giving evidence, and thereafter reject such witness' evidence as having no probative value on the basis of their presence in the hearing, commit a gross irregularity.[408]

Parties may agree that a particular procedure be used in order to expedite the proceedings and avoid postponement. Such consensual arrangements cannot thereafter be utilized as a basis for review, unless they are particularly objectionable or repugnant to one's sense of justice and fairness.[409] In *Coin Security Group (Pty) Ltd v Mshengu & Others*,[410] the CCMA commissioner also played the role of interpreter, as no interpreters were available. This was done with the express consent of the parties. While the Court stated that this practice should be avoided, it continued that the parties appreciated what they were doing and that speedy finalization of the dispute was a practical reason for accepting this proposal. No irregularity was committed.

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405 *Coin Security Group (Pty) Ltd v Mshengu & Others* (2001) 22 *ILJ* 910 (LC) at 914B; *Mthembu & Another v CCMA & Others supra*.

406 *Coin Security Group (Pty) Ltd v Mshengu & Others supra* at 914B-915A.

407 *Morningside Farm v Van Staden NO & Another supra* at 1207C. However, no reviewable irregularity is committed where the commissioner relies on unsworn evidence where neither party gives evidence under oath: *Aitken v Khoza & Others* (2000) 9 LC 1.11.17 at paragraph [12]-[13] (viewed at **www.irnetwork.co.za** on 24 August 2003).

408 *Natal Shoe Components CC v Ndawonde* (1998) 19 *ILJ* 1527 (LC) at 1528G.

409 *Coin Security Group (Pty) Ltd v Mshengu & Others supra* at 917A.

410 *Coin Security Group (Pty) Ltd v Mshengu & Others supra* at 916G-B.

The decision-making process may also be attacked under this ground of review.[411] Commissioners are charged with the duty of deciding what is relevant to the matter in dispute and of attributing the appropriate weight to each relevant factor.[412] In doing so, they are required to uphold the keystones of equity and fairness, with minimal legal formality.[413] For example, commissioners are not obliged to utilize principles relating to credibility and demeanour of witnesses in assessing the evidence, unless the circumstances of a particular case call for such an approach.[414]

In *Abdull & Another v Cloete NO & Others*,[415] the Court held that commissioners must resolve the contradictions in the evidence before them, make reasoned findings thereon and then apply the LRA in determining what relief to grant the aggrieved party. A gross irregularity is committed where there is a complete failure to make such findings in a manner that is reasonably understandable.

In coming to a conclusion, commissioners must take account of all relevant information.[416] In *Alpha Pharm v SACCAWU & Another*,[417] it was held to be insufficient for a commissioner to consider only the Code of Good Practice[418] scheduled to the LRA, and not the negotiated disciplinary code of the individual employer.

A commissioner is obliged to deal with all the allegations made by the applicant to the arbitration proceedings.[419] A gross irregularity is committed where commissioners do not apply their minds to the allegations made, and the award

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411 *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp & Others supra* at 868DF-E; *Karos Leisure (Pty) Ltd v CCMA & Others supra* at paragraph [4].

412 *East Rand Gold & Uranium Co Ltd v CCMA & Others supra* at 2355A-B.

413 *East Rand Gold & Uranium Co Ltd v CCMA & Others supra* at 2354D-F.

414 *East Rand Gold & Uranium Co Ltd v CCMA & Others supra* at 2354G. An instance where a finding on credibility is necessary is where the two versions before the arbitrator are mutually exclusive: *Naicker & others v Blue Ribbon Bakeries* (2000) 9 LC 1.11.26 at paragraph [7] –[8] (viewed at www.irnetwork.co.za on 24 August 2003).

415 *Abdull & Another v Cloete NO & Others supra* at 805B-E.

416 *Free State Buying Association Ltd t/a Alpha Pharm v SACCAWU & Another supra* at 1485G.

417 *Free State Buying Association Ltd t/a Alpha Pharm v SACCAWU & Another supra* at 1485I.

418 Schedule 8 to the LRA 66.

419 *Coetzee v Lebea NO & Another supra* at 135H.

may consequently be set aside on review.[420] However, where the award is rationally justifiable, commissioners need not refer to each and every aspect of the evidence adduced.[421]

3.3.2.3 Section 145(2)(a)(iii): Acting ultra vires

Various powers are conferred on CCMA commissioners in terms of the LRA. Where commissioners act outside these and any other powers conferred by law, the resultant award may be set aside on review.[422]

The phrase "exceeding one's powers" is common in South African statutes. The same phrase in s145(2)(a)(iii) of the LRA is understood in this ordinary sense.[423] Commissioners are said to have exceeded their powers when they do not act within their jurisdiction,[424] where the award is not confined to the ambit of their statutory powers,[425] or where they make awards that they do not have the power to make.[426] The award need not be *greater* than that which is permitted in terms of the law, but merely outside the powers of the commissioner.[427]

A good example of the application of this review ground is the case of *Colyer v Essack NO & Others; Malan v CCMA & Another*.[428] The commissioner found that the candidate attorney representing a party to the dispute committed contempt of the CCMA. The Court stated that due to the far-reaching nature of a conviction of contempt, as well as the principles of natural justice, a commissioner may only make such a decision where there is express statutory empowerment to that effect.

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420 *Coetzee v Lebea NO & Another supra* at 135I.
421 *Aitken v Khoza & Others supra* at paragraph [15].
422 Section 145(2)(a)(iii) of the LRA.
423 *Reunert Industries (Pty) Ltd v Naicker & Others supra* at 1637A-B.
424 *North West Tourism Council v CCMA & Others* (1998) 19 *ILJ* 1530 (LC) at 1532J-1533A; *Quality Workwear Manufacturing (Pty) Ltd v Commissioner Adair & Others* (1998) 7 LC 1.1.3 (viewed at www.irnetwork.co.za on 24 August 2003); *Spilhaus and Co (WP) Ltd v CCMA and Others* (1997) 1 LC 1.1.79 (viewed at www.irnetwork.co.za on 23 August 2003). For a full discussion of the dispute jurisdiction of the CCMA, see 2.2.2.
425 *Reunert Industries (Pty) Ltd v Naicker & Others supra* at 1637C.
426 *Le Roux v CCMA & Others supra* at 1370F.
427 *Le Roux v CCMA & Others supra* at 1370F.
428 *Colyer v Essack NO & Others; Malan v CCMA & Another supra*.

It held that, prior to amendment, s142(9) of the LRA[429] merely allowed a commissioner to refer an alleged incident of contempt to the Labour Court, and did not give the power to make a finding of contempt or to prescribe punishment for contempt.[430] The award was set aside, as the commissioner had exceeded her powers.

The question of a commissioner entertaining an issue not submitted to the CCMA for adjudication was discussed in *Cycad Construction (Pty) Ltd v CCMA & Others*.[431] The commissioner found that the version of events alleged by the employee did not render the dismissal procedurally unfair. The commissioner then went on to examine the other witness testimonies to determine whether there was another basis for procedural unfairness of the dismissal. The Court held that once procedural fairness was put in dispute, the commissioner could consider all aspects of procedure in terms of the evidence adduced to determine the fairness of the dismissal.[432] Commissioners are thus not confined to the aspects of procedural unfairness alleged by the parties, but rather to the aspects manifest in the evidence adduced at the hearing. The award was not set aside.

Commissioners also exceed their powers where they make awards that are inappropriate.[433] In *Benicon Earthworks & Mining Services (Pty) Ltd v Dreyer NO & Another*, the award was found to be inappropriate in that it was not capable of proper clarification and understanding.[434]

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429 **"142. Powers of commissioner when attempting to resolve disputes**
(9) The Commission may refer any contempt to the Labour Court for an appropriate order."
Act 66 of 1995, before amendment in terms of Act 12 of 2002.

430 *Colyer v Essack NO & Others; Malan v CCMA & Another supra* at 1180B-C. Sub-sections 142(8) – (12) of the LRA, as amended now assert clearer provisions concerning contempt of the CCMA.

431 *Cycad Construction (Pty) Ltd v CCMA & Others* (1999) 20 *ILJ* 2340 (LC); see to *Foschini Group (Pty) Ltd v CCMA & Others* (2001) 22 *ILJ* 1642 (LC) at 1646C-E.

432 *Cycad Construction (Pty) Ltd v CCMA & Others supra* at 1344C-1344D.

433 Section 138(9) of the LRA; *Benicon Earthworks & Mining Services (Pty) Ltd v Dreyer NO & Another* (1999) 20 *ILJ* 118 (LC).

434 *Benicon Earthworks & Mining Services (Pty) Ltd v Dreyer NO & Another supra* at 122B.

Commissioners have the power to decide what evidence will be heard.[435] Thus, awards cannot be set aside solely on the basis that commissioners exceeded their powers in disallowing evidence.[436] In order to escape review, commissioners must adopt a purposeful and commonsense approach in exercising this power – they must consider all issues and dispose of such issues in an appropriate manner.[437] The appropriateness of the manner in which a dispute is determined will depend on the circumstances of that particular case.[438]

Certain discretionary powers are conferred in the LRA. In *Smuts v Adair & Another*,[439] the commissioner's award was set aside as she exercised a discretion that did not exist in awarding less compensation than required in terms of s194(1) of the LRA. Another example is *Polifin Ltd v Sibeko NO & Another*,[440] where the Court set aside a CCMA award because the commissioner ordered re-employment of an employee after finding that the dismissal was fair. Such an order is only permitted as a remedy in terms of s193 of the LRA when the dismissal is found to be unfair.

An award may not be set aside where the commissioner is given the discretion to choose between two remedies and merely chooses one remedy over the other.[441] However, commissioners cannot be said to exercise the discretion properly where they fail to appreciate the nature of the discretion through a misreading of the statutory provision.[442] The award may also be set aside where the commissioner fails to consider the discretionary provision at all.[443]

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435 Section 138(1) of the LRA.

436 However, a refusal to hear evidence may amount to a gross irregularity in the conduct of the arbitration proceedings. See 3.3.3.2 above.

437 *Food & Allied Workers Union v Buthelezi & Others* (1998) 19 *ILJ* 829 (LC) at 833D-E.

438 *FAWU v Buthelezi & Others supra* at 833F-G.

439 *Smuts v Adair & Another supra* at 934, confirmed in *Le Roux v CCMA & Others supra*.

440 *Polifin Ltd v Sibeko NO & Another* (1999) 20 *ILJ* 628 (LC) at 629.

441 *National Entitlement Workers Union v DJ John NO & Ground Water Civils CC* [1997] 12 BLLR 1623 (LC), as confirmed in *Reunert Industries (Pty) Ltd v Naicker & Others supra* at 1637D.

442 *Le Roux v CCMA & Others supra* at 1370I-1371B, applying *Union Government v Union Steel Corporation (SA) Ltd* 1928 AD 220 at 234.

443 *Le Roux v CCMA & Others supra* at 1371B-C.

3.3.2.4 Section 145(2)(b): Award improperly obtained

CCMA arbitration awards may be set aside if they are obtained improperly.[444] This ground of review must be read in context of the entire review provision.[445] It relates to situations where one party to the arbitration obtains an award in its favour, through fraud or improper means.[446] Cases of improperly obtained awards include those obtained through bribery of the commissioner and instances where a party misleads the commissioner through false or fraudulent representations.[447]

One of the most prominent instances of improperly obtained awards is where the commissioner is accused of bias in favour of the successful party.[448] The test to determine whether an award can be set aside on the grounds of bias is whether the commissioner's conduct created a suspicion or perception of bias, which might be entertained by a lay litigant.[449] It is not necessary that there is a "real likelihood" of bias, but merely a reasonable suspicion thereof.[450]

Every commissioner has a duty to disclose a previous or present relationship with any of the parties to the dispute - be it a social or business relationship.[451] Should the commissioner fail to disclose the relationship, a reasonable suspicion of bias may arise in the mind of a party to the arbitration, and the award may be set aside

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444 Section 145(2)(b) of the LRA.

445 *Moloi v Euijen NO & Another supra* at 1378I-1379B, relying on *Bester v Easigas (Pty) Ltd & Another supra* at 38C-D.

446 *ibid.*

447 *Moloi v Euijen NO & Another supra* at 1379B-C.

448 Note that where the commissioner demonstrates bias, this may be a reviewable form of misconduct in terms of s145(2)(a)(i) of the LRA.

449 *Mutual & Federal Insurance Co Ltd v CCMA & Others supra*, relying on *BTR Industries SA (Pty) Ltd v MAWU & Others* (1992) 13 *ILJ* 803 at 817C-D, approach confirmed in *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) 1 at 8H-I; *Coin Security Group (Pty) Ltd v Mshengu & Others supra* at 915G-H.

450 *Mutual & Federal Insurance Co Ltd v CCMA & Others supra*, relying on *BTR Industries SA (Pty) Ltd v MAWU & Others supra* at 822B-C.

451 *Venture Motor Holdings Ltd t/a Williams Hunt Delta v Biyana & Others* (1998) 19 *ILJ* 1266(LC) at 1270A.

on review. [452] This duty of disclosure applies to compulsory and voluntary arbitration alike.[453]

A perception of bias may also arise where the commissioner makes derogatory comments concerning the competence of one of the parties.[454] However, an award will not be set aside on the grounds of suspected bias where commissioners adopt an inquisitorial role in investigating the disputes (for example by cross-examining witnesses themselves),[455] or where commissioners are firm and authoritative in maintaining control over the hearing.[456]

Having disclosed any fact that may lead to a reasonable apprehension of bias, commissioners may be requested to recuse themselves but need not agree to the request. Should such a request not be made, commissioners still have the discretion to recuse themselves. They must recuse themselves if they believe they may not be impartial in the matter. Dealing with such matters timeously will avoid delays and costs involved in aborting the arbitration process and in unnecessary review proceedings. [457]

3.3.2.5 The Justifiability Test

The controversial test laid down for the review of CCMA awards in *Carephone (Pty) Ltd v Marcus NO & Others*[458] has been confirmed by the Labour Appeal Court,[459] and continues to be applicable in the review of such awards. This investigation requires that the award contain a rational objective basis justifying the connection between the evidence properly before the commissioner and the

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452 *Venture Motor Holdings Ltd v Biyana & Others supra* at 1270I-J.
453 *Venture Motor Holdings Ltd v Biyana & Others supra* at 1270A.
454 *Mutual & Federal Insurance Co Ltd v CCMA & Others supra* at 1619C-D.
455 *Mutual & Federal Insurance Co Ltd v CCMA & Others supra* at 1620B-D.
456 *Mutual & Federal Insurance Co Ltd v CCMA & Others supra* at 1620F-G.
457 *KwaZulu Transport (Pty) Ltd v Mnguni & Others* (2001) 22 *ILJ* 1646 (LC) at 1651C-F.
458 *Carephone (Pty) Ltd v Marcus NO & Others supra.*
459 *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* (2001) 22 *ILJ* 1575 (LAC).

conclusion eventually arrived at. This ground of review will be dealt with in chapter four.

3.4 Conclusion

CCMA arbitration awards are generally final and binding. However, the awards are subject to review on four limited grounds, namely misconduct of the commissioner, gross irregularity in proceedings, *ultra vires* acts and improperly obtained awards. In general, these grounds relate to procedural and jurisdictional aspects of the proceedings and *mala fides* of the arbitrator. Appeals from the awards are not permitted. The courts will not enter into the merits of a matter in order to set aside the decision of an arbitrator. Nonetheless, the justifiability of the decision may be examined on review.

CHAPTER FOUR

CAREPHONE (PTY) LTD v MARCUS NO & OTHERS: THE JUSTIFIABILITY TEST

4.1 Introduction

The justifiability test, propounded in *Carephone (Pty) Ltd v Marcus NO & Others*,[460] has caused much debate among judges and academics alike. However, the Labour Appeal Court has confirmed the application of the justifiability test in the review of awards of the Commission for Conciliation, Mediation and Arbitration ("CCMA"),[461] and the test has subsequently been applied in numerous cases.

This chapter reviews the *Carephone* judgment, and discusses the substance given to the justifiability test through the subsequent cases. It then explores the merits of the criticisms and general observations of the rationality test under three general themes. Firstly, the justifiability test has been denounced as blurring the distinction between appeals and reviews – a distinction which has been carefully guarded by the judiciary. Secondly, the justifiability test has been attacked on constitutional grounds relating to administrative law and exercises of public power. Thirdly, the miscellaneous policy considerations in favour of the application of the justifiability test are described. Having dealt with the comments relating to whether the justifiability test should be utilized at all, the final assessment relates to how this test should be included in current legal jurisprudence.

4.2 *Carephone (Pty) Ltd v Marcus NO & Others*

In *Carephone*, the Labour Appeal Court upheld the judgment of the Labour Court dismissing an application for the review of a CCMA award. The Labour Appeal Court discerned that s145 and not s158(1)(g) of the Labour Relations Act

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460 *Carephone (Pty) Ltd v Marcus NO & Others* (1998) 19 *ILJ* 1425 (LAC) at 1435C-E.

461 *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* (2001) 22 *ILJ* 1575 (LAC) at 1617C-F. Note that while the Court confirmed the application of the justifiability test to CCMA arbitration awards, it did so for different reasons to those set out in *Carephone*.

("LRA"),[462] applies in the review of CCMA awards. It went on to formulate the justifiability test in light of the constitutional limits on commissioners' powers.

4.2.1 Factual Background[463]

The appellants dismissed the respondent towards the end of 1996. The referral of the matter to the CCMA for conciliation proved unsuccessful, after which the dispute was referred for arbitration.

The appellant was made aware of the dates of the arbitration two weeks prior to the commencement of the hearing. On the first day of the hearing, the appellant requested *inter alia* that the hearing be postponed. The appellant averred that it was informed five days prior to the hearing that its legal representative could not assist it in the arbitration due to his daughter being diagnosed with a terminal illness. The commissioner refused this application, but delayed proceedings until the following day. When the arbitration commenced the following day, the appellant's representative once again requested a postponement. The commissioner refused the request, but allowed the matter to stand down until the next day.

When the appellant applied for postponement on the third day, the commissioner refused to grant it. Further, he warned that should the appellant leave, the hearing would continue. Nonetheless, the appellant departed and the commissioner found in favour of the respondents, who were awarded compensation for wrongful dismissal. Thereafter, the appellant applied to the Labour Court to set aside the commissioner's award due to the refusal to grant a postponement and the resultant arbitration hearing occurring in the absence of the appellant.

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462 Act 66 of 1995.

463 *Carephone (Pty) Ltd v Marcus NO & Others supra* at 1435G-1439A.

4.2.2 Reasoning of the Labour Appeal Court

The Court found that the LRA contains three review provisions. Section 145 concerns the review of CCMA arbitration awards, s158(1)(h) relates to the review of awards where the State is party to the award as the employer, and s158(1)(g) provides for the review of all other administrative functions performed in terms of the LRA.[464] The Labour Appeal Court held that s145 of the LRA, and not s158(1)(g), is the applicable provision in review proceedings relating to CCMA awards.[465] The Court considered the competence of the CCMA with reference to the LRA and the Constitution.[466] It stated that the CCMA finds its ultimate authority in the Constitution and is subject to its provisions, as it is a public institution created in terms of legislation under the auspices of the Constitution.[467]

The Court rejected the argument that the CCMA performs a judicial function in performing compulsory arbitrations. It stated that while commissioners may perform certain acts of a judicial nature, they are not vested with judicial authority in terms of the Constitution.[468] Rather, the CCMA exercises public power when it resolves labour disputes in compulsory arbitration proceedings. As such, it is an organ of state as envisioned by s239 of the Constitution; it is bound by the Bill of Rights and subject to the basic principles of public administration, namely impartiality, fairness and equity.[469]

The Court emphasized the constitutional recognition of forums such as the CCMA under s34 of the Constitution,[470] as well as the purpose of the right to

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464 *Carephone (Pty) Ltd v Marcus NO & Others supra* at 1428F-1429D.

465 *Carephone (Pty) Ltd v Marcus NO & Others supra* at 1433H. This dissertation is focused on the review grounds applicable to arbitration awards. Thus, the Court's discussion on which review provision applies will be dealt with only insofar as it is applicable.

466 *Carephone (Pty) Ltd v Marcus NO & Others supra* at 1429G-1430B.

467 *Carephone (Pty) Ltd v Marcus NO & Others supra* at 1430A.

468 *Carephone (Pty) Ltd v Marcus NO & Others supra* at 1431F.

469 *Carephone (Pty) Ltd v Marcus NO & Others supra* at 1430D-G.

470 "**34. Access to courts**
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.*" (My emphasis).

administrative justice, which is to extend the values of accountability, openness and responsiveness to institutions like the CCMA.[471]

The Labour Appeal Court went on to hold that a CCMA award may be reviewed in terms of s145(2)(a)(iii) where commissioners exceed the constitutional duties incumbent on them.[472] The provisions of the LRA concerning compulsory CCMA arbitration were found to be consistent with these constitutional requirements.[473] The imperatives required in terms of the Constitution and highlighted by the Court were:[474] that the process is fair and equitable; that the arbitrator is impartial and unbiased; that the proceedings are lawful and procedurally fair; that the reasons for the award are given publicly and in writing; that the award is justifiable in terms of the reasons; and that the award is consistent with the constitutionally entrenched right to fair labour practices.

The Labour Appeal Court then went on to formulate the justifiability test. It averred that administrative action must be justifiable in relation to the reasons given for it.[475] It stated further that the requirement of justifiability gives expression to the constitutional values of accountability, responsiveness and openness.[476] Justifiability in this sense involves substantive rationality in the outcome of the administrative decision.[477] The test for rationality laid down in this case was as follows:[478]

> "Is there a rational objective basis justifying the connection made by the administrative decision maker between the material properly available to him and the conclusion he or she eventually arrived at?"

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471 *Carephone (Pty) Ltd v Marcus NO & Others supra* at 1431H.
472 *Carephone (Pty) Ltd v Marcus NO & Others supra* at 1432H.
473 *Carephone (Pty) Ltd v Marcus NO & Others supra* at 1432A.
474 *Carephone (Pty) Ltd v Marcus NO & Others supra* at 1431J-1432A.
475 *Carephone (Pty) Ltd v Marcus NO & Others supra* at 1434B.
476 *Carephone (Pty) Ltd v Marcus NO & Others supra* at 1435.
477 *Carephone (Pty) Ltd v Marcus NO & Others supra* at 1434B-C and 1435C-E.
478 *Carephone (Pty) Ltd v Marcus NO & Others supra* at 1435E-F.

The Court stated that justifiability relates to whether the decision is defensible; whether it can be shown to be just, reasonable or correct. It does not concern whether the decision made was in fact correct or just.[479] The application of this test requires the Labour Court to make value judgments. This will entail a consideration of the merits of the commissioner's decision in some form.[480]

However, the Court cautioned that an investigation into the justifiability of the decision does not eliminate the distinction between a review and an appeal.[481] The Labour Court does not possess appeal jurisdiction in respect of matters referred to the CCMA for conciliation and arbitration.[482] On review, the judges of the Labour Court must be aware that they enter into the merits merely to determine whether the outcome is rationally justifiable and not in an effort to substitute their own opinions for that of the commissioners in question.[483] Should the judges on review substitute the decisions with their own, they will in effect be performing the administrative function, which is in conflict with the doctrine of the separation of powers.[484]

4.2.3 Application of the Law

The commissioner had rejected the application for a postponement in light of the factors that follow.[485] Having being informed five days prior to the hearing that his representative would be unable to assist him, the appellant could not adequately explain why he did not obtain other legal assistance. The commissioner weighed up the prejudice that the respondents would suffer on the granting of the postponement, against the prejudice suffered by the appellant should the postponement be refused. Further, the commissioner acknowledged that in terms of the LRA such injustice could not be alleviated by a corresponding costs order.

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479 *Carephone (Pty) Ltd v Marcus NO & Others supra* at 1434D.
480 *Carephone (Pty) Ltd v Marcus NO & Others supra* at 1435B-C.
481 *Carephone (Pty) Ltd v Marcus NO & Others supra* at 1434B-D.
482 *Carephone (Pty) Ltd v Marcus NO & Others supra* at 1434E-F.
483 *Carephone (Pty) Ltd v Marcus NO & Others supra* at 1435B-C.
484 *Carephone (Pty) Ltd v Marcus NO & Others supra* at 1434I and 1435A.
485 *Carephone (Pty) Ltd v Marcus NO & Others supra* at 1439F-J.

The Court considered the reasoning of the commissioner, described above and also took into account the difference in approach to applications for postponement made in courts of law, and those made in CCMA arbitration proceedings.

4.2.4 Ruling of the Labour Appeal Court

The Court found that there was sufficient material before the commissioner for him to decide the matter rationally and objectively, and that his reasoning was rationally connected to such material.[486] The commissioner was found to have acted within the substantive constitutional limits to the exercise of his powers under the LRA, and the appeal was dismissed with costs.[487]

4.3 Public Power and Rationality

The Court in *Carephone* held that the power exercised by CCMA commissioners when making arbitration awards was administrative in nature. This formed the basis of the entire judgment, and the Court consequently held that an element of rationality is required in such awards. This approach was wholly rejected in *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others*.[488] The *ratio decidendi* of *Carephone*'s case was permitted to stand – that CCMA arbitration awards must be justifiable in the sense described in *Carephone*. However, the Court based this conclusion on the premise that commissioners exercise public powers when performing their arbitral functions and are thus bound by the constitutional requirement of justifiability.[489]

Despite the over-arching constitutional scope described below, it is necessary to classify bodies according to these groups in order to identify the substantive law

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486 *Carephone (Pty) Ltd v Marcus NO & Others supra* at 1440C-D.

487 *Carephone (Pty) Ltd v Marcus NO & Others supra* at 1440E.

488 *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* (LAC) *supra*. Note the comments in *Toyota SA Motors (Pty) Ltd v Radebe & Others* (2000) 21 *ILJ* 340 (LAC) at 351D-F and *Stocks Civil Engineering (Pty) Ltd v Rip NO & Another* (2002) 23 *ILJ* 358 (LAC) at 378H-I.

489 *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* (LAC) *supra* at 1616J-1617F.

principles applicable to each functionary of the State. This categorization will also impact on the manner in which the Constitution, and particularly the Bill of Rights, may be applied. It is relevant, not only to legal accuracy and certainty, but to ensure the proper application of law in future disputes.

The Constitution provides for a three-tier system of government, including the judiciary, the legislature, and the executive. Each branch of government is constitutionally vested with its respective power.[490] In terms of the doctrine of separation of powers, no governmental division may usurp the functions entrusted to another.[491] Various institutions and tribunals also exercise public power in terms of legislation or the Constitution itself. As organs of state, these powers are also regulated by the Constitution.[492] The constitutional review of all these powers is based on the premise that state action must be capable of being analysed and justified in terms of law.[493]

The Bill of Rights,[494] set out in Chapter 2 of the Constitution, is the cornerstone of democracy in South Africa.[495] It embodies the universal moral and ethical norms and values that our democratic society has delineated as being vital for the promotion of human dignity, equality and freedom for all.[496] All three branches of government, as well as organs of state, are bound by the Bill of Rights.[497]

The arbitral function performed by CCMA commissioners is clearly not legislative or executive in nature. It is an adjudicative task conferred in terms of the LRA. CCMA arbitrators perform similar functions to the judiciary, in that they make binding decisions in certain disputes that can be resolved by the application of law.[498] However, CCMA commissioners do not exercise judicial power as is

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490 Sections 44, 85 and 165 of the Constitution.
491 See, generally, Devenish, GE A Commentary on the South African Bill of Rights at 13.
492 Section 239 read with s8(1) of the Constitution.
493 *S v Makwanyane* 1995 (3) SA 391 (CC) at paragraph [156].
494 Chapter Two of the Constitution.
495 Section 7(1) of the Constitution.
496 Section 7(1) of the Constitution; Devenish, GE *op cit* at 643.
497 Section 8(1) of the Constitution.
498 Section 165 of the Constitution.

intended in the Constitution.[499] The Constitution explicitly vests judicial authority in the courts alone.[500] Arbitration tribunals such as the CCMA are not courts, and as such, do not exercise judicial authority.[501] Rather, the CCMA exercises specific statutory powers.[502] But what is the nature of these powers?

4.3.1 The CCMA as an organ of state

An 'organ of state' is defined in the Constitution as including any functionary or institution "exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer".[503] This clearly requires that the body perform a statutory function that is of a public nature.

The CCMA is obliged in terms of the LRA to arbitrate certain matters after conciliation in such disputes has failed.[504] This is so regardless of whether dispute jurisdiction is conferred on the CCMA in terms the LRA, or whether all parties to a dispute in respect of which the Labour Court has jurisdiction consent to arbitration by the CCMA.[505] Thus, the CCMA performs a statutory function when arbitrating labour disputes.

Next, one must determine whether this arbitral function is of a public nature. The Labour Appeal Court has held that the issuing of an arbitration award by a CCMA

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499 *Carephone (Pty) Ltd v Marcus NO & Others supra* at 1431F; *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* (2000) 21 ILJ 1232 (LC) at 1258G-J; *Kynoch Feeds (Pty) Ltd v CCMA & Others* (1998) 19 ILJ 836 (LC) at 847J; *Sun International (SA) Ltd t/a Morula Sun Hotel and Casino v CCMA & Others* (1999) 8 LC 1.11.32 (viewed at www.irnetwork.co.za on 11 November 2003). Brown, H & Marriott, A ADR Principles & Practice at 53 state that in the continental European & US legal systems, arbitrators are perceived perform a judicial function.

500 Section 165(1) and s166 of the Constitution.

501 *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* (LC) *supra* at 1258H and 1259I-J; *Carephone (Pty) Ltd v Marcus NO & Others supra* at 1430I-1431I; *East Rand Gold & Uranium Co Ltd v CCMA & Others* (1999) 20 *ILJ* 2348 (LC) at 2354A-C; *Kynoch Feeds (Pty) Ltd v CCMA & Others supra* at 847J.

502 These powers are set out in the LRA. See also *Kynoch Feeds (Pty) Ltd v CCMA & Others supra* at 848A.

503 Section 239(a)(ii) of the Constitution.

504 Section 115(1)(a) read with s115(1)(b) of the LRA.

505 Section 115(1)(a) read with s115(1)(b) of the LRA.

commissioner is "clearly" an exercise of public power.[506] However, no reasons for this conclusion are provided.

'Public power' is a complex term that should not be too rigidly defined, as its scope and nature are constantly changing.[507] In defining public power, the following concepts should be taken into account: the nature and extent of the power being exercised, the vulnerability of the citizen and the availability of alternate means of controlling the exercise of power.[508] The source of the power exercised and nature of the body exercising the power, while relevant, are not conclusive in the categorisation of the power as public or private; more important is the nature of the power being exercised.[509]

Commissioners act on behalf of the CCMA, which is an independent, legal *persona*.[510] This independence does not negate the possibility that the CCMA may wield public power.[511] The Commission is established in terms of legislation.[512] It is entrusted with the statutory duty of resolving certain disputes through the application of law in arbitration proceedings.[513] These proceedings are generally

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506 *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* (LAC) *supra* at 1614I; *Glaxo Welcome SA (Pty) Ltd v Mashaba & Others* [2000] 8 BLLR 923 (LC) at 927I.

507 The second Breakwater Declaration, as reproduced in Corder, H & Maluwa, T (eds) Administrative Justice in Southern Africa at 14. *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 (2) BCLR 176 (SCA) at 186F.

508 The second Breakwater Declaration, as reproduced in Corder, H & Maluwa, T (eds) *op cit* at 14.

509 *R v Panel on Takeovers and Mergers, ex parte Datafin PLC* 1987 QB 815 (CA); *Transnet Ltd v Goodman Brothers (Pty) Ltd supra* at 187G.

510 Sections 112-113 of the LRA.

511 *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC).

512 Section 112 of the LRA.

513 Section 115(1)(b) of the LRA. The 'benevolent-control test' utilized under the common law to define 'organ of state' finds its origin in the 'control test', whereby the defining question is whether the body is controlled by the State (*Directory Advertising Cost Cutters v Minister for Posts, Telecommunications and Broadcasting* 1996 (3) SA 800 (T) at 810F-H, confirmed in *Mistry v Interim National Medical & Dental Council of South Africa* 1997 (7) BCLR 933 (D), applied in *Korf v Health Professions Council of South Africa* 2000 (3) BCLR 309 (T); *Goodman Brothers (Pty) Ltd v Transnet Ltd* 1998 (8) BCLR 1024 (W)). However, the benevolent-control test seeks to broaden the scope of the notion of state control to include any governmental right to prescribe the function of the body and the manner in which such function is to be performed (*Esack v Commission on Gender Equality* (2000) 21 *ILJ* 467 (W) at 473F-H). In *Zimema v CCMA* [2001] 2 BLLR 251 (LC) at 255C-E, the Court stated that while it was bound by the judgment in *Carephone*, it doubted whether the State can be said to have control over the CCMA.

compulsory in that they are the only legal recourse available to parties in such disputes.[514] CCMA proceedings are practically a performance of the governmental function to adjudicate labour matters, and which are imposed on individuals.[515] In addition, parties generally are not permitted to choose the arbitrator of their case.[516]

The members of the governing body of the CCMA are appointed by NEDLAC, where the State controls one-third of the voting power.[517] Thereafter, the CCMA is self-regulating.[518] State finances are its primary source of funding.[519] The CCMA operates wholly in the public domain.[520] It exercises its functions in service of a public interest, rather than for private gain.[521]

Commissioners acting on behalf of the CCMA wield vast power, as their decisions affect the rights and duties of all people in prescribed labour disputes.[522] The only redress available to parties aggrieved by the award of a CCMA arbitrator is through the review provisions set out in the LRA.[523] No appeal is permitted from such awards. No contractual relationship exists between the CCMA and the party aggrieved by the award whereby the party could utilise an alternate means of legal

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514 In *Sun International (SA) Ltd t/a Morula Sun Hotel and Casino v CCMA & Others supra*, the Court stated that the legislative imperative in the LRA to perform compulsory conciliation proceedings resulted in the commissioners performing a public power when resolving disputes.

515 The absence of voluntary submission to the exercise of the power as a factor in the applicability of public law to the exercise of such power was discussed in *R v Panel on Takeovers and Mergers, ex parte Datafin PLC supra* at 838E and *Pennington v Friedgood* 2002 (1) SA 251 (C) at 262E – 263F.

516 Sections 135(1) and 136(5)(a)-(b) of the LRA.

517 Section 116(2) of the LRA.

518 Sub-sections 115(2)(cA) and 115(2A) of the LRA. An approach utilized under the common law to define the term 'organ of state' was set out in *Baloro v University of Bophuthatswana* 1995 (8) BCLR 1018 (B) at 1056B-D. It involved a wide formulation of the term to incorporate all exercises of public power, rather than exercises of governmental power alone. This extended meaning was taken to include bodies that are established in terms of statute, but privately managed and maintained.

519 Section 122(1)(a) and (b) of the LRA.

520 *Baloro v University of Bophuthatswana supra*; *East Rand Gold & Uranium Co Ltd v CCMA & Others supra* at 2354D.

521 *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange* 1983 (3) SA 344 (W) at 364H-365A.

522 *R v Panel on Takeovers and Mergers, ex parte Datafin PLC supra.*

523 Section 145(2)(a) of the LRA.

redress.[524] This is important, as the grounds of review are the only means of control of the vast power exercised by CCMA commissioners in the performance of their arbitral duties.

Thus, a holistic view of the CCMA and the powers of commissioners indicate that the CCMA exercises public power and, as such, is an organ of state subject to the Constitution and various administrative law principles.[525]

4.3.2 Rationality as a requirement in the exercise of public power

The people of South Africa are protected from the abuse and misuse of public power, in that all public power must conform to certain minimum standards of lawfulness, reasonableness and procedural fairness. These are administrative law standards that reflect the rule of law, and the founding constitutional values of accountability, responsiveness and openness.[526]

The judicial review of public power is a direct consequence of the doctrine of the separation of powers. This marks a significant departure from the previous system of parliamentary sovereignty whereby the exercise of public power was not reviewable, no matter how arbitrary, unjust or unreasonable. "State" action must now be capable of being analysed and justified.[527] As stated by Mureinik, the dawn of the new democratic order marked a shift in the South African community from a 'culture of authority' to a 'culture of justification'.[528]

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524 *Theron v Ring van Wellington van die NG Sendingklerk in Suid-Afrika* 1976 (2) SA 1 (A); *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A); *R v Disciplinary Committee of the Jockey Club: ex parte Aga Khan* (1993) 1 WLR 909 (CA).

525 *Deutsch v Pinto & Another* (1997) 18 ILJ 1008 (LC) at 1012C; *Glaxo Welcome SA (Pty) Ltd v Mashaba & Others supra* at 927I; *Mkhize v CCMA & Another* (2001) 22 ILJ 477 (LC) at 484B-D; *Sun International (SA) Ltd t/a Morula Sun Hotel and Casino v CCMA & Others supra.*

526 Section 1(d) of the Constitution; *East Rand Gold & Uranium Co Ltd v CCMA & Others supra* at 2354D.

527 *S v Makwanyane supra* at paragraph [156].

528 Mureinik, E 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *SAJHR* 31 at 32; *S v Makwanyane supra* at 757J-759B; *Pharmaceutical Manufacturers of SA: In re ex parte President of the RSA* 2000 (2) SA 674 (CC) at 708D-F, fn 107.

Various public law standards apply to exercises of public power despite that such exercises may not amount to administrative action.[529] The Constitutional Court has stated that bodies or persons exercising public power are bound to comply with the Constitution and the courts may intervene where these constitutional limits are not respected.[530] The principle of legality underlying the Constitution allows for this form of review.[531]

Legality implies notions such as just government, fairness and equality before the law.[532] In the narrow sense, administrators are compelled to perform functions in accordance with the constitutional obligations set out in the right to administrative justice.[533] In a more general sense, the Constitution implicitly requires that any exercise of public power be lawful.[534] Further, it upholds the traditional distinction between appeals and reviews, in that a court may review the legality of a decision made by another branch of the State, but may not enter into the merits of such.[535]

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529 Plasket, C unpublished thesis at 42.

530 *Pharmaceutical Manufacturers Association of SA supra* at paragraph [20] and [85]-[86]; *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government* 2000 (12) BCLR 1322 (E) at 1328H-1329B.

531 Hoexter, C at 84. The doctrine of legality is an inherent part of constitutionalism, and it encapsulates one of the Constitution's founding values, the rule of law (Section 1(c) of the Constitution; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 (2) SA 274 (CC) at around 1483D; *Pharmaceutical Manufacturers Association of SA supra* at 708D-F; *Glaxo Welcome SA (Pty) Ltd v Mahsaba & Others supra* at 927J. See Boulle *et al* at 20, where the authors state that the notion of constitutionalism relates to government being limited in terms of its powers and the manner in which the powers are exercised).

532 Baxter at 77-78.

533 "**33. Just administrative action**

(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.

(3) 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.

534 *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council supra* at paragraphs [56] and [59].

535 Hoexter, C at 70.

A holder of public power must act in good faith and may not misconstrue his or her powers.[536] Further, the holder must act within the bounds of the powers legitimately conferred.[537] Finally, public power must be exercised in a rational and non-arbitrary manner.[538] It is this last requirement with which we are primarily concerned.

In *Pharmaceutical Manufacturers*,[539] the Constitutional Court stated that the rule of law requires that decisions made in the exercise of public power be rationally related to the purpose for which the power is bestowed.[540] This involves an objective investigation. Should an irrational decision be permitted to stand, it would be contrary to the constitutional principles required of such exercises of power.

The Constitutional Court perceived rationality as the minimum constitutional requirement of all exercises of public power by the executive and its functionaries.[541] However, it cautioned that this requirement does not call for judges to substitute their own opinions for the decision made.[542] The element of rationality demands that the purpose of the exercise of a specific power be within the powers of the functionary and that the functionary's decision is objectively rational.[543] This applies regardless of whether or not the objectively irrational decision is made in good faith.[544]

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536 *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) at paragraph [48].

537 *Fedsure Life Assurance v Greater Johannesburg Metropolitan Council supra* at paragraphs [56] & [58]. See generally, Hoexter, C at 83.

538 *Pharmaceutical Manufacturers Association of SA supra* at paragraphs [85] and [89]; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council supra* at about 1483C; *S v Makwanyane supra* at 725I-726B; *Prinsloo v Van der Linde* 1997 (6) BCLR 759 (CC).

539 *Pharmaceutical Manufacturers Association of SA supra* at 708D-G; *Glaxo Welcome SA (Pty) Ltd v Mashaba & Others supra* at 927J-928C.

540 Confirmed by the labour courts in *Miladys, a Division of Mr Price Group Ltd v Naidoo & Others* (2002) 11 LAC 6.13.3 at paragraph [29] (viewed at www.irnetwork.co.za on 24 August 2003); *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* (LAC) *supra* at 1614H-I.

541 *Pharmaceutical Manufacturers Association of SA supra* at 709D-E.

542 *Pharmaceutical Manufacturers Association of SA supra* at 709F.

543 *Pharmaceutical Manufacturers Association of SA supra* at 709E-F.

544 *Pharmaceutical Manufacturers Association of SA supra* at 708F.

As holders of public power, CCMA arbitrators are required to comply with the requirement of rationality in making arbitration awards. Consequently, the justifiability test as pronounced in the *Carephone* judgment is applicable in the review of such awards.[545]

4.4 Adding substance to the justifiability test

In devising the justifiability test in *Carephone's* case, Froneman DJP stated that this requirement of substantive rationality could also be formulated as "reasonableness", "rationality" or "proportionality".[546] He goes on to aver:

> "Without denying that the application of these formulations in particular cases may be instructive, I see no need to stray from the concept of justifiability itself. It seems to me that one will never be able to formulate a more specific test other than, in one way or another, asking the question: is there a rational objective basis justifying the connection made by the administrative decision maker between the material properly available to him and the conclusion he or she eventually arrived at?"

Froneman DJP continues that judicial precedent will give more specific content to the broad concept of justifiability in the review of CCMA arbitration awards in terms of the LRA. What follows, is a brief analysis of the interpretation that the Courts have since accorded to the justifiability test.

4.4.1 The meaning of "justifiability"

"Justifiability" has been found to have a specialised meaning in regard to the review of CCMA commissioners' awards.[547] However, considering justifiability in

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545 See *Glaxo Welcome SA (Pty) Ltd v Mashaba & Others supra* at 928D, where the Court states that the test enunciated in the *Pharmaceutical Manufacturer's* case bears a striking similarity to the *Carephone* justifiability test.

546 *Carephone (Pty) Ltd v Marcus NO & Others supra* at 1435C-E.

the sense explained below can alleviate the confusion surrounding the meaning of this concept.

In the simplest terms, the justifiability test requires that Commissioners apply their minds seriously and conscientiously to the evidentiary material and reach conclusions on rational rather than confused or illogical bases.[548] It concerns the very process of reasoning and the connection or absence of connection between the premises and the outcome.[549] Once a Court finds that the Commissioner applied his or her mind to the relevant issues and the facts, and that there is a rational connection between the findings of fact and the conclusion, it will not interfere with the award.[550] This is so even if the Court or another commissioner would have come to a different conclusion.[551]

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547 *Nel v Ndaba & Others* (1999) 20 ILJ 2666 (LC) at 2671D; *Glaxo Welcome SA (Pty) Ltd v Mashaba & Others supra* at 924J-925A.

548 *Rope Constructions Co (Pty) Ltd v CCMA & Others supra* at 162C; *Computicket v Marcus NO & Others* (1999) 20 *ILJ* 342 (LC) at 345I; *Sun Couriers (Pty) Ltd v CCMA & Others* (2002) 23 *ILJ* 189 (LC) at 195H read with 196B; *Adcock Ingram Critical Care v CCMA & Others* (2000) 21 *ILJ* 1752 (LC) at 1755I; *Cadema (Pty) Ltd v CCMA (Western Cape Region) & Others* (2000) 21 *ILJ* 2261 (LC) at 2267F; Kroon JA in *County Fair Foods (Pty) Ltd v CCMA & Others* (1999) 20 *ILJ* 1701 (LAC); *Miladys, a Division of Mr Price Group Ltd v Naidoo & Others supra* at paragraph [29]. Note that a commissioner may be held to have applied his or her mind to a particular facet of the matter, despite a failure to deal explicitly with such in the award: *County Fair Food (Pty) Ltd v CCMA & Others supra* at 1715F.

549 *Director General: Department of Labour v Claasen & Others* (1998) 19 *ILJ* 1142 (LC), confirmed in *Gimini Indent Agencies CC t/a S & A Marketing v CCMA & Others* (1999) 20 *ILJ* 2872 (LC) at 2876I.

550 *SMCWU v Party Design CC* (2001) 10 LC 1.11.21 at paragraph [9] (viewed at www.irnetwork.co.za on 31 May 2003); *Cadema (Pty) Ltd v CCMA (Western Cape Region) & Others supra*; *Transnet Ltd v HOSPERSA & Another* (1999) 20 *ILJ* 1293 (LC) at 1298D; *Corobrik (Pty) Ltd t/a Brick and Tile v CCMA & Others* (2002) 11 LC 1.11.16 (viewed at www.irnetwork.co.za on 31 May 2003); *Miladys, a Division of Mr Price Group Ltd v Naidoo & Others supra* at paragraph [29].

551 *Travellers Retail Services, a Division of the Fedics Group (Pty) Ltd v CCMA & Others* (2001) 10 LC 1.11.14 at [9] (viewed at www.irnetwork.co.za on 24 August 2003).

Justifiability does not relate to whether the decision is correct;[552] this is the subject matter of an appeal.[553] Justifiability relates to the process of decision-making – whether there is logical reasoning or an explanation for that decision.[554] The result of this distinction is that an incorrect conclusion does not necessarily lack justifiability.[555] Likewise, a correct decision may lack justifiability and may be set aside on this ground.[556] The outcome is relevant only insofar as it relates to the reasoning; the merit of the outcome is of no consequence at all. This approach is in line with the legislative imperative that no appeal lies against CCMA awards.[557]

In *County Fair Foods v* CCMA,[558] Ngcobo AJP found that justifiability means no more than that the Commissioner's decision must be supported by the facts and applicable law.[559] However, I believe it necessary to qualify this approach in order to bring it in line with the true nature of the justifiability concept.

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552 See for example, *Carephone (Pty) Ltd v Marcus NO & Others supra* at 1435B-C; *County Fair Foods (Pty) Ltd v CCMA & Others supra* at 1706D-I and at 1716 B; *Computicket v Marcus NO & Others supra* at 346D. In the latter case, the Court errs in stating that the correctness of a decision will only be relevant where the commissioner is mistaken in law, and such mistake results in injustice (at1596H). It is not the correctness of the decision that should be in question, but rather the Court should focus on the lack of a fair hearing or failure to apply one's mind. These instances fall under the review grounds set out in s145 without having recourse to the justifiability test.

553 *Rope Constructions Co (Pty) Ltd v CCMA & Others supra* at 162C. While *Carephone's* case acknowledges that the Commissioner's decision need not be correct, justifiability was found *inter alia* to relate to whether the decision *can be shown* to be just, reasonable or correct (at 1434D). This articulation is problematic, as it alludes to actual correctness of the Commissioner's decision. This issue was broached in *County Fair Foods v CCMA supra* at 1706F-H, where the Court discredited the inclusion of "able to be shown to be correct" in the articulation of the justifiability test.

554 *Ellerine Holdings Ltd v CCMA & Others* [1999] 7 BLLR 676 (LC).

555 *Purefresh Foods (Pty) Ltd v Dayal & Another* (1999) 20 *ILJ* 1590 (LC) at 1595D; *County Fair Foods (Pty) Ltd v CCMA & Others supra* at 1716B; *Gray Security Services (Western Cape)(Pty) Ltd v Cloete NO & Another* (2000) 21 *ILJ* 940 (LC) at 955G; *RHM Technical Underwriters CC v Kahn & Others* (1999) 20 *ILJ* 630 (LC) at 634E, where the Court states that the Commissioners award *in casu* "is more than justifiable; it is correct". This implies that justifiability sits at a plane lower than correctness.

556 *Solomon v CCMA & Others* (1999) 20 *ILJ* 2960 (LC) at 2966D-2967F.

557 The distinction between appeals and reviews is that the former relates to the correctness of the result, while the latter relates to the manner in which the tribunal reaches the result. See for example *County Fair Foods (Pty) Ltd v CCMA & Others supra* at 1706D-E.

558 *County Fair Foods (Pty) Ltd v CCMA & Others supra* at1712H-I.

559 This formulation is similar to the test for whether a commissioner has applied his or her mind as set out in *Coetzee v Lebea NO & Another* (1999) 20 *ILJ* 129 (LC) at F-G. The most significant difference between these judgments is that in *Coetzee's* case, the Court states that the question is whether the outcome *can* be sustained by the facts found and law applied (rather than that it *must* be sustainable in this way). It emphasizes the number of

Firstly, the decision must be supported by the facts *found*, as reflected in the rational reasoning. Put differently, a court may not interfere with a commissioner's factual findings, where they are logically substantiated.[560] Secondly, the law applied, as shown by the Commissioner's reasoning, must support the decision. The application of incorrect legal principles may, however, be indicative of a failure by the Commissioner to apply his mind and nonetheless render the award reviewable. Lastly, the final decision of the Commissioner must follow logically from the factual and legal findings made in the reasoning process.

The existence of one or more flawed reasons in a commissioner's award will not render the entire decision unjustifiable, provided that the commissioner *would* have reached the same conclusion had such flawed reasons not been present.[561] The enquiry here is whether the commissioner *would* make the same decision, and not whether the commissioner *could* have made the same decision. In addition, the Courts will be slow to allow a decision to stand where the flawed reason is of a dishonest nature. The decision must be viewed as a whole.[562] Thus, the odd misconception or error in an award will not necessarily cause it to be set aside on the basis of irrationality.

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reasonable outcomes rather than the correct outcome. See below at 4.4.1.1, the comments on reasonableness as a formulation of the justifiability test.

560 Factual findings may rely largely on matters of judgment and evaluation of the commissioner at the hearing, such as credibility of a witness. These factors influence the commissioner in drawing inferences and determining probabilities. Such findings will be more likely to be upheld, as it is impossible for the review court to determine whether the commissioner has made the finding on an illogical basis: *City Lodge Hotels Ltd v Gildenhuys NO & Others* (1999) 20 *ILJ* 2332 (LC) at 2337C and 2339E.

561 *Gray Security Services (Western Cape) (Pty) Ltd v Cloete NO & Another supra*, particularly at 952C-954J; *F N Marketing Distribution Services v Commissioner Matee & Others* (2002) 23 *ILJ* 1413 (LC) at 1417D-E. This concept was put differently in *Adcock Ingram Critical Care v CCMA & Others supra* at 1757J. Here, the Court stated that while there may be misdirections in the commissioner's award, none of them were "of any consequence, or of a nature that detract from the decision he finally arrived at". See also, *Karbochem Sasolburg (A Division of Sentrachem Ltd) v Kriel & Others* (1999) 20 *ILJ* 2889 (LC) at 2892 A; *Transnet Ltd v HOSPERSA & Another supra* at 1298C-D.

562 *Ellerine Holdings Ltd v CCMA & Others supra* at 682A.

The justifiability test requires an objective analysis.[563] This is in line with the common-law principles of review.[564] In making this determination, the Court will consider the allegations of the parties, the decision and reasoning of the Commissioner, the material properly before the Commissioner and any other relevant factor.[565]

At this point, it is useful to consider the following application of the principles stated above. An award is reviewable: where there is no evidence to support the decision, where the evidence does not support the decision, where the Commissioner accepts a patently false version of events, or where the Commissioner fails to consider relevant evidence in making the decision.[566] This is so because in such cases the reasoning of the Commissioner cannot logically lead to the decision made.

4.4.1.1 Justifiability v Reasonableness, Rationality and Proportionality

The Court in *Carephone's* case stated that "reasonableness", "rationality" and "proportionality" may be useful re-formulations of "justifiability" in certain disputes.[567] However, this may serve only to complicate the issue. It is understandable that the Labour Appeal Court stated that it would generally be

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563 *Carephone (Pty) Ltd v Marcus NO & Others supra* at 1435E; *Sun Couriers (Pty) Ltd v CCMA & Others supra* at 196B; *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp & Others* (2002) 23 *ILJ* 863 (LAC) at 868A-B; *Roman v Williams NO* 1998 (1) SA 270 (C) at 282B; *Kotze v Minister of Health & Another* 1996 (3) BCLR 417 (T) at 425F-G.

564 *Smithkline Beecham (Pty) Ltd v CCMA & Others* (2000) 21 *ILJ* 988 (LC) at 995E, citing *Farjas (Pty) Ltd & Another v Regional Land Claims Commissioner, KwaZulu-Natal* 1998 (2) SA 900 (LC) at 912H-913D.

565 *Department of Justice v CCMA & Others* (2001) 22 *ILJ* 2439 (LC) at 2447I-J; *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* (LAC) *supra* at 1631E.

566 *Kynoch Feeds (Pty) Ltd v CCMA & Others supra* at 845H-J, confirmed in *Gimini Indent Agencies CC v CCMA & Others supra* at 2877A-C; *Crown Chickens (Pty) Ltd v Kapp & Others supra* at 867B-C; *City Lodge Hotels Ltd v Gildenhuys NO & Others supra* at 2339H-I; *Mkhonto v Ford NO & Others* [2000] 7 BLLR 768 (LAC) at 770D; *F N Marketing Distribution Services v Commissioner Matee & Others supra* at 1416H-I.

567 *Carephone (Pty) Ltd v Marcus NO & Others supra* at 1435C-E.

unnecessary to stray from the original formulation of the assessment, namely justifiability.[568]

The Court in *Carephone* treated the commissioner's power as administrative action. Thus, the origin and context of the concepts of reasonableness, rationality and proportionality is immediately clear: these are grounds for review under administrative law.[569] Justifiability should remain the definitive yardstick in CCMA reviews for irrationality, as *Carephone* has been held to be incorrect in that CCMA arbitrators exercise public power rather than administrative power.[570] However, these concepts may be useful insofar as they are congruent with the concept of justifiability.

The Courts have framed the justifiability test in terms of reasonableness in a number of cases.[571] An example of such is to ask whether a reasonable person sitting as Commissioner might come to the same conclusion.[572] To avoid review, the Commissioner's decision must fall within the range of reasonably possible and appropriate outcomes.[573] The error in this approach is that it focuses on the conclusion of the commissioner, rather than on the reasons for such conclusion. This is not the purpose of the justifiability test. It may blur the distinction between

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568 *Carephone (Pty) Ltd v Marcus NO & Others supra* at 1435C-E.

569 See s33 of the Constitution and s6 of the PAJA.

570 *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* (LAC) *supra* at 1616J-1617F.

571 *Computicket v Marcus NO & Others supra*; *Coetzee v Lebea NO & Another supra*; *County Fair Foods (Pty) Ltd v CCMA & Others supra*; *Waverley Blankets v CCMA & Others* (2000) 21 *ILJ* 2497 (LC) at 2500I; *SMCWU v Party Design CC supra* at paragraph [8]; *Shoprite Checkers (Pty) Ltd v CCMA & Others* (LC) *supra* at 900G.

572 *Computicket v Marcus NO & Others supra* at 346E. Also see *Morningside Farm v Van Staden NO & Another* (1998) 19 *ILJ* 1204 (LC) at 1206J, where the Court stated that there was a "glaring inconsistency" between the facts found by the commissioner and the final conclusion arrived at. This seems in line with the true conception of the justifiability test. However, the Court went on to state that no reasonable person would have arrived at such conclusion. This is where the flaw in the Court's reasoning arose.

573 *Computicket v Marcus NO & Others supra* at 346F-H; *Coetzee v Lebea NO & Another supra* at 13F. In *De Beers Consolidated Mines Ltd v CCMA & Others* (2000) 21 *ILJ* 1051 (LAC) at 1062F, the Court referred to the phrase "*Quot homines, tot sententiae*": Opinions, even among reasonable men and women, may differ. It is clear that reasonableness implies a range of outcomes occurring along a medium. While one cannot conceive a circumstance where it would transpire, an award need not be reasonable in order to be justifiable. These concepts are not wholly co-extensive.

appeals and reviews, in that the Court may look into the correctness of the Commissioner's decision.

Another reference to reasonableness was made by Conradie JA in *County Fair Foods v CCMA*.[574] In testing the justifiability of the sanction awarded by a commissioner, Conradie JA referred to the judicial alteration of sentence in a criminal appeal.[575] An award would not be considered justifiable if it is "dramatically wrong", "perverse" or "strikingly inappropriate".[576] It is also not justifiable if it is excessively out of kilter with what the review Court would have awarded. This test was based on the reluctance by appeal courts to interfere with the exercise of discretion on the grounds of unreasonableness. Conradie JA stated that the reluctance to interfere on the review ground of unreasonableness should be just as strong, if not stronger.[577]

This approach should not be followed in investigating the justifiability of an award. It fails to take cognisance of the material elements of the justifiability test, namely the rationality of the commissioner's decision as reflected in the reasoning for such decision. It focuses on the outcome of the hearing, rather than on the reasoning process, thus blurring the distinction between appeals and reviews. In fact, the learned judge applies an appellate test in the review proceedings.[578] This

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574 *County Fair Foods (Pty) Ltd v CCMA & Others supra.*

575 *County Fair Foods (Pty) Ltd v CCMA & Others supra* at1716B-E.

576 *County Fair Foods (Pty) Ltd v CCMA & Others supra* at1716B-E.

577 In *Toyota South Africa Motors (Pty) Ltd v Radebe & Others* (LAC) *supra* at 355A-E, the Labour Appeal Court applied a similar principle in a different manner. It stated that disputant parties are not afforded a fair hearing where there is a yawning chasm between the sanction that the Court would impose, and that of the commissioner. Commissioners have a duty to determine a fair sanction within reasonable parameters, and they misconceive this duty where the imposition of the sanction is so egregious that it shocks the Court. In such cases, they are said to commit a gross irregularity reviewable under s145(2)(a)(i) of the LRA. The Court acknowledged, however, that it is impossible to define precisely the degree of error necessary to substantiate review for gross irregularity.

578 A similar approach was adopted in *Morningside Farm v Van Staden NO & Another supra* at 1206I-1207A. Here, the Court stated that a CCMA award may be set aside if there is a glaring inconsistency between the facts found and the final decision. At best, these judgments can be interpreted to relate to the rationality of the decision, in that the glaring inconsistency may show that the commissioner's reasoning is inadequate and unjustifiable. However, the glaring inconsistency should not relate to the correctness of the decision, as

contributes to the erroneous notion that review for justifiability is in fact an appeal.[579]

The Courts have discussed the similarity between the meanings of rationality and justifiability.[580] Indeed, the justifiability test formulated in *Carephone* requires a "rational objective basis".[581] In *Crown Chickens v Kapp*,[582] the Labour Appeal Court stated that rationality requires that Commissioners are not arbitrary; that they arrive at a decision through a reasoning process rather than through "conjecture, fantasy, guesswork or hallucination". It goes on to state that justifiability relates to the decision being defensible on the important rational steps taken in the reasoning advanced by the commissioner. It is not useful to differentiate between rationality and justifiability, as a rational decision is justifiable and vice versa.[583]

Proportionality has not been utilized as a means of applying the principles of *Carephone*. This does not seem to be a useful formulation, despite reference to such in *Carephone's* case.[584] Given the administrative law basis of the *Carephone* judgment, one may consider the statements made in *Roman v Williams NO*[585] concerning administrative action. The High Court asserted that every administrative decision must be capable of objective substantiation.[586] This requires that three factors be present, namely suitability, necessity and proportionality.[587] The former two factors, which may overlap, depend largely on

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this transforms review for justifiability into an appeal. The dividing line between these concepts is a fine one.

579 See 4.5.1 below.

580 *Crown Chickens (Pty) Ltd v Kapp & Others supra*; *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* (LAC) *supra*.

581 *Carephone (Pty) Ltd v Marcus NO & Others supra* at 1435E. A "rationally justifiable outcome" is also referred to in *Cash Paymaster Services (Pty) Ltd v Mogwe & Others* (1999) 20 *ILJ* 610 (LC) at 616A.

582 *Crown Chickens (Pty) Ltd v Kapp & Others supra* at 868C-D.

583 *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* (LAC) *supra* at 1614 F-G.

584 *Carephone (Pty) Ltd v Marcus NO & Others supra* at 1435C-E.

585 *Roman v Williams NO supra*.

586 *Roman v Williams NO supra* at 282A-B.

587 *Roman v Williams NO supra* at 282C.

the purpose for which the administrative power is bestowed.[588] Proportionality relates to the relationship between the means and the end of the investigation, and will be determined on the particular facts of each case.[589]

4.4.2 The meaning of "material properly available"

The *Carephone* formulation of the justifiability test requires that there be a rational connection between the decisions of commissioners and the material properly available to them.[590] As such, commissioners must consider the material properly placed before them, and after evaluating and assessing it, base their decision thereon.[591]

The "material properly available" refers to all the evidence that is properly tendered to and received by the Commissioner.[592] This includes documentary evidence, audio and visual recordings, evidence given under oath (whether *viva voce* or by sworn affidavit) and any admissions made by the parties.[593] On review, the court will also consider the reasoning of the commissioner,[594] and the onus of proof in the arbitration proceedings.[595]

The material relied upon in a CCMA award may be limited due to irregularities committed by the Commissioner, such as a failure to allow a party to call witnesses or to place appropriate documentary evidence before the Commissioner. This in

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588 *Roman v Williams NO supra* at 282C-D.
589 *Roman v Williams NO supra* at 287E-288E.
590 *Carephone (Pty) Ltd v Marcus NO & Others supra* at 1435C-E.
591 *East Rand Gold & Uranium Co Ltd v CCMA & Others supra* at 2352J-2353B.
592 *Federated Timbers (Pty) Ltd v Lallie NO & Others* (1999) 20 *ILJ* 348 (LC) at 352A-B.
593 *Federated Timbers (Pty) Ltd v Lallie NO & Others supra* at 352B-C; *DB Thermal (Pty) Ltd v CCMA & Others* (2000) 9 LC 1.11.23 at paragraph [20] (viewed at www.irnetwork.co.za on 31 May 2003); *Glaxo Welcome SA (Pty) Ltd v Mashaba & Others supra* at paragraph [61].
594 *Department of Justice v CCMA & Others supra* at 2447I-J; *Ross & Son Motor Engineering v CCMA & Others* [1998] 11 BLLR 1168 (LC) at 1172A; *Mafongosi & Others v United Democratic Movement & Others* (2002) 23 *ILJ* 2179 (Tk) at 2184B-C.
595 *National Union of Metalworkers of SA on behalf of Ngele v Delta Motor Corporation & Others* (2002) 23 *ILJ* 1876 (LC) at 1883B-C.

itself may render the award reviewable on the ground of justifiability, as the decision is not based on material properly before the Commissioner.[596] The award may also be set aside in these cases without reference to the justifiability test, on the ground of gross irregularity in proceedings.[597]

"Material" in the justifiability formulation has been said to include more than just the factual material, as described above. It also encompasses the applicable principles and logic required by the law.[598] The Labour Court argues that this is a necessary inclusion, as an error of reasoning or misunderstanding of the law is likely to result in an unjustifiable award. However, it seems that the review principles developed in relation to misconduct of the commissioner adequately accommodate instances where a commissioner fails to take account of the law in making a decision.[599]

4.5 Comments and criticism of the justifiability test

The *Carephone* judgment has been attacked on various grounds. These will be discussed below with reference to case law, in favour of the ruling and against it. While the reasoning of the *Carephone* judgment has been rejected, these criticisms have not been found sufficiently strong to validate the rejection of the justifiability test.

4.5.1 Blurring the distinction between appeals and reviews

The justifiability test has been criticised as blurring the distinction between appeals and reviews[600] - despite the judicial emphasis on the existence of this distinction.[601]

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596 *Oakfields Thoroughbred & Leisure Industries v McGahey & Others* (2001) 22 *ILJ* 2026 (LC) at 2033D.

597 s145(2)(a)(i) of the LRA; *DB Thermal (Pty) Ltd v CCMA & Others supra* at paragraph 26.

598 *Metcash Trading (Pty) Ltd t/a Trador Cash & Carry Wholesalers v Sithole & Others* unreported Labour Court judgment case no J1079/97 dated 11 September 1998), cited in *Portnet v La Grange & Others* (1999) 20 *ILJ* 916 (LC) at 919F-H.

599 See above at 3.3.3.1.

600 *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* (LC) *supra* at 1247H-I and at 1254G-H; *Toyota South Africa Motors (Pty) Ltd v Radebe & Others* (LAC) *supra* at 349A-B.

Appeals relate to whether the conclusion of the decision-maker is correct on the merits. Reviews concern the manner in which the decision-maker reached such conclusion.[602] While these processes may be co-extensive in certain respects,[603] their essential differences should not be overlooked. The LRA does not provide for appeals against CCMA arbitration awards.[604] However, aggrieved parties have a limited right to the review of such awards where a statutorily defined defect exists in the award.[605]

In light of our constitutional dispensation and the doctrine of separation of powers, courts may not exercise functions that fall beyond the scope of their judicial power.[606] The courts may not disregard the legislative directive that it has no appeal jurisdiction in respect of CCMA awards. This is in line with the checks and balances that sustain our democracy. The Courts are further bound not to interfere with the public power exercised by CCMA commissioners. By substituting its own opinions through an appeal, the Court itself would be exercising the power and would usurp that of the commissioners.

In *Carephone*,[607] Froneman DJP stated that the justifiability test does not abolish the distinction between appeals and reviews. The learned judge differentiates

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601 For example, *Carephone (Pty) Ltd v Marcus NO & Others supra*; *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* (LC) *supra*; *Coetzee v Lebea NO & Another supra; Toyota South Africa Motors (Pty) Ltd v Radebe & Others* (LAC) *supra*; *County Fair Foods (Pty) Ltd v CCMA & Others supra*; *Cox v CCMA & Others supra*; *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* (LAC) *supra*.

602 *Coetzee v Lebea NO & Another supra* at 133A-B; *County Fair Foods (Pty) Ltd v CCMA & Others supra* at 1712G-H.

603 *Coetzee v Lebea NO & Another supra* at 133B-C. The Labour Court recognized that this is particularly the case where the subject of the review is the very process of reasoning of the commissioner.

604 See *Toyota SA Motors (Pty) Ltd v Radebe & Others* (LAC) *supra* at 349E-F, where Nicholson JA states that in a "perfect society with unlimited resources, full rights of appeal should be allowed from every administrative decision. Society has an inbred distaste for the spectre of a remediless recipient of administrative injustice. This distaste is ameliorated in labour law, to some extent one hopes, by the widespread service provided to those with access to the CCMA."

605 Section 145(2)(a) of the LRA. See Chapter Three.

606 Devenish, GE *op cit* at 12-13. Judicial authority is the power to resolve a dispute by interpreting the law and applying the law: Rautenbach, IM & Malherbe, EFJ Constitutional Law (2 ed) at 215; Currie, I & De Waal, J (eds) The New Constitutional and Administrative Law Volume 1: Constitutional Law at 268.

607 *Carephone (Pty) Ltd v Marcus NO & Others supra* at 1434C-F.

between justifiability ("able to be shown to be just, reasonable or correct") and correctness ("just", "justified" or "correct").[608] The reference here to a decision being able to be shown to be "correct" is unfortunate, as justifiability does not relate to correctness of a commissioner's decision.[609] The reference merely perpetuates the mistaken belief that justifiability blurs the appeal-review divide.

The argument that the justifiability test transforms the review of CCMA awards into appeal proceedings is based on the alleged similarity between the justifiability test and appeals. By including justifiability under the review ground of commissioners having exceeded their powers, courts are said to advocate that commissioners exceed their powers unless they decide the case correctly.[610] Neither was s145(2)(a)(iii) intended for this purpose, nor is this the effect of the justifiability test.[611] Admittedly, the justifiability test comes close to transcending the line dividing appeals and reviews. This distinction must be recognised in interpreting the justifiability test.[612] What's more, it must give content to the test.[613]

Review courts are not required to determine whether the commissioner was correct in making the award.[614] This would be tantamount to an appeal. The Courts must investigate the reasoning of the award and determine whether the commissioner applied his or her mind, and gave a decision based on rational reasoning; in other words, whether the reasons leads logically to the conclusion of the commissioner. Commissioners act beyond their powers where they give arbitrary, irrational awards that are not based on logical reason, regardless of whether or not the award is correct.

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608 *Carephone (Pty) Ltd v Marcus NO & Others supra* at 1434C-E.

609 *County Fair Foods (Pty) Ltd v CCMA & Others supra* at 1706F-1707A.

610 *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* (LC) *supra* at 1247I, cited with approval in *Cox v CCMA & Others* [2001] 2 BLLR 141 (LC) at 145D.

611 *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* (LC) *supra* at 1247D-H.

612 *County Fair Foods (Pty) Ltd v CCMA & Others supra* at 1706D-F and at 1712G-H; *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* (LAC) *supra* at 1631F-H.

613 *County Fair Foods (Pty) Ltd v CCMA & Others supra* at 1712G-H.

614 See *Cadema (Pty) Ltd v CCMA (Western Cape Region) & Others supra* at 2266A-B, as an example of the Court erroneously alluding to the correctness of a commissioner's decision. Note, however, that the Court redeemed itself in stating that the accuracy of the decision is not the issue at 2267F. The correctness of the decision is not relevant to the justifiability enquiry, and courts should avoid commenting on such.

The test places an onerous burden on the Court to enter into the rationality of the merits of the decision.[615] However, the merits are not considered to comment on the correctness of the decision or to substitute the decision with a judicial evaluation. Rather, the merits are considered only to determine the rationality of the process of decision-making through a consideration of the relationship between the reasons and the outcome.[616] This is the key difference between an appeal and a review on grounds of justifiability.

A further argument is that it is unlikely that an incorrect award based on erroneous findings of fact and erroneous reasoning will be justifiable.[617] The argument continues that as a result, no significant difference exists between review on the grounds of justifiability and appeal.[618] Awards based on erroneous reasoning and erroneous findings of fact are likely to be unjustifiable. Further, the final decision in such awards is likely to be incorrect. However, the correctness of the decision is irrelevant in applying the justifiability test.

On appeal, decisions that are incorrect will always be set aside. Correct decisions based on incorrect reasoning will be upheld, provided there is a different process of reasoning to uphold the decision.[619] On review for justifiability, incorrect decisions will not necessarily be set aside. It is insufficient and irrelevant to show that the award is incorrect,[620] as incorrect decisions may yet be justifiable.[621] This will be the case where the commissioner applied his mind to the matter, and his reasons

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615 *Carephone (Pty) Ltd v Marcus NO & Others supra* at 1435B; *Cox v CCMA & Others supra* at 146E; *Cadema (Pty) Ltd v CCMA (Western Cape Region) & Others supra* at 2268B-D.

616 *County Fair Foods (Pty) Ltd v CCMA & Others supra* at 1706E-F and at 1716A.

617 *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* (LC) *supra* at 1254H-I.

618 *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* (LC) *supra* at 1247I.

619 *Karbochem Sasolburg (A Division of Sentrachem Ltd) v Kriel & Others supra* at 2891H; *Gqibela v West Driefontein Mine & Others* (2000) 9 LC 1.11.6 at paragraph [5] (viewed at www.irnetwork.co.za on 31 May 2003). Indeed, this occurred in *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* (LAC) *supra*, where the Labour Appeal Court rejected the reasoning in *Carephone*, but upheld the decision for different reasons.

620 *Gqibela v West Driefontein Mine & Others supra* at paragraph [11].

621 *County Fair Foods (Pty) Ltd v CCMA & Others supra* at 1716B; *Purefresh Foods (Pty) Ltd v Dayal & Another supra* at 1595D.

lead logically and rationally to the conclusion.[622] Such awards would be upheld despite the incorrect conclusion.[623] The corollary is that a correct yet unjustifiable decision will be set-aside on review due to an absence of rationality. This demonstrates that the appeal-review divide can be maintained despite the use of the justifiability test.

The distinction between appeals and review for justifiability is a matter of perspective. The Court must focus on the process of decision-making, rather than on the result of the commissioner's award. The justifiability test requires that the Court be aware of the correct application of the test and give effect to this subtle distinction. Aggrieved parties may attempt to appeal a commissioner's award under the guise of review for justifiability.[624] This is insufficient reason to disallow the justifiability test in its entirety.[625] Instead, the labour courts must be cautious in the application of the test, and should dismiss any applications that seek appeals under the guise of reviews.[626]

4.5.2 The right to just administrative action

The application of the justifiability test in *Carephone* was premised on the notion that commissioners exercise administrative action when making arbitral determinations. This has since been held to be incorrect in that commissioners

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622 In *Cox v CCMA & Others supra* at 148A-B, the Court stated that in order to hold that an award is justifiable, it must merely be satisfied that the commissioner considered the evidence adduced. Thereafter, judicial interference will only be warranted if the commissioner's assessment of the evidence is "so patent that there is no logical connection between the assessment of the evidence by the Commissioner in relation to the evidence presented" (at148C-D).

623 *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* (LAC) *supra* at 1636H: A CCMA arbitration award may be unsatisfactory but nevertheless be upheld as the defect is not one that is defined in s145(2)(a) of the LRA.

624 *Carephone (Pty) Ltd v Marcus NO & Others supra* at 1434C-F.

625 *Cox v CCMA & Others supra* at 146E.

626 Examples of matters dismissed as a result of the applicants seeking appeals under the guise of reviews include *Cox v CCMA & Others supra* at 144D-E; *Ster Kinekor (Pty) Ltd v Daka & Another* (2001) 10 LC 1.11.11at paragraph [11] (viewed at www.irnetowrk.co.za on 31 May 2003); *Cape Wrappers (Pty) Ltd v Scheepers & Another* (2002) 11 LC 1.11.19 at paragraph [14] (viewed at www.irnetwork.co.za on 31 May 2003).

exercise public power rather than administrative power in doing so.[627] The courts have given little, in any, motivation in support of this conclusion.[628] It is thus necessary to investigate why this arbitral function is not administrative action.

The critical issue concerns the interest protected by s33 of the Constitution, namely administrative justice. This provision may only be relied upon where the power exercised constitutes administrative action.[629] As explained above, the CCMA is an organ of state exercising public power.[630] However, not every exercise of public power is administrative in nature.[631] In order for s33 of the Constitution and administrative law in general to apply, one must determine whether the exercise of public power is in fact administrative action.[632]

The South African system of administrative law is a complex and inter-dependent legal framework.[633] It consists of the constitutional right to just administrative

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627 *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* (LAC) *supra* at 1617C-D. Also see *Cox v CCMA & Others supra* at 144G-I; *Department of Justice v CCMA & Others supra* at 2443H; *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others supra* at 1259E-H. However, the Labour Appeal Court judgment of *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* (2001) 22 *ILJ* 1603 (LAC) has been cited as authority for the statement that a commissioner's exercise of arbitral power is administrative action (*Department of Justice v CCMA & Others supra* at 2443I). This perpetuates the misconception that CCMA arbitral powers are administrative.

628 *Cycad Construction (Pty) Ltd v CCMA & Others* (1999) 20 *ILJ* 2340 (LC) at 2344G; *County Fair Foods (Pty) Ltd v CCMA & Others supra* at 1707B; *Armstrong v Tee & Others* (1999) 20 *ILJ* 2568 (LC) at 2575I; *Deutsch v Pinto & Another* (1997) 18 *ILJ* 1008 (LC) at 1012D and 1014F; *Ellerine Holdings Ltd v CCMA & Others supra* at 678I and 681I-682A; *Ntshangane v Speciality Metals CC* (1998) 19 *ILJ* 584 (LC); *Kynoch Feeds (Pty) Ltd v CCMA & Others supra* at 847J-848A; *Shoprite Checkers (Pty) Ltd v CCMA & Others supra* at 899A-900G; *Smithkline Beecham (Pty) Ltd v CCMA & Others supra* at 996D; *Standard Bank of SA Ltd v CCMA & Others supra* at 907G-H. See, however, *NUM v Brand NO & Another* (1999) 20 *ILJ* 1884 (LC) at 1888H-I, where Gon AJ questions the categorization of a CCMA arbitrator's function as administrative and states that it is arguable that the function is in fact judicial.

629 *Pennington v Friedgood & Others supra* at 258I.

630 See 4.3.1.

631 *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* (LC) *supra* at 1258C, cited in *Zimema v CCMA supra* at 255C-E. The similarity between the control of public power and that of administrative action is recognizable immediately. Administrative action seems to be a specialized form of public power.

632 *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* (LAC) *supra* at 1610G-I.

633 See generally, Harris, M & Partington, M (eds.) Administrative Justice in the 21st Century at 376.

action,[634] the Promotion of Administrative Justice Act ("PAJA"),[635] the extensive common law jurisprudence and statutory grounds of review.[636] These sources of law form one system, deriving force from the Constitution and subject to constitutional control.[637]

Section 33 of the Constitution allows for control of the public administration by granting everyone the right to administrative justice.[638] The enactment of s33 is a result of the lack of accountability and transparency of the public administration during Apartheid, and is aimed at promoting democracy.[639] This fundamental right is based largely on the principle of legality, in that the rule of law requires that the government's exercise of power be authorised and regulated by law.[640] It affords protection from unlawful, unreasonable and procedurally unfair action that is

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634 Section 33 of the Constitution.

635 Act 3 of 2000.

636 Hoexter, C explains that the constitutional right to administrative justice is a free-standing right (The New Constitutional and Administrative Law - Volume II: Administrative Law at 88). It does not replace the sophisticated common law developed by the courts, but rather, it is the culmination of such jurisprudence (Devenish, GE *op cit* at 461). Further, it allows for constitutional control over the exercise of power (*President of the RSA v SARFU supra* at 65C). The PAJA codifies this constitutionally entrenched right, giving effect to it and providing for any incidental matters thereto (Long title to the PAJA). In addition, the Act incorporates most of the common law principles of review of administrative action (Hoexter, C *op cit* at 87. Note however, that certain grounds of review are excluded from the PAJA, but may be incorporated under the general ground of review in s6(2)(i) of he PAJA.). Insofar as they are applicable in the new constitutional era, the common law serves to give content to the fundamental right to just administrative action, as well as the rights contained in the PAJA (*Pharmaceutical Manufacturers Association of SA supra* at 696C-696I; Hoexter, C *op cit* at 91. Note that any law or conduct inconsistent with s33 will transgress the common law and statutory principles of administrative law, and will amount to a violation of the Constitution: see Devenish, GE *op cit* at 461 and Hoexter, C *op cit* at 87). The right to administrative justice casts the net of review much wider than the common law previously provided for (*Roman v Williams NO supra* at 281F).

637 *Pharmaceutical Manufacturers Association of SA supra* at 696B-C. Also see *Roman v Williams NO supra* at 281A. But see *Commissioner for Customs & Excise Container Logistics (Pty) Ltd; Commissioner for Customs & Excise v Rennies Group Ltd t/a Renfreight* 1999 (8) BCLR 833 (SCA) at 843H-844B. *Mafongosi & Others v United Democratic Movement & Others supra* at 2186B.

638 *President of the RSA v South African Rugby Football Union supra* at 65B-D.

639 Devenish, GE *op cit* at 460 and 479.

640 Boulle, L *et al* Constitutional and Administrative Law: Basic Principles at 256; Pharmaceutical *Manufacturers of SA supra* at 698D-E.

administrative in nature.[641] This includes that administrative decisions be justified, rather than arbitrary.[642]

In the normal course of events, parties would not seek recourse from invalid administrative action by invoking the constitutional right, but rather through the use of the PAJA.[643] For our purposes, the most significant provision in the PAJA is that administrative action may be reviewed if it is not rationally connected to the information before the administrator and the reasons given for the decision by the administrator.[644] The similarity between this review ground and the justifiability test is immediately recognizable.

It is unlikely that the PAJA will apply to the review of commissioners' arbitral powers for a number of reasons. Firstly, review the terms of the PAJA may be expressly excluded by other legislation.[645] While the LRA does not do so explicitly, one must bear in mind the fact that this Act came into effect before the planning for the PAJA had even begun. Should, the PAJA apply to decisions made in CCMA awards, the drafters of the LRA could not have anticipated that the PAJA would regulate such review.

Secondly, one should note the intense judicial debate as to the applicability of s158(1)(g) of the LRA, the general review powers of the Labour Court, to CCMA arbitration awards. It was held that a constitutional interpretation of the LRA requires that s145 is the only provision applicable to the review of CCMA awards.[646] This upholds the maxim *generalia specialibus non derogant*, which embodies the

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641 Section 33 of the Constitution.

642 *Mafongosi & Others v United Democratic Movement & Others supra* at 2183I-J.

643 Hoexter, C *op cit* at 87-88. See Plasket, C *op cit* at 103, where he states that it is unlikely that one can rely on common law review under the new constitutional order. Note that the application of the constitutional right is largely indirect in that it must be acknowledged in the interpretation of the PAJA: Hoexter, C *op cit* at 89.

644 Section 6(2)(f)(ii) of the PAJA.

645 In *Volkswagen SA (Pty) Ltd v Brand NO & Others* (2001) 10 LC 9.5.3 (at paragraph [53] viewed at www.irnetwork.co.za on 24 August 2003), the Court stated that the PAJA does not seem to repeal s145 of the LRA, and thus that s145 is the only ground of review available to aggrieved parties.

646 *Carephone (Pty) Ltd v Marcus NO & Others supra* at 1433G.

principle of legal interpretation that specific provisions apply over their general counterparts.

The third reason lies in the PAJA itself, as it is unlikely that the commissioners' actions will qualify as administrative in the sense defined in the Act.[647] The PAJA defines 'administrative action' as including any decision of an administrative nature taken by an organ of state whilst exercising public power or a power in terms of the Constitution,[648] provided that the administrative decision adversely affects the rights of the person and has a direct, external legal effect.[649] Despite this wordy provision, the actual meaning of the phrase "administrative decision" is left unexplained.[650] It is thus necessary to turn to the common law to determine the meaning of "administrative action".[651]

Under the common law, administrative action is defined far wider than is likely to be accepted in the new constitutional dispensation.[652] Formerly, the judiciary had an inherent right to review and set aside proceedings where a public body acting in terms of a statutory duty, disregarded the legislative provisions, committed a gross irregularity or committed a clear illegality in performing the duty.[653] Numerous factors were considered in determining whether actions constituted administrative

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647 See, however, *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* (LAC) *supra* at 1616B-D, where the Court states that the making of a CCMA arbitration award may fall into the wide definition provided in the PAJA. The Court states that this is regardless of the fact that *Carephone* is incorrect in holding that this exercise of power is administrative action. However, the application of the PAJA is not dealt with in any great detail. This conclusion is dubious for the reasons stated above.

648 Section 1(i)(a) read with s1(v) of the PAJA. Note that an organ of state is construed in the same sense as stated in s239 of the Constitution: See s1(ix) of the PAJA. Note, too, that a 'decision' includes those that are required or proposed to be made: s1(v) of the PAJA.

649 Section 1(i) of the PAJA. This statutory definition is said to significantly narrow the common law definition of administrative action: Hoexter, C "The Future of Judicial Review in South African Administrative Law" (2000) 117 *SALJ* 484 at 514.

650 Perhaps the most helpful portion of these definitions is the express inclusion of nine categories of decisions that are not considered administrative in nature. However, the circumstance where a CCMA commissioner acts as arbitrator is not one of these exceptions.

651 *President of the RSA v South African Rugby Football Union supra* at 65B.

652 Hoexter, C *op cit* at 92-93. Note that the term 'administrative action' has probably been narrowed due to the other avenues of recourse now available to aggrieved parties under the 1996 Constitution (For example the fundamental right to equality and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000).

653 *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111 at 115.

action. These included whether the body exercising the power is created or controlled in terms of statute, whether it is controlled by a recognised public authority, whether it exercises statutory powers, whether it is funded by public money and whether it is under a duty to act in the public interest.[654]

The common law approach resulted in a wide formulation of the types of powers that the judiciary was empowered to review.[655] In order to provide some form of limitation, the courts took to classifying functions into categories such as 'purely administrative action', 'judicial administrative action' and 'quasi-judicial administrative action'.[656] This approach was used to apply varying standards of review, depending on the classification of the power exercised.[657] While judges and academics alike have rejected this approach,[658] the Constitutional Court has held that it may be informative in the enquiry into what constitutes administrative action.[659]

The common law approach that focuses on the characteristics of the power exercised is still utilised to some degree. In *President of the Republic of South Africa v South African Rugby Football Union*,[660] the Constitutional Court stated that when determining whether an exercise of power is administrative action, relevant considerations include the source, nature and subject matter of the power, whether a public duty is being exercised and the relation between the power and

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654 Hoexter, C *op cit* at 92; Boulle, L *et al op cit* at 247.

655 Since the change to a constitutional democracy, there is no need for such a wide interpretation of the concept of administrative action. While administrative law remains an important mechanism for the control of public power, there are a number of provisions in the Bill of Rights that parties may utilize in seeking redress (for example, the right to equality in s9 of the Constitution): See Hoexter, C *op cit* at 93.

656 Hoexter, C *op cit* at 92.

657 *Ibid.*

658 *Carephone (Pty) Ltd v Marcus NO & Others supra*; *Pretoria North Town Council v A1 Electric Ice-Cream Factory (Pty) Ltd* 1953 (3) SA 1 (A) at 11A-C; *South African Roads Board v Johannesburg City Council* 1991 (4) SA 1 (A); *Du Preez v Truth & Reconciliation Commission* 1997 (3) SA 204 (A); *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council supra* at paragraph [26].

659 *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council supra* at 391F-G; *Transnet Ltd v Goodman Brothers (Pty) Ltd supra* at 186I-187A; *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* (LAC) *supra* at 1610I.

660 *President of the Republic of South Africa v South African Rugby Football Union supra* at paragraph [143].

non-administrative policy matters or the implementation of legislation.[661] While the constitutional review test is much wider than its common law predecessor,[662] the common law remains part of our law, as developed in light of the Constitution.[663]

Hoexter suggests that an institutional approach, informed by the doctrine of separation of powers, be adopted in determining the constitutional meaning of 'administrative action'.[664] This approach excludes the exercise of power by the judiciary and the legislature from the definition, as these powers are judicial and legislative in nature.[665] The public administration consists of all executive organs, barring the Cabinet and in certain circumstances the President. This administration is regarded as the primary implementer of legislation, and thus performs most administrative functions.[666]

However, this is not a decisive test.[667] Any branch of government, any organ of state and even private bodies may be deemed to exercise powers of an administrative nature. The key element of the enquiry is the nature of the power being wielded, rather than the nature of the organisation or branch of government wielding such power; the function rather than the functionary.[668]

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661 These concepts were expanded on in *Pharmaceutical Manufacturers Association of SA supra* at 706E-H and *Permanent Secretary, Department of Education and Welfare, Eastern Cape v Ed-U-College (PE) (Section 21) Inc* 2001 (2) SA 1 (CC) at paragraph [21].

662 See *Smithkline Beecham (Pty) Ltd v CCMA & Others supra* 995E-G and 996C.

663 *Smithkline Beecham (Pty) Ltd v CCMA & Others supra* at 996C-D.

664 Hoexter, C at 93. See also Craig, P "What is public power?" in Corder, H & Maluwa, T *op cit* at 25.

665 See, for example, *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council supra*. While commissioners do perform a judicial or quasi-judicial function, this is not a judicial function in terms of the Constitution (*Shoprite Checkers (Pty) Ltd v Ramdaw NO and Others* (LC) *supra* at 1259B-1260A). However, see 4.3 above for a discussion on the difference between judicial action and the exercise of power by CCMA commissioners when giving awards.

666 Plasket C, *op cit* at 132; *Transnet Ltd v Goodman Brothers (Pty) Ltd supra* at 187H.

667 *President of the Republic of South Africa v SARFU supra* at about paragraph [141].

668 *Ibid.*

It is arguable that the CCMA performs certain administrative functions, such as deciding which commissioner will hear each matter referred for arbitration.[669] However, the notion that a CCMA commissioner exercises administrative action when performing arbitral functions has been firmly rejected by the labour courts.[670] This conclusion was based on Constitutional Court cases decided after *Carephone,*[671] and on the fact that the Court in *Carephone* failed consider whether making the arbitration award was an administrative act before applying the right to administrative justice.[672] The nature of the commissioners' power was entered into in the Labour Court judgment of *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others.*[673] Here the Court stated that arbitration has never been regarded as a form of administrative action.[674] Commissioners do not exercise administrative powers due to the compulsory nature of CCMA arbitration, as an extension of private arbitration and an alternative to court adjudication.[675]

4.5.3 Other policy considerations

The justifiability test has found support on the basis of other policy considerations.[676] Justice is perhaps the most important factor to be considered in

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669 See also *Sun International (SA) Ltd t/a Morula Sun Hotel and Casino v CCMA & Others supra,* where the Court regards the decision to condone a late referral as administrative action.

670 *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* (LAC) *supra* at 1617C-D. Also see *Cox v CCMA & Others supra* at 144G-I; *Department of Justice v CCMA & Others supra* at 2443H; *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* (LC) *supra* at 1259E-H. However, the Labour Appeal Court judgment of *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* (LAC) *supra* has been erroneously cited as authority for the statement that a commissioner's exercise of arbitral power is administrative action (*Department of Justice v CCMA & Others supra* at 2443I). This perpetuates the misconception that CCMA arbitral powers are administrative.

671 *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council supra*; *Pharmaceutical Manufacturers Association of SA supra.*

672 *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* (LAC) *supra* at 1610D-I.

673 *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* (LC) *supra* at 1259B-1260C, confirmed in *Zimema v CCMA supra* at 255C-E and *Cox v CCMA & Others supra* at 144G-I. The Labour Appeal Court in *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* (LAC) *supra* at 1616J-1617F, stated that it is not necessary to determine whether the judgment in *Carephone* was correct, and held that sound policy considerations requires that the justifiability test applies to the review of CCMA awards.

674 *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* (LC) *supra* at 1259E-H.

675 *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* (LC) *supra* at 1259C-D.

676 *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* (LAC) *supra* at 1617B.

determining whether the justifiability test should apply. However, other factors are also discussed below.

The endorsement of awards that are not based on the findings made by a commissioner, or which are irrational, arbitrary or unjustifiable in any other sense, serves only to perpetrate injustice.[677] It is in the interests of justice and sound labour relations that a CCMA arbitration award be justifiable in relation to the reasons given for it.[678] This is particularly in light of CCMA arbitration generally being a compulsory form of recourse for parties to labour disputes.[679] Fairness is an overriding and fundamental objective of the LRA.[680] Allowing awards to stand where they are wrong in fact or law is unduly harsh on the party suffering under the award.[681] The requirement of justifiability in awards also contributes to the pursuit of justice by reducing the effects of commissioners being ill trained, inexperienced and overworked.[682]

In a similar vein, the application of the justifiability test has been upheld on the basis of the Labour Court being a court of "law and equity", rather than merely a "court of law".[683] This status is a result of the 1998 amendments to the LRA and requires that the Labour Court attribute equal weight to law and equity in interpreting the law.[684] Aspects of fairness must be considered when the Court

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677 *Cox v CCMA & Others supra* at 145F. However, the Court stated that this reasoning applies only where, but for the mistake, the commissioner would have ruled in favour of the party (at 145H).

678 *Shoprite Checkers (Pty) Ltd v CCMA & Others supra*, confirmed in *Armstrong v Tee & Others supra* at 2576D; *Volkswagen SA (Pty) Ltd v Brand NO & Others supra* at paragraph [63].

679 See brief discussion below at 4.4.3.

680 *Karos Leisure (Pty) Ltd t/a Movenpick v CCMA & Others supra* at paragraph [4].

681 *Cox v CCMA & Others supra* at 145G.

682 See *Volkswagen SA (Pty) Ltd v Brand NO & Others supra* at paragraph [63], where the Court stated that perhaps it may be time for the judiciary to accept the legislative intention that the CCMA deal with certain disputes, for better or worse.

683 Section 151(1) of the LRA. *Cox v CCMA & Others supra* at 146F-H. This distinction was also recognized in *East Rand Gold & Uranium Co Ltd v CCMA & Others supra* at 2354F-G, albeit in the context of an arbitrator's task in assessing the credibility of a witness.

684 Basson, A *et al* Essential Labour Law: Collective Labour Law (3 ed) at 200.

makes decisions.[685] Equity requires, so the argument goes, that substantive rationality be an essential characteristic of CCMA awards.

In general, labour dispute jurisdiction is divided between the Labour Court and the CCMA,[686] depending on the nature of the dispute. Unlike private arbitration, CCMA arbitration is imposed on parties.[687] The parties to the dispute are denied the opportunity of approaching the courts, and must refer the matter to the CCMA. While no appeal lies from the commissioner's award, limited review is permitted.[688] The element of compulsion and the finality of the awards require that a review be permitted where the final decision is not justifiable on the reasons, despite the LRA aim for expedience in the resolution of labour disputes. This also reflects the necessity that justice is done.

It has also been said that sound labour relations would be better served in general if arbitration awards comply with the requirements of s33 of the Constitution.[689] The Labour Appeal Court has stated that the labour relations community has accommodated itself around the *Carephone* judgment and that to discard it now would lead to instability and uncertainty in law.[690] Although the Court did not purport to do so,[691] I submit that this would not be sufficient grounds alone to accept the *ratio decidendi* of *Carephone* were the judgment incorrect.

4.6 Developing the law

685 Basson, A *et al op cit* at 201.

686 Note that bargaining councils and accredited agencies generally have concurrent jurisdiction with the CCMA. Parties may also refer disputes to private arbitration.

687 This is the rule rather than the exception.

688 Section 145(2) of the LRA.

689 *Shoprite Checkers (Pty) Ltd v CCMA & Others supra* at 899G-900A, confirmed in *Armstrong v Tee & Others supra* at 2576D.

690 *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* (LAC) *supra* at 1617C-D.

691 In *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* (LAC) *supra* at 1617D-F, the Court stated that sound policy considerations warrant the application of the *Carephone* test. It gave further justification for the application of the test, namely that arbitrating commissioners exercise public power, and that the PAJA may be applicable in the review of commissioners' decisions.

Constitutional values and principles are fused with established law through a process of indirect application of the Constitution. Courts and other tribunals must promote the spirit, purport and objects of the Bill of Rights when interpreting legislation and developing the common law.[692] Through this process, the ordinary legal remedies and rules are adhered to, while honouring the values enshrined in the Bill of Rights.[693]

The current constitutional dispensation aims to foster a democratic society, where accountability, responsiveness and openness are central features.[694] The wrongs committed in our Apartheid past are addressed in the Bill of Rights to ensure that justice may be done in the future. The application of the justifiability test upholds the culture of rationality upon which this order is based. Section 145(2) of the LRA must be interpreted to allow review on the grounds of justifiability.

Justifiability has been incorporated into s145(2) of the LRA in various ways. In *Carephone*, Froneman DJP stated that review in terms of the justifiability test applies on the basis that the commissioner has exceeded the constitutional constraints on his or her arbitral powers. This is a defect in terms of s145(2)(a)(iii) of the LRA, and renders the award reviewable.[695]

However, case law indicates that the Courts are divided as to how the justifiability test fits into the existing body of labour law. Some judges claim that the justifiability test is a separate, constitutional ground of review. Others try to incorporate the test under s145(2), either by applying it as the "standard of review", or by adopting the *Carephone* approach and including the test as an incidence of defective award as envisioned by s145(2). In further cases still, the judges fail to categorise the test, merely citing it along with s145 and proceeding to focus on the application of the justifiability test. This unclear, combined approach is detrimental to legal precedent and certainty. Questions of law arising from the application of

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692 Section 39(2) of the Constitution.
693 Currie, I & De Waal, J *op cit* at 321.
694 Preamble to and s1 of the Constitution.
695 *Carephone (Pty) Ltd v Marcus NO & Others supra* at 1439C.

the justifiability test will not be readily answered until a sound framework for such application is established.[696]

Each of these methods of integrating the justifiability test into the existing case law will be discussed below. It seems that the doctrine of separation of powers and our constitutional order in general requires that justifiability be included as an instance of review under s145(2), just as any other form of reviewable irregularity or misconduct.[697]

4.6.1 A separate ground of review?

In certain cases, the judiciary has viewed the justifiability test as a review ground separate from s145.[698] For example, in *Department of Justice v CCMA & Others*,[699] the Court refers to s145, and then states,

> "In addition to the grounds set out above, there is a further ground based on the constitutionally entrenched right to fair administrative action. This ground is set out in the matter of *Carephone v Marcus NO & Others.*" (My emphasis).

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696 One such legal enquiry is whether the time limit to bring an application for review in terms of s145 applies to reviews on the grounds of the justifiability of the award. If this ground falls under the defects specified in s145(2), the six-week time limit will apply. However, if the justifiability test is a separate review ground, such applications can be brought within a reasonable time period. See *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* (LAC) *supra* at 1616J-617B.

697 *Cadema (Pty) Ltd v CCMA (Western Cape Region) & Others supra* at 2267H.

698 *Department of Justice v CCMA & Others supra*; *Crown Chickens (Pty) Ltd v Kapp & Others supra* at 868A-C; *NUMSA & Another v CCMA & Others* (2002) 11 LC 1.11.8 (viewed at www.irnetwork.co.za on 31 May 2003). It was implied that the justifiability test is a separate ground of review in *Rope Constructions Co (Pty) Ltd v CCMA & Others supra*, *Computicket v Marcus NO & Others supra* and *Oakfields Thoroughbred & Leisure Industries Ltd v McGahey & Others supra* at 2033D. The *Carephone* judgment was also interpreted to introduce a new, separate review ground of justifiability in *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* (LC) *supra* at 1253G-1254D.

699 *Department of Justice v CCMA & Others supra* at 2443E-J. Note, however, that the Court states that an unjustifiable award may be reviewable on the grounds of the arbitrator having committed a gross irregularity in arriving at the decision, rather than on the separate ground of justifiability (at 2444A). The Court goes on to apply the justifiability test in terms of the Commissioner having exceeded his powers, on the basis that the applicant's attack on the award related to the jurisdiction of the CCMA to hear the matter (at2447H-2448B). This approach is confusing and illogical.

The reliance on the right to administrative justice in the reasoning of *Carephone* has been criticised and rejected by the Labour Appeal Court.[700] However, the *ratio decidendi* of the case has been upheld on the basis of policy considerations.[701] In the absence of any statement to the contrary, this implies that the incorporation of the test under s145, rather than as a separate ground of review, should stand as well.

It is important to recognize the doctrine of separation of powers in this enquiry. Section 145(2) provides the limited grounds of review determined by the legislature. The judiciary is not permitted to interfere in this exercise of legislative power. Until a law is declared unconstitutional, the courts may, at best, interpret the existing grounds in a manner consistent with the Constitution. Thus, the judiciary must keep within its statutory review jurisdiction.[702] It may not merely decide that a new ground of review on the basis of justifiability exists; either s145(2) must be set aside as unconstitutional, or it must be interpreted in light of the Constitution. While s145 has not come under constitutional attack, the Courts have stated *obiter* that this provision is not unconstitutional.[703] As a result, the justifiability test must be interpreted under the existing review grounds.

Thus, justifiability must be incorporated into s145. It is not a separate or constitutional ground of review.[704] Parties should be prohibited from utilizing *Carephone's* test to circumvent the review grounds set out in s145 of the LRA.

4.6.2 The justifiability test – the standard of review under s145?

In discussing the requirement of justifiability in a CCMA award, the Court in *Carephone* labelled the sub-section of the judgment, "The standard of review".[705]

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700 *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others supra* (LAC) at 1617A-B.
701 *ibid.*
702 *Gray Security Services (Western Cape) (Pty) Ltd v Cloete NO & Another supra* at 955A.
703 *Ntshangane v Speciality Metals CC supra* at 593H-594C.
704 *Toyota SA Motors (Pty) Ltd v Radebe & Others* (LAC) *supra* at 351F; *Cox v CCMA & Others supra* at 146A; *University of the North v Nobrega & Another supra* at 2122C-D, citing and confirming *Hilton Weiner (Pty) Ltd v Rose & Others*, unreported case no J2910/98.

The Court stated that the constitutional right to administrative justice extends the scope of judicial review to include substantive rationality.[706] It then discussed how one would go about determining whether administrative action is justifiable in relation to the reasons given for it, and formulates the justifiability test.[707]

This reasoning has been taken to mean that the justifiability test is the general standard to be applied to all reviews of CCMA awards.[708] For example, in *Ensign Brickford SA (Pty) Ltd v Shongwe NO & Others*,[709] the commissioner's failure to exercise his discretion on the facts was held to be misconduct on the basis that no rational objective basis justified the connection between the material before him and the conclusion he arrived at. Here, justifiability is used as a measure of misconduct. In other cases, this so-called standard of review is applied without any reference to the express grounds in s145.[710]

The *Carephone* concept of rationality is clearly not a general test for the review of CCMA awards. This approach disregards the existence of s145 in its entirety, flouting both the doctrine of separation of powers and the many cases that form legal precedent in CCMA reviews. *Carephone's* justifiability test does not purport to do this, neither expressly nor impliedly. Further, the use of the justifiability test as a general standard of review cannot be wholly reconciled with the grounds set out in s145. For example, justifiability cannot be used as a yardstick for whether an award is improperly obtained.

Whether the approach of using a general review standard has been developed through misinterpretation or any other reason is not pertinent. It is an incorrect approach, and should not be followed. The established principles applicable to

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705 *Carephone (Pty) Ltd v Marcus NO & Others supra* at 1433I.
706 *Carephone (Pty) Ltd v Marcus NO & Others supra* at 1433I-1434J.
707 *Carephone (Pty) Ltd v Marcus NO & Others supra* at 1435B-F.
708 *Metro Cash & Carry Ltd v Le Roux NO & Others* [1999] 4 BLLR 351 (LC) at 353F-I.
709 *Ensign Brickford SA (Pty) Ltd v Shongwe NO & Others supra* at 152E. See also *Zaayman v Provincial Director: CCMA Gauteng & Others* (1999) 20 *ILJ* 412 (LC) at 414H-415C.
710 *Nel v Ndaba & Others supra*, particularly 2669J; *National Union of Metalworkers of SA on behalf of Ngele v Delta Motor Corporation & Others supra*; *Gimini Indent Agencies CC v CCMA & Others supra* at 2876E and 2878H.

CCMA review may be developed to embrace the justifiability test, rather than the test replacing such principles in entirety. The justifiability test is not the standard of review applicable to all applications to set aside CCMA awards.

4.6.3 Justifiability – an instance of review under s145?

An overwhelming number of cases incorporate the lack of substantive rationality into s145(2), as any other form of conduct or omission that is reviewable.[711] Irrationality is viewed as an instance justifying the setting-aside of an award on the grounds of the arbitrator exceeding his or her powers, committing misconduct in relation to his or her arbitral duties or committing a gross irregularity in the conduct of the arbitration proceedings.

In *Carephone*, the Labour Appeal Court incorporated substantive rationality under s145(2)(a)(iii) as an instance of review, in that commissioners have a constitutional duty to make determinations that are justifiable and exceed this limit by making irrational awards.[712] In terms of the general principles relating to s145(2)(a)(iii),[713] CCMA commissioners must recognize and abide by prescribed duties and powers. Where commissioners do not do so, they exceed their powers and their awards may be set aside. Irrationality is a form of conduct whereby commissioners exceed their powers, in the same manner as review where commissioners hear matters beyond their statutory jurisdiction. The justifiability test is merely applied as a guiding principle to determine whether the defect of irrationality exists in the award.

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711 Numerous instances of CCMA review can be gleaned from Chapter Three. An example of another instance of review is where commissioners commit a gross irregularity in terms of s145(2)(a)(ii) of the LRA, by prohibiting a party from calling witnesses.

712 *Carephone (Pty) Ltd v Marcus NO & Others supra* at 1439C.

713 See Chapter Three above.

Numerous cases have followed *Carephone* in holding that unjustifiable CCMA awards may be set aside on the grounds of commissioners having exceeded their powers.[714] Justifiability is treated as an instance of review, and not as the sole basis upon which parties may apply for review under s145(2)(a)(iii).[715] The starting point of the review enquiry always lies in s145(2)(a). Thus, a commissioner exceeds his or her powers because the award is unjustifiable, and not vice versa.[716]

The grounds of review are not watertight groupings of defective conduct rendering CCMA awards open to review. One form of defective conduct may fall into two or more of the grounds set out in s145(2) of the LRA, depending on the manner in which one approaches the issue.

This phenomenon was recognised in *County Fair Foods v CCMA*,[717] where the Court stated that an award lacking rationality may be reviewed in terms of the commissioner having exceeded his powers, having committed misconduct or having committed a gross irregularity – whichever is most appropriate. I agree with this approach, as it is in line with both established principle and logic. It recognises the place the doctrine of separation of powers holds in South African law, as well as the principles concerning the indirect application of the Constitution. Further, the lack of strict categorisation allows for the flexible application of the law to practical instances, which is necessary for the proper development of the law.

Many judges have chosen to locate justifiability under the review ground of a commissioner having committed a gross irregularity in the conduct of the

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714 *National Manufactured Fibres Employers Association & Another v Bikwani & Others* (1999) 20 *ILJ* 2637 (LC); *Purefresh Foods (Pty) Ltd v Dayal & Another supra* at 1595A-B; *Sun Couriers (Pty) Ltd v CCMA & Others supra* at 192A-C; *Dimbaza Foundaries Ltd v CCMA & Others* (1999) 20 *ILJ* 1763 (LC); *Zaayman v Provincial Director: CCMA Gauteng & Others supra* at 418A; *Smuts v Adair & Another* (1999) 20 *ILJ* 931 (LC) at 938D-E; *Cash Paymaster Services (Pty) Ltd v Mogwe & Others supra* at 616A; *Sajid v Mahomed NO & Others* [1999] 10 BLLR 1175 (LC) at 1188B.

715 *De Beers Consolidated Mines Ltd v CCMA & Others supra* at 1063E.

716 For an example of such an incorrect conclusion that the award is unjustifiable because the commissioner exceeded her powers, see *Federated Timbers (Pty) Ltd v Lallie NO & Others supra* at 354A-C.

717 *County Fair Foods (Pty) Ltd v CCMA & Others supra* at 1706B-D. A similar statement was made in *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* (LC) *supra* at 1253D-E.

arbitration proceedings.[718] On first consideration, an error in reasoning such as the justifiability of an award cannot be considered a component of the conduct of the arbitration proceedings. However, as stated in *Goldfields Investment Ltd & Another v City Council of Johannesburg & Another*,[719] gross irregularities fall into two classes, namely patent and latent irregularities. The former relates to those that occur openly in the conduct of the arbitration, while the latter concerns irregularities occurring in the mind of the decision-maker and are reflected in the reasons provided for the decision.

In terms of this classification, the justifiability of an award may be considered a latent defect and allow review in terms of the ordinary principles relating to s145(2)(a)(ii): The reasoning is so flawed and the conclusions made on the basis of the material properly before the commissioner so unsound that a gross irregularity must have been committed and a fair trial not rendered to the parties.[720] Similarly, an unjustifiable award may be set aside if it is so grossly unreasonable that the Court may infer that the commissioner did not apply his or her mind.[721] Where the outcome is not sustained by the facts found and the law applied, the commissioner may not have applied his or her mind to the matter.[722] In other words, the lack of a rational connection between the material available to the commissioner and the final decision may indicate either an irregularity inhibiting a fair hearing or the commissioner's failure to apply his or her mind to the matter. However, no

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718 *Department of Justice v CCMA & Others supra* at 2444A; *County Fair Foods (Pty) Ltd v CCMA & Others supra* at 1711H-I.

719 *Goldfields Investment Ltd & Another v City Council of Johannesburg & Another* 1938 TPD 551 at 560, cited in *Toyota SA Motors (Pty) Ltd v Radebe & Others* (LAC) *supra* at 351F-352A; *Miladys, a Division of Mr Price Group Ltd v Naidoo & Others supra* at paragraph [30].

720 *Miladys, a Division of Mr Price Group Ltd v Naidoo & Others supra* at paragraph [30]; *Price Busters Brick Company (Pty) Ltd v Mbileni & Another* (1999) 8 LC 1.11.30 at paragraph [12] (viewed at www.irnetwork.co.za on 24 August 2003).

721 *East Rand Gold & Uranium Co Ltd v CCMA & Others* (1999) 20 *LIJ* 2348 (LC) at 2354J-2355B; *Maarten & Others v Rubin NO & Others* (2000) 21 *ILJ* 2656 (LC) at 2658 C-J. A similar approach was adopted in the common law regarding administrative action, where decisions were reviewed on the basis that the gross unreasonableness of the decision indicated that the decision-maker had not applied his or her mind to the issues of the matter (*Schoch NO & Others v Bhettay & Others* 1974 (4) SA 865 (A) at 865A-B; *National Transport Commission v Chetty's Motor Transport (Pty) Ltd* 1972 (3) SA 726 (A) at 735).

722 *Coetzee v Lebea NO & Another supra* at 133E-G; *SMCWU v Party Design CC supra* at paragraph [9].

irregularity is committed where commissioners apply their minds to the matters they hear and, if aware of the relevant legal principles, they apply the principles to the facts before reaching a decision.[723]

The Labour Court in *Cox v CCMA & Others* expressly rejected the *Carephone* categorisation of substantive rationality under s145(2)(a)(iii) of the LRA.[724] Nonetheless, the Court stated that a commissioner has a duty to arrive at a decision in a manner that is justifiable and logical in relation to the evidence presented at the arbitration.[725] The court reasoned that commissioners fail to apply their minds and commit misconduct in relation to their duties as arbitrator if the award is not justifiable. This renders the award reviewable in terms of s145(2)(a)(i).[726]

Another approach to incorporating justifiability under the ground of misconduct concerns the principles of mistake, whether *bona fide* or otherwise. Errors of fact or law are insufficient to substantiate review on their own; the error must render the reasoning so flawed that it results in a denial of the parties' right to a fair arbitration.[727] An award that is not justified may indicate that the hearing could not have been fair.[728]

In terms of this approach, an award lacking justifiability is but one of many circumstances that can lead to review of a CCMA award. The Courts should apply whichever individual review ground is appropriate in the circumstances of the particular case.

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723 *Softex Mattress (Pty) Limited v Paper Printing Wood and Allied Workers Union and Others* (2000) 21 *ILJ* 2390 (LAC) at 2397F-H.

724 *Cox v CCMA & Others supra* at 145J.

725 *Cox v CCMA & Others supra* at 146A-B.

726 *Cox v CCMA & Others supra* at 146B. A similar approach was followed in *Ensign Brickford SA (Pty) Ltd v Shongwe NO & Others supra* at 152E.

727 *Maarten & Others v Rubin NO & Others supra* at 2659A; *Crown Chickens (Pty) Ltd v Kapp & Others supra* at 868E and at 869B-C.

728 *East Rand Gold & Uranium Co Ltd v CCMA & Others supra* at 2354J-2355B. Also see *NF Die Casting (Pty) Ltd v Metal & Engineering Bargaining Council & Others* (2002) 23 *ILJ* 924 (LC) at 931J-932F, at 933C and at 934A, where the Labour Court reflects these principles, but does not refer directly to the justifiability test.

4.6.4 Section 145(2) – instances of substantive rationality?

In the preceding section, justifiability was dealt with as an instance of review under s145(2) of the LRA. A wholly opposite stance is described in *University of the North v Nobrega & Another*.[729] The Labour Court averred that *Carephone* held that s145(2) requires a determination of the existence of substantive rationality in a CCMA award. This determination, it continued, is not a separate enquiry. In fact, s145(2) provides instances that are indicative, if not determinative, of an absence of substantive rationality in the award. In this sense, no one review ground is the sole component of a lack of rationality – all the grounds contribute to the existence of rationality.

Thus, misconduct of commissioners and the commission of gross irregularities are considered to result in the award being unjustifiable. Justifiability is believed to be the umbrella under which the s145(2) review grounds fall, rather than irrationality being a form of defective conduct under s145(2), as described above.

The Court makes a novel and interesting proposition. In certain cases, the defect in the award may render it unjustifiable. Examples of these instances are where commissioners fail to apply their minds to the issues or where the award indicates bias. However, not all circumstances envisioned by s145(2) will necessarily result in the award lacking rationality. For example, where a commissioner is bribed to make an award in favour of a particular party. In this instance, the award may be justifiable. It may even be correct. This does not detract from the fact that the commissioner has committed misconduct in accepting the bribe and that the award is improperly obtained. As a result of this inconsistency in application, the approach cannot be followed.

4.7 Conclusion

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729 *University of the North v Nobrega & Another* (1999) 20 *ILJ* 2117 (LC) at 2121H-2122D, citing *Hilton Weiner (Pty) Ltd v Rose & Others*, unreported, J2910/98.

The CCMA is an organ of state and CCMA commissioners exercise public power in making arbitration awards. As a result, their decisions must be justifiable in relation to the reasons they provide. Justifiability entails that commissioners apply their minds to the matters before them and reach conclusions on rational bases, rather than illogically or arbitrarily. Review for justifiability involves an objective analysis of the arbitrator's process of reasoning – whether there is a connection between findings made and the final decision reached. Justifiability does not concern the merits of the dispute or correctness of the award.

This chapter has illustrated the difficulties the judiciary has faced in interpreting the review grounds and applying the justifiability test. The application of the justifiability test in CCMA arbitration review can only be beneficial. If applied correctly, the test does not transcend the dividing line between appeals and reviews. Rather, it serves a vital function in controlling the immense public power exercised by CCMA arbitrators – despite such power not amounting to administrative action in the sense protected by the Constitution. In fact, the rule of law and the doctrine of legality inherent in our constitutional order require that the decisions of CCMA arbitrators be rational, as do the founding constitutional values of a democratic society based on accountability, responsiveness and openness.

Various other policy factors also call for justifiability in CCMA arbitration awards. These are the pursuit of justice, the compulsory nature of most CCMA arbitration proceedings, the finality of CCMA awards, the supervisory role played by the Labour Court in relation to the CCMA and sound labour relations.

While the requirement of justifiability in CCMA awards seems to sit well with the judiciary in principle, courts have anguished over how to legitimately include such rationality into labour law as it stands. Perhaps one of the greatest problems has been that justifiability was accepted as a requirement of CCMA awards without the

correct legal foundation. Had the reasoning of *Carephone* been correct,[730] the *ratio decidendi* of the case would not have been questioned and courts would have included the justifiability test under the review ground that a commissioner has exceeded his or her powers. While justifiability is not a separate ground of review or a general standard of review, it is not necessary to limit justifiability to s145(2)(a)(iii) of the LRA.

The starting point of the review of a CCMA award is always s145(2) of the LRA. Any alleged defective conduct must be envisioned by the Legislature in order for it to be set aside by the Courts on review. An award may lack substantive rationality where:

- Commissioners exceed the limits of their public power in CCMA arbitration proceedings; or where
- Commissioners commit misconduct in relation to their duty to decide a matter justifiably and logically, on the basis of the evidence; or where
- Commissioners make awards that are so flawed or unreasonable that one can infer that the parties did not receive a fair trial.

This is not a closed list. The interpretation of s145(2) to include justifiability is a matter of perception. There seems no good reason in principle or logic to confine the requirement of substantive rationality to one ground of review. It may be appropriate in a particular case to apply the rationality principle in terms of one ground of review, whilst in other cases to utilize a different review ground.

730 It seems ironic that a judgment concerning the tension between the justifiability and correctness of a decision has itself been held to be correct, but not justifiable.

CHAPTER FIVE

REVIEW OF PRIVATE ARBITRATION AWARDS

5.1 Introduction

The finality of an arbitrator's award is central to the effectiveness of private arbitration proceedings. The arbitral parties enter into the process voluntarily and the arbitrator is chosen by consent. Thus, courts will only enter into objections in relation to arbitration awards on limited grounds.

This chapter discusses the recourse available to parties aggrieved by arbitrators' awards. This analysis comprises a discussion of the rejection of appeals from arbitration awards, as well as a discussion of the two key means of abrogating private arbitration awards: the common law recourse whereby an award is declared null and void due to invalidity and the statutory grounds of review whereby the award is set aside. The interpretation and application of the narrow grounds of review are dealt with in full in an effort to unravel the legal disarray, which has, at times, led to the erroneous interpretation of the review provision.

5.2 Private Arbitration Awards

A private arbitration award must be in writing and all members of the arbitration tribunal must sign it.[731] The award must be delivered to the parties,[732] within the period prescribed in the arbitration agreement, or failing any specification as to time of the award, within four months.[733] These time limits may be extended by written agreement between the parties or by a court on good cause shown.[734]

Contrary to the position in a number of foreign jurisdictions,[735] there is no authority in South African law that requires arbitrators to give reasons for their

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731 Section 24(1) of the Arbitration Act 42 of 1965.
732 Section 24(1) and s25 of the Act.
733 Section 23(a) of the Act. Section 23(b) sets out a three-month time limit where an umpire makes an award.
734 Section 23 of the Act.
735 See Butler, D & Finsen, E Arbitration in South Africa at 269 footnote 89.

decisions.[736] However, it is custom and good practice for an arbitrator to do so.[737] Arbitrators are directed largely by the terms of reference set out in the arbitration agreement, and thus they must provide reasons for the decision if the arbitration agreement so directs.

While no particular form or content is required of an award, there are certain substantive requirements which awards must possess before a court will enforce it. These are that the award is certain, final, legal and capable of enforcement. Should any of these requirements be absent, the award is invalid and as such, unenforceable. Invalid awards will be discussed below.[738]

Once the award is delivered to the parties, the dispute is *res iudicata* and parties may not embark on a fresh arbitration hearing or court hearing on the same issues.[739] Unless otherwise agreed, parties may not appeal the arbitral decision and the only recourse available to aggrieved parties is review on the limited grounds set out in the Arbitration Act.[740] Thus, the effect of the award is to bring the dispute to an end and often to create or extinguish rights and obligations between the parties.

There are two courses of action available to a party who wishes to enforce an arbitration award. Firstly, a party may apply to court in terms of the common law to compel the party in default to abide by the contractual obligations of the arbitration agreement.[741] Secondly, where the award was made under the authority of the Arbitration Act, the successful party may apply to the High Court[742] or

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736 This is true of the Arbitration Act and of the common law: see *Schoch NO v Bhettay* 1974 (4) SA 860 (A) at 865D-E.

737 Butler, D & Finsen, E *op cit* at 271.

738 See 2.7.3 below.

739 Butler, D & Finsen, E *op cit* at 271

740 Section 28 and s33 of the Act.

741 *Benidai Trading Co Ltd v Gouws & Gouws (Pty) Ltd* 1977 (3) SA 1020 (T) at 1038H-1039C. Butler, D & Finsen, E *op cit* at 272.

742 Section 1 of the Arbitration Act defines "court" as any court of a provincial or local division of the Supreme Court of South Africa having jurisdiction.

Labour Court[743] with jurisdiction to have the award made an order of court and thus enforceable through execution proceedings.[744]

Generally, the court will not enter into the merits of the dispute and will merely adopt the award as its own decision unless an opposing party shows that the award is invalid or that there are satisfactory grounds to set aside the award, or to remit it to the arbitrator.[745] The right to claim enforcement of an award that has been made an order of court prescribes after thirty years.[746] Where the arbitration award has not been made an order of court, the right to enforce it prescribes after three years of publication of the award by the arbitrator, unless prescription is delayed or interrupted.[747]

5.3 Contesting an Arbitration Award

The parties generally agree that the arbitrator's award will be final and binding,[748] and in so doing, waive their right to recourse to the courts. The advantage of a binding award is "a speedier result, privacy and tailor-made or individualized justice".[749] If parties do not such expressly agree that the award is subject to appeal,

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743 Section 157(3) of the Labour Relations Act states that any reference to a court in the Arbitration Act must be interpreted as referring to the Labour Court where the private arbitration concerns any dispute that may be referred to arbitration in terms of the Labour Relations Act. Section 158(1)(c) of the Labour Relations Act grants the Labour Court the power to make an arbitration award an order of court.

744 Section 31(3) of the Arbitration Act; Uniform Rules of Court Rule 45.

745 Butler, D & Finsen, E *op cit* at 273.

746 Section 11(2)(a) of the Prescription Act 68 of 1969.

747 Section 11(d) of the Prescription Act; *Cape Town Municipality v Allie NO* 1981 (2) SA 1 (C) at 4H-5A; See Butler, D & Finsen, E *op cit* at 275.

748 The same consequence is achieved where parties agree that the terms of the Arbitration Act apply. In such cases, s28 of the Act states that the award will be final and binding and not subject to appeal. See Voet at 739 where it is stated that in Roman-Dutch law, the submission to arbitration often had a penalty attached for a party who breaches the agreement in failing to abide by the decision of the arbitrator. Such penalties are generally not imposed in South African law.

749 *ESKOM v Hiemstra* (1999) 20 *ILJ* 2362 (LC) at 2368E-F. Voet: *Digest* IV, 8, 1: Arbitration is resorted to due to the fear "of the too heavy expenses of lawsuits, the din of legal proceedings, their harassing labours and pernicious delays, and finally the burdensome and weary waiting on the uncertainty of the law". Approved in *Dutch Reformed Church v Town Council of Cape Town* 1898 CPD 14 at 20; Butler, D & Finsen, E *op cit* at 19-23.

no such appeal will be permitted.[750] However, the award may be challenged on three grounds.[751] Firstly, the award may be set aside under the common law for invalidity. Valid awards may be remitted to the arbitrator in certain circumstances or may be reviewed and set aside in terms of the limited grounds in the Arbitration Act.[752] Remittal is not directly relevant to this dissertation and thus will be dealt with briefly.

In certain circumstances, a private arbitration award may be remitted.[753] Remittal involves the referral of the award back to the arbitrator for reconsideration, either by agreement of the parties[754] or by a court.[755] The arbitrator then remedies the award by making a further or new award, or considers the award for any other purpose specified in writing by the parties.[756] Remittal of the award, either by the consent or by the court, is not an appropriate remedy in all cases.[757] The court will not award remittal unless the aggrieved party applies specifically for such relief on notice to the opposing party.[758]

5.3.1 The Rejection of Appeals

Private arbitration awards are generally final and binding.[759] Neither the High Court nor the Labour Court have inherent appeal jurisdiction of these awards.[760] However, disputant parties may agree that the award is open to appeal and must expressly state this intention in the arbitration agreement.[761] The absence of the right of appeal supports the important advantage of arbitration proceedings being a

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750 Section 28 of the Act.
751 Section 33 of the Act. See below for a detailed discussion of these grounds.
752 Section 33(1) of the Act.
753 Butler and Finsen state that the remedies of review and remittal have not always been seen as separate alternatives: see Butler, D & Finsen, E *op cit* at 285.
754 Section 32(1) of the Act.
755 Section 32(2) of the Act. Butler, D & Finsen, E *op cit* at 285.
756 Section 32(1) of the Act.
757 For example, parties who have been subjected to the bias or incompetence of an arbitrator should not be forced to have the same arbitrator reconsider the matter.
758 *Benjamin v SOBAC South African Building & Construction (Pty) Ltd* 1989 (4) SA 940 (C) at 959.
759 Section 28 of the Act.
760 Section 28 of the Act and s157(3) of the Labour Relations Act ("LRA").
761 Section 28 of the Act; *Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun (Pty) Ltd* (1993) 14 *ILJ* 1431 (A) at 1435H-I.

speedy form of dispute resolution. If courts had appeal jurisdiction, the finality of arbitration awards would be lost, as any losing party would appeal the decision.[762]

Appeals against private arbitration awards have been denied since Roman and Roman-Dutch times, where parties were obliged to stand by the award regardless of whether or not it was equitable.[763] Aggrieved parties did have the recourse of the "*mandament van reductie*",[764] or revision of an award, whereby the objecting party sent a witnessed protest to a judge or the opposing party stating that it rejected the decision of the arbitrator and claiming an amendment as would be approved by a man of good sense and judgment.[765] The *reductio* did not lie where the arbitration determination was granted in terms of a deed of submission that contained a clause for confession to judgment.[766] In such instances, the parties agreed unequivocally to be bound by the arbitrator's award and to make such award a rule of court.[767]

Reductio and appeal were generally not the same process. The similarities of these procedures lie firstly in the aggrieved party's demand for a rectification of the arbitrator's award, and secondly in the process to be followed in each form of recourse.[768] However, superior judges heard appeals.[769] Cases of revision, on the other hand, were heard by ordinary judges who would have had jurisdiction over the matter had the parties not submitted to arbitration.[770] These ordinary judges were empowered to correct any manifest unfairness of an arbitrator.[771] Some old authorities claim that revision is substantially the same as appeal, as these

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762 Cowling, MG "Finality in Arbitration" 1994 SALJ 306 at 306.
763 See Voet: *Code* II, 55(56),1; *Digest* IV 8,32,14; Van Leeuwen at 414; Huber at 96.
764 *Dutch Reformed Church v Town Council of Cape Town* 1898 CPD 14 at 21.
765 *Dutch Reformed Church v Town Council of Cape Town* 1898 CPD 14 at 21; See Voet: *Code* II, 55 (56), 5.
766 Juta, H *Van der Linden's the Institutes of Holland* at 310.
767 *Dutch Reformed Church v Town Council of Cape Town* 1898 CPD 14 at 21.
768 See Voet: *Digest* IV, 8, 32, 14; Huber at 97; Van der Linden at 311.
769 See Voet at 759.
770 See Voet: *Digest* IV, 8, 30; Van der Linden at 311 where it is stated that the practice was to apply to the High Court for a *writ of reductie*.
771 See Voet: *Digest* IV, 8, 30; Van der Linden at 311.

procedures have the same effect.[772] This debate is now superfluous, as the practice of revision is now regarded as obsolete and not part of South African law.[773]

5.3.2 Common law: Invalidity of Awards

The Arbitration Act serves to codify the common law. As such, the common law grounds of invalidity are generally subsumed under the grounds of review set out in the Arbitration Act. However, the common law remains important, as the Arbitration Act will not govern arbitration proceedings resulting from an oral submission.[774] If a disputant party is aggrieved by an award in these cases, the common law relating to invalidity of awards and that relating to ordinary principles of contractual obligations will apply. Whether an award is set aside on review, or whether it is declared invalid, the effect is the same. The award is unenforceable and is dealt with in terms of the prayers of the parties.

Invalid awards are unenforceable. Awards may be rendered invalid where they lack the substantive requirements of certainty, finality, enforceability and legality. The Arbitration Act does not provide for the invalidity of awards and thus one must look to the common law in order to determine the position in the law.[775]

Certainty of an award relates to whether the parties know what is expected of them in terms of the award.[776] Where the award is found to be ambiguous, a court of law will, on application by a party to the dispute, accord the award with an

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772 This was particularly as the initially limited permissibility of revision to cases of serious injustice was extended to all cases, as in appeals. It has also been argued that a revision is substantially the same as an appeal in that the matter is transferred from the private arbitrator to an inferior judge with public authority, which is in effect a superior judge: See Voet at 761; Van Leeuwen at 415; Huber at 96-7; *Dutch Reformed Church v Town Council of Cape Town supra* at 21, where the court stated that the *reductio* was but another name for an appeal.

773 This was primarily due to the influence of English law in the introduction of the principle of finality in arbitration awards. See Voet at 735; *Dutch Reformed Church v Town Council of Cape Town supra* at 21.

774 Preamble and s1 of the Act

775 *Kroon Meule CC v Wittstock t/a J D Distributors; Wittstock t/a J D Distributors v De Villiers & Another* 1999 (3) SA 866 (E) at 870.

776 Butler, D & Finsen, E *op cit* at 261-262;Van Jaarsveld, F and Van Eck, S Principles of Labour Law (2 ed) at 460.

interpretation that imparts certainty.[777] Should there be no interpretation of the award that will impart certainty, the award will be set aside as being invalid.

The arbitrator's award must be final. It must dispose of the matter by containing a definite decision.[778] Arbitrators are required to deal fully with the matters referred to them by the parties and to make determinations on each specific issue and no less.[779] It follows that a determination that is subject to the certification of another party is not an award at all.[780]

However, the mere fact that the arbitrator leaves a point undetermined does not, without more, render the award invalid. It is in the discretion of the court to determine whether the award is null and void for a lack of finality.[781] Where the award is not final and complete, a court may either enforce the portion of the award that is final,[782] or it may remit the award to the arbitrator in order for correction.[783]

Arbitrators may not give illegal awards. Awards will be set aside for invalidity where they are against public policy, or direct a party to commit a criminal offence.[784] This is in line with the general principles of justice. Disputant parties may not even confer the arbitral power to make awards that are illegal or contrary to public policy; any agreement that purports to do so is null and void.[785]

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777 *Wood v Griffith* (1818) All ER 294 (LC Ct), 36 ER 291 at 296; *Patcor Quarries CC v Issroff & Others* 1998 (4) BCLR 467 (SE) at 476.

778 See Voet: *Digest* IV, 8, 32, 16; Huber at 96; *Haffajee v Gordon and Sons (Pty) Ltd* 1928 GWLD 49 at 53-4; *De Jager v Colonial Government* 15 NLR 311 at 312.

779 See Voet: *Digest* IV, 8, 19,1; *Basson v Herman* 1904 TS 98 at 100; *Collins & Co v Brown* 1923 NLR 450; Butler, D & Finsen, E *op cit* at 262-263.

780 *Collins & Co v Brown supra* at 451-2.

781 *Basson v Herman* 1904 TS 98 at 100.

782 *Dutch Reformed Church v Town Council of Cape Town supra*; *Basson v Herman* 1904 TS 98 at 100.

783 Butler, D & Finsen, E *op cit* at 262-263; *Harlin Properties (Pty) Ltd v Rush & Tomkins (SA) (Pty) Ltd* 1963 (1) SA 187 (D) at 199; *Delport v Kopjes Irrigation Settlement Management Board* 1948 (1) SA 258 (O) at 269 and 271-2.

784 *ACTWUSA v Veldspun (Pty) Ltd supra* at 1440 -1443; *Bester v Easigas (Pty) Ltd & Another* 1993 (1) SA 30 (C) at 42.

785 *Veldspun (Pty) Ltd v Amalgamated Clothing and Textile Workers Union of South Africa* 1992 (3) SA 880 (E) at 898I-J.

Thus, where an arbitrator makes a mistake of law that leads to the award being *contra bonos mores* or illegal, the court will set it aside, regardless of whether the mistake was *bona fide* or otherwise.[786] The court in *Veldspun (Pty) Ltd v Amalgamated Clothing and Textile Workers Union of South Africa* concluded that an arbitrator that makes an illegal award commits misconduct in relation to his duties and the award may be set aside on review.[787]

Performance of the award must be possible, and thus it must be capable of enforcement.[788] The award is not capable of enforcement where the parties to the matter do not have the power to submit the matter to arbitration,[789] where they are prohibited from submitting the matter or where the matter is ill suited to arbitration.

Under the colonial legislation, an award was considered invalid where an arbitrator had exceeded the powers conferred in terms of the deed of submission.[790] Arbitrators could not exceed the limits of the matter referred to them by the parties, as, should the determination have exceeded the matter submitted, the award would not be enforced.[791] While the principles enunciated by the colonial courts still apply, the 1965 Arbitration Act now includes the *ultra vires* acts of an arbitrator as a ground of review. This will be discussed below under the statutory grounds of review.

5.3.3 Statutory Review of Awards

The final and binding nature of an arbitration award is central to the private arbitration process. Courts are reluctant to interfere with private arbitration

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786 Butler, D & Finsen, E *op cit* at 294.

787 *Veldspun (Pty) Ltd v Amalgamated Clothing and Textile Workers Union of South Africa* 1992 (3) SA 880 (E) at 898J-899A.

788 Butler, D & Finsen, E *op cit* at 263.

789 Huber at 96; *Cape Town Town Council v Pinn* 1906 SC 213; *Kimberley Town Council v London & South Africa Exploration Co* Buch. AC 385 at 404-405.

790 *Dickenson & Brown v Fisher's Executors* 1915 AD 166 at 175; *McKenzie NO v Basha* 1951 (3) SA 783 (N) at 786.

791 See Voet: *Digest* IV, 8, 21, 7; *Digest* IV, 8, 26; *Digest* X, 3, 18.

awards, as this is a voluntary procedure that is generally not subject to appeal.[792] These awards will only be set aside on the limited grounds of review set out in the Arbitration Act, as parties forsake their right of recourse to the traditional court system by referring the matter to arbitration. Limited grounds of review are provided in s33(1) of the Arbitration Act as follows:

> "**33. Setting aside of award**
>
> (1) Where -
>
> (a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or
>
> (b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or
>
> (c) an award has been improperly obtained,
>
> the court may, on application of any party to the reference after due notice to the other party or parties, make an order setting aside the award."

This review provision is substantially similar in wording to the provincial statutes that previously governed arbitration proceedings.[793] However, there are two notable differences in the application of the grounds of review. Firstly, the review grounds in the provincial Acts were limited strictly to cases where the arbitrator or umpire had misconducted himself or an arbitration, and where the award had been improperly obtained.[794] These grounds are similar to the grounds of the 1965 Arbitration Act, barring the reference in the new Act to arbitrators exceeding their powers.[795] Under the colonial legislation, circumstances where arbitrators exceeded

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792 *Dickenson & Brown v Fisher's Executors supra* at 174; *Clark v African Guarantee & Indemnity Co Ltd* 1915 CPD 68 at 77; *Amalgamated Clothing & Textile Workers Union of SA v Veldspun (Pty) Ltd* (1993) 14 *ILJ* 1431 (A) at 1435.

793 *Hyperchemicals International (Pty) Ltd & Another v Maybaker Agrichem (Pty) Ltd & Another* 1992 (1) SA 89 (W) at 99. See also *Bester v Easigas (Pty) Ltd and Another supra* at 36 where the Court stated that this can be implied by the unrestricted application by the post-colonial courts of the case *Dickenson & Brown v Fisher's Executors supra.*

794 See s18 of the Natal Act 24 of 1898; s17(2) of Act 29 of 1898; s16(2) of Ordinance 24 of 1904.These grounds were considered exhaustive: See *Dickenson & Brown v Fisher's Executors supra* at 175.

795 *Hyperchemicals International (Pty) Ltd & Another v Maybaker Agrichem (Pty) Ltd & Another supra* at 97.

their powers were considered to result in invalid awards and were subsequently null and void. Thus, recourse still existed for aggrieved parties.[796]

The second point to note concerns the ground of misconduct under the colonial legislation. Misconduct in terms of these statutes included instances where the arbitrator misconducted *himself* or the *arbitration proceedings*. The former related to misconduct as it is construed under the current Arbitration Act, while the latter pertained to the modern review ground of gross irregularity in proceedings. This variation of s33(1)(a) of the Arbitration Act was based on the review ground of misconduct in terms of the English Arbitration Act,[797] and has caused much anguish regarding the scope of misconduct as a ground for setting aside the award of an arbitrator. This issue will be discussed in full below.

5.3.3.1 Procedure for setting aside an award

A court[798] may set aside an arbitrator's award on application by any party to the arbitration and after due notice has been given to the other parties involved in the dispute.[799] Such application must be made within six weeks of the publication of the award to the parties.[800] Where the application relates to corruption of the arbitrator, it must be made within six weeks of the discovery of the corruption and no later than three years from the date of publication of the award.[801] Where an award is set aside, the parties remain bound by the arbitration agreement,[802] and

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796 *Dickenson & Brown v Fisher's Executors supra.*

797 Section 23(1) of the English Arbitration Act of 1950, as introduced by s15 of the Arbitration Act of 1934. See *Johan Louw Konstruksie (Edms) Bpk v Mitchell NO & Another* 2002 (3) SA 143 (C) at 180.

798 The High Courts and the Labour Court have jurisdiction to review private arbitration awards: s1 of the Act and s157(3) of the LRA.

799 Section 33(1) of the Act.

800 Section 33(2) of the Act.

801 Section 33(2) of the Act.

802 Butler, D & Finsen, E *op cit* at 285.

thus a court must,[803] on request of any party to the dispute, submit the matter to a new arbitration tribunal, as elected by the court.[804]

5.3.3.2 Statutory Grounds of Review

There is considerable overlap between the instances that justify review under each sub-section of s33(1) of the Act. For example, where the arbitrator accepts a bribe to rule in a particular party's favour, the award has been improperly obtained and the arbitrator has misconducted him- or herself.[805] This overlap has no real bearing on the interpretation of the grounds of review.[806]

5.3.3.2.1 Section 33(1)(a): Misconduct of the Arbitrator

An award may be set aside where any member of the arbitration tribunal has misconducted him- or herself in relation to his or her duties as arbitrator.[807] Aggrieved parties have often attempted to rely on this ground in the review of private arbitration awards.

'Misconduct' was authoritatively described in *Dickenson & Brown v Fisher's Executors*, as some wrongful or improper conduct on the part of the arbitrator.[808] It involves some form of dishonesty, *mala fides* or partiality of the arbitrator.[809] This is personal or actual misconduct requires that arbitrators act according to

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803 In *Benjamin v Sobac South African Building and Construction (Pty) Ltd supra* at 961J-962A, the court stated that this is not a discretionary power and that the court must grant this request.

804 Section 33(4) of the Act.

805 Butler, D & Finsen, E *op cit* at 291.

806 *Bester v Easigas (Pty) Ltd & Another supra* at 38.

807 Section 33(1)(a) of the Act.

808 *Dickenson & Brown v Fisher's Executors supra* at 176, confirmed in *Donner v Ehrlich* 1928 WLD159 at 161. Note that *Dickenson's* case interpretation was given in relation to s18 of the Natal Arbitration Act 24 of 1898, which stated that review is permitted where the arbitrator misconducts himself However, this provision is substantially similar to its equivalent in the 1965 Arbitration Act.

809 *Donner v Ehrlich supra* at 161. See also *Bester v Easigas (Pty) Ltd & Another supra* at 38; *Naidoo v Estate Mahomed & Others* 1950 NPD 915 at 920; *ACTWUSA v Veldspun (Pty) Ltd supra* at 1435F-G.

their quasi-judicial position,[810] and that they perform their duties in a judicial manner,[811] with the judicial capacity required of an ordinary fair-minded layperson appointed as adjudicator.[812] This is not to say that they should observe the "precision and forms of a court of law, but they must proceed in such a manner as to insure a fair administration of justice between the parties".[813]

An award will not be set aside on the basis of misconduct if it is excessive, unless there is evidence of partial, unfair or irregular conduct of the arbitrator.[814] Where a nominated arbitrator is influenced by personal knowledge of the dispute, this in itself is not sufficient justification for setting aside the award, as the freedom of contract is paramount.[815] Arbitrators may misconduct themselves where they examine witnesses in the absence of the parties to the dispute,[816] unless the parties consent to a witness giving evidence in their absence, prior to the evidence being given.[817] Further, arbitrators who receive additional evidence will only escape review for misconduct where they notify the parties of such fact and allow them an opportunity to rebut or concede the additional evidence.[818]

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810 *Naidoo v Estate Mahomed & Others supra* at 919.

811 *Clark v African Guarantee & Indemnity Co Ltd supra* at 77; *Steeledale Cladding (Pty) Ltd v Parsons NO & Another* 2001 (2) SA 663 at 669; *Field v Grahamstown Municipality* 1928 135 at 142; *Fino v SA Railways & Harbours* 1927 NPD 369 at 373.

812 *Clark v African Guarantee & Indemnity Co Ltd supra* at 78, confirmed in *McKenzie NO v Basha supra* at 786.

813 *Clark v African Guarantee & Indemnity Co Ltd supra* at 77; *Lazarus v Goldberg & Another* 1920 CPD 154 at 157, cited in *Steeledale Cladding (Pty) Ltd v Parsons NO & Another supra* at 669. In *Benjamin v SOBAC South African Building & Construction supra* at 971 the Court stated that an objective test was applied under provincial legislation to determine whether the conduct of the proceedings was likely to result in a miscarriage of justice. While the authority of this statement has been questioned *(Bester v Easigas (Pty) Ltd & Another supra* at 36), it accords substantially with the accepted principle concerning the fair administration of justice.

814 *Tedder & Another v Greig & Another* 1912 AD 73 at 91.

815 *Marlin v Durban Turf Club* 1942 AD 112 at 130-132. The Court stated that an arbitrator whose state of mind is influenced by his own observations of the incident is not disqualified from acting as an arbitrator if the parties have chosen the arbitrator by agreement.

816 *Lazarus v Goldberg supra*; *Shippel v Morkel* 1977 (1) SA 429 (C) at 434; *Gafoor v Mahomed* 1926 WLD 188.

817 *Landeshut v Koenig* (1903) SC 33 at 34.

818 *Landmark Construction (Pvt) Ltd v Tselentis* 1972 (1) SA 435 (R).

5.3.3.2.2 Personal Misconduct v Legal Misconduct

In the English law of arbitration, the term "misconduct" includes both personal and legal misconduct. Personal misconduct concerns transgressions in the sense described above. Legal misconduct relates to a failure to conduct the arbitration proceedings in terms of the legal obligations imposed on arbitrators,[819] and need not involve any moral turpitude.[820]

This distinction was an effort to avoid the implication resented by arbitrators that they are guilty of misconduct when they comply with arbitration agreement but make mistakes or draw incorrect inferences.[821] The English courts based this judicial intervention on the grounds that awards that are contrary to public policy ought not to be enforced by the executive.[822]

In South Africa, legal misconduct was not a permissible ground of review under the provincial arbitration legislation.[823] The courts have held that there is no reason to extend the interpretation of misconduct under the 1965 Arbitration Act.[824] The Legislature must have intended the review grounds to bear the meaning judicially attributed under the colonial legislation, as substantially similar terminology is utilized in the current Arbitration Act.[825]

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819 *Hyperchemicals International (Pty) Ltd & Another v Maybaker Agrichem (Pty) Ltd & Another supra* at 94.

820 *In re Hall and Hinds* (1841) 133 ER 987 at 989, cited in Cowling, MG "Finality in Arbitration" 1994 *SALJ* 306 at 307; Butler, D & Finsen, E *op cit* at 292. This description of legal misconduct echoes of the review ground allowing awards to be set aside where there is a gross irregularity in the arbitration proceedings (s33(1)(b) of the Act).

821 *Hyperchemicals International (Pty) Ltd & Another v Maybaker Agrichem (Pty) Ltd & Another supra* at 94; Cowling, MG "Finality in Arbitration" 1994 SALJ 306 at 307.

822 Cowling, MG "Finality in Arbitration" 1994 SALJ 306 at 307 and 313.

823 *Dickenson & Brown v Fisher's Executors supra*; *Donner v Ehrlich supra*; *Clark v African Guarantee & Indemnity Co Ltd supra*; *Syphus & Others v Schoeman* 1923 CPD 113; *McKenzie NO v Basha supra.*

824 *Hyperchemicals International (Pty) Ltd & Another v Maybaker Agrichem (Pty) Ltd & Another supra* at 99.

825 *Ibid.*

The rejection of legal misconduct was confirmed in *Bester v Easigas (Pty) Ltd & Another*.[826] The Cape Provincial Division stated further that the *dictum* concerning legal misconduct in *Benjamin v SOBAC South African Building & Construction (Pty) Ltd*[827] should not be followed to the extent that it advocates a wide interpretation of the term 'misconduct'.[828]

In the rejected passage in *Benjamin's*[829] case, Selikowitz J interpreted *Dickenson & Brown v Fisher's Executors*[830] as dealing with personal misconduct. This interpretation was based on the express distinction in the Natal Act[831] between misconduct in relation to an arbitrator and that in relation to the arbitration proceedings. Misconduct of the proceedings, he stated, is determined objectively to ascertain whether the conduct of the proceedings was likely to result in a miscarriage of justice, and need not involve personal turpitude.

The decision in *Naidoo v Estate Mahomed & Others*[832] supports the latter assertion. De Wet J averred that where the arbitrator offends the fundamental principles of justice, the award may be set aside on the basis of improper conduct in relation to the arbitration proceedings, even though it may not necessarily amount to dishonesty.[833] However, the learned judge expressly stated that such conduct does not extend the meaning of 'misconduct'.[834]

The *dicta* of Selikowitz J and De Wet J need not be discarded in entirety. Instances of legal misconduct that do not involve dishonesty on the part of the arbitrator may

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826 *Bester v Easigas (Pty) Ltd & Another supra* at 37, confirmed in *Johan Louw Konstruksie (Edms) Bpk v Mitchell NO & Another supra* at 180.
827 *Benjamin v SOBAC South African Building & Construction (Pty) Ltd supra* at 971B-D.
828 *Bester v Easigas (Pty) Ltd & Another supra* at 36.
829 *Benjamin v SOBAC South African Building & Construction (Pty) Ltd supra* at 971B-D.
830 *Dickenson & Brown v Fisher's Executors supra.*
831 Act 24 of 1898.
832 *Naidoo v Estate Mahomed & Others supra.*
833 *Naidoo v Estate Mahomed & Others supra* at 920.
834 *ibid.*

yet be grounds for setting aside a private arbitration award on the basis that there is a gross irregularity in the conduct of the proceedings.[835]

The English law justification for the import of legal misconduct may apply equally in the South African context.[836] The executive enforces arbitration awards.[837] The judiciary is the custodian of legal issues and must protect the executive from abuse that may occur if the executive is required to enforce legally incorrect awards. In contrast to this argument, finality goes to the root of arbitration proceedings, as the primary advantage is expeditious resolution of disputes.[838] As such, the right of appeal is sacrificed and courts will not interfere with the award on grounds of mistake, whether *bona fide* or otherwise.

This debate highlights the tension between justice and the advantage of finality in arbitration awards. Nonetheless, the South African interpretation of "misconduct" under the 1965 Arbitration Act does not include legal misconduct.[839]

5.3.3.2.1.2 Mistakes of Fact and Law

The incorporation of legal misconduct in English law resulted in the judicial power to review arbitration awards where the award is incorrect due to a *bona fide* mistake of fact or law appearing on the face of the award.[840] This principle was rejected in South African law as a consequence of the rejection of the concept of

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835 Section 33(1)(b) of the Act. This can also be implied from the exposition concerning misconduct in *Steeledale Cladding (Pty) Ltd v Parsons NO & Another supra* at 668-9 where the Court cites cases enunciating both the *bona fide* mistake principle requiring dishonesty and that of procedural misconduct which does not require *mala fides*. The Court clearly does not comment on the disparity, and in fact states that *Benjamin's* case supports *Dickenson & Brown v Fisher's Executors supra*. Butler, D & Finsen, E *op cit* at 292.

836 Cowling, MG "Finality in Arbitration" 1994 SALJ 306 at 310.

837 Section 31(3) of the Act.

838 *Hyperchemicals International (Pty) Ltd & Another v Maybaker Agrichem (Pty) Ltd & Another supra* at 100; *Bester v Easigas (Pty) Ltd & Another supra* at 38.

839 *Johan Louw Konstruksie (Edms) Bpk v Mitchell NO & Another supra* at 180; *Hyperchemicals International (Pty) Ltd & Another v Maybaker Agrichem (Pty) Ltd & Another supra* at 100; *Bester v Easigas (Pty) Ltd & Another supra* at 36; Cowling, M "Finality in Arbitration" 1994 *SALJ* 304 at 311.

840 *Dickenson & Brown v Fisher's Executors supra* at 180.

legal misconduct.[841] *Bona fide* errors will not amount to misconduct provided the arbitrators give fair consideration to the matter submitted.[842] Courts will not readily interfere with awards marred by mistake as the parties have sacrificed the right of appeal in order to obtain a final and binding award.[843] The parties appoint the arbitrator themselves, knowing that no assumption exists that an arbitrator knows and applies South African legal principles.[844]

However, where a mistake is so gross or manifest that it could not have been made without some degree of misconduct or partiality, it may be evidence of the misconduct – regardless of whether or not it appears on the face of the award.[845] In these cases, the award is set aside on grounds of misconduct and not on the grounds of mistake.[846] Thus, a mistake on an immaterial point is not reviewable.[847] Further, where a gross error can be explained in terms other than misconduct or corruption, the court will not set aside the award, and instead will attribute the alternate explanation to the error.[848]

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841 *Dickenson & Brown v Fisher's Executors supra* at 176, approved in *Donner v Ehrlich supra* at 161 and in *ACTWUSA v Veldspun (Pty) Ltd supra* at 1435E-F.

842 *Dickenson & Brown v Fisher's Executors supra* at 176. An exception to the general rule that a *bona fide* mistake will not render an arbitration award open to review is where an arbitrator applies the principles concerning awards of costs incorrectly (*Kathrada v Arbitration Tribunal* 1975 (2) SA 673 (A) at 678E; *Harlin Properties (Pty) Ltd v Rush & Tomkins (SA) (Pty) Ltd supra* at 198A-B). An arbitrator is bound to exercise his discretion as to costs judicially and within the bounds of the accepted legal principles regarding costs (*Joubert t/a Wilcon v Beacham & Another* 1996 (1) SA 500 (C); Butler, D & Finsen, E *op cit* at 276-285).

843 *Syphus & Others v Schoeman supra* at 116; *RPM Construction (Pty) Ltd v Robinson & Another* 1979 (3) SA 632 at 636.

844 *RPM Construction (Pty) Ltd v Robinson & Another supra* at 635.

845 *Dickenson & Brown v Fisher's Executors supra* at 176; *Bester v Easigas (Pty) Ltd & Another supra* at 38; *ACTWUSA v Veldspun (Pty) Ltd supra* at 1435E-F.

846 *Dickenson & Brown v Fisher's Executors supra* at 176.

847 *Landeshut v Koenig supra* at 34, approved in *Dickenson & Brown v Fisher's Executors supra* at 176. The fact that the Court in *Landeshut* rationalizes this point with reference to a mistake apparent on the face of the award does not detract from the South African condemnation of this aspect of English law.

848 *MM Fernandes (Pty) Ltd v Mahomed* 1986 (4) SA 383 (W) at 389D-E; *Allied Mineral Development Corporation (Pty) Ltd v Gemsbok Vlei Kwartsiet (Edms) Bpk* 1968 (1) SA 7 (C) at 17.

It follows that an award will not be reviewed on the sole basis that there is no evidence to support the decision.[849] The absence of evidence must be of such gross impropriety as to justify review on the grounds of misconduct.[850] In other words, the lack of evidence must establish a total want of the judicial capacity required of an ordinary fair-minded layperson appointed to adjudicate a dispute.[851] Thus, where an arbitrator hears evidence and considers it fairly, the Court will refuse to interfere on the basis that the arbitrator drew inferences from the evidence that, although possible, are incorrect in the opinion of the court.[852] This upholds the traditional distinction between appeals and reviews.

In *McKenzie v Basha*,[853] the court discussed the test to determine misconduct in an ordinary arbitrator's award where there is an allegation that no evidence exists to support the arbitral decision. The test was considered threefold: The applicant must prove that there was in fact no evidence to support the decision, that no reasonable person could properly have come to that decision and that the lack of evidence is so glaring that misconduct ought to be inferred as a result.[854] This test is stringent, particularly as the courts will not lightly infer the dereliction of duty and untruthfulness of a responsible body.[855]

The Court did, however, note that the rationale for the application of a stringent test was in line with the reluctance of the judiciary to interfere in the awards of arbitrators.[856] The Court held that the arbitrator had in fact acted in an exemplary

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849 *McKenzie NO v Basha supra* at 786, cited in *Johan Louw Konstruksie (Edms) Bpk v Mitchell NO & Another supra* at 182; *Dutch Reformed Church v Town Council of Cape Town supra* at 23; *Clark v African Guarantee & Indemnity Co Ltd supra* at 78. Note that in *Johan Louw's* case, the Court stated that an award that is not supported by the evidence constitutes a mistake of fact and thus, if *bona fide*, would only justify review if it were so gross or manifest as to infer misconduct in terms of the principles above.

850 *Middleton v The Water Chute Co* 1922 CPD 155.

851 *Clark v African Guarantee & Indemnity Co Ltd supra* at 78.

852 *Clark v African Guarantee & Indemnity Co Ltd supra* at 79.

853 *McKenzie NO v Basha supra* at 786.

854 For a clear application of this approach, see *Bester v Easigas (Pty) Ltd & Another supra*.

855 *Bester v Easigas (Pty) Ltd & Another supra* at 38: The "responsible body", the arbitrator, in this case was an attorney of the Cape Provincial Division and a member of the arbitration body, IMSSA.

856 *McKenzie NO v Basha supra* at 786.

fashion and that there was no evidence of dishonesty or ulterior motives.[857] It stated further that any error of law or fact that may have existed in the award was reasonable and made in good faith, and as a result, the arbitrator was not guilty of misconduct.

Bona fide mistakes have also been found to include situations where the arbitration award indicates that the arbitrator ignored uncontroverted evidence in reaching the final decision.[858] However, in light of the principles set out above, an incorrect decision on the competency of a witness or the admissibility and relevancy of evidence will not in itself render the award tainted by misconduct.[859]

5.3.3.2.2 Section 33(1)(b): Gross irregularities in proceedings

In contrast to review for misconduct, considerably fewer cases are brought on review for gross irregularities in the conduct of the proceedings. The courts will be guided by the procedural powers conferred on the arbitrator in terms of the Act and in terms of the arbitration agreement.[860]

Gross irregularities relate to the *conduct* of the proceedings and not the *result* thereof.[861] This ground refers to a mistaken action that prevents an aggrieved party from having his or her case fully and fairly determined, and not to an incorrect judgment or the result of the proceedings.[862] Objections to awards will not be upheld if they merely amount to contentions that the arbitral decision is erroneous.

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857 *Johan Louw Konstruksie (Edms) Bpk v Mitchell NO & Another supra* at 183-184.

858 *Patcor Quarries CC v Issroff & Others supra* at 475. The Court found that the arbitrator had not ignored uncontroverted evidence but rather had rejected the admissibility of the evidence as a statement of opinion by the witness. Unfortunately, while the principles concerning *bona fide* mistakes were once again confirmed, the lack of application of these principles restricts the usefulness of this case.

859 *Scholtz v Mostert* 1926 CPD 406 at 409.

860 *Kroon Meule CC v Wittstock t/a J D Distributors; Wittstock t/a J D Distributors v De Villiers and Another supra* at 875; *Anshell v Horwitz & Another* 1916 TPD 65 at 67. For example, courts will not interfere in an arbitrator's order refusing to compel a party to the dispute to discover documents if this power has not been conferred in the arbitration agreement.

861 *Bester v Easigas supra* at 42; *Mia v DJL Properties* 2000 (4) SA 220 (T) at 230.

862 *Ellis v Morgan; Ellis v Dessai* 1909 TS 576 at 581; *R v Zackey* 1945 AD 505 at 509.

Such objections concern the result of the proceedings, rather than the method utilized.[863]

Gross irregularities must be determined as an objective fact.[864] The procedural irregularity must be of such a serious nature that it in fact results in the aggrieved party not having had its case fully and fairly determined.[865] The arbitrator controls the proceedings, and thus a Court cannot interfere with the rulings made unless "his conduct of the proceedings is grossly irregular or contrary to natural justice".[866] Proof of dishonesty or *mala fides* on the part of the arbitrator is not necessary where a party is denied a fair and complete hearing.[867] The requirement that the irregularity is sufficiently serious to warrant review limits the courts' power to intervene and upholds the notion of finality in arbitration awards.[868]

The courts have had little difficulty in applying these principles and in light of the notions underlying arbitration, have maintained a respectful restraint in interfering with the manner in which arbitrators conduct arbitration proceedings.

Arbitrators commit a gross irregularity where they hear evidence or accept documentary evidence in the absence of one or both parties.[869] However, where a party to the dispute absents itself from the arbitration hearing and the arbitrator thereafter hears the evidence of the other party, this alone is not sufficient reason to set aside an award despite the risks attached to hearing evidence in this manner.[870]

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863 *Bester v Easigas supra* at 43.

864 *Steeledale Cladding (Pty) Ltd v Parsons NO & Another supra* at 670-673.

865 *Bester v Easigas supra* at 43-44; *Ellis v Morgan; Ellis v Dessai supra* at 581; *Mia v DJL Properties supra* at 230. In regard to the nature of procedural irregularities that give rise to general review proceedings, see *Coetser v Henning & Ente NO* 1926 TPD 401 at 404; *S v Moodie* 1961 (4) SA 752 (A).

866 *Anshell v Horwitz & Another supra* at 67.

867 *Naidoo v Estate Mahomed & Others supra* at 920; *Benjamin v Sobac South African Building & Construction supra* at 971. Note the comments made above at 2.7.4.2.1.

868 Cowling, MG "Finality in Arbitration" 1994 SALJ 306 at 314-315.

869 *Field v Grahamstown Municipality supra* at 144-145; *Naidoo v Estate Mahomed & Others supra* at 920; *Sapiero v Lipschitz* 1920 CPD 483 at 486.

870 *Transport & General Workers Union & Others v Hiemstra NO & Another* (1998) 19 *ILJ* 1598 (LC) at 1609: In this case, gross irregularity was alleged *inter alia* in the form of bias.

Injustice may result where parties are not permitted to make representations on material issues. This is contrary to the principles of natural justice and the result is that the proceedings are not conducted in a manner that ensures the fair administration of justice between parties.[871] This will be the case despite any *bona fide* misunderstanding concerning the consent of the parties to do so.[872] This principle is taken further as a refusal to hear evidence concerning events occurring subsequent to the offence for which the employee had allegedly been unfairly dismissed is a reviewable irregularity. [873]

It should be noted that a review application might fail if a party accepts the procedural irregularity at the hearing.[874] Such consent may occur where the irregularities are not objected to and the aggrieved party accepts the award and pays the arbitrator's fees.[875] Furthermore, a party may be held to have waived the right to review on the basis of procedural irregularity where the party did object to the irregularity, but remains at the hearing and after the close of the proceedings, made enquiries as to when an award can be expected.[876]

5.3.3.2.3 Section 33(1)(b): *Ultra vires* acts

In addition to gross procedural irregularity, s33(1)(b) of the Arbitration Act provides that an award may be set aside on the basis that the arbitration tribunal has exceeded its powers. Where parties disagree on the extent of the authority conferred on the arbitrator, the reviewing court, and not the arbitrator, makes the final decision on the issue.[877]

The court stated that by stating that the hearing was held *in camera*, it meant that the record of proceedings kept by the arbitrator did not reflect the identity of the witnesses.

871 *Kannenberg v Gird* 1966 (4) SA 173 (C) at 187.

872 *Field v Grahamstown Municipality supra* at 144.

873 *Manaka & Others v Air Chefs (Pty) Ltd* (1999) 20 *ILJ* 388 (LC) at 391.

874 *Shippel v Morkel supra* at 436; *Naidoo v Estate Mahomed & Others supra* at 918.

875 *Chabaud & Son v Mackie, Dunn & Co* (1876) 6 Buch 190.

876 *Naidoo v Estate Mahomed & Others supra* at 918-919.

877 *Harlin Properties Ltd v Rush & Tomkins (SA) Ltd supra* at 193; *Attorney-General for Manitoba v Kelly* 1922 AC 268 at 276.

The starting-point of an enquiry into whether arbitrators exceed their powers lies in determining the scope of the powers conferred in the arbitral submission.[878] Arbitrators derive their jurisdiction and powers from the referral to arbitration.[879] The referral is a written contract and as such, must be construed in terms of the usual principles applicable to the interpretation of contracts.[880] Extrinsic evidence may only be led where the true meaning of the contract cannot be ascertained with sufficient certainty.[881] However, surrounding circumstances of the case may be taken into account.[882] The Arbitration Act applies to the proceedings where the referral is silent on an issue.[883] Once the scope of the arbitrator's powers is delineated, the Court will continue to determine whether the award falls within these powers or within the terms of reference.[884]

In both English law and South African law, arbitrators are under a duty to decide all matters submitted in the referral to arbitration.[885] Arbitrators are said to exceed their powers where they fail to decide each and every matter submitted by the parties,[886] where they make awards that extend to matters not submitted by the parties,[887] or where the awards given are not in terms of the submission.[888] In

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878 *Harlin Properties Ltd v Rush & Tomkins (SA) Ltd supra* at 193.

879 *Harlin Properties Ltd v Rush & Tomkins (SA) Ltd supra* at 192; *Clark v African Guarantee & Indemnity Co Ltd supra* at 75-77. In *Clark's* case, the dispute was referred to arbitration in terms of clause 19 of an insurance contract signed by the parties, where after the parties also signed a deed of submission. The Court held that the arbitrator's jurisdiction arose from the arbitration agreement itself. While the insurance policy gave rise to the submission to arbitration, it did not constitute the submission itself - particularly as the dispute could be referred to arbitration without the existence of a contractual arbitration clause.

880 The approach to determine the common intention of the parties consists of an analysis of the ordinary, grammatical meaning of the words, having regard to the context and background circumstances of the matter. Should the contract still seem ambiguous, extrinsic evidence may then be employed: See *Coopers & Lybrand v Bryant* 1995 (3) SA 761 (A) at 767E-768E.

881 *Harlin Properties Ltd v Rush & Tomkins (SA) Ltd supra* at 193.

882 See *ACTWUSA v Veldspun (Pty) Ltd supra* at 1436 - 1438, where the Appellate Division took relevant South African and foreign literature, as well as the parties' negotiations on the submission to arbitration, into account in determining the meaning of the phrase 'closed shop agreement'.

883 See for example, s14 of the Arbitration Act.

884 *Harlin Properties Ltd v Rush & Tomkins (SA) Ltd supra* at 193.

885 *Harlin Properties Ltd v Rush & Tomkins (SA) Ltd supra* at 196.

886 *Ibid.*

887 *McKenzie NO v Basha supra* at 786; *ACTWUSA v Veldspun (Pty) Ltd supra* at 1435D-E.

order to remain within the limits of the referral to arbitration, an arbitrator must appreciate and properly conceive such referral.[889] Arbitrators exceed their powers where they misconstrue the terms of reference, because in relying on this misinterpretation, arbitrators do not decide the actual question submitted by the parties.[890]

Where an award is defective in terms of this review ground, it may be set aside to the extent that the arbitrator has exceeded the powers conferred or in its entirety, depending on the nature and extent of the *ultra vires* action.[891] An award may also be open to review where a party does not in fact have *locus standi* at the time of the arbitration.[892]

Difficulties arise where an arbitrator adjudicates the validity of the referral. Illegality of the contract or submission that gives rise to the arbitration renders the referral void, and the arbitrator devoid of jurisdiction – unless the arbitrator's jurisdiction is based in part on another document.[893] However, arbitrators may adjudicate the validity of the actual document that refers the matter to arbitration (and thus gives them authority to act), if the parties expressly put this in issue.[894] This is because the issue falls squarely within the arbitrator's terms of reference. However, where the arbitration referral does not extend the dispute jurisdiction of the arbitrator in this manner, the arbitrator will not have jurisdiction to act and the award may be set aside on review.

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888 *McKenzie NO v Basha supra* at 786; *Dickenson & Brown v Fisher's Executors supra* at 175.

889 For an application of this principle, see *Orange Toyota (Kimberley) v Van der Walt & Others* (2000) 21 *ILJ* 2294 (LC) at 2300.

890 *McKenzie NO v Basha supra* at 787; *ACTWUSA v Veldspun (Pty) Ltd supra* at 1436.

891 *Kroon Meule CC v Wittstock t/a J D Distributors; Wittstock t/a J D Distributors v De Villiers and Another supra* at 871: Note that when making the order in terms of the Arbitration Act of 1965, Erasmus J discussed the issue of the arbitrator exceeding his powers as a ground of invalidity, rather than as a ground of review. I submit, with respect, that while he erred in this classification, his sentiments concerning the exceeding of powers by an arbitrator hold true.

892 *Patcor Quarries CC v Issroff & Others supra* at 476-478.

893 *Allied Mineral Development Corporation (Pty) Ltd v Gemsbok Vlei Kwartsiet (Edms) Bpk supra* at 15.

894 *Allied Mineral Development Corporation (Pty) Ltd v Gemsbok Vlei Kwartsiet (Edms) Bpk supra* at 14-15.

5.3.3.2.4 Section 33(1)(c): Award improperly obtained

An award may be improperly obtained through the actions of the arbitrator, a party to the dispute, a witness involved in the arbitration, or any combination of these participants.[895] This ground of review overlaps significantly with s33(1)(a) of the Arbitration Act, in the sense that misconduct of the arbitrator may cause the award to be obtained improperly.[896] However, dishonest or blameworthy conduct of the arbitrator will not always cause an award to be improperly procured.[897] Generally, an award tainted by improper conduct of the arbitrator will be reviewed in terms of s33(1)(a), while improper conduct of a disputant party will result in the award being set aside under s33(1)(c).[898]

Arbitrators are entrusted with the duty to act impartially, without personal interest and to see that justice is done equally to all parties.[899] Arbitrators clearly cannot act in this manner where they accept bribes, either from one of the parties to the dispute or from a third party wholly unconnected with the arbitration.[900] The applicant must show that the arbitrator acted in a manner that gave rise to a reasonable suspicion of bias in the mind of the individual applicant.[901] This requires a factual enquiry into whether or not the arbitrator's conduct vitiated the proceedings.[902]

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895 The setting aside of awards motivated by ill intent in the form of corruption, bias or enmity was recognized in Roman-Dutch law: See Voet: *Digest* IV, 8, 31, *Code* II, 55 (56), 3; Huber at 96; *Cape Town Town Council v Pinn supra* at 219; *Kimberley Town Council v London and South Africa Exploration Co supra* at 404-405.

896 *Bester v Easigas (Pty) Ltd & Another supra* at 38.

897 *Ibid.*

898 *Bester v Easigas (Pty) Ltd & Another supra* at 38. See Butler, D & Finsen, E *op cit* at 294 fn 274, where they state that this unnecessarily restricts the meaning of an "improperly obtained" award. They acknowledge that the arbitrator may still commit misconduct in accepting the bribe whether or not the bribe influences the award. The award will be set aside as the confidence of the other party in the impartiality and fairness of the arbitrator is destroyed.

899 *Graaff-Reinet Municipality v Jansen* 1917 TPD 604 at 607.

900 *Graaff-Reinet Municipality v Jansen supra* at 610.

901 *TGWU & Others v Hiemstra NO & Another supra* at 1603.

902 *TGWU & Others v Hiemstra NO & Another supra* at 1605.

Yet another instance falling into this category of review is that of bias of the arbitrator. Where the aggrieved party has knowledge of the factor allegedly giving rise to the bias at the time of the conclusion of the referral, it is likely that the review will fail.[903] If the arbitrator is specifically named in the arbitration agreement, a party wishing to have the award set aside due to bias of the arbitrator must prove actual bias, or at least a probability of bias.[904] A suspicion of bias will not suffice, as is the case where the arbitrator is not named specifically.

An award may be reviewed where a witness gives deliberately false evidence and its falsity is unbeknown to the arbitrator. However, in addition to perjured evidence, the applicant must prove that the false statements of the witness were material and that they influenced the arbitrator's mind in coming to a decision.[905]

5.4 Conclusion

Private arbitration awards are similar to CCMA awards in that arbitrators reach final and binding conclusions that are subject only to limited grounds of review. The formulation of the review grounds in the Arbitration Act is strikingly similar to those applicable to CCMA arbitration awards in terms of the LRA. Section 33(1) of the Arbitration Act states that awards may be set aside if the arbitrator commits misconduct in relation to the arbitral duties, if the arbitrator exceeds the powers legally conferred, if a gross irregularity is committed in proceedings or if the award is obtained improperly. These review grounds have been interpreted narrowly by the courts in light of the consensual nature of this process. Barring certain exceptions, this interpretation is akin to the interpretation of the review grounds for CCMA awards.

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903 *Syphus & Others v Schoeman supra* at 115. In a family dispute concerning a deceased estate, the Court held that it was probable that the applicant was aware of the "distant" familial bond the arbitrator had to his opponents (the arbitrator was the cousin of the wife of one of the applicant's opponents, to whom she was married in community of property), and thus that the award could not be set aside on grounds of bias.

904 *Syphus & Others v Schoeman supra* at 115.

905 *Van Schalkwyk v Vlok* 1914 CPD 999 at 1000.

Unlike CCMA awards, private arbitration awards may also be set aside in terms of the common law on grounds of invalidity. While the Arbitration Act regulates most arbitration review, the common law remains important as it applies to private arbitration proceedings pursuant to oral submissions to arbitration.

CHAPTER SIX

THE APPLICATION OF THE *CAREPHONE TEST* TO PRIVATE ARBITRATION

6.1 Introduction

The Arbitration Act sets out limited grounds upon which a private arbitration award may be reviewed.[906] Traditionally, these grounds have been narrowly construed,[907] based on the need for a speedy and final award, and the parties' explicit or implicit acceptance to be finally bound by the arbitrator's decision.[908]

The Labour Appeal Court has rejected the application of *Carephone's* justifiability test to private arbitration review.[909] This is rather curious, as the authority for this proposition originates in a split judgment of the Court, where the majority merely stated that the justifiability test does not apply, without authority or reasoning. It goes on to apply the justifiability test to the review under s33 (1) of the Arbitration Act on the authorization of an implied term in the arbitration agreement.[910] The minority judgment of Van Dijkhorst AJA briefly stated various policy factors in favour and against the application of test. The learned judge then averred that expediency cannot override the narrow grounds set out in the Arbitration Act, and as a result, found that the justifiability test is not incorporated in s33(1) of the Arbitration Act.[911]

Some judges have found it fitting to rule in favour of the application of the justifiability test to private arbitration on the basis of policy considerations alone.[912]

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906 Act 42 of 1965.

907 *Amalgamated Clothing & Textile Workers Union of SA v Veldspun (Pty) Ltd* (1993) 14 *ILJ* 1431 (A) at 1435C.

908 *ACTWUSA v Veldspun (Pty) Ltd supra* at 1435H-J.

909 *Stocks Civil Engineering (Pty) Ltd v Rip NO & Another* (2002) 23 *ILJ* 358 (LAC) at 364F-H and 377J-378H, cited and applied in *Transwerk v IMSSA* (2002) 23 *ILJ* 2313 (LC) at 2322F-G.

910 *Stocks Civil Engineering (Pty) Ltd v Rip NO & Another supra* at 364F-H and at 367A-371D.

911 *Stocks Civil Engineering (Pty) Ltd v Rip NO & Another supra* at 377J-378H. Also see *ESKOM v Hiemstra NO & Others* [1999] 10 BLLR 1041 (LC) at 1045J-1046A. See below 6.3 for a discussion on how the test can be incorporated into the narrow grounds of review, rather than override its provisions.

912 *Cox v CCMA & Others* [2001] 2 BLLR 141 (LC) at 146I-147B; *Transnet Ltd v HOSPERSA & Another* (1999) 20 *ILJ* 1293 (LC) at 1297I; *NUM v Brand NO & Another* (1999) 20 *ILJ* 1884 (LC) at 1888H-1889A. However, see *ESKOM v Hiemstra NO & Others supra* at 1045J-1046A.

The Labour Appeal Court judgment discussed above has overruled these judgments, but without any solid rationale.

This chapter endeavours to suggest a legal framework within which the *Carephone* test can comfortably be applied. The disputant parties' relationship is contractual in nature: it is governed by the terms of the arbitration agreement, the Arbitration Act and the applicable principles of the law of contract.[913] The notion of rationality in our current constitutional dispensation and the spirit, purport and objects of the Bill of Rights inform this analysis, as they shape the interpretation of s33(1) of the Arbitration Act and the development of the common law of contract.

Two preliminary notes as to the application of this chapter need mentioning. Firstly, the meaning assigned to *Carephone's* justifiability test in Chapter 4 applies equally in this context. In short, arbitrators are required to apply their minds to the matter and reach conclusions on rational bases, rather than illogically or arbitrarily. Review on this basis concerns an objective analysis of the arbitrator's process of reasoning, rather than the merits of the outcome – whether there is a connection between findings made and the final decision reached. Secondly, this chapter deals with private arbitration review in terms of s33 (1) of the Arbitration Act ("the Act"). Thus, it incorporates ordinary private arbitration performed in terms of the Act, as well as those arbitrations between parties to bargaining councils that are reviewed in terms of the Arbitration Act.[914]

6.2 Private arbitration awards: Public or Private Power?

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913 *Jockey Club of SA v Transvaal Racing Club* 1959 (1) SA 441 (A) at 450, cited in *Turner v Jockey Club of SA* 1974 (3) SA 633 (A) at 645. It should be noted that the agreement is between the parties to the dispute and does not bind the arbitrator. Where the arbitrator exceeds the terms of reference or powers set out in the agreement, or commits another reviewable transgression, the award is reviewed though the residual effect in terms of the Arbitration Act.

914 The application of the *Carephone* test to other arbitrations conducted by bargaining councils is dealt with in Chapter Six. One should note that s1 of the Arbitration Act requires a written arbitration agreement to be concluded by parties to the proceedings. This is obviously also necessary for review on the basis of irrationality, as written reasons must be furnished in order to show the final decision is unjustifiable.

It is accepted that the *Carephone* test is applicable to the review of CCMA arbitration awards primarily because commissioners, as organs of state, exercise public power in performing their arbitral duties.[915] As such, the constitutional requirement of rationality must be present in these awards. Rationality is tested on review through the application of the justifiability test.[916]

It follows logically that the first port of call in attempting to justify the application of the test to private arbitration is to discern whether private arbitrators exercise powers or perform functions that are public in nature.[917] If this is the case, their final decisions ought to be rational, regardless of whether they are organs of state, juristic persons or otherwise.[918] However, it is clear from the discussion below that private arbitrators do not exercise public power. Rather, they perform a private function in terms of agreement between the parties.

The starting point of the investigation is that the concept of public power includes all exercises of power by the State. However, it incorporates more than mere exercises of governmental power.[919] Public law controls may be applicable to seemingly private bodies.[920] Indeed, both the Promotion of Administrative Justice Act ("PAJA")[921] and the Constitution[922] itself foresee that public law principles may

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915 *Deutsch v Pinto & Another* (1997) 18 *ILJ* 1008 (LC) at 1012C; *Glaxo Welcome SA (Pty) Ltd v Mashaba & Others* [2000] 8 BLLR 923 (LC) at 927I; *Mkhize v CCMA & Another* (2001) 22 *ILJ* 477 (LC) at 484B-D.

916 See Chapter Four for a full exposition. Note, however, that this is not the only rationale for the application of the justifiability test to CCMA arbitration awards.

917 *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 (2) BCLR 176 (SCA) at 188F.

918 *Transnet Ltd v Goodman Brothers (Pty) Ltd supra* at 188F-G. See also *ESKOM v Hiemstra NO & Others* (1999) 20 *ILJ* 2362 (LC) at 2367I-J, cited with approval in *Seardel Group Trading (Pty) Ltd t/a The Bonwit Group v Andrews NO & Others* [2000] 10 BLLR 1219 (LC) at 1227D-E. These cases state that the justifiability test does not apply to private arbitration because private arbitrators do not act as organs of state. The Supreme Court of Appeal judgment in *Transnet Ltd v Goodman Brothers (Pty) Ltd* overrules these cases in terms of precedent.

919 *Dawnlaan Beleggings v Johannesburg Stock Exchange* 1983 (3) SA 344 (W) at 360C-361A; *R v Panel on Take-overs & Mergers,* Ex parte *Datafin PLC and Another* 1987 QB 815 (CA) at 838E-H. But see *Cronje v United Cricket Board of SA* 2001 (4) SA 1361 (T).

920 *Dawnlaan Beleggings v Johannesburg Stock Exchange supra*; *R v Panel on Take-overs & Mergers,* Ex parte *Datafin PLC and Another supra*

921 Section 1(b) of Act 3 of 2000.

922 Sub-sections 8(2) and (3) of Act 108 of 1996.

be employed in the regulation of the horizontal relationships between private individuals or juristic bodies where public powers are exercised.[923]

The dividing line between public and private power is far from clear.[924] This is particularly so in complex modern societies. These are transforming from traditional welfare states, where the State has a duty to provide certain benefits and services to citizens, to states based on efficiency whereby the government transfers the responsibility of such duties to "private" service providers.[925] To complicate the issue further, the divide between public power and private power is mutable; justice requires that this hazy line is continually re-evaluated as the nature and power of the State changes.[926] Regardless, the public law/private law divide must be compatible with the values and ethos of our constitutional order.[927]

In terms of English law, there are only two essential requirements for the application of public law principles to exercises of power.[928] The first is that the power is public in nature. The second is that the sole source of the power in question may not be a consensual submission to jurisdiction.[929]

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923 Note that the PAJA only applies to exercises of public power that are administrative in nature (s1(b) read with s1(v) of the PAJA). However, the principle of rationality has been held to apply to all exercises of public power (*Pharmaceutical Manufacturers Association of SA & Others: In re Ex parte Application of President of RSA & Others* 2000 (3) BCLR 241 (CC) at paragraph [90]).

924 The difficulty in drawing such lines was eloquently described by a Lord Chancellor in *Boyse v Rossborough* 10 ER 1192 at 1210, cited in *Hira & Another v Booysen & Another* 1992 (4) SA 69 at 77D-E: "There is no possibility of mistaking midnight for noon; but at what precise moment twilight becomes darkness is hard to determine."

925 Hoexter, C The New Constitutional and Administrative Law - Volume II: Administrative Law at 113; Ntanda Nsereko, D "Controlling Executive Power in Southern Africa: The Role of Courts and Administrative Tribunals" in Corder, H & Maluwa, T (eds.) Administrative Justice in Southern Africa at 95-6; *Transnet Ltd v Goodman Brothers (Pty) Ltd supra* at 186F-I.

926 Plasket, C thesis at 167. *R v Jockey Club,* ex parte *RAM Racecourses Ltd* [1993] All ER 225 (QBD) at 246j-247b and 248c-d; *Transnet Ltd v Goodman Brothers (Pty) Ltd supra* at 186F; Second Breakwater Declaration as reproduced in Corder & Maluwa (eds.) *op cit* at 14.

927 Sections 1(c) and 2 of the Constitution.

928 *R v Criminal Injuries Compensation Board, Ex parte Lain* [1967] 2 QB 864 at 882; *R v Panel on Take-overs & Mergers,* Ex parte *Datafin PLC and Another supra* at 838E-F. See Plasket, C "The Fundamental Right to Just Administrative Action: Judicial Review of Administrative Action in the democratic South Africa" unpublished thesis at 196, where he states with no judicial authority that this is probably also the case in South Africa.

929 As can be gleaned from Chapter Four, the source of a power is no longer considered decisive in determining whether the power is to be considered public (*Dawnlaan Beleggings v*

This latter requirement seems to remove private arbitration from the reach of public law principles, regardless of whether private arbitrators exercise public or private power. This is because the source of a private arbitrator's power lies in the consensual arbitration agreement.[930] The mandate and powers of the arbitrator are defined in the agreement.[931]

However, the requirement that the sole source of the power may not be consensus should not be viewed as separate from the enquiry into whether the body performs a public function. The South African courts have found that, while it remains a relevant consideration, the source of the power is no longer decisive in the public power/private power enquiry; the power need not be founded in legislation for public law principles to apply.[932] Of utmost importance is the nature of the actual power being exercised: is the power such that it can be classified as 'public'?[933]

A number of factors are useful in determining whether the power exercised is public in nature. These include the nature of the body exercising the power,[934] whether the body is self-regulating,[935] the extent to which the body is incorporated

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Johannesburg Stock Exchange supra at 364H-365A; *R v Panel on Take-overs & Mergers,* Ex parte *Datafin PLC and Another supra* at 834G-H and 847C). This investigation into whether a power is public in nature must be distinguished from the reference, here, to voluntary submissions to power. Where parties voluntarily submit to jurisdiction, no public element exists, even if the exercise of power affects the public or if the public benefits from the exercise of power: *Law v National Greyhound Racing Club Ltd supra* at 1307.

930 *Baldwin v Bateman* 1908 TS 54 at 56; *Clark v African Guarantee & Indemnity Co Ltd* 1915 CPD 68 at 76; *Portnet (A Division of Transnet Ltd) v Finnemore & Others* [1999] 2 BLLR 151 (LC) at 152G.

931 *Stocks Civil Engineering (Pty) Ltd v Rip NO & Another supra* at 381C. The Arbitration Act only applies to the powers of the arbitrator where the arbitration agreement is silent on a particular issue.

932 *Dawnlaan Beleggings v Johannesburg Stock Exchange supra* at 364H-365A. See the English law counterpart in *R v Panel on Take-overs & Mergers,* Ex parte *Datafin PLC and Another supra* at 834G-H and 847C.

933 *Dawnlaan Beleggings v Johannesburg Stock Exchange supra*; *R v Panel on Take-overs & Mergers,* Ex parte *Datafin PLC and Another supra*; *President of the RSA & Others v South African Rugby Football Union & Others* 1999 (10) BCLR 1059 (CC) at 1119 [141].

934 *Transnet Ltd v Goodman Brothers (Pty) Ltd supra* at 187G.

935 *R v Panel on Take-overs & Mergers,* Ex parte *Datafin PLC and Another supra* at 826B-D.

into structures of state authority[936] and whether it exercises immense *de facto* power, despite a lack of *de jure* power.[937] Other relevant factors include the purpose of the power, whether exercised in the public interest or for private gain,[938] the availability of legal means of control other than public law remedies,[939] whether the private body acts in a competitive or monopolistic environment and the vulnerability of the citizen when the power is exercised.[940] These criteria contribute to a greater understanding of the nature of the power being exercised.

Taking these factors into consideration, private arbitrators cannot be said to exercise public power.[941] Arbitration is in the nature of litigation: A dispute that generally may be adjudicated upon by courts exists, but parties elect to resort to arbitration for a speedy and less costly decision.[942] This form of dispute resolution is premised and structured as a substitution for a court of law due to the shortcomings in the judicial system, rather than in the public administration.[943] Private arbitrators perform a quasi-judicial function in carrying out their arbitral duties.[944] They must assess the evidence produced by the parties and make a determination based on the facts and the law. They do not implement legislation or make policy decisions.

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936 Devenish, GE A Commentary on the South African Bill of Rights at 29. Principle utilised in *Cronje v United Cricket Board of South Africa supra* at 1375D-E.

937 *R v Panel on Take-overs & Mergers,* Ex parte *Datafin PLC and Another supra* at 826C-D.

938 *Coetzee v Comitis & Others* 2001 (1) SA 1254 (C) at paragraph [17.8].

939 Second Breakwater Declaration as reproduced in Corder & Maluwa (eds.) *op cit* at 14; *R v Panel on Take-overs & Mergers,* Ex parte *Datafin PLC and Another supra* at 839B

940 Plasket, C *op cit* at 167; Second Breakwater Declaration as reproduced in Corder & Maluwa (eds.) *op cit* at 14. Note that the Declaration refers to a "public body" operating in a monopolistic or competitive environment. I submit that Plasket is correct in stating that the context of this passage indicates that this is an erroneous reference, and that "private bodies" is presumably what was referred to (at 168 fn 5).

941 *Seardel Group Trading (Pty) Ltd t/a The Bonwit Group v Andrews NO & Others supra* at 1224J-1225A.

942 *Patcor Quarries CC v ISSROFF & Others* 1998 (4) BCLR 467 (SE) at 479E-F.

943 *Nxako v Wade & Others* (2000) 21 *ILJ* 1412 (LC) at 1415G-I and at 1416D-E.

944 *Patcor Quarries CC v ISSROFF & Others supra* at 479G-H, cited with approval in *Seardel Group Trading (Pty) Ltd t/a The Bonwit Group v Andrews NO & Others supra* at 1225H-1226B (These cases discuss the reasoning behind the finding that a private arbitrator does not perform administrative functions, but rather a judicial function).

The source of the arbitrator's powers is the arbitration agreement; a voluntary submission to jurisdiction that is in no way influenced by the State.[945] The parties to the arbitration control not only the identity of the arbitrator, but the breadth of the arbitrator's powers and the arbitrator's jurisdiction as well. As such, the parties' vulnerability to the effects of exercises of such power is completely within their own control. While the arbitrator's decision affects the rights and duties of the immediate parties to the dispute, there is no greater legal or public consequence, as arbitration awards do not form binding precedent.

Private arbitrators exercise the arbitral powers conferred for their own financial gain, in the interests of the parties, and hopefully in the interests of justice. While there is public interest in arbitrators making justifiable decisions, they cannot be said to perform these functions for public benefit. Private arbitrators act in a competitive environment where parties are open to elect any person they deem fit to arbitrate the dispute, or to approach the courts to resolve the dispute.

A private arbitration award is generally final and binding.[946] However, aggrieved parties may apply for a review of defective awards or may have recourse in terms of the law of contract.[947] If parties expressly make provision for the award to be subject to appeal, an appeal also lies against the award.[948] Thus, public law is not the only legal remedy available to the parties aggrieved by the award.

The factors described above indicate that public law remedies were not intended for application to private arbitration. Private arbitrators are not organs of state and do not wield public power. They exercise private power.[949] As a result, the application of the justifiability test to private arbitration cannot be based on this

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945 The link between public power and compulsory arbitration was emphasized in *Transwerk v Independent Mediation Services of South Africa & Others* (2002) 23 *ILJ* 2313 (LC) at 2326A-B.

946 Section 28 of the Act.

947 See below at 6.3.

948 Section 28 of the Act.

949 *Transwerk v IMSSA & Others supra* at 2326B.

legal argument.[950] Nonetheless, private arbitrators often exercise great powers with far-reaching consequences for the parties to the matter. Justice seems to require that some remedy exists for a party who suffers under an irrational award.

6.3 Developing the Law

The Bill of Rights can be applied to the ordinary law either directly of indirectly.[951] Where it is possible to decide a matter without broaching a constitutional issue, courts should do so.[952] The effect of this principle is that the Bill of Rights should be applied indirectly before recourse is had to the direct application of the Constitution.[953] Thus, the common law must be developed and applied to give effect to the Constitution before applying the Bill of Rights directly,[954] and statutes

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950 *Seardel Group Trading (Pty) Ltd t/a The Bonwit Group v Andrews NO & Others supra* at 1225B; *ESKOM v Hiemstra NO & Others* (1999) 20 *ILJ* 2362 (LC) at 2367I-J; *Transwerk v IMSSA & Others supra* at 2325J-2326B.

951 De Waal, J *et al* The Bill of Rights Handbook (4 ed) at 64-65; Currie, I & De Waal J The New Constitutional and Administrative Law Volume 1: Constitutional Law at 325-326; *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) at 891J-892A, 906E-G, 927H and 931H; *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) at paragraphs [69] and [90]. Indirect application of the Bill of Rights involves applying the ordinary law and if necessary, the developing or interpreting it in light of the spirit, purport and object of the Bill of Rights. The aim of indirect application is to avoid inconsistencies between the law and the Bill of Rights. On the other hand, the direct application of the Bill of Rights involves the allegation that an inconsistency exists between law (or conduct) and a specific constitutional right, and calls for such inconsistency to be declared unconstitutional and thus invalid. For a brief discussion on the constitutionality of s33 and s28 of the Arbitration Act, see *Patcor Quarries CC v ISSROFF & Others supra* at 479C-482I.

952 *S v Mhlungu* 1995 (3) SA 867 (CC) at paragraph [59], approved in *Zantsi v Council of State, Ciskei* 1995 (4) 615 (CC) at paragraph [2]-[8]; *S v Dlamini* 1999 (4) SA 623 (CC) at paragraph [27]. Note that De Waal, J *et al op cit* at 69-70 state that in *Pharmaceutical Manufacturers Association of SA supra* at paragraphs [33], [44], [45] and [49], the Constitutional Court does away with the principle of indirect application before direct application of the Bill of Rights by stating that the Constitution should be the first port of call in administrative law disputes. I do not believe that the Court intended to abolish the *Mhlungu* principle. It was merely commenting on the relationship between the Constitution and the common law grounds of review for administrative law.

953 This rule is not absolute, and parties are not required to exhaust non-constitutional remedies before resorting to the direct application of the Bill of Rights (*Harksen v Lane* 1998 (1) SA 300 (CC) at paragraph [26]). Where the circumstances of the matter illustrate a clear need for the Constitution to be directly invoked, it is not necessary to first attempt an indirect application of the Bill of Rights (De Waal, J *et al op cit* at 69).

954 *Amod v Multilateral Motor Vehicle Accidents Fund* 1998 (10) BCLR 1207 (CC) at paragraph [26].

must be interpreted in light of the Bill of Rights ("read down") before being struck down as unconstitutional.[955]

In this way, the ordinary law is developed incrementally[956] and brought into line with the values and ethos of the Constitution. By making constitutional rulings only where it is necessary, the courts respect the doctrine of separation of powers. The Constitutional Court is the final authority on the interpretation of the Constitution. However, the other branches of the state should first be permitted to interpret and give effect to the Constitution, without the "constitutional straitjacket" of extensive court pronouncements on constitutional issues.[957]

Public law principles have been applied to private bodies in certain cases. Courts have taken to using the contract between the parties as an "empty vessel into which the duty to comply with the administrative law standards] is poured", by considering the terms of the contract, both express and implied, and the duty to act in good faith.[958]

Where private tribunals are charged with a duty to decide, they must observe both the rules that regulate them and the fundamental principles of fairness.[959] These fundamental principles of fairness include the promotion of the *audi alteram partem* rule,[960] the observation of the "principles of fair play",[961] the discharge of

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955 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributing* 2000 (10) BCLR 1079 (CC) at paragraph [18].

956 *Zantsi v Council of State, Ciskei supra* at paragraphs [5] and [7].

957 De Waal, J *et al op cit* at 67-68.

958 Cockrell "Can you Paradigm? – Another Perspective on the Public Law/Private Law Divide" 1993 *Acta Juridica* 227 at 230-231.

959 *Jockey Club of SA & Others v Feldman* 1942 AD 340 at 350-351; *Herbert Porter & Co Ltd & Another v Johannesburg Stock Exchange* 1974 (4) SA 781 (T) at 788C-E, as approved in *Johannesburg Stock Exchange & Another v Witwatersrand Nigel Ltd & Another* 1988 (3) SA 132 (A) at 149B and 153H. This is, of course, subject to the express terms of the agreement: *Herbert Porter & Co Ltd & Another v Johannesburg Stock Exchange supra* at 788G.

960 *Marlin v Durban Turf Club & Others* 1942 AD 122 at 125-126, citing *Dabner v South African Railways* 1920 AD 583.

961 *Marlin v Durban Turf Club & Others supra* at 126 and 128, approved in *Turner v Jockey Club of South Africa supra* at 646G-H.

duties honestly, impartially and in good faith,[962] disclosure by the arbitral tribunal of the nature of the observations that influenced its mind[963] and the realization of decisions based on fair and *bona fide* findings of fact.[964] The notion of rationality incorporates this last-mentioned category.

The requirements of fairness are based on the nature of the tribunal, the agreement between the parties and the circumstances of the particular case.[965] Just as a tribunal established in terms of statute must adhere to the principles expressed or implied in the legislation,[966] so a tribunal created in terms of a contract must comply with the obligations of fairness as derived from the express or implied terms of the agreement between the parties.[967] Thus, there are two differences between the review of CCMA awards for justifiability and the corresponding review of private arbitration awards. The first difference lies in the starting-point of the enquiry: the applicable principles of statutory review are found in the intention of the Legislature, while the rules relating to review of a decision made in terms of contract are guided by the intention of the parties.[968] The other difference lies in the remedies available to the parties, either public law remedies or contractual remedies.[969]

The Arbitration Act came into effect decades before the current constitutional order was established, and thus the provisions of the Act must be re-assessed in light of the values and principles that guide the current constitutional order.[970] It will

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962 *Dabner v SA Railways & Harbours supra* at 589; *Maclean v Workers' Union* (1929) 1 Ch.D 602 at 623, as approved in *Turner v Jockey Club of South Africa supra* at 464H.

963 *Jockey Club of SA & Others v Feldman supra* at 348-349.

964 *Jockey Club of SA v Transvaal Racing Club supra* at 450.

965 *Marlin v Durban Turf Club & Others supra* at 126-127; *Russell v Duke of Norfolk & Others* (1949) 1 All ER 109 at 118, as cited in *Turner v Jockey Club of South Africa supra* at 646D-F.

966 *Turner v Jockey Club of South Africa supra* at 645H.

967 *Turner v Jockey Club of South Africa supra* at 646A.

968 *Theron & Others v Circuit of Wellington of the DR Mission Church in South Africa & Others* 1976 (2) SA 1 (A) at 21.

969 *ibid.*

970 When interpreting the statutory grounds of review, the courts must promote the spirit, purport and objects of the Bill of Rights and the founding values of the Constitution (Section 39(2) and s1 read with s2 of the Constitution). South Africa has committed itself to a culture of justification, based on democratic founding values. These values, as well as

become clear that there is scope in the current law to allow the review of private arbitration awards on the grounds of irrationality.

6.3.1 Interpretation of s33 of the Arbitration Act

In *Carephone (Pty) Ltd v Marcus NO & Others*,[971] the Court found that the CCMA commissioner exceeded the constitutional limits on his powers by furnishing an irrational award. These constitutional limits do not apply to private arbitrators, as they do not exercise public power. However, this does not preclude justifiability from falling under another ground of review.[972] An unjustifiable award could be argued to warrant review for misconduct of the arbitrator or for gross irregularity in the arbitration proceedings.

The ground of misconduct is defined narrowly in private arbitration review.[973] It involves wrongful or improper conduct on the part of the arbitrator.[974] There must be some form of moral turpitude, dishonesty or ulterior motive.[975] However, the courts will not lightly infer *mala fides*.[976] Arbitrators are required to act with the judicial capacity required of an ordinary fair-minded layperson appointed as adjudicator.[977]

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notions of fairness and justice, require that rationality of a private arbitration award be an instance of review under s33(1) of the Arbitration Act.

971 *Carephone (Pty) Ltd v Marcus NO & Others* (1998) 19 *ILJ* 1425 (LAC) at 1439C.

972 See above at 4.6. For examples of cases relating to CCMA arbitration review, see *County Fair Foods (Pty) Ltd v CCMA & Others* (1999) 20 *ILJ* 1701 (LAC) at 1706B-D; *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* (2000) 21 *ILJ* 1232 (LC) at 1253D-E.

973 *Hyperchemicals International (Pty) Ltd & Another v Maybaker Agrichem (Pty) Ltd & Another* 1992 (1) SA 80 (W) at 95.

974 *Dickenson & Brown v Fisher's Executors* 1915 AD 166 at 176.

975 *Donner v Ehrlich* 1928 WLD159 at 161; *Bester v Easigas (Pty) Ltd & Another* 1993 (1) SA 30 (C) at 37-38, confirmed in *Johan Louw Konstruksie (Edms) Bpk v Mitchell NO & Another* 2002 (3) SA 143 (C) at 180; *Naidoo v Estate Mahomed & Others* 1950 NPD 915 at 920.

976 *Bester v Easigas (Pty) Ltd & Another supra* at 38.

977 *Clark v African Guarantee & Indemnity Co Ltd* 1915 CPD 68 at 78, confirmed in *McKenzie NO v Basha* 1951 (3) SA 783 (N) at 786.

Bona fide mistakes of fact or law will not render awards reviewable, if the arbitrators receive the evidence and, after fair consideration, come to a decision.[978] However, where the mistake is so gross or manifest that it could not have been made without some misconduct on the part of the arbitrator, the mistake may be evidence of misconduct.[979] Where a decision is made without any evidence to support it, the award may be set aside if the lack of evidence establishes a total want of the judicial capacity required of an "ordinary, fair-minded layman appointed to adjudicate a dispute".[980]

These principles could be applied to a decision that is not justifiable in terms of the reasons provided for it. Where the reasons provided by the arbitrator would lead to conclusion X, but the arbitrator makes conclusion Y, the irrationality of the award may be a mistake so gross that one may infer that the arbitrator could not have come to the decision without some form of misconduct. In such circumstances, arbitrators could not be said to have applied their minds seriously and conscientiously to the evidence, and the review ought to be permitted.[981]

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978 *Clark v African Guarantee & Indemnity Co Ltd supra* at 79; *Dickenson & Brown v Fisher's Executors supra* at 176; *Donner v Ehrlich supra* at 161; *ACTWUSA v Veldspun (Pty) Ltd supra*.

979 *Dickenson & Brown v Fisher's Executors* supra at 176; *Landeshut v Koenig* (1903) SC 33 at 34.

980 *Clark v African Guarantee & Indemnity Co Ltd supra* at 78, citing *Middleton v The Water Chute Co* 1922 CPD 155, approved in *McKenzie NO v Basha supra*. The Court in *McKenzie's* case stated that there are three legs to the approach to determining misconduct. The applicant must prove that there is in fact no evidence to support the decision, that no reasonable person could have reached that decision and that the lack of evidence is so glaring that misconduct can be inferred (at 786). This was applied in *Bester v Easigas (Pty) Ltd & Another supra*. However, there has been some reluctance to applying this test, as a lack of evidence may amount to a mistake of fact and thus must be a gross mistake in order to infer misconduct (*Johan Louw Konstruksie (Edms) Bpk v Mitchell NO & Another supra* at 182).

981 Note that the justifiability test requires that arbitrators apply their minds seriously and conscientiously to the evidence, and that the conclusion is reached through logical reasoning: *Rope Constructions Co (Pty) Ltd v CCMA & Others* (2002) 23 *ILJ* 157 (LC) at 162C; *Computicket v Marcus NO & Others* (1999) 20 *ILJ* 342 (LC) at 345I; *Sun Couriers (Pty) Ltd v CCMA & Others* (2002) 23 *ILJ* 189 (LC) at 195H read with 196B; *Adcock Ingram Critical Care v CCMA & Others* (2000) 21 *ILJ* 1752 (LC) at 1755I; *Cadema (Pty) Ltd v CCMA (Western Cape Region) & Others* (2000) 21 *ILJ* 2261 (LC) at 2267F; Kroon JA in *County Fair Foods (Pty) Ltd v CCMA & Others supra*.

If there is no evidence to support the decision, the award cannot be justifiable, as the arbitrator cannot provide any logical reasons for the conclusion. This lack of evidence would indicate the absence of the judicial capacity required of an ordinary fair-minded adjudicator. Thus, review on the grounds of misconduct ought to be permitted.

Recourse need not be had to the justifiability test as it is formulated in CCMA arbitration review. The ordinary principles concerning misconduct accommodate the review of unjustifiable awards. However, the judicial interpretation of the justifiability test[982] would be useful in ensuring that the enquiry into justifiability does not transcend its boundary to an enquiry into the merits of the matter. The justifiability test relates to the arbitrator's process of reasoning, and not to the correctness or merits of the decision.[983] This reflects the position in terms of review for misconduct, as courts will not set aside an award if there is a mistake of fact or law, unless it is so gross that arbitral misconduct can be inferred.

The difficulty with this approach is that misconduct requires some form of moral turpitude or dishonesty on the part of the arbitrator, such as bias or corruption. The courts will not reach this conclusion flippantly. As a result, it is perhaps better to classify irrationality of an award under the review ground of gross irregularity in the conduct of the arbitration proceedings, as no *mala fides* or dishonesty is required of the arbitrator in these instances. [984]

The review ground of "gross irregularity in the conduct of the proceedings" relates to the conduct of proceedings and not to an incorrect judgment or the result of the

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982 See above at 4.4.1.

983 See for example, *Carephone (Pty) Ltd v Marcus NO & Others supra* at 1435B-C; *County Fair Foods (Pty) Ltd v CCMA & Others supra* at 1706D-I and at 1716 B; *Computicket v Marcus NO & Others supra* at 346D; *Rope Constructions Co (Pty) Ltd v CCMA & Others supra* at 162C.

984 *Naidoo v Estate Mahomed & Others supra* at 920; *Benjamin v Sobac South African Building & Construction* 1989 (4) SA (C) 940 at 971. Note the comments made above at 2.7.4.2.1.

proceedings.[985] The irregularity must be of such a serious nature or so gross, that it results in the case not being fully and fairly determined.[986]

In the review of magistrate's court proceedings, and in CCMA arbitration review, both patent and latent irregularities are recognised.[987] A patent irregularity occurs openly in the conduct of the proceedings, while a latent irregularity is one which takes place in the mind of the judicial officer and which is only apparent from the reasons provided. There is no reason why this categorisation should not also apply to gross irregularities in the context of private arbitration, as the applicable principles are the same.

Irrationality in an award is a patent irregularity in that it reflects an error in the mind of the arbitrator. If one were to consider the situation where the arbitrator's reasons would lead to conclusion X, but the arbitrator makes conclusion Y, the incongruent effect is an irregularity that may be indicative of a failure by the arbitrator to apply his or her mind to the matter.[988] Reasoning that is so flawed that it may also indicate that the parties have been deprived a fair hearing, and thus that the irregularity is serious. [989] As a result, the award ought to be reviewable due to a gross irregularity in the mind of the arbitrator, although no dishonesty is present.

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985 *Bester v Easigas supra* at 42; *Ellis v Morgan; Ellis v Dessai* 1909 TS 576 at 581; *R v Zackey* 1945 AD 505 at 509.

986 *Bester v Easigas supra* at 43-44; *Ellis v Morgan; Ellis v Dessai supra* at 581; *Anshell v Horwitz & Another* 1916 TPD 65 at 67, confirmed and applied in *Mia v DJL Properties* 2000 (4) SA 220 (T) at 230. In regard to the nature of procedural irregularities that give rise to general review proceedings, see *Coetser v Henning & Ente NO* 1926 TPD 401 at 404; *S v Moodie* 1961 (4) SA 752 (A).

987 *Goldfields Investment Ltd & Another v City Council of Johannesburg & Another* 1938 TPD 551 at 560, applied in *Paper Printing Wood & Allied Workers Union v Pienaar NO & Others* 1993 14 *ILJ* 1187 (A) and cited in relation to CCMA arbitration awards in *Toyota SA Motors (Pty) Ltd v Radebe & Others* (2000) 21 *ILJ* 340 (LAC) at 351F-352A. Note that it is a strain on the phrase "gross irregularity" to describe an issue concerning the merits of the case as such: *Goldfields Investment Ltd & Another v City Council of Johannesburg & Another supra* at 560. However, as described in this dissertation, justifiability does not relate to the merits of the dispute.

988 In relation to CCMA arbitration review, see *Cox v CCMA & Others supra* at 146B; *Ensign Brickford SA (Pty) Ltd v Shongwe NO & Others* (2001) 22 *ILJ* 146 (LC) at 152E.

989 In relation to CCMA arbitration awards, see *Maarten & Others v Rubin NO & Others* (2000) 21 *ILJ* 2656 (LC) at 2659A; *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp & Others* (2002) 23 *ILJ* 863 (LAC) at 868E and at 869B-C.

By including justifiability as an instance of review under s33(1) of the Arbitration Act, the judiciary will give effect to the values and ethos of the Bill of Rights, and respect the limits of the doctrine of the separation of powers. One of the chief obstacles to the application of the justifiability test to private arbitration is that rationality is seen as a constitutional ground of review separate from the statutory review grounds.[990] It is not. It ought to be incorporated as an instance of review under s33(1) of the Arbitration Act just as it is an instance of review under s145 of the Labour Relations Act ("LRA").[991] However, the common law principles relating to the law of contract provide other bases in favour of the inclusion of review for irrationality in private arbitration awards. This will be discussed below.

6.3.2 Development of the Law of Contract

The common law is dynamic and must be adapted to the changing circumstances of society.[992] Policy considerations play a major role in the development of the common law, as they are illustrative of society's changing needs and reflect the nature and desires of the current social dynamic. Rationality of a private arbitration award can be viewed as a case in point.

The Constitution should be indirectly applied to the law on a case-by-case basis,[993] with full regard to the circumstances of the case before the court.[994] In this context, the indirect application requires that the judiciary interpret arbitration agreements with reference to the values of the Bill of Rights,[995] or to amend the common law regarding arbitration so that it is brought in line with the Constitution.[996] Is it possible that a duty to make a rational award may be an implied term of the

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990 See above at 4.6.1.

991 Act 66 of 1995. "Instances of review" in this sense are circumstances giving rise to review. For example, bias and the failure to hear evidence of the disputant parties.

992 Devenish, GE *op cit* at 31.

993 *Du Plessis v De Klerk supra* at paragraph [63].

994 *Gardener v Whitaker* 1996 (4) SA 337 (CC) at paragraph [16].

995 *Rivett-Carnac v Wiggins* 1997 (3) SA 80 (C); *Farr v Mutual & Federal Insurance* 2000 (3) SA 682 (C); *Findevco v Faceformat SA* [2000] 4 All SA 14 (E).

996 *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA).

consensual arbitration agreement?[997] Can the common law relating to the existence of *naturalia* in specific forms of contracts be developed to incorporate review on the basis of justifiability? These questions will be discussed below.

6.3.2.1 Interpretation of the arbitration agreement: An implied term of review for irrationality?

The South African courts are reluctant to acknowledge the existence of implied terms in a consensual agreement.[998] This is due to the sanctity of individual autonomy to contract on whatever terms parties reach consensus, provided the limits of the law are respected. The Courts will not conclude contracts for parties,[999] or supplement contracts merely because it is reasonable or wise to do so.[1000]

To determine whether a particular tacit term is implied in the arbitration agreement, the standard test in the law of contract is applied: the innocent bystander test.[1001] The term may only be said to exist where an implication necessarily arises that parties intended to contract on the basis of such term.[1002]

The following hypothetical test is useful in this regard: The tacit term exists if it can confidently be said that, at the time the contract was negotiated, were one to ask the parties, "What will happen in such a case?" they would reply "Of course, so-

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997 *Pennington v Friedgood* 2002 (1) SA 251 (C) at 262E-263F.

998 *West End Diamonds Ltd v Johannesburg Stock Exchange* 1946 AD 910 at 921; *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 532; *Techni-Pak Sales (Pty) Ltd v Hall* 1968 (3) SA 231 (W) at 236.

999 *JRM Furniture Holdings v Cowlin* 1983 (4) SA 541 (W) at 545H.

1000 *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration supra* at 532; *Techni-Pak Sales (Pty) Ltd v Hall supra* at 236F, cited with approval in *Delfs v Kuehne Nagel (Pty) Ltd* 1990 (1) SA 822 (A) at 827H-0828A.

1001 *Reigate v Union Manufacturing Co (Ramsbottom)* 118 LT 479 at 483, cited with approval in *Barnabas Plein & Co v Sol Jacobson & Son* 1928 AD 25 at 31; *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration supra* at 532-533; *Langeberg Voedsel Bpk v Sarculum Boerdery Bpk* 1996 (2) SA 565 (A) at 568D-E.

1002 *Mullin (Pty) Ltd v Benade Ltd* 1952 (1) SA 211 (A) at 214E; *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration supra* at 532.

and-so. We did not trouble to say that; it is too clear".[1003] There should be a "prompt and unanimous assertion of the term" by the parties.[1004]

The courts will consider the express terms of the agreement in a reasonable and businesslike manner.[1005] The tacit term must be consistent with the intention indicated in these express terms.[1006] They will also take account of admissible evidence of any surrounding circumstances that show the intention of the parties.[1007] The courts will assume that the parties act in good faith in negotiating the contract;[1008] unless the contrary is apparent, they are considered "typical men of affairs, contracting on equal and honest footing, without hidden motives and reservations".[1009] The particular parties' knowledge or lack of knowledge is also important.[1010] The Court, in determining the existence of a tacit term, will consider the parties' knowledge of the legal position on a particular point.[1011]

Some say that the approach to implying a term into a contract has been objectified to a certain extent.[1012] In this vein, tacit terms have been found to include both

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1003 *Reigate v Union Manufacturing Co (Ramsbottom) supra* at 483, cited with approval in *Barnabas Plein & Co v Sol Jacobson & Son supra* at 31.

1004 *Techni-Pak Sales (Pty) Ltd v Hall supra* at 236H-237A, cited with approval in *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration supra* at 532A-B and *Van den Berg v Tenner* 1975 (2) SA 268 (A) at 277D.

1005 *West End Diamonds Ltd v Johannesburg Stock Exchange supra* at 921; *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration supra* at 532; *Reigate v Union Manufacturing Co (Ramsbottom) supra* at 483, cited with approval in *Barnabas Plein & Co v Sol Jacobson & Son supra* at 31.

1006 *Dutch Reformed Church Council v Crocker* 1953 (4) SA 53 (C) at 62H; *Robin v Guarantee Life Assurance Co Ltd* 1984 (4) SA 558 (A) at 567A-F; *Simon v DCU Holdings (Pty) Ltd & Others* 2000 (3) SA 202 (T) at 213A-B; Van der Merwe *et al Contract* at 199; Kerr, AJ The Principles of the Law of Contract (6 ed) at 366.

1007 *Barnabas Plein & Co v Sol Jacobson & Son supra* at 31-32; *Mullin (Pty) Ltd v Benade Ltd supra* at 214E; *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration supra* at 532; *Van der Merwe v Viljoen* 1953 (1) SA 60 (A) at 64D. Note the remarks of Innes CJ in *Richter v Bloemfontein Town Council* 1922 AD 57 at 70.

1008 *Savage & Lovemore Mining (Pty) Ltd v International Shipping Co (Pty) Ltd* 1987 (2) SA 149 (W) at 198A-B; Kerr, AJ *op cit* at 360.

1009 *Wilkins NO v Voges* 1994 (3) SA 130 (A) at 141C-E. Also see the reference to a "reasonable and honest person" in *Administrator (Transvaal) v Industrial & Commercial Timber & Supply Co Ltd* 1932 AD 25 at 33. See comments in Kerr, AJ *op cit* at 361.

1010 *Dutch Reformed Church Council v Crocker* 1953 (4) SA 53 (C) at 62E-F.

1011 *Administrator (Transvaal) v Industrial & Commercial Timber & Supply Co Ltd* 1932 AD 25 at 34-37; Kerr, AJ *op cit* at 363.

1012 Van der Merwe *et al* Contract: General Principles (6 ed) at 199. But see the comments in Kerr, AJ *op cit* at 360-361.

those terms which the parties did not bother to express, and those which they would have expressed, had they envisioned the need for such.[1013] Thus, parties need not actually have intended that the particular term be part of the contract when negotiating it.[1014] This approach is based on the fact that parties may not anticipate their particular predicament at the time of concluding the contract, but would have included such a term had they foreseen the need for it.[1015]

In this more objective test, reference may be made to what reasonable contractants would have intended in the particular circumstances of the case,[1016] and to the business efficacy of the contract *sans* the implied term.[1017] These factors do not detract from the requirement that the term must be necessarily implied.[1018] The factors merely contribute to discerning the intention of the parties.

The principles set out above must be applied to the particular case at hand to determine whether the arbitration agreement includes an implied term that an irrational award is reviewable on grounds of justifiability. The aggrieved party must show that, at the time of concluding the contract, were one to ask the parties "What would happen if the arbitrator makes a decision that does not follow logically from the reasons provided in the award?" the parties would reply "Of course, the award would be reviewable".

The imputation of such a reply will be influenced by the express terms of the arbitration agreement, particularly the clauses concerning the terms of reference and the powers of the arbitrator. Section 28 of the Arbitration Act, or any clause in

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1013 *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration supra* at 532.

1014 *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration supra* at 532; *Techni-Pak Sales (Pty) Ltd v Hall supra* at 236; *Van den Berg v Tenner supra* at 277; *Delfs v Kuehne & Nagel (Pty) Ltd supra* at 827.

1015 Van der Merwe *et al op cit* at 198.

1016 *Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd* 1978 (4) SA 901 (N). See Kerr, AJ *op cit* at 360-362, where he disagrees with the objective reference to reasonableness in determining the implied intention of the parties.

1017 See Kerr, AJ *op cit* at 357 fn 138, where he states that the meaning of "business efficacy" is not explained in *Barnabas Plein & Co v Sol Jacobson & Son supra* at 31, or in those cases adopting this phraseology,

1018 *West End Diamonds Ltd v Johannesburg Stock Exchange supra* at 921.

the arbitration agreement expressing the final and binding nature of the award are not indications of the parties' intention to exclude review on the basis of irrationality in the award. The justifiability test does not amount to an appeal of the arbitration proceedings. It is not concerned with the merits of the award. Review on the grounds of irrationality relates to a procedural defect in the arbitrator's process of reasoning, and as a result, renders the award no less binding or final than a biased or *ultra vires* award.

The surrounding circumstances and the knowledge of the parties as to the lack of review for irrationality will also shape the judicial enquiry. Unless the contrary is indicated, the parties will be assumed to have acted in good faith in concluding the arbitration agreement. The parties approach the arbitrator for a decision in a matter, presuming that he or she will act judicially and reach a conclusion based on logical reasoning. While it is the intention of the particular parties that is relevant, no party acting in good faith at the time of concluding an arbitration agreement would be satisfied with an unjustified decision, as this goes to the heart of the arbitral submission of the dispute. If one were to adopt the more objective stance in this enquiry, reasonable contractants entering into an arbitration agreement would intend a review of unjustifiable awards on a similar basis.[1019]

In at least three reported cases, courts have considered private arbitration agreements with the object of implying terms permitting the review of unjustifiable awards.[1020] A less legalistic approach than described above was utilised in these cases. The Courts simply interpreted the arbitration agreements and made little, if any, reference to the intention of the parties or the law of contract.

1019 The business efficacy of the contract is not exceedingly relevant in the context of arbitration. One may argue that a final award that is obtained quickly may be most appropriate in certain cases – this is ultimately one of the advantages of private arbitration. However, review on grounds of justifiability is not an appeal. The review of a defect in procedure is a permissible obstacle to the speedy nature of arbitration awards. As such any negative effect on the so-called business efficacy of the arbitration agreement is tolerable.

1020 *Seardel Group Trading (Pty) Ltd t/a The Bonwit Group v Andrews NO & Others supra*; *Transwerk v IMSSA & Others supra*; *Stocks Civil Engineering (Pty) Ltd v Rip NO & Another supra*.

In *Seardel Group Trading v Andrews NO*,[1021] a dispute concerning an alleged unfair dismissal was referred to arbitration in terms of a collective agreement. The Court found that the proceedings were essentially voluntary, based on the contrast between arbitration in terms of a collective agreement and CCMA arbitration.[1022] As such, it found that the justifiability test generally does not apply to the matter.[1023]

However, the Court accepted that s28 allows parties to extend the grounds of review of private arbitration awards. The Court considered a clause of the main collective agreement that stated, "In addition to the rights of review provided for in the Arbitration Act, any party to any arbitration in terms of this clause shall be entitled to the right of review to the Labour Court provided for in the Act (the LRA)" (my emphasis).[1024] It found that this clause illustrated that the parties intended to widen the scope of review to include the justifiability test.[1025]

A similar approach was utilised by the majority of the Labour Appeal Court in *Stocks Civil Engineering (Pty) Ltd v Rip NO & Another*.[1026] The arbitration agreement stated, in a clause entitled "Powers of the arbitrator and terms of reference" that the arbitrator shall have "powers equivalent to that [sic] of a judge in the Labour Court. In addition, the Rules of the Labour Court will be applicable".[1027]

1021 *Seardel Group Trading (Pty) Ltd t/a The Bonwit Group v Andrews NO & Others supra.*

1022 *Seardel Group Trading (Pty) Ltd t/a The Bonwit Group v Andrews NO & Others supra* at 1224A-1225A.

1023 *Seardel Group Trading (Pty) Ltd t/a The Bonwit Group v Andrews NO & Others supra* at 1225A-B.

1024 *Seardel Group Trading (Pty) Ltd t/a The Bonwit Group v Andrews NO & Others supra* at 1227F-G.

1025 *Seardel Group Trading (Pty) Ltd t/a The Bonwit Group v Andrews NO & Others supra* at 1228B-F. Note that the Court stated that if it was incorrect in reaching this conclusion, other grounds did exist for setting the award aside (at 1229B-1232E).

1026 *Stocks Civil Engineering (Pty) Ltd v Rip NO & Another supra.*

1027 *Stocks Civil Engineering (Pty) Ltd v Rip NO & Another supra* at 363G-H.

The Court found that the Constitution requires that Labour Court judges make decisions that are rational and justifiable.[1028] Similarly, the arbitrator in this private arbitration was bound to give a justifiable decision, and having not done so, the award was set aside.[1029] The Court did not refer to any other clauses of the agreement, or to any external circumstances that may have indicated the intention of the parties. It merely interpreted the clause stated above.

The applicant in *Transwerk v IMSSA & Others*[1030] attempted to utilise the *Stocks Civil Engineering* case as precedent for the application of the justifiability test to the review of a private arbitration between parties to a bargaining council. Freund AJ stated that this decision is authority for the proposition that, subject to any ground of review flowing from the terms of reference of a specific arbitration agreement, the justifiability test may not be applied in private arbitration review.[1031]

The issue was defined in the arbitration agreement as "whether in the arbitrator's opinion based on evidence presented in the arbitration" an unfair labour practice had been committed and whether the employees should be remunerated retrospectively.[1032] The learned judge went on to consider clause 3 of the arbitration agreement, which stated, "We agree that the arbitrator will have the power to decide upon the procedure which she will follow at the hearing of this matter".[1033]

The effect of these clauses was found to be insufficient to justify an inference that the parties intended to limit the powers of the arbitrator and impose a duty to make a decision that is justifiable.[1034] This seems to be correct, as neither of these clauses imply that the award must be justifiable. It is no help in establishing review on

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1028 *Stocks Civil Engineering (Pty) Ltd v Rip NO & Another supra* at 366B-H.
1029 *Stocks Civil Engineering (Pty) Ltd v Rip NO & Another supra* at 366H-367A and at 371D.
1030 *Transwerk v IMSSA & Others supra* at 2328C.
1031 *Transwerk v IMSSA & Others supra* at 2322F-G.
1032 *Transwerk v IMSSA & Others supra* at 2316F.
1033 *Transwerk v IMSSA & Others supra* at 2328F-G.
1034 *Transwerk v IMSSA & Others supra* at 2328G-I.

grounds of justifiability that the parties intended the arbitrator to base her opinion on the evidence adduced at the hearing. This is so because a decision that is based on the evidence may nonetheless be irrational in that the reasons provided might not lead logically to the decision finally arrived at.

As illustrated above, there is room for an aggrieved party to argue that a tacit term exists in the arbitration agreement allowing review on the grounds of rationality. In drawing up the arbitration agreement, parties to private arbitrations should be mindful of the limited grounds of review permitted by our courts. They should include appropriate express clauses to protect themselves in the event of the arbitrator rendering an unjustifiable award.

Implied terms are often not in the minds of parties at the time of the conclusion of the contract and may not pass the innocent bystander test.[1035] Some have stated that by interpreting a contract where parties had no intention concerning a matter that is later the subject of litigation, courts embark on "an exasperating goose-chase after non-existent contractual meaning".[1036] In so doing, the courts frustrate the law and create legal uncertainty, as they look to factors external to the parties' intention yet do not create any binding precedent.[1037] It follows that the next investigation is whether the common law relating to arbitration should be developed with reference to *naturalia* in the law of contract.

6.3.2.2 Development of *Naturalia*

Naturalia are contractual terms attached *ex lege* to every contract of a particular class,[1038] without the parties having to negotiate the terms themselves.[1039] The

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1035 Kerr, AJ *op cit* at 372.

1036 Vorster, JP "The Resolution of Contractual Disputes: Interpretation versus Recognition of Novel *Naturalia*" (1987) 50 THRHR 450 at 451.

1037 *Ibid.*

1038 Van der Merwe *et al op cit* at 200.

1039 Van der Merwe *et al op cit* at 201. A tension obviously arises between terms imposed by the law and the recognition of individual autonomy in contractual undertakings. In general, however, parties are still free to exclude expressly such terms in their agreement. Examples

existence of *naturalia* is not fixed. Both the legislature and the judiciary may extend, curtail or develop *naturalia* in accordance with *bona fides* and the changing needs of society.[1040] Courts are, however, reluctant to do so.[1041]

This discussion will attempt to highlight the need for *naturalia* in arbitration agreements that allow the review of a private arbitration decision that is unjustifiable on the reasons provided for such decision by the arbitrator. The primary basis for this conclusion is that it is required by notions of fairness and reasonableness in light of a number of policy considerations.

The development of new *naturalia* in a specific genre of contracts depends on the state of the law, ideas of justice, fairness and reasonableness, the usual terms included in that particular type of contract, economic viability of the proposed term, and policy considerations.[1042]

As stated above, a constitutional democracy has replaced the former system of parliamentary sovereignty. In the new dispensation, the values and ethos of the Constitution pervade all law.[1043] The common law must be "re-visited and revitalised with the spirit of the constitutional values defined in chapter 3 of the [interim] Constitution and with due regard to the purport and objects of that

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of such exclusion include *Stocks & Stocks (Pty) Ltd v TJ Daly & Sons (Pty) Ltd* 1979 (3) SA 754 (A) 762-764 and *Rosenthal v Marks* 1944 TPD 172 at 176.

1040 Van der Merwe *et al op cit* at 201; Vorster, JP *op cit* at 451; *Queen v Eayrs* (1894) 11 SC 330 at 333-334; *Birkbeck & Rose-Innes v Hill* 1915 CPD 687 at 703-704; *Nel v Cloete* 1972 (2) SA 150 (A) at 160-161A.

1041 It is important to consider whether the judiciary will in fact usurp the function of the legislature in developing new *naturalia* in arbitration agreements. This is particularly worrying because private arbitration is governed by statute that codifies the common law. While it is perhaps best for our democratic process that the legislature be solely concerned with law-making, the courts are charged with the duty of developing the law to bring it in line with the Constitution and the changing *boni mores* of society. The legislature cannot be relied upon to amend legislation every time a new circumstance arises. Indeed, our law recognizes that the courts have the power to develop novel *naturalia* in the law of contract.

1042 Van der Merwe *et al op cit* at 201; Kerr, AJ *op cit* at 374 and 380. Section 28 of the Arbitration Act is an example of legislative intervention to include a tacit term in private arbitration agreements; such term ordinarily being included in arbitration agreements. It states "Unless the arbitration agreement provides otherwise, an award shall, subject to the provisions of this Act, 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."

1043 Sections 2 and s39(2) of the Constitution.

chapter".[1044] The statements made above in relation to rationality as a principle upon which the current order is based are significant here as the values and ethos of the Constitution guide the exploration of public policy.[1045]

Based on basic notions of reasonableness and fairness,[1046] all contracts are considered *bona fidei*.[1047] As such, good faith must be utilised as a criterion in interpreting contracts. This is a prime area of the law of contract where the duty to act in good faith can be utilised in developing the law. Good faith demands that the award be reviewable on the basis of rationality.

Admittedly, parties to arbitration agreements do not generally include an express term allowing a review on grounds of justifiability.[1048] As a result, this term cannot be incorporated into the law on the basis that it is commonly used in private arbitration agreements. Rather, justice requires that it be so incorporated, provided that parties do not expressly exclude this ground of review in the arbitration agreement.

The courts have acknowledged numerous policy considerations in attempting to permit the application of the *Carephone* test to private arbitration review. They have done so under the guise of public policy, rather than within any specific legal framework. These policy considerations, while relevant on their own, are

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1044 *Du Plessis v De Klerk supra* at paragraph 86.

1045 See *De Klerk v Du Plessis* 1995 (2) SA 40 (T) at 127: "This means that whenever there is room for interpretation or development of our virile system of law ... [the fragrance of the values in which the Constitution is anchored] is to be the point of departure. When in future the unruly horse of public policy is saddled, its rein and crop will be that value system."

1046 Van der Merwe *et al op cit* at 232; *Tuckers Land & Development Corporation (Pty) Ltd v Hovis supra* at 652; *Mutual & Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 (1) SA 419 (A) at 433. But see *Bank of Lisbon & South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A) at 612-617. The concept of good faith has been utilised in numerous cases to ensure that justice is done between parties to contracts of sale: *Kleynhans Brothers v Wessels' Trustee* 1927 AD 271 at 290; *Neugebauer & Co v Hermann Neugebauer & Co v Hermann* 1923 AD 564 at 574.

1047 *Meskin NO v Anglo-American Corporation of SA Ltd & Another* 1968 (4) SA 793 (W) at 802A; *Estate Schickerling v Schickerling* 1936 CPD 269 at 274-276.

1048 Kerr, AJ *op cit* at 380. Note that s28 and the rejection of appeals from private arbitration awards does not negate review on the grounds of justifiability, as such review does not amount to an appeal.

particularly useful in developing the law relating to *naturalia* in arbitration agreements.

Private arbitration is an elective process, which the parties to the dispute control in most respects. The parties abandon their right to litigate on the matter and accept that they will be finally bound to the arbitrator's award.[1049] These attributes are the main reason for a narrow interpretation of the grounds of review set out in the Arbitration Act. The consequence of individual autonomy in the law of contract is that contractual undertakings must be strictly enforced.[1050] As a result, it is allegedly appropriate to exclude the application of the *Carephone* test in private arbitration review,[1051] and bind parties to the arbitrator's final decision.[1052] However, the voluntary characteristic of this process should not be a bar to the protection of the law. The basic principles relating to individual autonomy and freedom of action are subject to the values of society,[1053] as illustrated by policy considerations, notions of fairness and the Constitution.

To refuse to apply the principle of rationality to consensual arbitration awards is to misconstrue the justifiability test. If the justifiability test did in fact amount to an appeal, it could be rejected with good reason on the grounds of the voluntary nature of the process. On the contrary, the correct interpretation of the justifiability test recognises that it is a review of the arbitrator's process of reasoning, and not of the reasons themselves.

The justifiability test was clearly misinterpreted in *ESKOM v Hiemstra NO & Others*.[1054] The Court stated that policy considerations do not enter into the question of the applicability of the justifiability test to private arbitration awards, as

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1049 *ACTWUSA v Veldspun (Pty) Ltd supra* at 196G.

1050 Van der Merwe *et al op cit* at 10. The Latin maxim for this doctrine is "*pacta servanda sunt*".

1051 *Seardel Group Trading (Pty) Ltd t/a The Bonwit Group v Andrews NO & Others supra* at 1226G-H.

1052 *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* (LC) *supra* at 1252F-H.

1053 Van der Merwe *et al op cit* at 10.

1054 *ESKOM v Hiemstra NO & Others supra* at 1045J-1046A.

the parties choose the forum and in so doing, choose a different standard of justice in electing to resort to private arbitration.[1055] As such, the Court continued, they are bound by the arbitrator's findings of fact and rulings on the law.[1056] When one considers the proper interpretation of the justifiability test, as related to reasoning rather than merits, it is clear that this judgment is flawed. Parties are certainly bound by the arbitrator's findings of fact and law, but the issue is not whether the decision is correct, but whether the reasoning is defective in the sense envisioned by the justifiability test.

In fact, the final and binding nature of private arbitration awards requires that parties be protected from injustice. As they stand, the statutory review grounds are limited instances of injustice that the legislature has recognised as procedural defects that do not relate directly to the merits of the arbitrator's decision. The justifiability test is no different. Justice requires that parties to private arbitration be protected where this procedural defect exists. Thus, it is possible to respect the exclusion of the right to appeal, while ensuring that private arbitrators are not a law unto themselves.

While a technical difference exists between CCMA arbitrators and private arbitrators (the former performs a compulsory function under the auspices of an organ of state, the CCMA, and the latter is a private person acting in terms of a voluntary agreement),[1057] there is no factual difference in the functions performed by each respective arbitrator.[1058] To base the application of a test simply on the voluntary nature of the proceedings imposes an unduly harsh penalty on parties who relieve the burden of the State in seeking alternate dispute resolution.[1059]

1055 *ESKOM v Hiemstra NO & Others supra* at 1045J-1046A.

1056 *ESKOM v Hiemstra NO & Others supra* at 1046F.

1057 *NUM v Brand NO & Another supra* at 1888F-H. It has been said that there is a stronger policy consideration in limiting grounds of review in private arbitration as parties are not obliged to participate in the arbitration proceedings and hence finality of the award is paramount: *Standard Bank of SA Ltd v CCMA & Others* (1998) 19 *ILJ* 903 (LC) at 907.

1058 *NUM v Brand NO & Another supra* at 1888H-I.

1059 *Cox v CCMA & Others supra* at 146J-147A.

One may speculate that the exclusion of the justifiability test in private arbitration review may discourage the voluntary use of alternate dispute resolution.[1060] No conclusive evidence to this effect exists. Regardless, the numerous advantages of private arbitration indicate that it would be unwise to dissuade parties from using these proceedings.[1061] Private arbitration makes justice more accessible to ordinary people, as it is cheaper and faster than the court process, more user-friendly and less formal.[1062] It would be counter-productive for courts to discourage the use of private arbitration.[1063]

Another consideration relates to uniformity in the law. The application of different standards of review to CCMA and private arbitration awards may – and to a certain extent already has – led to inconsistencies and confusion.[1064] There is a distinct similarity between the grounds of review for CCMA awards[1065] and those for private arbitration awards.[1066] This may indicate that the same standard of review be applied for both classes of awards,[1067] as the legislature probably did not intend for the application of a less stringent review test for CCMA as opposed to private arbitration awards.[1068] This is particularly relevant as CCMA arbitration was moulded on the private arbitration system.

1060 *NUM v Brand NO & Another supra* at 1887I-188A and 1889F-G.

1061 *ACTWUSA v Veldspun (Pty) Ltd supra* at 1435J-1436A.

1062 Devenish, GE *op cit* at 491.

1063 *Ibid.*

1064 *Transnet Ltd v HOSPERSA & Another supra* at 1297I, rejected in *ESKOM v Hiemstra NO & Others supra* at 1045G.

1065 Section 145 of the LRA.

1066 Section 33 of the Act.

1067 *Transnet Ltd v HOSPERSA & Another supra* at 1297I. This was also the argument of the applicant in *NUM V Brand NO & Another supra* at 1887C-F, rejected in *ESKOM v Hiemstra NO & Others supra* at 1045G.

1068 *Ntshangane v Speciality Meals CC* (1998) 19 *ILJ* 584 (LC) at 593D-E. In *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* (LC) *supra* at 1255C-D, the Court stated that it would be "absurd" for a less stringent test to be applied in CCMA arbitration review, than in private arbitration review. In *NUM v Brand NO & Another supra* at 1889A-B, it was argued that the fact that arbitrations under the CCMA are excluded from the scope of the Arbitration Act indicates that the legislature did not object to two separate forms of dispute resolution operating side by side, under different legal regimes. The court was not in favour of this contention. See, however, the minority judgment in *Stocks Civil Engineering (Pty) Ltd v Rip NO & Another supra* at 378E, where it states that the similarity between the review provisions under the LRA and the Arbitration Act and the advantages of a single test for all arbitral reviews cannot override the clear provisions of the Arbitration Act.

In addition, in the labour context, the discrepancy between the review of private arbitrations of parties to bargaining councils and CCMA arbitration review negates the primary objects of the LRA: to advance social justice and promote the effective resolution of labour disputes.[1069] The LRA gives legal force to agreements between parties to utilise alternate processes.[1070] Surely the disparity between the applicable review grounds serves only to frustrate the basic premises of the Act?

The courts may be persuaded that, unless the parties expressly agree otherwise, a *naturale* should be included in all arbitration agreements to the effect that awards will be reviewable if the decision is not rationally connected to the reasons provided for such decision. Barring a wider interpretation of the grounds of review in s33(1) of the Act, this may be the only way to guarantee protection to parties to private arbitrations.

6.4 Conclusion

The current position in South African law is that private arbitration awards cannot be reviewed on the grounds of irrationality. Private arbitrators do not wield public power and as such cannot be bound by the justifiability test on the basis of the constitutional imperative to render rational awards. However, the private power that they do exercise cannot go unchecked, where procedural defects occur in the private arbitration awards.

The courts seem to have placed too much emphasis on the private nature of these arbitration proceedings. In so doing, they have not explored alternate explanations for the application of the *Carephone* test, despite the numerous policy considerations in favour thereof.

Three approaches are described above. Firstly, s33, the review provision in the Arbitration Act, can be interpreted to include justifiability as an instance of review.

1069 Section 1 of the LRA; *Cox v CCMA & Others supra* at 146J-147A.
1070 *Cox v CCMA & Others supra* at 147A-B.

Secondly, the principles of the law of contract can be applied to the arbitration agreements to imply terms allowing review for rationality. Thirdly, the common law relating to private arbitration can be developed in light of the law of contract to incorporate *naturalia* allowing review on the grounds of justifiability. These approaches give effect to the distinction between appeals and reviews, as they are consistent with the judicial reluctance to interfere with the merits of an arbitration award.

As a closing note, parties to private arbitration proceedings could avoid this entire fiasco if they include an express term in the arbitration agreement allowing review on the grounds of rationality. Parties should exercise the control they have in these proceedings, rather than relying on the muddled jurisprudence concerning this area of law.

CHAPTER SEVEN

REVIEW OF AWARDS OF COLLECTIVE BARGAINING AGENTS AND AWARDS OF ACCREDITED AGENCIES

7.1 Introduction

The centralised bargaining system consist of a hybrid of bodies, namely bargaining councils in the private sector, the PSCBC and bargaining councils in the public service and statutory councils. Parties that are not party to one of these councils may nonetheless be subject to the collective agreements concluded by the councils and thus subject to arrangements concerning review of arbitration awards. Few cases have dealt with the review of arbitration proceedings conducted by bargaining councils, and not one case consulted used the terminology "statutory council" in identifying the arbitral council.[1071]

This discussion attempts to determine which provision, s33 of the Arbitration Act or s145 of the LRA, applies to the review of arbitration proceedings conducted under the various councils. The previous two chapters have dealt with the application of the justifiability test in CCMA arbitration review and in private arbitration review. Based on the premise that arbitration proceedings under the auspices of bargaining councils are reviewable in terms of the Arbitration Act, the courts have held that the justifiability test does not apply. However, the intricate web of voluntarism and governmental control in the centralised bargaining system, as well as the primary aims of the LRA require that this conclusion is re-assessed.

The legal framework for the review of arbitration awards in the labour context consists of three basic provisions in two statutes, namely s33 of the Arbitration Act,[1072] and s145 and s158(1)(g) of the Labour Relations Act.[1073] Section 33 applies in private arbitration review while s145 applies to the review of CCMA arbitration awards. Formerly, s158(1)(g), which grants wide powers of review to the Labour Court to review actions on any grounds permissible in law, was applied in certain

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1071 It is highly unlikely that no statutory council award has been reviewed. Statutory councils may have been misidentified as bargaining councils. The fundamental differences between these two varieties of council necessitate that this distinction is acknowledged.

1072 Act 42 of 1965 ("the Act").

1073 Act 66 of 1995 ("LRA").

CCMA arbitration reviews. This discussion will indicate which provision applies to bargaining council awards, statutory council awards and accredited agency awards.

In relation to the distinction between CCMA and private arbitration review and the application of the justifiability test, the courts have found the degree of compulsion in arbitration proceedings almost determinative of whether the arbitrator exercises public power and thus of whether the justifiability test applies in the review of the proceedings.[1074] The exposition above illustrates that the task of labelling the proceedings voluntary or compulsory is not as simple as it first seems.

7.1.1 Application of the justifiability test

The content of the justifiability test in arbitration review has been discussed elsewhere.[1075] The justifiability test applies to CCMA arbitration review, as CCMA commissioners exercise public power in making arbitration awards.[1076] The compulsory nature of CCMA arbitration proceedings is an important consideration in coming to this conclusion.[1077] In contrast, the justifiability test has been held not to apply in private arbitration review[1078] unless an express or implied term in the

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1074 *Total Support Management v Diversified Health Systems (SA)* 2002 (4) SA 667 (SCA) at 674; *Transwerk v Independent Mediation Service of South Africa & Others* (2002) 23 *ILJ* 2313 (LC) at 2326A.

1075 Chapter Four.

1076 *Deutsch v Pinto & Another* (1997) 18 *ILJ* 1008 (LC) at 1012C; *Glaxo Welcome SA (Pty) Ltd v Mashaba & Others* [2000] 8 BLLR 923 (LC) at 927I; *Mkhize v CCMA & Another* (2001) 22 *ILJ* 477 (LC) at 484B-D; *Shoprite Checkers (Pty) Ltd v CCMA & Others* (1998) 19 *ILJ* 892 (LC) at 1259B-1260C. Confirmed in *Zimema v CCMA* [2001] 2 BLLR 251 (LC) at 255C-E and *Cox v CCMA & Others* [2001] 2 BLLR 141 (LC) at 144G-I. The Labour Appeal Court in *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* (2001) 22 *ILJ* 1603 (LAC) at 1616J-1617F, stated that it is not necessary to determine whether the judgment in *Carephone* was correct, and held that sound policy considerations requires that the justifiability test applies to the review of CCMA awards.

1077 *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* (LC) *supra* at 1259C-D. The link between public power and compulsory arbitration was emphasized in *Transwerk v IMSSA & Others supra* at 2326A-B.

1078 Note that this ruling appears from a split Labour Appeal Court judgment, where the majority does not give reasons for its conclusion and the minority finds that the test does not apply on the basis of the narrow scope of the review grounds in the Arbitration Act: *Stocks Civil Engineering (Pty) Ltd v Rip NO & Another* (2002) 23 *ILJ* 358 (LAC) at 364F-H and 377J-378H, cited and applied in *Transwerk v IMSSA supra* at 2322F-G. *Seardel Group Trading (Pty) Ltd t/a The Bonwit Group v Andrews NO & Others* [2000] 10 BLLR 1219 (LC) at 1225B; *ESKOM v Hiemstra NO & Others* (1999) 20 *ILJ* 2362 (LC) at 2367I-J.See

arbitration agreement requires rationality in the award.[1079] The courts have emphasized the voluntary nature of private arbitration,[1080] as parties to the dispute consent to the submission to arbitration and forego their rights to approach a court of law for resolution of the dispute.[1081]

However, the rejection of the test in review under the Arbitration Act and the judicial interpretation and application of the relevant review provisions, result in bargaining council awards being subject to the justifiability test, while statutory council awards are not. This inconsistency is accentuated by the courts' emphasis on the extent of compulsion in the submission to arbitration and the emphasis on the breadth of the disputant parties' control of the proceedings.

While it is clear that the centralised bargaining system is largely voluntary in inception and regulation, a compulsory element also exists.[1082] The various councils exist within the legal framework of the LRA, and may be influenced by governmental power in their establishment and/or regulation.

The rationale for the application of the justifiability test under the Arbitration Act has been discussed in Chapter 6. If the courts accept that rationality ought to be required in arbitration awards given under both the LRA and the Arbitration Act, the review grounds applicable to the various collective bargaining agents is irrelevant in the justifiability enquiry. However, the discussions here on the application of the justifiability test presuppose that the judiciary will not interpret s33 of the Arbitration Act to allow review for irrationality.

Chapter Six above, which discusses the application of the justifiability test in private arbitration review.

1079 *Stocks Civil Engineering (Pty) Ltd v Rip NO & Another supra* at

1080 *Patcor Quarries CC v ISSROFF & Others* 1998 (4) BCLR 467 (SE) at 479E-F; *ESKOM v Hiemstra NO & Others supra* at 1045J-1046A.

1081 Section 1 "arbitration agreement" and s28 of the Arbitration Act.

1082 *Seardel Group Trading (Pty) Ltd t/a The Bonwit Group v Andrews NO & Others supra* at 1224C.

7.2 Bargaining councils in the private and public sectors[1083]

7.2.1 Applicable Review Provision

Unless bargaining council parties agree otherwise in a collective agreement, arbitration awards given under the auspices of a bargaining council are final and binding and are subject to limited review in terms of s145 of the LRA.[1084] The Arbitration Act does not apply in these cases.[1085] This provision is the result of an amendment made to the LRA in 2002[1086] – possibly in response to the confusion over how bargaining council awards must be reviewed, as no express provision was set out in the LRA.[1087]

Councils are free to regulate the review of arbitration awards themselves.[1088] Council parties may conclude collective agreements setting out any alternate arrangements for the review of arbitration awards given under the auspices of the

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1083 Section 213 of the LRA states that any reference in the LRA to a "bargaining council" includes councils in the private sector as well as the PSCBC and the other councils established in the public service.

1084 Section 143(1) read with s51(8) of the LRA and s145 of the LRA, read with s51(8) of the LRA. Note that this does not apply to advisory arbitration awards, and that the director of the CCMA must certify that the award is one contemplated by s143(1) before it is enforced (see s143(3)). See also the other sub-sections of s143 of the LRA.

1085 Section 146 of the LRA, read with s51(8) of the LRA

1086 Section 12 of the Labour Relations Amendment Act 12 of 2002.

1087 Certain judges allowed review of bargaining council awards in terms of s33 of the Arbitration Act (read with s157(3) of the LRA), while others reviewed the awards under the general review ground, s158(1)(g) of the LRA. In this regard see the following cases:
Review in terms of s33 of the Arbitration Act read with s157(3) of the LRA: *Portnet v Whitcher & Others* (1999) 21 ILJ 1924 (LC) at 1925A; *Portnet (A division of Transnet Ltd) v Finnemore & Others* [1999] 2 BLLR 151 (LC) at 152G-I and 153D; *Orange Toyota (Kimberley) v Van der Walt & Others* (2000) 21 ILJ 2294 (LC) at 2296F-2297A; *Building Bargaining Council (Southern & Eastern Cape) v Melmons Cabinets CC & Another* [2001] 3 BLLR 329 (LC) at 330I-G; *Transwerk v IMSSA & Others supra* at 2319G-I; *Kem-Lin Fashions v Brunton and Another* (2000) 9 LC 1.11.14 at paragraphs [4] and [37] (viewed at http://www.irnetwork.co.za on 24 August 2003).
Review in terms of s158(1)(g) of the LRA: *Portnet v Whitcher & Others supra* at 1925A; *East London Joinery Works (Pty) Ltd v Knox NO & Others* (2001) 22 *ILJ* 929 (LC) at 930I-J; *Building Bargaining Council (Southern & Eastern Cape) v Melmons Cabinets CC & Another supra* at 331A; *Wanenburg v Motor Industry Bargaining Council & Others* (2001) 22 *ILJ* 242 (LC) at 244D and 245F-H.

1088 This was not the case before the amendment, as parties could not contract out of the terms of the LRA: *Bargaining Council for the Furniture Manufacturing Industry v Unique Kitchen Designs* (2000) 21 *ILJ* 419 (CCMA) at 423J-424A.

relevant council.[1089] This collective agreement will take precedence over the general position laid down by statute.[1090] They may agree that the review of awards be conducted in terms of the Arbitration Act and may go so far as to allow appeals from the awards. However, it is unlikely that review under the Arbitration Act will be favoured over review under the LRA, as the latter allows review in terms of the justifiability test laid down in *Carephone (Pty) Ltd v Marcus NO & Others*, while the former does not.[1091]

Where the collective agreement has been extended to non-parties, they too are required to abide by its terms. With a view to escaping the review/appeal clauses of a collective agreement, non-parties that are not exempt from such clauses should merely elect to refer the matter to the CCMA rather than the bargaining council. However, this applies only where the non-party is making the referral.

The LRA also envisages that accredited councils will arbitrate matters referred to councils in terms of the LRA where a disputant party is not a party to the council.[1092] Consent of both parties is not required for such arbitration if the LRA requires arbitral resolution of the dispute and any disputant party requests the arbitration proceedings.[1093] In these cases, the accredited council will arbitrate the matter and the review provisions agreed upon in the collective agreement will bind the non-party. This reveals an element of compulsion for non-parties in bargaining council arbitration proceedings and the review thereof.

1089 Section 51(8) of the LRA. Note, however, *Reddy v KZN Department of Education & Culture & Others* (2003) 12 LAC 1.11.11 at paragraph [17] (viewed at http://www.irnetwork.co.za on 24 August 2003) where the Court failed to take account of this provision in holding that s158(1)(g) applies in the review of a bargaining council award. It is conceivable that the constitution of a bargaining council will fall within the definition of a collective agreement, as defined in s213 of the LRA (s30(1) of the LRA; *SALSTAFF on behalf of Bezuidenhout v Metrorail* (2001) 22 *ILJ* 1924 (BCA) at 1926H-I).

1090 *MIBCO v Osborne & Others* (2003) 12 LC 4.8.1 (viewed at http://www.irnetwork.co.za on 24 August 2003); *Vista University v Botha* (1997) 18 *ILJ* 1040 (LC).

1091 *Carephone (Pty) Ltd v Marcus NO & Others* (1998) 19 *ILJ* 1425 (LAC) at 1435C-E, confirmed in *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* (2001) 22 *ILJ* 1575 (LAC).

1092 Section 51(3)(b) of the LRA.

1093 Section 51(3)(b) of the LRA.

But what of the case where bargaining council parties have not concluded a collective agreement, but wish to submit to private arbitration on an *ad hoc* basis? Is it permissible to contract out of the provisions of the LRA in a form other than a collective agreement as provided for in s51(8) of the LRA?

Prior to the 2002 LRA amendment, the Courts were divided on this point. Where disputes arose that were not regulated by the LRA, the Arbitration Act was held to apply.[1094] Certain arbitrators took this point further in stating that a council could arbitrate *any* dispute that was referred to it by agreement between the parties, thus allowing the private arbitration of disputes regulated by the LRA but referred by consent of the parties.[1095] The objectives of the LRA were significant in finding that the Arbitration Act applies: the purpose of the LRA is to promote the effective resolution of labour disputes,[1096] and thus bargaining council parties should be permitted to elect whatever dispute resolution processes they wish.[1097]

In any event, written consent to private arbitration was a prerequisite for the application of the Arbitration Act in bargaining council review.[1098] If the parties agreed to private arbitration orally, and no written arbitration agreement existed, the review of the arbitration award was regulated by the common-law.[1099]

However, the LRA seems peremptory in that it now states in s51(8) that "unless otherwise agreed to in a collective agreement, sections s142A and 143 to 146 apply

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1094 *SALSTAFF on behalf of Bezuidenhout v Metrorail supra* at 1926G-I; *Building Bargaining Council (Southern & Eastern Cape) v Melmons Cabinets CC & Another supra*, cited in *United Transport & Allied Trade Union v Autopax Passenger Services (Pty) Ltd* (2001) 22 *ILJ* 1928 (BCA) at 1935E-F.

1095 *United Transport & Allied Trade Union v Autopax Passenger Services (Pty) Ltd* (2001) 22 *ILJ* 1928 (BCA); *Public Service Association on behalf of Putter & Others v Department of Agriculture* (2001) 22 *ILJ* 568 (BCA) at 573A-B and 573D.

1096 Section 1 of the LRA.

1097 See s30(1) , s147(6), s157(3) of the LRA and Item 13(2) of Schedule 7 to the LRA. *Public Service Association on behalf of Putter & Others v Department of Agriculture supra* at 573B; *SALSTAFF on behalf of Bezuidenhout v Metrorail supra* at 1926I-J.

1098 Section 1 of the Act; *Mandhla v Belling & Another* [1997] 12 BLLR 1605 (LC) at 1608J-1609B.

1099 *United Transport & Allied Trade Union v Autopax Passenger Services (Pty) Ltd supra* at 1935F; *Public Service Association on behalf of Putter & Others v Department of Agriculture supra* at 572C-D and 573H-574A.

to any arbitration conducted under the auspices of a bargaining council".[1100] A collective agreement is a written document where a registered trade union/s, on the one hand, and a registered employers' organisation/s, employer/s, or both, on the other hand, agree to certain terms and conditions of employment and other matters of mutual interest.[1101]

The scope of this definition does not seem to include *ad hoc* agreements to submit to private arbitration, as the parties to collective agreements are bargaining agents and not individuals. Further, the arbitration referral in an individual matter does not warrant a collective agreement. Indeed, *ad hoc* submissions to private arbitration in individual disputes would probably serve only to frustrate the purpose of collective bargaining as it would result in inconsistency in dispute resolution procedures and is wholly opposite to the collective use of economic power through centralised bargaining.

It stands to reason that where a collective agreement or council constitution so provides, it is possible that *ad hoc* private arbitration agreements will be permissible. Councils may wish to facilitate the private arbitration of disputes to alleviate the financial burden of dispute resolution processes, as the parties to private arbitration are required to pay for the proceedings.[1102] Disputant parties may prefer private arbitration proceedings as this form of dispute resolution is generally quick and holds numerous other advantages.[1103] The arbitration awards arising out of such proceedings will be reviewed under the Arbitration Act.

The corollary is that bargaining council parties are not permitted to contract out of the terms of a collective agreement.[1104] This defeats the very purposes of the LRA and the centralised bargaining system it establishes. The minority are required to

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1100 Section 51(8) of the LRA.
1101 Section 213 of the LRA.
1102 Brand, J "Bargaining Council Dispute Resolution – Under the LRA as amended" unpublished paper (2002).
1103 See above at 2.5.1.
1104 *Building Industry Bargaining Council (East London) v Naidoo t/a Dev's Construction Trust & Another* [2000] 8 BLLR 898 (LC) at 899J-890A.

sacrifice their individual desires in order to promote the good of the industry as a whole.[1105] Parties must submit to whatever dispute resolution procedures are agreed upon in the collective agreement, and thus they are bound by the review provision applicable to that form of arbitration.

Thus, all parties falling within the scope of a collective agreement must abide by review and/or appeal regulations provided therein. Parties may only conclude *ad hoc* agreements to submit to private arbitration where they are permitted to do so in terms of a collective agreement. Where no collective agreement regulates the review of council arbitration awards, s145 of the LRA will apply.

7.2.2 Application of the Justifiability Test

7.2.2.1 Bargaining councils in the private sector

Bargaining councils in the private sector are voluntarily established.[1106] They are regulated by collective agreements that may take precedence over the LRA.[1107] Disputes between parties to a council are resolved in accordance with the council's constitution, as agreed to by council parties.[1108] Thus, the councils derive their powers from the LRA and their constitutions.[1109] Any clause concerning the review of arbitration awards issued under a bargaining council is based on the agreed intention of the parties.[1110] This is the case despite the fact that the LRA requires that certain matters be referred to arbitration.[1111] Regardless of the degree of

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1105 *Kem-Lin Fashions CC v Brunton & Another* [2001] 1 BLLR 25 (LAC) at 31D-F.
1106 Section 27(1) and s30 of the LRA.
1107 Section 28(1)(a) of the LRA; *Portnet v La Grange & Others* (1999) 20 *ILJ* 916 (LC).
1108 Section 51(2)(a) of the LRA.
1109 *Wanenburg v Motor Bargaining Council & Others supra* at 249I-J; *SALSTAFF on behalf of Bezuidenhout v Metrorail supra* at 1926I.
1110 See *Seardel Group Trading (Pty) Ltd t/a The Bonwit Group v Andrews NO & Others supra* at 1223I-J, where the Court states that s40 of the Arbitration Act prescribes that arbitration proceedings conducted under a special law such as the LRA are consensual in nature.
1111 *Independent Municipal & Allied Trade Union v Northern Pretoria Metropolitan Sub-Structure & Others* 1999 (2) SA 234 (T) at 239A.

voluntariness, the justifiability test clearly applies to bargaining council review as a result of the legislative directive that s145 apply in bargaining council review.[1112]

The courts have not yet considered the justifiability test in relation to this directive. In the past, reference was made to the notion of rationality in bargaining council awards without directly citing the *Carephone* test. In one matter, the Labour Court stated that a bargaining council decision to condone late referral of a dispute is vulnerable if it is not justifiable on the submissions before the decision-maker if it indicates a failure by the decision-maker to apply his or her mind properly.[1113] The Court held that the decision-maker applied his mind to the material before him and the review application was dismissed.[1114] Again, in *East London Joinery Works (Pty) Ltd v Knox NO*,[1115] the Court held that there was no factual basis justifying the arbitrator's interference with the sanction of the employer. As such, the arbitrator was held to have exceeded the arbitral powers and the award was set aside.[1116]

In *Portnet (A Division of Transnet) v Finnemore & Others*,[1117] the Court stated that where a dispute must be referred to arbitration in terms of a bargaining council constitution, the arbitration is compulsory. However, *in casu* the council did not arbitrate the matter itself – an independent arbitrator from IMSSA was appointed to arbitrate. As such, the Court held that the award must be reviewed under the Arbitration Act.

1112 Section 51(8) of the LRA.

1113 *Metz Transport v Furniture, Bedding & Upholstery Industry Bargaining Council & Others* [2001] 10 BLLR 1137 (LC) at 1142E.

1114 *Metz Transport v Furniture, Bedding & Upholstery Industry Bargaining Council & Others supra* at 1142H-1143A. Note that no statutory review provision was cited.

1115 *East London Joinery Works (Pty) Ltd v Knox NO & Others supra* at 935B.

1116 *East London Joinery Works (Pty) Ltd v Knox NO & Others supra* at 935B-D. In *Building Bargaining Council (Southern & Eastern Cape) v Melmons Cabinets CC & Another supra* at 331C-G, the Labour Court stated that the justifiability test did not apply to the bargaining council review in question. This was based on the proposition that, as the LRA did not regulate the arbitration of the dispute, the Arbitration Act applied to the review and the justifiability test was excluded (The Court cited *ESKOM v Hiemstra NO & Others supra* as authority for this conclusion).

1117 *Portnet (A Division of Transnet) v Finnemore & Others supra* at 152F-G.

In my view, the parties agreed in the council constitution that a member of IMSSA would arbitrate certain disputes. This is a voluntary submission to arbitration, contained in a consensual document. Such proceedings fall within the scope of the Arbitration Act, regardless of the identity of the arbitrator. Whether the parties agree on the appointment of an IMSSA arbitrator, a CCMA arbitrator, or a member of the council as arbitrator, the appointment is nonetheless voluntary.[1118] Both the submission to arbitration and the identity of the arbitrator are based on the agreement of the parties, as is the membership to the council.

In other cases, the contrary was found. In *Seardel's* case,[1119] the conclusion that bargaining council arbitrators exercise private power was based on the notion that bargaining council arbitration in terms of a collective agreement is voluntary in nature – despite the extension of such collective agreement to non-parties. As a result, the Court held that the award must be reviewed in terms of the Arbitration Act and that the justifiability test does not apply.[1120]

In *Transwerk v IMSSA & Others*,[1121] the Court considered the situation where the arbitration is not private insofar as the bargaining council, rather than the disputant parties, appoints the arbitrator. While the dispute-resolution functions of bargaining councils are comparable to that of the CCMA, the Court found that councils are not required by law to perform these functions.[1122] Further, an arbitrator appointed by parties to the bargaining council cannot be seen to form part of the State, and as such is not part of the constitutional system that must be capable of rational testing.[1123] The Court concluded that the applicant had not

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1118 See, however, *Seardel Group Trading (Pty) Ltd t/a The Bonwit Group v Andrews NO & Others supra* at 1224G-I, where the Court agreed with the distinction in *Portnet (A Division of Transnet) v Finnemore & Others supra* between arbitration proceedings managed by a bargaining council and those managed in terms of an agreement. See also *Transwerk v IMSSA & Others supra* at 2322G-2326E.

1119 *Seardel Group Trading (Pty) Ltd t/a The Bonwit Group v Andrews NO & Others supra* at 1224A-1225A.

1120 *Seardel Group Trading (Pty) Ltd t/a The Bonwit Group v Andrews NO & Others supra* at 1225A-B.

1121 *Transwerk v IMSSA & Others supra*

1122 *Transwerk v IMSSA & Others supra* at 2324H-2325F.

1123 *Transwerk v IMSSA & Others supra* at 2326C-E.

discharged the onus of proving that the arbitrator exercised public power in issuing the arbitration award.[1124]

However, the classification in these latter two cases fails to take account of the compulsory features of the centralised bargaining system. Section 51(8) is, however, decisive in that s145 of the LRA is the review provision applicable to bargaining council review. The Legislature must have known that the justifiability test applies to reviews in terms of that section and nonetheless provided that s145 applies. As a result, the justifiability test must apply.

7.2.2.2 Bargaining Councils in the public sector

The Public Service Co-ordinating Bargaining Council ("PSCBC") is the over-arching bargaining council in the public sector. It is compulsory in establishment and participation by the founding parties to the council.[1125] However, it is regulated by a constitution and collective agreements determined by agreement of the council parties.

The position of other public sector bargaining councils is slightly different, as the PSCBC, and not the individual parties, establish the bargaining council.[1126] All matters concerning these councils are regulated by agreement between the parties in the form of a constitution, failing which the Registrar determines the constitution. Such determinations by the Registrar are an imposition of governmental control in the regulation of the council, and indicate a degree of compulsion in the manner in which the council relationships will be supervised.

The regulation of public bargaining councils is determined largely by collective bargaining.[1127] In relation to administrative justice, the courts have averred that the

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1124 *Transwerk v IMSSA & Others supra* at 2324G.
1125 Section 35(a) of the LRA and item 2(3) of Schedule 1 to the LRA.
1126 Sections 37(1) and (2) of the LRA.
1127 *National Police Services Union & Others v National Negotiating Forum & Others* (1999) 20 *ILJ* 1081 (LC) at 1093I-1094C.

processes set out in the LRA satisfy the values of accountability, responsiveness and openness as referred to in *Carephone's* case.[1128] This relates to the governmental influence on the establishment and regulation of bargaining councils in the public sector. Given that the extent of compulsion in the PSCBC and other public bargaining councils and the lack of voluntary agreement in the establishment and regulation of the councils, it seems fitting that the justifiability test applies to the review of awards given under the auspices of public sector bargaining councils.[1129] Indeed the test does apply, as bargaining council awards are reviewable in terms of s145 of the LRA.

7.3 Accredited Agencies

7.3.1 Applicable Review Provision

Accredited agencies perform a dispute resolution function on behalf of bargaining councils that have not received CCMA accreditation. Such councils are compelled to refer matters to accredited agencies, failing which the CCMA will hear the dispute. It follows that the awards of accredited agencies will be reviewable in terms of s145 of the LRA, unless council parties agree otherwise in a collective agreement, and the application of the Arbitration Act is excluded.[1130]

1128 *National Police Services Union & Others v National Negotiating Forum & Others supra* at 1094D; *Carephone (Pty) Ltd v Marcus NO & Others supra.*

1129 Note that in *National Education Health & Allied Workers Union v Public Health & Welfare Sectoral Bargaining Council & Others* (2002) 23 *ILJ* 509 (LC) at 516H, the Court upheld the decision of a council arbitrator as being correct, after observing that the arbitrator's reasoning was flawed. No mention is made of the *Carephone* test, nor any collective agreement allowing reviews or appeals other than is set out in s51(8) of the LRA. This conflicts with the lack of a right to appeal arbitration awards in terms of s143, as well as the justifiability test as interpreted in s145 of the LRA.

1130 Section 51(8) of the LRA.

7.3.2 Application of the Justifiability Test

Since s145 applies in the review of accredited agency awards, it follows that the awards may be set aside on the grounds of irrationality in the same manner as CCMA awards and bargaining council awards.

7.4 Statutory Councils

7.4.1 Applicable Review Provision

The LRA empowers employment parties to form statutory councils. The statutory councils are envisaged *inter alia* as a medium for dispute resolution through conciliation and arbitration. Thus, the LRA should provide for the review of the arbitral powers exercised by such councils. However, no express review provision is given in either the LRA or the model constitution.[1131]

Section 51(8), discussed above, does not apply to statutory council awards, by virtue of the reference in that provision to arbitration proceedings conducted under the auspices of "a bargaining council".[1132] Other sections of the LRA use the term "council" as inclusive of both bargaining and statutory councils.[1133] Given these legislative definitions, the Legislature could not have intended s51(8) to apply to statutory councils. Further, s145 expressly states that it applies to the review of CCMA arbitration awards. One must assume that s145 of the LRA does not apply in the review of statutory council awards.

The only possible review provision in the LRA lies in s158(1)(g), which grants the Labour Court the power to review functions performed under the LRA on any ground permissible in law.[1134] This provision generally relates to administrative

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1131 The model constitution for statutory councils appears in Schedule 9 to the LRA.

1132 Section 51(8) of the LRA. "Bargaining council" includes bargaining councils in both the private and public sphere, but does not include statutory councils (s213 of the LRA).

1133 Section 213 of the LRA.

1134 **Section 158(1)(g) of the LRA:**

actions performed in terms of the LRA,[1135] and which are reviewable on the common law grounds.[1136]

Section 158(1)(g) was applied in several bargaining council reviews prior to the 2002 amendment.[1137] These cases are of little assistance in this enquiry for two reasons. Firstly, no reference is made in these cases as to why this is the appropriate review provision, and thus the judicial reasoning cannot be analysed. Secondly, the distinct difference between statutory councils and bargaining councils is the extent of compulsion and State interference in the establishment and regulation of each of these bodies, as well as in the referral of the disputes to the bodies. The compulsory or voluntary nature of submissions to arbitration has been highlighted throughout this dissertation. This is obviously a vital difference between the two forms of councils that will impact on the review provision that ought to be applied. Finally, s158(1)(g) is of little use in determining which review principles apply, as the reference in the provision to "any grounds that are permissible in law" merely begs the question.[1138]

Section 33 of the Arbitration Act is a review provision "permissible in law",[1139] and the Labour Court has jurisdiction to hear matters relating to proceedings conducted under that Act, if the dispute may be referred to arbitration in terms of the LRA.[1140] Thus, s33 may be a viable provision for application in statutory council reviews.

> "The Labour Court may, subject to s145, review the performance or purported performance of any function provided for in this Act on any grounds that are permissible in law."

1135 *Carephone (Pty) Ltd v Marcus NO & Others supra* at 1428F-1429D.

1136 *Juggath v Shanker NO and Another* (1999) 2 BLLR 141 (LC) at 141, cited in *Sun International (SA) Ltd t/a Morula Sun Hotel and Casino v CCMA & Others* (1999) 8 LC 1.11.32 (viewed at www.irnetwork.co.za on 11 November 2003).

1137 See above at 6.5.1.1.

1138 *Seardel Group Trading (Pty) Ltd t/a The Bonwit Group v Andrews NO & Others supra* at 1222F-G.

1139 *Seardel Group Trading (Pty) Ltd t/a The Bonwit Group v Andrews NO & Others supra* at 11223G.

1140 Section 157(3) of the LRA; *Seardel Group Trading (Pty) Ltd t/a The Bonwit Group v Andrews NO & Others supra* at 1223E-F; *Manaka & Others v Air Chefs (Pty) Ltd* (1999) 20 *ILJ* 388 (LC) at 390C.

The Arbitration Act applies to all arbitration proceedings conducted in terms of arbitration agreements.[1141] An "arbitration agreement" is a written agreement providing for the reference to arbitration of any existing or future dispute relating to a matter specified in the agreement.[1142] It is conceivable that a collective agreement or constitution of a statutory council could fall into this definition. The Court in *IMATU V Northern Pretoria Metropolitan Substructure* equated ordinary consensual arbitration agreements with collective agreements that are required to provide a procedure for disputes concerning the interpretation or application of such agreement.[1143] If one can prove on the particular facts of a case that the collective agreement is an arbitration agreement within the definition stated above, the Arbitration Act will apply and statutory council awards will be reviewable in terms of s33 of the Act.

The Arbitration Act also applies to statutory arbitrations conducted under special laws:[1144] s40 states that the Act applies to every arbitration under any law, as if the arbitration were pursuant to an arbitration agreement and as if that other law were an arbitration agreement.[1145] However, where that other law is an Act of Parliament, the Arbitration Act will not apply in so far as it is excluded by or is inconsistent with that law.[1146] [1147]

In terms of s40 of the Arbitration Act, the Act will apply to statutory council arbitration as if the provisions of the LRA were the arbitration agreement – in other words, the jurisdiction of the arbitrator arises from the LRA without the necessity of the parties concluding a separate submission to arbitration. The only

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1141 Preamble to the Act.

1142 Section 1 of the Act.

1143 Section 24(1) of the LRA: This excludes closed shop and agency shop agreements, as well as certain settlement agreements; *IMATU v Northern Pretoria Metropolitan Substructure & Others supra* at 238H-J.

1144 *IMATU v Northern Pretoria Metropolitan Substructure & Others supra* at 237J.

1145 Section 40 of the Act.

1146 Section 40 of the Act.

1147 *Seardel Group Trading (Pty) Ltd t/a The Bonwit Group v Andrews NO & Others supra* at 1222H-1223J and 1225C-E, confirming *Portnet (A Division of Transnet Ltd) v Finnemore & supra* at 152G-I and 153D. The judge in *Seardel* rejects the view he formerly adopted in *Portnet v La Grange supra* at 919A-H, as he did not consider s40 of the Arbitration Act in finding that the *Carephone* test applies to bargaining council review in terms of s158(1)(g).

proviso is that the Arbitration Act will not apply if the LRA excludes the Arbitration Act or is inconsistent with it. Unlike CCMA arbitration review and bargaining council review,[1148] no contradictory provisions for the review of statutory council arbitration awards exist in the LRA. Nor does the LRA exclude the Arbitration Act in relation to statutory council arbitration proceedings.[1149] However, the LRA and its interpretation may be inconsistent with the application of s33 of the Arbitration Act.

Two major differences between s33 of the Arbitration Act and s145 of the LRA exist. The first difference is that *bona fide* mistakes of law may be set aside on the grounds of misconduct under s145 of the LRA, but not under s33 of the Arbitration Act. This judicial interpretation was based on the requirement that decisions made in the exercise of statutorily bestowed powers must be given in accordance with the law.[1150] The power of statutory councils to perform dispute resolution functions is conferred in the LRA.[1151] It follows logically that *bona fide* mistakes of law made in statutory council awards ought to be reviewable, as is the case in terms of s145 review. The LRA conferral of the power to perform dispute resolution functions may be inconsistent with the conclusion that *bona fide* mistakes of statutory council arbitrators may not be reviewed by virtue of the application of the Arbitration Act.

The second difference is that the justifiability test applies in s145 review and not in s33 review. If the judiciary accepts the argument in favour of the application of the justifiability test to private arbitration awards, rationality would be required

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1148 In relation to CCMA review, see s145 of the LRA and in relation to bargaining council review, see s51(8) of the LRA. *Stocks Civil Engineering (Pty) Ltd v Rip NO & Another supra* at 378D-E, cited in *Transwerk v IMSSA & Others supra* at 2321E-2322C; *Seardel Group Trading (Pty) Ltd t/a The Bonwit Group v Andrews NO & Others supra* at 1223F.

1149 In relation to CCMA review, see s146 of the LRA and in relation to bargaining council review, see s51(8). *Seardel Group Trading (Pty) Ltd t/a The Bonwit Group v Andrews NO & Others supra* at 1223C-E and at 1224E-F.

1150 *Reunert Industries (Pty) Ltd t/a Reutech Defence Industries v Naicker & Others* [1997] 12 BLLR 1632 (LC) at 1636A-B; *Standard Bank of SA Ltd v CCMA & Others* (1998) 19 *ILJ* 903 (LC) at 915B-C.

1151 Section 43(1)(a) of the LRA.

regardless of the review provision applied.[1152] However, as the law stands, the interpretation of s33 of the Arbitration Act as exclusionary of the justifiability test may be argued as being inconsistent with the LRA for two reasons.

The application of the justifiability test to CCMA and bargaining council awards is accepted. In terms of the extent of compulsion, CCMA arbitration is the epitome of compulsory proceedings, while bargaining council arbitration falls on the voluntary side of the continuum. Proceedings under the auspices of statutory councils involve a far greater degree of compulsion than bargaining council proceedings, and are statutorily regulated[1153] to a greater extent than their bargaining council counterparts. The regulation of the review of bargaining council awards and not statutory council awards is thus peculiar. One would imagine that it is more crucial to regulate statutory councils that may be imposed on industrial parties, than it is to regulate bargaining councils that are formed voluntarily. It seems fitting that the justifiability test apply to statutory council review. Injustice would surely result if rationality were not required of such awards.

Further, the LRA aims to facilitate collective bargaining and to provide simple, inexpensive dispute resolution procedures in the labour context through the creation special *fora*.[1154] These objects would be frustrated if the justifiability test does not apply – particularly in light of the inconsistency that results in relation to bargaining council review through s51(8). Thus it is arguable that the application of s33 of the Arbitration Act (as it is currently interpreted by the courts) is inconsistent with the LRA, although not expressly excluded.

The Court in *Seardel Group Trading (Pty) Ltd t/a The Bonwit Group v Andrews NO & Others*[1155] states that s40 of the Arbitration Act prescribes that arbitration

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1152 See Chapter Six above.

1153 Item 11 of Schedule 9 to the LRA; Item 13(5) of Schedule 9 to the LRA, read with s138 and s142 of the LRA.

1154 Preamble to the LRA and s1(c)-(d) of the LRA; *IMATU v Northern Pretoria Metropolitan Substructure & Others supra* at 239B.

1155 *Seardel Group Trading (Pty) Ltd t/a The Bonwit Group v Andrews NO & Others supra* at 1224A-B.

proceedings conducted under a special law such as the LRA are essentially voluntary in nature.[1156] Generally, s40 does advocate that the Arbitration Act will apply to any arbitration as if the proceedings were conducted in pursuance of an arbitration agreement. However, the conclusion of the Court does not follow in that the arbitration is not necessarily voluntarily submitted to as a result.

In both bargaining council and statutory council arbitration proceedings, the LRA requires councils to perform certain dispute resolution functions if the council has jurisdiction.[1157] Disputant parties are compelled in terms of statute to refer the matter to such council. While this is not a voluntary submission to arbitration as contemplated by the Arbitration Act, it is a statutory arbitration as envisioned by s40 of that Act. While this factor goes to the root of the judicial interpretation of s145 and the justifiability test, falls precisely within the scope of s40 of the Arbitration Act. As such, it cannot be said that the LRA is inconsistent with the application of the Arbitration Act on this ground.

A holistic consideration of these factors indicates that s33 of the Arbitration Act ought to apply to statutory council review insofar as it is not inconsistent with the LRA.[1158] Thus, review for justifiability ought to be permitted as well.

Where statutory council parties indicate the intention to submit to a contrary review provision in a collective agreement, the agreement will take precedence over the provisions of statutes.[1159] To alleviate the issues surrounding the applicable review provision, council parties should expressly state their intentions in a collective agreement. Parties are given the power to influence the regulation of their employment relationships, and should actively utilise this power to maintain control over their affairs.

1156 *Seardel Group Trading (Pty) Ltd t/a The Bonwit Group v Andrews NO & Others supra* at 1223I-J and 1224C-E.

1157 See for example s191(1)(a) of the LRA.

1158 Section 40 of the Arbitration Act.

1159 *Seardel Group Trading (Pty) Ltd t/a The Bonwit Group v Andrews NO & Others supra* at 1223D-E; *Transwerk v IMSSA supra* at 2322F-G. See, however, *MIBCO v Osborne & Others supra.*

7.4.2 Application of the Justifiability Test

The justifiability test ought to apply to statutory council review. Not only may parties be forced to join a statutory council,[1160] but the council is also governed by decisions made by the Minister.[1161] The ministerial determinations come in the form of case-by-case decision-making and the model constitution,[1162] on which the Minister had to consult NEDLAC before promulgation. There is a large degree of coercion and little voluntarism in these cases. Despite this element of compulsion and governmental interference in statutory councils,[1163] the justifiability test will not apply if the review of statutory council awards is governed by s33 of the Arbitration Act, as it is interpreted in private arbitration review. [1164] This creates a serious anomaly in that the justifiability test will apply to bargaining council awards and not to statutory council awards. This is alleviated if s40 of the Arbitration Act applies to statutory council arbitration, and the proceedings are reviewable in terms of s33 only insofar as it is consistent with the LRA. Thus, the justifiability test and principles regarding *bona fide* mistakes in CCMA review ought to be applicable to statutory council awards.

Statutory council parties may find consensus on the grounds of review or review provision applicable to the arbitration proceedings in collective agreements or in their constitutions.[1165] These agreements are as much voluntary as are bargaining council agreements to the same effect. They ought to take precedence in regard to the review provision applicable to arbitration proceedings conducted under the auspices of that council.

1160 See sections 40(1), s39(2)-(6) and s41 of the LRA.
1161 Section 41(3), (4), (5), (8) of the LRA.
1162 Items 11(1) and 11(4) of Schedule 9 to the LRA.
1163 Governmental interference in the form of ministerial decision-making and the parliamentary regulation through the provisions of the LRA.
1164 The argument as to the applicable review provision is discussed above: see 7.2.2.
1165 Section 43(1)(d) of the LRA.

7.5 Parties that are not party to the Councils

On the far end of the continuum is the party to a dispute that is not a party to a council, but that is compelled to abide by collective agreements on the basis that it is within a council's registered scope.[1166] While these non-parties may apply for an exemption from the application of the collective agreement, such exemption may be withheld. Where the non-parties are subject to the dispute resolution practices of a council,[1167] the awards must be reviewed as provided for in the collective agreement of the council. In these cases, the non-party is bound by the decisions of those that were involved in the conclusion of the agreements and not by their own intention.

In *Seardel Group Trading (Pty) Ltd t/a The Bonwit Group v Andrews NO & Others*,[1168] the Court stated that arbitration proceedings emanating from a collective agreement that has been extended to non-parties are essentially voluntary. This conclusion was based on the fact that a collective agreement is a consensual document. This seems inaccurate, as the non-parties' intention is not reflected in the collective agreement. They do not accede directly to the terms of the agreement. However, the provisions of the collective agreement bind them.

7.6 Conclusion

Minimal case law exists in regard to arbitration proceedings conducted under the auspices of collective bargaining agents and private accredited agencies. One may

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1166 Provided the collective agreement has been extended to non-parties. See s32(1) of the LRA and the discussion above. Note that non-parties that refer a dispute to a council by consent, rather than in terms of a collective agreement, will be bound by the review provisions applicable to that council. This is based on the wholly voluntary nature of the submission to arbitration.

1167 Where one of the parties to the dispute is a non-party and the LRA bestows arbitral jurisdiction on the council to resolve the dispute, it must be referred to the accredited council if a disputant party requests or by consent (s51(3)). Where one of the parties to the dispute is a non-party in the registered scope of the council, it may refer a dispute to the council (s51(2)(b)).

1168 *Seardel Group Trading (Pty) Ltd t/a The Bonwit Group v Andrews NO & Others supra* at 1224A-B.

speculate that either there is little dissatisfaction with the awards of such bodies, or that some form of agreement is reached in relation to the review of defective arbitration proceedings. The inadequacy of the LRA provisions and the lack of case law make it difficulty to discern the review provisions applicable to each bargaining agent. It seems that the review grounds in the LRA apply to bargaining councils in the public and private sector (unless the parties reach an alternate agreement) and accredited agencies, while the Arbitration Act governs statutory council review.

The debate as to whether the justifiability test should apply to private arbitration proceedings is highlighted in this chapter. Throughout this dissertation, the voluntary or compulsory nature of the arbitration proceedings was highlighted in the judicial rationalisation of whether the justifiability test applies on review. It is clear that the voluntary attributes of arbitration under the auspices of private sector bargaining councils have not deterred courts from applying the justifiability test. The recent LRA amendment that s145 is the appropriate provision for such bargaining council review only serves to strengthen the argument that rationality is required in private sector bargaining council awards.

Bargaining councils in the public sector exhibit a great degree of compulsion, yet they are governed largely by collective agreement. This multifaceted character has not been considered in detail by the courts. However, the little case law that does exist indicates that the justifiability test applies in the review of awards given under the auspices of these councils.

Statutory councils are marked with a degree of compulsion similar to public sector bargaining councils. In fact, the forced membership to statutory councils seems more extreme as these councils operate in the private market – the industry is not controlled, owned or provided by the state. I have argued that the current legislation and case law must be interpreted to indicate that the Arbitration Act applies in the review of statutory council awards insofar as it is not inconsistent with the LRA. If this is the case, the justifiability test will apply based on the provisions of the LRA and the judicial interpretation thereof. This approach

recognizes the compulsory nature of statutory councils and the arbitration proceedings conducted there under.

This chapter illustrates that the heavy reliance on the degree of compulsion in arbitration proceedings and the consequent classification of the proceedings as private or public is hampering the proper analysis of the justifiability test. The nature of the arbitration proceedings as voluntary or compulsory remains important. However, one must consider all policy factors and circumstances before reaching the conclusion that rationality in awards is not a necessity. Not only is justifiability is central to the current constitutional order, but justice itself requires that disputant parties have recourse where arbitration awards are irrational.

APPENDIX 1
Tabled Summary of Nature of Arbitral Bodies

	CCMA	BARGAINING AGENTS			PRIVATE ARBITRATION
		Public Sector Bargaining Councils	Private Sector		
			Bargaining Council	Statutory Council	
Nature of Body	Independent, juristic body	Independent body corporate	Independent body corporate	Independent body corporate	Independent private body
Establishment of Body	Compulsory	Compulsory	Generally voluntary	Compulsory	Voluntary
Initiation of Arbitration Proceedings	Generally compulsory	Compulsory for council parties	Compulsory for council parties	Compulsory for council parties	Voluntary
Dispute Jurisdiction	Territorial: All of South Africa Common labour disputes & if parties consent, rights disputes within jurisdiction of Labour Court	Territorial: All employers & employees within scope Limited labour disputes	Territorial: All employers & employees within scope Limited labour disputes	Territorial: All employers & employees within scope Limited labour disputes	Only over parties to dispute Issues limited by submission and Arbitration Act
Appointment of Arbitrator	CCMA allocates commissioners with minimal input from disputant parties	Accredited: permanent pane;l or *ad hoc* appointment Not accredited: Accredited agency or CCMA possibility of Private Arbitration	Accredited: permanent pane;l or *ad hoc* appointment Not accredited: Accredited agency or CCMA possibility of Private Arbitration	Accredited: permanent pane;l or *ad hoc* appointment Not accredited: Accredited agency or CCMA possibility of Private Arbitration	Parties elect arbitrator in terms of submission

	CCMA	BARGAINING AGENTS			PRIVATE ARBITRATION
		Public Sector Bargaining Councils	Private Sector		
			Bargaining Council	Statutory Council	
Determination of Procedure	Directed by CCMA commissioner, LRA and CCMA rules	Directed by LRA, council constitution and collective agreement	Directed by LRA, council constitution and collective agreement	Directed by LRA, council constitution and collective agreement	Primarily directed by parties to dispute
Powers of Arbitrator	Governed by LRA (similar to Arbitration Act powers)	Governed by LRA, constitution and collective agreement	Governed by LRA, constitution and collective agreement	Governed by LRA, constitution and collective agreement	Parties and/ or Arbitration Act
Applicable Review	LRA	LRA unless council parties agree otherwise	LRA unless council parties agree otherwise	Arbitration Act, unless parties agree otherwise	Arbitration Act, unless parties agree otherwise