THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 191/08

In the matter between:

EDCON LTD

APPELLANT

v

B PILLEMER NO
FIRST RESPONDENT
COMMISSION FOR CONCILIATION MEDIATION & ARBITRATION **SECOND RESPONDENT**

P C REDDY
THIRD RESPONDENT

Neutral citation: *Edcon v Pillemer* (191/2008) [2009] ZASCA 135 (5 October 2009).

Coram: Mpati P, Heher, Mlambo, Maya JJA and Tshiqi AJA

Heard: 4 September 2009
Delivered: 5 October 2009

Summary: Labour Law – Labour Relations Act 66 of 1995 – Commission for Conciliation Mediation and Arbitration – Review of arbitration award –Constitutional standard of reasonableness applicable.

Labour Law – fairness of dismissal – destruction of relationship of trust – evidence showing destruction necessary.

ORDER

On appeal from: Labour Appeal Court, (Sangoni AJA with Wallis JA and Tlaletsi AJA concurring sitting as court of appeal).

The following order is made:

The appeal is dismissed with costs including the costs consequent upon the employment of two counsel.

JUDGMENT

MLAMBO JA (MPATI P, HEHER, MAYA JJA, TSHIQI AJA CONCURRING)

[1] The appellant (Edcon) had dismissed the third respondent (Reddy) for misconduct. Contending that her dismissal was unfair Reddy referred a dispute to the second respondent, the Commission for Conciliation Mediation and Arbitration (CCMA) for resolution through conciliation and, failing that, through arbitration. The CCMA appointed the first respondent (Pillemer) to arbitrate the dispute after conciliation failed to resolve it. Having conducted the arbitration proceedings Pillemer made an award in which she concluded that

Reddy's dismissal was substantively unfair and ordered Edcon to reinstate her but without arrear salary.

[2] Unhappy with the award Edcon launched review proceedings in the Labour Court (LC) in terms of s 145[1] of the Labour Relations Act 66 of 1995 (LRA) with a view to setting it aside. The LC (Pillay J) declined to set the award aside. Undaunted, Edcon appealed to the Labour Appeal Court (LAC), with that court's leave, but that effort again came unstuck when the LAC dismissed the appeal, concluding that the award was unassailable. The judgment of the LAC has been reported – *Edcon Ltd v Pillemer NO & others* (2008) 29 ILJ 614 (LAC). Edcon's appeal is before us with special leave of this court.

[3] For appropriate appreciation of the matter, it is prudent to traverse its factual background in some detail. Reddy was the beneficial user of a company vehicle, a Toyota Corolla (the Corolla), courtesy of Edcon's car scheme policy (the policy). In June 2003 the Corolla was involved in a collision with another vehicle whilst driven by Reddy's son, Andre. Reddy was not in the Corolla at the time. In terms of the policy Reddy was obliged, amongst others, to report the

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[1] Section 145 provides: 'Review of arbitration awards
(1) Any party to a *dispute* who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award –
(a) . . .
(b) . . .
(2) A defect referred to in subsection (1), means –
(a) that the commissioner –
    (i) committed misconduct in relation to the duties of the commissioner as an arbitrator;
    (ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
    (iii) exceeded the commissioner's powers; or
(b) that an award has been improperly obtained.
(3) . . .

accident to Edcon, the South African Police Service and the relevant insurance company within 24 hours and not carry out repairs to the Corolla without the approval of the insurance company. Reddy did none of the above, arranging, instead, with her husband to repair the Corolla at his panel beating shop at own cost. As fate would have it, a combination of factors led to Edcon getting to know of the collision some six months later. This was when Reddy, who was unhappy with the Corolla's performance, took it to a Toyota dealer for a check up. On inspection the service personnel discovered collision damage which had apparently not been repaired properly. When the service personnel appraised Reddy of this fact she approached her manager, Mr Clive Dwyer, with a request to authorise payment for the required repairs. She did not, however, disclose to Dwyer that the Corolla had been in a collision. He discovered this when he contacted the service personnel.

[4] On being confronted by Dwyer, Reddy initially denied that the Corolla had been involved in a collision but later admitted the occurrence, stating that the collision had occurred whilst she was driving it at a time when she was still employed by a company that had later merged with Edcon. Dwyer referred the matter to Mr Sayendiran Danny Naidoo, a security manager employed by Edcon, for investigation. When Naidoo spoke to Reddy, she repeated her lie that she was the driver when the collision took place, stating that a minibus taxi had crashed into her. She did tell Naidoo, though, that she had given the Corolla to her husband to repair at his panel

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(4) . . .'

beating shop. Naidoo recommended Reddy's suspension on full pay pending finalisation of his investigation. At Naidoo's request for a further statement Reddy changed her version, this time stating that the collision had occurred whilst Andre was driving, but that she was a passenger. Her final statement was when she came clean and told the truth with an offer to repay the costs associated with the required repairs. Andre had also, in the mean time, made a statement to Naidoo confirming that he was driving the Corolla and that he was alone when the collision occurred. It is common cause that in terms of the policy Andre was entitled to drive the Corolla as he was in possession of a valid driver's licence.

[5] In due course Edcon convened a disciplinary enquiry to look into the matter, chaired by Ms Yasmeen Ismail, an employee. The charge levelled against Reddy was: 'failure to be honest and act with integrity in that you committed an act, which has affected the trust relationship between the company and the employee in that on 8 June 2003 to 8 October 2003: You failed to report an accident of a company vehicle . . . which your son was driving on the day of the accident (8 June 2003) and this resulted in a breach of trust between yourself and the company'. Reddy pleaded guilty to the charge at the commencement of the enquiry, stating that her ignorance of the policy rule that Andre was entitled to drive the Corolla had driven her to be deceitful as an attempt to protect him. She was found guilty and dismissed from her employment.

[6] Ms Ismail's decision to dismiss Reddy appears to have been

motivated by her view that Reddy had behaved without integrity and honesty, values regarded highly by Edcon. In this regard Ms Ismail regarded Reddy's unblemished record and character as not sufficiently mitigatory of her conduct. Reddy appealed her dismissal and the resultant appeal hearing was chaired by Mr Loyiso Maponya, another employee. Reddy's grounds of appeal were:

'Penalty too harsh – in that it is respectfully submitted that although serious offences generally warrant dismissal, the nature of the offence in this instance had not completely destroyed the trust relationship between the accused and the employer.

Inconsistency of Disciplinary Penalty – Historical inconsistency – in that the employer has not dismissed an employee guilty of a similar offence (uncontested) viz. an auditor by the name of Patience had acted dishonestly by failing to report an accident and had eventually told the truth.

The accused wishes the following to be considered – That she has dedicated most part of her working life to the company and is two years away from retirement age.

She accepts full responsibility for all the necessary and reasonable costs of repairing the company vehicle and therefore the company will incur no loss.

She is diabetic and hypertensive and the sequence of events have been stressful, seeing that she always provided a loyal service to the company.'

[7] Regarding the case of another employee (Patience Mtsweni) who had apparently behaved in similar fashion to Reddy, Maponya remarked:

'In examination of the evidence before me it appears that Ms Reddy had established a prima facie case of similarities that existed between her case and that of Ms Mtsweni.

I have noted the following salient similarities:

Both of them were involved in an act of dishonesty by failing to report the accident as per the company car policy and disciplinary procedures.

In both cases it was their kids who caused an accident with the company car.

Both of them was their first offence and it also appears that their line managers commended both of them as good and hard working employees.

Both of them had undertaken to pay the cost for the repair of the company vehicle.

The company did not dispute the above allegations of inconsistency, the only objection the company had with this issue was the issue regarding the amount that Ms Reddy had undertaken to pay towards repair costs of the vehicle.'

Maponya, however, upheld the sanction of dismissal, concluding that:

'In evaluating the nature and the role played by Ms Reddy in the commission of the above misconduct, it is clear that it resulted in a negative impact on the trust relationship. When Ms Reddy was confronted about the accident she lied throughout the investigation, with the aim to hide the true facts of what really happened to the company car. It is trite law that an act of dishonesty undermines the trust relationship and therefore may justify dismissal.

Ms Reddy has been remorseful for her actions, however in the above case the gravity of her offence does not justify a deviation from the prescribed penalty.'

This turn of events prompted Reddy to initiate the CCMA proceedings referred to earlier.

[8] When Pillemer became seized with the arbitration, she identified the fairness or otherwise of the sanction of dismissal as the issue requiring determination. Analysing the evidence Pillemer remarked that Reddy's failure to report the collision in itself was not misconduct that warranted dismissal, but that the issue was whether her lack of candour thereafter destroyed the trust relationship, justifying her dismissal. Pillemer also determined, referring to s 138[2] of the LRA, that as arbitrator she was entitled to have regard to certain correspondence from Dwyer and one Val Barnes, also a

[2] Section 138(1) provides: 'The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the *dispute* fairly and quickly, but must deal with the substantial merits of the *dispute* with the minimum of legal formalities.'

manager employed by Edcon, who had at some stage worked with Reddy. Both had not testified in the arbitration but their views, captured in the correspondence, were a disavowal of a breakdown in the trust relationship.

[9] Pillemer found that no direct evidence had been led by Edcon to show that the trust relationship had been destroyed by Reddy's misconduct and lack of candour. She further found that for a decision to dismiss a person with Reddy's track record of 43 years unblemished employment with Edcon and related companies, the misconduct committed had to be gross and evidence was necessary to show that the trust relationship had in fact been destroyed. She went on to find that Reddy's long and unblemished track record militated against a decision to dismiss her under the circumstances. She also found that the views expressed by Barnes and Dwyer were an indication that dismissal in those circumstances was not an inevitable result. She consequently concluded that Edcon had failed to prove that dismissal was a fair sanction.

[10] Before us counsel for Edcon, Mr Redding SC, essentially argued that the award issued by Pillemer was defective, rendering it liable to be set aside. This argument was premised on three bases:

(1) that Pillemer failed to appreciate the extent of Reddy's dishonesty in the context of Edcon's own rules. He argued that this failure by Pillemer prevented her from appreciating the justification for Edcon's decision to dismiss Reddy;

(2) that Pillemer's admission of hearsay evidence without proper consideration of the provisions of s 3(1)(c) of the Law of Evidence Amendment Act 45 of 1998 rendered her award defective; and
(3) that Pillemer's finding that the appellant had led no evidence regarding the alleged destruction of the trust relationship was erroneous.

[11] This being a review of an award of a CCMA commissioner, it is worthwhile to revisit the jurisprudence that has developed around CCMA arbitration awards. The standard employed in the review of awards issued by CCMA commissioners is an area that has occupied the minds of judges of the LC and LAC since the inception of the labour dispensation ushered in by the LRA. Until the LAC's decision in *Carephone (Pty) Ltd v Marcus NO & others* (1998) 19 ILJ 1425 (LAC), the standard of review applicable to CCMA awards was far from certain in view of the divergence of views among LC judges at the time about the applicability of s 145 and s 158(1)(g)[3] of the LRA in the review of CCMA arbitration awards.[4] The LAC in *Carephone* found that the administrative justice provisions in the Constitution[5] were integral to the functions of CCMA commissioners when arbitrating disputes. The court, having concluded that substantive rationality was required of 'administrative decision makers', formulated the standard of review applicable to CCMA awards as follows:

'Many formulations have been suggested for this kind of substantive rationality required of administrative decision makers, such as "reasonableness", "rationality", "proportionality", and the like . . . 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?'[6]

[1 2] The controversy regarding the reviewability of CCMA awards did not go away, however, as a divergence of views began to emerge again from the LAC regarding the ambit of the *Carephone* standard. One view was that the standard of review of a CCMA award was whether

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[3] The section provides: 'The Labour Court may –
(g) subject to s 145, review the performance or purported performance of any function provided for in *this Act* on any grounds that are permissible in law.'

[4] Some judges of the LC had favoured reviewing CCMA awards under s 158(1)(g) having branded s 145 as too restrictive and unconstitutional and as such inconsistent with the administrative justice dictates of the Constitution of the Republic of South Africa, Act 108 of 1996. Another view favoured by some LC judges was that only s 145 was applicable in the review of CCMA awards. In *Carephone* the LAC settled that controversy by concluding that s 145 and 158 had specific functions but that only s 145 was applicable in the review of CCMA awards.

[5] Constitution of the Republic of South Africa Act 108 of 1996.

[6] At para 37.

an award was justifiable in relation to the reasons given for it. See *Mzeku & others v Vokswagen SA (Pty) Ltd & others* (2001) 22 ILJ 1575 (LAC); [2001] 8 BLLR 857 (LAC) at para 60; *Adcock Ingram Critical Care v CCMA & others* (2001) 22 ILJ 1799 (LAC); [2001] 9 BLLR 979 (LAC) at para 22; *Waverley Blankets Ltd v CCMA & others* (2003) 24 ILJ 388 (LAC); [2003] 3 BLLR 236 (LAC) at para 41; *Branford v Metrorail Services (Durban) & others* (2003) 24 ILJ 2269 (LAC); [2004] 3 BLLR 199 (LAC) at para 20. The other, broader view, was whether the award was justifiable not only in relation to the reasons given for it, but also taking account of the material placed before the commissioner. See *Toyota SA Motors (Pty) Ltd v Radebe & others* [2000] 21 ILJ 340 (LAC) at para 53; *Shoprite Checkers (Pty) Ltd v Ramdaw NO & others* (2001) 22 ILJ 1603 (LAC); [2001] 9 BLLR 1011 (LAC) at para 101.

[13] The uncertainty created had the consequence that the review of CCMA awards continued to clog the rolls of our Labour specialist courts. It was therefore inevitable that the Constitutional Court would at some stage be drawn into the debate. This eventually occurred in the matter of *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (2007) 28 ILJ 2405 (CC). That matter had its origin in the dismissal of the appellant (Sidumo) who had then obtained an award in the CCMA reversing his dismissal on the basis that it was too harsh. A review of the award failed in the LC and an appeal to the LAC also failed. See *Rustenburg Platinum Mines Ltd v CCMA & others* [2004] 1 BLLR 34 (LAC). This is one of those decisions emanating from the LAC in which the so-called broad standard of review was favoured.[7]

[14] That decision came on appeal to this court. See *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration* 2007 (1) SA 576 (SCA); [2006] 11 BLLR 1021 (SCA); (2006) 27 ILJ 2076 (SCA). The appeal succeeded in this court and part of the reasoning is found in paras 29 and 30 to the following effect:

'[29] For what both *Carephone* and PAJA required the LAC to do was to consider whether the commissioner's decision to reinstate Sidumo was "rationally connected" to the information before him and *to the reasons he gave for it*. "Rational connection" requires, as Froneman DJP explained in *Carephone* (para [37]), in a passage this Court approved and applied in the light of PAJA, that there must be a rational objective basis justifying the connection the commissioner made between the material before him and the conclusion he reached.

[7] The LAC had reasoned that the reasons of the commissioner which were attacked in the LC review could not on their own sustain the award but that there were other reasons which were not challenged in the review which rendered the award unassailable on appeal.

[30] The LAC did not apply this test. Nor did it refer to *Carephone*, or indeed to PAJA. Instead it asked whether considerations existed, which the commissioner had taken into account, that were "capable of sustaining" his finding. In effect, the LAC asked whether there was material on record that could support the view that, despite his errors, the commissioner had nevertheless "got it right". In so approaching the matter, the LAC treated the mine's challenge to the decision as an appeal. In my respectful view, this was incorrect. The question on review is not whether the record reveals relevant considerations that are capable of justifying the outcome. That test applies when a court hears an appeal: then the enquiry is whether the record contains material showing that the decision – notwithstanding any errors of reasoning – was correct. This is because in an appeal, the only determination is whether the decision is right or wrong.'

[1 5] When the matter was eventually heard in the Constitutional Court, that court exhaustively considered the jurisprudence regarding administrative review in general and specifically in relation to CCMA awards as well as the impact of the Constitution. The court reasoned the matter for present purposes as follows:

'[106] The *Carephone* test, which was substantive and involved greater scrutiny than the rationality test set out in *Pharmaceutical Manufacturers*, was formulated on the basis of the wording of the administrative justice provisions of the Constitution at the time, more particularly, that an award must be justifiable in relation to the reasons given for it. Section 33(1) of the Constitution presently states that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. The reasonableness standard should now suffuse section 145 of the LRA.

[107] The reasonableness standard was dealt with in *Bato Star*. In the context of section 6(2)(h) of PAJA, O'Regan J said the following: "[A]n administrative decision will be reviewable if, in Lord Cooke's words, it is one that a reasonable decision-maker could not reach."

[108] This Court recognized that scrutiny of a decision based on reasonableness introduced a substantive ingredient into review proceedings. In judging a decision for reasonableness, it is often impossible to separate the merits from scrutiny. However, the

distinction between appeals and reviews continues to be significant.

[109] Review for reasonableness, as explained by Professor Hoexter, does threaten the distinction between review and appeal. The Labour Court in reviewing the awards of commissioners inevitably deals with the merits of the matter. This does tend to blur the distinction between appeal and review. She points out that it does so in the limited sense that it necessarily entails scrutiny of the merits of administrative decisions. She states that the danger lies, not in careful scrutiny, but in "judicial overzealousness in setting aside administrative decisions that do not coincide with the judge's own opinions". This Court in *Bato Star* recognized that danger. A judge's task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.

[110] To summarise, *Carephone* held that s 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that s 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in *Bato Star*: Is the decision reached by the commissioner one that a reasonable decision-maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair.'

And further

'[119] To my mind, having regard to the reasoning of the commissioner, based on the material before him, it cannot be said that his conclusion was one that a reasonable decision-maker could not reach. This is one of those cases where the decision-makers acting reasonably may reach different conclusions. The LRA has given that decision-making power to a commissioner.'

Reduced to its bare essentials, the standard of review articulated by the Constitutional Court is whether the award is one that a reasonable decision maker could arrive at considering the

material placed before him.

[16] It is therefore the reasonableness of the award that becomes the focal point of the enquiry and in determining this one focuses not only on the conclusion arrived at but also on the material that was before the commissioner when making the award. It is remarkable that the constitutional standard of 'reasonableness' propounded by the Constitutional Court in *Sidumo* is conceptually no different to what the LAC said in *Carephone*. The only difference is in the semantics – the LAC had preferred 'justifiability' whilst the Constitutional Court has preferred the term 'reasonableness'.

[17] With this treatise of the law regarding the standard of review applicable to CCMA awards I return to the facts. The thrust of Edcon's case is that Pillemer had ample material before her showing that the trust relationship between it and Reddy had been destroyed by Reddy's misconduct and lack of candour. This, it was submitted, showed that the decision to dismiss her was justified. The determinant issue in the appeal must therefore be whether the trust relationship between Edcon and Reddy had been shown in the arbitration to have been destroyed. This calls for an examination of Pillemer's reasons for her conclusion and the material that was available to her in arriving at it.

[18] As already stated, Pillemer concluded that Edcon had failed to show that the trust relationship had been destroyed by Reddy's deceitful conduct. Both the LC and LAC upheld this conclusion.

Naidoo was Edcon's sole witness in the arbitration and Reddy testified in support of her own case. The records of the disciplinary enquiry and appeal hearing, as well as all statements collated by Naidoo during the investigation, were also before Pillemer as well as the correspondence from Barnes and Dwyer.

[19] It is to Naidoo's testimony, as Edcon's sole witness in the arbitration, as well as the documentary evidence referred to above, that one must look to see if indeed there was evidence showing that Reddy's conduct had destroyed the trust relationship between her and Edcon. Naidoo's testimony in the arbitration was mainly to recount the investigative history of the matter. He also testified that Edcon was intolerant towards dishonesty and that employees were generally dismissed if they committed dishonest acts. This, he said, was one of Edcon's core values. As already mentioned Naidoo was the investigator of Reddy's misconduct and fielded some of her lies. It was at his recommendation, as investigator, that Reddy was suspended and eventually disciplined. What becomes immediately apparent is that Naidoo's evidence did not, and could not, deal with the impact of Reddy's conduct on the trust relationship. Neither did Naidoo testify that Reddy's conduct had destroyed the trust relationship. This was the domain of those managers to whom Reddy reported. They are the persons who could shed light on the issue. None testified.–

[20] Edcon's policy regarding the misconduct at issue here was also before Pillemer. But that document is just that – a policy – and is no

evidence of the consequences of misconduct based on it. On its own it evinces Reddy's failure to comply with its dictates. It cannot be correct that mere production thereof would suffice to justify a decision to dismiss. The gravaman of Edcon's case against Reddy was that her conduct breached the trust relationship. Someone in management and who had dealings with Reddy in the employment setup, as already alluded to, was required to tell Pillemer in what respects Reddy's conduct breached the trust relationship. All we know is that Reddy was employed as a quality control auditor; no evidence was adduced to identify the nature and scope of her duties, her place in the hierarchy, the importance of trust in the position that she held or in the performance of her work, or the adverse effects, either direct or indirect, on Edcon's operations because of her retention, eg because of precedent or example to others. In *De Beers Consolidated Mines Ltd v CCMA & others* (2000) 21 ILJ 1051 (LAC) at paras [17] to [27] Conradie JA considered the relationship between an employee's dishonesty and continued employment, and the bearing of such factors as long service, which Pillemer also considered. In the present context he said (at para [23]):

'The seriousness of dishonesty – ie whether it can be stigmatized as gross or not – depends not only, or even mainly, on the act of dishonesty itself but on the way it impacts on the employer's business'.

But to get here evidence showing adverse impact, if any, on the 'business' is critical.

[21] It also cannot be correct as submitted by Mr Redding, that

Ismail and Maponya, who were the internal disciplinary enquiry and appeal chairpersons respectively, provided the management view regarding the damaged trust relationship. It needs hardly be stated that their role in those proceedings was not as witnesses. They were there to ensure that a fair conclusion was reached by Edcon regarding Reddy's fate. In fact Ismail did not make a positive finding in this regard save to state that Reddy had not conducted herself with the integrity and honesty expected by Edcon, whilst Maponya did state that her conduct had had an impact on the trust relationship. Maponya, as a matter of fact, had no evidence suggesting a breakdown in the trust relationship and one can only surmise that he relied on his opinion as an employee in making this finding. The surprising feature regarding the findings by Ismail, and especially Maponya, is that Barnes had testified in the disciplinary enquiry and stated that she could still work with Reddy. She was not challenged by Naidoo.

[22] Pillemer was entitled and in fact expected, in the scheme of things, to explore if there was evidence by Edcon and/or on record before her showing that dismissal was the appropriate sanction under the circumstances. This was because Edcon's decision was underpinned by its view that the trust relationship had been destroyed. She could find no evidence suggestive of the alleged breakdown and specifically mentioned this as one of her reasons for concluding that Reddy's dismissal was inappropriate. A reading of the award further reveals that in addition to this finding Pillemer also found that in the context of that matter Reddy's long and unblemished

track record was also an important consideration in determining the appropriateness of her dismissal.

[23] It is inevitable that courts, in determining the reasonableness of an award, have to make a value judgment as to whether a commissioner's conclusion is rationally connected to his/her reasons taking account of the material before him/her. That this is the correct approach has been stated on a number of occasions by the LAC,[8] this court in the *Sidumo* matter[9] as well as the Constitutional Court in the same matter[10]. In my view, Pillemer's finding that Edcon had led no evidence showing the alleged breakdown in the trust relationship is beyond reproach. In the absence of evidence showing the damage Edcon asserts in its trust relationship with Reddy, the decision to dismiss her was correctly found to be unfair. She cannot be faulted on any basis and her conclusion is clearly rationally connected to the reasons she gave, based on the material available to her. She did not stray from what was expected of her in the execution of her duties as

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[8] *Carephone* supra in para 36: 'In determining whether administrative action is justifiable in terms of the reasons given for it, value judgments will have to be made which will, almost inevitably, involve the consideration of the ''merits'' of the matter in some way or another. As long as the judge determining this issue is aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order.'

[9] *Rustenburg Platinum Mines Ltd (Rustenburg Section)* supra in para 31: 'In a review, the question is not whether the decision is capable of being justified (or, as the LAC thought, whether it is not so incorrect as to make intervention doubtful), but whether the decision-maker properly exercised the powers entrusted to him or her. The focus is on the process, and on the way in which the decision-maker came to the challenged conclusion. This is not to lose sight of the fact that the line between review and appeal is notoriously difficult to draw. This is partly because process-related scrutiny can never blind itself to the substantive merits of the outcome. Indeed, under PAJA the merits to some extent always intrude, since the court must examine the connection between the decision and the reasons the decision-maker gives for it, and determine whether the connection is rational. That task can never be performed without taking some account of the substantive merits of the decision.'

[10] At para 109

a CCMA arbitrator. The challenge, therefore, to Pillemer's award on this basis is without merit. I have no hesitation in concluding that the award issued by her is properly compliant with the constitutional standard of reasonableness propounded in *Sidumo*. This conclusion on its own is, in my view, dispositive of the appeal. I find it unnecessary therefore, in view of this conclusion, to consider the other interesting point regarding the admissibility of hearsay evidence, raised on behalf of Edcon.

[24] The appeal is dismissed with costs including the costs consequent upon the employment of two counsel.

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D MLAMBO
JUDGE OF APPEAL

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