The recent decision of the Supreme Court of Appeal in Rustenburg Platinum Mines Ltd v CCMA and others (unreported SCA case no 598/05) has attracted widespread attention. It is clearly an important decision that makes two important points of relevance to every day labour law and industrial relations practice.

The first point deals with the grounds on which an arbitration award of a commissioner of the Commission for Conciliation Mediation and Arbitration (CCMA), and presumably also an arbitrator acting under the auspices of a bargaining council, can be reviewed and set aside.

The second point deals with the vexed question of to what extent an arbitrator is entitled to “second guess” managerial decisions as to what an appropriate disciplinary sanction is for any particular disciplinary offence.

In this edition of CLL we publish two contributions discussing this decision. The first, from Kirsty Leigh Young, examines the grounds on which an arbitration award can be reviewed and set aside. The second, from Wayne Hutchinson, deals with the limitation on the power of the arbitrator to overturn managerial decisions regarding sanction.

Applying the Promotion of Administrative Justice Act (PAJA) to labour review proceedings
Kirsty Leigh Young

It is trite that a party aggrieved by a CCMA arbitration award has no right to bring an appeal in respect of the merits of the award. The aggrieved party may, however, apply to the Labour Court for a review of the arbitration award, on the basis of a procedural defect.

In the past, review proceedings were brought in terms of s 145 of the Labour Relations Act, 66 of 1995 (LRA). This provision of the LRA provides for the following grounds of review:

- misconduct by the commissioner;
- gross irregularity in the arbitration proceedings;
- poor work performance or misconduct - which label to attach? p50
the commissioner exceeded his or her powers (which has been interpreted by the labour courts to include the well-known “justifiability test”);

· the award has been improperly obtained.

These grounds of review typically manifest themselves in cases where the commissioner is accused of failing to take account of relevant evidence, failing to apply the law correctly or inappropriately interfering with the sanction imposed by an employer.

The further “catch-all” ground generally utilised when reviewing a CCMA arbitration award is the application of the justifiability test, where the question is asked: is there a rational objective basis justifying the connection made by the commissioner between the material properly available to him and the conclusion he or she eventually arrived at?

The recent case of Rustenburg Platinum Mines Limited v CCMA and Others (unreported SCA case no 598/05) has changed the framework within which grounds of review are applied to CCMA arbitration awards. Effectively, the Supreme Court of Appeal (SCA) has found that:

· the PAJA applies to the review of CCMA arbitration awards;

· the fact that a commissioner may adduce some good reasons for the award made, while his or her decision is significantly influenced by poor reasons, does not satisfy the justifiability test; and that;

· commissioners must exercise caution and defer to the employer when assessing the fairness of the sanction imposed by the employer.

A synopsis of the Rustenburg Platinum case: The facts

Mr Sidumo was employed by the mine as a patrolman in its protection services department, at a facility where high grade platinum metal was separated from low grade ore, through a benefaction process.

Mr Sidumo’s primary duty was to control access to and egress from the facility, in order to protect the mine’s valuable precious metal product. The mine instituted detailed procedures to be followed by patrolmen such as Mr Sidumo for the searching of all individuals leaving the facility. This involved a search of each individual and a metal detector scan.

However, the losses incurred by the mine continued. The mine then installed video surveillance to check compliance with the search procedures. The video surveillance revealed that Mr Sidumo conducted the correct search procedure on only one of twenty-four individuals in a three-day period. Eight individuals were not searched at all and were permitted by Mr Sidumo to sign the search register.

After a disciplinary enquiry, the mine dismissed Mr Sidumo for negligence and failing to follow established search procedures. The sanction of dismissal was based on the fact that the misconduct went to the heart of Mr Sidumo’s duties and that the trust relationship had been broken down, making a future employment relationship intolerable.

In imposing the sanction of dismissal, the mine also considered several mitigating factors - that there was no direct evidence of the product being stolen during Mr Sidumo’s shifts, that Mr Sidumo had a clean disciplinary record and that he had almost fifteen years’ service at the mine.

At an internal appeal hearing, the factual findings and sanction of dismissal were upheld. Again, the abuse of a position of trust and the seniority of Mr Sidumo were taken into account by the appeal chairperson.

Mr Sidumo thereafter referred an alleged unfair dismissal dispute to the CCMA. The commissioner found that Mr Sidumo was “clearly” guilty of misconduct. He also found that the mine followed a fair procedure in dismissing Mr Sidumo.

However, the commissioner went on to rule that dismissal was an inappropriate sanction in the circumstances. The commissioner accordingly reinstated Mr Sidumo, subject to a written warning valid for six months, and directed the mine to pay three months’ compensation.

The mine applied to the Labour Court for the review of the commissioner’s award on the basis, inter alia, that the arbitration award was not justifiable in relation to the reasons given for it.
The review application was unsuccessful. The Labour Court found that the offence was one of poor work performance rather than misconduct. It found further that Mr Sidumo had fifteen years of service and that the offence did not unequivocally demand dismissal, as opposed to any other sanction.

An appeal against the Labour Court’s decision was then launched in the Labour Appeal Court. The Labour Appeal Court rejected three of the grounds upon which the commissioner reinstated Mr Sidumo, and yet it declined to overrule the decision of the Labour Court. The Labour Appeal Court stated that the other reasons relied upon by the commissioner had not been challenged by the mine and that the clean record and long service of Mr Sidumo sustained the commissioner’s finding that the sanction of dismissal was too harsh.

Application of PAJA to review proceedings in the Labour Court

The mine was thereafter granted leave to appeal to the Supreme Court of Appeal, which subsequently made certain important findings. A summary of its reasoning is set out below.

The Court first considered the well-known judgment of Carephone (Pty) Ltd v Marcus NO 1999 (3) SA 304 (LAC), where it stated that the Court in that case had reconciled s 145 of the LRA with the right in the Interim Constitution to just administrative action. The justifiability test propounded in this case was accepted in later judgments of the Labour Appeal Court.

In November 2000, PAJA came into effect. Section 6 of this legislation contains grounds for reviewing administrative action that are more extensive than those contained in s 145 of the LRA, including the ground that administrative action must be rationally connected to the information before the administrator and the reasons provided by the administrator.

The SCA found that the Constitution obliges parties to promote the spirit, purport and objects contained in the Bill of Rights, including the right to just administrative action. The LRA must be interpreted in light of this constitutional imperative and must give recognition to the right to administrative justice and the legislation that gives effect to this right. i.e. PAJA.

The Court held that -

“Both the Constitution, which required Parliament to give general legislative effect to the right to administrative justice, and the legislation so enacted, superseded the LRA’s specialised enactment within the field…There can be no doubt that a CCMA commissioner’s arbitral decision constitutes administrative action.”

Accordingly, it found that the PAJA applies to the review of CCMA arbitration awards. More specifically, it found that –

"section 6’s codificatory purpose subsumed the grounds of review in section 145(2), and PAJA’s constitutional purpose must be taken to override that provision’s preceding, more constricted, formulation”.

The correct application of the justifiability test

The SCA criticised the Labour Appeal Court’s application of the justifiability test and made certain findings in respect of the correct application of this test.

It stated that the justifiability test necessitates an enquiry into whether or not there is a rational, objective basis justifying the connection a commissioner makes between the material before him or her and the conclusion reached.

It continued that the Labour Appeal Court had applied the incorrect test, when it asked whether or not the commissioner took into account relevant considerations that were capable of justifying the final decision, despite any defective reasons in the award.

This test is more akin to the test applied in appeal proceedings, rather than the test applied in review proceedings. The effect of this incorrect approach is that the decisions of CCMA commissioners are protected from interference, unless there is absolutely no reason capable of justifying the outcome.

The SCA stated that the correct test on review is whether the decision-maker properly exercised the powers entrusted to him or her. The Court continued that the question focuses on the process and manner in which the decision-maker reached the conclusion.
The Court warned that the difference between reviews and appeals must be upheld, although it is sometimes difficult to draw the line between the two, as process-related scrutiny can never blind itself of the substantive merits of the outcome. The Court went so far as to recognise that a value judgment of the merits does intrude, to some extent, when applying the grounds of review under the PAJA, and when applying the justifiability test.

In finding that the sanction of dismissal was inappropriate in the circumstances, the CCMA commissioner had relied on the following findings:

- the mine suffered no losses;
- the violation of the employer’s rule was “unintentional”;
- there was a lack of dishonesty inherent in the offence;
- the type of offence did not go to the heart of the trust relationship;
- Mr Sidumo had a clean record and long service.

The SCA rejected the first three reasons, as had the Labour Appeal Court. It found further that the fourth reason was also incorrect. When asking the question whether the decision of the commissioner to reinstate Mr Sidumo was rationally connected to the information before him, or the reasons provided as whole, it found that four of the reasons -

“were preponderantly bad and bad reasons cannot provide a rational connection to a sustainable outcome”.

This, it found, was so, despite there being other legitimate reasons capable of sustaining the decision to reinstate. The PAJA does not oblige courts to pick and choose between reasons to find some sustenance for a decision, despite poor reasons being relied upon. If the poor reasons play an appreciable or significant role in the outcome, it is impossible to say that the decision is rational. This also applies where it is impossible to distinguish the reasons that significantly influence a decision from those that do not.

On this basis, the SCA found that the commissioner’s decision to reinstate Mr Sidumo ought to have been set aside on review.

The resurrection of the “reasonable employer” test?

In the past, there have been conflicting judgments emanating from the Labour Appeal Court as to whether or not the “reasonable employer” test ought to be applied by commissioners when determining whether or not a sanction imposed by an employer is appropriate.

In the Rustenburg Platinum case, the SCA criticises the tests applied previously when determining whether or not to intervene in the decisions of commissioners to set aside sanctions of dismissal and to replace such sanctions with their own decisions.

These erroneous tests include the setting aside of the sanction of dismissal when there is a “yawning chasm” between the sanction the court would impose and that of the commissioner, and where the sanction “is so egregious that it shocks and alarms the court”. These narrow tests are similar to those applied in appeals against criminal sentences.

The SCA found that these tests are not statutorily warranted or constitutionally sound. It found further that CCMA commissioners are not vested with a discretion to impose sanctions in cases concerning incapacity or misconduct. This discretion lies largely with the employer, as it is the employer that is entitled to set the standard in its workplace and to determine the sanction for non-compliance with that standard. This is a function of management that cannot be abdicated.

A commissioner’s only statutory duty is to determine whether the sanction imposed by the employer is fair and whether the employer acted fairly in imposing the sanction. In order to withstand scrutiny at the CCMA, the sanction imposed by the employer need not be the only fair sanction. The criterion of fairness is a relative concept, which necessitates a range of possible sanctions, all of which could be fair.

The SCA cited, with approval, the decisions of Nampak Corrugated Wadeville v Khoza (1999) 20 ILJ 578 (LAC) at para 33 and County Fair Foods (Pty) Ltd v CCMA (1999) 20 ILJ 1701 (LAC) at para 28, confirming that the question is not whether a court would have imposed the same sanction as was
imposed by the employer; rather, the question is whether the sanction was reasonable in the circumstances. Courts and CCMA commissioners must show a measure of deference to employers’ decisions as to sanction and ought only to interfere with the sanctions imposed by employers with great caution.

The effect of the Rustenburg Platinum case on future review proceedings in the Labour Court

The SCA stated that s 6 of PAJA “subsumed” the grounds of review contained in s 145(2) of the LRA. It stated further that the constitutional purpose of PAJA “overrides” the constricted approach contained in the LRA.

There is some current debate as to whether or not a party must now approach the Labour Court in terms of s 6 of PAJA or s 145(2) of the LRA. The South African Pocket Oxford Dictionary defines “subsume” as “include (instance etc) under a particular rule or class”.

Having regard to the ordinary grammatical meaning of the word, as well as the reference to the purpose of the PAJA overriding the LRA, it appears that s 6 of the PAJA must include the provisions of s 145(2) of the LRA. This meaning accords with the SCA finding that the application of the PAJA in the labour context extends the grounds of review. From a practical perspective, it would obviously be best for parties to approach the Labour Court in terms of s 6 of the PAJA, read with s 145(2) of the LRA.

Most grounds of review are available under both statutes, taking into account the extended “justifiability” test referred to above. (These are illustrated in the table on page 46.)

However, certain of the grounds of review contained in s 6 of PAJA are more extensive than those contained in s 145 of the LRA. This extension of the review grounds is threefold.

Firstly, an action can be reviewed if it consists of a failure to take a decision s 6(2)(g). The LRA enjoins CCMA commissioners to despatch awards to parties within 14 days of the close of arbitration proceedings. However, in practice, CCMA arbitration awards are seldom received within this time frame. The PAJA envisages that a failure by the CCMA to dispatch arbitration awards can be taken on review. In practice, it is unlikely that this ground of review will be pursued in the absence of a refusal or continued and prejudicial failure to render the award, in light of the legal costs occasioned in review applications.

Secondly, an award can now be reviewed on the basis that the exercise of the commissioner’s power to render an award or performance of the function to hear the matter, is so unreasonable that no reasonable person could have so exercised the power or performed the function (s 6(2)(h)). While the justifiability test is focused on the process of the commissioner reaching a decision, s 6(2)(h) introduces reasonability of the outcome of that process of decision-making. Undoubtedly, the courts will caution that this review ground does not involve an appeal against the commissioner’s decision on the merits. However, it does introduce a consideration of the outcome of the decision-making process – if the outcome is so unreasonable that no other reasonable person could have reached that decision. This is clearly a strict test, which would only be satisfied in exceptional circumstances.
Thirdly, a CCMA arbitration award can now be reviewed on the basis that it is “otherwise unconstitutional or unlawful” (s 6(2)(i)). This catch-all ground of review does envisage that there may be other grounds to set aside a decision of a commissioner. It is unlikely, however, that these grounds of review have not already been captured in the case law in terms of which s 145 of the LRA has been interpreted in the past.

In light of the Rustenburg Platinum case, parties may wish to amend or supplement papers in review applications relating to arbitration awards, currently before the Labour Court. This will only be necessary if it is beneficial to the outcome of the matter or, if the

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<th>PAJA</th>
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<td>Section 6(2)(a)(i): Administrator not authorised to take administrative action by empowering provision or administrator acted under delegation of power that was not authorised by empowering provision.</td>
<td>Section 145(2)(c): Commissioner exceeded his or her powers.</td>
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<td>Section 6(2)(a)(iii): Administrator was biased or reasonably suspected of bias.</td>
<td>Section 142(2)(d): Award was improperly obtained.</td>
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<td>Section 6(2)(b): Non-compliance with mandatory and material procured or condition prescribed by empowering provision.</td>
<td>Section 145(2)(c): Commissioner exceeded his or her powers.</td>
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<td>Section 6(2)(c): Action was procedurally unfair.</td>
<td>Section 145(2)(b): Commissioner committed a gross irregularity in the conduct of the arbitration proceedings.</td>
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<td>Section 6(2)(d): Action was materially influenced by an error of law.</td>
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<td>Section 6(2)(e)(i) and (ii): Action taken for a reason not authorised by the empowering provision or for an ulterior purpose or motive.</td>
<td>Section 145(2)(d): Award was improperly obtained; or section 145(2)(a): Commissioner committed misconduct in relation to his or her duties.</td>
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<td>Section 6(2)(e)(iii): Action taken because irrelevant considerations taken into account or relevant considerations not considered.</td>
<td>Section 145(2)(b): Commissioner committed a gross irregularity in the conduct of the arbitration proceedings.</td>
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<td>Section 6(2)(e)(iv): Action taken because of the unauthorised or unwarranted dictates of another person or body.</td>
<td>Section 145(2)(d): Award was improperly obtained.</td>
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<td>Section 6(2)(e)(v): Action taken in bad faith.</td>
<td>Section 145(2)(d): Award was improperly obtained.</td>
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<td>Section 6(2)(e)(vi): Action taken arbitrarily or capriciously.</td>
<td>Section 145(2)(b): Commissioner committed a gross irregularity in the conduct of the arbitration proceedings.</td>
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<td>Section 6(2)(f)(i): Action contravenes a law or is not authorised by the empowering provision.</td>
<td>Section 145(2)(a): Commissioner committed misconduct in relation to his or her duties; or Section 145(2)(c): Commissioner exceeded his or her powers.</td>
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<td>Section 6(2)(f)(ii): Action is not rationally connected to the purpose for which it was taken, the purpose of the empowering provision, the information before the administrator or the reasons given for it.</td>
<td>Section 145(2)(c): Commissioner exceeded his or her powers (including the interpretation of the ground including the justifiability test).</td>
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application of the PAJA raises additional grounds of review. It appears that this will only be the case where the extended grounds of review in PAJA are applicable.

Further, parties ought to consider the application of the extended grounds of review to other actions taken by CCMA commissioners in terms of the LRA, such as decisions made in condonation and rescission rulings. The Rustenburg Platinum case certainly provides scope to argue that the PAJA also applies to other actions taken by decision-makers within the CCMA.

The question in these instances will be whether or not the granting of a condonation or rescission ruling falls within the ambit of the definition of “administrative action” in the PAJA, i.e., whether it is a decision taken by an organ of state or juristic person, when exercising a public power or performing a public function in terms of legislation or an empowering provision. A prima facie consideration of this definition would lead one to think that the PAJA will indeed apply to the review of condonation and rescission rulings.

In practice, whether this will make any difference is debateable. Condonation and rescission rulings were previously reviewed in terms of s 158(1)(g) of the LRA which refers to reviews on "any grounds in law" - thus including s 6 of the PAJA.

Section 7(1) of PAJA provides that review applications brought in terms of this legislation must be brought without unreasonable delay and within 180 days of the exhaustion of internal remedies or the after the party becomes aware of the administrative action and the reasons for it.

In contrast, s 145(1) of the LRA provides that a review application in respect of a CCMA arbitration award must be brought within 6 weeks of the award being served on an aggrieved party.

The Supreme Court of Appeal in the Rustenburg Platinum case specifically stated that the extension of the grounds of review does not impinge on the time period set out in s 145(1) of the LRA. The Court found that the six-week time period accorded with the purpose of the LRA to provide for the speedy resolution of labour disputes. Accordingly, review applications must be brought within six weeks of the aggrieved party becoming aware of the award or ruling, despite the application of the PAJA to the review proceedings.

Sub-sections 7(3) and (4) read with section 10 of PAJA envisage rules for the procedure of judicial review in terms of the legislation, being enacted by 2003. To date, no such rules of procedure have been enacted. Until such time as the legislature applies its mind to the rules of procedure, the High Court or “another court with jurisdiction” is empowered to hear the review applications.

Accordingly, it appears that the Labour Court shall retain jurisdiction to hear labour review applications until and unless the rules of procedure are enacted and provide otherwise.

Defining the role of Commissioners and Labour Court judges

Wayne Hutchinson

The case of Rustenburg Platinum Mines Limited (“Rustenburg Section”) v CCMA and Others (SCA) Unreported Case No. 598/05 is of critical importance in at least two respects. The judgment examines the approach that commissioners should adopt in determining whether the sanction of dismissal in cases of proven misconduct, is fair. The judgment also deals with the approach that the Labour Court should adopt when reviewing a commissioner’s decision to substitute the employer’s sanction of dismissal with a lesser sanction. This note deals with the role of commissioners and Judges of the Labour Court in the light of the Rustenburg decision.

The Role of Commissioners

If an employer establishes, on a balance of probabilities, that the employee was indeed guilty of the offence that led to her dismissal, the next stage of the enquiry is for the commissioner to determine whether the sanction of dismissal was an appropriate penalty.
A dismissal is unfair if the employer fails to prove that the reason for the dismissal is a fair reason relating to the employee’s conduct or capacity (s188(1)(a)(i)) of the Labour Relations Act, 66 of 1995 (LRA). A commissioner, in considering whether a dismissal is for a fair reason must take into account the Code of Good Practice: Dismissal (s188(2)) found in Schedule 8 to the LRA.

The Code provides that it is generally inappropriate to dismiss an employee for a first offence:

“Except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable.
Examples of serious misconduct ... are gross dishonesty, or wilful damage to ... property ... wilful endangering of the safety of others, physical assault and gross insubordination”.

Commissioners should take cognisance of the following factors to determine whether a dismissal was fair:

- The list of examples of gross misconduct provided for in the Code, is by no means exhaustive. Other forms of misconduct that constitute a material breach of the employment contract include gross negligence, drunkenness, competing with the employer, disclosing confidential information, and sexual harassment
- Only the employer is entrusted with the power to dismiss an employee. However, the employer’s discretion is not unfettered. Section 188 prescribes the factors to be taken into account as fleshed out in the Code. A commissioner is not empowered to substitute her opinion as to what is an appropriate sanction for that of the employer. The commissioner is involved in a form of secondary decision making far removed from the dynamics of the workplace. In the Rustenburg case it was held:

“... a CCMA Commissioner is not vested with a discretion to impose a sanction in the case of workplace incapacity or misconduct. The discretion belongs in the first instance to the employer. The Commissioner enjoys no discretion in relation to sanction, but bears the duty of determining whether the employer’s sanction is fair;” (Para. 40).

- Since the CCMA is an administrative tribunal, it must strive to ensure a high level of certainty and consistency in its decisions. One of the most important objectives of the LRA is to protect vulnerable employees from abusive employers. Nonetheless, employers should be entitled to entertain a reasonable expectation that if they follow the prescripts of the Code, their decisions will be immune from attack. If outcomes can be predicted with reasonable certainty, parties can arrange their affairs safe in the knowledge of the likely legal consequences. Lack of certainty results in a loss of public confidence in the institutions that are expected to set standards and provide guidance to the industrial relations community.

The role of the Labour Court in reviewing arbitration awards

A reviewing court must be guided by the provisions of the Promotion of Administrative Justice Act, 3 of 2000, (PAJA) which has codified the grounds of review and extended them beyond those contemplated in s 145(2) of the LRA. In particular, s 6(2)(f)(ii) of PAJA empowers a Court to review an administrative action if the action itself is not rationally connected to

“(cc) the information before the administrator; or
(dd) the reasons given for it by the administrator”.

In the Rustenburg case, the position was summarised as follows:-

“(a) The PAJA applies in the review of the decisions of CCMA commissioners.
(b) The review criterion relevant to this case is whether the decision is rationally connected with the information before the commissioner and with the reasons given for it.
(c) In applying this criterion the question is whether there is a rational objective basis justifying the connection the commissioner made between the available material and the conclusion.”
The Labour Court is, in its own right, a specialist tribunal and is not enjoined to show deference to the views of commissioners. A commissioner has no greater expertise than a judge of the Labour Court. Courts are more reluctant to review the decisions of administrative tribunals that have specialised knowledge in certain fields such as the desired standards of ethical behaviour in a particular practice of profession.

“Judicial deference is particularly appropriate where the subject matter of an administrative action is very technical or of a kind in which a court has no particular proficiency. We cannot even pretend to have the skills and access to knowledge that is available to the Chief Director”. (Minister of Environmental Affairs and Tourism & Others v Phambili Fisheries (Pty) Ltd and Another [2003] 2 All SA 616 SCA 53).

It is the function of the Labour Court to exercise supervisory powers over the CCMA. If a commissioner erroneously believes that she is empowered to determine an appropriate sanction, such an approach would amount to a material error of law that would result in the invalidity of the decision. What if a commissioner purportedly applies the correct test but nevertheless concludes that dismissal is too harsh a sanction? In such circumstances it would be incumbent upon the commissioner to furnish rational and compelling reasons for concluding that the sanction imposed by an employer fell outside the hypothetical band of fair responses. A failure to do so may add weight to an inference that the commissioner has misdirected herself or misconceived the whole nature of the enquiry.

In order to survive attack will it be sufficient to show that a commissioner’s interference with the sanction imposed is rationally justifiable or must the interference survive a more exacting objective standard? The problem with applying the rationality standard is that it does not require the commissioner to show deference to the employer’s decision. In terms of this test it may be possible for the commissioner to substitute the employer’s sanction, provided there is some justification such as relying on an employee’s length of service to constitute a mitigating factor. If the commissioner’s decision is subject to the rationality standard, the focus will be on her decision and not on the employer’s.

In the Rustenburg matter, the Court held that:-

“Although the sanction of dismissal is undoubtedly severe, especially in its effects on the employee, it is in my view impossible to say it is not a fair sanction.” (Para 42).

By using the term “impossible” it appears that the Court may have applied an objective standard and not the more onerous rationality one. In the matter of Solid Doors (Pty) Ltd v Commissioner Theron and Others (2004) 25 ILJ 2337 (LAC), the Court held that, in terms of s 186(1)(e), three requirements must be present before a constructive dismissal is established. The Court indicated with specific reference to s 186 (1)(e) that the test on review is one of correctness and not whether the Commissioner’s award was rationally justifiable. The Court explained the position as follows:-

“Having established what the requirements are for a constructive dismissal; it is necessary to make the observation at this stage of the judgment that the question whether the employee was constructively dismissed or not is a jurisdictional fact that – even on review – must be established objectively. That is so because if there was no constructive dismissal – the CCMA would not have the jurisdiction to arbitrate.” (Para 29).

Although an objective standard is usually associated with the establishment of jurisdictional facts, it is submitted that a similar approach is called for. On review, it is for the Labour Court to determine whether the sanction imposed by the employer was objectively speaking fair and not whether the commissioner’s interference therewith was justified on rational grounds.

Various factors support the adoption of an objective test. The second-guessing of the sanction imposed by the employer is not permissible in the light of the limitation that has been placed on commissioners to show deference to employers. This argument is reinforced by the fact that commissioners are involved in a form of secondary decision-making and that the quest for certainty and consistency will not be achieved.
if commissioners impose their own subjective opinions as to what is “fair”. Fairness is a broad based concept that does not lend itself to a single correct answer.

Accordingly, it is argued that on review the focus of the enquiry is on the fairness of the sanction imposed by the employer - does it fall within or without the parameters of fairness.

Poor work performance or misconduct - which label to attach?

SABC v CCMA [2006] 6 BLLR 587 (LC)

If an employee is not meeting the performance standards set for him by his employer this can normally be ascribed to two reasons. The first is that the employee is unable to meet these standards. This is an instance of poor work performance or incapacity due to ill health or injury. The second is that the employees has the necessary skills and ability to meet the standards but nevertheless fails to meet these standards. Here we are dealing with misconduct on the part of the employee – he is either negligently or intentionally failing to meet the standards.

In some cases it may be difficult to determine whether the failure is due to misconduct or poor work performance or incapacity and, in a few cases where employers have made the wrong choice, disciplinary action against an employee has been held to be unfair because the arbitrator found that the matter should have been dealt with on the basis that it was a case of poor work performance rather than misconduct.

The facts in SABC v CCMA & others [2006] 6 BLLR 587 (LC) illustrate this situation. Here the arbitrator found that the dismissal of an employee on the grounds of misconduct was unfair because, in his opinion, this was a case of poor work performance.

The SABC took this award on review and overturned the decision. The Court agreed with the SABC and set the award aside. The Labour Court expressed the following views –

“[20] It does not appear from the commissioner’s award that he analysed the evidence in any material detail. Nor did he assess its value or cogency. His approach appears to have been simply to categorise the evidence against the fourth respondent as constituting complaints of poor work performance and to conclude that because she was disciplined for misconduct and not poor performance, her dismissal was not fair.

[21] By seeking to categorise the issues in the way he did, the commissioner erred. Clearly the charges and the evidence against the fourth respondent would, if sufficiently proved, constitute evidence of conduct justifying dismissal. But more importantly, in adopting the approach that he did, he failed to address the issues that he was required to do, namely, whether the fourth respondent was guilty of conduct serious enough to warrant dismissal.

[22] The notional line between the various circumstances that could give rise to a fair dismissal (misconduct, poor performance, incapacity and operational requirements) is not always easy to draw. Often the same conduct may give rise to more than one appropriate categorisation. Employers may often, not unreasonably, err in their attempts to categorise the circumstances giving rise to a potential dismissal. The failure to correctly categorise should not however detract from the appropriate inquiry in each case, namely, to assess first, whether there was a substantively fair reason for dismissal and second, whether an appropriate and fair procedure was followed by the employer. (AT 591 G-I)”

From the perspective of substantive fairness this approach is, it is submitted, undoubtedly correct. From a procedural perspective there may be problems as different types of procedures apply to dismissals for misconduct and poor work performance. However, much will depend on the precise procedure followed by the employer prior to the dismissal.

P.A.K. Le Roux