

TITLE

An analysis of the test for review as set down in the *Sidumo* judgement

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ABSTRACT

This research study focuses on the test for review as set down in the *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (2007) BLLR 1097 (CC) (herein after referred to as *Sidumo*), judgement. An analysis of case law is undertaken in order to determine whether the test is now in decline. This is achieved by exploring the relevant case law and cases that were decided before the *Sidumo* case, particularly the *Carephone (Pty) Ltd v Marcus and others* (1998) 11 BLLR 1093 (LAC) (herein after referred to as *Carephone*) case. The *Sidumo* (CC) case is discussed in detail, as well as the recent judgements in *Herholdt v Nedbank Ltd* (701/2012)2013ZASCA (herein after referred to as *Herholdt*) and *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA* (JA 2/2012) 2013 ZALAC 28, 2014 1 BLLR (herein after referred to as *Gold Fields Mining*)

The aim of this work is to explore whether employment justice for all might be better served were the relief against awards to take the form of an appeal rather than review.

DECLARATION

I, Guest Mamvura (209541634) do hereby declare that unless specifically indicated to the contrary in this text, this dissertation is my own original work and has not been submitted to any other university in full or partial fulfilment of the academic requirements of any other degree or other qualification.

Signature: -----

Date:-----

ACKNOWLEDGMENTS

First and foremost, thank you to my supervisor, Advocate Daren Subramanien, who consistently encouraged and advised me throughout the process of completing this thesis. Adding to his support, Professor Brenda Grant for her support and has unhesitatingly responded to research queries.

I would like to thank God the almighty for giving me strength and without whom I would not have undertaken this thesis at all. Finally, the support of my family and friends has been tremendous. My husband, Zacharie, my daughter Gabriella and my son Neil – the proverbial pillar of strength throughout my research, my mom, Tracy and my sister Marian have been equally supportive and understanding, as have many of my friends.

Thank you to all of you.

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CHAPTER 1: INTRODUCTION AND BACKGROUND

1.1 Introduction

It is not inconceivable that disputes will arise in an employer-employee relationship. The law prescribes formalities which have to be followed in order to resolve such issues in the interests of fairness. This is important because the employer-employee relationship is not an equal one. The employer has more power, especially in financial terms. Therefore, in seeking to prevent an employer from abusing his/her power, labour laws prescribe measures to resolve disputes in a fair manner.

1.2 Background

In order to ensure that labour-related disputes are resolved in a speedy and cost-effective manner, the legislature enacted the Labour Relations Act¹ (LRA) and established the Commission for Conciliation, Mediation and Arbitration (CCMA). Many employees do not have the financial means to approach the Labour Court (LC) in order to challenge their employer's decisions.² The CCMA enables an employee to resolve disputes with their employer without incurring onerous costs.³

One of the primary objectives of the LRA is to effectively resolve labour disputes.⁴ The process of dispute resolution includes the identification of a commissioner to arbitrate between an employer and employee.⁵ The commissioner is tasked with speedily and fairly resolving the dispute.⁶ In terms of section 143 (1), an arbitration award is final and binding and must be enforced as though it were an order of the LC.

1.3 Main research question

The main research question that this study addresses is whether or not employment justice would be better served if arbitration awards were subjected to the process of appeal rather than review. In answering this question, the following sub-questions are posed:

¹ 66 of 1995.

² P Benjamin 'Friend or foe? The impact of judicial decisions on the operation of the CCMA' (2007) 28 *ILJ* 1at 3-6; The Explanatory Memorandum to the Labour Relations Act 1995 16 *ILJ* 278 ('The Explanatory Memorandum') at 279 & 318-319; also see Paul Benjamin & Carole Cooper 'Innovation and continuity: Responding to the Labour Relations Bill' (1995) 16 *ILJ* 258.

³ *Ibid*

⁴ Section 1 of the LRA.

⁵ Section 138 of the LRA.

⁶ *Ibid*

What do the processes of appeal and review entail?

What are the differences between these processes?

What was the position with regard to appeal and review before the *Sidumo & another v Rustenburg Platinum Mines Ltd & others (2007) BLLR 1097* case?

What are the repercussions of the test applied in the *Sidumo* case?

1.4 Methodology

This research study comprises desktop research that draws on statutes, journal articles and case law. The cases considered are critically analysed to assess whether the legal principles are accurately applied and interpreted.

1.4.1 Structure

The dissertation is structured as follows:

- ✓ Chapter 1 introduction and background
- ✓ Chapter 2 examines the processes of appeal and review. It analyses the differences between these processes and highlight the grounds for each. It concludes by assessing how these processes fit into arbitration awards handed down by the CCMA.
- ✓ Chapter 3 considers the position before the *Sidumo* case.
- ✓ Chapter 4 analyses the *Sidumo* case and highlights its findings. It also considers the test for reviewing arbitration awards and the repercussions of this test.
- ✓ Chapter 5 examines the cases that followed the *Sidumo* case and highlights what was held in those cases in light of appeal and review processes.
- ✓ Chapter 6 presents the study's conclusions and recommendations.

CHAPTER 2: PROCESSES OF APPEAL AND REVIEW

2.1 Introduction

Before analysing case law, it is important to distinguish between appeal and review. This is due to the fact that has been argued that appeals are the best route to follow for justice to be done in labour law.⁷

2.2 Appeal and Review

In the legal context, review entails the correctness of procedure which is followed in reaching a decision,⁸ while appeal refers to the procedure which is followed in assessing the correctness of the decision itself.⁹ Hoexter (2012) notes that appeal and review are methods to re-examine a decision.¹⁰ She adds that even though the motive for making a finding on either of the two processes (appeal or review) will normally result in an identical outcome, these processes of appeal and review serve different functions.¹¹

In theory, it is generally observed that the distinction between the concepts of appeal and review is quite clear.¹² The main difference is that when conducting an appeal, the appellate court has the mandate to consider the merits of the matter before it and conclude if the decision of the court of first instance was right or wrong.¹³ On the other hand, in a review the court may not consider the merits of the decision but rather the manner in which such a decision was reached. In this instance the courts are tasked with the mandate to determine whether or not the procedures followed in the court a quo were appropriate.¹⁴

The case of *Johannesburg Consolidated Investment Co v Johannesburg Town Council*¹⁵ provided the classic definition of the term 'review'.¹⁶ In the majority judgement, Innes CJ held that there were three distinct forms of review, namely review of decisions of lower courts and the decisions of administrative authorities commonly referred to as common-law

⁷ J Murphy, 'An Appeal for an Appeal', (2013) 34 ILJ

⁸ <http://www.difference-between.com/difference> accessed on 16 August 2013.

⁹ Ibid

¹⁰ C Hoexter, *Administrative Law in South Africa* 2012, p108.

¹¹ Ibid p108

¹² E Fergus. 2013 'Distinction Between Appeals and Reviews - Defining the Limits of the Labour Courts : Powers of Review' in the *International Labour Law Journal* Vol. 31 at 1556.

¹³ Ibid p1556

¹⁴ Ibid p1556

¹⁵ *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111 at 116

¹⁶ C Hoexter, *Administrative Law in South Africa* 2012, p108

review and statutory review.¹⁷ These two forms of review continue to play a role in post-apartheid South Africa.¹⁸

Hoexter submits that reviews now take one of five forms.¹⁹ The first is the review of an inferior court decision.²⁰ This is similar to the type of review pronounced in the *Johannesburg Consolidated Investment Co* case.²¹

The second form of review is an automatic review. This type of review obliges a superior court to automatically review the decision of a stipulated judicial officer.²² The process is accordingly initiated by a superior court rather than by an aggrieved party to the inferior court's decision.²³

The third form is judicial review in the constitutional sense.²⁴ This is concerned with the direct application of the Constitution by a reviewing court.²⁵ A decision that is in violation of the Constitution is declared unconstitutional.²⁶

The fourth form of review is a judicial review in the administrative law sense. This emanates from section 33 of the Constitution and the provisions of the Promotion of Administrative Justice Act (PAJA) and is no longer simply governed by common law.²⁷

The final form of review is special statutory review.²⁸ This refers to the courts' entitlement to review the decisions of inferior courts or tribunals especially where they are expressly empowered to do so by legislation.²⁹ The powers granted to the reviewing court may extend beyond the powers ordinarily conferred on appellate courts.³⁰ It is important to note that while section 145 of the LRA falls squarely into this category, the power of the courts to undertake review proceedings on the basis of statutory direction remains subject to the

¹⁷ C Hoexter, *Administrative Law in South Africa* 2012,p112

¹⁸ Ibid p112

¹⁹ C Hoexter, *Administrative Law in South Africa* 2012,p112-113

²⁰ Ibid p112

²¹ Ibid p113

²² Ibid p113

²³ Ibid p113

²⁴ Ibid p113

²⁵ Ibid p113

²⁶ Ibid p113

²⁷ Ibid p113

²⁸ E Fergus, *Difference between Appeals and Reviews –Defining the limits of the Labour Court's Powers of Reviews* (2010)31 ILJ 1558

²⁹ Ibid p1558

³⁰ Ibid p1558

requirements of the Constitution.³¹This means that the review must be in line with the Constitution.

2.3 Forms of Appeal

In *Chevron Engineering (Pty) Ltd v Nkambule & Others*³² the court highlighted the various forms of appeal. In *Tikly and Others v Johannes NO and Others*³³ the court discussed the different meanings which may be attributed to the concept of appeal. These include:

An appeal in the broad sense, that is, a total re-hearing of and new determination on the merits of the case with or without more evidence or information;

An appeal in the general strict sense, that is, a rehearing on the merits but limited to the evidence or information on which the decision that is under appeal was made. The only determination is whether that decision was right or wrong.³⁴

In *Chevron Engineering (Pty) Ltd*³⁵ it was held that whilst the proceedings before the court properly involved a rehearing on the merits, in conducting the rehearing, the court is limited to the evidence which had been presented before the court a quo.³⁶ The judge therefore pointed out that the only question under consideration was if the decision of the court of first instance had been correct or wrong; this was done without leading any new evidence but was based on the evidence already presented in the court a quo.³⁷

The differences between appeal and review

Hoexter is of the view that it is more prudent to use an appeal process when it is suspected that the decision-maker arrived at an incorrect decision on the facts of the law.³⁸ She adds that an appeal deals with the merits of the case; therefore, in the appeal process, the court is obliged decide whether the decision of the court a quo was right or wrong.³⁹

³¹ Ibid p1558

³² *Chevron Engineering (Pty) Ltd v Nkambule & Others* (2001)22 ILJ 627 (LAC).

³³ *Tikly and Others v Johannes NO and Others* 1963 (2) SA 588 (T)

³⁴ *Chevron Engineering (Pty) Ltd v Nkambule & Others* (2001)22 ILJ 627 (LAC) para 15.

³⁵ Ibid para15

³⁶ Ibid para15

³⁷ Ibid para15

³⁸ C Hoexter, *Administrative Law in South Africa* 2012, p108.

³⁹ Ibid p 108

On the other hand, a review does not examine the merits of the decision but whether it was arrived at in an appropriate manner.⁴⁰ It therefore considers the procedure that was followed to reach the decision.⁴¹

Hoexter postulates that the issue concerning review is not whether the record reveals relevant considerations that are capable of justifying the outcome.⁴² This is the territory of appeal where the question is whether the decision was correct.⁴³ Govender states that another major distinction is that review is an external safeguard against maladministration, whereas appeals constitute an internal or domestic check.⁴⁴ This means that effective administrative appeal tribunals breed confidence in the administration as they give assurance to all aggrieved persons that the decision has been considered at least more than once and reaffirmed. In addition they include a second decision-maker who is able to exercise a calmer, more objective and reflective assessment in reconsidering the issue.⁴⁵

Fergus identifies the major characteristics of an appeal and a review.⁴⁶ She notes that appeals involve a rehearing of the merits of the decision and the appellate court can only look at the evidence and material that was before the court or tribunal of first instance.

As far as the granting of remedies is concerned, those that can be granted by a reviewing court are not the same as those which may be granted by an appellate court. An appeal court may substitute the decision of the court a quo or tribunal with its own decision after hearing the matter afresh. On the other hand, when it comes to review, the court may not overturn the decision; it can only set it aside, but it may send the matter back to the court or tribunal of first instance to be heard again. It should be noted that the Labour Court (herein after referred to as L.C) does sometimes substitute its own decision.

The Labour relations Act⁴⁷ stipulates the following procedure as far as allegations of defects are concerned.

⁴⁰ Ibid p109

⁴¹ Ibid p109

⁴² Ibid p109

⁴³ K Govender *Administrative Appeals Tribunals* in Bennet et al 77, quoting Lawrence Baxter *Administrative Law*. (1984) p 255

⁴⁴ Ibid p 255

⁴⁵ Ibid p255

⁴⁶ E Fergus. 2013 'Distinction Between Appeals and Reviews-Defining the Limits of the Labour Courts : Powers of Review' in the *International Labour Law Journal* Vol. 31 at 1556.

⁴⁷ Act 66 of 1995

In terms section 145 of the Labour Relations Act:⁴⁸

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

(a) within six weeks of the date that the award was served on the applicant, unless the alleged defect involves the commission of an offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004;’ appeal has been finalized, the institution of review proceedings does not necessarily have the same effect.

Section 145 of the LRA therefore makes provision for an aggrieved party to a dispute to have a CCMA award or decision set aside by the LC.⁴⁹ This point was clearly highlighted in *NUMSA & Another v Espach Engineering*⁵⁰. It was also held in this case that launching a review application does not interrupt the running of the prescription of a claim due according to the terms of an arbitration award.⁵¹

The decision of the court was that the employer's inaction had no bearing on the running of the prescription period because the union could have enforced the award at any time.⁵² However, it is important to note that the court added that its finding may have been different had it been furnished with a copy of the record of the review proceedings.⁵³

In the context of labour disputes, two provisions provide for review proceedings.⁵⁴ Section 145 of the LRA deals with the review of arbitration awards and section 158 makes provision for the review of any act or function performed according to the LRA.⁵⁵ The courts have maintained the distinction between proceedings in accordance with these sections when undertaking review proceedings.⁵⁶ Please note that s145 will be explained in detail in chapter 4. The next chapter analyses the position on review before the *Sidumo*⁵⁷ case was decided.

⁴⁸ Act 66 of 1995

⁴⁹ Ibid

⁵⁰ (2010) 31 ILJ 987 (LC)

⁵¹ Ibid para 11

⁵² Ibid para 18

⁵³ Ibid para 17

⁵⁴ Act 66 of 1995.

⁵⁵ Ibid

⁵⁶ Ibid

⁵⁷ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (2007) 28 ILJ 2405 (CC)

CHAPTER 3: THE POSITION BEFORE THE *SIDUMO* CASE

3.1 Introduction

*Carephone (Pty) Ltd v Marcus NO & others*⁵⁸ set the standard and scope of the test of review of CCMA arbitration awards before *Sidumo & another v Rustenburg Platinum Mines Ltd & others*⁵⁹ was decided. It was considered the leading case for the test of review in labour law by many courts.

The major difference between the judgment of *Sidumo*⁶⁰ and *Carephone*⁶¹ is that *Carephone* was decided under the Interim Constitution and *Sidumo* was decided after the adoption of final Constitution.⁶² Thus the two cases are closely connected and a rigorous analysis of *Carephone* is important in order to understand *Sidumo*.⁶³ *Carephone* has resulted in much debate and confusion that has led to challenges in establishing the test for review in labour law.⁶⁴

3.2 *Carephone (Pty) Ltd v Marcus No& Others*

In the *Carephone* case, the Labour Appeal Court (LAC) dealt with the nature and extent of the court's powers of review of CCMA arbitration awards.⁶⁵ The court had to consider whether review proceedings against arbitration awards could be instituted under both sections 145 and 158 (1) (g) of the LRA, or whether the applicants were confined to bringing proceedings under section 145.⁶⁶

The debate arose because s 145 offered only limited grounds for review and failed to give adequate effect to the parties' rights to just administrative action.⁶⁷ This obstacle has sometimes been circumvented by perceiving s 158(1) (g) as a permissible way to review arbitration awards.⁶⁸ In *Carephone*, Froneman DJP did not agree with this approach.⁶⁹

⁵⁸ *Carephone (Pty) Ltd v Marcus and others* [1998] 11 BLLR 1093 (LAC)

⁵⁹ *Sidumo & another v Rustenburg Platinum Mines Ltd & others supra*

⁶⁰ *Ibid*

⁶¹ *Carephone (Pty) Ltd v Marcus and others supra*

⁶² Section 33 of the Constitution

⁶³ *Ibid*

⁶⁴ *Carephone(Pty) Ltd v Marcus and others supra*

⁶⁵ *Ibid* para 2

⁶⁶ Labour Relations Act 66 of 1995

⁶⁷ Nicci Whitear –Nel 'Carephone (Pty)Ltd v Marcus NO & others' (1998) 19 ILJ 1425 (LAC) (1999) 20 ILJ 1483 at 1484

⁶⁸ *Ibid* p1484

⁶⁹ *Ibid* para 26

In *Carephone*, the court dealt with the question of whether CCMA arbitrations constituted administrative action.⁷⁰ The court held that while the CCMA was not judicial in nature, it remained bound by the Constitutional provisions governing organs of state and public administration; it was similarly bound by the Bill of Rights.⁷¹ According to Froneman DJP, the CCMA was an administrative body for the purposes of the Constitution.⁷² The Judge therefore held that it is clear that, in conducting arbitrations, the CCMA engaged in administrative action.⁷³

Froneman DJP then dealt with the type of review appropriate to administrative action. He pointed out that the entrenchment of the right to administrative justice had extended the scope of review.⁷⁴ This was clear from the Constitutional stipulation that administrative action must be justifiable in relation to the reasons for it.⁷⁵ It was submitted that this requirement introduced the need for rationality in the merits or outcome of administrative decisions.⁷⁶

However, Froneman DJP reiterated that the distinction between appeals and reviews remained essential.⁷⁷ He added that the rationality test did not excuse reviewing courts from maintaining this distinction during s 145 proceedings.⁷⁸

In Froneman DJP's view, this fine discrepancy was crucial to sustain the discrete characteristics of appeal and review.⁷⁹ He went on to state that preserving this distinction signaled respect for the proper separation of powers between the legislature, the executive and the judiciary.⁸⁰

Thus Froneman DJP formulated the test for review as follows:

‘.....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?’⁸¹

⁷⁰ Ibid para 15

⁷¹ *Carephone(Pty) Ltd v Marcus and others supra*

⁷² Ibid para 9

⁷³ Ibid para 11-19

⁷⁴ Nicci Whitear –Nel ‘*Carephone (Pty)Ltd v Marcus NO & others*’ (1998) 19 *ILJ* 1425 (LAC) (1999) 20 *ILJ* 1483 at 1484

⁷⁵ Ibid p1484

⁷⁶ *Carephone(Pty) Ltd v Marcus and other supra*

⁷⁷ Ibid para 30-31

⁷⁸ Ibid para 30-31

⁷⁹ Ibid para 30-31

⁸⁰ Ibid para 30-31

⁸¹ Ibid para 37

When this new standard was applied to the matter before the court, Froneman DJP found the commissioner's award rationally justifiable.⁸² The commissioner's reasoning was rationally connected to the material before him and he had therefore not exceeded his 'constitutionally constrained' powers under s 145(2) (a) (iii).⁸³

Even though the *Carephone* decision was criticized by various scholars it is said to be commendable in numerous respects.⁸⁴ This is because it stated that s 145 review proceedings were to be conducted in the context of the Constitution.⁸⁵ It is submitted that Froneman DJP's emphasis on rational justifiability as requiring only the ability to appear justified (rather than to be justified) is of great importance in defining the limits of review.⁸⁶ Furthermore, it is submitted that it is clear from Froneman DJP's decision that the original s 145 grounds for review remain applicable.⁸⁷

However, it is submitted that notwithstanding the clarity of this decision, subsequent courts failed to apply the test consistently⁸⁸ and that this inconsistency laid a poor foundation for the Constitutional Court (CC)'s decision in *Sidumo*.⁸⁹

In *Shoprite Checkers (LC)*⁹⁰, Wallis AJ analyzed *Carephone*, and was of the view that it had been wrongly decided.⁹¹ Even though it was binding because it was decided by the LAC, he was not obliged to follow it.⁹² This is because he examined it and held that it had been wrongly decided. Wallis AJ did not agree with Froneman DJP's findings because, according to him, the LAC had construed section 145 inappropriately, and in the absence of a constitutional challenge to the section there had been no basis for doing so.⁹³

The court was faced with the question of whether CCMA arbitrations constituted administrative action.⁹⁴

⁸² Ibid para 53

⁸³ Ibid para 53

⁸⁴ Ibid para 15 -37

⁸⁵ Ibid para 15 - 37

⁸⁶ Ibid para 32

⁸⁷ Ibid para 19-37

⁸⁸ *Edcon v Pillemer NO & others* [2010] 1 BLLR 1 (SCA) para 12. There, Mlambo JA set out the two distinct (but opposing) interpretations of the *Carephone* standard which reviewing courts applied before *Sidumo*; the judge suggested that only one of these interpretations was correct.

⁸⁹ Ibid

⁹⁰ *Shoprite Checkers (Pty) Ltd v Ramdaw NO & others supra*

⁹¹ Ibid

⁹² Ibid

⁹³ Ibid paras 75-77

⁹⁴ Ibid para 3

However, the court did not answer this question and instead stated the test for review.⁹⁵ Zondo JP held that the applicable test for review based on rationality required reviewing courts to examine the material available to the commissioner, the final decision taken, and the reasons for it.⁹⁶ The court also stressed the need for efficient resolution of labour disputes.⁹⁷

Zondo JP applied the above considerations to the matter and held that the commissioner's award, while open to criticism, was neither irrational nor unjustifiable and was consequently not reviewable.⁹⁸ It is submitted that this judgment is credible because Zondo JP did not replace the commissioner's preferences with his own.⁹⁹ Furthermore his clarification of the nature of review and his emphasis on expediting the resolution of labour disputes supported the LRA's objectives.¹⁰⁰

However, Zondo JP was criticized for not affirming the constitutional status of CCMA arbitrations or acknowledging the distinction between justifiability and rationality.¹⁰¹ In neglecting the former, the constitutional foundations for review remained unconfirmed.¹⁰² It is submitted that Zondo JP's decision did not emphasise the importance of the connections made by commissioners between evidence, the award and the reasons in conducting a rational review.¹⁰³

*Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp & others*¹⁰⁴ clarified these uncertainties.¹⁰⁵ Nicholson JA stated that the meaning of the term rational justifiability meant that, awards should not be 'arbitrary and must have been arrived at by a reasoning process as opposed to conjecture, fantasy, guesswork, or hallucination.'¹⁰⁶ In other words, the arbitrator must have applied his/her mind seriously to the issues at hand and reasoned his/her way to the conclusion.¹⁰⁷

It is submitted that, Nicholson JA declared that the award was not capable of justification even though it was based on the reasons given for it.¹⁰⁸ Hence, despite his emphasis on a

⁹⁵ *Shoplefte Checkers (Pty) Ltd v Ramdaw NO & others supra*

⁹⁶ *Ibid* para 3

⁹⁷ *Ibid*

⁹⁸ *Shoplefte Checkers (Pty) Ltd v Ramdaw NO & others supra* paras 84 & 101

⁹⁹ *Ibid*

¹⁰⁰ The Explanatory Memorandum at 318-319; section 1(d) of the LRA;

¹⁰¹ *Ibid*

¹⁰² *Shoplefte Checkers (Pty) Ltd v Ramdaw NO & Others supra*.

¹⁰³ *Ibid*

¹⁰⁴ *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp & others supra*.

¹⁰⁵ *Ibid*

¹⁰⁶ *Ibid* para 58.

¹⁰⁷ *Ibid* para 58

¹⁰⁸ *Ibid* paras 64 & 65-67

review of rationality as encompassing an assessment of commissioners' reasoning process and ideally of their decisions, Nicholson JA ultimately concerned himself with the various reasons that could sustain the award.¹⁰⁹ This enabled intrusive review.¹¹⁰ As a result, the distinction between appeal and review was obscured and the *Carephone* standard was misconstrued.¹¹¹

However, it is important to note that *Carephone* contributed immensely to labour law because it explained important values attached to review and their constitutional basis. It is important to revisit the principles and values addressed by the court in *Carephone* before analysing *Sidumo*.

For the purpose of this study, one of the most relevant principles dealt with in *Carephone* is that reviews should not be transmuted into appeals.¹¹² A thorough analysis of the CC's decision in *Sidumo* and key judgments flowing from it is presented in the chapters that follow.

¹⁰⁹ Ibid para 65 - 67

¹¹⁰ Ibid para 65 - 67

¹¹¹ Ibid para 65 - 67

¹¹² *Carephone (Pty) Ltd v Marcus and others supra*

CHAPTER 4: THE TEST FOR REVIEW IN THE *SIDUMO* DECISION

This chapter analyses the *Sidumo* case and highlights its findings. It also considers the test for reviewing arbitration awards and the repercussions of this test.

The facts of the case are that Sidumo was employed as a security guard by Rustenburg Mines and was dismissed when it was discovered that he had repeatedly failed to search employees as they left the premises.¹¹³ The CCMA commissioner found that the dismissal was procedurally fair, but that the sanction of dismissal was inappropriate because the employer had suffered no loss, the employee had not acted intentionally and because his conduct did not ‘go to the heart of the employment relationship’.¹¹⁴

On review in the LC, the employer argued that the award was irrational¹¹⁵ as ‘there was no link between the evidence and his factual conclusions.’¹¹⁶ The commissioner’s finding that the misconduct did not go to the heart of the employment relationship was also criticized as being irrational.¹¹⁷ The mine contended that the commissioner had been so grossly careless that he could rightly be described as having had committed misconduct.¹¹⁸ It was submitted that the commissioner had failed to apply his mind to such an extent that the mine did not have a fair hearing and furthermore, that the commissioner had exceeded his powers.¹¹⁹

With reference to the grounds for review set out in s145 of the LRA and the test in *Carephone*, the LC concluded that there was no basis upon which it could interfere with the commissioner’s award.¹²⁰

On appeal, the LAC rejected the reasons on which the commissioner based his award, but found that other considerations, in particular the employee’s length of service, had to be taken into account by the commissioner in reaching the decision on whether or not dismissal was an appropriate sanction.¹²¹ The court found that s145¹²² permitted the review of CCMA

¹¹³ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (2007) 28 ILJ 2405 (CC)

¹¹⁴ *Ibid* para 21

¹¹⁵ *Ibid* para 22

¹¹⁶ *Ibid* para 23

¹¹⁷ *Ibid* para 25

¹¹⁸ *Ibid* para 26

¹¹⁹ *Ibid* para 28

¹²⁰ *Ibid* para 29

¹²¹ *Ibid* para 29

¹²² Act 66 of 1995

arbitration proceedings that goes beyond mere procedural impropriety to the rational basis of the award.¹²³

The matter was taken on appeal to the Supreme Court of Appeal (SCA) in *Rustenburg Platinum Mines Ltd v CCMA & Others*¹²⁴. The SCA found that the LAC had not applied *Carephone* correctly.¹²⁵ Murphy stated that the LAC had not assessed the rational connection between the evidence and the reasons given for the conclusion arrived at.¹²⁶

In *Rustenburg Platinum Mines*, the SCA held that employers may set reasonable standards of conduct at the workplace and may enforce such standards.¹²⁷ In a unanimous judgment, it ruled that the award be set aside.¹²⁸ Smit notes that the extent of a commissioner or judge's right to interfere with an employer's judgment regarding the appropriateness of dismissal as a penalty for misconduct is a controversial issue.¹²⁹

Hoexter submits that the focus is on the way in which the decision-maker came to the disputed conclusion.¹³⁰ Murphy concurs and submits that the focus is on the process and its relation to the result.¹³¹ The reasons stated by the commissioner did not rationally justify the result.¹³²

However, Smit adds that this does not mean that an employer always knows best when deciding on the appropriate sanction for transgression of a workplace rule.¹³³ The SCA took account of the fact that the labour courts have stated that even though it is up to the commissioner to determine the facts on which the employer relies, on a balance of probabilities, the commissioner should not interfere with an employer's decision on the appropriateness of dismissal as a penalty unless the decision to dismiss is grossly unreasonable¹³⁴.

¹²³ Ibid para 24

¹²⁴ *Rustenburg Mines Ltd v CCMA & Others* [2006]11 BLLR 1021 (SCA)

¹²⁵ J Murphy, *An appeal for an Appeal*, (2013)34 ILJ 6

¹²⁶ Ibid p6

¹²⁷ *Rustenburg Platinum Mines v CCMA* supra

¹²⁸ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* supra

¹²⁹ N Smit, *When is a Dismissal an appropriate Sanction and when should a Court set Aside an Arbitration Award? Sidumo & Another v Platinum Mines Ltd Others* (2008) 28 ILJ 2405 (cc) 2008 29 ILJ 1635

¹³⁰ C Hoexter, *Administrative Law in South Africa*, (2012) p108

¹³¹ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* supra

¹³² N Smit, *When is a Dismissal an appropriate Sanction and when should a Court set Aside an Arbitration Award? Sidumo & Another v Platinum Mines Ltd Others* (2008) 28 ILJ 2405 (cc) 2008 29 ILJ 1635

¹³³ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* supra

¹³⁴ *De Beers Consolidated Mines Ltd v CCMA Others* (2000) 21ILJ 1051 (LAC)

The SCA held that both *Carephone* and the PAJA required the LAC 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'.¹³⁵

According to the SCA, the LAC had blurred the line between appeal and review by asking whether the considerations taken into account by the commissioner were 'capable of sustaining' his finding.¹³⁶ This was not the question on review; rather, the issue was whether the decision-maker properly exercised the powers entrusted to him.¹³⁷ The SCA held that the mine had always considered *Sidumo's* service record to be relevant.¹³⁸ However, according to the mine, despite this, continued employment was intolerable.¹³⁹ The mine argued that the commissioner's decision was tainted by reliance on misconceived considerations.¹⁴⁰ Per Navsa AJ, the LAC did not apply the 'rational objective test' explained in *Carephone*, which was in line with the PAJA. It incorrectly asked whether there were factors capable of sustaining the commissioner's findings, thereby treating the matter as an appeal rather than a review.¹⁴¹

Despite the mine's subsequent appeals to the LC and the LAC not being successful, the SCA overturned both these decisions and the commissioner's finding was replaced with a ruling that the dismissal was fair.¹⁴² The matter was taken on appeal to the CC which adopted a different approach.¹⁴³

The CC handed down judgment in *Sidumo & another v Rustenburg Platinum Mines Ltd & others* in 2007.¹⁴⁴ In *Sidumo*, the court held that the grounds for review of CCMA arbitration awards set out in s145 of the LRA¹⁴⁵ were governed by the constitutional standard of reasonableness.¹⁴⁶ In terms of this standard, when courts review disputes, they must assess the reasonableness of a CCMA commissioner's award by establishing whether the decision is one that a reasonable decision-maker could not reach.¹⁴⁷

¹³⁵ *Rustenburg Platinum Mines Ltd v CCMA & Others supra*

¹³⁶ *Ibid*

¹³⁷ *Ibid*

¹³⁸ *Sidumo v Rustenburg Platinum Mines Ltd others supra*

¹³⁹ *Rustenburg Platinum Mines Ltd v CCMA & Others supra*

¹⁴⁰ *Ibid*

¹⁴¹ *Ibid*

¹⁴² *Ibid*

¹⁴³ *Ibid*

¹⁴⁴ *Sidumo v Rustenburg Platinum Mines Ltd others* 2002 (12) BCLR 1097 (CC)

¹⁴⁵ Note that throughout this dissertation, references to 'section 145' are references to this of the Labour Relations Act (LRA) unless otherwise stated.

¹⁴⁶ Section 33 of the Constitution

¹⁴⁷ *Sidumo v Rustenburg Platinum Mines Ltd others supra* (CC) para 110

However, it is submitted that the court did not give reasonable guidance as to how to this standard should be applied in practice. This has caused much uncertainty and has resulted in different judicial attitudes to review.¹⁴⁸

Sidumo appealed to the CC, giving it an opportunity to analyse the scope of review under s145.¹⁴⁹ The court had to answer the following questions: Did the reasonable employer test remain part of South African law and were CCMA arbitrations treated as administrative action?¹⁵⁰ The court had to examine the extent to which CCMA arbitrations constitute administrative action.¹⁵¹

In answering the first of these questions the Court rejected the SCA's findings in *Rustenburg Platinum Mines Ltd*.¹⁵² In its view, the reasonable employer test did not comply with the contemporary constitutional principles of South African labour law.¹⁵³

However the CC upheld the SCA's decision in respect of the second question, holding that CCMA arbitration proceedings qualified as administrative action.¹⁵⁴ As far as the third question was concerned the CC did not agree with the SCA.¹⁵⁵ The majority, per Navsa AJ, held that CCMA awards were not reviewable under the PAJA.¹⁵⁶

It is submitted that the court reached its conclusion by affirming the constitutional foundations for review. The administrative status of the CCMA was the first issue to be addressed by the court.¹⁵⁷ It recognized the evident similarities between the CCMA and courts of law, while recording important distinctions between them.¹⁵⁸

The court confirmed that CCMA arbitrations comprised administrative action.¹⁵⁹ Thus the court was implying that s145 of the LRA had to be read with s 33(1) of the Constitution – the right to just administrative action.¹⁶⁰

The CC in *Sidumo* held that:

¹⁴⁸ *Southern Sun Hotel interests* para 13, C Garbers 'Reviewing CCMA awards in the aftermath of *Sidumo*' (2008) 17 (9) Contemporary Labour Law 84 at 84, PAK Le Roux & K Yang 'The role of reasonableness in dismissal (2007) 17 (3) Contemporary Labour Law 21 at 30

¹⁴⁹ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC).

¹⁵⁰ *Ibid*

¹⁵¹ *Ibid* para 60

¹⁵² *Ibid*

¹⁵³ *Ibid*

¹⁵⁴ *Ibid* para 88.

¹⁵⁵ *Ibid*

¹⁵⁶ *Ibid*

¹⁵⁷ *Ibid*

¹⁵⁸ *Ibid* paras 81-87.

¹⁵⁹ *Ibid* para 98-100.

¹⁶⁰ *Ibid* para 98-100

‘...section 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in *Bato Star (Pty) Ltd v Minister of Environmental Affairs and Tourism and others*:¹⁶¹ Is the decision reached by the Commissioner one that a reasonable decision-maker could not reach?’¹⁶²

However, it is submitted that the infusion of s 145 with reasonableness was not the straightforward affair it was intended to be. On the one hand, this led to numerous confusing decisions by the LC, LAC and SCA.¹⁶³ Ray-Howet submits that the ‘generous approach adopted by the SCA in *Sidumo* is a much better approach’, as¹⁶⁴ by ensuring that an arbitrator applies his or her mind to the process, proper and fair decisions are more likely.¹⁶⁵

On the other hand, the CC judgement was welcomed on the grounds that it clarified the law in two important respects. ‘Navsa AJ, on behalf of the majority of the court, ruled that s145 of the LRA in its entirety (and not merely s145(2)(a) (iii)) was suffused by the constitutional standard of reasonableness, as defined in *Bato Star*,¹⁶⁶ rather than by the obsolete standard of justifiability drawn from the interim Constitution, 1993. The test now is: Is the decision reached by the commissioner one that a reasonable decision maker could not reach?’¹⁶⁷

Myburgh submits that the CC replaced the reasonable employer test with what may be called the ‘impartial commissioner test.’¹⁶⁸ Accordingly, he submits that while the former may have been biased in favour of employers, the latter is by no means biased in favour of employees¹⁶⁹. According to Myburgh, this is consistent with the constitutional right to fair labour practices applying equally to both parties; the impartial commissioner test strives to ensure absolute neutrality on the part of commissioners in the determination of a sanction.¹⁷⁰

Rycroft’s recent evaluation of the LC points out that 63% of successful reviews before the LC in 2011 were based on the fact that the award was found not to be a reasonable decision.¹⁷¹ He submits that this shows that the impact of the *Sidumo* case is that the grounds of review set out in s 145(2) of the LRA have to a large extent been eclipsed by the more

¹⁶¹ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others* 2004 (7) BCLR 687 (CC)

¹⁶² *Sidumo v Rustenburg Platinum Mines Ltd* supra

¹⁶³ Ibid para 67

¹⁶⁴ G Ray-Howet, *Is it reasonable for CCMA commissioners to act irrationally* (2009) 29 ILJ 1619

¹⁶⁵ C Hoexter, *Administrative Law in South Africa*, (2012) p 108

¹⁶⁶ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others* 2004 (7) BCLR 687 (CC)

¹⁶⁷ J Murphy, *An appeal for an Appeal*, (2013) 34 ILJ 6

¹⁶⁸ A Myburgh, *Determining and Reviewing Sanction After Sidumo* (2010) 31 ILJ 1 6

¹⁶⁹ Ibid p 6

¹⁷⁰ Ibid p 6

¹⁷¹ J Murphy, *An Appeal for an Appeal*, (2013) 34 ILJ 6

generalized test of whether the arbitrator's decision was one that a reasonable decision-maker could not reach.¹⁷²

The *Sidumo* test was recently upheld by the SCA's judgement in *Herholdt v Nedbank*¹⁷³, where the court confirmed that it is the correct one to apply. It was also stated as the locus classicus in the recent decision of *Gold Fields v CCMA*¹⁷⁴

The following chapter analyses the cases that came after *Sidumo*.

¹⁷² Ibid p 7

¹⁷³ *Herholdt v Nedbank Ltd* (2012) 33 ILJ 1789 (LAC)

¹⁷⁴ *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA* 28, [2014] 1 BLLR 20 LAC

CHAPTER 5: POST-SIDUMO CASE ANALYSIS

This chapter considers the cases that came after the *Sidumo* case, focusing on appeal and review processes.¹⁷⁵ It analyses three cases: *Gaga v Anglo Platinum Ltd & others*¹⁷⁶, *Afrox Healthcare Ltd v Commission for Conciliation, Mediation & Arbitration & others*¹⁷⁷ and *Herholdt v Nedbank Ltd*¹⁷⁸ Myburgh submits that these cases clarify some of the grounds for review encapsulated in s145 of the LRA.¹⁷⁹

The facts of these cases are somewhat similar.¹⁸⁰ In each case, the employee was dismissed for gross misconduct and reinstated in an arbitration award by a CCMA commissioner.¹⁸¹ Furthermore, the LAC either set aside or confirmed the setting aside of the award mainly on the basis of process-related grounds for review.¹⁸²

The question that arises as a result of these three judgements is ‘Is the *Sidumo* Test in decline?’¹⁸³ In other words the courts no longer putting as much emphasis in the *Sidumo* test when it comes to review.

5.1 *GAGA v Anglo Platinum Ltd & others*¹⁸⁴

In this matter, the employee, a group human resource manager employed by Anglo Platinum was dismissed on the grounds of having sexually harassed his personal assistant over a period of two years.¹⁸⁵ However, he was reinstated in a CCMA award after having been found not guilty of misconduct.¹⁸⁶

The employer successfully reviewed the award in the LC,¹⁸⁷ but the employee took the matter on appeal to the LAC.¹⁸⁸ The appeal was dismissed by the LAC (per Murphy AJA).¹⁸⁹ The court in this case held that in finding the employee not guilty the commissioner had omitted

¹⁷⁵ *Sidumo v Rustenburg Platinum Mines Ltd others 2002 (12) BCLR 1097 (CC)*

¹⁷⁶ *Gaga v Anglo Platinum & others (2012) 33 ILJ 329 (LAC)*

¹⁷⁷ *Afrotex Healthcare Ltd v Commission for CCMA and others (2012) 33 ILJ 1381 (LAC)*

¹⁷⁸ *Herholdt v Nedbank Ltd (2012) 23 ILJ1789(LAC)*

¹⁷⁹ A Myburgh, ‘Determining and Reviewing Sanction After Sidumo (2010) 31 ILJ 1 6

¹⁸⁰ Ibid p6

¹⁸¹ Ibid p6

¹⁸² Ibid p6

¹⁸³ *Herholdt v Nedbank Ltd (2012) 23 ILJ1789(LAC)*

¹⁸⁴ 2012 33 ILJ 329 (LAC)

¹⁸⁵ Ibid para 3

¹⁸⁶ Ibid para 31

¹⁸⁷ Ibid par 39

¹⁸⁸ Ibid para 40

¹⁸⁹ Ibid para 41

important considerations and failed to apply his mind properly to material evidence and to provisions on sexual harassment in the relevant Code of Good Practice.¹⁹⁰

The court held that if a commissioner fails to apply his/her mind properly to material facts and consequently narrows the inquiry by incorrectly construing the scope of an applicable rule, he/she will not fully and fairly determine the case before him/her.¹⁹¹ In addition, it held that such a decision will be tainted by dialectical unreasonableness which results in a lack of rational connection between the decision and the evidence and hence a likely unreasonable outcome.¹⁹²

If a commissioner does not take into account a factor that he/she is bound to take into account, his/her decision will be unreasonable.¹⁹³ As a result of this flaw in the process, it will usually be sufficient to set aside the award on the grounds of it being a latent gross irregularity, enabling a review in terms of s145 (1) read with s145 (2) (a) (ii) of the LRA.¹⁹⁴

Myburgh submits that, even though the LC has in the past found that there are two forms of unreasonableness, these are interlinked and that process failure alone is sufficient basis on which to sustain a review; this was the first time that the LAC had done so in clear terms.¹⁹⁵ Where a commissioner does not apply his mind to material facts and unduly narrows the inquiry by incorrectly construing the scope of an applicable rule, he will not fully and fairly determine the case before him.¹⁹⁶ The resultant decision as a result will be tainted by dialectical unreasonableness (process-related unreasonableness), characteristically resulting in a lack of rational connection between the decision and the evidence and most likely an unreasonable outcome (substantive unreasonableness).¹⁹⁷ Usually there will often be an overlap between the ground of review based on a failure to take into consideration a relevant factor and one based on the unreasonableness of a decision. Thus if a commissioner does not take into consideration a factor that he is obliged to take into account, his or her decision will be unreasonable. (my emphasis).¹⁹⁸

¹⁹⁰ Ibid para 41

¹⁹¹ Ibid para 44

¹⁹² Ibid para 44

¹⁹³ Ibid para 44

¹⁹⁴ Ibid para 44

¹⁹⁵ A Myburgh 'The LAC's Trilogy of Review Judgements; Is the *Sidumo* Test in Decline' (2013) 34 *ILJ* 2

¹⁹⁶ *Gaga v Anglo Platinum & others* (2012) 33 *ILJ* 329 (*LAC*) at para 44

¹⁹⁷ Ibid para 44

¹⁹⁸ Ibid para 44

Ngcobo J's gross irregularity dictum also formed the basis for the LAC's judgements in the *Afrox Healthcare* and *Herholdt* cases.¹⁹⁹ The new principle that failure on the part of a commissioner to apply his/her mind to material facts deprives a party of a fair hearing and thus constitutes a gross irregularity, warranting the setting aside of the award, is now firmly established in South Africa's labour law.²⁰⁰ Myburgh notes that in dealing with the commissioner's decision to disallow some evidence at the arbitration, the LAC held that this was, in itself, sufficiently irregular to set the award aside as the commissioner did not therefore consider all the relevant facts in reaching a decision.²⁰¹

5.2 *Afrox Healthcare v Commission for Conciliation, Mediation & Arbitration & others*²⁰²

The employee in this case was a night shift supervisor in the Intensive Care Unit (ICU) at a private hospital operated by Aprox Healthcare.²⁰³ He was dismissed for negligence because he did not supervise untrained staff and act in a responsible manner, as a result of which a patient's condition deteriorated.²⁰⁴ The patient had undergone an operation and had been in the ICU overnight. The patient died after being handed over to the day shift nursing shift supervisor.²⁰⁵

However, the employee's dismissal was found to be unfair and he was reinstated.²⁰⁶ The matter was taken on review and was dismissed by the LC.²⁰⁷ The company took the matter on appeal and the LAC (per Mlambo JP) upheld the appeal.²⁰⁸

The court concluded that the commissioner had not taken proper account of material evidence placed before him and had failed to conduct a proper appraisal of critical aspects of the matter.²⁰⁹ It is submitted that in addressing the consequences of this failure on the part of the commissioner, the LAC differentiated between two types of review. The first is where the commissioner does not consider all the material evidence,²¹⁰ while the second is where the

¹⁹⁹ A Myburgh 'The LAC's Trilogy of Review Judgements; Is the *Sidumo* Test in Decline' (2013) 34 ILJ 3

²⁰⁰ Ibid p 3

²⁰¹ Ibid

²⁰² 2012 33 ILJ 1381 (LAC)

²⁰³ Ibid para 1

²⁰⁴ Ibid para 2

²⁰⁵ Ibid para 3

²⁰⁶ Ibid para 4

²⁰⁷ Ibid para 5

²⁰⁸ Ibid para 24

²⁰⁹ Ibid para 25

²¹⁰ A Myburgh 'The LAC's Trilogy of Review Judgements; Is the *Sidumo* Test in Decline' (2013) 34 ILJ 4

commissioner considers all the material evidence, but it poses a lot of doubt as to how the evidence was treated.²¹¹

The LAC referred to the *Sidumo* and *Carephone* cases and held that as far as the review test is concerned:

‘The fact of the matter is that the reasonable decision maker yardstick crafted in *Sidumo*, viewed in the proper context, is none other than that in the absence of a rational objective basis (the *Carephone* test) between the decision arrived at and the material placed before the decision maker, the relevant decision is clearly not one which a reasonable maker would have arrived at.’²¹²

Furthermore, the LAC cited the dictum in the CC judgement in the case of *New Clicks*²¹³ that there is clearly an overlap between the grounds for review based on failure to take a relevant factor into consideration and that based on the unreasonableness of the decision.²¹⁴ The court went on to hold that a decision-maker must take factors that are essential to a reasonable decision into account.²¹⁵ Hence if a decision-maker fails to take into account a factor that he or she is bound to consider, the ensuing decision cannot be said to be that of a reasonable decision-maker.²¹⁶ Thus the LAC held that the award made by the commissioner in this case was not one a reasonable decision-maker could have made.²¹⁷ In other words, it did not pass the *Sidumo* test.

Myburgh notes that in this case the commissioner’s failure to apply his mind to material evidence which had a bearing on the ultimate conclusion made the award irrational and unreasonable.²¹⁸

5.3 *Herholdt v Nedbank Ltd*²¹⁹

The facts of the case are that Herholdt was a successful financial broker who was appointed as a beneficiary in his dying client’s will.²²⁰

²¹¹ Ibid p 4

²¹² *Afrox Healthcare v Commission for Conciliation, Mediation & Arbitration & others* at para 21

²¹³ *Minister of Health & another v New Clicks SA (Pty) Ltd & others 2006 (2) SA 311 (CC)*

²¹⁴ *Afrox Healthcare v Commission for Conciliation, Mediation & Arbitration & others* (2012) 33 ILJ 1381(LAC) at para 21

²¹⁵ Ibid para 21

²¹⁶ Ibid para 21

²¹⁷ *Afrox Healthcare v Commission for Conciliation, Mediation & Arbitration & others supra* para 21

²¹⁸ A Myburgh ‘The LAC’s Trilogy of Review Judgements; Is the *Sidumo* Test in Decline’ (2013) 34 ILJ 4

²¹⁹ [2012] BLLR 857 (LAC)

²²⁰ Ibid para 1

He failed to disclose this to his employer, Nedbank, despite a duty to do so in terms of the company's conflict of interest policy.²²¹ Herholdt was dismissed for dishonesty which he contested as being unfair at the CCMA.²²² In the CCMA arbitration award he was found not guilty of the charge and awarded reinstatement.²²³ Nedbank brought a process-related review, alleging that the arbitrator misconstrued evidence, leading to a decision that a reasonable decision-maker could not have reached.²²⁴ The LC held that the dismissal was fair and granted the review, finding that the commissioner had ignored or discounted relevant evidence and failed to apply her mind to a number of material issues and, as a consequence, committed gross irregularities in the conduct of the proceedings.²²⁵ The award was accordingly set aside.²²⁶

Herholdt took the decision of the LC on appeal to the LAC which is the judgment under comment. The matter was taken on appeal to the SCA which decision is discussed later in this dissertation.

The first issue that the LAC dealt with on appeal was whether the LC (per Gush J) had correctly applied the review test in setting aside the award.²²⁷ The LC had found, in effect, that the commissioner had committed a series of process-related errors, which served to vitiate the award and render the result unreasonable.²²⁸ The court relied on the dictum from the often-quoted case of *Southern Sun Hotel Interests*²²⁹ per Van Niekerk J.

“In summary, section 145 requires that the outcome of CCMA arbitration proceedings (as represented by the commissioner's decision) must fall within a band of reasonableness, but this does not preclude this Court from scrutinising the process in terms of which the decision was made. If a commissioner fails to take material evidence into account, or has regard to evidence that is irrelevant, or the commissioner commits some other misconduct or a gross irregularity during the proceedings under review and a party is likely to be prejudiced as a consequence, the commissioner's decision is

²²¹ Ibid para 1

²²² Ibid para 2

²²³ Ibid para 1-3

²²⁴ Ibid para 7

²²⁵ Ibid para 8

²²⁶ Ibid para 9

²²⁷ A Myburgh 'The LAC's Trilogy of Review Judgements; Is the *Sidumo* Test in Decline' (2013) 34 *ILJ* 5

²²⁸ A Myburgh 'The LAC's Trilogy of Review Judgements; Is the *Sidumo* Test in Decline' (2013) 34 *ILJ* 5

²²⁹ *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2010) 31 *ILJ* 452 (LC)

liable to be set aside regardless of the result of the proceedings or whether on the basis of the record of the proceedings, that result is nonetheless capable of justification.”²³⁰

According to Van Niekerk J, section 145 of the LRA requires the outcome of CCMA arbitration proceedings to fall within a band of reasonableness.²³¹ He went on to hold that, this does not stop the court from scrutinising the process in terms of which the decision was made.²³² In the case of *Southern Sun*, the court held that if a commissioner fails to take material evidence or evidence that is relevant into account, or commits some other misconduct or a gross irregularity during the proceedings under review, a party is likely to be prejudiced.²³³ Thus the commissioner’s decision is likely to be set aside notwithstanding the result of the proceedings.²³⁴

The LAC in *Herholdt* went on to hold that an award would be reviewable if it suffered from dialectical unreasonableness or was substantively unreasonable in its outcome.²³⁵ According to the LAC, substantive unreasonableness means that the decision that the commissioner reached was one that a reasonable decision-maker could not reach,²³⁶ whereas process-related or dialectical unreasonableness means that one is not obliged to consider all the necessary facts and issues in order for a decision to be termed a reasonable decision.²³⁷

Furthermore, if a decision-maker does not take relevant information which he/she is bound to consider into account, the resulting decision will not be reasonable in the dialectical sense.²³⁸

The court also held that as per the *Sidumo* test, an applicant must not only establish that the commissioner’s reasons are unreasonable, but also that no good reason exists in all the material presented before the commissioner to justify the award.²³⁹ The LAC went on to find that 'dialectical and substantive unreasonableness are intrinsically interlinked and that latent process irregularities carry the inherent risk of causing an unreasonable substantive

²³⁰ Ibid para 17

²³¹ Ibid para 37

²³² Ibid para 37

²³³ *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others supra*

²³⁴ Ibid

²³⁵ *Herholdt v Nedbank Ltd (2012) 23 ILJ 1789 LAC.*

²³⁶ Ibid para 39

²³⁷ Ibid para 39

²³⁸ Ibid para 39

²³⁹ Ibid para 12

outcome.²⁴⁰ For all of these reasons, the LAC concluded that the legal approach adopted by the LC was correct and consistent with the prevailing law.²⁴¹

Turning to the findings made by the commissioner in her award, the LAC found that they were not sustainable because she failed to apply her mind properly to the facts and the relevant issue, as well as the law of evidence.²⁴² With reference to these and other similar findings by the commissioner, the LAC concluded that the degree and extent of latent irregularities in the award clearly indicated that there was no fair trial of the issues.²⁴³ It was submitted that the commissioner not only ignored material evidence in relation to the deliberate conduct of the appellant but fundamentally misconstrued the respondent's conflict of interest policy with the consequence that her method in determining the issues was latently irregular and, in the final analysis, led to a result that was not only incorrect but substantively unreasonable.²⁴⁴

To summarise, the LAC held that the LC had not erred in finding that the commissioner had ignored or discounted relevant evidence and failed to apply her mind to a number of material issues and, as a consequence, committed gross irregularities in the conduct of the proceedings.²⁴⁵ The appeal was accordingly dismissed.²⁴⁶

It is submitted that the effect of this judgement is that it gave the impression that appeals might be preferred in labour matters instead of reviews although this was stated in obiter. This led to the proposal that the time has come for the court and the legislature to think again. Justice might be better served for all concerned were relief against awards to take the form of an appeal rather than a review.

In my view, this is the correct approach and it is proposed that reviews are replaced by appeals in order for justice to be served in labour matters.

²⁴⁰ Ibid para 40

²⁴¹ Ibid para 41

²⁴² *Herholdt v Nedbank Ltd* (2012) 33 ILJ 1789 (LAC)

²⁴³ Ibid para 16

²⁴⁴ Ibid para 16

²⁴⁵ Ibid para 26

²⁴⁶ Ibid

5.4 The Legal Position in Summary

The overall legal position emerging from *Gaga*, *Afrox Healthcare* and *Herholdt* can be summarized as follows:

- (a) CCMA awards can be reviewed on the grounds listed in s145 of the LRA and also on the grounds of unreasonableness.
- (b) There are two broad types of reviews – result-based reviews (that examine the result) and process-related reviews (which examine the process followed by a commissioner in arriving at the result).
- (c) There are also two types of unreasonableness - substantive unreasonableness (aimed at the result) and dialectical unreasonableness (aimed at the process).
- (d) The test for substantive unreasonableness is the *Sidumo* test, which must be applied as per *Fidelity Cash Management Service*. To succeed, an applicant must establish that, based on all the material served before the commissioner, the result of the award is unreasonable (i.e., it falls outside the range of reasonable outcomes). Based on this test, the award may be wrong, but nevertheless not unreasonable. However, as held in *Herholdt*, wrong decisions are rarely reasonable.
- (e) Where a commissioner fails to apply his/her mind to materially relevant facts or considerations, this constitutes dialectical unreasonableness as consideration of all materially relevant facts is fundamental to a reasonable decision.
- (f) Dialectical and substantive unreasonableness are linked in that a dialectical failure on the part of a commissioner will often lead to a substantively unreasonable result (this occurred in *Gaga*, *Afrox Healthcare* and *Herholdt*).
- (g) Where a commissioner fails to apply his/her mind to materially relevant facts or considerations, this also constitutes a (latent) gross irregularity in terms of s145 of the LRA as such a failure results in the losing party being deprived of a fair hearing.
- (h) A gross irregularity of this nature equates to an act of dialectical unreasonableness.
- (i) The threshold for interference on review in the case of a gross irregularity/dialectical unreasonableness is the potential for prejudice. This can be tested by asking: if the commissioner had applied his/her mind to the facts/considerations which he/she ignored, *may* (not would) he/she have come to a different conclusion on the merits? If the answer is in the affirmative, the award should be set aside.

The Congress of South African Trade Unions (Cosatu) intervened and was admitted as *amicus curiae* by order of the court. Cosatu expressed the view that the labour courts had unreasonably relaxed the grounds for challenging CCMA awards²⁴⁷;

This surfaced when it was indicated that the grounds for review of gross irregularity in respect of CCMA arbitrations under s145(2) (a) (ii) of the LRA involve the consideration of what the LAC termed ‘latent irregularities’ and ‘dialectical unreasonableness’; these provide a basis for more extensive review than the level of unreasonableness identified as grounds for review in *Sidumo*.²⁴⁸

According to the SCA, Cosatu’s view appeared to be supported by a recent article concerning the effects of three recent LAC judgments, including the one in the present case, which posed the question as to whether the test for review of CCMA awards enunciated in *Sidumo* is in decline.²⁴⁹ The court held that ‘there are thus clearly special circumstances that require us to entertain the appeal’.²⁵⁰

The court found it unnecessary to go into the detail of the history of reviews of CCMA arbitration awards under the LRA. It held that those responsible for drafting the LRA purposefully chose arbitration on a roughly informal basis as the preferred process to deal with many issues that arise in the context of labour relations and under the LRA. This was also to be the means for resolving disputes over dismissals, which constitute the bulk of the CCMA’s work.²⁵¹ The court went on to hold that the drafters of the LRA were deliberate in rejecting the possibility of appeals and selecting the narrowest possible grounds for review as the basis to challenge arbitration awards.²⁵² Their reason for doing so is not because review is an inexpensive or speedy way of reconsidering an arbitrator’s award, but because it sets a high standard for setting aside an award and, together with the cost and delays inherent in reviews, it was thought that this would deter parties from challenging arbitration awards and thereby support the overall aim of speedy and inexpensive resolution of such disputes.²⁵³

The court held further that the height of the bar set by the provisions of s145(2)(a) of the LRA²⁵⁴ is apparent in considering the approach to reviews of arbitral awards under the

²⁴⁷ *Herholdt v Nedbank Ltd supra*

²⁴⁸ *Ibid* para 15-17

²⁴⁹ A Myburgh ‘The LAC’s Latest Trilogy of Review Judgments: Is the *Sidumo* Test in Decline?’ (2013) 34 *ILJ* 19.

²⁵⁰ *Ibid* p19

²⁵¹ *Herholdt v Nedbank Ltd supra*

²⁵² *Ibid* para 19

²⁵³ *Herholdt v Nedbank Ltd supra* at para 20

²⁵⁴ Act 66 of 1995

corresponding provisions²⁵⁵ of the Arbitration Act 42 of 1965.²⁵⁶ It also held that the general principle is that a ‘gross irregularity’ concerns the conduct of the proceedings and not the merits of the decision.²⁵⁷ A ‘gross irregularity’ is evident where decision-makers fail to take into account the whole nature of the enquiry and as a result misconceive their mandate or their duties in conducting such enquiry.²⁵⁸

Hence, where the arbitrator’s mandate is conferred by statute then, subject to any limitations imposed by the statute, they exercise exclusive jurisdiction over questions of fact and law.²⁵⁹

The SCA held that it is clear in case of *Sidumo* that the distinction between review and appeal, which the CC stressed, must be preserved.²⁶⁰ The court further held that, although the evidence needs to be scrutinised to determine whether the outcome was reasonable, the reviewing court must always remind itself that it should avoid judicial overzealousness in setting aside administrative decisions that do not coincide with the judge's own opinions.²⁶¹

The LAC reiterated that the test is a stringent one that will ensure that awards are not lightly interfered with and stressed that the emphasis is on the result of the case rather than the reasons for arriving at that result.²⁶² Furthermore, according to the court,²⁶³ *Sidumo* will justify setting aside an award on review if the decision is entirely disconnected with the evidence²⁶⁴ or is not supported by any evidence and involves speculation on the part of the commissioner.²⁶⁵

The court went on to hold that after the *Sidumo* judgement, the position with regard to reviews of CCMA arbitration awards should have been clear. Reviews could be brought on the grounds of the unreasonableness test set down by the CC and the particular grounds set out in s 145(2) (a) and (b) of the LRA. It is submitted that the latter is not disregarded by the

²⁵⁵ Section 33(1) of the Arbitration Act 42 of 1965 provides:

‘(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 the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.’

²⁵⁶ Ibid

²⁵⁷ Ibid

²⁵⁸ Ibid

²⁵⁹ Ibid

²⁶⁰ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* *supra* para 108.

²⁶¹ Ibid para 109

²⁶² Ibid para 100.

²⁶³ Ibid para 100.

²⁶⁴ Ibid para 27.

²⁶⁵ Ibid paras 22 and 25.

CC²⁶⁶ but should be ‘suffused’ with the constitutional standard of reasonableness. This confirms that a ‘gross irregularity in the conduct of the arbitration proceedings’ as envisaged by s 145(2) (a) (ii) of the LRA is not confined to a situation where the arbitrator misconceives the nature of the enquiry, but extends to those instances where the result was unreasonable in the sense explained in a given case.²⁶⁷

It is submitted that two points flow from this approach. The first is that the threshold for interference in the award is lower than in terms of the judgment in *Sidumo*.²⁶⁸ The second is that it is immaterial whether or not the result reached by the arbitrator is one that could reasonably be reached on the material before the arbitrator.²⁶⁹ It is submitted that according to the court, the mere possibility of prejudice is sufficient to call for intervention.

In the case of *Sidumo*, Ngcobo J submitted that, commissioners need to apply their mind to the issues that are material to the determination of the dispute in order for justice to prevail.²⁷⁰ In particular, in conducting arbitration, a commissioner has a duty to determine the material facts and then apply the provisions of the LRA to those facts in answering the question of whether or not dismissal was fair. According to Ngcobo J, where a commissioner fails to apply his or her mind to a matter which is material to the determination of the fairness of the sanction, it cannot be said that there was a fair trial of issues. In *Herholdt* the SCA did not agree with Ngcobo J’s submissions.

Furthermore, the SCA went on to hold that Ngcobo J did not explain how material an oversight with regard to the facts would have to be to result in the award being set aside. He also did not seek to reconcile this approach with the long chain of authority, which he cited and relied on, that held that an error of fact or law by the arbitrator would not justify the setting aside of the award, unless the result was that the arbitrator was diverted from the correct path in the conduct of the arbitration and thus failed to address the question raised for determination in the arbitration.²⁷¹ This did not relate to the outcome of the arbitration but to the conduct of the arbitration.

²⁶⁶ Ibid para 5.

²⁶⁷ Ibid para 5

²⁶⁸ Ibid para 20

²⁶⁹ Ibid para 21

²⁷⁰ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC).

²⁷¹ *Ellis v Morgan; Ellis v Dessai* 1909 TS 576 at 581; *Goldfield Investments Ltd & another v City Council of Johannesburg & another* 1938 TPD 551 at 560 and *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) paras 52 to 78 and 85 to 88.

Ngcobo J analysed the arbitrator's award and held that, it could be construed in a way that did not involve the arbitrator making a material error with regard to the facts.²⁷² In contrast the majority held that the arbitrator had erred in certain respects in making his award, particularly in holding that the relationship of trust between the employer and employee had not been breached, but added that it was nonetheless an award that a reasonable decision-maker could make in the light of all the facts. In other words, the approach of the majority was clearly inconsistent with the approach suggested by Ngcobo J.²⁷³

The court went on to hold that it is, but only in the limited sense mentioned earlier, where the decision-maker has undertaken the wrong enquiry or conducted it in the wrong manner.²⁷⁴ That is well illustrated by the facts of that case.²⁷⁵ A magistrate charged with a valuation appeal was required under the relevant legislation to conduct a fresh enquiry into the question of the proper value of the property.²⁷⁶

He refused to consider the evidence of value tendered by the appellant and stated that he could only amend the valuation if it was clearly erroneous.²⁷⁷ In the circumstances he did not conduct the correct enquiry and his decision was set aside.²⁷⁸

The SCA then explained 'dialectical unreasonableness' and held that this refers to the unreasonableness flowing from an arbitrator's process of reasoning.²⁷⁹ The question confronting a reviewing court, as expressed by the LAC in this case, is whether the decision 'is supported by arguments and considerations recognised as valid, even if not conclusive'.²⁸⁰ The court went on to hold that thorough consideration of all the important and material facts and issues is indispensable to a reasonable decision and that if a decision-maker fails to take account of a relevant factor which he or she is bound to consider, the resulting decision will not be reasonable in a dialectical sense.²⁸¹

This approach is also based on a dictum by Ngcobo J, this time in *New Clicks*²⁸² that reads:

²⁷² Ibid

²⁷³ Ibid para 29

²⁷⁴ Ibid para 31

²⁷⁵ Ibid para 22

²⁷⁶ Ibid para 40

²⁷⁷ Ibid para 41

²⁷⁸ Ibid para 42

²⁷⁹ *Herholdt v Nedbank Ltd supra*

²⁸⁰ Ibid para 20

²⁸¹ Ibid para 21

²⁸² *Minister of Health & another NO v New Clicks South Africa (Pty) Ltd & others (Treatment Action Campaign & another as Amici Curiae)* 2006 (2) SA 311 (CC) para 511.

‘There is obviously an overlap between the ground of review based on failure to take into consideration a relevant factor and one based on the unreasonableness of the decision. A consideration of the factors that a decision-maker is bound to take into account is essential to a reasonable decision. If a decision maker fails to take into account a factor that he or she is bound to take into consideration, the resulting decision can hardly be said to be that of a reasonable decision maker.’²⁸³

The first thing to note about this dictum is that it expressly relates to the provisions of the PAJA and the manner in which they are to be applied.²⁸⁴ The PAJA does not apply to reviews under s 145(2) of the LRA and is therefore not applicable to CCMA awards. Secondly, if applied by considering the reasoning of a CCMA arbitrator and determining that the reasons given for making an award are not such as to justify that award, its effect is to resuscitate the court’s decision in *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration*, even though that decision was expressly overruled in *Sidumo*. Once again, this is not permissible in terms of the law.

Finally, the court held that, in summary, the position regarding the review of CCMA awards is that a review is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a) of the LRA.

For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2) (a) (ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach based on all the material before the arbitrator.²⁸⁵ Material errors of fact, as well as the weight and relevance attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.²⁸⁶

The court then returned to the *Herholdt* case and held that the issue in dispute was whether Herholdt had dishonestly failed to disclose a conflict of interest regarding the two wills.²⁸⁷ It is submitted that the commissioner correctly stated in her award that this was the issue. She dealt exhaustively with the evidence and concluded that he had not been dishonest. However,

²⁸³ *Herholdt v Nedbank Ltd supra*

²⁸⁴ *Ibid* para 23

²⁸⁵ *Ibid*

²⁸⁶ *Ibid* para 24

²⁸⁷ *Ibid*

the SCA did not agree and held that, given the depth of her treatment of the evidence, it could hardly be said that she misconceived the nature of the enquiry.²⁸⁸

It is submitted that it is clear from the judgments of both the LC and the LAC that the commissioner's conclusion was not one that a reasonable decision-maker could have reached in light of the evidence and the issues she was called upon to decide.

The result was substantively unreasonable as a commissioner that acted reasonably, would not have reached this decision based on the evidence and the inferences that were drawn from it.²⁸⁹ The court went on to hold that notwithstanding its excursus on 'latent irregularities' and 'dialectical unreasonableness' the LAC was alive to *Sidumo* and applied it correctly.²⁹⁰ There was thus no basis for the SCA to interfere with its decision.²⁹¹ The appeal was dismissed with costs, including legal costs.²⁹²

An analysis of *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA* follows.²⁹³

This once again gave the LAC an opportunity to analyse the approach courts are required to follow in reviewing CCMA awards and rulings. The facts of this case are stated below.

Moreki was employed by Goldfields mine as a senior sampler.²⁹⁴ He held the highest qualification in this field, an Advanced Mine Valuation Certificate.²⁹⁵

His job involved taking ore samples from measured and plotted rock faces from the mine's underground operations according to the Stope and Development Sampling Standard.

Moreki was required to take measurements underground so as to indicate the exact location of the stope face position from which he extracted ore samples.²⁹⁶ According to the sampling standard, measurements must be taken from at least two numbered survey pegs and entered

²⁸⁸ Ibid para 23

²⁸⁹ Ibid para 26

²⁹⁰ Ibid para 26

²⁹¹ Ibid para 26

²⁹² Ibid para 26

²⁹³ (2014) 1 BLLR 20 LAC

²⁹⁴ *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA supra*

²⁹⁵ Ibid para 2

²⁹⁶ Ibid para 3

into a field book which is then co-signed by a miner.²⁹⁷ The field book is given to a senior dedicated sampler who plots the measurements onto a sampling plan.²⁹⁸

The ore samples collected by the sampler are sent to a laboratory for analysis in order to determine the valuation of the whole area. Hence the decision to mine a particular area depends on the results of the laboratory test.²⁹⁹ Mining carries significant costs.³⁰⁰ Therefore it is important that the measurements are done according to the sampling standard.³⁰¹ A wrong measurement could result in the mine suffering huge a huge loss.³⁰² The sampler plays an extremely important role in selecting areas to mine.³⁰³

According to the facts of this case, on 20 June 2009, the employee in question recorded the measurements of an area from which he had collected ore samples in his field book.³⁰⁴ However, doubt was cast on these measurements and the entry was not co-signed by a miner.³⁰⁵

After a scheduled monthly measurement of various panels which included the panels the employee had measured, the surveyors found a discrepancy³⁰⁶. Moreki was confronted regarding the discrepancy in the measurements.³⁰⁷ He did not agree that his measurements were incorrect and suggested that that someone be sent underground to re-measure the panels.³⁰⁸

The sampler who did so reported that the position of the stope face reported on by the employee was 11 metres further than was actually the case.³⁰⁹ This affected the valuation of the panels and resulted in a financial loss of R1.2 million.³¹⁰

Moreki was charged with serious neglect of duty and failure to work according to the applicable standards.³¹¹ He was dismissed after being found guilty as charged at the disciplinary hearing.³¹²

²⁹⁷ Ibid para 3

²⁹⁸ Ibid para 3

²⁹⁹ Ibid para 4

³⁰⁰ Ibid

³⁰¹ Ibid

³⁰² Ibid para 4

³⁰³ Ibid para 4

³⁰⁴ Ibid para 4

³⁰⁵ Ibid para 4

³⁰⁶ Ibid para 5

³⁰⁷ Ibid

³⁰⁸ Ibid para 6

³⁰⁹ Ibid

³¹⁰ Ibid para 7

The employee registered a dispute of unfair dismissal with the CCMA for conciliation and thereafter arbitration.³¹³ While he was found guilty of poor work performance, the arbitrator found that the sanction of dismissal was too harsh on the basis that his conduct could be *corrected and improved*. He was reinstated by the arbitrator without back pay.³¹⁴

The major question that arose in this case is to what extent the LC should be able to overturn CCMA awards and rulings³¹⁵. It is clear that the intention of the legislature was that the powers of the court in this regard should be limited.³¹⁶ The LRA, 66 of 1995 does not make provision for an appeal against arbitration awards or rulings.³¹⁷ It merely allows for the review of such awards on limited grounds (e.g., where the arbitrator commits misconduct in relation to his/her duties or there is a gross irregularity in the arbitration). However, experience over the past few years has shown that the concept of a review has been widely or narrowly interpreted by different courts; this has sparked widespread debate.³¹⁸

It is submitted that this was a far wider interpretation than the traditional approach to the concept of gross irregularity, which was largely limited to a situation where the arbitrator misconceives the whole nature of the enquiry, and as a result misconceives his/her mandate or duties in conducting the enquiry.³¹⁹

However, the SCA did not uphold the LAC's generous approach to the *Herholdt* judgement.³²⁰ It revisited and analysed the provisions of s145 of the LRA, and stated that the legislature was deliberate in rejecting the option of an appeal of awards.³²¹ It is submitted that the court deliberately chose review, on narrow grounds, to deter parties from seeking to challenge awards. This supported the purpose of the CCMA as a dispute resolution forum that offers an inexpensive and expeditious resolution process.³²² The SCA summarised the position as follows:³²³

'A review ...is permissible if the defect in the proceedings falls within one of the grounds in s145 (2) (a) of the LRA. For a defect in the conduct of the proceedings to

³¹¹ Ibid

³¹² Ibid

³¹³ Ibid

³¹⁴ Ibid

³¹⁵ <http://www.ensafrica.com/com/news/Test-for-review-relooked> is there still scope for poce...accessed on the 2014/7/25

³¹⁶ Ibid

³¹⁷ Ibid

³¹⁸ Ibid

³¹⁹ <http://www.ensafrica.com/com/news/Test-for-review-relooked> is there still scope for poce...accessed on the 2014/7/25

³²⁰ *Herholdt v Nedbank supra*.

³²¹ Ibid

³²² Ibid para 19

³²³ Ibid para 20

*amount to a gross irregularity as contemplated by s 145(2) (a) (ii) ...the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.’*³²⁴

Since the coming into force of the Constitutional Seventeenth Amendment Act, 2012 the SCA no longer has the jurisdiction to hear appeals from the LAC and the latter is now the final body of appeal (except for constitutional issues) in interpreting the LRA.³²⁵

It was therefore with much anticipation that observers waited to see if the LAC would follow the SCA decision in *Herholdt* when it next confronted the review test issue. The *Goldfields* decision was the LAC’s first consideration of the test for review after the SCA’s *Herholdt* decision.

It is submitted that in its judgment, the LAC recognized that the process-related grounds for review provided for in s145(2)(a) still pertain but that once the procedural defect is established, the reviewing court must go a step further and satisfy itself that the defect resulted in the award being one that a reasonable arbitrator could not have reached.

According to the LAC,³²⁶

*What is required is first to consider the gross irregularity that the arbitrator is said to have committed and then to apply the reasonableness test established by Sidumo. The gross irregularity is not a self-standing ground insulated or independent of the Sidumo test. That being the case it serves no purpose for the reviewing court to consider and analyse every issue raised at the arbitration and regard failure by the arbitrator to consider all or some of the issues albeit material as rendering the award liable to be set aside on the grounds of process-related review.’*³²⁷

It is submitted that in *Goldfields* the LAC reaffirmed the purpose of an arbitrator, as set out in s138 of the LRA, as being to address the substantial merits of a dispute between parties with

³²⁴ Ibid para 23

³²⁵ Ibid

³²⁶ *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA supra*

³²⁷ Ibid

minimal legal formalities and to do so expeditiously and fairly. According to the LAC, the relevant enquiries to make in review applications are the following.³²⁸

‘(i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he was required to arbitrate...? (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? And (v) Is the arbitrator’s decision one that another decision-maker could reasonably have arrived at based on the evidence?’³²⁹

In the *Goldfields* matter, Moreki had been dismissed for allegations of misconduct.³³⁰ However, the arbitrator found that he was in fact guilty of poor performance and that the sanction of dismissal was too harsh. He ordered that Moreki be reinstated.³³¹

Applying the review test that it had articulated, the LAC came to the conclusion that the arbitrator had misconceived the nature of the enquiry, which had been to determine whether Moreki’s dismissal, based on misconduct, was fair.³³² Thus the arbitrator had erroneously miscategorised Moreki’s conduct as poor performance, which required a different enquiry from that of cases involving misconduct.³³³ This amounted to a gross irregularity.

The LAC stated that³³⁴

‘...the arbitrator committed a gross irregularity in the conduct of the proceedings. The conclusion he arrived at was influenced by the wrong categorisation of the case against the Third Respondent. This however is not sufficient for the award to be reviewed and set aside. The question needs to be asked: had the categorisation of the case against the Third Respondent been misconduct as opposed to poor performance, is the arbitrator’s award nonetheless one that could be arrived at by a reasonable decision-maker? In my view it is clearly not. The Third Respondent committed a serious act of misconduct...the

³²⁸ Ibid

³²⁹ Ibid

³³⁰ Ibid

³³¹ Ibid

³³² Ibid

³³³ *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA supra*

³³⁴ Ibid

decision arrived at by the arbitrator is not one which a reasonable-maker could reach.³³⁵

This means that, where an arbitrator commits misconduct in relation to his/her duties or there is a gross process-related irregularity in the arbitration, this is not - in and of itself - sufficient grounds to warrant interference by our courts on review. In addition, the irregularity must be of such a nature that it renders the decision reached unreasonable in the circumstances.³³⁶

In other words, it is no longer good enough for employers or employees wishing to review an award based on one of the procedural defects provided for in s 145(2)(a), to only establish the existence of the defect, i.e., misconduct by an arbitrator in relation to his/her duties, a gross irregularity committed by the arbitrator in the conduct of the arbitration proceedings or the arbitrator exceeding his/her powers.

It is submitted that it may become be more difficult to successfully prosecute review applications in the LC. In my view this case shows that the *Sidumo* test is still the locus classicus when it comes to reviews. This is because the test was set out clearly by the CC in the *Sidumo* case.

³³⁵ Ibid

³³⁶ Ibid

CHAPTER 6: CONCLUSION

It is submitted that *Herholdt* breaks new ground in that it is the first time that the LAC has expressly held that the test for prejudice in the case of a gross irregularity is no more than the potential that the commissioner may have come to a different conclusion if he/she had applied his mind to the facts/considerations which he/she ignored. This is clearly a much lower threshold for interference than the *Sidumo* test.

Murphy adds that there may be another twist in the tale³³⁷. Although having previously found that a misapplication of the *Sidumo* test does not alone constitute a basis for leave to appeal to the SCA,³³⁸ in the *Herholdt* judgement, it affirmed that the *Sidumo* test is the correct one and that it should be followed by the courts. This confirms that the *Sidumo* test is not in decline.

Experienced and highly regarded labour lawyer and arbitrator, John Brand has questioned whether the absence of a right to appeal is appropriate in compulsory arbitration proceedings,³³⁹ when parties are compelled into a process and have an adjudicator forced upon them.³⁴⁰ While he notes that it is acceptable for parties to not have the right to appeal when they opt out of formal litigation and choose private arbitration, the situation changes when one party forces another party to take part in arbitration and an adjudicator is imposed on them. In the latter situation, fairness and legitimacy require that the parties should be able to challenge an adverse finding³⁴¹

Brand adds that dismissal jurisprudence is more complex than many realize, often with grave implications for workers in a context of high unemployment and inadequate social security.³⁴² He therefore argues that, under current circumstances in South Africa, it is inappropriate to treat an unfair dismissal case as a simple, small claim with no right of appeal.³⁴³ Brand further submits that appeals provide greater consistency and may improve the quality of both the process and outcomes.³⁴⁴

³³⁷ Murphy, J 'An Appeal for an appeal' (2013)34 *ILJ* 1

³³⁸ *FAWU obo Mbatha & others v Pioneer Foods (Pty) Ltd t/a Sasko Milling and Baking & others* (2011) 32 *ILJ* 2916 (SCA).

³³⁹ Brand J, *CCMA Achievements and Challenges – lessons from the First Three years* (2000) 21 *ILJ* 77

³⁴⁰ S191 of LRA

³⁴¹ Brand J, *CCMA Achievements and Challenges – lessons from the First Three years* (2000) 21 *ILJ* 77

³⁴² *Ibid*

³⁴³ *Ibid*

³⁴⁴ *Ibid*

Few support limiting judicial supervision to review on the narrow grounds in s 145(2) of the LRA.³⁴⁵ In certain cases, the LC has relied on s 158(1)(g) of the LRA to extend the scope of review to allow for review on the grounds of reasonableness and rationality.³⁴⁶ This provision forms part of the section governing the powers of the LC. In its original formulation it provided that:

'The Labour Court may - *despite* section 145, review the performance or purported performance of any function provided for in this Act or any act or omission of any person or body in terms of this Act on any grounds that are permissible in law.'³⁴⁷

The use of the word “despite” supports the interpretation that a wider basis for review of arbitration awards (on any permissible legal grounds) was contemplated and reinforces the contention that the provision was necessary to give full effect to the constitutional right to administrative action that is lawful, fair and justifiable, which s 145 apparently failed to do.³⁴⁸

It is submitted that the LAC gave important guidance on what it intended to achieve by extending the scope of review.³⁴⁹ Furthermore, it emphasized that it would be wrong to read into s145 of the LRA an abolition of the distinction between review and appeal.³⁵⁰ The LRA does not maintain a clear division and the concept of justifiability nor should rationality lead to the distinction being abandoned.³⁵¹ It is conceded, however, that in determining whether arbitration proceedings and awards are justifiable or rational, value judgments will be made which, almost inevitably, will involve the consideration of the merits in one way or another.³⁵²

The court in the *Carephone supra* held the following:

'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.'³⁵³

It is submitted that '*Carephone* was a welcome and prudent intervention'³⁵⁴ as it introduced an appropriate and adequate level of judicial supervision which accorded with prevailing

³⁴⁵ J Murphy , *An appeal for an Appeal*, (2013) 34 ILJ p6

³⁴⁶ Ibid p6

³⁴⁷ Ibid p 6

³⁴⁸ Ibid p 6

³⁴⁹ Ibid p7

³⁵⁰ Ibid p7

³⁵¹ Ibid p8

³⁵² J Murphy , *An appeal for an Appeal*, (2013) 34 ILJ p6

³⁵³ *Carephone* note 294 above *Carephone (Pty) v Marcus NO & [1998] 11 BLLR 1093 (LAC)* at para 36

constitutional norms and the public's sense of justice.³⁵⁵ Nevertheless it contained the seeds of destruction of the legislature's desire for a more informal and less legalistic process.³⁵⁶ Review on the grounds of rationality requires analysis of the link between the reasons for a decision and the evidence upon which it is based.³⁵⁷ This meant that the CCMA was obliged to become a tribunal of record, perhaps contributing to further juridification of the process and an increasingly technical, formal and legalistic practice'.³⁵⁸

It is submitted that, as the judgment in *Carephone* suggests, the notion that justifiability of the award on the merits of the material placed before the arbitrator can properly fall within the ambit of an excess of the arbitrator's powers, is certainly new. To adopt such an approach is to effectively state that the only jurisdiction that arbitrators have is to decide the case correctly; this is not only contrary to the authority granted them, but would have the effect of transforming a review into an appeal.'³⁵⁹

Murphy contends that, 'it is hard to disagree with Judge Wallis that the approach in *Carephone* went against authority, but his point that rationality review would transform reviews into appeals is submitted to be something of an overstatement'.³⁶⁰ After *Carephone*, the line between the two was more likely to be blurred.³⁶¹ A rationality review will often mutate into an appeal on the merits and there is no legal basis for introducing such a review³⁶²

It is submitted that there is no getting away from the fact that rationality and reasonableness reviews can resemble appeals, depending on the factual and legal issues that are subject to challenge'. The most identifiable outcome is that bad decisions are sometimes allowed to stand because they are rational.

It is further submitted that parties that have the financial means, a grievance and a creative legal representative will not encounter many difficulties in crafting a rationality review from a bad or incorrect arbitration award. It seems that parties use review to achieve much the same end as an appeal and LC judges have been known to use their review powers to perform

³⁵⁴ J Murphy, *An appeal for an Appeal*, (2013) 34 ILJ p6

³⁵⁵ Ibid p6

³⁵⁶ Ibid p6

³⁵⁷ J Murphy, *An Appeal for an Appeal*, (2013) 34 ILJ 6

³⁵⁸ Ibid p6

³⁵⁹ *Carephone* note 294 above *Carephone (Pty) v Marcus NO & [1998] 11 BLLR 1093 (LAC)* at para 53

³⁶⁰ J Murphy note 356 above p10

³⁶¹ Ibid p 10

³⁶² J Murphy, *An Appeal for an Appeal*, (2013) 34 ILJ 10

an appeal function to correct mistakes by CCMA commissioners.³⁶³ It is submitted that the LAC's caution to judges in *Carephone* not to enter the merits for the wrong reason has not always been heeded, confirming Wallis AJ's prognosis that a rationality review would at times have the effect of transforming reviews into appeals.³⁶⁴

Murphy submits that from a moral and constitutional perspective, parties probably prefer an appeal because they want to be treated lawfully, correctly and with due regard to the merits of their cause.³⁶⁵ The author asks: 'why should those interests yield to the expedience of a supposedly quick and informal process, which practice shows will often be neither, especially when the arbitrator gets it wrong?',³⁶⁶

However, the SCA has taken a bold stance on the difference between appeals and reviews in a judgement recently handed down in *Herholdt v Nedbank*. The SCA restated that the test set in the case of *Sidumo* by the CC is the locus classicus and should be followed by the courts when it comes to review.

'Far better,' Murphy submits, 'would be a system that provided for an arbitration followed by a single appeal on the record on whether the arbitrator got the decision on fairness right or wrong'.³⁶⁷ Aside from the dilemmas raised by the overlapping and contradictory standards of review, for Murphy, there is an even better reason to revert to an appeal.³⁶⁸ However Murphy's submission was rejected by the SCA in the recent case of *Herholdt supra*.

'In the circumstances, the submission by some that it may be more appropriate to allow parties a clearly defined right to appeal is a good one'.³⁶⁹ It is further submitted that in the context of unfair dismissal, there is little real worth left in the rationale that review is better in circumscribing the ambit of administrative decision-making and ensuring that the courts do not usurp the functions of administrative tribunals.³⁷⁰ Accordingly it is submitted that the labour courts themselves are specialists and are well-placed to assess the correctness of fairness decisions.³⁷¹ Therefore, it is increasingly recognized that justice in labour relations will be better promoted by enabling judicial supervision through an appeal.

³⁶³ Ibid p10

³⁶⁴ Ibid p10

³⁶⁵ Ibid p11

³⁶⁶ Ibid p 11

³⁶⁷ Ibid p11

³⁶⁸ Ibid p10

³⁶⁹ Ibid 11

³⁷⁰ Ibid p11

³⁷¹ Ibid p11

However, the SCA's assertion in the *Herholdt* case that the 'distinction between review and appeal, which the Constitutional Court stressed is to be preserved',³⁷² is clearer in the case of the *Sidumo* test. The court further held that 'while the evidence must necessarily be scrutinised to determine whether the outcome was reasonable, the reviewing court must always be alert to remind itself that it must avoid 'judicial overzealousness in setting aside administrative decisions that do not coincide with the judge's own opinions'.³⁷³ The LAC subsequently stressed that the test 'is a stringent [one] that will ensure that ... awards are not lightly interfered with',³⁷⁴ and that its emphasis is on the result of the case rather than the reasons for arriving at that result.³⁷⁵ The *Sidumo* test will, however, justify setting aside an award on review if the decision is 'entirely disconnected with the evidence'³⁷⁶ or is 'unsupported by any evidence'³⁷⁷ and involves speculation by the commissioner.

It is submitted that the court has reaffirmed that the *Sidumo* test is not in decline and is the proper test to follow when it comes to reviews. This clearly indicates that the courts are not of the view that appeals are better than reviews. They still favour reviews and in particular, the *Sidumo* test is the *locus classicus* and should be followed.

I agree with the submission that the *Sidumo* is the correct test as this leads to fair outcomes in labour law since it is an impartial test.

³⁷² Ibid

³⁷³ Ibid

³⁷⁴ *Fidelity Cash Management Service v CCMA & others supra*

³⁷⁵ *Fidelity Cash Management Service v CCMA & others supra* .

³⁷⁶ *Transnet Ltd v CCMA & others* (2008) 29 ILJ 1289 (LC) para 27.

³⁷⁷ Ibid

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