

**COLLEGE OF LAW AND MANAGEMENT STUDIES
SCHOOL OF LAW**

**The Grounds for Reviewing CCMA Arbitration Awards: A Critical
Assessment of whether the Courts' Interpretation thereof gives Adequate
Effect to the Fundamental Right to Just Administrative Action**

by

Andile Wesley Khumalo

210547314

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Supervisor:

Prof Tamara Cohen

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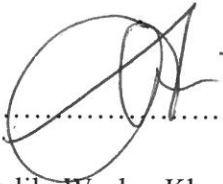
Courts and practicing lawyers are only now beginning to grapple with redefining the role of the law in regulating the tension which must exist between the procedural fairness and rationality [or reasonableness] of the administrative process on the one level, and the need for efficient, effective and expeditious public administration on the other.

- Professor Hugh Corder ¹

¹ H Corder 'Reviewing Review: Much Achieved, Much More to do' in H Corder & L van der Vijver (eds) *Realising Administrative Justice* (2002) 1, 18. Footnote omitted.

DECLARATION

I, Andile Wesley Khumalo, student number 210547314, hereby declare that this thesis, presented for the degree magister legum at the University of KwaZulu-Natal, is my own work and has not been submitted for any degree or examination at any other university.



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Andile Wesley Khumalo

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ABSTRACT

In *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC) (*Sidumo*), the Constitutional Court (CC) decreed that arbitration awards issued by commissioners acting under the auspices of the Commission for Conciliation, Mediation and Arbitration (CCMA) constitute administrative action within the meaning of section 33 of the Constitution of the Republic of South Africa, 1996 (1996 Constitution). Having made that finding, the CC proceeded to lay down the standard for reviewing such awards. In attempting to determine the import of the CC's judgment in *Sidumo* in respect of the reviewability of CCMA arbitration awards, the lower courts have adopted numerous conflicting approaches. Although there is extensive research on the standard for reviewing CCMA arbitration awards, there is no research aimed at ascertaining which of the conflicting approaches to the standard of review, particularly the approaches encapsulated in *Herholdt v Nedbank Ltd* (2012) 23 ILJ 1789 (LAC) (*Herholdt (LAC)*); *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* (2013) 34 ILJ 2795 (SCA) (*Herholdt (SCA)*) and *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & Others* (2014) 35 ILJ 943 (LAC) (*Gold Fields*), is supported by the weight of Labour Appeal Court (LAC) and Supreme Court of Appeal (SCA) judgments. This study investigates that issue as one of its chief objectives. The findings on that issue provide significant insight into which of the approaches to the standard of review represents an accurate statement of the law. To achieve that objective, the study analysis 124 judgments of the LAC and the SCA handed down since *Sidumo* to date. The analysis of those judgments reveals that the SCA's delineation of the standard of review in *Herholdt (SCA)* is supported by the weight of LAC and SCA judgments.

The question then arises as to whether the delineation of the standard of review by the SCA in *Herholdt (SCA)*, which until recently was the highest court in labour matters, gives adequate protection to the fundamental right to just administrative action in section 33 of the 1996 Constitution. No research has been conducted on that issue as yet. This study thoroughly explores that issue primary through an examination of pertinent CC judgments and scholarly writings. The findings of that exercise give critical insight into the regulation of the right to just administrative action within the labour law sphere. More specifically, this study reveals that while the SCA's formulation of the standard of review in *Herholdt (SCA)* is praiseworthy because it provides sufficient scope for the proper regulation of the right of parties to CCMA arbitration proceedings to lawful and procedurally fair administrative action, the SCA's conception of the standard of review detracts from the parties' right to reasonable administrative action by rejecting the application of the rationality component of reasonableness to reviews of CCMA arbitration awards. Although the SCA's decision to limit the right to reasonable administrative action in the employment sphere is informed by a desire to give effect to the legislature's goal of expediting the resolution of labour disputes, the SCA fails to carry out the analysis envisaged in section 36 of the 1996 Constitution with the view of determining whether such a limitation is reasonable and justifiable. The conclusion to this thesis suggests that the SCA's decision to limit the right to reasonable administrative action in this fashion is contrary to the prescripts of the 1996 Constitution. The conclusion proposes that, in the light of the fact that the SCA's conception of reasonableness is supported by the weight of LAC and SCA judgments, the LAC ought to effect a section 36 analysis and determine definitely whether the SCA's limitation of the right to reasonable administrative action in *Herholdt (SCA)* is reasonable and justifiable. The conclusion proposes further that, in the alternative, the LAC ought to give full effect to the right to reasonable administrative action in the employment sphere by endorsing the rationality component of reasonableness.

KEY WORDS: Administrative Law; Just Administrative Action; Reviews; Standard of Review, *Sidumo*; CCMA; Arbitration Awards; Reasonableness; Rationality; Substantive Reasonableness; Dialectical Reasonableness.

CHAPTER 1

GENERAL INTRODUCTION

1.1 BACKGROUND

Approximately two decades after the establishment of the Commission for Conciliation, Mediation and Arbitration (CCMA),² the jurisprudence pertaining to judicial review of arbitration awards issued by commissioners of the CCMA is arguably still indeterminate. At various junctures since the inception of the CCMA, judges of the labour courts have grappled with that issue.³

Section 145 of the LRA⁴ makes provision for an unsuccessful party to any arbitration hearing conducted by the CCMA to institute review proceedings in the Labour Court (LC) against an arbitration award issued pursuant to the arbitration hearing.⁵ It further prescribes that this may be done on any one of the following grounds:

- ‘(a) that the commissioner –
 - (i) committed misconduct in relation to the duties of the commissioner as an arbitrator;
 - (ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
 - (iii) exceeded the commissioner’s powers; or
- (b) that an award has been improperly obtained.’⁶

Early on in the development of the LC’s review jurisprudence, judges of the LC became divided on the applicability of sections 145 and 158(1) (g) of the LRA⁷ to reviews of CCMA arbitration awards.⁸ The problem was that section 158(1) (g) apparently provided much wider scope for reviewing CCMA arbitrations awards than section 145.⁹ This was ironical because the latter was supposedly the authority for reviews; whereas it was seemingly possible to ignore it entirely and ground a review on the basis of section 158(1) (g) which stated, before its amendment, that the LC may undertake a review on any grounds permissible in law

² See section 112 of the Labour Relations Act 66 of 1995 (LRA).

³ See, for example, *Edcon Ltd v Pillemer NO & others* (2009) 30 ILJ 2642 (SCA) (*Edcon*) 11; *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* (2013) 34 ILJ 2795 (SCA) (*Herholdt (SCA)*) 11.

⁴ Hereinafter referred to as ‘section 145’.

⁵ Section 145(1).

⁶ Section 145(2).

⁷ Hereinafter ‘section 158(1)(g)’.

⁸ *Edcon* (note 3 above) 11; *Shoprite Checkers (Pty) Ltd v Ramdaw NO & others* 2001 (4) SA 1038 (LAC); (2001) 22 ILJ 1603 (LAC) (*Shoprite Checkers (LAC)*) 3.

⁹ *Ellerine Holdings Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2008) 29 ILJ 2899 (LAC) (*Ellerine Holding*) 2904; J Murphy ‘*An Appeal for an Appeal*’ (2013) 34 ILJ 1, 7.

‘despite section 145’.¹⁰ The use of the word ‘despite’ also bolstered an argument that section 158(1) (g) was essential to achieve adequate protection of the right to just administrative action under the Constitution of the Republic of South Africa Act, 1996 (1996 Constitution) because section 145 apparently failed to do so.¹¹

The conflict between sections 145 and 158(1)(g) was eventually resolved by the Labour Appeal Court (LAC) in *Carephone* where it (per Froneman DJP) held that ‘despite’ in section 145 had to be interpreted to mean ‘subject to’, essentially locating the authority for reviews of CCMA awards back in section 145.¹²

Froneman DJP was nevertheless sensitive to sentiments that section 145 was too narrow and inappropriate to give proper effect to the administrative justice provisions envisaged in the 1996 Constitution.¹³ The need to interpret section 145 in compliance with the 1996 Constitution¹⁴ flowed from, amongst others, Froneman DJP’s findings that the CCMA is an organ of state and that the provisions of the Bill of Rights directly bind it.¹⁵ Froneman DJP proceeded to read into section 145(2) (a) (iii)¹⁶ the requirement that administrative action rendered by CCMA commissioners had to satisfy a standard of *substantive rationality*,¹⁷ thereby expanding the scope of the standard for reviewing CCMA arbitration awards.¹⁸ He explained that in applying this substantive rationality standard a reviewing court would have to ask the following question: ‘is there a rational objective basis justifying the connection made by the administrative decision maker between the material properly available to him and the conclusion he or she eventually arrived at?’¹⁹ This finding was grounded in the

¹⁰ Murphy (note 9 above) 7; *Carephone (Pty) Ltd v Marcus* 1999 (3) SA 304 (LAC); (1998) 19 ILJ 1425 (LAC) (*Carephone*) 26; *Shoprite Checkers (LAC)* (note 8 above) 6.

¹¹ Murphy (note 9 above) 7; *Carephone* (note 10 above) 26 – 27; *Shoprite Checkers (LAC)* (note 8 above) 5 – 7.

¹² *Carephone* (note 10 above) 28; Murphy (note 9 above) 7.

¹³ Murphy (note 9 above) 7.

¹⁴ *Carephone* (note 10 above) 28.

¹⁵ *Carephone* (note 10 above) 11 – 12.

¹⁶ *Carephone* (note 10 above) 24.

¹⁷ *Carephone* (note 10 above) 37; *Edcon* (note 3 above) 11; *Ellerine Holding* (note 9 above) 2904; *Shoprite Checkers (LAC)* (note 8 above) 8.

¹⁸ *Carephone* (note 10 above) 30 read with 37. Hereinafter referred to as ‘the standard of review’ or ‘the standard for review’. In this thesis, these phrases are used to refer collectively to all the grounds in terms of which a CCMA arbitration award may be set aside, namely those envisaged in section 145 and those that may flow from the provisions of the right to just administrative action in section 33 of the 1996 Constitution.

¹⁹ *Carephone* (note 10 above) 37.

administrative justice provisions of the Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution).²⁰

The debates surrounding the standard of review did not cease, however.²¹ Following *Carephone*, a debate emerged regarding whether the substantive rationality standard that was established in that judgment had been imported into section 145(2) (a) (iii) or whether it had been established as an independent ground of review. In one of its later judgments, the LAC expressed misgivings concerning the latter and was not sure about the former.²² This prompted some judges of the LC to argue that *Carephone*'s importation of the standard of 'justifiability' or substantive rationality into section 145(2) (a) (iii) was misplaced.²³

Carephone sparked a further debate, this time between judges of the LAC, concerning the scope of the substantive rationality standard.²⁴ There were two views in this debate. One view was that after *Carephone* a reviewing court had to determine whether a commissioner's award was justifiable in relation to the reasons given for it.²⁵ While the other view proffered that a commissioner's award had to be justifiable not only on the reasons given for it, but also taking into account the totality of the evidence placed before the commissioner.²⁶

In *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation & Arbitration & others*²⁷(*Rustenburg (SCA)*) the Supreme Court of Appeal (SCA) was afforded an opportunity to pronounce on the scope of the substantive rationality standard. The LAC in *Rustenburg Platinum Mines Ltd v CCMA & others* ²⁸(*Rustenburg (LAC)*) had adopted the second view outlined above in applying the substantive rationality standard.²⁹ The SCA in *Rustenburg (SCA)* decried that approach holding that the LAC in *Rustenburg (LAC)* had in effect equated the inquiry on review to an appeal.³⁰

²⁰ *Carephone* (note 10 above) 15 – 16. See further, item 23(2) of schedule 6 to the 1996 Constitution; *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC) (*Sidumo*)106.

²¹ *Shoprite Checkers (LAC)* (note 8 above) 8-9.

²² *Toyota SA Motors (Pty) Ltd v Radebe & others* (2000) 21 ILJ 340 (LAC) (*Radebe*) 33.

²³ *Shoprite Checkers (Pty) Ltd v Ramdau NO & others* (2000) 21 ILJ 1232 (LC) (*Shoprite Checkers (LC)*) 53; *Murphy* (note 9 above) 9.

²⁴ *Edcon* (note 3 above) 12.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ 2007 (1) SA 576 (SCA); (2006) 27 ILJ 2076 (SCA).

²⁸ [2004] 1 BLLR 34 (LAC).

²⁹ See *Edcon* (note 3 above) 13.

³⁰ *Rustenburg (SCA)* (note 27 above) 30.

The SCA in *Rustenburg (SCA)* went even further in this judgment and reconsidered the standard of review established in *Carephone*. Although it approved the formulation of the standard of review in *Carephone*, the SCA held that the more extensive provisions in section 6(2) of the Promotion of Administrative Justice Act³¹ (PAJA) extended the remedies therein to parties to CCMA arbitration proceedings.³² This is because, according to the SCA, PAJA had superseded section 145.³³ However, the SCA held that both the *Carephone* rationality standard and PAJA required the LAC in *Rustenburg (LAC)* to determine whether the decision of the commissioner was ‘rationally connected to the information before him and to the reasons he gave for it.’³⁴

The debates arising from *Carephone* finally came to a head when the SCA’s decision in *Rustenburg (SCA)* was taken on appeal to the Constitutional Court (CC) in *Sidumo*. In its landmark judgment in *Sidumo*, the CC (per Navsa AJ) reconsidered and developed the standard of review even further. In developing this standard, Navsa AJ recognised that the administrative justice imperative contained in the Interim Constitution had been superseded by the imperative in section 33 of the 1996 Constitution³⁵ that requires administrative action to be lawful, reasonable and procedurally fair.³⁶ In view of this, he found that the reasonableness standard was henceforth to suffuse section 145.³⁷ He explained that the reasonableness standard is the same standard that the CC had adopted in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others*³⁸ (*Bato Star*), which poses the question: ‘Is the decision reached by the commissioner one that a reasonable decision maker could not reach?’³⁹

Since *Sidumo*, there have been numerous conflicting approaches that have been adopted by judges of the LC, the LAC and the SCA in delineating the import of the CC’s judgment in

³¹ 3 of 2000.

³² *Rustenburg (SCA)* (note 27 above) 23-26.

³³ *Ibid.*

³⁴ *Rustenburg (SCA)* (note 27 above) 29; *Sidumo* (note 20 above) 45.

³⁵ Hereinafter ‘section 33’.

³⁶ *Sidumo* (note 20 above) 106.

³⁷ *Ibid.*

³⁸ 2004 (4) SA 490 (CC).

³⁹ *Sidumo* (note 20 above) 107 and 110.

Sidumo insofar as the standard of review is concerned.⁴⁰ This has led to inconsistency in the development of the standard of review.

The main uncertainties that have emerged during the *Sidumo* era, as revealed by conflicting judgments and academic writings, may be summarised as follows:

- i. Firstly, the CC in *Sidumo* did not indicate with any precision how the constitutional standard of reasonableness ‘suffuses’ section 145.⁴¹ Put differently, the CC did not explain whether that meant that reasonableness was established as a self-standing ground of review.⁴² Nor did it indicate whether that meant that reasonableness was imported into either the ground of ‘excess powers’, as was the case with the rationality standard in *Carephone*;⁴³ or all three grounds of review in section 145, namely ‘misconduct’, ‘gross irregularity’ and ‘excess of powers’, as suggested by some.⁴⁴
- ii. Secondly, the content of the individual grounds of review in section 145 has been a very contentious matter, with some⁴⁵ arguing that these grounds were meant to bear the meaning ascribed to the same grounds under the Arbitration Act⁴⁶ (AA). Others claimed that the suffusion of the fundamental right to just administrative action into section 145 meant that the grounds of misconduct, gross irregularity and excess of powers in this section would evolve and take on different meanings as against the same grounds in the AA.⁴⁷
- iii. Thirdly, the CC in *Sidumo* had also not given any direction as to whether the reasonableness standard is purely substantive in nature⁴⁸ or whether it consists of both substantive and dialectic/procedural elements, i.e. whether it relates to both the

⁴⁰ See, for example, *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & Others* (2010) 31 ILJ 452 (LC) (*Southern Sun*); *Gaga v Anglo Platinum Ltd & others* (2012) 33 ILJ 329 (LAC) (*Gaga*); *Afrox Healthcare Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2012) 33 ILJ 1381 (LAC) (*Afrox*); *Herholdt v Nedbank Ltd* (2012) 23 ILJ 1789 (LAC) (*Herholdt (LAC)*); *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & Others* (2014) 35 ILJ 943 (LAC) (*Gold Fields*) and *Herholdt (SCA)* (note 3 above).

⁴¹ *Southern Sun* (note 40 above) 13; C Garbers ‘Reviewing CCMA awards in the aftermath of *Sidumo*’ (2008) 17 *CLL* 84, 84 – 85.

⁴² *Herholdt (SCA)* (note 3 above) 14.

⁴³ *Shoprite Checkers (LAC)* (note 8 above) 8; (*Ellerine Holding*) (note 9 above) 2904.

⁴⁴ Murphy (note 9 above) 12; *Gold Fields* (note 40 above) 14.

⁴⁵ (*Shoprite Checkers (LC)*) (note 23 above); *Herholdt (SCA)* (note 3 above).

⁴⁶ 42 of 1965.

⁴⁷ Murphy (note 9 above) 10.

⁴⁸ See, for instance, *Herholdt (SCA)* (note 3 above).

outcome of an arbitrator's award and the process adopted by an arbitrator in arriving at that outcome.⁴⁹

- iv. Fourthly, there is uncertainty relating to the nature of the relationship between the substantive unreasonableness and procedural/ dialectic unreasonableness standards. There has been debate as to whether dialectic unreasonableness, if found, would be sufficient to justify the setting aside of an arbitration award issued by a commissioner of the CCMA⁵⁰ or whether such unreasonableness could be cured if the award is otherwise found to be substantively reasonable.⁵¹
- v. Finally, there have been cases in which judges have stated that the rationality standard established in *Carephone* remains significant in applying the reasonableness standard formulated by the CC in *Sidumo*,⁵² and other cases in which judges have held that the *Carephone* rationality standard was discarded completely.⁵³ Together these problems have caused considerable incoherence in the development of the LC's review jurisprudence.

Recently, the SCA in *Herholdt (SCA)* attempted to determine some of the issues outlined above. In the process, the SCA dismissed some developments that had gained considerable traction in a number of LAC judgments. The *Herholdt (LAC)* judgment represents the culmination of those developments.⁵⁴ It is apparent, though, that the scope of the standard of review in employment law cannot be determined simply with reference to the SCA's decision in *Herholdt (SCA)*. This is because of the recent legislative enactment of the Constitution Seventeenth Amendment Act, 2012⁵⁵ (CSAA).

Section 4 of the CSAA amends section 168(3) of the Constitution to provide that the SCA may determine any matter emanating from the high court or any court of similar status, excluding labour matters to the extent determined by an Act of Parliament. This provision should be read in conjunction with section 167(2) of the LRA which stipulates that the LAC is the final court of appeal on all matters within the exclusive jurisdiction of the LC. The

⁴⁹ See, for example, *Herholdt (LAC)* (note 40 above) 33 and 36; *Southern Sun* (note 40 above) 13 and 14.

⁵⁰ See, for example, *Herholdt (LAC)* (note 40 above) 36 and 39; *Southern Sun* (note 40 above) 17.

⁵¹ See, for example, *Gold Fields* (note 40 above) 14.

⁵² *Bestel v Astral Operations Ltd* [2011] 2 BLLR 129 (LAC) (*Bestel*) 17.

⁵³ *Herholdt (SCA)* (note 3 above) 11, 12 and 24.

⁵⁴ *Herholdt (SCA)* (note 3 above) 15.

⁵⁵ Date of commencement: 23 August 2013.

effect of these provisions is to do away with appeals from the LAC to the SCA.⁵⁶ This is a significant development since there is an apparent conflict between the approach adopted by the SCA in *Herholdt (SCA)* and that adopted by the LAC in *Gold Fields* regarding the interpretation of the *Sidumo* judgment and thus the standard of review.⁵⁷ In keeping with the CSAA, precedent established in judgments of the LAC and the SCA may now be on equal footing.⁵⁸ Moreover, Fergus argues, very convincingly, that the enunciation of the standard of review by the SCA in *Herholdt (SCA)* is questionable.⁵⁹

It is equally apparent that because of the significant development introduced by the CSAA and the absence of a definitive pronouncement on the effect of this development, the standard of review cannot be determined simply with reference to the LAC's decision in *Gold Fields* either. Additionally, Anton Myburgh has put forward cogent arguments that raise doubt as to the correctness of the formulation of the standard of review by the LAC in *Gold Fields*.⁶⁰ The LAC's deviation in *Gold Fields* from the SCA's judgment in *Herholdt (SCA)* indicates that the LAC may have the authority to revive the approach it adopted in *Herholdt (LAC)* should it wish to do so in the future.⁶¹ The *Herholdt (SCA)*, *Herholdt (LAC)* and *Gold Fields* judgments encapsulate the predominant approaches vis-à-vis the standard of review. It is apparent that research is necessary to determine which of these approaches represents an accurate statement of the law regarding the standard for reviewing CCMA arbitration awards.

1.2 LITERATURE REVIEW

There is no shortage of research aimed at assessing the courts' approaches to the interpretation of the *Sidumo* judgment, and in particular, to the import of that judgment as far as the standard of review is concerned.

The research has taken several different approaches. Some of this research examines some recent judgments of the LAC and the SCA that interpret *Sidumo* and pronounce on the

⁵⁶ B P S van Eck & M K Mathiba 'Constitution Seventeenth Amendment Act: Thoughts on the Jurisdictional Overlap, the Restoration of the Labour Appeal Court and the Demotion of the Supreme Court of Appeal' (2014) 35 *ILJ* 863, 870 – 871.

⁵⁷ *Gold Fields* is a judgment of the LAC delivered after the judgment of the SCA in *Herholdt (SCA)* (note 3 above) and following the commencement of the CSAA. The conflict between the two judgments is described in chapter two below.

⁵⁸ A Myburgh 'The test for review of CCMA arbitration awards: an update' (2013) 23 (4) *CLL* 31, 36; A Myburgh & C Bosch *Reviews in the Labour Court* (2016) 18.

⁵⁹ E Fergus 'Reviewing an Appeal: A Response to Judge Murphy and the SCA' (2014) 35 *ILJ* 47, 57 – 59.

⁶⁰ Myburgh (note 58 above) 39 – 40.

⁶¹ Myburgh & Bosch (note 58 above) 21 – 22, read with 14 – 21.

standard of review. The object of that research is generally to i) consider whether such judgments are consistent with *Sidumo* ii) illustrate the development of the standard of review and iii) to comment on the accuracy of the foundations of these judgments.⁶²

At times, the research has questioned the accuracy of the underlying rationale for and the benefit of preferring reviews, as opposed to appeals, of CCMA arbitration awards and suggestions have been made for the substitution of the right to review with a right of appeal.⁶³ In addition, the uncertainties emanating from the current formulations of the standard of review have resulted in a number of proposals being made for a consideration of the review models applied in other jurisdictions and the development of the LC's review jurisprudence accordingly.⁶⁴

Other research into the scope of the standard of review has been directed at evaluating significant judgments of both the labour courts and the SCA that have been delivered within a particular timeframe after *Sidumo* and which reflect developments in the review jurisprudence during that time period.⁶⁵

There seems to be only three studies that assess exclusively LAC judgments in an effort to ascertain how the LAC, in particular, has applied or interpreted the *Sidumo* standard of unreasonableness. Two of these studies consider LAC judgments, delivered after *Sidumo*, for the period 2007 to 2009.⁶⁶ Another study looks at judgments of the LAC delivered between 2010 and the first half of 2011.⁶⁷

Myburgh has recently examined the approaches contained in *Herholdt (LAC)*, *Herholdt (SCA)* and *Gold Fields* in respect of the standard of review, and points out their potential

⁶² See, for example, G Ray-Howett 'Is It Reasonable for CCMA Commissioners to Act Irrationally' (2008) 29 *ILJ* 1619, 1619; A Myburgh 'The LAC's Latest Trilogy of Review Judgments: Is the Sidumo Test in Decline?' (2013) 34 *ILJ* 19, 19; Myburgh (note 58 above) 31.

⁶³ Murphy (note 9 above) 11 – 12 and 16 – 18.

⁶⁴ See, for example, Fergus (note 59 above) 56 – 78; C Botma-Kleu & A Govindjee 'The Role of Reasonableness in the Review of CCMA Arbitration Awards in South Africa — An English Comparison' (2014) 35 *ILJ* 1777; E Fergus *From Sidumo to Dunsmuir: The Test for Review of CCMA Arbitration Awards* (published Phd thesis, University of Cape Town, 2013); C H Botma-Kleu *The Role of Reasonableness in the Review of CCMA Arbitration Awards in South Africa: An English Law Comparison* (published LLD thesis, Nelson Mandela Metropolitan University, 2013)

⁶⁵ See, for example, A Myburgh 'Sidumo v Rustplats: How Have the Courts Dealt with It?' (2009) 30 *ILJ* 1, 2; A Myburgh 'Determining and Reviewing Sanction after Sidumo' (2010) 31 *ILJ* 1; A Myburgh 'Reviewing the Review Test: Recent Judgments and Developments' (2011) 32 *ILJ* 1497, 1497.

⁶⁶ Garbers (note 41 above) 86 – 87; Myburgh (2009) (note 65 above) 1, 2 – 4.

⁶⁷ Myburgh (2011) (note 65 above) 1503 – 1508.

flaws.⁶⁸ This research is very insightful because it reveals the differences in the approaches adopted by the appellate courts in those judgments and exposes some of the pitfalls in their respective pronouncements on the standard of review. However, it does not set out to investigate which of those approaches is in line with the weight of LAC and SCA judgments. Nor does it set out to test the correctness of those approaches from a constitutional perspective in order to determine, particularly, whether they give adequate effect to the right to just administrative action or detract from it.

Steenkamp has also very recently considered the standard of review.⁶⁹ In this work, Steenkamp recounts the adoption of the reasonableness standard of review by the CC in *Sidumo*⁷⁰ and assesses the judgments of the lower courts that have sought to interpret that judgment.⁷¹ Steenkamp also looks at ‘the purpose that was envisaged in 1995 when the LRA was enacted.’⁷² He acknowledges that the standard of review has undergone considerable development since the CC’s judgment in *Sidumo*. In respect of the apparent conflict between the judgment of the LAC in *Gold Fields* and that of the SCA in *Herholdt (SCA)*, Steenkamp attempts to reconcile the judgments by considering the *Gold Fields* judgment as a ‘refinement’ of the standard of review enunciated in *Herholdt (SCA)*.⁷³

While some of the research mentioned above considers whether the approaches adopted by the appellate courts⁷⁴ are in line with or detract from the right to just administrative action, the research generally does so in passing or this is not the primary purpose of the research.⁷⁵

1.3 STATEMENT OF THE PROBLEM

As the discussion above illustrates, the courts’ divergent approaches to the standard of review have given rise to profound debate and controversy. In this regard, John Murphy aptly notes that ‘[t]he incessant quibble over the standard of review has not been edifying, continues to engender avoidable costly litigation and fosters ongoing unrewarding debate.’⁷⁶ The continuation of this state of affairs serves only to create uncertainty and delays in the

⁶⁸ Myburgh (note 58 above) 31.

⁶⁹ A Steenkamp ‘Dispute Resolution’ in Darcy Du Toit (ed) *Labour Relations Law: A Comprehensive Guide* (2015) 113.

⁷⁰ Steenkamp (note 69 above) 197.

⁷¹ Ibid.

⁷² Steenkamp (note 69 above) 198.

⁷³ Steenkamp (note 69 above) 197 – 198.

⁷⁴ The LAC and the SCA.

⁷⁵ See, for example, *Ray-Howett* (note 62 above); Garbers (note 41 above).

⁷⁶ Murphy (note 9 above) 18.

finalisation of labour disputes and thereby subverts one of the primary objects of the LRA – the effective resolution of labour disputes.⁷⁷

The significance of the uncertainty should not be underestimated. It has far-reaching implications as the standard of review affects the manner in which parties to review proceedings present their cases and the manner in which commissioners arrive at their decisions.⁷⁸ The standard of review may also either persuade or dissuade parties from instituting review proceedings.⁷⁹

The ultimate cost of this uncertainty is perhaps that it may operate so as to perpetuate injustice in the sense that it may result in parties to CCMA arbitration proceedings not being able to detect when arbitration awards have fallen short of the requirements of just administrative action as contemplated in section 33.

1.4 RATIONALE FOR THE STUDY

In order to promote the effective resolution of labour disputes in line with the LRA, it is of paramount importance that research be conducted into which of the courts' numerous approaches to the standard of review is supported by the weight of LAC and SCA judgments – particularly those LAC and SCA judgments handed down since *Sidumo* – and represents an accurate statement of the law.

The need for legal certainty and consistency also necessitates such research. Moreover, there is perhaps an even more urgent reason for conducting such research. That is the need for the formulation of the standard of review to be consistent with the fundamental right to just administrative action as envisaged in the 1996 Constitution. For as long as there is uncertainty relating to the exact parameters of the standard of review there continues to be the risk of a violation of the right of parties to CCMA arbitration proceedings to just administrative action.

1.5 RESEARCH MOTIVATION AND SIGNIFICANCE OF THE STUDY

⁷⁷ Section 1(d)(iv) of the LRA.

⁷⁸ E Fergus & A Rycroft 'Refining Review' in A Rycroft and R Le Roux (ed) *Reinventing Labour Law* (2012) 170, 170.

⁷⁹ *Ibid.*

To date, a study has not been conducted to determine which of the approaches favoured in *Herholdt (LAC)*, *Herholdt (SCA)* and *Gold Fields* (which represent the predominant approaches to the interpretation of *Sidumo*) is supported by the weight of LAC and SCA decisions delivered since *Sidumo*.

Neither has there been a study directed principally at critically assessing whether the SCA's approach in *Herholdt (SCA)*, which was until recently the highest court in labour matters,⁸⁰ is in line with the weight of LAC and SCA decisions handed down subsequent to *Sidumo* to date. There also has not been a study with the primary object of evaluating whether the SCA's approach in *Herholdt (SCA)* to the standard of review gives adequate effect to the fundamental right to just administrative action as envisaged in section 33.

The chief purpose of the research undertaken in the present study is to investigate those crucial questions.

The significance of the research is that it will provide an essential insight into which approach to the standard of review has been consistently endorsed by the appeal courts and represents an accurate statement of the law. It will also give critical insight regarding the regulation of the fundamental right to just administrative action within the labour law sphere. Ultimately, the hope is that the research will lead to greater consistency in the application of a single approach to the standard of review and to the regulation of the right to just administrative action in a manner that conforms with the ethos of the 1996 Constitution.

1.6 STATEMENT OF PURPOSE

Broadly, the ultimate goal of this research is therefore to establish whether the SCA's formulation of the standard of review in *Herholdt (SCA)* is consistent with the weight of LAC and SCA judgments, and to evaluate the extent to which this standard of review gives effect to or detracts from the constitutional guarantee of just administrative action. More specifically, this study will analysis:

- i. the constitutional framework for determining the standard of review;
- ii. the legislative intent behind the adoption of arbitration as a mechanism for labour dispute resolution under the LRA, as well as the object of the legislature in conferring

⁸⁰ See in this regard the earlier discussion on the CSAA.

parties to CCMA arbitration proceedings a right of review against CCMA arbitration awards;

- iii. which of the approaches to the reasonableness standard as articulated in *Herholdt (SCA)* and *Herholdt (LAC)* is consistent with the weight of LAC and SCA judgments;
- iv. which of the approaches to the relationship between the reasonableness standard and the section 145 grounds of review as enunciated in *Herholdt (SCA)* and *Gold Fields* is in line with the weight of LAC and SCA judgements; and
- v. finally, the extent to which the formulation of the standard of review in *Herholdt (SCA)* gives effect to or detracts from the constitutional promise of just administrative action.

1.7 OVERVIEW OF CHAPTERS

In chapter two of this thesis, the constitutional and legislative frameworks that inform the standard of review are delineated. This is achieved through an analysis of pertinent provisions of the 1996 Constitution and the LRA, scholarly writings and influential judicial decisions. It concludes with some remarks on the relationship between the constitutional aspirations and the legislative vision as far as the standard of review is concerned.

Chapter three of this thesis critically assesses the approaches formulated in *Herholdt (LAC)*, *Herholdt (SCA)* and *Gold Fields* in respect of the reasonableness standard. Chapter three further critically analyses the approaches to the relationship between the reasonableness standard and the section 145 grounds of review encompassed in *Herholdt (SCA)* and *Gold Fields*. The aim of both of these exercises is to establish which of the approaches in *Herholdt (LAC)*, *Herholdt (SCA)* and *Gold Fields* is supported by the weight of LAC and SCA judgments regarding the standard of review. In order to determine this issue regard is had to LAC and SCA judgments delivered subsequent to *Sidumo* to date.

Chapter four of this thesis then determines whether the pronouncement of the standard of review in *Herholdt (SCA)* conforms with the prescripts of the 1996 Constitution, particularly the right to just administrative action. It identifies the potential flaws as well as the praiseworthy aspects of the *Herholdt (SCA)* judgment. These findings are informed by pertinent constitution provisions, scholarly writings, and binding CC judgments.

Chapter five reiterates some of the principal findings made in the previous chapters and suggests a way forward for the labour courts in relation to the future regulation of the right to just administrative action within the labour sphere.

CHAPTER 2

THE CONSTITUTIONAL AND LEGISLATIVE FRAMEWORK FOR REVIEWS IN THE LABOUR COURTS

2.1 INTRODUCTION

The primary focus of this chapter is to investigate the constitutional and legislative frameworks that inform the standard for reviewing CCMA arbitration awards. The chapter is divided into three segments.

The first segment sets out the constitutional framework, having regard to the relevant constitutional rights and values that come into play during the conduct of CCMA arbitration proceedings and that are at stake in review proceedings instituted against CCMA arbitration awards.

The second segment seeks to determine the legislative intent behind the adoption of the CCMA's arbitration process as one of the primary mechanisms for the resolution of unfair dismissal disputes as well as the object of the legislature in conferring parties to CCMA arbitration proceedings a right of review against CCMA arbitration awards.

The third segment concludes the chapter by suggesting an approach that ought to be adopted in reconciling the aspirations of the 1996 Constitution and the legislature's vision regarding the resolution of labour disputes in so far as the standard of review is concerned.

2.2 THE CONSTITUTIONAL FRAMEWORK

The 1996 Constitution ought to be the starting point in any attempt to ascertain the parameters of the standard of review. The injunction to do so flows directly from section 2 thereof which proclaims that the 1996 Constitution is the supreme law of the Republic, that law that is inconsistent with it is invalid and that the obligations imposed by it must be fulfilled.⁸¹ In addition, section 39(2) of the 1996 Constitution enjoins every court to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation.⁸²

⁸¹ See, further, *Carephone* (note 10 above) 8.

⁸² *Ibid.*

In the employment sphere, the legislation referred to in sections 2 and 39(2) of the 1996 Constitution is the LRA, which regulates the judicial review of CCMA arbitration awards. The supremacy of the 1996 Constitution is recognised in the LRA through, amongst others, the interpretative injunction in section 3(b) of the LRA which provides that any person applying the provisions of the LRA must interpret such in compliance with the 1996 Constitution.

In its seminal judgment in *Sidumo*, the CC pronounced, *inter alia*, that commissioners acting under the auspices of the CCMA exercise a public power and that when they conduct arbitration proceedings they are in fact performing administrative functions.⁸³ Thus, their awards constitute administrative action within the meaning of section 33, which entrenches the right to lawful, reasonable, and procedurally fair administrative action (the right to just administrative action).⁸⁴ Section 33(3) enjoins the legislature to enact national legislation for the purposes of, *inter alia*, giving effect to that right; providing for the review of administrative action by a court of law and promoting an efficient administration. According to Professor Ian Currie, the latter purpose does not constitute a special limitation of the right to just administrative action.⁸⁵

Although the LRA predated the 1996 Constitution, in *Sidumo* the CC found that '[s]ection 145 of the LRA constitutes national legislation in respect of 'administrative action' within the specialized labour law sphere.'⁸⁶ In addition, the CC held that section 145 must therefore be interpreted in a manner that is compliant with section 33.⁸⁷

Section 33 is one of the fundamental provisions that give substance and effect to the constitutional values of accountability, responsiveness and openness entrenched in section 1(d) of the 1996 Constitution.⁸⁸

Furthermore, the finding in *Sidumo* that commissioners of the CCMA exercise a public power denotes that the CCMA is an organ of state.⁸⁹ The CCMA, being an organ of state, attracts

⁸³ *Sidumo* (note 20 above) 88 and 94.

⁸⁴ *Sidumo* (note 20 above) 88 and 94. See, further, section 33(1) of the 1996 Constitution.

⁸⁵ I Currie *The Promotion of Administrative Justice Act: A Commentary* 2 ed (2007) 40.

⁸⁶ *Sidumo* (note 20 above) 89.

⁸⁷ *Sidumo* (note 20 above) 89 and 105.

⁸⁸ *Sidumo* (note 20 above) 138; *Carephone* (note 10 above) 35.

⁸⁹ *Sidumo* (note 20 above) 88, 139, and 200.

the application of the provisions of section 195 of the 1996 Constitution⁹⁰ to its commissioners when they conduct arbitration proceedings under the LRA. That section delineates the basic values and principles governing public administration. In the context of the judicial review of CCMA arbitration awards section 195 requires that compulsory arbitration service of the CCMA be provided impartially, fairly, equitably and without bias.⁹¹ It further requires mechanisms to be in place to hold the CCMA accountable for the manner in which it conducts arbitration proceedings⁹² and that, in order to promote transparency, arbitration awards to be accessible, given timeously and accurately to the parties to these proceedings.⁹³ Lastly, the arbitration process is required to be efficient and effective.⁹⁴

There are two further fundamental rights, namely those contemplated in sections 23 and 34 of the 1996 Constitution, that come into play when one considers the constitutional impact on the LC's supervisory functions in respect of CCMA arbitration awards. In *Sidumo*, the CC held that in this context the right to fair labour practices, which protects the rights of workers to security of employment,⁹⁵ is consonant with the right to just administrative action.⁹⁶ Regarding the right to a fair public hearing before an independent and impartial court or tribunal in section 34, the CC held that this means that parties are entitled to enforce their section 23 and 33 rights before the CCMA acting as an impartial tribunal.⁹⁷ As such, the CC concluded that in this context those rights "in part overlap and are interconnected."⁹⁸

2.3 THE LEGISLATIVE INTENT BEHIND THE ADOPTION OF THE CCMA ARBITRATION PROCESS AND THE PROVISION OF A RIGHT OF REVIEW AGAINST CCMA ARBITRATION AWARDS

The legislative intent behind the adoption of the CCMA's arbitration process as a principal labour dispute resolution mechanism may be ascertained through an analysis of the provisions of the LRA that regulate arbitration proceedings by the CCMA.⁹⁹

⁹⁰ Hereinafter 'section 195'.

⁹¹ Section 195(1)(d); *Carephone* (note 10 above) 14 and 20.

⁹² Section 195(1)(f). This is done through section 145.

⁹³ Section 195(1)(g).

⁹⁴ Section 195(1)(b).

⁹⁵ *Sidumo* (note 20 above) 55.

⁹⁶ *Sidumo* (note 20 above) 112.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ See, for instance, Botma-Kleu & Govindjee (note 64 above) 1777.

One of the primary goals of the LRA is to promote ‘the effective resolution of labour disputes.’¹⁰⁰ In the context of the conduct of arbitration proceedings by CCMA commissioners, the more substantive provisions aimed at achieving this goal are located in sections 138 and 143 of the LRA.¹⁰¹

In terms of section 138, a commissioner must conduct the arbitration proceedings in a manner that he or she considers appropriate in order to determine the dispute between the parties ‘fairly and quickly’.¹⁰² Commissioners are also enjoined by section 138 to deal ‘with the substantial merits of the dispute with the minimum of legal formalities.’¹⁰³ In *Commercial Workers Union of SA v Tao Ying Metal Industries & others*¹⁰⁴ (*Tao Ying*), the CC held that that injunction requires a commissioner to deal with the substance of the dispute between the parties by cutting through all the claims and counter-claims in an endeavour to arrive at the real dispute between them.¹⁰⁵ Therefore, the CC held that commissioners must be permitted a significant measure of leeway in the performance of their arbitral functions.¹⁰⁶ The CC in *Tao Ying* then held that it is for that reason that the LRA confers upon a commissioner the discretion to conduct the arbitration proceedings in a manner that he or she deems appropriate.¹⁰⁷ However, the CC was of the view that, in determining the appropriate manner to conduct the arbitration proceedings, the commissioner ought to be guided by at least three considerations.¹⁰⁸ Namely, the CC held that the commissioner must endeavour to determine the real dispute between the parties; he or she must do that in an expeditious manner; and the commissioner must act fairly towards all the parties.¹⁰⁹

After the commissioner has concluded the arbitration proceedings, he is then required, within 14 days thereof, to issue an award ‘with brief reasons’.¹¹⁰ Section 143(1) then contemplates that the arbitration award will be ‘final and binding’.

¹⁰⁰ Section 1(d)(iv) of the LRA.

¹⁰¹ Hereinafter ‘section 138’ and ‘section 143’, respectively.

¹⁰² Section 138(1).

¹⁰³ *Ibid.*

¹⁰⁴ 2009 (2) SA 204 (CC); (2008) 29 *ILJ* 2461 (CC).

¹⁰⁵ *Tao Ying* (note 104 above) 65.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ Section 138(7)(a).

Commenting on sections 138 and 143, Paul Benjamin concludes that ‘[t]he CCMA’s powers and procedures emphasize the desirability of the expeditious resolution of disputes in a non-technical and non-legalistic manner.’¹¹¹

The Explanatory Memorandum¹¹² to the LRA provides instructive insights into the legislative intent.¹¹³ It states that:

‘[b]y providing for the determination of dismissal disputes by final and binding arbitration, the [LRA] adopts a *simple, quick, cheap and non-legalistic* approach to the adjudication of unfair dismissal.’¹¹⁴

Further that:

‘[i]n order for this alternative process to be credible and legitimate and to achieve the purposes of the legislation, it must be *cheap, accessible, quick and informal*. These are the characteristics of arbitration....’¹¹⁵

In *Toa Ying*, the CC noted what is recorded above in the Explanatory Memorandum and held that by adopting the arbitration process the legislature intended ‘to bring about the expeditious resolution of labour disputes’.¹¹⁶ This expedited approach correlates with the delineation in section 138 of the manner in which commissioners are required to conduct arbitration proceedings¹¹⁷ and with the legislative pronouncement in section 143 that arbitration awards are to be final and binding. Landman observes that in *Sidumo*, as in *Tao Ying*, the CC endorsed the legislature’s expedited approach and recognised that, having regard to that, CCMA arbitration awards are not expected to be impeccable.¹¹⁸

Regarding the legislative intent as far as the LC’s supervisory function over CCMA arbitration awards is concerned, it is significant that the legislature elected not to provide for a right of appeal against CCMA arbitration awards,¹¹⁹ but preferred instead to subject such to review.¹²⁰ The Explanatory Memorandum reveals the rationale for the decision to restrict

¹¹¹ P Benjamin ‘Friend or Foe? The Impact of Judicial Decisions on the Operation of the CCMA’ (2007) 28 *ILJ* 1, 3–4.

¹¹² (1995) 16 *ILJ* 278.

¹¹³ P Jammy ‘Interpreting the New Act: Getting Down to Business with the Labour Appeal Court’ (1997) 18 *ILJ* 906, 912.

¹¹⁴ Explanatory Memorandum (note 112 above) 318. Emphasis added.

¹¹⁵ Explanatory Memorandum (note 112 above) 318. Emphasis added.

¹¹⁶ *Tao Ying* (note 104 above) 63 read with footnote 33.

¹¹⁷ Benjamin (note 111 above) 8.

¹¹⁸ A Landman ‘A Study in Deference: Labour Court Deference to CCMA Arbitration Awards’ (2008) 29 *ILJ* 1613, 1618.

¹¹⁹ *Sidumo* (note 20 above) 139 and 186; *Tao Ying* (note 104 above) 64.

¹²⁰ Section 145(1) and (2).

scrutiny of CCMA arbitration awards to reviews. It states that '[t]he absence of an appeal from the arbitrator's award speeds up the process and frees it from the legalism that accompanies appeal proceedings.'¹²¹

The CC in *Tao Ying* considered section 145 as giving effect to the expedited approach the legislature adopted through sections 138 and 143.¹²² The CC first took account of section 138 and held that the arbitration process was intended to speed up the resolution of labour disputes.¹²³ Thereafter, the CC in *Tao Ying* held that:

'...Parliament intended that, as far as it is possible, arbitral awards should be final [section 143] and should only be interfered with in very limited circumstances. In order to give effect to these objectives, parliament deliberately decided against appeals from arbitral awards and opted for the narrowest species of review, namely, that specified in s 145 of the LRA.'¹²⁴

In the light of the Explanatory Memorandum and that section 145 provides for the 'narrowest species of review', it is apparent that the overarching reason behind the legislature's decision to opt for a right of review against CCMA arbitration awards is a desire to facilitate the speedy resolution of labour disputes.¹²⁵

2.4 CONCLUSION

Scrutiny of CCMA arbitration awards is ensured primarily through section 145, which the CC in *Sidumo* held must be read consistently with the administrative justice provisions in section 33(1).

Significantly, there is no special limitation of the right to lawful, reasonable and procedurally fair administrative action in section 33.

The purpose of requiring the CCMA to act lawfully, reasonably and procedurally fairly during arbitration proceedings is to give effect to the constitutional values of accountability, openness and responsiveness. By virtue of being an organ of state, the CCMA also attracts the application of section 195, which emphasises accountability, transparency, impartiality, fairness and equitability in the CCMA's arbitration process.

¹²¹ Explanatory Memorandum (note 112 above) 318.

¹²² *Toa Ying* (note 104 above) 62-64

¹²³ *Toa Ying* (note 104 above) 62-63.

¹²⁴ *Tao Ying* (note 104 above) 64. (Footnote omitted). (Emphasis added). See also, *Sidumo* (note 20 above) at para 245.

¹²⁵ E Fergus 'The Distinction Between Appeals and Reviews - Defining the Limits of the Labour Court's Powers of Review' (2010) 31 *ILJ* 1556, 1570 – 1571.

Furthermore, parties to CCMA arbitration proceedings have the rights to fair labour practices and a fair trial.

What emerges from the above is that the 1996 Constitution demands that the standard of review must give effect to the rights to just administrative action, a fair trial and fair labour practices, and that the constitutional values and the values governing public administration applicable to the CCMA must be upheld through the review process.

On the other hand, sections 138 and 143 reveal that the legislature sought to ensure the expeditious resolution of unfair dismissal disputes through statutory arbitration. The legislature sought further to facilitate this expedited approach via section 145, which provides for very circumscribed grounds of review.

However, the provisions of section 33, which are the substantive constitutional provisions governing reviews, do not appear to sanction the less exacting standard a literal interpretation of section 145 would suggest. Manifestly, there is a tension between the legislative goal of expediting the resolution of labour disputes and the aspiration of the 1996 Constitution of ensuring just administrative action and accountability by commissioners of the CCMA.

Jammy provides very useful insights into the approach that ought to be adopted when seeking to reconcile constitutional and statutory interpretation. He states that:

‘Purposive interpretation in the sense used in the judgments of the Constitutional Court referred to earlier involves an exercise in analysing the *aim or object* of a particular provision of the Constitution. The injunction in the Labour Relations Act that the Act should be interpreted ‘in compliance with the Constitution’ is not a directive that the Act should be interpreted purposively. Rather, it should be taken to mean that having applied a purposive interpretation to the Constitution, the Act should then be interpreted (where possible) in accordance with accepted methods of statutory interpretation, in such a way so as to conform with the constitutional purpose so distilled. *Seen in this light, it will always be the purpose of the Constitution that is determinative, not the purpose of the Act, or any particular provision thereof.*’¹²⁶

The approach that Jammy proposes seems to be in line with the supremacy clause of the 1996 Constitution, which indicates that, in the event that there is a tension between the 1996 Constitution and any piece of legislation, it ought to be the purpose of the former that is determinative. This should apply equally to formulations of the standard of review, and the purpose of the 1996 Constitution ought to prevail over the intention of the legislature.

¹²⁶ P Jammy (note 113 above) 910. (Footnotes omitted). (Emphasis added).

Should the courts be inclined to constrict the standard of review by limiting section 33 in favour of the legislative goal of expediting labour dispute resolution, the proper method of doing that would be to conduct the analysis envisaged in section 36 of the 1996 Constitution, in view of ascertaining whether such a limitation is reasonable and justifiable.

CHAPTER 3

THE WEIGHT OF AUTHORITY ON THE STANDARD OF REVIEW

3.1 INTRODUCTION

The CC's formulation of the reasonableness standard, to the effect that a CCMA arbitration award will be reviewable if it is one that a reasonable commissioner could not reach,¹²⁷ has been criticised as being 'not particularly helpful' on the basis that it does not disclose the content and meaning of reasonableness.¹²⁸ The basis of this criticism is that the CC in *Sidumo* formulated a standard of reasonableness that involves 'circular logic' as it appears to render the reasonableness of an arbitration award dependent on the reasonableness of the arbitrator.¹²⁹

The CC in *Sidumo* also held that the reasonableness standard should suffuse section 145.¹³⁰ In this regard, the CC neglected to explain what this meant in practical terms regarding the reviewability of CCMA arbitration awards.

In light of this lack of clarity, the courts have suggested a number of approaches to these issues.

The present chapter is divided into three major segments. The primary purpose of the first segment is to establish which of the approaches to the reasonableness standard, formulated in *Herholdt (LAC)* and *Herholdt (SCA)*, is consistent with the weight of LAC and SCA judgments.

The approaches endorsed in *Herholdt (SCA)* and *Herholdt (LAC)*, respectively, are described. For the purpose of completeness, a third approach, which has been adopted on numerous occasions by the labour courts, will be briefly discussed. Then the segment examines and records the judgments of the LAC and the SCA that have tacitly or expressly endorsed either the LAC's approach in *Herholdt (LAC)* or the SCA's approach in *Herholdt (SCA)*, respectively.

¹²⁷ *Sidumo* (note 20 above) 110.

¹²⁸ *Southern Sun* (note 40 above) 13.

¹²⁹ *Ibid.*

¹³⁰ *Sidumo* (note 20 above) 106 and 110.

The second segment is aimed at establishing which of the approaches to the relationship between the reasonableness standard and the grounds of review in section 145 propounded in *Herholdt (SCA)* and *Gold Fields* is consistent with the weight of LAC and SCA judgments. This is achieved by firstly describing the respective approaches. Thereafter, an examination of LAC and SCA judgments will be conducted and the findings on the issue under consideration will be recorded.

Both segments will ultimately shed light on whether the approach adopted by the SCA in *Herholdt (SCA)* to the standard of review is in line with the weight of LAC and SCA judgments.

For the purpose of achieving the objectives outlined above, 124 judgments of the LAC and the SCA delivered subsequent to *Sidumo* were examined.

The third segment concludes the chapter by providing a synopsis of the core findings made throughout the chapter.

3.2 ESTABLISHING WHETHER THE *HERHOLDT (SCA)* APPROACH TO THE REASONABLENESS STANDARD IS IN LINE WITH THE WEIGHT OF LAC AND SCA JUDGMENTS

There are two competing approaches in respect of the reasonableness standard propounded in *Sidumo*. The *Herholdt* matter best captures these two approaches. In *Herholdt (LAC)*, the LAC adopts the ‘broad-based unreasonableness approach’, whereas the SCA in *Herholdt (SCA)* adopts the ‘purely substantive unreasonableness approach’. These approaches are discussed in more detail below.

3.2.1 THE PURELY SUBSTANTIVE UNREASONABLENESS APPROACH

In *Herholdt (SCA)*, the SCA observed that in *Rustenburg (SCA)* it had held that CCMA arbitration awards were reviewable on the ground of unreasonableness.¹³¹ This meant, according to the SCA in *Herholdt (SCA)*, that a reviewing court would:

‘...[examine] the ‘substantive merits’ of the award, not to decide whether the decision was correct, but to determine whether the award was *rationally related to the reasons given by the arbitrator*. Once it was found that the award was appreciably or significantly infected with

¹³¹ *Herholdt (SCA)* (note 3 above) 11.

bad reasons it fell to be set aside irrespective of whether it could otherwise be sustained on the material in the record.’¹³²

The first aspect of note in this dictum is that the nature of the standard of reasonableness that the SCA had adopted in *Rustenburg (SCA)* is similar to that which the LAC had enunciated in *Carephone*. Murphy describes the *Carephone* rationality standard as being ‘dialectical in the sense that it targets the rational reasoning process of the arbitrator and investigates whether there is rational justification in the link drawn between evidence and verdict (decision).’¹³³ Thus, the SCA in *Rustenburg (SCA)* had adopted a standard of dialectical unreasonableness as a ground for reviewing CCMA arbitration awards. However, the SCA in *Herholdt (SCA)* was of the view that the effect of endorsing this ground post *Sidumo* would be to resuscitate its decision in *Rustenburg (SCA)*, which had been overruled by the CC in *Sidumo*.¹³⁴ On that basis, the SCA held that the LAC’s endorsement of dialectical unreasonableness in *Herholdt (LAC)* constituted an impermissible development of the law.¹³⁵

According to the SCA in *Herholdt (SCA)*, the reasonableness standard enunciated in *Sidumo*:

‘...involves the reviewing court examining the merits of the case ‘in the round’ by determining whether, in the light of the issue raised by the dispute under arbitration, the outcome reached by the arbitrator was not one that could reasonably be reached on the evidence and other material properly before the arbitrator. On this approach the reasoning of the arbitrator assumes less importance than it does on the SCA test, where a flaw in the reasons results in the award being set aside. The reasons are still considered in order to see how the arbitrator reached the result. That assists the court to determine whether that result can reasonably be reached by that route. If not, however, the court must still consider whether, apart from those reasons, the result is one a reasonable decision-maker could reach in the light of the issues and the evidence.’¹³⁶

The SCA further held that:

‘Material errors of fact, as well as the weight and relevance to be 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.’¹³⁷

Fergus expresses grave doubts about the legitimacy of the SCA’s formulation of the reasonableness standard. According to Fergus, the net effect of the SCA’s approach is to ‘declare reasonable outcomes resolute of procedural errors or poor reasoning’.¹³⁸ This

¹³² *Herholdt (SCA)* (note 3 above) 11. (Footnote omitted). (Emphasis added).

¹³³ Murphy (note 9 above) 8.

¹³⁴ *Herholdt (SCA)* (note 3 above) 24.

¹³⁵ *Ibid.*

¹³⁶ *Herholdt (SCA)* (note 3 above) 12. (Footnote omitted).

¹³⁷ *Herholdt (SCA)* (note 3 above) 25.

¹³⁸ Fergus (note 59 above) 58.

means that a commissioner's failure to provide adequate reasons or to consider materially relevant factors will not render his award reviewable.¹³⁹ Hence, the SCA's approach to reasonableness has been referred to as the 'purely substantive unreasonableness approach'.

3.2.2 THE BROAD-BASED UNREASONABLENESS APPROACH

The LAC in *Herholdt (LAC)*, on the other hand, adopted the view that although the CC in *Sidumo* endorsed a standard of reasonableness that is substantive in nature,¹⁴⁰ the reasonableness standard is to be applied not only to the outcome of a CCMA arbitration award but also to the process adopted by the commissioner in arriving at that outcome.¹⁴¹ This is because section 145(2) (ii) – the gross irregularity ground of review – permits scrutiny of a commissioner's process-related conduct.¹⁴² Thus, according to the LAC, a commissioner's award must be both dialectically and substantively reasonable otherwise it will be reviewable.¹⁴³ Hence, this approach is referred to as 'the broad-based unreasonableness approach'.

The LAC in *Herholdt (LAC)* explained that substantive reasonableness requires 'the ultimate decision [to be] assessed with regard to the sufficiency and cogency of the evidence to determine if it is reasonably supportable.'¹⁴⁴ In view of this, the LAC held that other reasons that the commissioner failed to identify but which are capable of rendering his decision reasonable or unreasonable may be taken into account.¹⁴⁵ However, the LAC in *Herholdt (LAC)* went on to find that a commissioner's award may be set aside on the ground of dialectical unreasonableness, irrespective of whether the outcome of the award is substantively reasonable.¹⁴⁶

Furthermore, the broad-based unreasonableness approach holds that the enunciation of the reasonableness standard of review in *Sidumo* was not intended to dispose of rationality, but rather the effect thereof was to subsume rationality into the broader conception of reasonableness.¹⁴⁷ It was illustrated above that the *Carephone* rationality standard is dialectic

¹³⁹ Ibid.

¹⁴⁰ *Herholdt (LAC)* (note 40 above) 35.

¹⁴¹ *Herholdt (LAC)* (note 40 above) 33 read with 41.

¹⁴² *Herholdt (LAC)* (note 40 above) 33 – 41.

¹⁴³ *Herholdt (LAC)* (note 40 above) 33 – 36, read with 41.

¹⁴⁴ *Herholdt (LAC)* (note 40 above) 35.

¹⁴⁵ Ibid.

¹⁴⁶ *Herholdt (LAC)* (note 40 above) 36, read with 39, 40 and 41.

¹⁴⁷ Murphy (note 9 above) 13 – 14.

in nature. Rationality (or dialectical reasonableness) review encompasses challenges to a decision on the grounds that the decision-maker, failed to apply his mind to relevant facts, ignored relevant considerations, or took irrelevant facts into account.¹⁴⁸ In *Herholdt* (LAC), the LAC held that, in order to set aside a commissioner's award on the basis that the commissioner failed to apply his mind to certain facts, it is necessary to establish that such facts were material facts.¹⁴⁹ Similarly, the LAC held that a commissioner's award will be reviewable if the latter fails to apply his mind to issues that are material to the determination of the dispute between the parties.¹⁵⁰

3.2.3 THE SUBSTANTIVE UNREASONABLENESS APPROACH

In terms of the substantive unreasonableness approach, when a court reviews a CCMA arbitration award, the enquiry is directed at the outcome of the arbitrator's award – as opposed to the process he adopted – and the test is whether the outcome he has reached could not reasonably be arrived at on the basis of all the material that was before him.¹⁵¹ This approach recognises that a commissioner's award may be upheld on review for reasons that exist based on the material before him but upon which he did not rely to support his decision.¹⁵²

The substantive unreasonableness approach occupies the middle ground between the purely substantive unreasonableness approach and the broad-based unreasonableness approach. It is evident from the discussions on the purely substantive unreasonableness and the broad-based unreasonableness approaches that both these approaches contain features of the substantive unreasonableness approach. This is because the proponents of both approaches are generally congruent that the CC in *Sidumo* endorsed the substantive unreasonableness approach.¹⁵³

The disagreement between them is on the import of the CC's endorsements of this approach, that is, whether it constitutes a rejection of dialectical unreasonableness as a ground of review and therefore a sanctioning of the purely substantive unreasonableness approach. The divergence emerges because the substantive unreasonableness approach does not provide any clear insights into the role of the reasoning of a commissioner, including material errors of

¹⁴⁸ Murphy (note 9 above) 14.

¹⁴⁹ *Herholdt* (LAC) (note 40 above) 38-39.

¹⁵⁰ *Ibid.*

¹⁵¹ *Herholdt* (LAC) (note 40 above) 35 and *Herholdt* (SCA) (note 3 above) 12.

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

law and fact on the commissioner's part, in respect of the reviewability of his award on the ground of unreasonableness. This lack of clarity on such critical issues is indicative of the inadequacy of this approach.

3.2.4 EXPRESS OR TACIT SUPPORT FOR BROAD-BASED UNREASONABLENESS APPROACH

It is necessary to highlight at the outset that the broad-based unreasonableness approach is essentially a recognition of two facts. It recognises, firstly, that a commissioner's award may be reviewed and set aside on the reasonableness standard enunciated in *Sidumo*; and, secondly, that a latent gross irregularity¹⁵⁴ in the conduct of the arbitration proceedings is, in itself, sufficient to vitiate a commissioner's award.

3.2.4.1 The emergence of the broad-broad based unreasonableness approach

In *Maepe v Commission for Conciliation, Mediation & Arbitration & another*¹⁵⁵ (*Maepe*), the LAC tacitly endorsed the broad-based unreasonableness approach. In endorsing the view that a CCMA arbitration awards is reviewable on the basis of a latent gross irregularity, the LAC (per Zondo JP) held that:

'[w]hile it is reasonable to expect a commissioner to leave out of his reasons for the award matters or factors that are of marginal significance or relevance to the issues at hand, his or her omission in his or her reasons of a matter of great significance or relevance to one or more of such issues can give rise to an inference that he or she did not take such matter or factor into account.'¹⁵⁶

Zondo JP further held that:

'[in] my view the commissioner's failure to take into account the appellant's conduct in giving false evidence under oath in the arbitration when he considered the issue of relief constituted a [latent] *gross irregularity which justified the setting aside of the order of reinstatement which the commissioner had made.*'¹⁵⁷

¹⁵⁴ John Grogan states that latent irregularities may be classified into three categories, namely errors of fact, errors of law and errors of logic (J Grogan *Labour Litigation and Dispute Resolution 2* (ed) (2014) 382 – 385). However, the courts' decisions endorsing the broad-based unreasonableness approach have focused on errors regarding facts and logic, and not so much on errors of law.

¹⁵⁵ (2008) 29 *ILJ* 2189 (LAC).

¹⁵⁶ *Maepe* (note 155 above) 8.

¹⁵⁷ *Maepe* (note 155 above) 22. (Emphasis added).

The LAC in *Maepe* went on to find that a commissioner's award could also be reviewed on the unreasonableness standard established in *Sidumo*.¹⁵⁸

Again, in *Ellerine Holding* the LAC tacitly sanctioned the broad-based unreasonableness approach. Specifically, the LAC found that reasonableness is an 'outcomes based inquiry' and endorsed the reviewability of CCMA arbitration awards on this grounds.¹⁵⁹ In line with the broad-based unreasonableness approach, the LAC endorsed the view that an arbitration award is also reviewable where a commissioner commits a latent gross irregularity.¹⁶⁰ The latter is evident from the LAC's endorsement of Ngcobo J's explication in *Sidumo* of the (latent) gross irregularity ground of review, wherein he held that:

'[w]here a commissioner fails to have regard to material facts, the arbitration proceedings cannot in principle be said to be fair because the commissioner fails to perform his or her mandate. In so doing ... the commissioner's action prevents the aggrieved party from having its case fully and fairly determined. This constitutes a gross irregularity in the conduct of the arbitration proceedings as contemplated in s 145(2)(a) (ii) of the LRA. And the ensuing award falls to be set aside not because the result is wrong but because the commissioner has committed a gross irregularity in the conduct of the arbitration proceedings.'¹⁶¹

In *Bestel v Astral Operations Ltd and Others*¹⁶²(*Bestel*) the LAC interpreted the reasonableness standard as requiring a reviewing court to determine 'whether the evidence is such that the reasonable person acting reasonably could have reached the decision from the evidence and inferences'.¹⁶³ This is an endorsement of the substantive unreasonableness approach. Although judgments that provide support only for the substantive unreasonableness approach are not discussed in this section, the LAC's judgment in *Bestel* is important because the LAC later builds on the jurisprudence established in this case in developing the broad-based unreasonableness.¹⁶⁴

3.2.4.2 The LAC expressly adopts the broad-based unreasonableness approach

The LAC expressly endorsed the broad-based unreasonableness approach in *Gaga*. In expounding this approach, the LAC in *Gaga* held that where a commissioner fails to apply

¹⁵⁸ *Maepe* (note 155 above) 39 – 40.

¹⁵⁹ *Ellerine Holding* (note 9 above) 2906.

¹⁶⁰ *Ellerine Holding* (note 9 above) 2905.

¹⁶¹ *Ellerine Holding* (note 9 above) 2905. (Footnote omitted). For convenience, further reference to this dictum by Ngcobo J will be 'Ngcobo J's gross irregularity dictum'.

¹⁶² (JA 37/08) [2010] ZALAC 19; [2011] 2 *BLLR* 129 (LAC) (16 September 2010)

¹⁶³ *Bestel* (note 162 above) 16 read with 18. Quotation marks omitted.

¹⁶⁴ See discussion below under the heading 'The LAC confirms previous developments to be in line with broad-based unreasonableness approach'.

his mind to material facts (flaw in process) his decision will invariably be tainted by dialectic unreasonableness.¹⁶⁵ The LAC then observed that, typically, dialectical unreasonableness results in a lack of rational connection between the commissioner's decision and the material before him and in most instances causes the outcome to be unreasonable (substantive unreasonableness or *Sidumo* unreasonableness standard).¹⁶⁶ However, the LAC went on to find that, '[t]he flaw in process alone will usually be sufficient to set aside the award on the grounds of it being a latent gross irregularity, permitting a review in terms of section 145(1) read with section 145(2)(a)(ii) of the LRA.'¹⁶⁷

3.2.4.3 The LAC Elaborates on the Dialectical Unreasonableness Approach

The LAC elaborated on the dialectical unreasonableness approach in the following matters.

In *SA Municipal Workers Union v SA Local Government Bargaining Council & others*¹⁶⁸ (*SAMWU*), the issue was whether 'the commissioner acted fairly, considered and applied his mind to the issues before him.'¹⁶⁹ As opposed to whether, for instance, the outcome of his award was substantively reasonable. In the light of this, the LAC held that in such a case the reasonableness standard requires a reviewing court to focus on the manner in which the commissioner approached the material before him and the analytical process he adopted in making his award.¹⁷⁰

According to the LAC in *SAMWU*, that is the correct approach and this is self-evident from *Sidumo* wherein the CC held that a commissioner is required to act fairly in determining the fairness of a dismissal dispute and that his failure to do so constitutes a gross irregularity vitiating his award.¹⁷¹ Moreover, the LAC pointed out that according to *Sidumo* a commissioner must act in accordance with his duties under the LRA and if he fails to do so, he would have exceeded his powers, thereby rendering his award reviewable.¹⁷² Finally, the

¹⁶⁵ *Gaga* (note 40 above) 44.

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*

¹⁶⁸ (2012) 33 *ILJ* 353 (LAC).

¹⁶⁹ *SAMWU* (note 168 above) 10.

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

¹⁷² *Ibid.*

LAC highlighted that the CC in *Sidumo* held that CCMA arbitrations proceedings will not be fair if the commissioner presiding over the proceedings fails to have regard to material.¹⁷³

The LAC in *SAMWU* noted further that the CC had given additional guidance to the labour courts regarding the application of the reasonableness standard.¹⁷⁴ In this regard, the LAC observed that the CC in *Tao Ying* had held that where a commissioner fails to apply his mind to the issues before him, this may result in his award being set aside for want of lawfulness and/or reasonableness.¹⁷⁵

The LAC again elaborated on the dialectical unreasonableness approach. Having found that the commissioner had failed to consider material evidence, the LAC in *Afrox* concluded that the commissioner's award was one that a reasonable decision maker could not reach on the basis that it was irrational.¹⁷⁶ In elucidation of this approach to reasonableness, the LAC held that:

‘[t]he correct approach in matters such as this where the focus of the attack on the award is not process related but directed at the merits, especially in considering whether the mischief set out in Section 145 (2) has been shown, is to consider whether the commissioner brought his mind to bear on the material before him before making his award.’¹⁷⁷

The LAC added that this is the same approach it propounded in *Carephone* (the rationality standard).¹⁷⁸ Thus, the LAC in this case adopted a dialectic approach to reasonableness.

3.2.4.4 The LAC confirms previous developments to be in line with broad-based unreasonableness approach

In *Public Servants Association on behalf of PSA Members v National Prosecuting Authority & another*¹⁷⁹ (*PSA*), the LAC confirms two things it had stated in the past regarding the reasonableness standard. Firstly, it confirmed that in *Bestel* it had held that the reasonableness of an arbitration award is determined with regard to the material that was before the arbitrator (the substantive unreasonableness approach).¹⁸⁰ Secondly, it confirmed that ‘[this substantive unreasonableness] approach as well as an enquiry into the process employed by the arbitrator

¹⁷³ *Ibid.*

¹⁷⁴ *SAMWU* (note 168 above) 11.

¹⁷⁵ *Ibid.*

¹⁷⁶ *Afrox* (note 40 above) 16 – 17.

¹⁷⁷ *Afrox* (note 40 above) 20.

¹⁷⁸ *Afrox* (note 40 above) 20-21.

¹⁷⁹ (2012) 33 *ILJ* 1831 (LAC).

¹⁸⁰ *PSA* (note 179 above) 27.

in making an award have been sanctioned by this Court as acceptable and to be in line with the *Sidumo* test.¹⁸¹ The LAC in *PSA* acknowledged that the LAC had sanctioned the scrutiny of an arbitrator's decision-making process when applying the reasonableness standard (dialectical reasonableness approach) in *SAMWU* and *Afrox* above.¹⁸²

3.2.5 EXPRESS OR TACIT SUPPORT FOR PURELY SUBSTANTIVE UNREASONABLENESS APPROACH

The LAC in *Independent Municipal & Allied Trade Union on behalf of Strydom v Witzenberg Municipality & others*¹⁸³ (*IMATU*) tacitly endorsed the purely substantive unreasonableness approach. This is apparent from the fact that, although the LAC referred to Ngcobo J's gross irregularity dictum¹⁸⁴ and held that the commissioner's conduct, in failing to consider material evidence,¹⁸⁵ flew in the face of the 'well-established principle' enunciated by Ngcobo J, the LAC did not set the commissioner's award aside on that basis.¹⁸⁶ It instead went on to set the award aside on the reasonableness standard established in *Sidumo*, thereby treating the reasonableness standard as an additional standard (for example, over and above a gross irregularity) that an applicant must satisfy on review.¹⁸⁷

A slightly different, amplified version of the purely substantive unreasonableness approach articulated in *Herholdt (SCA)* was enunciated in *Gold Fields*. In *Gold Fields*, the LAC expressly endorsed the purely substantive unreasonableness approach, holding that a failure by a commissioner to consider a material fact or issue does not vitiate the commissioner's award.¹⁸⁸ The LAC held that a reviewing court is required to consider the totality of the evidence that was before the commissioner with the view of establishing whether the commissioner's decision is one that a reasonable decision maker could have made.¹⁸⁹ Whereas the SCA in *Herholdt (SCA)* held that where a commissioner has 'undertaken the wrong enquiry or undertaken the enquiry in the wrong manner', this would constitute a latent gross irregularity sufficient to vitiate his award,¹⁹⁰ the LAC in *Gold Fields* was of the view

¹⁸¹ *PSA* (note 179 above) 27.

¹⁸² *PSA* (note 179 above) footnote 11.

¹⁸³ (2012) 33 *ILJ* 1081 (LAC).

¹⁸⁴ See footnote 161 above.

¹⁸⁵ *IMATU* (note 183 above) 20 – 21.

¹⁸⁶ *IMATU* (note 183 above) 22.

¹⁸⁷ *IMATU* (note 183 above) 25.

¹⁸⁸ *Gold Fields* (note 40 above) 15.

¹⁸⁹ *Gold Fields* (note 40 above) at para 18.

¹⁹⁰ *Herholdt (SCA)* (note 3 above) 21 and 25.

that something more is required.¹⁹¹ According to the LAC in *Gold Fields*, for an applicant to succeed on a review based on the gross irregularity ground of review, the applicant must establish that the commissioner committed a gross irregularity and, in addition, that his decision is one that a reasonable commissioner could not reach on all the evidence.¹⁹² The LAC was even more specific though in rejecting the SCA's approach, stating that: 'where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator *misconceived the nature of the proceedings*, but extends to whether the result was unreasonable'.¹⁹³

The SCA's enunciation of the purely substantive unreasonableness approach appears to recognise that there are limits in terms of which substantive reasonableness may not cure process-related flaws; the approach adopted by the LAC in *Gold Fields* does not acknowledge such limits.

The purely substantive unreasonableness approach adopted in *Gold Fields* has been endorsed in only two LAC cases thus far: *Palace Engineering (Pty) Ltd v Ngcobo & others*¹⁹⁴(*Palace Engineering*) and *Ethekwini Municipality v Hadebe and Others*¹⁹⁵ (*Hadebe*). In contrast, the SCA's enunciation of the purely substantive unreasonableness approach in *Herholdt (SCA)* has been followed in at least fourteen LAC judgments.¹⁹⁶

¹⁹¹ *Gold Fields* (note 40 above) 14.

¹⁹² *Gold Fields* (note 40 above) 14 and 15.

¹⁹³ *Gold Fields* (note 40 above) at para 14. Emphasis added.

¹⁹⁴ (2014) 35 ILJ 1971 (LAC) 16.

¹⁹⁵ (DA17/14) [2016] ZALAC 14 (10 May 2016) 23 – 24.

¹⁹⁶ *Blue Financial Services Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2014) 35 ILJ 2368 (LAC)(*Blue Financial Service*) 25; *Potgieter v Tubatse Ferrochrome & others* (2014) 35 ILJ 2419 (LAC) (*Potgieter*)12; *National Union of Mineworkers & another v Commission for Conciliation, Mediation & Arbitration & others* (2015) 36 ILJ 2038 (LAC) (*NUM1*)16; *Western Cape Education Department v General Public Service Sectoral Bargaining Council & others* (2014) 35 ILJ 3360 (LAC) (*WCED*) 15; *Makade v Public Health And Social Development Sectoral Bargaining Council and Others* (PA2/2012) [2014] ZALAC 43 (19 August 2014) (*Makade*) 16; *Draken Industries CC v Maande and Others* (JA69/2013) [2014] ZALAC 42 (19 August 2014) (*Maande*) 9; *Shatterprufe (Pty) Ltd v Sesani NO and Others* (PA4/13) [2014] ZALAC 44 (10 September 2014) (*Sesani*) 29; *Head of Department of Education v Mofokeng & Others* (2015) 36 ILJ 2802 (LAC)(*Mafokeng*) 31; *National Union of Mineworkers and Another v Rustenburg Platinum Mine (Mogalakwena Section) and Others* (JA43/2013) [2014] ZALAC 62; [2015] 1 BLLR 77 (LAC) (23 October 2014) (*NUM2*) 26 and 52; *Palluci Home Depot (Pty) Ltd v Herskowitz & others* (2015) 36 ILJ 1511 (LAC)(*Herskowitz*)16; *Transnet Rail Engineering v Mienies & Others* (2015) 36 ILJ 2605 (LAC)(*Mienies*) 11 and 18; *Grey v Education Labour Relations Council and Others* (CA12/2014) [2015] ZALAC 50; [2015] 1 BLLR 50 (LAC); (2015) 36 ILJ 2802 (LAC) (23 October 2015) (*Grey*) 12; *Rustenburg Platinum Mines Limited (Amandelbult Section) v NUM obo Monageng and Others* (JA12/2015) [2016] ZALAC 21 (26 May 2016) (*NUM obo Monageng*) 11; *Satani v Department of Education, Western Cape And Others* (CA10/15) [2016] ZALAC 24 (13 June 2016) (*Satani*) 20 and 36 – 38.

The LAC has subsequently endorsed the purely substantive unreasonableness approach in a number of cases, citing the enunciation of this approach in either *Herholdt (SCA)* or *Gold Fields*. The aforesaid cases include: *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer & others*¹⁹⁷(*Anglo Platinum*); *Absa Bank LTD v Naidu & Others*¹⁹⁸ (*Naidu*); *General Motors (Pty) Ltd v National Union of Metalworkers of SA on behalf of Ruiters*¹⁹⁹(*General Motors*); *National Health Laboratory Service v Yona & Others*²⁰⁰(*Yona*); *City of Cape Town v Freddie and Others (Freddie)*; ²⁰¹ *First Garment Rental (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*²⁰² (*First garment rental*). However, these cases are silent on the discrepancy in the approaches in *Herholdt (SCA)* and *Gold Fields*. Therefore, it is only possible to state that they provide support for the purely substantive unreasonableness approach but not which version of it.

3.3 ESTABLISHING WHETHER THE *HERHOLDT (SCA)* APPROACH TO THE RELATIONSHIP BETWEEN THE REASONABLENESS STANDARD AND THE SECTION 145 GROUNDS OF REVIEW IS IN LINE WITH THE WEIGHT OF LAC AND SCA JUDGMENTS

As noted in chapter one, the CC in *Sidumo* did not indicate how the constitutional standard of reasonableness is to ‘suffuse’ section 145.²⁰³ Put another way, the CC did not authoritatively state whether this meant that reasonableness is established as a self-standing ground of review²⁰⁴ or whether it is imported into either the ground of ‘excess of powers’²⁰⁵ or all three grounds of review under section 145 – namely ‘misconduct’,²⁰⁶ ‘gross irregularity’²⁰⁷ and “‘excess of powers’”.²⁰⁸

The SCA’s decision in *Herholdt (SCA)* and the LAC’s decision in *Gold Fields* contain the predominant approaches to this issue. The SCA in *Herholdt (SCA)* was of the view that, pursuant to *Sidumo*, a CCMA arbitration award may be reviewed and set aside on the ground

¹⁹⁷ (2015) 36 ILJ 1453 (LAC) 11 – 12.

¹⁹⁸ (2015) 36 ILJ 602 (LAC).

¹⁹⁹ (2015) 36 ILJ 1493 (LAC) 31.

²⁰⁰ (2015) 36 ILJ 2259 (LAC) 27.

²⁰¹ (CA13 /14) [2016] ZALAC 8; [2016] 6 BLLR 568 (LAC) (15 March 2016) 49.

²⁰² (JA01/14) [2015] ZALAC 38; [2015] 11 BLLR 1094 (LAC) (9 September 2015) 13.

²⁰³ *Southern Sun* (note 40 above) 13.

²⁰⁴ *Herholdt (SCA)* (note 3 above) 14.

²⁰⁵ Section 145(2) (a) (iii). As was the case under the justifiability standard established in *Carephone* – see chapter one above.

²⁰⁶ Section 145(2) (a) (i).

²⁰⁷ Section 145(2) (a) (ii).

²⁰⁸ *Murphy* (note 9 above) 12; *Gold Fields* (note 40 above) 14.

of unreasonableness and, in addition, on any one of the grounds of review contemplated in section 145(2) (a) and (b).²⁰⁹ In relation to the ‘suffusion’ of the reasonableness standard into section 145, the SCA essentially found that the CC in *Sidumo* intended that the former would augment the latter.²¹⁰ To illustrate this point, the SCA held that subsequent to *Sidumo* a gross irregularity in the conduct of arbitration proceedings (section 145(2)(a)(ii)) is no longer limited to a situation where a commissioner misconceives the nature of the enquiry (error of law²¹¹), but is also established when a commissioner arrives at an unreasonable result.²¹²

In contrast, the LAC in *Gold Fields* decreed that the suffusion of the reasonableness standard into section 145:

‘...implies that an application for review sought on the grounds of misconduct, gross irregularity in the conduct of the arbitration proceedings, and/or excess of powers will not lead automatically to a setting aside of the award if any of the above grounds are found to be present.’²¹³

In further explication of this approach, the LAC in *Gold Fields* held that:

‘[w]hat 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 from or standing independent of the *Sidumo* test.’²¹⁴

Therefore, it is apparent that the LAC in this case viewed reasonableness as being an additional test that an applicant must satisfy before succeeding on a review brought in terms of section 145.²¹⁵

There is thus a conflict between the LAC’s judgment in *Gold Fields* and the judgment of the SCA in *Herholdt (SCA)*. As noted in chapter one, the CSAA means that the two judgments may be on equal footing in terms of precedent. As was done above in the first segment, an investigation into which of these approaches is in line with the weight of LAC and SCA judgments is undertaken below.

²⁰⁹ *Herholdt (SCA)* (note 3 above) 14.

²¹⁰ *Herholdt (SCA)* (note 3 above) 14; Myburgh (note 58 above) 37.

²¹¹ See, for example, the discussion in *Democratic Nursing Organisation of SA on behalf of Du Toit & another v Western Cape Department of Health & others* (2016) 37 ILJ 1819 (LAC)(DENOSA) 15 -22.

²¹² *Herholdt (SCA)* (note 3 above) 14 and 25.

²¹³ *Gold Fields* (note 40 above) 14. (Footnotes omitted).

²¹⁴ *Gold Fields* (note 40 above) 15.

²¹⁵ Myburgh (note 58 above) 37; Myburgh & Bosch (note 58 above) 18.

3.3.1 TACIT OR EXPRESS SUPPORT FOR THE APPROACH OF THE SCA IN *HERHOLDT (SCA)*

In *Fidelity Cash Management Service v Commission for Conciliation, Mediation & Arbitration & others*²¹⁶ (*Fidelity*), the LAC emphatically stated that the reasonableness standard enunciated in *Sidumo* does not mean that CCMA arbitration awards cease to be reviewable on the basis that the CCMA lacked jurisdiction in a particular matter ‘or [on] any of the other grounds specified in s 145’.²¹⁷

It was noted earlier that there are judgments of the LAC that endorse the broad-based unreasonableness approach in that the LAC in these judgments takes the view that a review of a CCMA arbitration award may be brought on the basis of either the (latent) gross irregularity ground of review or the reasonableness standard enunciated in *Sidumo*. These judgments therefore provide support for the view that the section 145 grounds of review exist alongside the reasonableness standard of review.²¹⁸ Hence, they may be carried over as support for the SCA’s approach in *Herholdt (SCA)* in relation to the issue under discussion. Altogether, there are at least five LAC judgments of this nature, namely: *Maepe*; *Ellerine Holding*; *Gaga*; *PSA* and *Herholdt (LAC)*.²¹⁹

The cases identified earlier under the heading ‘express or tacit support for purely substantive unreasonableness approach’ which support the purely substantive unreasonableness approach delineated in *Herholdt (SCA)* may also be carried over as support for the approach of the SCA in *Herholdt (SCA)* in relation to the issue under discussion.²²⁰

Even prior to *Herholdt (SCA)*, the SCA in *National Union of Mineworkers & another v Samancor Ltd (Tubatse Ferrochrome) & others*²²¹ (*Samancor*) had found that reviews may be brought on the section 145 grounds of review or on the reasonableness standard. Specifically,

²¹⁶ (2008) 29 ILJ 964 (LAC).

²¹⁷ *Fidelity Cash Management Service* (note 216 above) 101.

²¹⁸ The difference between these judgments and the SCA’s judgment in *Herholdt (SCA)* (note 3 above) is that the former generally take the view that a material error of fact amounts to a latent gross irregularity, whereas the SCA in *Herholdt (SCA)* (note 3 above) disagrees with this conclusion, holding that a latent gross irregularity is confined to instances where the commissioner misconceives the nature of the enquiry or reaches an unreasonable result.

²¹⁹ Excluding *Bestel* (note 162 above), *SAMWU* (note 168 above) and *Afrox* (note 40 above), which do not explicitly endorse the view that a CCMA arbitration award may be reviewed on both the unreasonableness standard and the section 145 grounds of review. They have to be read in connection with other LAC judgments to establish that they provide support for this view.

²²⁰ There are fourteen judgments of this nature. See, further, footnote 196 above.

²²¹ (2011) 32 ILJ 1618 (SCA).

the SCA in *Samancor* held that section 145 permits the LC to review and set aside a CCMA arbitration award if it is defective in the manner envisaged in that section.²²² The SCA further observed that *Sidumo* had recognised that an award may ‘also be set aside if it is one that a reasonable decision maker could not reach.’²²³

The LAC in *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi & others*²²⁴ (*Mmoledi*) noted, with approval, that the courts in *Fidelity*, *Maepa* and *Samancor* had endorsed the view that CCMA arbitration awards may be reviewed on the section 145 grounds of review and/ or on the unreasonableness standard sanctioned in *Sidumo*.²²⁵

Interestingly, however, the LAC has recently, in two cases, reconsidered whether an error of law (or a misconception of the nature of the enquiry, as expressed in *Herholdt(SCA)*), in itself, may result in the review and setting aside of a commissioner’s arbitration award. It decided that it was unnecessary on the facts of those two cases to make a definitive pronouncement.²²⁶

3.3.2 TACIT OR EXPRESS SUPPORT FOR THE APPROACH OF THE LAC IN *GOLD FIELDS*

It appears that the approach enunciated in *Gold Fields* has been followed in only two other judgments of the LAC, namely *Palace Engineering* and *Hadebe*. In the former matter, the court quoted verbatim the dictum in *Gold Fields* without mentioning the SCA’s approach in *Herholdt (SCA)*.²²⁷ In the latter matter, the LAC acknowledged the approach taken by the SCA in *Herholdt (SCA)*, but proceeded to note, with apparent approval, that the LAC in *Gold Fields* held that a gross irregularity will not, in itself, lead to the setting aside of a commissioner’s award unless the result of the award is also found to be unreasonable.²²⁸ This is contrary to what the SCA held in *Herholdt (SCA)* and is startling since the SCA has traditionally been the higher court in labour matters prior to the CSAA. This may indicate

²²² *Samancor* (note 221 above) 5.

²²³ *Samancor* (note 221 above) 5. Quotation marks omitted. Footnote omitted.

²²⁴ (2012) 33 *ILJ* 2812 (LAC).

²²⁵ *Mmoledi* (note 224 above) 20 – 21.

²²⁶ *DENOSA* (note 211 above) at para 15 – 22; *McDonald's Transport Upington (Pty) Ltd v Association of Mineworkers and Construction Union (AMCU) and Others* (JA10/2016) [2016] ZALAC 32 (28 June 2016) 22 – 30.

²²⁷ *Palace Engineering* (note 194 above) 16.

²²⁸ *Hadebe* (note 195 above) 23 and 24.

that judges of the LAC now perceive judgments of the LAC and the SCA to be on equal footing in terms of legal authority in the employment realm.²²⁹

3.4 CONCLUSION

Therefore, regarding the first issue that this chapter set out to determine, namely ‘whether the *Herholdt (SCA)* approach to the reasonableness standard is in line with the weight of LAC and SCA judgments’, the research establishes that the SCA’s approach to reasonableness is, indeed, consistent with the weight of LAC and SCA judgments. This is illustrated by the findings made in this chapter which indicate that there are seven LAC judgments that have sanctioned the broad-based unreasonableness approach,²³⁰ compared to the twenty-four judgments of the LAC that have endorsed the purely substantive unreasonableness approach.²³¹ It can be deduced, therefore, that the weight of LAC judgments are behind the purely substantive unreasonableness approach.

The reasonableness standard, as enunciated in the SCA’s judgment in *Herholdt (SCA)*, which is supported by the weight of LAC judgments, may be summarised as follows.

In assessing a CCMA arbitration award for reasonableness:

- a reviewing court must determine whether the outcome of the award is one that could reasonably be reached in light of the issues in dispute and all the evidential material that was before the commissioner;
- it is not sufficient for an applicant on review to prove only that the reasons the commissioner supplied in support of his award are deficient or defective;
- the applicant must establish that both the reasons of the commissioner and the result of his award are unreasonable in order to succeed on his review application;
- material errors of fact, including the weight and relevance that may be attached to certain facts, do not constitute a sufficient basis to vitiate a CCMA arbitration award unless their effect is to cause the outcome of the award to be unreasonable; and

²²⁹ See, for instance, Myburgh & Bosch (note 58 above) 21.

²³⁰ These are: *Maepo; Ellerine Holding; Bestel; Gaga; SAMWU; Afrox; and PSA.*

²³¹ These cases are: *IMATU; Gold Fields; Pallace Engineering; Hadebe; Blue Financial Service; Potgieter; NUMI; WCED; Maande; Makade; Sesani; Mafokeng; NUM2; Hershowitz; Mienies; Grey; NUM obo Monageng; Satani; Anglo Platinum; Naidu; General Motors; Yona; Freddie and First Garment Rental.*

- the reviewing court may, however, set aside the commissioner’s award if it finds that it is ‘entirely disconnected with the evidence’ or is ‘unsupported by any evidence’.

The second segment of this chapter set out to determine ‘whether the *Herholdt (SCA)* approach to the relationship between the reasonableness standard and the section 145 grounds of review is in line with the weight of LAC and SCA judgments’. In this regard, the research establishes that the approach sanctioned by the LAC in *Gold Fields* differs significantly from the SCA’s approach in *Herholdt (SCA)*. In addition, the research establishes that the SCA’s approach to the issue under discussion has been adopted in at least twenty-two LAC and SCA judgments,²³² whereas the LAC’s approach in *Gold Fields* has been followed in only two other LAC judgments.²³³ The SCA’s approach in *Herholdt (SCA)* to the nature of the relationship between reasonableness and the section 145 grounds of review thus appears to be in line with the weight of LAC and SCA judgments.²³⁴

The position of the law in this regard may therefore be summarised as follows.

- A CCMA arbitration award is reviewable on the unreasonableness standard propounded by the CC in *Sidumo* and on the grounds of review contemplated in section 145 (2)(a) and (b).
- The grounds of review in section 145 are suffused by the reasonableness standard. With regard to section 145(2)(ii), this means that a commissioner will be found to have committed a gross irregularity in the conduct of the arbitration proceedings if he undertakes the wrong enquiry or undertakes the enquiry in the wrong way (latent irregularity) or if the result of his award is one that a reasonable decision-maker could not reach.
- The result of a commissioner’s award will be unreasonable if it is not reasonably supported by the evidence that was before the commissioner, having regard to the issue the commissioner was called upon to decide.

²³² These cases are: *Fidelity Cash Management Service*; *Maepo*; *Ellerine Holdings*; *Gaga*; *PSA*; *Herholdt (LAC)*; *Blue Financial Service*; *Potgieter*; *NUM1*; *WCED*; *Makade*; *Maande*; *Sesani*; *Mafokeng*; *NUM2*; *Hershowitz*; *Mienies*; *Grey*; *NUM obo Monageng*; *Satani*; *Samancor and Mmoledi*.

²³³ These are: *Palace Engineering* and *Hadebe*.

²³⁴ Note the sentiments expressed by Myburgh & Bosch that “[a]n analysis of the judgments of the LAC handed down after *Herholdt (SCA)* and *Gold Fields* reflects that the LAC has not made any real distinction between the two judgments and follows them both.” (Myburgh & Bosch (note 58 above) 21). This observation is correct, but it the research in this these establishes that the approach of the SCA in *Herholdt (SCA)* has, by and large, enjoyed wider support.

CHAPTER 4

TESTING COMPLIANCE WITH THE FUNDAMENTAL RIGHT TO JUST ADMINISTRATIVE ACTION

4.1 INTRODUCTION

In chapter 3 an analysis of relevant case law revealed that the SCA's interpretation, in *Herholdt (SCA)*, of the *Sidumo* judgment, insofar as the criteria for reviewing CCMA arbitration proceedings is concerned, is consistent with the weight of LAC and SCA judgments. The present chapter is directed at determining the extent to which the SCA's interpretation in *Herholdt (SCA)* of the *Sidumo* judgment gives effect to, or detracts from, the fundamental right to just administrative action in section 33.

The more specific aims of this chapter are to determine: (i) the elements of the right to reasonable administrative action in section 33(1), (ii) whether the CC in *Sidumo* discarded the rationality component of reasonableness in the context of judicial review of CCMA arbitration awards, (iii) whether the SCA's conception of the reasonableness standard in *Herholdt (SCA)* gives adequate protection to, or diminishes, the right of parties to CCMA arbitration proceedings to reasonable administrative action and, finally, (iv) whether the SCA's delineation in *Herholdt (SCA)* of the association between the grounds of review contained in section 145 and the reasonableness standard²³⁵ of review is congruent with the prescripts of section 33(1).

4.2 THE ELEMENTS OF THE RIGHT TO REASONABLE ADMINISTRATIVE ACTION

It is trite that section 33(1) makes provision for the right to administrative action that is reasonable, lawful and procedurally fair. The focus of this section is, however, on the right to administrative action that is reasonable.

²³⁵ This term is used loosely here, and is not intended to convey that reasonableness is a threshold which, when met, triggers a review on one of the grounds listed in section 145. This issue will be discussed in more detail further below.

Reasonableness is effectively an administrative law concept and therefore it would be prudent for the labour courts to take cognisance of the manner in which administrative lawyers have dealt with it.²³⁶ The following exposition is undertaken in that vein. Its purpose is to describe the elements of the right to reasonable administrative action in section 33(1).

Following a comprehensive analysis of the common-law context preceding and informing the right to reasonable administrative action in section 33(1),²³⁷ Professor Cora Hoexter concludes that it is now ‘uncontroversial’ that the first element encompassed in the right to reasonable administrative action is ‘rationality’.²³⁸

As to the meaning of rationality, Professor Hoexter provides that this requires a decision of an administrator to be supported not only by the evidence and information before the administrator but also by the reasons he provides in justification thereof.²³⁹ She further states that, in addition, rationality demands that the administrator’s decision must be ‘objectively capable of furthering the purpose for which the power was given and for which the decision was purportedly taken.’²⁴⁰ She also notes the delineation of the rationality standard by the LAC in *Carephone*.²⁴¹

Professor Hoexter concludes that section 6(2)(f)(ii) of the PAJA ‘gives ample scope to the element of rationality...’.²⁴² Section 6(2)(f)(ii) of the PAJA provides for the review of administration action on the grounds that:

‘it is not rationally connected to-
(aa) the purpose for which it was taken; (bb) the purpose of the empowering provision;
(cc) the information before the administrator; or (dd) the reasons given for it by the administrator...’.

Moreover, rationality is, according to Professor Hoexter, merely one element of the right to reasonable administrative action envisaged in section 33(1).²⁴³ She identifies proportionality

²³⁶ Garbers (note 41 above) 85.

²³⁷ C Hoexter *Administrative Law in South Africa* 2 ed (2012) 328 – 339; C Hoexter ‘Unreasonableness in the Administrative Justice Act’ in C Lange and J Wessels (eds) *The Right to Know* (2004) 148,148 – 151; C Hoexter ‘The Standards of Review of Administrative Action’ in J Klaaren (ed) *A Delicate Balance* (2006) 16, 62-63.

²³⁸ Hoexter (2012) (note 237 above) 340. See also, Hoexter (2004) (note 237 above) 154; Hoexter (2006) (note 237 above) 63; C Hoexter ‘The Future of Judicial Review in South African Administrative Law’ (2000) 484, 510-511. See, further, Currie (note 85 above) 170 – 171.

²³⁹ Hoexter (2012) (note 237 above) 340.

²⁴⁰ Hoexter (2012) (note 237 above) 340.

²⁴¹ Hoexter (2012) (note 237 above) 340-341.

²⁴² Hoexter (2012) (note 237 above) 341. See also, Hoexter (2004) (note 237 above) 158.

²⁴³ Hoexter (2012) (note 237 above) 343.

as being the second component thereof, but concedes that the status of this component remains contested.²⁴⁴ Nevertheless, she states that the purpose of proportionality is to avoid a situation where there is no equilibrium between the negative and positive effects of an administrative decision, while concomitantly encouraging administrators to consider the necessity for the action as against the possibility of employing less drastic measures to achieve the desired end.²⁴⁵

Thereafter, she considers whether the proportionality component of reasonableness is provided for in the PAJA, and concludes that it is unfortunate that the drafters of the PAJA elected instead to enact section 6(2) (h), in her view, deals with unreasonable effects and not specifically with proportionality. ²⁴⁶ Section 6(2) (h) of PAJA was considered by the CC in *Bato Star*, and Professor Hoexter highlights that in that matter the CC (per O'Regan J) found that section 6(2) (h) should be interpreted as enabling the review and setting aside of an administrative decision if it is 'one that a reasonable decision-maker could not reach.'²⁴⁷

In *Bato Star*, O' Regan J enumerated the factors relevant to the reasonableness enquiry as follows:

'the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected.'²⁴⁸

Professor Hoexter correctly maintains that this list of factors is to be welcomed because it provides a frame of reference for reasonableness.²⁴⁹ She further observes that these factors validate the inherent variability of reasonableness and provide ample scope for the elements of proportionality²⁵⁰ and rationality.²⁵¹

4.3 ASCERTAINING WHETHER THE CC IN *SIDUMO* DISCARDED RATIONALITY AS A GROUND FOR REVIEWING CCMA ARBITRATION AWARDS

²⁴⁴ Hoexter (2012) (note 237 above) 343-344. See also, Hoexter (2004) (note 237 above) 154-155.

²⁴⁵ Hoexter (2012) (note 237 above) 344.

²⁴⁶ Hoexter (2012) (note 237 above) 345.

²⁴⁷ Hoexter (2012) (note 237 above) 348 – 349.

²⁴⁸ *Bato Star* (note 38 above) 45.

²⁴⁹ Hoexter (2012) (note 237 above) 349.

²⁵⁰ Hoexter (2012) (note 237 above) 349 – 350.

²⁵¹ Hoexter (2006) (note 237 above) 67.

As highlighted in chapter 3, the CC in *Sidumo* did not demarcate the precise content and meaning of the reasonableness standard it adopted, namely ‘[i]s the decision reached by the commissioner one that a reasonable decision maker could not reach?’²⁵²

It is submitted that when the CC in *Sidumo* made this pronouncement it did not purport to discard rationality as a ground of judicial review of CCMA arbitration awards, but rather its intention was to subsume it within the broader concept of reasonableness. However, in *Herholdt (SCA)*, the SCA seemed to disagree with this proposition. The SCA in *Herholdt (SCA)* held that the CC in *Sidumo* overruled its decision in *Rustenburg (SCA)* in relation to its finding that CCMA arbitration awards could be reviewed and set aside on the basis of the rationality standard of review (the *Rustenburg* approach).²⁵³

With respect, it is submitted that that finding by the SCA in *Herholdt (SCA)* is not as clear-cut as the SCA has indicated. In this regard, Ray-Howett correctly notes that ‘nowhere in the majority judgment in *Sidumo*, does the CC reject [the *Rustenburg*] approach.’²⁵⁴

Ray-Howett’s view is supported by a number of academics and judges. For instance, Judge Murphy has expressed the opinion that the pronouncement of reasonableness in *Sidumo* was not intended to discard rationality as a review ground.²⁵⁵ In *Thebe Ya Bophelo Healthcare Administrators (Pty) Ltd and Others v National Bargaining Council for the Road Freight Industry and Another*²⁵⁶ (*Thebe Ya Bophelo*), Judge Willis remarked that the CC in *Sidumo* had been silent on the applicability of the rationality standard of review, adding that its silence appears to have been deliberate and significant.²⁵⁷ According to him, ‘the Constitutional Court may have taken the decision to suffuse rationality into reasonableness.’²⁵⁸

Willis then expresses the concern that it would be ‘rather chilling’ if the only basis upon which the substantive aspect of an administrative decision could be challenged is merely that the decision is one that a reasonable decision-maker could not reach.²⁵⁹ This concern appears to be predicated on a perception that reasonableness is a purely result-based standard. Put

²⁵² *Sidumo* (note 20 above) 110.

²⁵³ *Herholdt (SCA)* (note 3 above) 12 and 24.

²⁵⁴ Ray-Howett (note 62 above) 1629.

²⁵⁵ Murphy (note 9 above) 14.

²⁵⁶ 2009 (3) SA 187 (W).

²⁵⁷ *Thebe Ya Bophelo* (note 256 above) 23.

²⁵⁸ *Thebe Ya Bophelo* (note 256 above) 23. Quotation marks omitted.

²⁵⁹ *Thebe Ya Bophelo* (note 256 above) 23.

differently, the basis of the concern stems from a conception of the subsumption of rationality into reasonableness as implying that an irrational decision²⁶⁰ would not necessarily equate to a decision which a reasonable decision-maker could not reach.²⁶¹

In the labour law realm, there are a number of academics who hold the view of Willis that the intention in *Sidumo* was most probably to subsume rationality into the broader concept of reasonableness.²⁶² However, different from Willis, Murphy correctly maintains that the reasonableness standard enunciated in *Sidumo* would justify the setting aside of a decision that is not rational in relation to the reasons given for it.²⁶³ Thus, Murphy would disagree with Willis's view that the subsumption of rationality into reasonableness would be 'rather chilling'. Murphy's assertion is predicated on an appreciation of the degrees of intensity or intrusiveness involved in the rationality and reasonableness standards of review. Chaskalson CJ considered the difference between these two standards in *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)*²⁶⁴ (*New Clicks*). He held that reasonableness in section 33(1) 'is a variable but higher standard, which in many cases will call for a more intensive scrutiny of administrative decisions than would have been competent under the [rationality standard of review in terms of the] interim Constitution.'²⁶⁵

Finally, Professor Hoexter also maintains that it is not surprising that the CC in *Sidumo* was silent on the question of rationality because it was not concerned with the specific grounds of review in the PAJA (or with the reviewability of CCMA arbitration awards on the ground of irrationality, for that matter) but had been broadly considering the constitutional standard of reasonableness.²⁶⁶

4.4 DETERMINING WHETHER THE SCA'S CONCEPTION OF REASONABLENESS IN *HERHOLDT (SCA)* GIVES ADEQUATE EFFECT TO THE RIGHT TO REASONABLE ADMINISTRATIVE ACTION

²⁶⁰ For instance, in the sense that the decision-maker's reasons do not provide a sufficient basis to support his decision.

²⁶¹ *Thebe Ya Bophelo* (note 256 above) 23 and 24.

²⁶² Murphy (note 9 above) 14; Fergus (note 58 above) footnote 78; Ray-Howett (note 62 above) 1628.

²⁶³ Murphy (note 9 above) 14.

²⁶⁴ 2006 (2) SA 311 (CC)

²⁶⁵ *New Clicks* (note 264 above) 108.

²⁶⁶ Hoexter (2012) (note 237 above) 343.

In *Sidumo*, the CC held that '[n]othing in s 33 of the Constitution precludes specialized legislative regulation of administrative action such as s 145 of the LRA alongside general legislation such as PAJA. *Of course, any legislation giving effect to s 33 must comply with its prescripts.*'²⁶⁷

The discussion above reveals that in the context of general administrative law it is 'uncontroversial' that reasonableness in section 33(1) incorporates rationality, but that it remains contested whether it encompasses proportionality as well. The analysis undertaken here is primarily concerned with the applicability of the rationality element of reasonableness to the judicial review of CCMA arbitration awards.²⁶⁸

It is apparent that the SCA in *Herholdt (SCA)* treated reasonableness as a variable standard.²⁶⁹ This is evident from the fact that the SCA referred to the rationality standard adopted in *Carephone*, and interpreted in *Rustenburg (SCA)*, as one of 'reasonableness', and later found that the CC in *Sidumo* 'enunciated an unreasonableness test that differed from the test adopted by this court [in *Rustenburg*].'²⁷⁰ This indicates that the courts may 'vary' the intensity of reasonableness. This aspect of the SCA's conception of reasonableness is in line with the dictum of Chaskalson CJ in *New Clicks*, noted earlier, that reasonableness is a variable standard. It is questionable, though, whether the SCA's conception of reasonableness accords proper, if any, weight to the part of Chaskalson CJ's dictum that emphasises that reasonableness 'will call for more intensive scrutiny of administrative decisions' than rationality. For the SCA effectively discards the rationality facet of reasonableness, arguably rendering reasonableness a less intensive standard of review than rationality.²⁷¹

It is submitted that 'more intensive scrutiny' implies that review for reasonableness would permit the examination and setting aside of an administrative decision, not only on the basis of irrationality but also on another basis (or bases), for instance, (dis) proportionality, which is recognised by Professor Hoxter as the second component of reasonableness. In this regard, the proposition advanced by Murphy, that reasonableness ought to vitiate a decision that is

²⁶⁷ *Sidumo* (note 20 above) 91. Emphasis added.

²⁶⁸ The proportionality facet of reasonableness has not been the subject of intensive debate within the context of employment law, and will not be considered here. See, however, the brief discussion of proportionality in *Myburgh & Bosch* (note 58 above) 32 – 33.

²⁶⁹ As to the meaning of variability, see discussion further below.

²⁷⁰ *Herholdt (SCA)* (note 3 above) 11 – 12.

²⁷¹ It is arguably easier to set aside an administrative decision on the basis of rationality than it is on the SCA's conception of reasonableness (see *Herholdt (SCA)* (note 3 above) 11).

not rationally related to the reasons given for it by an arbitrator, is to be preferred as it would give better expression to the notion that reasonableness calls for more intensive scrutiny as contemplated by Chasklson CJ in *New Clicks*. This proposition is predicated on the idea that if reasonableness incorporates rationality and rationality requires, *inter alia*, a decision to be rational in relation to the reasons given for it, then a decision that is not so rational must be reviewed and set aside for want of reasonableness. It also coincides with the edifying remarks made by Professor Hoexter that '[a] reasonable decision must have reasonable effects²⁷² as well as a rational structure.'²⁷³ Significantly, *Bato Star* reveals that the reasons given by an administrative decision maker remain important in the reasonableness inquiry, and *Sidumo* indicates that reasonableness is concerned not only with the ultimate outcome of a decision but also with the reasons given in support of the outcome.²⁷⁴

Admittedly, the SCA's enunciation of the reasonableness standard in *Herholdt (SCA)* may be justifiable based on the principle of variability as advanced by Professor Hoexter. According to Professor Hoexter, this principle may be employed to avoid the undesirability of applying the grounds of review in an all-or-nothing fashion since it allows the courts instead to vary the intensity of judicial review within different contexts.²⁷⁵ She highlights a number of factors that would inform the intensity of a court's scrutiny and willingness to set a decision aside on review, including the breadth of the discretion afforded to a particular administrative agency.²⁷⁶

Professor Corder offers a useful method of determining the intensity of judicial review (for instance, on the ground of unreasonableness) based on the degree of discretion enjoyed by an administrative agency, which accords with the principle of variability proposed by Professor Hoexter.²⁷⁷ In this regard, Professor Corder submits the following "spectrum-like" model:

'if one places the degree of discretion authorized to a particular administrator from zero to one hundred on a spectrum, one can predict with a fair degree of confidence that the scope,

²⁷² By effects, Professor Hoexter is referring to the proportionality element of reasonableness. See Hoexter (note 238 above) 511.

²⁷³ By structure, Professor Hoexter is referring to the rationality element of reasonableness. See Hoexter (note 238 above) 511.

²⁷⁴ Garbers (note 41 above) 85.

²⁷⁵ Hoexter (note 238 above) 502.

²⁷⁶ Hoexter (note 238 above) 503.

²⁷⁷ H Corder 'Reviewing Executive Action' in J Klaaren (ed) *A Delicate Balance* (2006) 73, 73.

depth or intrusiveness of accountability (and thus review authority of a judge) will be highest where the discretion is lowest and rise in inverse proportion to the decline in discretion.’²⁷⁸

In order to justify the SCA’s approach to reasonableness as a variable standard on this basis, one would first have to establish the degree of discretion that the legislature has accorded to CCMA commissioners in the execution of their arbitral functions. Although it is by now trite that the LRA has given CCMA commissioners the power to determine the fairness of a dismissal dispute,²⁷⁹ CCMA commissioner are nevertheless required to ‘consider all relevant circumstances’ when making that determination.²⁸⁰

In *Tao Ying*, the CC demarcated the limits of the discretion afforded to CCMA commissioners as follows:

‘It is plain from these constitutional and statutory provisions that CCMA arbitration proceedings should be conducted in a fair manner.... Fairness in the conduct of the proceedings requires a commissioner to apply his or her mind to the issues that are material to the determination of the dispute. One of the duties of a commissioner in conducting an arbitration is to determine the material facts and then to apply the provisions of the LRA to those facts in answering the question whether the dismissal was for a fair reason. *In my judgment, 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 can hardly be said that there was a fair trial of issues.*’²⁸¹

As noted in chapter 3, the SCA in *Herholdt (SCA)* took the view that material errors of fact, including the weight and relevance to be given to particular facts, are of no consequence unless their effect is to render a commissioner’s award unreasonable.²⁸² The LAC in *Mafokeng* aptly notes that the SCA’s approach in *Herholdt (SCA)* is ‘...somewhat at variance with the Constitutional Court in *Tao Ying* [which] seemed to take the view that a factual or legal error would be reviewable if it was material to the determination of the dispute submitted to arbitration.’²⁸³ The SCA’s approach in *Herholdt (SCA)* therefore appears to afford CCMA commissioners a greater degree of discretion in the performance of their arbitral functions than that envisaged by the CC in *Tao Ying*. Consequently, the intensity of reasonableness review favoured by the SCA in *Herholdt (SCA)*, if based on the degree of

²⁷⁸ Corder (note 277 above) 74.

²⁷⁹ *Sidumo* (note 20 above) 119, 59 and 79; See also, section 143(1) of the LRA; See further, Fergus (note 64 above) 134.

²⁸⁰ *Sidumo* (note 20 above) 79; A van der Waldt & C Botma ‘The Role of Reasonableness in the Review of Labour Arbitration Awards (Part 2)’ (2009) *O* 530, 538.

²⁸¹ *Tao Ying* (note 106 above) 76. Footnote omitted. Quotations omitted. Emphasis added.

²⁸² *Herholdt (SCA)* (note 3 above) 25.

²⁸³ *Mafokeng* (note 196 above) at footnote 12.

discretion given to commissioners to determine the fairness of dismissal disputes, may not be appropriate.

Apart from that, it is also apparent that the SCA's approach to reasonableness in *Herholdt (SCA)* is predicated on a perception that in *Sidumo* the CC drew a distinction between its jurisprudence relating to judicial review of administrative action within the general administrative law sphere as against its jurisprudence pertaining to judicial review of administrative action in the labour law arena. This perception is most evident where the SCA in *Herholdt (SCA)* decries the LAC in *Herholdt (LAC)* for having relied on a CC judgment²⁸⁴ (dealing with the ground of unreasonableness under the PAJA) to support the proposition that CCMA arbitration awards are reviewable not only on the ground of substantive unreasonableness but also on the ground of dialectical unreasonableness.²⁸⁵ This explains why the SCA in *Herholdt (SCA)* did not deem it necessary to consider and apply O'Regan J's exposition of reasonableness in *Bato Star*.

The CC in *Sidumo* drew heavily on *Bato Star*, which dealt with the unreasonableness grounds of review under the PAJA, in order to delineate the meaning of the unreasonableness ground for review of CCMA arbitration awards. It is submitted that this is indicative of a desire on the part of the CC in *Sidumo* to ensure consistency in the development of its jurisprudence in relation to the right to reasonable administrative action in section 33(1). Thus, the reasonableness standard enunciated in *Sidumo* should be conceptually no different to the unreasonableness ground of review found in the PAJA.²⁸⁶

As alluded to earlier, O'Regan J enumerated a number of factors that ought to inform the reasonableness of a decision of an administrative agency.²⁸⁷ Although the CC in *Sidumo* did not refer specifically to these factors, the CC was guided by similar considerations.²⁸⁸

²⁸⁴ *New Clicks* (note 264 above).

²⁸⁵ *Herholdt (SCA)* (note 3 above) 23 – 24.

²⁸⁶ C Botma-Kleu & A Govindjee (note 64 above) 1779 – 1780.

²⁸⁷ *Bato Star* (note 38 above) at para 45. The LAC has acknowledged the applicability of these factors in the determination of the reasonableness of CCMA arbitration awards. See, for example, *Edcon Limited v Pillemer and Others* (DA4/06) [2007] ZALC 101; [2008] 5 *BLLR* 391 (LAC) (28 November 2007) (*Edcon*) 22; *Woolworths (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2011) 32 *ILJ* 2455 (LAC) (*Woolworths*) 28. See further, P Le Roux & K Leigh Young 'The Role of Reasonableness in Dismissal' (2007) 17 *CLL* 21, 29.

²⁸⁸ As noted earlier, O'Regan J identified five factors in *Bato Star* that should inform the reasonableness of an administrative decision. These factors and the relevant paras in *Sidumo* that consider similar issues are recorded here:

In addition to identifying the factors referred to above, O'Regan J went further in *Bato Star* to state that:

'Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a Court should pay due respect to the route selected by the decision-maker. This does not mean, however, that where the decision is one which will not reasonably result in the achievement of the goal, *or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a Court may not review that decision. A Court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker.*'²⁸⁹

This dictum connotes that a decision will be unreasonable if, amongst other things, (i) it is not reasonably supported by the facts or (ii) it is not reasonable on the basis of the reasons given for it.²⁹⁰

It would appear that the former ((i) above) requires a weighing of all the considerations relevant to a decision, followed by a determination of whether the decision is reasonably supported by such considerations.²⁹¹ The emphasis of this 'ground' of unreasonableness is on the facts and their ability to justify the outcome of the decision. The SCA's approach to reasonableness in *Herholdt (SCA)* is congruent with this 'ground' or delineation of unreasonableness. Specifically, and as noted in chapter 3, the SCA in *Herholdt (SCA)* held that reasonableness requires a court to determine whether, having regard to the issues in dispute in a particular matter, 'the outcome reached by the arbitrator was not one that could reasonably be reached on the evidence and other material properly before the arbitrator.'²⁹²

The latter 'ground' of unreasonableness ((ii) above) enunciated by O'Regan J in *Bato Star* appears to place emphasis on the reasoning process that a decision-maker adopts in arriving at a decision. It seems to imply that a decision that is not reasonably supported by the reasons (as opposed to the evidential material) proffered by the decision-maker would be reviewable

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- The range of factors relevant to a particular decision (*Bato Star* (note 38 above) 45). This issue is considered in *Sidumo* (note 20 above) at para 78.
 - The identity as well as the expertise of the administrative agency (*Bato Star* (note 38 above) 45). This issue is considered in *Sidumo* (note 20 above) 118.
 - The nature of the administrative decision (*Bato Star* (note 38 above) 45). This issue is considered in *Sidumo* (note 20 above) 59, 61 and 79.
 - The nature of the competing interests involved in a matter as well as the effect of the administrative decision on the lives of those affected by it (*Bato Star* (note 38 above) 45). This issue is considered in *Sidumo* (note 20 above) 65 – 66.
 - The reasons given by the administrative agency for the decision (*Bato Star* (note 38 above) 45). This issue is considered in *Sidumo* (note 20 above) 113 – 117, and 119.

²⁸⁹*Bato Star* (note 38 above) 48. Emphasis added. See, further, Currie (note 85 above) 171 – 172.

²⁹⁰ See P Le Roux & K Leigh Young (note 287 above) 29.

²⁹¹ See, for instance, *Sidumo* (note 20 above) 113 – 119.

²⁹² *Herholdt (SCA)* (note 3 above) 12. Footnote omitted.

for want of reasonableness. The meaning of the second ‘ground’ of unreasonableness ((ii) above) may be gleaned from the following exposition. That ground resembles the ground of judicial review of administrative action under the Interim Constitution, which required administrative action to be justifiable in relation to the reasons given for it.²⁹³ The difference is that in *Bato Star* O’Regan J used the term ‘reasonable’, whereas the Interim Constitution contained the word ‘justifiable’.

At the time of the drafting of the Interim Constitution the terms ‘justifiable’ and ‘reasonable’ were widely regarded by commentators as synonymous.²⁹⁴ It is trite that *Carephone* was based on the justifiability standard of review contemplated in the Interim Constitution.²⁹⁵ In *Rustenburg (SCA)*, the SCA observed that on the *Carephone* standard an arbitration award could be reviewed and set aside if it was found that bad reasons had played an ‘appreciable or significant role in the outcome’ ultimately reached by the commissioner.²⁹⁶ It may be possible, therefore, to ascribe this meaning to the second ‘ground’ of unreasonableness ((2) above) identified by O’Regan J in *Bato Star*.

Based on this explication of the second ‘ground’ of unreasonableness and the congruence between *Bato Star* and *Sidumo* established above, it is submitted that a CCMA arbitration award that is not rational or reasonable in relation to the reasons given for it ought to be set aside for want of reasonableness. Contrary to the finding of the SCA in *Herholdt (SCA)* that the CC in *Sidumo* discarded the rationality element of reasonableness, Ray-Howett aptly demonstrates that the CC in *Sidumo* did in fact give effect to that element. After analysing the manner in which the CC in *Sidumo* applied the reasonableness standard to the facts in that matter, Ray-Howett states that:

‘[i]t is clear...that the court took into account the commissioner's process of reasoning. If one reads the judgment, it becomes evident that in assessing whether the commissioner's decision was reasonable, the court analysed the reasoning process followed by the commissioner and decided that it was not unreasonable primarily on the basis that while the commissioner's reasoning process was defective in one or two instances, these defects were not sufficiently serious to warrant a review of the ultimate decision.’²⁹⁷

²⁹³ Section 24(d) of the Interim Constitution.

²⁹⁴ Hoexter (2012) (note 237 above) 337 and footnote 62. See also, Hoexter (2004) (note 237 above) 151.

²⁹⁵ *Sidumo* (note 20 above) 106.

²⁹⁶ *Rustenburg* (note 27 above) 34, read with para 29.

²⁹⁷ Ray-Howett (note 62 above) 1629.

This explains why Fergus concludes, after conducting a similar examination of the *Sidumo* judgment, that the CC in *Sidumo* ‘confirmed the reasonableness of the Commissioner’s award. In its view, both his *reasoning* and the *material* before him established this.’²⁹⁸

In the final analysis, it is evident that the SCA’s decision in *Herholdt (SCA)* seeks to strike a distinction between the right to reasonable administrative action as enjoyed by litigants in the context of general administrative law and the right to reasonable administrative action afforded to litigants within the realm of labour law. The right to reasonable administrative action of litigants within the arena of general administrative law incorporates the right to rational administrative action. When regard is had to that fact, it may be argued that the finding of the SCA in *Herholdt (SCA)* – that the right to reasonable administrative action of litigants within the labour law sphere does not encompass a similar right – prima facie amounts to a limitation of the right to reasonable administrative action of litigants within the labour law sphere. That limitation, it is submitted, cannot be justified on the basis of the CC’s judgment in *Sidumo*. It is also difficult to reconcile the SCA’s approach to reasonableness in *Herholdt (SCA)* with the provisions of section 33, which do not distinguish between different kinds of administrative action; much less does section 33 prescribe that rationality applies to some kinds of administrative action but not to others.

4.5 DETERMINING WHETHER THE SCA’S CONCEPTION OF THE RELATIONSHIP BETWEEN REASONABLENESS AND THE SECTION 145 GROUNDS OF REVIEW IN *HERHOLDT (SCA)* IS CONSISTENT WITH THE PRESCRIPTS OF SECTION 33(1)

The different approaches that have been adopted in the interpretation of the CC’s judgment in *Sidumo* in respect of the relationship between reasonableness and the section 145 grounds of review were described in chapter 3 of this discourse. It was also noted in chapter 3 that the predominant approaches in that regard are those encapsulated in the judgments of the SCA in *Herholdt (SCA)* and the LAC in *Gold Fields*. Ultimately, the analysis undertaken in chapter 3 revealed that the SCA’s approach is consistent with the weight of LAC and the SCA judgments on that issue. The evaluation below considers whether the SCA’s approach in *Herholdt (SCA)* is consonant with the prescripts of section 33(1).

²⁹⁸ Fergus (note 64 above) 95. Emphasis added.

At the outset it is necessary to highlight that the approach adopted in *Gold Fields* has a lot to recommend it. This is because of the use of the word ‘suffuse’ by the CC in *Sidumo*. It has been noted by some commentators that in terms of the ordinary dictionary meaning of the word ‘suffuse’, reasonableness is spread over or covers the grounds of review in section 145.²⁹⁹ The reference by the CC in *Sidumo* to reasonableness as a ‘standard of review’, as opposed to a ‘ground of review’, is also relied upon as credence for the proposition that reasonableness is not a self-standing ground of review,³⁰⁰ but rather a test to establish whether an applicant has met the threshold in order to succeed on one of the grounds of review in section 145.³⁰¹

It is submitted that, although those remarks by the CC in *Sidumo* no doubt lend themselves to such an interpretation, a contextual and holistic appraisal of the CC’s judgment in *Sidumo* points away from its likelihood and reveals instead that the intention was to establish reasonableness as an independent basis for reviewing CCMA arbitration awards. This is evident from the following. Firstly, the CC in *Sidumo* had been very explicit in stating that ‘s 145 has to meet the requirements of s 33(1) of the Constitution, ie it has to provide for administrative action that is *lawful, reasonable and procedurally fair*.’³⁰² Had the CC sought to establish reasonableness as a threshold for succeeding on a review based on the section 145 grounds of review, one would have expected the CC to state, for example, that ‘section 145 has to provide for administrative action that is reasonable’ only and not for administrative action that is lawful and procedurally fair as well. Were this interpretation of *Sidumo* accepted, it would mean that judicial review of CCMA arbitration awards in terms of section 145 would provide solely for administrative action that is reasonable. That would be in stark contrast with the prescripts of section 33(1) – that everyone has a right not only to administrative action that is reasonable but also to administrative action that is lawful and

²⁹⁹ A van der Waldt & C Botma (note 280 above) 535 – 536.

³⁰⁰ See, for example, A van der Waaldt & C Botma (note 280 above) 541.

³⁰¹ A van der Waaldt & C Botma (note 280 above) 541, the authors here submit that reasonableness should be a test or a standard to trigger a review based on the grounds in section 145. However, Botma-Kleu & Govindjee (note 64 above) submit that that approach should not be accepted because it renders the grounds in section 145 redundant (C Botma-Kleu & A Govindjee (note 64 above) 1793). Furthermore, Myburgh raises cogent criticism against this approach, arguing that it is ‘misconceived and potentially more onerous’ (Myburgh (note 58 above) 39). In the case of the latter, he maintains that, ‘one cannot find, as the LAC does, that a commissioner actually committed a ‘*gross irregularity*’ (as per section 145) but, at the same time, that something more must be established to succeed on review based on a ‘*gross irregularity*’.’ (Myburgh (note 58 above) 39). In respect of the former, he points out that, ‘...there are instances of review where the law has long since recognised that the irregularity committed by the commissioner serves, in itself, to render the award reviewable irrespective of the result of the award.’ (Myburgh (note 58 above) at page 39).

³⁰² *Sidumo* (note 20 above) 89. Emphasis added. See also, *Sidumo* (note 20 above) 105.

procedurally fair. It would be contrary to the CC's findings in *Sidumo* that any legislation giving effect to section 33 must comply with its prescripts³⁰³ and that section 145 must be read to ensure that administrative action rendered by the CCMA is lawful, reasonable and procedurally fair.³⁰⁴

Secondly, such an interpretation overlooks the fact that the CC in *Sidumo* had been dealing broadly with the different constitutional standards, namely justifiability and reasonableness, upon which CCMA arbitration awards could be set aside on review in the past under the Interim Constitution and presently in terms of the 1996 Constitution.³⁰⁵ The CC in *Sidumo* had not been dealing with the operation of the individual grounds of review in section 145. This makes it less likely that the CC sought to establish reasonableness as a threshold to be met in order to trigger a review on the listed grounds in section 145.

Finally, the CC in *Sidumo* held that the reasonableness standard is substantive in nature and introduces this ingredient into review proceedings.³⁰⁶ It is submitted that in holding that the CC did not intend that review proceeding in terms of section 145 must be undertaken purely to establish whether the substantive outcome of a CCMA arbitration award is reasonable or not. Rather, it simply sought to supplement the existing procedural grounds of review already provided for in section 145³⁰⁷ – namely misconduct, gross irregularity and excess of powers, which are capable of giving effect to the right to administrative action that is lawful and procedurally fair.³⁰⁸ The reason for this was to bring section 145 in line with the demands of section 33(1) as a whole and not merely with reasonableness.

In the light of all of the above, it is submitted that it is more probable that the CC in *Sidumo* intended to read reasonableness into section 145 as a self-standing ground of review existing alongside section 145.³⁰⁹ Botma-Kleu and Professor Govindjee submit that such an interpretation is in keeping with section 33(1) of the Constitution 'which requires administrative action to be reasonable in addition to being lawful and procedurally fair.'³¹⁰ Fortunately, this approach to the relationship between reasonableness and the section 145

³⁰³ *Sidumo* (note 20 above) 91.

³⁰⁴ *Sidumo* (note 20 above) 105.

³⁰⁵ Hoexter (2012) (note 237 above) 343; *Sidumo* (note 20 above) 105 – 110.

³⁰⁶ *Sidumo* (note 20 above) 108.

³⁰⁷ C Botma-Kleu & A Govindjee (note 64 above) 1792 and 1793.

³⁰⁸ Fergus (note 64 above) 91.

³⁰⁹ See, further, C Botma-Kleu & A Govindjee (note 64 above) 1793; Fergus (note 64 above) 110 – 111.

³¹⁰ C Botma-Kleu & A Govindjee (note 64 above) 1793.

grounds of review, which it is submitted affords greater scope for the protection of the fundamental rights in section 33(1), has been followed by the SCA in *Herholdt (SCA)*. The discussion in chapter 3 also reveals that in this regard the SCA's approach is consistent with the weight of LAC and SCA judgments.

4.6 CONCLUSION

It is now accepted that reasonableness in section 33(1) incorporates the element of rationality, but it is still contested whether it encompasses proportionality as well. Although the SCA in *Herholdt (SCA)* effectively finds that the CC in *Sidumo* rejected the applicability of the rationality element to judicial review of CCMA arbitration awards, a number of commentators and judges have taken the view that that is not entirely clear from the CC's judgment in *Sidumo*. Instead, they have argued, correctly, that most probably the intention of the CC in *Sidumo* was to subsume the element of rationality into the broader genus of reasonableness.

There is, however, a divergence of opinion amongst the commentators and judges on the effect of this phenomenon. In the main, there are two views in that regard. On the one hand, there is the view that the subsumption of rationality into reasonableness would be 'rather chilling' because this would mean that an irrational decision, in the sense that the decision is not rationally related to the reasons advanced in support of it, would not necessarily equate to an unreasonable decision. That view further holds that such an irrational decision may nevertheless survive judicial scrutiny if its outcome is regarded as being reasonable. The other view, which it is submitted seems to be more plausible, regards the subsumption of rationality into reasonableness as having the effect that an administrative decision that does not accord with the reasons on which it is premised would be unreasonable, irrespective of the reasonableness of the outcome of the decision. This conception of reasonableness would give better expression to the notion that reasonableness is a more intrusive standard than rationality and to the idea that reasonable effects as well as a rational structure are both indispensable to a reasonable decision.

Nevertheless, it is conceded that the SCA's conception of reasonableness in *Herholdt (SCA)*, insofar as it discards the element of rationality, may be justifiable based on the variability principle advocated for by Professor Hoexter. One of the factors that may influence the intensity of judicial review on the ground of unreasonableness and allow for its variation

within different contexts is the degree of discretion afforded to a particular administrative agency. The potential problem in respect of the SCA's delineation of the reasonableness standard in *Herholdt (SCA)* is that the SCA affords commissioners a greater degree of discretion in the execution of their arbitral functions than that contemplated by the CC in *Tao Ying*. Accordingly, the SCA's delineation in *Herholdt (SCA)* of the intensity of judicial review of CCMA arbitration awards on the grounds of unreasonableness may not be justifiable on the basis of the principle of variability.

Apart from that, though, it is apparent that the underlying rationale that influenced the manner in which the SCA delineated the reasonableness standard in *Herholdt (SCA)* was a perception on its part that the CC in *Sidumo* sought to draw a distinction between its reasonableness jurisprudence within the fields of general administrative law and labour law. It is submitted, however, that the fact that the CC in *Sidumo* had drawn heavily on its jurisprudence in *Bato Star* indicates that its intention was to ensure consistency in its jurisprudence regarding the review of administrative action on the standard of unreasonableness in the realms of general administrative law and labour law. Further credence for this proposition is to be located in a holistic appraisal of the CC's judgment in *Sidumo*, which reveals that the CC in *Sidumo* had taken cognizance of the factors identified by O'Regan J in *Bato Star* that find application in the determination of the reasonableness of an administrative decision.

Having established this congruence between *Sidumo* and *Bato Star*, it is submitted that the CC's judgment in *Bato Star* provides fertile ground for the proposition that an administrative decision will be unreasonable if (i) it is not reasonably supported by the facts or (ii) it is not reasonable on the basis of the reasons given for it. On that basis it is submitted that a CCMA arbitration award that is not rationally related to the reasons given for it ought to be reviewed and set aside for want of reasonableness. Contrary to the SCA's finding in *Herholdt (SCA)* that the CC in *Sidumo* did away with the rationality standard of review, a number of commentators have demonstrated that the CC in *Sidumo* had applied the rationality standard of review and found that the reasoning of the arbitrator in that matter had not been sufficiently deficient to warrant a review of his award on the ground of irrationality.

Moreover, it is submitted that, insofar as the SCA's conception of reasonableness in *Herholdt (SCA)* discards the rationality element of reasonableness, this detracts from the protection afforded to the right to reasonable administrative action in section 33(1) and prima facie

amounts to a limitation of the right within the sphere of labour law. Such limitation does not find support in the CC's judgment in *Sidumo*, nor does it find support in the provisions of section 33, which do not prescribe the application of the rationality facet of reasonableness to some administrative decision and not to others.

Finally, the SCA's decision in *Herholdt (SCA)* is to be commended for regarding reasonableness as a self-standing ground of review existing alongside the grounds of review in section 145. As this approach gives better expression to the CC's finding in *Sidumo* that section 145 must be read to ensure that CCMA commissioners render administrative action that is not only reasonable but that it is also lawful and procedurally fair. The SCA's conception of the relationship between reasonableness and the section 145 grounds of review provides greater scope for the protection of the right to administrative action that is lawful and procedurally fair than the approach adopted by the LAC in *Gold Fields*.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

The object of this thesis is to establish whether the SCA's approach to the standard of review in *Herholdt (SCA)* is consistent with the weight of LAC and SCA judgments. The object is further to evaluate the extent to which the SCA conception of the standard of review in *Herholdt (SCA)* gives effect to or detracts from the constitutional guarantee of just administrative action. It is hoped that the answers to these critical questions will give essential insights into,

- (i) whether the SCA's approach in *Herholdt (SCA)* represents an accurate statement on the law regarding reviews of CCMA arbitration awards, and, perhaps more significantly,
- (ii) whether the regulation of the right to just administrative action within the labour law sphere conforms with the prescripts of the 1996 Constitution.

Approximately two decades have lapsed since the establishment of the CCMA. Notwithstanding this, the review jurisprudence of the labour courts in respect of CCMA arbitration awards remains uncertain.³¹¹ The predominant reason for this uncertainty is that since the inception of the CCMA the courts have adopted divergent approaches to the standard for reviewing and setting aside CCMA arbitration awards.³¹²

The root cause of the latter phenomenon is, however, the apparent tension between the vision of the legislature and the aspirations of the Constitutions of the Republic of South Africa³¹³ regarding the standard that CCMA arbitration awards ought to be subjected to.³¹⁴ In this regard, Professor Corder aptly recognises that there is an inevitable tension between the procedural fairness and rationality of the administrative process and the laudable social goal of attaining an effective and efficient public administration.³¹⁵

³¹¹ Chapter 1 para 1.1.

³¹² Chapter 1 para 1.1 and chapter 3.

³¹³ The Interim Constitution and the 1996 Constitution.

³¹⁴ Chapter 1 para 1.1 and chapter 3.

³¹⁵ See footnote 1 above.

The legislature sought to expedite the resolution of labour disputes through the adoption of the CCMA's arbitration process and by providing for the review of CCMA arbitration awards on the narrowest grounds of review, namely those envisaged in section 145 of the LRA.³¹⁶ When regard is had to the constitutional framework for the review of administrative action, however, section 33 of the 1996 Constitution does not appear to sanction the less exacting grounds of review that a literal interpretation of section 145 may suggest.³¹⁷ Instead, section 33 of the 1996 Constitution confers a seemingly unfettered right to administrative action that is lawful, reasonable and procedurally fair, with the view of upholding the foundational values of accountability, openness and responsiveness, including the values of good public administration, which also emphasise accountability, transparency, impartiality, fairness and equitability in the CCMA's arbitration process.³¹⁸ Significantly, section 33 of the 1996 Constitution does not contain any special limitation of the right to just administrative action.³¹⁹ Therefore, the rights contained in section 33 of the 1996 Constitution ought to be given their full effect by the courts in formulating the standard for reviewing CCMA arbitration awards.

The approach of the SCA in *Herholdt (SCA)* and that of the LAC in *Herholdt (LAC)* are the predominant approaches regarding the reasonableness standard enunciated in *Sidumo*.³²⁰ The SCA in *Herholdt (SCA)* favours a purely substantive approach to reasonableness, one that rejects the dialectical facet of reasonableness and gives primacy to the substantive component of reasonableness.³²¹ The LAC in *Herholdt (LAC)*, on the other hand, endorses a broad or dual approach to reasonableness, one that recognises the significance of both the substantive and dialectical facets of reasonableness.³²² The SCA's approach to reasonableness in *Herholdt (SCA)* has been sanctioned in twenty-four judgments of the LAC,³²³ whereas the LAC's approach to reasonableness in *Herholdt (LAC)* has been adopted in only seven judgments of the LAC.³²⁴ This means that the SCA's approach in *Herholdt (SCA)* is in line with the weight of LAC judgments.³²⁵

³¹⁶ Chapter 2 para 2.3.

³¹⁷ Chapter 2 paras 2.2, 2.3 and 2.4.

³¹⁸ Chapter 2 paras 2.2 and 2.4.

³¹⁹ Chapter 2 para 2.2.

³²⁰ Chapter 3.

³²¹ Chapter 3 para 3.2.1.

³²² Chapter 3 para 3.2.2.

³²³ Chapter 3 paras 3.2.5 and 3.4.

³²⁴ Chapter 3 paras 3.2.4 and 3.4.

³²⁵ Chapter 3 para 3.4.

The approach of the SCA in *Herholdt (SCA)* and that of the LAC in *Gold Fields* to the relationship between the reasonableness standard and the grounds of review envisaged in section 145 represent the predominant approaches in this regard.³²⁶ In *Herholdt (SCA)*, the SCA took the view that following the *Sidumo* judgment CCMA arbitration awards can be reviewed and set aside on the basis of the reasonableness standard enunciated in that judgment and, in addition, on the section 145 grounds of review.³²⁷ The LAC in *Gold Fields* did not agree with the SCA's statement of the law on this issue.³²⁸ The LAC preferred instead to treat the reasonableness standard established in *Sidumo* as an additional or threshold standard that has to be satisfied before an applicant can succeed on a review brought on any one of the grounds of review set out in section 145.³²⁹ However, the LAC's approach in *Gold Fields* is not supported by the weight of LAC and SCA judgments. This is evident from the fact that the LAC's approach in *Gold Fields* has been adopted in only two other LAC judgments, compared to the SCA's approach in *Herholdt (SCA)* that has been sanctioned in twenty-two LAC and SCA judgments.³³⁰ Thus, the SCA's approach on this issue is consistent with the weight of LAC and SCA judgments.

Notwithstanding that the SCA's approach in *Herholdt (SCA)* to the standard for reviewing CCMA arbitration awards is consistent with the weight of LAC and SCA judgments, what is still required is that the SCA's formulation of the standard of review must be consistent with the 1996 Constitution, particularly the fundamental right to just administrative action.

The right to reasonable administrative action in section 33(1) of the 1996 Constitution incorporates the right to rational administrative action.³³¹

The SCA in *Herholdt (SCA)* effectively discards the rationality standard of review established in *Carephone* and subsequently interpreted by the SCA in *Rustenburg (SCA)*.³³² This finding prima facie constitutes a limitation of the right to just administrative action in the labour law

³²⁶ Chapter 3 para 3.3.

³²⁷ Chapter 3 para 3.3.

³²⁸ Chapter 3 para 3.3.

³²⁹ Chapter 3 para 3.3.

³³⁰ Chapter 3 paras 3.3.1, 3.3.2 and 3.4.

³³¹ Chapter 4 para 4.2.

³³² Chapter 4 para 4.3.

sphere and is thus inconsistent with section 33 of the Constitution.³³³ That limitation does not find support in the CC's judgment in *Sidumo*.³³⁴

The overwhelming evidence, including the CC's judgments in *Sidumo*, *Tao Ying*, *Bato Star* and *New Clicks*, suggests that it is more probable that the CC's enunciation of the reasonableness standard in *Sidumo* meant that the rationality standard of review would be subsumed within the broader genus of reasonableness.³³⁵ In practical terms, this means that where a commissioner's arbitration award is not rational in relation to the reasons upon which it is predicated, the award will be unreasonable, for it would be one that a reasonable decision-maker could not have made.³³⁶

In respect of the relationship between reasonableness and section 145, the SCA's approach in *Herholdt (SCA)* gives proper effect to the right to lawful and procedurally fair administrative action.³³⁷ This is because the SCA treats reasonableness as a self-standing ground of review that exists alongside, and supplements, the existing procedural grounds of review in section 145.³³⁸ The latter grounds can be regarded as giving effect to the right to lawful and procedurally fair administrative action in section 33(1) of the Constitution.³³⁹ The SCA's approach in that regard correlates with the CC's judgment in *Sidumo* and with the prescripts of section 33(1), and is to be commended.³⁴⁰

Therefore, in conclusion, the only shortfall in *Herholdt (SCA)* is the SCA's limitation of the right to reasonable administrative action.³⁴¹ Manifestly, this is a significant shortfall. It is apparent that in effecting that limitation, the SCA in *Herholdt (SCA)* sought to give effect to the legislature's aspiration of expediting the resolution of labour disputes.³⁴² It is unfortunate, though, that the SCA effected the limitation without first conducting a section 36 evaluation, with a view to establishing whether the limitation is reasonable and justifiable as contemplated in that section. Until such an evaluation is carried out and the limitation is found to be permissible, it should always be the aspiration in section 33 of the 1996

³³³ Chapter 4 para 4.4.

³³⁴ Chapter 4 para 44.

³³⁵ Chapter 4 para 4.3 and para 4.4.

³³⁶ Chapter 4 para 4.3 and para 4.4

³³⁷ Chapter 4 para 4.5.

³³⁸ Chapter 4 para 4.5.

³³⁹ Chapter 4 para 4.5.

³⁴⁰ Chapter 4 para 4.5.

³⁴¹ Chapter 4 para 4.4.

³⁴² *Herholdt (SCA)* para 11 -12.

Constitution that ought to prevail over the vision of the legislature in respect of the standard for reviewing CCMA arbitration awards.³⁴³ To do otherwise is to act contrary to the precepts of the 1996 Constitution and amounts to flouting its supremacy.

In light of the shortfall in the SCA's judgment in *Herholdt (SCA)* and the finding in this research that the weight of LAC and SCA judgments support the approach to reasonableness adopted in *Herholdt (SCA)*, the LAC ought to conduct a section 36 analysis and establish definitively whether the legislature's expedited approach has sufficient merit to warrant a limitation of the right to reasonable administrative action.

Alternatively, the LAC ought to resuscitate the broad-based unreasonableness approach, which, it is submitted, would give better effect to the right to reasonable administrative action because it recognises the significance of both the dialectical (rational) and substantive facets thereof. Permitting the review and setting aside of CCMA arbitration awards that are irrational would not only vindicate parties' fundamental right to rational administrative action, but it would also encourage commissioners of the CCMA to produce well-reasoned and sound arbitration awards, which may promote the acceptance of the outcome of CCMA arbitration proceedings³⁴⁴ and thus ensure the speedy resolution of labour disputes. In addition, it would also ensure that commissioners of the CCMA are held accountable for their decisions in line with the rule of law.³⁴⁵ Furthermore, rationality would protect the integrity of commissioners' reasoning process during arbitration proceedings and thus restore, maintain and foster the legitimacy of the CCMA.³⁴⁶

³⁴³ Chapter 2 para 2.4.

³⁴⁴ See, for example, *Strategic Liquor Services v Mvumbi NO and Others* 2010 (2) SA 92 (CC) (*Mvumbi*) 15.

³⁴⁵ *Mvumbi* (note 344 above) 17.

³⁴⁶ Garbers (note 41 above) 86.

BIBLIOGRAPHY

Books

Beukes M, Botha C, Currie I, Klaaren J, Mireku O, Mass C, van Wyk J, Wefelmeier C, Wessels J, Burns Y, Hoexter C, Lange C, Harris V and Wallace D A *The Right to Know* (Claremont 7735, Cape Town, South Africa: Siber Ink CC, 2004)

Bizos G, Achermann LWH, Briet L, Marshall M H, Langa P N, Kirby M, Hoexter C, Corder H, Klaaren J, Budlender G & Kollapen J *A Delicate Balance The Place of the Judiciary in a Constitutional Democracy* (Cape Town, South Africa: Siber Ink CC, 2006)

Bosch C & Myburgh A *Reviews in the Labour Court* (Durban: LexisNexis, 2016)

Conradie B, Everett W, Taylor M, Du Toit D, Fouche M, Steenkamp A, Cohen T, Cooper C, Godfrey S, Giles G & Van Staden P *Labour Relations Law: A Comprehensive Guide* 6 ed (Durban: LexisNexis, 2015)

Corder H & van de Vijver L *Realising Administrative Justice* (Cape town, South Africa: Siber Ink, 2002)

Currie I *The Promotion of Administrative Justice Act: A Commentary* 2 ed (Cape Town, South Africa: Siber Ink CC, 2007)

Grogan J *Labour Litigation and Dispute Resolution* 2 ed (21 Dreyer Street, Sunclare building, Cape Town, South Africa: Juta & Co. Ltd, 2014)

Hepple B, Benjamin P, le Roux R, Theron J, Cohen T, van Niekerk A, Steenkamp A, Bosch C, Ngcukaitobi T, Fergus E, Rycroft A, du Toit D, Ronnie R, Godfrey Shane, Bamu P, Dupper O, Garbers C, Mpedi L G, Christianson M, Davis D, le Roux M, Collier D & Cheadle H *Reinventing Labour Law: Reflecting on the first 15 years of the Labour Relations Act and future challenges* (First Floor, Sunclare building, 21 Dreyer Street, Claremont 7708: Juta & Co Ltd, 2012)

Hoexter C *Administrative Law in South Africa* 2 ed (First Floor, Sunclare Building, 21 Dreyer Street, Claremont 7708: Juta & Co, 2012)

Journal Articles

Benjamin P 'Friend or Foe? The Impact of Judicial Decisions on the Operation of the CCMA' (2007) 28 *ILJ* 1

Botma-Kleu C & Govindjee A 'The Role of Reasonableness in the Review of CCMA Arbitration Awards in South Africa — An English Comparison' (2014) 35 *ILJ* 1777

Fergus E 'Reviewing an Appeal: A Response to Judge Murphy and the SCA' (2014) 35 *ILJ* 47

Fergus E '*The Distinction Between Appeals and Reviews - Defining the Limits of the Labour Court's Powers of Review*' (2010) 31 *ILJ* 1556

Garbers C 'Reviewing CCMA awards in the aftermath of *Sidumo*' (2008) 17 *CLL* 84

Hoexter C 'The Future of Judicial Review in South African Administrative Law' (2000)

Jammy P 'Interpreting the New Act: Getting Down to Business with the Labour Appeal Court' (1997) 18 *ILJ* 906

Le Roux P & Leigh Young K 'The Role of Reasonableness in Dismissal' (2007) 17 *CLL* 21

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

Myburgh A 'Determining and Reviewing Sanction after *Sidumo*' (2010) 31 *ILJ* 1

Myburgh A 'Reviewing the Review Test: Recent Judgments and Developments (2011) 32 *ILJ* 1497

Myburgh A '*Sidumo v Rustplats: How Have the Courts Dealt with It?*' (2009) 30 *ILJ* 1

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

Myburgh A 'The test for review of CCMA arbitration awards: an update' (2013) 23 (4) *CLL* 31

Ray-Howett G 'Is It Reasonable for CCMA Commissioners to Act Irrationally' (2008) 29 *ILJ* 1619

Van Eck B P S & Mathiba M K 'Constitution Seventeenth Amendment Act: Thoughts on the Jurisdictional Overlap, the Restoration of the Labour Appeal Court and the Demotion of the Supreme Court of Appeal' (2014) 35 *ILJ* 863

Van der Waldt A & Botma C 'The Role of Reasonableness in the Review of Labour Arbitration Awards (Part 2)' (2009) *O* 530

Thesis

Fergus E *From Sidumo to Dunsmuir: The Test for Review of CCMA Arbitration Awards* (published Phd thesis, University of Cape Town, 2013)

Botma-Kleu C H *The Role of Reasonableness in the Review of CCMA Arbitration Awards in South Africa: An English Law Comparison* (published LLD thesis, Nelson Mandela Metropolitan University, 2013)

Law Reports

4Seas Worldwide (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others (CA 15/2011) [2013] ZALAC 30 (13 November 2013)

Absa Bank Limited v Naidu and Others (DA 14/12) [2014] ZALAC 60; [2015] 1 *BLLR* 1 (LAC); (2015) 36 *ILJ* 602 (LAC) (24 October 2014)

Afrox Healthcare Ltd v Commission for Conciliation, Mediation & Arbitration & others (2012) 33 *ILJ* 1381 (LAC)

Airport Company of South Africa v Nabee and Others (DA13/2006) [2008] ZALAC 26 (17 March 2008)

Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer & others (2015) 36 ILJ 1453 (LAC)

Arends & others v SA Local Government Bargaining Council & others (2015) 36 ILJ 1200 (LAC)

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others 2004 (4) SA 490 (CC)

Bestel v Astral Operations Ltd [2011] 2 BLLR 129 (LAC)

Blue Financial Services Ltd v Commission for Conciliation, Mediation & Arbitration & others (2014) 35 ILJ 2368 (LAC)

Botha v Commission for Conciliation, Mediation & Arbitration & others (2015) 36 ILJ 1463 (LAC)

Bridgestone SA (Pty) Ltd v National Union of Metalworkers of SA & others (2016) 37 ILJ 2277 (LAC)

Campbell Scientific Africa (Pty) Ltd v Simmers & others (2016) 37 ILJ 116 (LAC)

Carephone (Pty) Ltd v Marcus 1999 (3) SA 304 (LAC); (1998) 19 ILJ 1425 (LAC)

Carstenhof Clinic v Commission for Conciliation Mediation and Arbitration and Others (JA44/2006) [2009] ZALAC 23 (25 February 2009)

Checkpoint SA (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others (JA1/2007) [2008] ZALAC 22 (14 May 2008)

Cheryl Gaw Agencies CC v Toli NO and Others (JA37/07) [2008] ZALAC 24 (8 October 2008)

City of Cape Town v Freddie and Others (CA13 /14) [2016] ZALAC 8; [2016] 6 BLLR 568 (LAC) (15 March 2016)

Clarence v National Commissioner of the SA Police Service (2011) 32 ILJ 2927 (LAC)

Commercial Workers Union of SA v Tao Ying Metal Industries & others 2009 (2) SA 204 (CC); (2008) 29 ILJ 2461 (CC)

Comtech (Pty) Ltd v Molony NO and Others (DA12/05) [2007] ZALAC 40 (21 December 2007)

Dell v Seton South Africa (Pty) Ltd and Others (JA 33/09) [2011] ZALAC 6; [2011] 9 BLLR 846 (LAC) (8 April 2011)

Democratic Nursing Organisation of SA on behalf of Du Toit & another v Western Cape Department of Health & others (2016) 37 ILJ 1819 (LAC)

DHL Supply Chain (Pty) Ltd v De Beer NO & others (2014) 35 ILJ 2379 (LAC)

Doorges v Commission for Conciliation, Mediation and Arbitration and Others (CA4/2014; C965/2011) [2015] ZALAC 44 (6 November 2015)

Dorrainn Bailiff Investments (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others (JR86/2011, JA8/2015) [2016] ZALAC 20 (26 May 2016)

Draken Industries CC v Maande and Others (JA69/2013) [2014] ZALAC 42 (19 August 2014)

Dunwell Property Services CC v Sibande & others (2011) 32 ILJ 2652 (LAC)

Edcon Limited v Pillemer and Others (DA4/06) [2007] ZALC 101; [2008] 5 BLLR 391 (LAC) (28 November 2007)

Edcon Ltd v Pillemer NO & others (2009) 30 ILJ 2642 (SCA)

Ellerine Holdings Ltd v Commission for Conciliation, Mediation & Arbitration & others (2008) 29 ILJ 2899 (LAC)

Emalehleri Municipality v Commission for Conciliation Mediation and Arbitration and Others (JA 64/08) [2009] ZALAC 20 (1 January 2009)

Eskom Holdings Ltd v Fipaza & others (2013) 34 ILJ 549 (LAC)

Ethekwini Metropolitan Municipality: Durban Metropolitan Police Services v Khanya and Others (DA9/2012) [2014] ZALAC 48 (18 September 2014)

Ethekwini Municipality v Hadebe and Others (DA17/14) [2016] ZALAC 14 (10 May 2016)

Fidelity Cash Management Service v Commission for Conciliation, Mediation & Arbitration & others (2008) 29 ILJ 964 (LAC)

First Garment Rental (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others (JA01/14) [2015] ZALAC 38; [2015] 11 BLLR 1094 (LAC) (9 September 2015)

First National Bank—A division of First Bank Ltd v Language & others (2013) 34 ILJ 3103 (LAC)

Food & Allied Workers Union on behalf of Mbatha & others v Pioneer Foods (Pty) Ltd t/a Sasko Milling & Baking & others (2011) 32 ILJ 2916 (SCA)

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

Gemalto South Africa (Pty) Ltd v Ceppwawu obo Louw and Others (JA 54/14) [2015] ZALAC 36; [2015] 11 BLLR 1100 (LAC); (2015) 36 ILJ 3002 (LAC) (27 August 2015)

General Motors (Pty) Ltd v National Union of Metalworkers of SA on behalf of Ruiters (2015) 36 ILJ 1493 (LAC)

Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & Others (2014) 35 ILJ 943 (LAC)

Gold One Africa Limited Modder East Operations v Van Der Westhuizen and Others (JA 53/13) [2014] ZALAC 35 (3 July 2014)

Grey v Education Labour Relations Council and Others (CA12/2014) [2015] ZALAC 50; [2015] 1 BLLR 50 (LAC); (2015) 36 ILJ 2802 (LAC) (23 October 2015)

Head of Department of Education v Mofokeng & Others (2015) 36 ILJ 2802 (LAC)

Henred Fraunhauf (Pty) Ltd and Another v Marcus N.O and Others (JA41/14) [2015] ZALAC 53; [2016] 4 BLLR 401 (LAC) (8 December 2015)

Herholdt v Nedbank Ltd (2012) 23 ILJ 1789 (LAC)

Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae) (2013) 34 ILJ 2795 (SCA)

Independent Municipal & Allied Trade Union on behalf of Strydom v Witzenberg Municipality & others (2012) 33 ILJ 1081 (LAC)

Joseph v University of Limpopo & others (2011) 32 ILJ 2085 (LAC)

Khanyile v Billiton Aluminium SA Ltd t/a Hillside Aluminium (DA24/06) [2009] ZALAC 7 (24 February 2009)

Kievits Kroon Country Estate (Pty) Ltd v Mmoledi & others (2014) 35 ILJ 406 (SCA)

Kievits Kroon Country Estate (Pty) Ltd v Mmoledi & others (2012) 33 ILJ 2812 (LAC)

Kukard v GKD Delkor (Pty) Ltd (2015) 36 ILJ 640 (LAC)

Maepe v Commission for Conciliation, Mediation & Arbitration & another (2008) 29 ILJ 2189 (LAC)

Mahlangu and Another v Mashigo NO and Others (JA3/05) [2011] ZALAC 32 (2 February 2011)

Makade v Public Health And Social Development Sectoral Bargaining Council and Others (PA2/2012) [2014] ZALAC 43 (19 August 2014)

Maoka v General Public Service Sectoral Bargaining Council and Others (JA14/2012) [2014] ZALAC 28 (12 June 2014)

Matsekoleng v Shoprite Checkers (Pty) Ltd (JA 12/10) [2012] ZALAC 41; [2013] 2 BLLR 130 (LAC) (1 November 2012)

Mavhungu v Tsogo Sun Group (Montecasino) and Others (JA 53/07) [2009] ZALAC 21 (29 January 2009)

Mbanjwa v Shoprite Checkers (Pty) Ltd and Others (DA 4/11) [2013] ZALAC 29 (7 November 2013)

McDonald's Transport Upington (Pty) Ltd v Association of Mineworkers and Construction Union (AMCU) and Others (JA10/2016) [2016] ZALAC 32 (28 June 2016)

Metcash Trading Africa (Pty) Ltd v Maseko NO and Others (JA52/08) [2010] ZALAC 34 (28 May 2010)

Minerals Technologies South Africa (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others (JA87/09) [2011] ZALAC 30 (17 February 2011)

Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae) 2006 (2) SA 311 (CC)

Minister of Safety & Security & another v Madikane & others (2015) 36 ILJ 1224 (LAC)

Miyambo v Commission for Conciliation, Mediation & Arbitration & others (2010) 31 ILJ 2031 (LAC)

Mogale v A & D Spitz (Pty) Ltd (JA 36/2011) [2013] ZALAC 21 (22 August 2013)

Monare v SA Tourism & others (2016) 37 ILJ 394 (LAC)

Motsamai v Everite Building Products (Pty) Ltd (JA21/08) [2010] ZALAC 23; [2011] 2 BLLR 144 (LAC) (4 June 2010)

Mutual Construction Co Tvl (Pty) Ltd v Ntombela NO & others (2010) 31 ILJ 901 (LAC)

Narainsamy v Mutual & Federal Insurance Company Ltd (DA 8/07) [2009] ZALAC 30 (12 February 2009)

National Commissioner of the South African Police Service v Myers and Others (CA4/09) [2012] ZALAC 51 (2 March 2012)

National Health Laboratory Service v Yona & Others (2015) 36 ILJ 2259 (LAC)

National Union of Metal Workers of South Africa obo Cloete v Trentyre (Pty) Ltd and Others (JA49/05) [2008] ZALAC 18 (27 March 2008)

National Union of Metalworkers of SA on behalf of Sinuko v Powertech Transformers (DPM) & others (2014) 35 *ILJ* 954 (LAC)

National Union of Mineworkers & another v Samancor Ltd (Tubatse Ferrochrome) & others (2011) 32 *ILJ* 1618 (SCA)

National Union of Mineworkers & another v Commission for Conciliation, Mediation & Arbitration & others (2015) 36 *ILJ* 2038 (LAC)

National Union of Mineworkers and Another v Rustenburg Platinum Mine (Mogalakwena Section) and Others (JA43/2013) [2014] ZALAC 62; [2015] 1 *BLLR* 77 (LAC) (23 October 2014)

National Union of Mineworkers on behalf of Botsane v Anglo Platinum Mine (Rustenburg Section) (2014) 35 *ILJ* 2406 (LAC)

National Union of Mineworkers on behalf of Selemela v Northam Platinum Ltd (2013) 34 *ILJ* 3118 (LAC)

National Union of Mine Workers obo Smith v Namakwa Sands, A Division of Exxaro Tsa Sands (Pty) Limited and Others (CA12/2013) [2014] ZALAC 57 (23 October 2014)

Ntoagae and Another v Anglo Platinum Ltd (Mototolo JV Concentrator) (JA8/2012) [2014] ZALAC 47 (19 September 2014)

Netherburn Engineering CC t/a Netherburn Ceramics v Mudau NO and Another (JA 1/05) [2008] ZALAC 13; [2009] 4 *BLLR* 299 (LAC); (2009) 30 *ILJ* 269 (LAC) (5 December 2008)

Palaborwa Mining Co Ltd v Cheetham & others (2008) 29 *ILJ* 306 (LAC)

Palace Engineering (Pty) Ltd v Ngcobo & others (2014) 35 *ILJ* 1971 (LAC)

Palluci Home Depot (Pty) Ltd v Herskowitz and Others (CA21/13) [2014] ZALAC 81; [2015] 5 *BLLR* 484 (LAC); (2015) 36 *ILJ* 1511 (LAC) (12 December 2014)

Potgieter v Tubatse Ferrochrome & others (2014) 35 ILJ 2419 (LAC)

Public Servants Association on behalf of PSA Members v National Prosecuting Authority & another (2012) 33 ILJ 1831 (LAC)

Quest Flexible Staffing Solutions (Pty) Ltd (A Division of Adcorp Fulfilment Services (Pty) Ltd) v Legobate (2015) 36 ILJ 968 (LAC)

Rawu v Commission for Conciliation Mediation and Arbitration and Others (JA54/2006) [2008] ZALAC 17 (28 February 2008)

Russel Furnitures (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others (DA 21/08) [2010] ZALAC 44 (26 February 2010)

Rustenburg Platinum Mines Limited (Amandelbult Section) v NUM obo Monageng and Others (JA12/2015) [2016] ZALAC 21 (26 May 2016)

Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation & Arbitration & others 2007 (1) SA 576 (SCA); (2006) 27 ILJ 2076 (SCA)

SA Municipal Workers Union v SA Local Government Bargaining Council & others (2012) 33 ILJ 353 (LAC)

SA Post Office Ltd v Commission for Conciliation, Mediation & Arbitration & others (2011) 32 ILJ 2442 (LAC)

SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others (2014) 35 ILJ 656 (LAC)

Samancor Chrome Ltd (Tubatse Ferrochrome) v Metal and Engineering Industries Bargaining Council and Others (JA 38/2009) [2010] ZALAC 25; (2011) 32 ILJ 1057 (LAC) (26 November 2010)

Samancor Manganese (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others (JA17/2007) [2009] ZALAC 4 (18 May 2009)

Satani v Department of Education, Western Cape And Others (CA10/15) [2016] ZALAC 24 (13 June 2016)

SAPPI Forests (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others (DA 12/08) [2008] ZALAC 25 (1 January 2008)

Shatterprufe (Pty) Ltd v Sesani NO and Others (PA4/13) [2014] ZALAC 44 (10 September 2014)

Scheme Data Services (Pty) Ltd v Myhill NO and Others (JA 7/09) [2010] ZALAC 43 (1 October 2010)

Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Other 2009 (3) SA 493 (SCA)

Shoprite Checkers (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others (JA46/05) [2007] ZALAC 24; [2008] 12 BLLR 1211 (LAC) (21 December 2007)

Shoprite Checkers (Pty) Ltd v Ramdaw NO & others 2001 (3) SA 68 (LC); (2000) 21 ILJ 1232 (LC)

Shoprite Checkers (Pty) Ltd v Ramdaw NO & others 2001 (4) SA 1038 (LAC); (2001) 22 ILJ 1603 (LAC)

Shoprite Checkers (Pty) Ltd v Tokiso Dispute Settlement and Others (JA49/14) [2015] ZALAC 23; [2015] 9 BLLR 887 (LAC); (2015) 36 ILJ 2273 (LAC) (24 June 2015)

Sisonke Partnership t/a International Healthcare Distribution v National Bargaining Council for the Chemical Industry and Others (JA 51/10) [2013] ZALAC 16 (9 July 2013)

Sidumo & another v Rustenburg Platinum Mines Ltd & others 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC)

Solari v Nedbank Ltd & others (2014) 35 ILJ 3349 (LAC)

Solid Doors (Pty) Ltd v Hanekom N.O and Others (CA19/2012) [2014] ZALAC 19 (30 April 2014)

South African Breweries Ltd v Commission For Conciliation, Mediation And Arbitration and Others (CA13/2012) [2014] ZALAC 26 (30 May 2014)

South African Breweries v Mothata (JA29/2007) [2009] ZALAC 22 (25 February 2009)

South African Revenue Service v CCMA and Others (JA06/11) [2015] ZALAC 55 (8 December 2015)

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

Takalani Home for the Mentally Disabled v Commission for Conciliation Mediation and Arbitration and Others (JA 5/06) [2007] ZALAC 26 (15 November 2007)

Thebe Ya Bophelo Healthcare Administrators (Pty) Ltd and Others v National Bargaining Council for the Road Freight Industry and Another 2009 (3) *SA* 187 (W)

The Foschini Group v Maudi and Others (JA 12/08) [2010] ZALAC 5; (2010) 31 *ILJ* 1787 (LAC); [2010] 7 *BLLR* 689 (LAC) (25 March 2010)

Thanda Royal Zulu Football Club v Lester N.O. and Others (DA8/14) [2015] ZALAC 7 (21 April 2015)

Toyota SA Motors (Pty) Ltd v Radebe & others (2000) 21 *ILJ* 340 (LAC)

Trafford Trading (Pty) Ltd v National Bargaining Council for the Leather Industry of South Africa and Others (DA11/09) [2011] ZALAC 35 (1 January 2011)

Transnet Rail Engineering v Mienies & Others (2015) 36 *ILJ* 2605 (LAC)

Vergenoeg vir Seniors v Stone and Others (JA 45/08) [2010] ZALAC 35 (4 June 2010)

Visser v Mopani District Municipality & others (2012) 33 *ILJ* 321 (SCA)

Western Cape Education Department v General Public Service Sectoral Bargaining Council & others (2014) 35 *ILJ* 3360 (LAC)

Western Platinum Refinery Ltd v Hlebela & Others (2015) 36 *ILJ* 2280 (LAC)

Woolworths (Pty) Ltd v Mabija and Others (PA3/14) [2016] ZALAC 5; [2016] 6 *BLLR* 568 (LAC); (2016) 37 *ILJ* 1380 (LAC) (19 February 2016)

Woolworths (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others (2011) 32 *ILJ* 2455 (LAC)

Woolworths (Pty) Ltd v South African Commercial Catering and Allied Workers Union and Others (JA38/15) [2016] ZALAC 41 (27 July 2016)

Zapop (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others (CA21/2014) [2016] ZALAC 16 (12 May 2016)

Zimu v Commission for Conciliation Mediation and Arbitration and Others (JA 23/10) [2011] ZALAC 34 (28 September 2011)

Statutes

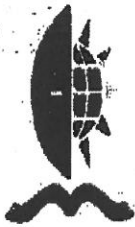
Arbitration Act 42 of 1965

Constitution of the Republic of South Africa Act 1996

Constitution of the Republic of South Africa Act 200 of 1993

Labour Relations Act 66 of 1995

Promotion of Administrative Justice Act 3 of 2000



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05 December 2016

Mr Andile Wesley Khumalo (210547314)
School of Law
Howard College Campus

Dear Mr Khumalo,

Protocol reference number: HSS/2074/016M

New project title: The grounds for Reviewing CCMA Arbitration Awards: A Critical Assessment of whether the Courts' Interpretation thereof gives Adequate Effect to the Fundamental Right to Just Administrative Action

Approval Notification – Amendment Application

This letter serves to notify you that your application and request for an amendment received on 28 October 2016 has now been approved as follows:

- Change In Title

Any alterations to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form; Title of the Project, Location of the Study must be reviewed and approved through an amendment /modification prior to its implementation. In case you have further queries, please quote the above reference number.

PLEASE NOTE: Research data should be securely stored in the discipline/department for a period of 5 years.

The ethical clearance certificate is only valid for period of 3 years from the date of original issue. Thereafter Recertification must be applied for on an annual basis.

Best wishes for the successful completion of your research protocol.

Yours faithfully

Dr Shenuka Singh (Chair)

/ms

Cc Supervisor: Professor Tamara Cohen
Cc Academic Leader Research: Dr Shannon Bosch
Cc School Administrator: Mr Pradeep Ramsewak / Ms Robynne Louw

Humanities & Social Sciences Research Ethics Committee

Dr Shenuka Singh (Chair)

Westville Campus, Govan Mbeki Building

Postal Address: Private Bag X54001, Durban 4000

Telephone: +27 (0) 31 260 3587/8350/4557 Facsimile: +27 (0) 31 260 4609 Email: simben@ukzn.ac.za / arvmanm@ukzn.ac.za / mohunp@ukzn.ac.za

Website: www.ukzn.ac.za



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