

**THE REVIEW OF CCMA ARBITRATION PROCEEDINGS CONDUCTED
UNDER SECTION 145 OF THE LABOUR RELATIONS ACT 56 OF 1995**

by

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DECLARATION

I, Zikhona Gontsana, declare that this work is original and that all the sources I have used or quoted have been indicated and acknowledged by means of complete references.

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ACRONYMS

CC	Constitutional Court
CCMA	Commission for Conciliation Mediation and Arbitration
LAC	Labour Appeal Court
LC	Labour Court
LRA	Labour Relations Act 66 of 1995
PAJA	Promotion of Administrative Justice Act 3 of 2000
SCA	Supreme Court of Appeal

CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND AND OUTLINE OF THE RESEARCH PROBLEM

One of the purposes of the Labour Relations Act¹ is to promote the effective resolution of disputes.² The LRA gives the Commission for Conciliation, Mediation and Arbitration³ the power to resolve disputes through arbitration.⁴ An arbitration award issued by the commissioner is final and binding.⁵ Although arbitration awards are binding, the LRA affords parties who allege a defect in any arbitration proceedings under the auspices of the commission the right to apply to the Labour Court for an order setting aside the arbitration award.⁶ The parties to a dispute have a right to review arbitration awards on the grounds listed in section 145 of the LRA. The Constitutional Court in *Sidumo v Rustenburg platinum Ltd & others*⁷ however held that the requirement of reasonableness must be suffused into the statutory review grounds, thereby adding a further ground of review to the statutory grounds of review [the 'Sidumo' test].

Reviews include arbitration awards issued by the bargaining councils. In terms of section 51(3) of the LRA, if a dispute is referred to an accredited bargaining council in terms of the LRA, the council must attempt to resolve the dispute through conciliation and if the dispute remains unresolved the council must arbitrate the dispute if the LRA requires arbitration. In terms of section 51(8) all provisions in the LRA relating to the conduct of arbitrations, including sections 142A, 143, 144, 145 and 146 apply to any arbitration conducted under the auspices of a bargaining council. Thus where disputes are referred for conciliation and arbitration in terms of the LRA to accredited bargaining councils, the bargaining council arbitrators have the same functions, powers, duties and review evaluation that CCMA commissioners have when

¹ 66 of 1995. Hereafter referred to as the LRA.

² Section 1(d)(iv).

³ Hereafter referred to as the CCMA

⁴ Section 136.

⁵ Section 143(1) of Labour relations Act 66 of 1995.

⁶ Section 145.

⁷ (2007) 28 ILJ 2405 (CC).

conciliating and arbitrating disputes. Thus all discussions on reviews relate to arbitrations conducted by bargaining councils under the LRA.

There has been a debate both in the Labour Courts and Constitutional Court regarding the interpretation and scope for review provided by section 145 of the LRA and further whether the constitutional right to fair and reasonable administrative decisions has added a ground for review to section 145. This has generated numerous conflicting judgments and essentially an imprecise jurisprudence on the matter. This in turn has, for years, generated a lot of debate in academic articles and journals. The debate in essence has revolved around whether section 145 provides for both a result-based and process-related review and whether the review ground of reasonableness introduced by the Constitutional Court in *Sidumo* restricted the review to a result-based approach, namely that if the outcome can be justified on the record, it does not matter how the commissioner arrived at his or her decision. That is, the *Sidumo* test has done away with the process-related review. The Labour Appeal Court⁸ decision of *Herholdt v Nedbank Ltd*⁹ was considered, by most of the prolific commentators on this matter, to have put an end to this debate. However the LAC's findings were recently set aside by the Supreme Court of Appeal¹⁰ in *Herholdt v Nedbank Ltd (COSATU AS AMICUS CURIAE)*.¹¹ After visiting the debate surrounding the proper test for reviews of such arbitration proceedings raised in the LAC judgment, the SCA found that the LAC and the cases relied upon by the LAC had unduly relaxed the grounds for challenging arbitrations conducted in terms of the LRA and then re-affirmed the correct test for such reviews.

1.2. RESEARCH QUESTIONS

The primary objective of this dissertation is to analyse the review of arbitration proceedings conducted under the LRA.

The following questions are addressed:

⁸ Hereafter referred to as the LAC.

⁹ (2012) 33 ILJ 1789 (LAC).

¹⁰ Hereafter referred to as the SCA.

¹¹ 2013 (6) SA 224 (SCA).

1. What is the difference between a review and an appeal?
2. What are the grounds for review in terms of section 145 of the LRA? How do they operate?
3. How have the courts formulated and developed the test for review?
4. What is the role of reasonableness in the review of CCMA arbitration proceedings?
5. Whether the SCA in *Herholdt* has finally settled the debate surrounding the proper test for reviews of arbitration proceedings conducted under the LRA.

1.3. AIMS OF THE RESEARCH

One of the purposes of this research is to show that for many years the Labour Courts failed to settle on clear and consistent jurisprudence regarding the test for review permitted by section 145 of the LRA and the interpretation and application of the so-called '*Sidumo*' test for review. A further aim of this paper is to determine whether the SCA in *Herholdt* has finally settled these debates.

1.4. RESEARCH METHODOLOGY

The methodology that this research employed is desktop research. Primary and secondary sources of law such as journal articles, case law, textbooks, and legislation were used to analyse as comprehensively as possible the review of arbitration proceedings conducted under the LRA.

CHAPTER TWO

REVIEWS AND APPEALS DISTINGUISHED

2.1 INTRODUCTION

The question that often arises is whether a party wishing to have the judgment of a lower court set aside should proceed by way of appeal or review. The grounds of complaint will determine which procedure a party should follow. When conducting an appeal, the court is obliged to consider the merits of the matter before it and determine whether the decision of the lower court was correct.¹² When hearing a review the court may not entertain the merits of the decision, but is instead required to determine whether the manner in which the arbitrator conducted the proceedings was appropriate.¹³ Since the statutory grounds of review have become suffused by the constitutional standard of reasonableness, it would seem that the distinction between appeals and reviews have become blurred because they now have to examine both the manner in which the decision was reached and the merits of the matter (the decision itself must be reasonable). However, the Labour Courts have also stressed the importance of maintaining the distinction.

2.2 GENERAL DISTINCTION

At the most general level the distinction between review and appeal may be explained as follows: An appeal court considers the material that was before the court of first instance to reach its own conclusion on that evidence and material; a review focuses on the decision making process (how the relevant decisions were arrived at). Wade and Forsyth¹⁴ described the difference as follows:

“The system of judicial review is radically different from the system of appeals when hearing an appeal the court is concerned with the merits of the decision under appeal. When subjecting some administrative act or order to judicial review, the court is concerned with its legality. On an appeal the question is ‘right or wrong’? On review the question is ‘lawful or unlawful’?”¹⁵

¹² E Fergus ‘The Distinction Between Appeals and Reviews- Defining the Limits of the Labour Courts Power of Review’ (2010) 31 *ILJ* 1556 at 1557.

¹³ *Ibid.*

¹⁴ W Wade & C Forsyth *Administrative Law* 7 ed (1994).

¹⁵ At 38.

In *Johannesburg Consolidated Investment Co v Johannesburg Town Council*¹⁶ the court stated the following:

“The procedure for review differs in several respects from the procedure by way of appeal, for example, an appellant comes into court upon a record of the case in the court below, and by that record he is bound; he cannot take advantage of any circumstances which does not appear upon or cannot be deducted from the record. On the other hand, the litigant who seeks to have a case reviewed depends upon irregularities which need not necessarily appear upon the face of the record. If they do not so appear, he is at liberty by affidavit to bring the facts upon which he relies to the notice of the Supreme Court. He is not bound by the record in the way in which an appellant is.”¹⁷

The court went on to describe a review as “the process by which the proceedings of inferior courts of justice, both civil and criminal are brought before this court in respect of grave irregularities or illegalities occurring during the course of such proceedings.”¹⁸

The court identified three types of review, namely:

“Firstly, review by summons being review of proceedings of inferior courts (civil or criminal) in respect of grave irregularities or illegalities occurring during the course of such proceedings; secondly, review by motion being review of the performance of statutory duties imposed on a public body; and thirdly a wider power specially given under particular statutes enabling the review court to exercise the powers of a court of appeal or review or even of a court of first instance.”¹⁹

In *R v Bates & Reidy*²⁰ the court said the following about the distinction between appeal and review:

“The difference between an appeal and a review is that an appeal is based upon the matter contained in the record, while in review the appellant may travel beyond the record in order to rely on certain grounds, such as gross irregularity and the admission of incompetent

¹⁶ 1903 TS 111.

¹⁷ At 114-115.

¹⁸ At 114.

¹⁹ At 111-112.

²⁰ 1902 TS 119

evidence if the appellant desires to appeal, but is not satisfied with the record as it stands he may proceed to apply for leave to amend it.”²¹

In *Tikly & others v Johannesburg NO & others*²² the court held as follows:

“The word ‘appeal’ can have different connotations. In so far as is relevant to these proceedings it may mean: i) an appeal in the wide sense, that is, a complete re-hearing of, and fresh determination on the merits of the matter with or without additional evidence or information; ii) an appeal in the ordinary strict sense, that is, a re-hearing on the merits but limited to the evidence or information on which the decision under appeal was given, and in which the only determination is whether the decision was right or wrong; iii) a review, that is, a limited re-hearing with or without additional evidence or information to determine, not whether the decision under appeal was correct or not, but whether the arbitrators had exercised their powers and discretion honestly and properly.”²³

2.3 DISTINCTION IN TERMS OF THE LRA

Where a party alleges a defect in any arbitration proceedings under the auspices of the commission they may apply to the Labour Court for an order setting aside the arbitration award.²⁴ The legislature has determined that there shall be no appeal from the decision of an arbitrator.

In *Coetzee v Lebea NO & others*²⁵ the court held as follows:

“The fact that a reviewing court may have come to a different result if the matter had been brought on appeal can never be on its own, a basis for attacking the process of reasoning. If it did then the distinction between appeal and review would be obliterated. And whatever effect Constitutional entrenchment of the right to administrative justice may have on our common law, it does not mandate a distinction between these two remedies. What then distinguishes the two remedies when it comes to applying them to the reasoning process employed by a tribunal? The seeds of the distinction lie in the phrase so commonly used to describe a process failure in the reasoning phase of a tribunal’s proceedings - ‘the failure to apply one’s mind’. That test is different from the one that applies to an appeal – namely, whether another court could come to a different conclusion. Accordingly, once a reviewing court is satisfied that the tribunal has applied its mind, it will not interfere with the result even if it would have come to a different conclusion. The best demonstration of applying

²¹ At 200.

²² 1963 (2) SA 588 (T).

²³ At 590F-G.

²⁴ Section 145(1) of the LRA.

²⁵ (1999) 20 ILJ 129 (LC).

one's mind is whether the outcome can be sustained by the facts found and the law applied. The emphasis is on the range of reasonable outcomes not on the correct one."²⁶

2.3.1 Review

a) Procedure

Applications for review must be filed within six weeks of the date that the award was served on the applicant.²⁷ If the ground of review is some form of corruption it must be filed within six weeks of the date on which the applicant learned of it.²⁸ The Labour Court may on good cause shown condone the late filing of a review application.²⁹ In terms of rule 7A of the Labour Court Rules review applications must be brought on notice of motion, supported by affidavit, and the person or body responsible for the decision under review must be called upon to supply the record of the proceedings.

b) Nature

In *Lekota v First National Bank of SA Ltd*³⁰ the court stated the law in regard to the review of arbitration awards as follows:

“It is not the function of the reviewing court when reviewing an arbitration award in terms of section 145 of the Act to decide whether the commissioner acted correctly or (from the applicant's point of view) whether the decision by the commissioner was wrong. The defects that have to be shown in terms of section 145(2) of the Act (discussed above) is that either the commissioner (1) committed misconduct in relation to the duties of the commissioner as an arbitrator (this clearly would require a *mala fide* act on the part of the commissioner); (2) committed a gross irregularity in the conduct of the arbitration proceedings (this clearly has to do with the conduct of the arbitration proceedings in terms of which a gross irregularity occurs); and (3) that the commissioner exceeded his or her powers.”³¹

²⁶ At 133C-F.

²⁷ Section 145(1)(a) of the Labour Relations Act 66 of 1995.

²⁸ Section 145(1)(b) of the Labour Relations Act 66 of 1995.

²⁹ Section 145(1A) of the Labour Relations Act 66 of 1995.

³⁰ (1998) 10 BLLR 1021 (LC).

³¹ At para 16.

In addition, as indicated earlier on, the Constitutional Court in *Sidumo* held that the requirement of reasonableness must be suffused into the statutory review grounds, thereby adding a further ground of review to the statutory grounds of review.

c) Legal effect

If a reviewing court finds an award reviewable, the court must send the matter back to the CCMA to be heard by the same commissioner or a different commissioner. However there are circumstances where a reviewing court may substitute its own decision for that of an inferior court or tribunal. Ellis and Dendy³² describe these as follows:

“This (the notion that a court may set aside a decision but not replace it with its own) is not a hard and fast rule, and in certain instances the court may exercise administrative functions by imposing its own decision. It is essentially a question of fairness to both sides. This, where the court’s finding that an act or decision is invalid will result in the tribunal choosing the other alternative if it is referred back, the court will do so, as referral back will serve no purpose. Again, where all aspects of a matter have been fully canvassed and referring the matter back will prejudice the parties, the court will refrain from doing so. A court will also refrain from referring a matter back where the official or tribunal has been shown to have acted mala fides or with fraudulent or improper motives.”³³

2.3.2 Appeal

a) Procedure

Application for leave to appeal against any final judgment or final order of the Labour Court must be filed with the Labour Court.³⁴ In terms of rule 5 of the Labour Appeal Court Rules a notice of appeal must be filed and served within 15 days after leave to appeal has been granted, or condonation must be sought, and the order granting leave to appeal must accompany the notice.

³² I Ellis & M Dendy ‘Civil Procedure: High Court’ in W.A. Joubert (ed) *The Law of South Africa Vol 3 Part 1 2 ed* (2007).

³³ At para 403.

³⁴ Section 166(1) of the Labour Relations Act 66 of 1995.

b) Nature

Appeals are concerned with the correctness of a result and not the procedure with which the result was reached. In *Coates Brothers Ltd v Shanker & others*³⁵ the court set out the test for when the exercise of a discretion by a court may be interfered with on appeal as follows:

“An appellant must show, in an appeal from a decision in a lower court, that the court *a quo* ‘acted capriciously, or acted upon a wrong principle, or in a biased manner, or for insubstantial reasons, or committed a misdirection or an irregularity, or exercised its discretion improperly or unfairly.’”³⁶

c) Legal effect

The appellate court may uphold, or dismiss, or refer the matter back for rehearing.

2.4 DISTINCTION BETWEEN APPEAL AND REVIEW BLURRED?

The courts have repeatedly warned that testing the reasoning process of the arbitrator does not mean a complete blurring of the distinction between review and appeal. The court in *Mosima v SA Police Service & others*³⁷ held as follows:

“The test to apply in considering whether the grounds of review set out by an applicant warrant interfering with the commissioner’s arbitration award, is that of a reasonable decision maker as confirmed by the Constitutional Court in *Sidumo & another v Rustenburg Platinum Mines Ltd & others*. The test to apply is whether the decision reached by the commissioner is one which a reasonable decision maker could not reach. In applying this test the court has been cautioned to guard against blurring the line between a review and an appeal. The test for appeal is that of determining the correctness of the decision maker whereas in a review the test is that of determining the reasonableness of the decision or whether the arbitration award suffers from any of the defects set out in s 145 of the LRA. Thus the difference between an appeal and a review lies in the distinction between the concepts of reasonableness and correctness.”³⁸

³⁵ (2003) 24 ILJ 2284 (LAC).

³⁶ At 5.

³⁷ (2012) 33 ILJ 1225 (LC).

³⁸ At para 17.

The Court in *Shoprite Checkers (Pty) Ltd v CCMA & others*³⁹ held as follows:

“There may well be a fine line between a review and an appeal, particularly where — as here — the standard of review almost inevitably involves a consideration of the merits. However, whilst at times it may be difficult to draw the line, the distinction must not be blurred. The drafters of the LRA were clearly alive to the distinction. They accordingly sought to introduce a cheap, accessible, quick and informal alternative dispute resolution process. In doing so, appeals were specifically excluded.”⁴⁰

It went on to cite the Explanatory Memorandum⁴¹ as follows:

“In 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, whose benefits over court adjudication have been shown in a number of international studies. The absence of an appeal from the arbitrator’s award speeds up the process and frees it from the legalism that accompanies appeal proceedings. It is tempting to provide for appeals because dismissal is a very serious matter, particularly given the lack of prospects of alternative employment in the present economic climate. However, this temptation must be resisted as appeals lead to records, lengthy proceedings, lawyers, legalism, inordinate delays and high costs. Appeals have a negative impact on reinstatement as a remedy, they undermine the basic purpose of the legislation and they make the system too expensive for individuals and small business. Without reinstatement as a primary remedy, the draft Bill’s prohibition of strikes in support of dismissal disputes loses its legitimacy.

Prior to the establishment of the present LAC, it was argued that an appeal structure would provide the consistency required to develop coherent guidelines on what constitutes acceptable industrial relations practice. This has not been the case. The LAC’s judgments lack consistency and have had little impact in ensuring consistency in judgments of the industrial court. The draft Bill now regulates unfair dismissal in express and detailed terms and provides a Code of Good Practice to be taken into account by adjudicators. This will go a long way towards generating a consistent jurisprudence concerning unfair dismissal despite the absence of appeals.”

The distinction between appeals and reviews has been criticized for not portraying what the courts really do on review. It has been contented that judges are often influenced by the merits of a matter when deciding whether or not to review and set aside arbitration awards.⁴²

“The distinction between review and appeal has become even more blurred since the enactment of the 1993 Constitution and of PAJA. For as long as the distinction remains the

³⁹(2009) 7 BLLR 619 (SCA).

⁴⁰At para 28.

⁴¹(1995) 16 ILJ 278 at 318.

⁴²H Cheadle, D Davis & N Hayson ‘South African Constitutional Law: The Bill of Rights’ in I Curie & J De Waal (contributing eds) (2003) 27.

sole or most important factor in determining the scope of inference by a court with administrative decisions; a judge wishing to interfere with a decision s/he does not agree with, could use this artificial distinction as a front, hiding his or her true reasons for interference. Whether a standard of correctness or a more deferential standard is appropriate is one that can only be determined with reference to the context of the specific case, not with reference to the distinction between appeal and review.”⁴³

In *Carephone (Pty) Ltd v Marcus No & others*⁴⁴ the court held that suffusing the review grounds by the then constitutional standard of justifiability was not an attempt to blur the distinction between review and appeal. It held as follows:

“But it would be wrong to read into this section an attempt to abolish the distinction between review and appeal. According to the *New Short Oxford English Dictionary* ‘justifiable’ means ‘able to be legally or morally justified, able to be shown to be just, reasonable, or correct; defensible.’ It does not mean ‘just’, ‘justified’ or ‘correct’. On its plain meaning the use of the word ‘justifiable’ does not ask for the obliteration of the difference between review and appeal. Neither does the LRA itself: it makes a very clear distinction between reviews and appeals.”⁴⁵

“When the Constitution requires administrative action to be justifiable in relation to the reasons given for it, it thus seeks to give expression to the fundamental values of accountability, responsiveness and openness. It does not purport to give courts the power to perform the administrative function themselves, which would be the effect if justifiability in the review process is equated to justness or correctness.”⁴⁶

Hoexter⁴⁷ acknowledges, within the context of administrative law, that the distinction between appeals and reviews is threatened by the examination of the merits but submits that:

“It is, in fact, quite impossible to judge whether a decision is within the limits of reason or ‘defensible’ without looking closely at matters such as the information before the administrator the weight given to various factors and the purpose sought to be achieved by the decision. Only cases decided on the narrowest and most technical of grounds will not entail such scrutiny.”⁴⁸

⁴³ J R de Ville *Judicial Review of Administrative Action in South Africa* 2 ed (2005) 30.

⁴⁴ (1998) 11 BLLR 1093 (LAC).

⁴⁵ At para 32.

⁴⁶ At para 35.

⁴⁷ C Hoexter *Administrative law* 2 ed (2007).

⁴⁸ At 317.

The courts have also accepted that a scrutiny of the merits when deciding whether or not to exercise their power to review is unavoidable. This was justified by the court in *Carephone* as follows:

“In determining whether administrative action is justifiable in terms of the reasons given for it, value judgments will have to be made which will, almost inevitably, involve the consideration of the ‘merits’ of the matter in some way or another. As long as the judge determining this issue is aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order.”⁴⁹

Since the decision of the LAC in *Carephone* and the Constitutional Court’s subsequent decision in *Sidumo* the Labour Courts have emphasized the importance of maintaining the distinction between appeals and reviews, when undertaking review proceedings in accordance with section 145 of the LRA.⁵⁰ In *Sidumo* the court noted that the distinction between appeals and reviews may be easily blurred and that it is important for the courts to maintain this distinction when undertaking review proceedings in accordance with section 145 of the LRA.⁵¹

The LAC’s judgment in *Herholdt* contains an *obiter dictum* in which the court questions the utility of reviews. The LAC quoting from the Explanatory Memorandum held that reviews, just like appeals, lead to records, lengthy proceedings, lawyers, legalism, inordinate delays and high costs.⁵² The court held as follows in this regard:

“Besides, I imagine, few decisions that are wrong are likely to be upheld as reasonable. Leaving aside the moral hazard of a message to commissioners that there is no need for them to get their decisions right, it being enough if they act reasonably, commissioners who get it wrong on the facts will usually commit the concomitant irregularity of not taking full or proper account of material evidence, and where they err on the law, they will fall short in not having properly applied their minds to the issues and thereby have denied the parties a fair trial. The inexorable truth is that wrong decisions are rarely reasonable. If that is true, the hypothetical reward from limiting intervention to a reasonableness or rationality review is dubious.”⁵³

⁴⁹ At para 36.

⁵⁰ E Fergus *Supra* at 1556.

⁵¹ At paras 109 and 244.

⁵² At para 53.

⁵³ At para 55.

The LAC proposed that the legislature intervene:

“I would therefore tentatively venture that the time has come for social partners and the legislature to think again. Justice for all concerned might be better served were the relief against wards to take the form of an appeal rather than a review. The protection granted by a narrower basis for intervention is, in all likelihood, fanciful – a chimera.”⁵⁴

2.5. CONCLUSION

In this chapter a discussion of the general distinction between an appeal and a review was undertaken. While appeals are limited to the record, in review proceedings new evidence may be introduced. In an appeal the judgment of the lower court is suspended unless the court orders otherwise whereas in a review the reviewing court does not suspend the operation of the award unless the court orders otherwise. The courts have acknowledged that the distinction between appeals and reviews is difficult to maintain but have also emphasized the importance of maintaining the distinction. The LAC and the Constitutional Court emphasized that reviews will involve the consideration of the ‘merits’ of the matter in some way or another. As long as the judge determining this issue is aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof, but to determine the reasonableness of the award and whether a gross irregularity occurred in the conduct of the proceedings.

⁵⁴ At para 56.

CHAPTER THREE

THE GROUNDS OF REVIEW IN TERMS OF SECTION 145 OF THE LRA

3.1. INTRODUCTION

The review of arbitration awards issued under the auspices of the CCMA and bargaining councils are governed by section 145 of the LRA. The Labour Court may set aside arbitration awards issued under the auspices of the CCMA and bargaining councils if it is satisfied that there was a defect in the arbitration proceedings.⁵⁵ In terms of section 145, a defect means that:

- a) the commissioner committed misconduct in relation to the duties of the commissioner as an arbitrator; or
- b) the commissioner committed a gross irregularity in the conduct of the arbitration proceedings; or
- c) the commissioner exceeded the commissioner's powers; or
- d) the award was improperly obtained.⁵⁶

The court in *Sidumo* held that the requirement of reasonableness must be suffused into the statutory grounds of review. The court reiterated that section 145 must be interpreted in compliance with the Constitution.⁵⁷ It ruled that section 145 must be read to ensure that administrative action by the CCMA is lawful, reasonable and procedurally fair.⁵⁸ The court ruled that the constitutional standard of reasonableness must be taken to have suffused the grounds set out in section 145 if that provision is to be constitutionally compliant.⁵⁹ According to this decision awards will be reviewable if they do not meet the constitutional standard of reasonableness. The requirement of reasonableness, including the debates surrounding this requirement, is discussed in detail in chapter five.

⁵⁵ Section 145(1) of the Labour Relations Act.

⁵⁶ Section 145(1) and (b) of the Labour relations Act

⁵⁷ At para 105.

⁵⁸ At para 105.

⁵⁹ At para 105.

3.2. MISCONDUCT

Arbitrators are required to conduct themselves with propriety when conducting arbitration proceedings. Failure to do so may constitute misconduct. For there to be misconduct, it has been held that there must be some unlawful or improper conduct on the part of the decision maker.⁶⁰ Some personal turpitude is required.⁶¹ Misconduct may include serious errors of law as well as errors of fact.⁶² The ordinary meaning of misconduct will not embrace a bona fide mistake of law or fact.⁶³ The leading case dealing with the meaning of misconduct is *Stocks Civil Engineering (Pty) Ltd v Rip No & another*.⁶⁴ The court in this case held as follows:

“A court is entitled on review to determine whether an arbitrator in fact functioned as arbitrator in the way that he upon his appointment impliedly undertook to do, namely by acting honestly, duly considering all the evidence before him and having due regard to the applicable legal principles. If he does this, but reaches the wrong conclusion, so be it. But if he does not and shirks his task, he does not function as an arbitrator and reneges on the agreement under which he was appointed. His award will then be tainted and reviewable. It is equally explicit in the agreement under which an arbitrator is appointed that he is fully cognisant with the extent of a limit to any discretion or powers he may have. If he is not and such ignorance impacts upon his award, he has not functioned properly and his award will be reviewable. An error of law or fact may be evidence of the above in given circumstances, but may in others merely be part of the incorrect reasoning leading to an incorrect result. In short, material malfunctioning is reviewable, a wrong result per se not (unless it evidences malfunctioning). If the malfunctioning is in relation to his duties, that would be misconduct by the arbitrator as it would be a breach of the implied terms of his appointment.”⁶⁵

It has been held that a mistake on a point of law in relation to the merits of the case will not amount to misconduct. In *Abdull & another v Cloete NO & others*⁶⁶ the court held a gross mistake of law or fact is not misconduct but may be indicative of misconduct.

“Gross mistake could be construed as evidence of misconduct in the sense that it may have been so manifest that it indicated misconduct on the part of the arbitrator. In order to

⁶⁰ *Dickinson & Brown v Fisher's Executors* 1915 AD 166 at 176.

⁶¹ *Ibid.*

⁶² *Sampson Associates (Pty) Ltd t/a Interbrand Sampson v Cities Shepherd & others* (2010) 7 BLLR 746 (LC) at para 41.

⁶³ *Reunert Industries (Pty) Ltd t/a Reutech Defence Industries v Naicker & others* (1997) 12 BLLR 1632 (LC) at 1635.

⁶⁴ (2002) 3 BLLR 189 (LAC).

⁶⁵ At para 52.

⁶⁶ (1998) 19 ILJ 799 (LC).

amount to misconduct in this sense the mistake must have been so gross that it resulted in the aggrieved party not having its case fully and fairly determined.”⁶⁷

The Labour Courts have held that a commissioner will be guilty of misconduct if he fails to apply his mind to the issues before him. In *Abdull*⁶⁸ the court held as follows in this regard:

“As far as misconduct is concerned, it is at least arguable that an arbitrator will make himself guilty of misconduct in relation to his duties as an arbitrator if he fails to apply his mind responsibly and fairly to the issues before him. An arbitrator that acts in this fashion is not conducting himself in accordance with the requirements of the LRA which enjoins the arbitrator to give due consideration to the issues before him, to apply his mind thereto and to come to a reasoned conclusion.”⁶⁹

A similar approach was adopted in *Carter v CCMA & others*⁷⁰, in which the court held as follows:

“The commissioner clearly failed to apply her mind properly to the material issue of the possible alternative meanings of the contentious words under consideration. This prevented her from making a balanced evaluation of the applicant’s prospects of success. In the circumstances, the commissioner’s failure was such that the applicant was denied a fair hearing which constituted misconduct in the performance of her duties as an arbitrator.”⁷¹

Misconduct includes bias. The test for bias is the existence of a reasonable apprehension.⁷² A few examples where CCMA commissioners conduct have been held to constitute misconduct must suffice. In *County Fair Foods (Pty) Ltd v Theron NO & others*⁷³ where a commissioner had questioned two of the employer’s witnesses in a manner that essentially amounted to cross examination, the court held the commissioner’s conduct had given rise to a reasonable apprehension of bias. It has been held that a commissioner who adopts an inconsistent procedure during the proceedings commits reviewable misconduct if it can be shown that such inconsistent

⁶⁷ At para 14.

⁶⁸ *Supra*.

⁶⁹ At para 12.

⁷⁰ (2010) 31 ILJ 2876.

⁷¹ At para 38.

⁷² *BTR Industries Supra*.

⁷³ (2001) 2 BLLR 134 (LC).

procedure was prejudicial to one party.⁷⁴ Misconstruction of evidence has been held to constitute misconduct on the part of the commissioner.⁷⁵

3.3 GROSS IRREGULARITIES IN THE PROCEEDINGS

It is important to reiterate that the defect relating to ‘a gross irregularity in the conduct of the arbitration proceedings’ generated discordant judgements and that this debate was examined in a recent decision of the SCA in *Herholdt*. Considering its importance for judicial and jurisprudence certainty, the SCA judgment, and its implications for the review ground relating to ‘a gross irregularity in the conduct of the arbitration proceedings’ has been discussed in detail in a separate chapter, headed ‘the *Herholdt* decision’.

“An irregularity in proceedings refers to the method of the trial, such as, for example, some highhanded or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined.”⁷⁶ Unlike misconduct bona fide decisions may be grossly irregular.⁷⁷ But if the gross irregularity was committed maliciously it would probably constitute misconduct.⁷⁸ Not every irregularity will amount to a defect. In order to amount to a defect the irregularity must be a gross one and therefore must be material.⁷⁹ *Ellerine Holdings Ltd v CCMA & others*⁸⁰ provides an example. In this case it was held that judgment calls are a process of decision making, and they do not constitute gross irregularities.⁸¹ “When all of the evidence is taken into account, when there is no irregularity of a material kind in that evidence was ignored, or improperly rejected, or where there was not a full opportunity for an examination of all aspects of the case, then there is no gross irregularity.”⁸²

⁷⁴ *Mthembu v Mahomed Attorneys v CCMA* (1998) 2 BLLR 150 (LC).

⁷⁵ *Sampson Supra at para 41.*

⁷⁶ *Ellis v Morgan* 1909 TS at 581.

⁷⁷ *Reunert Supra at 1636.*

⁷⁸ *Ibid.*

⁷⁹ *Reunert Supra at 1636.*

⁸⁰ (2008) 29 ILJ 2899.

⁸¹ At 2906B – C.

⁸² At 2906 E – F.

The phrase ‘a gross irregularity in the conduct of the arbitration proceedings’ has been held to refer to two types of irregularities. The first are procedural irregularities which relate to how the arbitrator conducted the proceedings. The second are latent irregularities which relate to the failure of proper reasoning by the commissioner. In *Toyota South Africa Motors (Pty) Ltd v Radebe & others*⁸³ the court referred to the case of *Goldfields Investments Ltd & another v City of Johannesburg and another*⁸⁴ which stated the following about gross irregularities:

“It seems to me that gross irregularities fall broadly into two classes, those that take place openly, as part of the conduct of the trial – they might be called patent irregularities – and those that take place inside the mind of the judicial officer, which are only ascertainable from the reasons given by him and which might be called latent. Neither in the case of latent nor in the case of patent irregularities need there be any intentional arbitrariness of conduct or any conscious denial of justice. The crucial question is whether it prevented a fair trial of the issue. If it did prevent a fair trial of the issues then it will amount to a gross irregularity. In matters relating to the merits the magistrate may err by taking a wrong one of several possible views or he may err by mistaking or misunderstanding the point in issue. In the latter case it may be said that he is in a sense failing to address his mind to the true point to be decided and therefore failing to afford the parties a fair trial. But that is not necessarily the case. Where the point relates only to the merits of the case, it would be straining the language to describe it as a gross irregularity or a denial of a fair trial. One would say that the magistrate has decided the case fairly but has gone wrong on the law. But if the mistake leads to the court’s not merely missing or misunderstanding a point of law on the merits, but to its misconceiving the whole nature of the enquiry, or of its duties in connection therewith, then it is in accordance with the ordinary use of the language to say that the losing party has not had a fair trial.”

3.3.1 Procedural irregularities

As stated earlier on, procedural irregularities generally relate to how an arbitrator conducted the proceedings (the procedures used). They are ‘patent’ irregularities which appear from the record. Procedural irregularities may be illustrated by many examples from case law. In *Minister of Safety & Security v De Vos & others*⁸⁵ the court held that the failure of the commissioner to join a party with an interest in the matter amounted to a gross irregularity in the conduct of the arbitration proceedings. In *SA Clothing Services Ltd v Steel Mining & Commercial Workers Union & others*⁸⁶ a dispute over the dismissal of an employee was referred to the CCMA, a CCMA commissioner ruled that the employee did not wish to testify and that there was no need for her to do so because he had already testified on her behalf. The court held that that the LRA

⁸³ (2000) 3 BLLR 243 (LAC) at para 41.

⁸⁴ 1938 TPD 551 at 56.

⁸⁵ (2008) 29 ILJ 688 (CC).

⁸⁶ (2000) 9 BLLR 1106 (LC).

permits an employee to be represented at arbitration proceedings does not mean that a representative can give evidence on her behalf in respect of matters on which the representative is not competent to testify. The commissioner's conduct was held to amount to a gross irregularity in the conduct of the arbitration proceedings.

In *Scholts v Maseko NO & others*⁸⁷ a commissioner had failed to inform an employee that he had a discretion to allow her legal representation in terms of section 140 of the LRA. The court found that there was a duty on the commissioner, in fairness, to advise the parties of the provisions of section 140(1) so that the factors mentioned there may be properly addressed by the parties. This was held to constitute an irregularity and the award was reviewed and set aside. In *University of the North v Mthombeni*⁸⁸ it was contended that a commissioner had refused the university the opportunity to testify and to call witnesses in support of its case. The court referred to *Pep Stores v Adv Laka*⁸⁹ where it was held that within the context of the LRA conduct is reviewable if it can be shown that it resulted in a failure of justice. The court concluded that the commissioner's conduct had led to injustice and his award was reviewable. In *Topics (Pty) Ltd v CCMA & others*⁹⁰ a commissioner had attempted to force parties to conciliate without the employer's consent. The court held that the commissioner's conduct amounted to a reviewable irregularity.

In *Leboho v CCMA & others*⁹¹ it was contended that the arbitrator had based his decision on hearsay evidence. Secondly, that the arbitrator had committed a gross irregularity when, the hearing having been concluded with closing argument on 26 November 2003, he re-opened it and *mero motu* called further witnesses on the 26 January 2004. It was also contended that this also showed bias on the part of the arbitrator. The court held that a presiding officer has no power to *mero motu* to call witnesses. He can only do so with the consent of the litigants. The court found that the arbitrator had committed a gross irregularity in re-opening the hearing and

⁸⁷ (2000) 21 ILJ 1854 (LC).

⁸⁸ J630/97 (1998) ZALC 33 (18 June).

⁸⁹ Unreported J1011/99.

⁹⁰ (1998) 10 BLLR 1071 (LC).

⁹¹ (JR689/2004) (2005) ZALC 65 (14 April).

calling and re-calling witnesses without the consent of the parties. In *C/K Alliance (Pty) Ltd t/a Greenland v Mosala No & others*⁹², the commissioner allowed a material witness to remain in the hearing and then barred her from testifying because she had done so. The absence of the witness's testimony affected the outcome. The court stated that arbitrators must warn parties if they intend to apply the rule and, in any event, witnesses are not precluded from testifying merely because they have heard earlier testimony, especially if they are called to testify on aspects not dealt with earlier. The award was reviewed and set aside.

In *Mutual & federal Insurance Co Ltd v CCMA & others*⁹³ a commissioner's failure to afford the parties an opportunity to present closing arguments was held to constitute a reviewable irregularity. In *Afrox Ltd v Laka & others*⁹⁴ the commissioner's refusal to admit minutes of disciplinary and appeal hearings on the grounds that they were not material was held to constitute a reviewable irregularity. In *Legal Aid Board v John NO & another*,⁹⁵ the failure by a commissioner to allow a party to lead relevant evidence constituted a reviewable irregularity. In *B & D Mines (Pty) Ltd v Sebothe No & another*⁹⁶ the arbitrator's ruling that questions can only be put to witnesses through their representative or the arbitrator was held to have undermined the rules of cross-examination and had therefore amounted to a gross irregularity. A commissioner's conduct was held to constitute a gross irregularity where she placed the onus of establishing fairness of dismissal on the employee rather than the employer.⁹⁷

3.3.2 Latent irregularities

As indicated earlier on latent irregularities generally refer to the reasoning process: errors in the manner in which the decision-maker applied his or her mind. In the recent decision of the SCA of *Herholdt* the court held a result will only be unreasonable if it were one that a reasonable arbitrator could not reach on the material facts before him or her. "Material errors of fact, as well

⁹²(2009) 1 BLLR 52 (LC).

⁹³(1997) 12 BLLR 1810 (LC).

⁹⁴(1999) 20 ILJ 1732 (LC).

⁹⁵(1998) 19 ILJ 851.

⁹⁶(1998) 6 BLLR 573 (LC).

⁹⁷*Jafta v CCMA & others* (2006) 27 ILJ 2368 (LC).

as the weight and relevance to be attached to particular facts, were not by themselves sufficient for an award to be set aside, but were only of any consequence if their effect were to render the outcome unreasonable.”⁹⁸ A 'latent irregularity' would thus be a ground for review only if the arbitrator had undertaken the wrong enquiry or undertaken it in the wrong manner.⁹⁹ Latent irregularities may be classified into three categories. These are errors of fact, errors of law, and errors of logic.

The development of the notion of latent irregularities as assumed by the Labour Courts is discussed below.

a) Errors of fact

Errors of fact, as illustrated by the case law below, often arise from failure to apply and have regard to relevant evidence; incorrect interpretations of evidence; erroneous conclusions drawn from evidence; being influenced by irrelevant evidence; findings not supported by evidence.

In *Sasol Mining (Pty) Ltd v Commissioner Ngqeleni & others*¹⁰⁰ the commissioner had failed to assess the credibility and reliability of the witnesses and failed to consider the probability and improbability of each party's version. The court, referring to Anton Myburgh¹⁰¹, held that if the applicant could show that had the commissioner reasoned correctly he would have arrived at a different conclusion the award would be reviewable due to irregularity.¹⁰² The court found that the award may have differed if not for the failure. In setting aside the award the court held as follows:

“Regrettably, the commissioner’s logic (or, more accurately, the lack of it) permeates many of the awards that are the subject of review proceedings in this court. Some commissioners appear wholly incapable of dealing with disputes of fact – their awards comprise an often detailed summary of the evidence, followed by an “analysis” that is little more than a truncated regurgitation of that summary accompanied by a few gratuitous remarks on the

⁹⁸ At para 25.

⁹⁹ At para 21.

¹⁰⁰ (2011) 4 BLLR 404 (LC).

¹⁰¹ A Myburgh ‘Determining and Reviewing Sanction after Sidumo’ (2010) 31 *ILJ* 1 at 16.

¹⁰² At para 11.

evidence, followed by a conclusion that bears no logical or legal relationship to what precedes it. What is missing from these awards (the award under review in these proceedings is one of them) are the essential ingredients of an assessment of the credibility of the witnesses, a consideration of the inherent probability or improbability of the version that is proffered by the witnesses, and an assessment of the probabilities of the irreconcilable versions before the commissioner.”¹⁰³

Arbitration proceedings which have been vitiated by errors of fact include the following:

An award was set aside because the commissioner failed to apply the cautionary rule to the evidence of a single witness, or to draw adverse inference from the party’s failure to call material witnesses.¹⁰⁴ A commissioner’s finding that the employee’s dishonesty arose from depression, where there had been no evidence regarding the employee’s psychological state before the commissioner was held to constitute a reviewable irregularity.¹⁰⁵ The Labour Courts have set aside awards where the commissioner reinstated an employee for a dismissal found to be only procedurally unfair,¹⁰⁶ where the commissioner based his finding solely on record of disciplinary hearing without admitting it as evidence,¹⁰⁷ where the commissioner found in favour of an employee on the basis of a disputed fact in respect of which she did not testify,¹⁰⁸ where the findings of the commissioner were not supported by the evidence before her the award was held to constitute a gross irregularity,¹⁰⁹ and where the commissioner framed the issue as one relating to item 2(1)(b) of schedule 7 of the LRA when the issue was clearly a dispute under item 2(1)(a).¹¹⁰ An award was also set aside where the commissioner’s conclusions were not justifiable in light of the evidence before her.¹¹¹

¹⁰³ At para 7.

¹⁰⁴ *Blue Ribbon Bakeries v Naicker & others* (2000) 12 BLLR 1411 (LC).

¹⁰⁵ *CSO Valuation (Pty) Ltd v CCMA & others* (1998) 12 BLLR 1271 (LC).

¹⁰⁶ *Malelane Toyota v CCMA* (1999) 6 BLLR 555 (LC).

¹⁰⁷ *DB Thermal (Pty) Ltd v CCMA & others* (2000) 10 BLLR 1163 (LC).

¹⁰⁸ *SA Cleaning Services* Supra.

¹⁰⁹ *Vita Foam SA (Pty) Ltd v CCMA & others* (2000) 21 ILJ 244.

¹¹⁰ *Sasko (Pty) Ltd v Buthelezi & others* (1997) 18 ILJ 1399 (LC).

¹¹¹ *Universal Product Network (Pty) Ltd v CCMA & others* (2004) 25 ILJ 1496 (LC).

b) Errors of law

The courts have held that statutory arbitrators are obliged to follow the judgments of the Labour Court and LAC.¹¹² In *Le Roux v CCMA & others*¹¹³ an arbitrator who had departed from the terms of the judgment of the LAC was held to have committed a gross irregularity in the conduct of the arbitration proceedings. Commissioners are obliged to apply the LRA correctly.¹¹⁴ In *Mzeku & others v Volkswagen SA (Pty) Ltd & others*¹¹⁵ the court found a commissioner who had reinstated employees whose dismissals were only procedurally unfair to have committed an error of law. In *Miladys, a division of Mr Price Group Ltd v Naidoo & others*¹¹⁶ the commissioner had incorrectly found that the employee's resignation constituted a constructive dismissal. The court held that the commissioner did not apply his mind seriously to the issues at hand and reason his way to the conclusion.¹¹⁷ The court held that award was so flawed that there had not been a fair trial of the issues.¹¹⁸ In *Transnet Limited v CCMA & others*¹¹⁹ the court held a commissioner who had incorrectly found a dispute relating to training arbitrable to have committed an error of law. In *City of Cape Town v SAMWU obo Jacobs & others*¹²⁰ the arbitrator's misconception of the law relating to the propriety of holding a second disciplinary enquiry was found to constitute a gross irregularity. An error of law has been held to render an award reviewable only if it can be attributed to one of the statutory grounds for review.¹²¹

In *Mahlamu v CCMA & others*¹²² the commissioner had accepted the validity of automatic termination clauses in employment contracts which stated that the employer could automatically terminate the employee's services where the client no longer required the employee's services for whatever reason. On review the court held as follows:

¹¹² *Le Roux v CCMA & others* (2000) 21 ILJ 1366 (LC).

¹¹³ *Ibid.*

¹¹⁴ J Grogan *Labour Litigation And Dispute Resolution* ed (2010) 294.

¹¹⁵ (2001) 22 ILJ 1575 (LAC).

¹¹⁶ (2002) 23 ILJ 1234 (LAC).

¹¹⁷ At para 31.

¹¹⁸ At para 33.

¹¹⁹ (2001) 6 BLLR 684 (LC).

¹²⁰ (2009) 9 BLLR 882 (LAC).

¹²¹ *Stocks Civil Engineering Supra* at para 52.

¹²² (2011) ILJ 1122 (CC).

“In the present instance, the upshot of the commissioner’s award is that the applicant’s security of employment was entirely dependent on the will (and the whim) of the client. The client could at any time, for any reason, simply state that the applicant’s services were no longer required and having done so, that resulted in a termination of the contract, automatically and by the operation of law, leaving the applicant with no right of recourse. For the reasons that follow, to the extent that the commissioner regarded this proposition to be the applicable law, he committed a material error of law that must necessarily have the result that his ruling is reviewed and set aside.”¹²³

In *Fipaza v Eskon Holdings Ltd*¹²⁴ the commissioner had found an employee’s dismissal substantively fair on the ground that she had failed to disclose that she had been dismissed for misconduct. The commissioner had also found that the employee’s failure to disclose this fact was a wilful and material misrepresentation amounting to an act of fraudulent non-disclosure. The court found that the commissioner had failed to give consideration to the principle that there is no general duty on a contracting party to tell the other all he knows about anything that may be material nor the fact that the employee’s earlier dismissal was not a matter within her exclusive knowledge. The court went on to state when an error of law will warrant the setting aside of an award on review. The court held as follows:

“Even so, it might be argued that insofar as the commissioner erred in law, it is not for the court to interfere as a simple mistake of law does not justify setting aside an arbitrator’s decision. It is well established though that where a mistake of law is such that it results in the arbitrator misconceiving the nature of the enquiry and addressing the wrong issue the arbitrator’s decision may be set aside, provided that if the result would still have been the same had the arbitrator adopted the correct approach the arbitrator’s decision will still stand.”¹²⁵

In *Local Road Transportation Board & another v Durban City Council & another*,¹²⁶ the court referred to *Goldfields investment Ltd* where it was held:

“A mistake of law per se is not an irregularity but its consequences amount to a gross irregularity where a judicial officer, although perfectly well-intentioned and bona fide, does not direct his mind to the issue before him and so prevents the aggrieved party from having his case fully and fairly determined.”¹²⁷

¹²³ At para 10.

¹²⁴ (2010) 31 ILJ 2903 (LC).

¹²⁵ At para 56.

¹²⁶ 1965 (1) SA 586 (A).

¹²⁷ At 597H to 598C.

Errors of logic

Examples of cases where awards have been set aside on the basis of constituting errors of logic include findings that a constructive dismissal is procedurally unfair but substantively fair,¹²⁸ failure by the commissioner to realize that the dismissed employee and the person found to have committed a misconduct were one and the same person,¹²⁹ commissioner's reasons which were not capable of being understood and mutually contradictory in material respects,¹³⁰ a finding by a commissioner that an employee was not guilty of an offence but refused to reinstate the employee and only granted a quarter of the compensation which the employee was entitled to under the LRA,¹³¹ and a finding that an employee did not commit a misconduct based on the employer's delay in instituting disciplinary action.¹³²

3.3.2.1 Failure to apply the mind

The failure by commissioners to apply the mind as a ground of review applies when an arbitrator fails to have regard to material facts, or ignored, or gave excessive weight to immaterial evidence, or gave insufficient weight to relevant evidence, or drew conclusions from evidence which were supported by neither law nor logic.¹³³

In *Sidumo, Ngcobo J* held as follows:

“It is plain from these constitutional and statutory provisions that CCMA arbitration proceedings should be conducted in a fair manner. The parties to a CCMA arbitration must be afforded a fair trial. Parties to the CCMA arbitrations have a right to have their cases fully and fairly determined. 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.

¹²⁸ *Riverview Manor (Pty) Ltd v CCMA & others* (2003) 24 ILJ 2196 (LC).

¹²⁹ *Rainbow Farms (Pty) Ltd v Ngidi & others* (2001) 6 BLLR 664 (LC).

¹³⁰ *Abdull Supra*.

¹³¹ *Reutech Supra* 61.

¹³² *Duicker Mining Ltd (Tavistock Colliery) v CCMA & others* (2003) 6 BLLR 550 (LC).

¹³³ *Grogan Supra* at 295.

It follows, therefore, that where 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, in the words of *Ellis*, 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.”¹³⁴

Examples abound. An award was set aside where the commissioner failed to consider the fact that an employee in a constructive dismissal dispute failed to exhaust alternative remedies.¹³⁵ An award was also set aside where the commissioner failed to take into account the employer's offer of retrospective reinstatement.¹³⁶

3.4 EXCESS OF POWER

This ground relates to commissioners exceeding powers set out in the LRA. A commissioner will exceed the powers conferred by the LRA when the commissioner strays from the ambit of jurisdiction or makes a ruling or awards a remedy which is beyond the powers conferred by the LRA.¹³⁷

Awards have been set aside on account of commissioners having exceeded their powers where commissioners have purported to determine disputes in the absence of jurisdiction to do so,¹³⁸ and where a commissioner had made an award in favour of dismissed employees after another commissioner had held that commission had lacked jurisdiction because of late referral.¹³⁹ A commissioner was held to have exceeded its jurisdiction by not ensuring that the compensation awarded in terms of s 194(2) of the LRA was not less than the amount specified in s 194(1).¹⁴⁰ A commissioner was found to have exceeded his powers where he ordered reinstatement of

¹³⁴ At paras 267-268.

¹³⁵ *Foschini Group v CCMA & others* (2008) 29 ILJ 1515 (LC).

¹³⁶ *Technikon SA v Mojela & others* (2003) 24 ILJ 1737 (LC).

¹³⁷ *Reunert Industries Supra* at 1637.

¹³⁸ *Transnet Limited v CCMA & others* (2001) 6 BLLR 684; *Chabeli v CCMA & others* (2010) 4 BLLR 389 (LC).

¹³⁹ *Independent Development Trust v CCMA & others* (2000) 12 BLLR 1455 (LC).

¹⁴⁰ *Le Roux v CCMA & others* (2000) 21 ILJ 1366 (LC). Compensation was governed by section 194 prior to the 2002 Amendment.

employees whose dismissals were only procedurally unfair.¹⁴¹ A commissioner was held to have exceeded his powers where he awarded an employee 14 months remuneration as compensation.¹⁴² An award was also set aside where the arbitrating commissioner decided that the commission lacked jurisdiction despite the fact that a certificate of non-resolution conferring the necessary jurisdiction upon the arbitrating commissioner to arbitrate the dispute referred to it had been issued.¹⁴³

It has been held that any pronouncement on jurisdiction remains subject to the review powers of the Labour Court.¹⁴⁴

“Where the jurisdiction of a tribunal is dependent on the existence of a particular state of affairs; it cannot give itself jurisdiction by incorrectly finding that the conditions for the exercise of jurisdiction are satisfied. The conditions precedent to jurisdiction are known as “jurisdictional facts” which must objectively exist before the tribunal has power to act; consequently a determination on the jurisdictional facts is always reviewable by the courts because in principle it is no part of the exercise of the jurisdiction but logically prior to it.”¹⁴⁵

3.5. AN AWARD HAS BEEN IMPROPERLY OBTAINED

This ground relates to the misconduct of the party and not the arbitrator. In *Moloi v Euijen & others*¹⁴⁶ Maserumule AJ stated the following:

“The grounds of review set out in the section distinguishes between misconduct by the commissioner (section 145(2)(a)(i)) and the improper obtaining of an award as a separate ground of review (section 145(2)(b)). In my view, the latter subsection contemplates a situation where the one party to the arbitration, through fraud or other improper means, obtains an award in his or her favour. This can either be in the form of a bribe or by misleading and false or fraudulent representations which lead to an award being granted in

¹⁴¹ *Mzeku & others v Volkswagen SA (Pty) Ltd & others* (2001) 22 ILJ 1575 (LAC).

¹⁴² *United National Breweries (SA) Ltd v Khanyeza & others* (2006) 4 BLLR 321 (LAC).

¹⁴³ *EOH Abantu (Pty) Ltd v CCMA & another* (2008) 29 ILJ 2588 (LC).

¹⁴⁴ *Ibid* at para 8.

¹⁴⁵ *Pinetown Town Council v President, Industrial Court* 1984 (3) SA 173 (N) at 179B - D.

¹⁴⁶ (1997) 8 BLLR 1022.

that party's favour. It is different, in my opinion, from a charge that the commissioner misconducted himself, although it is quite possible that the commissioner's misconduct may give rise to the improper obtaining of an award. For example, if a party to an arbitration bribes the commissioner and obtains an award in its favour, the award would have been improperly obtained and the commissioner would also have misconducted himself."¹⁴⁷

In *Lekota*¹⁴⁸ the court rejected the allegation that an award had been improperly obtained because the commissioner had accepted false evidence in a manner that made him an accessory to perjury.

3.6 CONCLUSION

In the above discussion it has been established that it is important for arbitrators to act honestly during arbitration proceedings, apply their minds to the issues, and not exceed their powers. In terms of the statutory grounds listed in section 145, an arbitrator is required to give due consideration to the evidence before him or her and have regard to the applicable legal principles. Failure to do so may constitute misconduct. Improper interest in the case, bias and corruption will also amount to misconduct. Gross irregularity in the conduct of proceedings refers to the process by which the result was reached. Unlike misconduct bona fide decisions may be grossly irregular. Awards will be set aside on the ground of excess of power where arbitrators exceed the powers set out in the LRA, for example, where they grant relief greater than that permitted by the Act. An example of an award that was improperly obtained is where a party to the dispute obtains the award through, for example, bribery or fraud. This ground relates to the misconduct of the party and not the arbitrator.

¹⁴⁷ At 1029.

¹⁴⁸ *Lekota Supra*.

CHAPTER FOUR

THE REVIEW OF PRIVATE ARBITRATION AWARDS

4.1 INTRODUCTION

As discussed in the previous chapter, the LRA provides for the resolution of disputes arising under the LRA by adjudication or arbitration. However, employers and employees can also agree to resolve disputes arising under the LRA outside the statutory framework. They may choose to resolve disputes by arbitration under the Arbitration Act 42 of 1965.

In *Commercial Catering & Allied Workers Union & others v Pick 'n Pay Retailers (Pty) Ltd & others* the Labour Court confirmed that the grounds on which a private arbitration award can be reviewed are confined to those set out in s 33(1)(a) and (b) of the Arbitration Act 42 of 1965. The applicants claimed that a private arbitrator, charged with determining whether certain agreements had been lawfully terminated, who had failed to determine the validity of the termination of a supplementary agreement as a separate issue, had committed a latent gross irregularity. The court considered the test to be applied for a review in the case of a 'non-determination', and confirmed that the failure to determine an issue could potentially constitute a latent gross irregularity. However, the court found that the arbitrator's determination had been wide enough to encompass a determination that the supplementary agreement had been lawfully terminated. Whether his answer was right or wrong was immaterial. He did not commit a gross irregularity.

4.2 GROUNDS OF REVIEW

The grounds on which an award may be set aside are similar to those provided for in section 145 of the LRA, discussed above. A court may set aside an award on one or more of the following grounds:

- a) Where an arbitrator committed misconduct in relation to his or her duties;
- b) Where an arbitrator committed a gross irregularity in the conduct of the arbitration proceedings;

- c) Where an arbitrator exceeded his or her powers;
- d) Where the award was improperly obtained.

4.2.1 Misconduct

Arbitrators are required to be impartial when conducting arbitration proceedings, any evidence that they have been partial to one side will constitute misconduct. As stated in the previous chapter, for there to be misconduct there must be some unlawful or improper conduct on the part of the decision maker. Misconduct does not include *bona fide* mistakes of law or fact, unless the mistake is so gross as to provide evidence of misconduct in the strict sense.¹⁴⁹

4.2.2 Gross irregularities

Gross irregularities in the proceedings apply to the manner in which arbitration proceedings are managed, not to their result.¹⁵⁰ An irregularity must be serious enough to prevent a party from having its case properly and fairly determined.¹⁵¹ An award was set aside where the arbitrator totally misconstrued the provisions of a disciplinary code he was required to interpret.¹⁵² In reviews of statutory arbitrations irregularities may be either patent or latent. In reviews private arbitrations, the following dictum is frequently cited: “An irregularity in proceedings does not mean an incorrect judgment: it refers not to the result, but to the method of a trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined.”¹⁵³ In other words, some minor error of law or fact or reasoning is not in itself sufficient to warrant review.

In *Telcordia Technologies Inc v Telkom SA Ltd*,¹⁵⁴ the SCA ruled that the extension of the common law grounds of review do not apply to arbitration proceedings, and drew a distinction

¹⁴⁹ *Renuert Supra*.

¹⁵⁰ *Bester v Easigas (Pty) Ltd v Parsons NO and another* 1993 (1) SA 30 (C) at 421-J.

¹⁵¹ *Total Support Management (Pty) Ltd and another v Diversified Health Systems (SA) (Pty) Ltd and another* 2002(4) SA 661 (SCA).

¹⁵² *Tshwane University of Technology v Kirstein NO & another* (2009) 30 ILJ 1650 (LC).

¹⁵³ *Ellis v Morgan; Ellis v Desai* 1909 TS 576 at 581.

¹⁵⁴ 2007 (3) SA 266 (SCA).

between grounds attacking the method by which decision-makers reached their conclusions (including the procedure followed and the reasoning process) and the result. Attacks on the result of proceedings are not permissible on review, because that would confuse review and appeal. In *Telcordina* the High Court had itself interpreted the contract the arbitrator was required to interpret, preferred a different interpretation, then concluded that the arbitrator had ‘misconceived the nature of the inquiry’. The SCA found this reasoning circular and wrong. The court found that it was not for the High Court to reinterpret the contract; its function was to determine whether the gross irregularities alleged had been committed.¹⁵⁵

According to the Constitutional Court in *Sidumo* the test for review is ‘whether the decision reached is one that a reasonable commissioner could not reach’. On this test the court needs to examine the conclusions reached by the arbitrator as well as the process by which it was reached. However where the private arbitrator reaches a conclusion that is manifestly irrational, unreasonable, arbitrary and unrelated to the evidence, it may be assumed that he or she failed to discharge his obligations as arbitrator. This failure may be referred to as a gross irregularity.

4.2.3 Excess of power

Arbitrators will exceed their powers where they take decisions outside their terms of reference, and where they decide issues not properly before them unless it is a collateral issue or an issue which is immaterial to the main issue.

4.2.4 Award was improperly obtained

This relates to the misconduct of the party and not the arbitrator. An award is improperly obtained if parties influence the arbitrator to find in their favour by direct inducement. An example of an improperly obtained award is a bribe or fraud.

¹⁵⁵ At para 99.

4.3 TIME LIMITS

Application for review of private arbitration awards must be launched within six weeks from the date on which the award was made.¹⁵⁶

¹⁵⁶ Section 33(1) of the Arbitration Act 42 of 1965.

CHAPTER FIVE

THE REQUIREMENT OF REASONABLENESS (THE *SIDUMO* TEST)

5.1 INTRODUCTION

In *Sidumo* the Constitutional Court had to determine two controversial findings by the SCA. The first finding of the SCA was that commissioner's conducting CCMA proceedings should defer to employers because it is primarily the function of the employer to decide on sanction. The second finding was that CCMA arbitration proceedings constitute administrative action as defined in s 1 of Promotion of Administrative Justice Act 3 of 2000¹⁵⁷ and are subject to the extended ground of review set under PAJA. The Constitutional Court evaluated these findings and rejected both of them. The court had to then determine if the grounds in section 145 of the LRA are constitutionally compliant. The court held that, based on section 33 of the Constitution, commissioners are obliged to render reasonable decisions and that this obligation suffuses the grounds set out in section 145 of the LRA.

After the decision in *Sidumo* the test for review should have been clear. However, it has generated numerous conflicting judgments.

5.2 BACKGROUND

Initially different views had been expressed by the courts over whether CCMA arbitration awards could be set aside only on the grounds listed in section 145 of the LRA, or whether the wider grounds mentioned in section 158(1)(g) were applicable. Some decisions had expressed that to allow review on the wider grounds permitted under the Constitution and the common law would frustrate the LRA's goal of ending labour disputes efficiently; while others had held that the wider grounds should be permitted because the LRA was designed to give effect to the Bill of Rights, which guaranteed fair administrative action.¹⁵⁸ *Carephone* was considered to have put an end to this controversy. The court in *Carephone* had formulated a test for the standard to be used, in determining whether or not there is a ground for reviewing a CCMA arbitration award,

¹⁵⁷ Hereafter referred to as PAJA.

¹⁵⁸ *Shoprite Checkers Supra.*

namely the justifiability and rationality test. The court had held that the question to be asked was: “whether there is 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.”¹⁵⁹ This test incorporated the Constitutional requirement that an administrative action must be justifiable in relation to the reasons given for it.¹⁶⁰

In *Shoprite Checkers (Pty) Ltd v Ramdaw NO & others*¹⁶¹ the issue before the court was the grounds on which a CCMA arbitration award can be reviewed. The court had to determine whether the *Carephone* decision was still applicable. It referred to the *Pharmaceutical* case where it was held that irrationality of a CCMA arbitration award was a ground of review and held that if the terms justifiable and irrational were synonymous then there was no need to interfere with the *Carephone* decision.¹⁶² The court found that the test was not “justifiability” but rather “rationality”. The court concluded that the court in *Carephone* viewed the concept of justifiability as related to the concept of rationality, and that the terms bore a sufficiently similar meaning to justify the conclusion that rationality can be said to be accommodated with the concept of justifiability.¹⁶³ The court held that a decision that is justifiable cannot be said to be irrational and a decision that is irrational cannot be said to be justifiable, and held therefore that the test in *Carephone* was applicable. This position remained until the decision in *Sidumo*.

According to *Sidumo* the review grounds in section 145 are now suffused by the Constitutional standard of reasonableness. The standard being: “is the decision reached by the commissioner one that a reasonable decision-maker could not reach?”¹⁶⁴ This is because of the change in the wording of the final Constitution. In terms of *Carephone* section 145 was suffused by the then Constitutional standard that an administrative decision must be reasonable in relation to the

¹⁵⁹ At para 37.

¹⁶⁰ S 24(d) of the interim Constitution 1993.

¹⁶¹ (2001) 9 BLLR 1011 (LAC).

¹⁶² At para 21.

¹⁶³ At para 22.

¹⁶⁴ At para 110.

reasons given for it. Section 33(1)¹⁶⁵ of the final Constitution provides that administrative action should be lawful, reasonable and procedurally fair. In *Carephone* the grounds in section 145 were suffused by justifiability found in the 1993 Constitution and now they are suffused by reasonableness found in the final Constitution.

5.2.1 Facts

Sidumo involved a dismissal of a security guard (Sidumo) who was responsible for monitoring access to and exits from a high security facility where high grade precious metals were separated from lower grade concentrate. Sidumo was dismissed for negligently failing to follow prescribed search procedures. He referred a dispute to the CCMA. The commissioner found Sidumo had been guilty of misconduct, but held that dismissal was unfair. The commissioner reinstated him subject to a final written warning, and awarded him compensation equivalent to three months' wages.

The employer took the matter to review but the Labour Court dismissed the action with costs. The employer appealed to the LAC, which held that, the commissioner's finding that the dismissal was too harsh a sanction was justifiable. On further appeal, the SCA overturned the LAC's judgment and ruled that the dismissal was fair. The SCA had based its decision on two legs. Firstly, that the commissioner failed to properly appreciate the ambit of his duties under the LRA, and therefore had applied the incorrect test when considering whether the dismissal was a fair sanction.¹⁶⁶ Secondly, that the test for rational administrative action laid down by PAJA applied to reviews of CCMA arbitration awards -i.e that their decisions must be rationally connected to the information before them and to the reasons given by them.¹⁶⁷ The matter was then taken to the Constitutional Court which did not agree with the decision of the SCA.

¹⁶⁵ Section 33 of the Constitution of the Republic of South Africa 1996.

¹⁶⁶ At para 29.

¹⁶⁷ Para 42 – 45.

5.3 PAJA OR THE LRA

One of the issues the Constitutional Court had to determine in *Sidumo* was whether the SCA was correct in finding that arbitration by the CCMA in terms of the LRA constitutes “administrative action” as defined in PAJA and is therefore subject to the standard of review set under that Act rather than that provided for in the LRA.¹⁶⁸ The Court confirmed that a commissioner conducting a CCMA arbitration is performing an administrative action.¹⁶⁹ However, it did not agree that CCMA arbitration proceedings were subject to review under PAJA. The court provided reasons for rejecting the SCA’s findings. It held that PAJA was not regarded as the exclusive legislative basis for review.¹⁷⁰ “Nothing in s 33 of the Constitution precludes specialised legislative regulation of administrative action such as s 145 of the LRA alongside general legislation such as PAJA.”¹⁷¹ The court found that the LRA constitutes national legislation in respect of administrative action within the specialised labour law sphere:

“S 33(3) of the Constitution provides that national legislation must be enacted to give effect to the right to administrative action that is lawful, reasonable and procedurally fair. S 145 of the LRA constitutes national legislation in respect of “administrative action” within the specialised labour law sphere. The LRA, including s 145 was in place at the time that the Constitution came into force. S 33(3) read with item 23(1) of schedule 6 to the Constitution contemplates that the national legislation referred to in s 33 of the Constitution is to be enacted in the future. It is clear that what was envisaged was legislation of general application. PAJA was the resultant legislation. The definition of administrative action in PAJA is extensive and intended to “cover the field”¹⁷².

The court held that its reasons for rejecting the SCA’s finding were supported by section 210 of the LRA which states that “If any conflict, relating to the matters dealt with in this Act, arises between this Act and the provisions of any other law save the Constitution or any Act expressly amending this Act, the provisions of this Act will prevail.”¹⁷³ The court also referred to the fact that courts have applied the principle that general legislation does not derogate from special

¹⁶⁸ At para 1.

¹⁶⁹ At para 88.

¹⁷⁰ At para 92.

¹⁷¹ At para 90.

¹⁷² Para 89 to 90.

¹⁷³ At para 99.

legislation, unless specifically indicated. In the court's view the SCA had erred in holding that PAJA was applicable to the review of CCMA arbitration awards

5.4. THE STANDARD OF REVIEW: REASONABLENESS

In *Sidumo* the court had to consider whether the standard of review set out in section 145 of the LRA is constitutionally compliant.¹⁷⁴ The court found that the correct standard to be applied was the reasonableness standard used in *Bato Star*. The court referred to section 3 of the LRA which provides that the provisions of the LRA must be interpreted in compliance with the Constitution and found therefore that section 145 must be read to ensure that administrative action by the CCMA is lawful, reasonable and procedurally fair.¹⁷⁵ In summation the court found that:

“The *Carephone* test, which was substantive and involved greater scrutiny than the rationality test set out in *Pharmaceutical Manufacturers*, was formulated on the basis of the wording of the administrative justice provisions of the Constitution at the time, more particularly, that an award must be justifiable in relation to the reasons given for it”¹⁷⁶.

The court then found that since section 33(1) of the Constitution presently states that everyone has a right to administrative action that is lawful, reasonable and procedurally fair, the reasonableness standard should now suffuse section 145 of the LRA.¹⁷⁷ The court made a distinction between the approach enunciated in *Carephone* with regard to the grounds of review set out in section 145 of the LRA and the constitutional standard of reasonableness:

“*Carephone* held that s 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that s145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in *Bato Star*: Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?”¹⁷⁸

The court held that applying this test will give effect not only to the constitutional right to fair labour practices but also to the right to administrative action which is lawful, reasonable and

¹⁷⁴ At para 104.

¹⁷⁵ At para 105.

¹⁷⁶ At para 106.

¹⁷⁷ At para 106.

¹⁷⁸ At para 110.

procedurally fair.¹⁷⁹ The grounds in section 145 of the LRA are now suffused by the constitutional standard of reasonableness.

5.5 REASONABLENESS: INTERPRETED AND APPLIED

After the *Sidumo* judgment was handed down questions arose as to its interpretation and application. The Labour Courts have attempted to interpret and apply the *Sidumo* test. A discussion of how the courts have interpreted the reasonable decision maker test will be undertaken. Firstly, it is important to consider whether a reviewing court is entitled to justify commissioners' decisions with reasons he might have applied but did not apply. Secondly, it must be considered whether the courts have interpreted reasonableness as a test for review or as a further ground of review.

5.5.1 Reasonableness interpreted

One of the leading explications of the *Sidumo* test by the LAC is the case of *Fidelity Cash Management Services v CCMA*.¹⁸⁰ The judge in that case had the following to say about *Sidumo*:

“The test is a stringent test that will ensure that awards are not lightly interfered with. It will ensure that, more than before, and in line with the objectives of the Act and particularly the primary objective of the effective resolution of disputes, awards of the CCMA will be final and binding as long as it cannot be said that such a decision or award is one that a reasonable decision maker could not have made in the circumstances of the case. It will not be often that an arbitration award is found to be one that a reasonable decision maker could not have made”¹⁸¹.

A question that arose in *Sidumo* was whether, on review, a court should ask itself whether the conclusion reached by the commissioner was capable of being sustained on the evidence presented at the arbitration, even if the commissioner's conclusion was not strictly speaking justified by the reasons given in the award. The court in *Fidelity cash management* held that in

¹⁷⁹ At para 110.

¹⁸⁰ (2008) 28 ILJ 964 (LAC).

¹⁸¹ At para 100.

order to succeed with a reasonableness review, both the reasons and the result of the award must be unreasonable. Flawed reasoning will not be reviewable if the decision of the commissioner could ultimately be sustained on the evidence before him. The court held as follows:

“there can be no doubt under *Sidumo* that the reasonableness or otherwise of a commissioner’s decision does not depend-at least not solely-upon the reasons that the commissioner gives for the decision. In many cases the reasons which the commissioner gives for his decision, finding or award will play a role in the subsequent assessment of whether or not such decision or finding is one that a reasonable decision maker could or could not reach. However, other reasons upon which the commissioner did not rely to support his or her decision or finding but which can render the decision reasonable or unreasonable can be taken into account. This would clearly be the case where the commissioner gives reasons A, B and C in his or her award but, when one looks at the evidence and other material that was legitimately before him or her, one finds that there were reasons D, E and F upon which he did not rely but could have relied which are enough to sustain the decision.”¹⁸²

And further:

“whether or not an arbitration award or decision or finding of a CCMA commissioner is reasonable must be determined objectively with due regard to all the evidence that was before the commissioner and what the issues were that were before him or her. There is no reason why an arbitration award or a finding or decision that, viewed objectively, is reasonable should be held to be unreasonable and set aside simply because the commissioner failed to identify good reasons that existed which could demonstrate the reasonableness of the decision of finding.”¹⁸³

However, it has been acknowledged by the LAC that there are limits to the extent to which a commissioner’s decision can be justified by a reviewing court with reasons he might have applied but did not. *Maepe v CCMA & another*¹⁸⁴ provides an example. In *Maepe* a senior commissioner of the CCMA was found guilty of sexual harassment and was dismissed. After arbitration the commissioner found the employee’s conduct fell short of sexual harassment, although it was inappropriate. However, the commissioner ruled that dismissal was too harsh a sanction, and ordered the CCMA to reinstate the employee subject to a final written warning. The order of the commissioner was set aside on review, and replaced with a finding that the

¹⁸² At para 102.

¹⁸³ At para 103.

¹⁸⁴ (2008) 8 BLLR 723 (LAC).

dismissal was fair. On appeal the court had to determine whether the reinstatement was competent. The employer contended that reinstatement was not competent because the employee had lied under oath during arbitration proceedings. The court noted that while commissioners are not required to defer to the view of employers, their awards can still be set aside on the basis of unreasonableness. It noted further that while it cannot always be assumed that commissioners have failed to apply their minds to issues simply because they are not expressly mentioned in their awards, commissioners can at least be expected to mention evidence critical to the issues they are called on to decide.

In *Senama v CCMA & others*¹⁸⁵ the court held that “a reasonable decision is reached when a commissioner, in performing his/her functions as an arbitrator, applies the correct rules of evidence, and if there is to be a deviation it must not be of such a nature that it materially denies any party a fair hearing.”¹⁸⁶

A person can now bring a review to the CCMA, in addition to the grounds set out in section 145 of the LRA, on the ground of unreasonableness. The grounds in section 145 are not obliterated but are suffused by reasonableness. In *Fidelity Cash Management* the court held as follows:

“Nothing said in *Sidumo* means that the grounds of review in s 145 of the ACT are obliterated. The Constitutional Court said that they are suffused by reasonableness. Nothing said in *Sidumo* means that the CCMA’s arbitration award can no longer be reviewed on the grounds, for example, that the CCMA had no jurisdiction in a matter or any of the other grounds specified in s 145 of the Act.”¹⁸⁷

In *Palaborwa Mining Co Ltd v Cheetan & others*¹⁸⁸ the court held:

“The decision of the Constitutional Court in *Sidumo* does not entail a shift away only from any degree of deference towards employers. It also: (a) as in this case, reduces the scope for a dissatisfied employee to take his or her dispute further; and (b) reduces the potential

¹⁸⁵ 2008 9 BLLR 896 (LC).

¹⁸⁶ At para 18.

¹⁸⁷ At para 101.

¹⁸⁸ (2008) 6 BLLR 553 (LAC).

for the Labour Courts and Supreme Court of Appeal to exercise scrutiny over the decisions of commissioners who are appointed to arbitrate in terms of the LRA.”¹⁸⁹

Another important explication of *Sidumo* by the LAC is *Ellerine Holdings*.¹⁹⁰ In this case the court held as follows:

“A court should eschew the red light test for review and adopt a more facilitative framework. By that I took him to mean that it would be wrong formalistically to pass through the award of second respondent, find some irregularity had taken place, that irregularity would set off the judicial trip wire, the red lights of review would flicker brightly and the result would be to sustain an application for review. A more substantive overall framework for review would examine the nature and role of first respondent (CCMA) within the broad framework of labour relations, the role played by an official such as second respondent (the commissioner), and then take into account the substance of that decided, both in terms of its conclusion and the reasoning which underpinned the conclusion.”¹⁹¹

In *Nampak Corrugated Containers v CCMA & others*¹⁹² the court held as follows:

“The key inquiry in the application of reasonable decision maker test is whether the factual conclusions reached by the commissioner in the award are reasonable in light of the evidence before him or her. Thus, an award would be unreasonable if it is found that there is a glaring discrepancy between the evidence presented and the conclusion reached by the commissioner. In other words an award would be unreasonable if the commissioner completely misconstrued the evidence before him or her.”¹⁹³

In *CASU v Tao Ying Metal Industries & others*¹⁹⁴ the court held that a commissioner is obliged to apply his or her mind to the issues in a case.¹⁹⁵ Commissioners who do not do so are not acting lawfully and reasonably and their decisions will constitute a breach of the right to fair administrative justice.¹⁹⁶ The court held further:

“The first obligation on an arbitrator in determining a matter is to set out the reasons, even if only briefly, for any decision. However, beyond the dicta referred to above, there is no further discussion in the commissioner's award of the text of the exemption and its

¹⁸⁹ At para 6.

¹⁹⁰ *Ellerine Holdings Supra*

¹⁹¹ At para 11. (emphasis added).

¹⁹² (2009) 30 ILJ 647 (LC).

¹⁹³ At para 16.

¹⁹⁴ (2009) 1 BLLR 1 (CC).

¹⁹⁵ At para 76.

¹⁹⁶ At para 134.

meaning. . . . If the commissioner had in fact applied her mind to the question of the meaning of the exemption, one would have expected at least some discussion of its text. This is nowhere evident in the award.

In my view, it cannot be concluded that the commissioner did apply her mind to the meaning of the exemption.”¹⁹⁷

In interpreting the reasonableness test, the Labour Courts have found there to be two forms of unreasonableness, ie process-related unreasonableness and substantive unreasonableness.

In *Southern Sun Hotel Interests (Pty) Ltd v CCMA & others*¹⁹⁸ the court held as follows:

“In summary, s 145 requires that the outcome of CCMA arbitration proceedings (as represented by the commissioner’s decision) must fall within a band of reasonableness, but this does not preclude this court from scrutinizing the process in terms of which the decision was made. If a commissioner fails to take material evidence into account, or has regard to evidence that is irrelevant, or the commissioner commits some other misconduct or a gross irregularity during the proceedings under review and a party is likely to be prejudiced as a consequence, the commissioner’s decision is liable to be set aside regardless of the result of the proceedings or whether on the basis of the record of the proceedings, that result is nonetheless capable of justification.”¹⁹⁹

Southern Sun observed there is no clear meaning of reasonableness and suggests the existence of a rational and coherent decision-making process that tends to produce a reasonable outcome.²⁰⁰

In the case of *Gaga v Anglo Platinum Ltd*²⁰¹ the employee was dismissed on the grounds of having sexually harassed his personal assistant over a period of two years. He took the matter to the CCMA for arbitration and the commissioner found that the employer had failed to show on a balance of probabilities that the employee was guilty of sexual harassment and reinstated him. The employer successfully reviewed the award in the Labour Court but the employee appealed against the Labour Court’s decision to the LAC. In dismissing the appeal, the LAC held that in

¹⁹⁷ At paras 140-141. (emphasis added).

¹⁹⁸ (2010) 31 ILJ 452 (LC).

¹⁹⁹ At para 17.

²⁰⁰ At para 13.

²⁰¹ (2012) 3 BLLR 285 (LAC)

finding the employee not guilty, the commissioner had ignored relevant considerations and failed to apply his mind to material evidence.²⁰² In this regard, the LAC held as follows:

“Where a commissioner fails properly to apply his mind to material facts and unduly narrows the inquiry by incorrectly construing the scope of an applicable rule, he will not fully and fairly determine the case before him. The ensuing decision inevitably will be tainted by dialectical unreasonableness (process-related unreasonableness), characteristically resulting in a lack of rational connection between the decision and the evidence and most likely an unreasonable outcome (substantive unreasonableness). There will often be an overlap between the ground of review based on a failure to take into consideration a relevant factor and one based on the unreasonableness of a decision. If a commissioner does not take into account a factor that he is bound to take into account, his or her decision invariably will be unreasonable. The flaw in process alone will usually be sufficient to set aside the award on the ground of it being a latent gross irregularity, permitting a review in terms of section 145(1) read with section 145(2)(a)9ii) of the LRA.”²⁰³

“Although the Labour Court has previously found there to be two forms of unreasonableness, that the two are interlinked and that the flaw in process alone will usually be sufficient to set aside an award on review, it is the first time that the LAC has done so in express terms.”²⁰⁴

These decisions indirectly confirm the reasoning in *Abdull*²⁰⁵ and *Rustenburg Platinum Mines*²⁰⁶, which was overturned by the Constitutional Court in *Sidumo*. In *Rustenburg Platinum mines* the court held that:

“the conclusions (outcome) of an award must be “rationally connected” to the commissioner’s reasons as a whole. In a review, the question is not whether the decision is capable of being justified by looking at the material before the commissioner. The focus is on the process: on the commissioner’s logic; on the reasoning of the arbitrator; on how the arbitrator arrived at his decisions (conclusion and inferences); on the thought processes by which the commissioner reached his conclusion. The commissioner must reason properly.”²⁰⁷

“If the reasons given for a decision are mostly bad reasons, it cannot be said that the decision or conclusion is nevertheless rational or ‘rationally connected’ to the information

²⁰² At para 43.

²⁰³ At para 44.

²⁰⁴ Myburgh A. ‘The LAC’S Latest Trilogy of Review Judgments: Is The Sidumo Test In Decline?’ (2013) 34 ILJ 19 at 20.

²⁰⁵ *Abdull Supra*.

²⁰⁶ *Rustenburg Platinum mines v CCMA & others* (2006) 11 BLLR 1021 (SCA).

²⁰⁷ At para 31.

before the commissioner because other legitimate reasons not mentioned by the arbitrator existed of sustaining the outcome.”²⁰⁸

“If some or all of the bad reasons substantially influenced the commissioner, then the commissioner was influenced in his decision by irrelevant considerations. This is a ground of review.”²⁰⁹

In *Abdull* the court held as follows:

“Where an arbitrator does not give reasons which are capable of being understood and which are, on the face of it, mutually contradictory in material respects, it is not for the parties or the reviewing court to attempt to rescue a reason for findings where no such reason is apparent in the first place. To speculate in this fashion would be for a review court to substitute its reasoning for that of the arbitrator by a process of inference. This is not permitted on review.”²¹⁰

The LAC in *Herholdt* was considered to have settled the debate regarding the interpretation and applicability of the reasonableness test by holding that there are two forms of unreasonableness. However, this reasoning has been recently overturned by the SCA. That there are two forms of unreasonableness is not in line with the majority judgment in *Sidumo*. These decisions are discussed in detail in chapter five.

5.5.2 Reasonableness applied

a) Sanctions and reviews

This requires a proper balance being struck between the interests of the employer and a proper weighing up and balancing of the factors in favour of the employees and the factors in favour of the employer. Each case must be dealt with on its own peculiar facts. Sanctions imposed by the employer will be reviewable where the interests and factors of one party are over emphasized and conversely the interests and factors of the other party are under emphasized. They will also be reviewable where insufficient weight is given to certain important factors that may lessen the gravity of the offence or aggravate the gravity of the offence. The issue is whether relevant

²⁰⁸ At para 34.

²⁰⁹ At para 34.

²¹⁰ *Supra* At para 9.

factors cumulatively received due recognition in the determination of whether the sanction imposed was fair.

Applying the *Sidumo* test as a stringent result-based test, the LAC and the SCA have refused to interfere with arbitration awards in the following two judgments involving sanction reviews: *Edcon Ltd v Pillmer NO & others*²¹¹ and *Palaborwa Mining*.²¹²

In *Edcon*, the employee had been employed by the employer as a quality controller and was entitled to the use of a company car. In the event of an accident she was required to report the accident to the SAPS and to her employer, to complete and sign relevant claim forms, and not to carry repairs without the approval of the insurance company. When the car was involved in an accident while being driven by her son she did not comply with the foregoing requirements and initially denied the accident. Later she admitted the accident but lied as to the circumstances during the employer's investigations. Finally she admitted everything. After a disciplinary enquiry she was dismissed for failing to report the accident, which resulted in a breach of trust between herself and her employer. The commissioner found that the employer had led no direct evidence that the trust relationship had in fact broken down, and took into account the employee's long service and unblemished record, and the reasons for her initial dishonesty in finding that dismissal was not the appropriate sanction. On review the Labour Court refused to interfere with the commissioner's award. The LAC dismissed an appeal by the employer, and the employer then appealed to the SCA. The SCA expressed its view as follows:

"Pillemer's (the commissioner) finding that Edcon (the employer) had led no evidence showing the alleged breakdown in the trust relationship is beyond reproach. In the absence of evidence showing the damage Edcon asserts in its trust relationship with Reddy (the employee), the decision to dismiss her was correctly found to be unfair. She cannot be faulted on any basis and her conclusion is clearly rationally connected to the reasons she gave, based on the material available to her."²¹³

²¹¹(2009) 30 ILJ 2642 (SCA).

²¹² Supra.

²¹³ At para 23 (emphasis added).

In *Palaborwa*, the employee, the company secretary, had been subjected to a random alcohol test in terms of the employer's policy. He was found to be under the influence of alcohol. He faced a disciplinary enquiry and was dismissed. The CCMA commissioner, having found that the dismissal was substantively and procedurally fair, confirmed the dismissal. On review, the Labour Court found that the dismissal of the employee had been substantively unfair by virtue of the commissioner's failure to give adequate consideration to the employee's personal circumstances. It awarded the employee compensation. In the process the Labour Court held:

“On the evidence before me, the applicant did not behave in a fashion which endangered others. His job description did not place him in a category where he could harm others. Furthermore, his demeanour could not be described by anyone as being any one of those listed in the code. It would appear that if he was not tested for alcohol, nobody would have noticed that he had consumed alcohol. Furthermore, the applicant is 58 years old and a first offender. These are all factors which should have been taken into account but were not.”²¹⁴

On appeal to the LAC, the court allowed the appeal and restored the commissioner's award. In so doing, the court held as follows:

“Despite the fact that decision makers, acting reasonably, may reach different conclusions, the LRA has given the decision-making power to the commissioner and there it rests, unless it be concluded that a reasonable decision maker could not reach such a conclusion. Indeed, read together with *Bato Star*, upon which the majority decision in *Sidumo v Rustenburg Platinum Mines* so strongly relies, the judgment has the clear effect that the courts, and, in particular, the labour courts, must defer (but not in an absolute sense) to the decision of the commissioner.”²¹⁵

“If one compares the facts in casu with the facts in the case with which the Constitutional Court was concerned, then the obvious, inevitable and necessary conclusion is that the learned judge in the court a quo was clearly wrong in interfering with the award of the commissioner. The appeal must succeed.”²¹⁶

However, there are also a number of cases in which the Labour Courts have interfered with arbitration awards. In *Southern Sun* the commissioner's findings were reviewed and set aside because she failed to appreciate and apply the correct legal principles applicable to consistency in the exercise of discipline and that an inconsistency claim will fail where the employer is able to differentiate between employees who have committed similar transgressions on the basis of

²¹⁴ At para 2.

²¹⁵ At para 4.

²¹⁶ At para 8.

difference in personal circumstances, the severity of the misconduct, the fact that the other employees had pleaded guilty and shown remorse and other material factors which showed a relevant distinction. Moreover, the commissioner failed to appreciate that an employee cannot profit from an employer's manifestly wrong decision in the name of consistency.

In *Sasol Mining*²¹⁷, the court reviewed and set aside the arbitrator's award where the arbitrator had merely regurgitated the extensive testimony presented and made no proper attempt to analyse it. The court found that he had considered, irregularly, that the mere existence of conflicting versions between the employer and employee must lead inevitably to a finding that the onus of proving a fair dismissal had not been discharged by the employer. He also had disregarded material contradictions in the employee's evidence and had failed to notice that much of the company's evidence had gone unchallenged.

In *Network Field Marketing (Pty) Ltd v Mngezana NO & others*²¹⁸ the arbitrator's award was reviewed and set aside because the arbitrator barely evaluated the evidence and did not explain why it was necessary to resort to, and rely solely on, credibility findings when the balance of probabilities so clearly favoured the employer. The arbitrator's bold conclusion that the company witnesses were unreliable was based on one minor contradiction between two witnesses. The court held that this was insufficient to impugn the reliability of their evidence completely.

5.6 CONCLUSION

Sidumo created a precedent which will make it difficult to set aside an award of a commissioner on review for reasonableness. The courts have interpreted the reasonableness standard as a ground for review rather than a test. As illustrated by case law awards will not be readily reviewable for want of reasonableness. Commissioner's decisions will not be easily interfered with.

²¹⁷ *Supra*.

²¹⁸ (2011) ILJ 1705 (LC).

CHAPTER SIX

THE *HERHOLDT* DECISION

6.1 INTRODUCTION

The SCA recently delivered a decision where it had to determine whether the Labour Courts have unduly relaxed the standards for review. After the decision in *Sidumo* there has been a debate about whether section 145 provides for both a result-based and process-related review and whether the ground of reasonableness, introduced in that case, restricted the review to a result-based approach. The LAC decision of *Herholdt* was considered to have settled this debate by holding that there are two forms of unreasonableness. The SCA found that the Labour Courts have relaxed the standards for review and that holding that there are two forms of unreasonableness is in conflict with the majority judgment in *Sidumo*.

6.2 BACKGROUND

6.2.1 Facts

Herholdt, a financial broker employed by Nedbank Ltd, was dismissed on the ground that he dishonestly failed to declare a conflict of interest arising from his being nominated as a beneficiary in the will of a client of the bank. In terms of the conflict of interest policy a conflict of interest may arise when an employee enters into any engagement in which he or she may acquire a personal interest which may conflict with the interests of the employer or may appear to compromise the employee's ability to perform his or her duties impartially. Herholdt had received a copy of the conflict of interest policy and had made a declaration of his conflicts of interests. Nedbank accordingly assumed that Herholdt was aware of the policy and should have known he was obliged to disclose the fact that he had been made a beneficiary in terms of the will of his client, Mr Smith.

Two wills were relevant in the charge against Herholdt. In the first will he was nominated as a legatee to the proceeds of an investment valued at 92 000. In the second one Herholdt and his life

partner were appointed as the sole heirs to Mr Smith's estate. Neither wills was disclosed to Herholdt's line manager, Mr Snyman, as required by the conflict of interest policy. That is so notwithstanding the fact that Herholdt had asked his regional manager, Ms Esterhuizen, what he should do if he was made the beneficiary of a client's will and was told that in that event he had to disclose the details in full to line manager.

Herholdt was, at first, uncomfortable with the notion of being made a beneficiary and sought advice from Mr Williamson, an employee of an associated company that prepared wills for Nedbank customers at the instance of financial advisors such as Herholdt. He was advised that there were possible issues of conflict of interest. He was told that a letter should be prepared and signed by Mr Smith confirming that he made this bequest of his own free will. He was also told that the fact of the bequest should be disclosed to his manager. A letter was then prepared and signed in accordance with the advice given by Mr Williamson but was left, together with the will, with Mr Williamson. After the second will was executed a similar letter was signed and left with Mr Williamson. Herholdt was charged and found guilty of misconduct. He then referred an unfair dismissal dispute to the CCMA.

6.2.2 The CCMA

In the CCMA, the commissioner had to decide whether Herholdt had deliberately failed to disclose his interest in Smith's will to Esterhuizen and Snyman. The commissioner found that the Nedbank had failed to prove that Herholdt acted dishonestly, that he knew that there was a conflict of interest and that he had deliberately failed to disclose his benefit in terms of the Nedbank's conflict of interest policy.

The commissioner found that Nedbank did not have an explicit rule speaking to the duty of an employee to disclose that he or she was a beneficiary in terms of a client's will. The commissioner found that because the charge made no mention of dishonesty, the charge against Herholdt was vague. The commissioner accepted that Herholdt had only realized that there was a

conflict of interest when he conceded as much under cross-examination. In the commissioner's opinion neither Herholdt nor Williamson fully appreciated that there was a conflict of interest. She found that the letter included in the envelope with the will which was given to Williamson constituted sufficient disclosure to Nedbank and indicated further that Herholdt intended or wished to be in compliance.

6.2.3 The Labour Court

On review the Labour Court conducted a detailed analysis of the material before the commissioner and the commissioner's findings and concluded that the award was not reasonable given the evidence and material which were placed before her and because she failed to apply her mind to a number of material issues and as a consequence committed gross irregularities in the conduct of the arbitration.

With regards to the commissioner's finding that the charge was vague. The Labour Court held as follows:

“ . . . the charge clearly sets out the misconduct complained of with reference to the conflict of interest policy and refers to a general duty of disclosure between employee and employer which arises in such situations. The allegation of a failure to disclose under the heading of 'dishonesty' alleges in effect a deliberate non-disclosure.”²¹⁹

The Labour Court found unsustainable the commissioner's finding that neither Herholdt nor Williamson knew that a nomination as a beneficiary in a client's will amounted to a conflict of interest.²²⁰ Dealing with the commissioner's finding that there was no rule or policy requiring disclosure of nomination as a beneficiary in a client's will. According to the Labour Court's opinion this finding was a manifest indication that the commissioner did not understand the policy or simply did not take it into account.²²¹ The Labour Court found that Herholdt's version that he only realized that there was a conflict of interest during his cross-examination fails to take

²¹⁹ *Herholdt Supra* para 26.

²²⁰ At para 27.

²²¹ At para 27.

heed of his evidence that he was initially uncomfortable and his position of seniority.²²² The Labour Court rejected the commissioner's finding that the letter filed with the will and given to Williamson constituted disclosure and revealed an intention or desire to be compliant.²²³ According to the Labour Court this finding did not recognize the nature of the notification required by the policy and discounted the fact that Herholdt did not act in accordance with the advice given to him by both Williamson and Esterhuizen.²²⁴

6.3 THE LABOUR APPEAL COURT

On appeal, Herholdt challenged several of the factual conclusions of the Labour Court upon which it based its finding that the decision of the commissioner was unreasonable because she failed to apply her mind to a number of material issues and as consequence committed gross irregularities in the conduct of the arbitration. In dealing with these the court held as follows:

“The finding that neither the appellant nor Williamson understood that the appellant’s nomination constituted a potential conflict of interests flies in the face of Williamson’s evidence. The appellant approached Williamson because he felt uncomfortable and thus, in my opinion, had more than an intuitive inkling about the existence of a conflict of interests. Williamson shared that view. He testified that for that very reason he advised the appellant to act cautiously and specifically told the appellant to disclose the bequest to Nedbank management so that they could have insight into the risks involved which needed to be managed.”²²⁵

“The commissioner’s finding, on the basis of a supposed concession by the compliance officer Steenkamp, that the conflict of interest posed no risk to Nedbank was irrational and not justifiable with reference to the evidence or reasons given for the finding; hence reviewable. Steenkamp conceded that it was unlikely that Nedbank would lose its licence because of the contravention of the legislation regulating conflicts of interest. The commissioner however ignored Steenkamp’s evidence that the complaint would impact on its risk profile with FSB.”²²⁶

He contended that the Labour Court had erred in over emphasizing the process by which the commissioner had reached her award and that the target of review was the result or outcome

²²² At para 29.

²²³ At para 30.

²²⁴ At para 30.

²²⁵ At para 46.

²²⁶ At para 49.

rather than the process, and if that was sustainable as reasonable, no more should be expected. The LAC disagreed with this submission principally because the weight of authority favours greater scrutiny and section 145(2) of the LRA expressly permits the review of awards on the grounds of irregularity.

In the LAC two contentious findings were made. The first finding was in relation to latent irregularities. The second finding made by the LAC was that there are two forms of unreasonableness. Both these findings had been made by the Labour Courts before the LAC decision in *Herholdt*.

The first finding: Latent irregularity

In relation to latent irregularities, the court held as follows:

“Where a commissioner fails to have regard to material facts, this will constitute a gross irregularity in the conduct of the arbitration proceedings because the commissioner would have unreasonably failed to perform his or her mandate and thereby have prevented the aggrieved party from having its case fully and fairly determined.”²²⁷

The LAC went on to endorse the following passage in *Southern Sun*²²⁸:

“If a commissioner fails to take material evidence into account, or has regard to evidence that is irrelevant, or the commissioner commits some other misconduct or a gross irregularity during the proceedings under review and a party is likely to be prejudiced as a consequence, the commissioner’s decision is liable to be set aside regardless of the result of the proceedings or whether on the basis of the record of the proceedings, that result is nonetheless capable of justification.”

The court went on to say:

²²⁷ At para 36.

²²⁸ *Southern Sun Supra* at para 17.

“There is no requirement that the commissioner must have deprived the aggrieved party of a fair trial by misconceiving the whole nature of enquiry. The threshold for interference is lower than that; it being sufficient that the commissioner has failed to apply his mind to certain of the material facts or issues before him, with such having potential for prejudice and the possibility that the result may have been different.”²²⁹

The LAC concluded:

“The range and extent of latent irregularities in the award leave no doubt that there has not been a fair trial of the issues. The commissioner not only ignored material evidence in relation to the deliberate conduct of the appellant but fundamentally misconstrued the conflict of interests policy of the respondent with the consequence that her method in determining the issues was latently irregular and in the final analysis led concurrently to a result that was not only incorrect but substantively unreasonable in the sense that no reasonable commissioner, acting reasonably, could have reached the decision on the evidence and the inferences drawn from it.”²³⁰

The court held:

“..commissioners who get it wrong on the facts will usually commit the concomitant irregularity of not taking full or proper account of material evidence, and where they err on the law, they will fall short in not having properly applied their minds to the issues and thereby have denied the parties a fair trial. The inexorable truth is that wrong decisions are rarely reasonable. If that is true, the hypothetical reward from limiting intervention to a reasonableness or rationality review is dubious.”²³¹

The second finding: Dialectical unreasonableness

The LAC recognized that there are two forms of unreasonableness: dialectical unreasonableness and substantive unreasonableness. “An award will be reviewable if it suffers either from dialectical unreasonableness or is substantively unreasonable in its outcome.”²³²

The LAC held as follows:

²²⁹ At para 39.

²³⁰ At para 51.

²³¹ At para 55.

²³² At para 33.

“Proper consideration of all the relevant and material facts and issues is indispensable to a reasonable decision and if a decision maker fails to take account of a relevant factor which he or she is bound to consider, the resulting decision will not be reasonable in a dialectical sense. Likewise, where a commissioner does not apply his or her mind to the issues in a case the decision will not be reasonable.”²³³

The court held that “dialectical and substantive reasonableness are intrinsically interlinked and ... latent process irregularities carry the inherent risk of causing an unreasonable substantive outcome.”²³⁴

The court endorsed *Ellis v Morgan*²³⁵ where the court said the following:

“But an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result, but to the methods of a trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined.”

The LAC explained this as follows:

“If conduct of the commissioner prevents a fair trial of issues, even if perfectly well-intentioned and bona fide, though mistaken, then such conduct will amount to a gross irregularity, and that will be enough successfully to found a review under s 145(2) of the LRA. The court by necessity must scrutinize the reasons of the commissioner not to determine whether the result is correct; or for that matter substantively reasonable, but to determine whether there is a latent irregularity, that is, an irregularity that has taken place within the mind of the commissioner, which will only be ascertainable from his or her reasons.”²³⁶

²³³ At para 36.

²³⁴ At para 39.

²³⁵ *Supra*.

²³⁶ At para 40.

6.4 THE SUPREME COURT OF APPEAL

Herholdt appealed to the SCA against the decision of the LAC. COSATU had intervened in this case because it was concerned that the Labour Courts had, by admitting latent irregularities and dialectical unreasonableness as grounds for review, unduly watered down the standard for challenging CCMA awards on review.

“This relaxation appears from the judgment of the LC initially and thereafter the judgment of the LAC where it was indicated that the ground of review of gross irregularity in respect of CCMA arbitrations under s 145(2)(a)(ii) of the LRA involves the consideration of what the LAC termed ‘latent irregularities’ and ‘dialectical unreasonableness’ and that these provide a basis for review more extensive than the level of unreasonableness identified as a ground of review in *Sidumo*.”²³⁷

The SCA observed that after *Sidumo* the position in regard to reviews of CCMA arbitration awards should have been clear.²³⁸ It held that reviews could be brought on the unreasonableness test laid down by the Constitutional Court and the grounds set out in sections 145(2)(a) and (b) of the LRA. However, there has been a development in a different direction aimed at providing a more generous standard for review of CCMA arbitration awards.²³⁹

Latent irregularity

With regard to the approach adopted by the LAC in relation to latent irregularities, the SCA found that two points flow from it. The first point is that the threshold for interference with the award is lower than in terms of the judgment in *Sidumo*.²⁴⁰ The second point flowing from the approach is that it is immaterial whether the result reached by the arbitrator is one that could reasonably be reached on the material before the arbitrator.²⁴¹ The potential for prejudice is sufficient to warrant interference.²⁴²

²³⁷ At para 8.

²³⁸ At para 14.

²³⁹ At para 15.

²⁴⁰ At para 17.

²⁴¹ At para 17.

²⁴² At para 17.

The origin of the approach adopted by the LAC is a dictum in the minority judgment of Ngcobo J in *Sidumo*²⁴³ where he said the following:

“Fairness in the conduct of proceedings requires the 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 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 fairness of the sanction, it can hardly be said that there was a fair trial of issues.”²⁴⁴

The SCA held that this dictum results in an approach to the review of CCMA arbitration awards that is contrary to that endorsed by the majority judgment in *Sidumo*.²⁴⁵ The SCA held that as all courts are bound by the majority judgment the development of the notion of latent irregularity, in the sense that it has assumed in the Labour Courts, cannot be accepted.²⁴⁶

The SCA held that a latent irregularity is a gross irregularity within the meaning of section 145(2)(a)(ii) only in the limited sense, where the decision maker has undertaken the wrong enquiry or undertaken the enquiry in the wrong manner.²⁴⁷

Dialectical unreasonableness

With regard the LAC’s approach on dialectical unreasonableness, the SCA found that the approach is based on a dictum by Ngcobo J in *Minister of Health & another NO v New Clicks South Africa (Pty) Ltd & others (Treatment Action Campaign & another as Amici Curiae)*²⁴⁸ which reads:

“There is obviously an overlap between the ground of review based on failure to take into consideration a relevant factor and one based on the unreasonableness of the decision. A consideration of the factors that the decision maker is bound to take into account is

²⁴³ At para 267.

²⁴⁴ At para 18.

²⁴⁵ At para 20.

²⁴⁶ At para 20.

²⁴⁷ At para 21.

²⁴⁸ 2006 (2) SA 311 (CC) at para 511.

essential to a reasonable decision. If a decision maker fails to take into account a factor that he or she is bound to take into consideration, the resulting decision can hardly be said to be that of a reasonable decision maker.”²⁴⁹

The SCA stated that this dictum relates to the provisions of PAJA and that as PAJA does not apply to reviews under section 145(2) it is of no application to CCMA arbitration awards.²⁵⁰ The SCA further noted that if the dictum is applied by considering the reasoning of a CCMA arbitrator and determining that the reasons given for making an award are not such as to justify that award its effect it to resuscitate the SCA’s decision in *Rustenburg Platinum Mines v CCMA* even though that decision was expressly overruled in *Sidumo*.²⁵¹

The SCA went on to summarize the position regarding the review of CCMA awards as follows:

“A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. 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.”²⁵²

The SCA then applied its mind to the facts of the case in light of the tests for review it had confirmed to be the proper approach. The court concluded as follows:

“...the issue in dispute was whether Mr Herholdt had dishonestly failed to disclose a conflict of interest regarding the two wills. The commissioner correctly stated in her award that this was the issue. She dealt exhaustively with the evidence and concluded that he had not been dishonest. Given the depth of her treatment of the evidence it could hardly be said that she misconceived the nature of the enquiry. But it is clear from the judgments of both the labour court and of the LAC that her conclusion was not one that a reasonable decision-maker could have reached in the light of the evidence and the issues she was called upon to decide. The result was 'substantively unreasonable in the sense that no reasonable commissioner, acting reasonably, could have reached the decision on the evidence and the

²⁴⁹ At para 23.

²⁵⁰ At para 24.

²⁵¹ At para 24.

²⁵² At para 25.

inferences drawn from it'. So, it is clear that notwithstanding its excursus on 'latent irregularities' and 'dialectical unreasonableness' the LAC was alive to *Sidumo* and applied it correctly."²⁵³

The findings of the SCA have been reaffirmed in the recent decision of the LAC in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA & others*.²⁵⁴ The LAC reiterated that reviews of arbitration awards are not divided into process-related and result-based reviews. The court held that the test for review of arbitration awards is the reasonableness test set out in *Sidumo*. In this regard the court held as follows:

“*Sidumo* does not postulate a test that requires a simple evaluation of the evidence presented to the arbitrator and based on that evaluation of the evidence presented to the arbitrator and based on that evaluation, a determination of the reasonableness of the decision arrived at by the arbitrator. The court in *Sidumo* was at pains to state that arbitration awards made under the Labour Relations Act (LRA) continue to be determined in terms of s 145 of the LRA but that the constitutional standard of reasonableness is “suffused” in the application of s145 of the LRA. This 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. In other words, in a case such as the present, 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 decision that the arbitrator arrived at is one that falls in a band of decisions to which a reasonable decision-maker could come on the available material.”²⁵⁵

The court held that gross irregularity is not a self-standing ground of review. The reviewing court must consider the alleged misconduct committed by the arbitrator then apply the test in *Sidumo*.

The court held as follows:

“A ‘process-related review’ suggests an extended standard of review, one that admits the review of an award on the grounds of a failure by the arbitrator to take material facts into account, or by taking into account facts that are irrelevant, and the like. The emphasis here is on process, and not result. Proponents of this view argue that where an arbitrator has committed a gross irregularity in the conduct of the arbitration as contemplated by s145(2), it remains open for the award to be reviewed and set aside irrespective of the fact that the decision arrived at by the arbitrator survives the *Sidumo* test. I disagree. What is required is first to consider the gross irregularity that the arbitrator is said to have committed and then to apply the reasonableness test established by *Sidumo*. The gross irregularity is not a self-standing ground insulated from or standing independent of the *Sidumo* test. That being the

²⁵³ At para 26.

²⁵⁴ Unreported case no JA 2/2012 of 4 November 2013.

²⁵⁵ Para 14.

case, it serves no purpose for the reviewing court to consider and analyse every issue raised at the arbitration and regard a failure by the arbitrator to consider all or some of the issues *albeit* material as rendering the award liable to be set aside on the grounds of process-related review.”²⁵⁶

6.5 CONCLUSION

The SCA held that the basis for the LAC’s judgment is Ngcobo J’s gross irregularity dictum in *Sidumo*. This dictum appears to have been subsequently endorsed by the Constitutional Court in *CUSA v Toa Ying* where the court held as follows:

“It is now axiomatic that a commissioner is required to apply his or her mind to the issues before him. One of the duties of a commissioner 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. Commissioners who do not do so do not fairly adjudicate the issues and the resulting award will be unreasonable.”²⁵⁷

There has been a lot of controversy with regard to the test for review since the judgment in *Sidumo*. It appears that the SCA has finally settled the debate. In summary, the SCA confirmed that the correct approach to reviews of statutory arbitrations is as follows:

The drafters of the LRA intended an extremely high standard for setting aside an award to support the overall aim of a speedy and inexpensive resolution of disputes arbitrated by the CCMA. The general principle is that a ‘gross irregularity’ concerns the conduct of the proceedings rather than the merits of the decision. A qualification to that principle is that a ‘gross irregularity’ is committed where decision-makers misconceive the whole nature of the enquiry. On *Sidumo*’s approach, the reasoning of the arbitrator assumes less importance than it does on the LAC’s approach where a flaw in the reasoning results in the award being set aside. In the *Sidumo* test, the reasons are still considered to see whether the result can reasonably be reached by that route. If not, the court must still consider whether, apart from those reasons, the result is one a reasonable decision-maker could reach in light of the issues and the evidence. The evidence must be scrutinised to determine whether the outcome was reasonable. The *Sidumo* test will justify setting aside an award if the decision is ‘entirely disconnected with the evidence’ or

²⁵⁶ Para 15.

²⁵⁷ At paras 76 and 134.

is 'unsupported by any evidence' and involves speculation by the commissioner. The review ground of reasonableness introduced by the Constitutional Court in *Sidumo* essentially provides for a result-based approach; not for a process-related review.

CHAPTER SEVEN

CONCLUSION

7.1. CONCLUSION

The aim of this research was to achieve four objectives namely:

- a) To outline the difference between reviews and appeals.
- b) To set out the grounds for review in terms of section 145 of the LRA.
- c) To outline how the courts have formulated and developed the test for review.
- d) To determine the role of reasonableness in the review of CCMA arbitration proceedings.
- e) To determine if the recent decision of the SCA in *Herholdt* has settled the debate revolving around the question whether section 145 provides for both a result-based and process-related review.

A discussion of the difference between reviews and appeals was undertaken. The courts have emphasized the importance of maintaining the distinction between a review and an appeal. An appeal court considers the material before the court of first instance to reach its own conclusion on that evidence. Reviews are to determine whether the arbitrator committed a gross irregularity in the conduct of the proceedings. There is a fine line between a review and an appeal and whilst it may be difficult to draw the line some times, the distinction must not be blurred.

In terms of section 145 of the LRA a person may apply to the Labour Court to set aside an award of the CCMA on one or more grounds listed in that section. The grounds listed in section 145 are: misconduct, gross irregularity in proceedings, excess of power, and improper obtaining of an award. Misconduct relates to immoral conduct such as bias and extra-curial conduct such as improper relationship with a party outside of arbitration. Gross irregularities in the proceedings refer to the manner in which the proceedings were conducted. There are two types of irregularities: patent irregularities which take place openly and latent irregularities which take place inside the mind of the arbitrator. A latent irregularity would be a ground for review only if

the arbitrator undertaken the wrong enquiry or undertaken it in the wrong manner. If an arbitrator exceeds the powers set out in the LRA the award will be set aside. Awards have been set aside on account of commissioners having exceeded their powers by assuming jurisdiction where they had none. An award is improperly obtained if the party to the dispute obtains the award through bribery or fraud, or if the party to the dispute threatens a commissioner.

Section 33(1) of the Constitution provides that administrative action should be lawful, reasonable and procedurally fair. In *Sidumo* the court held that CCMA arbitration proceedings constitute administrative action and therefore should comply with the Constitution. Arbitrators are obliged to make reasonable decisions, and the obligation to do so suffuses section 145 of the LRA.

Since *Sidumo* the Labour Courts have made significant strides in interpreting and applying the *Sidumo* test and the grounds of review set out in section 145(2) of the LRA. The legal position regarding reviews as illustrated by the case law cited above is that the grounds in section 145 of the LRA are not obliterated but are suffused by the Constitutional standard of reasonableness. CCMA arbitration awards may be reviewed on the grounds of review listed in section 145 of the LRA, and, in addition, on the ground of unreasonableness. Before the recent decision of the SCA in *Herholdt* the position held by the Labour Courts was that there are two broad types of reviews, namely, result based reviews and process related reviews. This meant that there are two types of unreasonableness: substantive unreasonableness and dialectical unreasonableness. However, after the Labour Courts were accused of unduly relaxing the standard for review, the SCA in *Herholdt* ruled that holding that there are two types of unreasonableness would not be in line with the majority judgment in *Sidumo*. All courts are bound by the majority judgment. It confirmed the accusation that the Labour Courts have unduly relaxed the standard for challenging CCMA awards on review. It concluded therefore that there is only one type of unreasonableness and that is substantive unreasonableness.

The test for substantive unreasonableness is the *Sidumo* test, i.e whether the decision reached by the commissioner is one which a reasonable decision maker could not reach. The arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. Where a commissioner fails to apply his mind to materially relevant facts or considerations, this is not by itself sufficient for an award to be set aside but is only of consequence if its effect is to render the outcome unreasonable.

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25. *Mzeku & others v Volkswagen SA (Pty) Ltd & others* (2001) 22 ILJ 1575 (LAC).
26. *Miladys, a division of Mr Price Group Ltd v Naidoo & others* (2002) 23 ILJ 1234 (LAC).
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45. *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA & others*
Unreported case no JA 2/2012 of 4 November 2013.
46. *Dickinson & Brown v Fisher's Executors* 1915 AD 166.
47. *Sampson Associates (Pty) Ltd t/a Interbrand Sampson v Cities Shepherd & others* (2010) 7 BLLR 746 (LC).
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52. *Blue Ribbon Bakeries v Naicker & others* (2000) 12 BLLR 1411 (LC).
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54. *Malelane Toyota v CCMA* (1999) 6 BLLR 555 (LC).
55. *DB Thermal (Pty) Ltd v CCMA & others* (2000) 10 BLLR 1163 (LC).
56. *Vita Foam SA (Pty) Ltd v CCMA & others* (2000) 21 ILJ 244.
57. *Sasko (Pty) Ltd v Buthelezi & others* (1997) 18 ILJ 1399 (LC).
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60. *Rainbow Farms (Pty) Ltd v Ngidi & others* (2001) 6 BLLR 664 (LC).
61. *Duicker Mining Ltd (Tavistock Colliery) v CCMA & others* (2003) 6 BLLR 550 (LC).
62. *Foschini Group v CCMA & others* (2008) 29 ILJ 1515 (LC).
63. *Technikon SA v Mojela & others* (2003) 24 ILJ 1737 (LC).

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72. *Tshwane University of Technology v Kirstein NO & another* (2009) 30 ILJ 1650 (LC).
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STATUTES

1. Arbitration Act 42 of 1965
2. The Labour Relations Act 56 of 1995
3. Promotion of Administrative Justice Act 3 of 2000



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25 March 2014

Ms Zikhona Gontsana (209515588)
School of Law
Howard College Campus

Protocol reference number: HSS/1089/013M
New project title: A review of the CCMA Arbitration Proceedings conducted under s145 of the LRA of 1995

Dear Ms Gontsana,

Approval - Change of project title

I wish to confirm that your application in connection with the above mentioned project has been approved.

Any alteration/s to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form, Title of the Project, Location of the Study, Research Approach/Methods 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 a period of 3 years from the date of 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: Benita Whitcher
cc Academic Leader Research: Professor Marita Carnelley
cc School Administrator: Mr Pradeep Ramsewak

Humanities & Social Sciences Research Ethics Committee

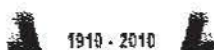
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