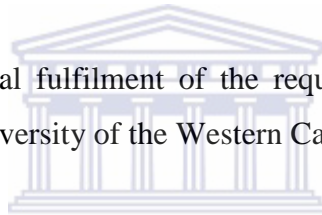




**UNIVERSITY of the
WESTERN CAPE
FACULTY OF LAW**

**A CRITICAL ANALYSIS OF HOW THE COURTS APPLY THE STANDARD OF
REASONABLENESS IN REVIEWING ARBITRATION AWARDS.**

A mini-thesis submitted in partial fulfilment of the requirements for the award of LL.M degree in the Faculty of Law, University of the Western Cape.



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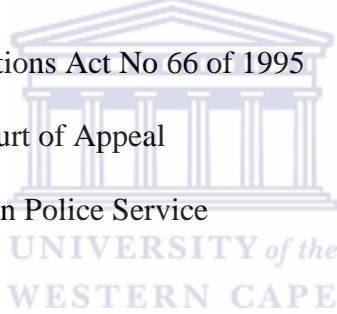
Review

South Africa



LIST OF ACRONYMS

CCMA	Commission for Conciliation, Mediation and Arbitration
CC	Constitutional Court
HC	High Court
PAJA	Promotion of Administrative Justice Act 3 of 2000
LC	Labour Court
LAC	Labour Appeal Court
1956 LRA	Labour Relations Act 28 of 1956
LRA	Labour Relations Act No 66 of 1995
SCA	Supreme Court of Appeal
SAPS	South African Police Service



DECLARATION

I, **Acama Uzell Brett**, declare that **A critical analysis of how the courts apply the standard of reasonableness in reviewing arbitration awards** is my own work and that it has not been submitted before for any degree or examination in any other university, and that all sources I have used or quoted have been indicated and acknowledged as complete references.

Student: Acama Uzell Brett

Signature:.....

Date:



Supervisor: Mr Pieter Koornhof

Signature:.....

Date:

ACKNOWLEDGEMENTS

I want to thank the Lord Almighty for giving me wisdom, strength, support and guidance to pursue this research. Without his Grace, I would not have been able to complete this research.

.

To my supervisor, Mr. Pieter Koornhof, thank you for going over and above your call of duty. Thank you for the support and input provided in the writing of this thesis. You believed in me even though I did not believe in myself at times. I could never have asked for a better supervisor and mentor.

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DEDICATION

I dedicate this thesis to my mother for your unconditional love and support in all my endeavors in life and my beloved son Arean Europa-Brett may you one day understand the journey of knowledge is of no value unless you put it into practice.



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CHAPTER 1

INTRODUCTION

1.1 BACKGROUND

The 1956 Labour Relations Act¹ (1956 LRA) allowed appeals from the Industrial Court to the former Labour Appeal Court (LAC).² A further appeal could be made to the then Appellate Division of the Supreme Court. The Industrial Court was not a court of law and as such, its proceedings were subject to review by the High Court (HC) or by the LAC.

Appeals and reviews are ways of revising a decision generally by lower courts and arbitrations.³ The reason for using one of these remedies is based upon dissatisfaction, for a variety of reasons, with the outcomes determined by the decision-maker.⁴ While sometimes conflated, appeal and review are two different remedies. It is trite that an arbitration award is usually final and binding. Accordingly, one cannot appeal against the award of an arbitrator in terms of the Labour Relations Act⁵ (LRA),⁶ nor can it be done in normal arbitration proceedings unless it has been agreed to between the parties. Even if a court is of the opinion that an award granted is incorrect, there are limited grounds upon which they are entitled to interfere.⁷

When conducting an appeal, the court is obliged to consider the merits of the matter before it. The court must decide whether the decision of court *a quo* was right or wrong.⁸ The court will

¹ Labour Relations Act 28 of 1956.

² Grogan J *Labour Litigation and Dispute Resolution* (2010) 321.

³ Hoexter G *Administration Law in South Africa* 2 ed (2012) 108.

⁴ Hoexter G *Administration Law in South Africa* 2 ed (2012) 108.

⁵ Labour Relations Act No 66 of 1995

⁶ *National Union of Mineworkers & Another v Samancor Ltd (Tubatse Ferrochme) & other* (2011) 32 ILJ 1618 (SCA); [2011] 11 BLLR 1041 para 5.

⁷ *National Union of Mineworkers & Another v Samancor Ltd (Tubatse Ferrochme) & other* (2011) 32 ILJ 1618 (SCA); [2011] 11 BLLR 1041 para 5.

⁸ Fergus E 'The distinction between appeal and reviews – Defining the limits of the labour court's powers of review' (2010) 31 ILJ 1556-1557.

have to decide whether the decision was right or wrong on the facts or the law.⁹ In essence, an appeal court looks at an issue for a second time.

In contrast to above, in terms of a review, the courts do not decide whether a decision is correct or not. Instead, it must determine whether a gross irregularity occurred in the proceedings or if the manner in which the decision was reached was fitting and reasonable, taking into account relevant circumstances.¹⁰ If a court determines that there was a substantial problem, the decision is effectively declared null and void. Great emphasis has been placed on the distinction between appeal and review and that this distinction must be maintained.¹¹ Notwithstanding this, the distinction between these two remedies is not as clear in practice as in theory. Hoexter notes that the focus is often on the decision itself as opposed to the decision-making process when dealing with judicial reviews. Thus in some cases it will be impossible to separate the merits from the rest of the matter. It has been noted that courts are often unable to effectively judge the legality of the decision without considering the merits of the case as well.¹²

The LRA excludes the remedy of appeals against arbitration awards. However, if a party is unhappy with the outcomes of the decision, such a party can request the court to review the decision of the commissioner. The reason for the exclusion of an appeal from the arbitrator's award of unfair dismissal is to speed up the process and free it from the legalism and cost that accompanies appeal proceedings.¹³

Section 145(2) of the LRA¹⁴ provides for the grounds upon which an unhappy party is able to challenge an arbitration award. In terms of the section, an award can be set aside on the grounds

⁹ Hoexter G *Administration Law in South Africa* 2 ed (2012) 108.

¹⁰ Fergus E 'The distinction between appeal and reviews – Defining the limits of the labour court's powers of review' (2010) 31 *ILJ* 1556-1557.

¹¹ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others* 2004 (7) BCLR 687 (CC) para 45; *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2007 12 BLLR 1097 (CC) para 108, 244; *Carephone (Pty) Ltd v Marcus NO. & others* 1998 11 BLLR 1093 (LAC) para 32.

¹² Hoexter G *Administration Law in South Africa* 2 ed (2012) 110; *Carephone (Pty) Ltd v Marcus NO. & others* 1998 11 BLLR 1093 (LAC) para 36; *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2007 12 BLLR 1097 (CC) para 108.

¹³ The Explanatory Memorandum to the Labour Relations Act 1995 16 *ILJ* 278-318.

¹⁴ Labour Relations Act No 66 of 1995.

of misconduct, gross irregularity in the conduct of the arbitration proceedings, the commissioner has exceeded his or her power, and the award has been improperly obtained.¹⁵

The drafters of the LRA did not see it fit to confer a right of appeal from proceedings of the Commission for Conciliation, Mediation and Arbitration (CCMA) and bargaining councils.¹⁶ Reviews conducted by the Labour Court (LC) under the LRA or the Arbitration Act¹⁷ are subject to further appeal to the LAC.¹⁸ When dealing with an appeal on a matter from a reviewing court. Courts must bear in mind that the issue on appeal remains whether the arbitrator committed reviewable misconduct.¹⁹

1.2 RESEARCH QUESTION

Is the standard of reasonableness as expressed in *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2007 12 BLLR 1097 (CC) an appropriate mechanism for reviewing arbitral awards?

1.3 THE TEST FOR REVIEW APPLIED BY THE COURTS AFTER *SIDUMO V RUSTENBURG PLATINUM MINES*

In *Sidumo & another v Rustenburg Platinum Mines Ltd & others*²⁰ a security guard was tasked with guarding a high risk security point but was dismissed on the basis that he repeatedly neglected to search, either properly or at all, employees exiting the security point. Sidumo requested the CCMA to arbitrate an unfair dismissal dispute. The commissioner concluded that Sidumo was guilty of misconduct, but that dismissal was not an appropriate or fair sanction. Rustenburg Platinum Mines applied to the LC to review the decision of the arbitrator and appealed to the LAC, but was unsuccessful on both occasions.²¹

¹⁵ Section 145(2)(a)-(b) of the LRA.

¹⁶ Grogan J *Labour Litigation and Dispute Resolution* (2010) 321.

¹⁷ Arbitration Act 42 of 1965.

¹⁸ Grogan J *Labour Litigation and Dispute Resolution* (2010) 321.

¹⁹ Grogan J *Labour Litigation and Dispute Resolution* (2010) 309.

²⁰ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2007 12 BLLR.

²¹ *Rustenburg Platinum mines Ltd v CCMA & others* [2004] 1 BLLR 34 (LAC) para 12-13.

A further appeal to the Supreme Court of Appeal (SCA) resulted in the court overturning both the decisions of the previous courts and the commissioner's finding being replaced with a ruling that the dismissal was fair. The SCA held that a CCMA commissioner does not have authority in relations to sanction, but bears the duty of deciding whether the employer's sanction is fair.²² The court went on to state that a commissioner opining that a different sanction would be fairer does not warrant setting aside the employer's sanction.²³ The SCA further held that CCMA arbitration awards amount to administrative actions and are accordingly reviewable under the Promotion of Administrative Justice Act²⁴ (PAJA). The court was of the view point that PAJA incorporated the grounds of review in section 145(2) of the LRA, replacing the specialised enactment of the LRA.²⁵

The matter was appealed to the CC, where the court had to determine the issue of how commissioners should approach the task of determining the fairness of a dismissal.²⁶ In rejecting the 'reasonable employer' test, the CC held that²⁷:

'The Constitution and the LRA seek to redress the power imbalance between employees and employers... Neither the Constitution nor the LRA affords any preferential status to the employer's view on the fairness of a dismissal... The approach of the Supreme Court of Appeal tilts the balance against employees.'

On the question of review, the majority held that the standard is suffused by the constitutional standard of reasonableness.²⁸ Reviewing courts will have to determine whether the decision reached by the commissioner is one a reasonable decision-maker could have reached.²⁹ The CC criticised the SCA's approach to CCMA arbitration awards being reviewable under PAJA. The court held that the SCA had not sufficiently referred to section 33 of the Constitution³⁰ when examining the functions of the commissioner, nor did it examine whether PAJA 'provided an exclusive statutory basis for the review of all administrative decisions.'³¹ Whereas a decision by

²² *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 para 29.

²³ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 para 34.

²⁴ Promotion of Administrative Justice Act 3 of 2000.

²⁵ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 para 38.

²⁶ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 para 46.

²⁷ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 para 74.

²⁸ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 para 110.

²⁹ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 para 110.

³⁰ Constitution of the Republic of South Africa, 1996.

³¹ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 para 80.

a commissioner could be an administrative action, it does not mean that PAJA is automatically applicable to the review of the CCMA arbitration awards.³² In this regard, it was held that³³:

‘To answer this question it is necessary first to deal with the LRA and its applicable provisions in relation to PAJA. The LRA is [a] specialised negotiated national legislation giving effect to the right to fair labour practices.... The task team was tasked to ‘provide a system of labour courts to determine disputes of right in a way that would be accessible, speedy, and inexpensive, with only one tier of appeal’.... Section 145 was purposefully designed, as was the entire dispute resolution framework of the LRA. The Supreme Court of Appeal was of the view that the only tension in relation to the importation of PAJA was the difference in time-scales in relation to reviews under section 145 of the LRA and PAJA. This difference is but one symptom of a lack of cohesion between provisions of the LRA and PAJA.’

It was held that when PAJA was enacted the legislature had knowledge of sections 145 and 210³⁴ of the LRA and did not repeal these sections.³⁵ Therefore the SCA had erred in holding that PAJA applied to arbitration awards in terms of the LRA.

The Constitutional Court in *Sidumo* gave very little guidance as to how the standard of reasonableness should be applied in practice.³⁶ It is noted that the standard of reasonableness threatens the distinction between appeal and review, as it is not often possible to separate the merits from scrutiny yet the court held that this distinction should be maintained.³⁷ The court further held that a reviewing court is obliged not to determine whether the decision by the arbitrator is correct but to determine whether a gross irregularity occurred during the proceedings.³⁸ Where a commissioner has failed to take into consideration material facts, the arbitration proceedings cannot be fair because the commissioner failed to perform in terms of

³² *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 para 94.

³³ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 para 94-95.

³⁴ 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.

³⁵ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 para 103.

³⁶ Fergus E *From Sidumo to Dunsmuir: The Test for Review of CCMA Arbitration Awards* (unpublished LLD Thesis, University of Cape Town, 2013) 14.

³⁷ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2007 12 BLLR 1097 (CC) para 108, 244.

³⁸ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2007 12 BLLR 1097 (CC) para 244.

their stated duty and functions.³⁹ The conduct of the commissioner accordingly prevents the aggrieved party from having his or her case fully and fairly determined, which constitutes gross irregularity in the conduct of the arbitration proceedings as envisioned in section 145(2)(a)(ii) of the LRA.⁴⁰

In *Herholdt v Nedbank*⁴¹ a financial broker employed by Nedbank was dismissed on the grounds that he dishonestly failed to declare a conflict of interest. This interest arose from him being nominated as a beneficiary in the will of a dying client. The employee was found not guilty of misconduct and reinstated in a CCMA arbitration award. Nedbank was successful in reviewing the award in the LC. The employee subsequently unsuccessfully appealed to both the LAC and SCA. The SCA in *Herholdt* held that the position after the Constitutional Court judgment in *Sidumo* with regards to review of arbitration awards should have been clear, but instead there has been a development in a different direction with regards to the review standard.⁴² The new development provides a more generous standard for reviewing arbitration awards.⁴³ This standard states that an arbitration award can be set aside on review on the ground of a latent irregularity as opposed to a gross irregularity which occurred during the proceedings.⁴⁴ A latent irregularity requires one to look at the reasons not to determine whether the result is correct but in essence to determine whether a gross irregularity had occurred in the proceedings.⁴⁵ This would then occur where the arbitrator has failed to take into account material facts or took into account immaterial facts.⁴⁶

Courts have held that there are two types of unreasonableness.⁴⁷ An award would be reviewable if it suffers either from dialectical unreasonableness or if it is substantively unreasonable in its

³⁹ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 para 268.

⁴⁰ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 para 268.

⁴¹ *Herholdt v Nedbank Ltd* [2012] 9 BLLR 857 (LAC) para 1-6.

⁴² *Herholdt v Nedbank Ltd and Another* (701/2012) [2013] ZASCA 97 para 14.

⁴³ *Herholdt v Nedbank Ltd and Another* (701/2012) [2013] ZASCA 97 para 15.

⁴⁴ *Herholdt v Nedbank Ltd and Another* (701/2012) [2013] ZASCA 97 para 16.

⁴⁵ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 para 264.

⁴⁶ Rogers P & Naidu C 'Test for review relooked – is there still scope for process related review or is it limited to Sidumo's outcome-based approach?' <http://www.lexology.com/library/detail.aspx?g=63b12c19-a56a-4a12-8f31-9b05de51fff5> (accessed 28 October 2014).

⁴⁷ *Herholdt v Nedbank Ltd* [2012] 9 BLLR 857 (LAC) para 33. See also Myburg A 'The LAC's Latest Trilogy of Review Judgments: Is the Sidumo Test in Decline?' (2013) 34 ILJ 19 26.

outcomes.⁴⁸ Substantive unreasonableness, which is the test used in *Sidumo* requires the aggrieved party to not only establish that the commissioner's reasons are unreasonable, but also that there existed no good reasons given the evidence before the commissioner to justify the award.⁴⁹ Dialectical unreasonableness is unreasonableness which flows from the process of reasoning adopted by the arbitrator.⁵⁰ The question facing the reviewing court is whether the decision 'is supported by arguments and considerations recognised as valid, even if not conclusive.'⁵¹ 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 from a dialectical point of view.⁵² It is not a requirement that the 'commissioner must have deprived the aggrieved party of a fair trial by misconceiving the whole nature of the enquiry.'⁵³ Instead, the threshold of interference is much lower, as it is sufficient to show that the commissioner has failed to apply his mind to certain material facts or issues before him, creating the potential for prejudice and the possibility that the result may have been different.⁵⁴ The SCA in *Herholdt*⁵⁵ held that this approach is based on the dictum by Ngcobo J in *New Clicks* a Constitutional Court judgment,⁵⁶ which reads as follows:

'There is obviously an overlap between the ground of review based on failure to take into consideration a relevant factor and one based on the unreasonableness of the decision. A consideration of the factors that a decision-maker is bound to take into account is essential to a reasonable decision. If a decision-maker fails to take into account a factor that he or she is bound to take into consideration, the resulting decision can hardly be said to be that of a reasonable decision-maker.'⁵⁷

⁴⁸ *Herholdt v Nedbank Ltd* [2012] 9 BLLR 857 (LAC) para 33.

⁴⁹ Myburgh A 'The LAC's Latest Trilogy of Review Judgments: Is the Sidumo Test in Decline?' (2013) 34 *ILJ* 19 23.

⁵⁰ *Herholdt v Nedbank Ltd and Another* (701/2012) [2013] ZASCA 97 para 22.

⁵¹ *Herholdt v Nedbank Ltd* [2012] 9 BLLR 857 (LAC) para 33.

⁵² *Herholdt v Nedbank Ltd* [2012] 9 BLLR 857 (LAC) para 36.

⁵³ *Herholdt v Nedbank Ltd* [2012] 9 BLLR 857 (LAC) para 39.

⁵⁴ *Herholdt v Nedbank Ltd* [2012] 9 BLLR 857 (LAC) para 39.

⁵⁵ *Herholdt v Nedbank Ltd and Another* (701/2012) [2013] ZASCA 97 para 23.

⁵⁶ *Minister of Health & another NO v New Clicks South Africa (Pty) Ltd & others (Treatment Action Campaign & another as Amici Curiae)* 2006 (2) SA 311 (CC).

⁵⁷ *Minister of Health & another NO v New Clicks South Africa (Pty) Ltd & others (Treatment Action Campaign & another as Amici Curiae)* 2006 (2) SA 311 (CC) para 511.

This dictum expressly relates to the provisions of PAJA and the manner in which they are to be applied.⁵⁸ However in accordance with *Sidumo*, PAJA does not apply to reviews under section 145(2) of the LRA and is of no application to CCMA awards.⁵⁹ In *Herholdt*⁶⁰ the SCA held that when evaluating the reasoning of a CCMA arbitrator and determining the reasons given for making an award are not justifiable as such, its effect is to revive the decision in *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration*,⁶¹ yet this decision was expressly overruled by the Constitutional Court in *Sidumo*.⁶² Accordingly an arbitration award will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material before them.⁶³ An award will not simply be set aside on (even material) errors of fact, including the weight and relevance attached to particular facts, unless the effect thereof is to render the outcome unreasonable.⁶⁴

Latent irregularity is often referred to as process related unreasonableness.⁶⁵ Such irregularity arises from the failure by the arbitrator to take into account a material fact in determining the arbitration, as well as the converse situation of taking into account materially irrelevant facts.⁶⁶ The origin of this approach is a dictum in the minority judgment of Ngcobo J in the Constitutional Court judgment of *Sidumo*,⁶⁷ where he stated that it is required of a commissioner to apply his or her mind to the issues that are material to the determination of the dispute in order for the proceedings to be fair. One of the duties of a commissioner when conducting arbitration is to determine the material facts. The commissioner must apply the provisions of the LRA to the facts in order to determine whether the dismissal was for a fair reason. He further holds that where a commissioner fails to apply their mind, it is impossible to say that there was a fair trial of issues. This threshold for intervention with the award is lower than the standard in the

⁵⁸ *Herholdt v Nedbank Ltd and Another* (701/2012) [2013] ZASCA 97 para 24.

⁵⁹ *Herholdt v Nedbank Ltd and Another* (701/2012) [2013] ZASCA 97 para 24.

⁶⁰ *Herholdt v Nedbank Ltd and Another* (701/2012) [2013] ZASCA 97 para 24.

⁶¹ *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration* 2007 (1) SA 576 (SCA).

⁶² *Herholdt v Nedbank Ltd and Another* (701/2012) [2013] ZASCA 97 para 24.

⁶³ *Herholdt v Nedbank Ltd and Another* (701/2012) [2013] ZASCA 97 para 25.

⁶⁴ *Herholdt v Nedbank Ltd and Another* (701/2012) [2013] ZASCA 97 para 25.

⁶⁵ *Herholdt v Nedbank Ltd and Another* (701/2012) [2013] ZASCA 97 para 16.

⁶⁶ *Herholdt v Nedbank Ltd and Another* (701/2012) [2013] ZASCA 97 para 16.

⁶⁷ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 para 267.

Constitutional Court majority judgment in *Sidumo* judgment⁶⁸ and such an approach is contrary to the approach endorsed by the Constitutional Court majority judgment in *Sidumo* judgment for reviewing arbitration awards.⁶⁹

In the judgment of Murphy AJA of the LAC in *Herholdt v Nedbank Ltd*⁷⁰ he opines that the time has arrived to rethink the remedy for a relief sought against an arbitration award. Justice for all may be better served were the relief against awards take the form of an appeal rather than a review. 'Reviews, just like appeals, lead to records, lengthy proceedings, lawyers, legalism, inordinate delays and high cost.'⁷¹ He is of the opinion that the objective of simple, quick, cheap and non-legalistic approach to unfair dismissals appears to not have been achieved through the limitation of review on the grounds of reasonableness.⁷² Murphy AJ holds that it is far easier to determine whether a commissioner's award is correct or incorrect on the facts or law, as opposed to determining whether a commissioner acted reasonably when making a decision.⁷³

The drafters of the LRA were deliberate in rejecting the possibility of appeals.⁷⁴ They went as far as selecting the narrowest possible grounds of review as the basis upon which arbitration awards will be challenged. Yet these narrow grounds are disregarded by various courts. These courts have interpreted these provisions to provide a more generous standard of review that is more easily satisfied.⁷⁵ By this generous standard parties will also not be deterred to challenge arbitration awards. The overall aim of a speedy and inexpensive resolution of labour disputes is accordingly not always reached.

1.4 RATIONALE OF THE STUDY

The aim of the CC in *Sidumo* was to bring clarity with regards to the test for reviewing arbitration awards. Based on the above cases and commentaries there is an apparent development

⁶⁸ *Herholdt v Nedbank Ltd and Another* (701/2012) [2013] ZASCA 97 para 17.

⁶⁹ *Herholdt v Nedbank Ltd and Another* (701/2012) [2013] ZASCA 97 para 20.

⁷⁰ *Herholdt v Nedbank Ltd* [2012] 9 BLLR 857 (LAC) para 56.

⁷¹ *Herholdt v Nedbank Ltd* [2012] 9 BLLR 857 (LAC) para 53.

⁷² *Herholdt v Nedbank Ltd* [2012] 9 BLLR 857 (LAC) para 53.

⁷³ *Herholdt v Nedbank Ltd* [2012] 9 BLLR 857 (LAC) para 54.

⁷⁴ *Herholdt v Nedbank Ltd and Another* (701/2012) [2013] ZASCA 97 para 9.

⁷⁵ *Herholdt v Nedbank Ltd and Another* (701/2012) [2013] ZASCA 97 para 11.

in a different direction with regards to the review test. The Constitutional Court in *Sidumo* required a review court to determine whether the decision by a commissioner was one a reasonable decision-maker could have reached on the evidential material available.⁷⁶ Rogers and Naidu submit that this focus is largely based on the conclusion as opposed to the method in which the arbitrator arrived at the conclusion. They note that ‘a defective reasoning by an arbitrator still passes the muster required in reviews’ on condition that the result is one that a reasonable arbitrator could have reached. They further note that in various decisions the LC did not limit itself to this relatively narrow outcome-based approach. Instead, a process-related approach was developed, which the court treated as existing in parallel to the outcomes-based approach. Process-related reviews allow for an arbitration award to be reviewed, even if the outcome of the award was one that a reasonable arbitrator could have reached, based on a determination that the process through which the award was reached was found to be materially wanting.⁷⁷

The above approach was adopted by the LAC in the *Herholdt* judgment. The LAC in this case adopted a generous standard of review which is easily satisfied as opposed to the test determined in *Sidumo* by the Constitutional Court. The LAC indicated that the ground of review of gross irregularity in terms of section 145 (2)(a)(ii) of the LRA included latent irregularity and dialectical irregularity, as the bases for the review of an arbitration award. A reviewing court is required to consider the reasoning of the arbitrator, an approach far wider than the traditional approach to the concept of gross irregularity.⁷⁸

Myburgh is of the opinion that from a practical perspective *Herholdt* does not prevent process-related reviews.⁷⁹ In order for an award to be set aside on a process related review, he submits it

⁷⁶ Rogers P & Naidu C ‘Test for review relooked – is there still scope for process related review or is it limited to Sidumo’s outcome-based approach?’ <http://www.lexology.com/library/detail.aspx?g=63b12c19-a56a-4a12-8f31-9b05de51fff5> (accessed 28 October 2014).

⁷⁷ Rogers P & Naidu C ‘Test for review relooked – is there still scope for process related review or is it limited to Sidumo’s outcome-based approach?’ <http://www.lexology.com/library/detail.aspx?g=63b12c19-a56a-4a12-8f31-9b05de51fff5> (accessed 28 October 2014).

⁷⁸ Rogers P & Naidu C ‘Test for review relooked – is there still scope for process related review or is it limited to Sidumo’s outcome-based approach?’ <http://www.lexology.com/library/detail.aspx?g=63b12c19-a56a-4a12-8f31-9b05de51fff5> (accessed 28 October 2014).

⁷⁹ Myburgh A ‘The test for review of CCMA arbitration awards: an update’ (2013) 23 Contemporary Labour Law 442.

must be established that the decision of the award had culminated in the result of the award being unreasonable.⁸⁰ He notes that after the Constitutional Court judgment in *Sidumo* the LAC has set aside awards or confirmed their setting aside on review in numerous cases on the basis of process-related errors.⁸¹ These awards were found to be sufficient in themselves to be reviewed without the *Sidumo* test being met.⁸² Myburgh submits that *Herholdt* puts us back into the legal position we were immediately before the Constitutional Court judgment in *Sidumo*.⁸³

Where it can be established that the outcome of an award is objectively wrong, a review for want of reasonableness will more often than not succeed. The LAC in *Herholdt* adopted the minority view of Ngcobo J which relates to the provisions of PAJA, something which was expressly determined not to be relevant in the majority judgment of the Constitutional Court judgment in *Sidumo*. These subsequent judgments accordingly create confusion as to how reviews are effectively dealt with in practice by our labour courts.

1.5 METHODOLOGY

The research methodology will be in the form of a desk study. In terms of International Labour Organisation, there are no standards, which are directly relevant to the question at hand. Instead, a critically comparative analysis between the laws of South Africa, Canada, and Namibia with reference to the context of appeal and review in labour matters (and more specifically that of arbitration) shall be done. Case law interpreting the law and principles relating to appeals and reviews together with academic commentary, shall be critically analysed accordingly.

⁸⁰ Myburgh A 'The test for review of CCMA arbitration awards: an update' (2013) 23 Contemporary Labour Law 4 42.

⁸¹ Myburgh A 'The test for review of CCMA arbitration awards: an update' (2013) 23 Contemporary Labour Law 4 42.

⁸² Myburgh A 'The test for review of CCMA arbitration awards: an update' (2013) 23 Contemporary Labour Law 4 42.

⁸³ Myburgh A 'The test for review of CCMA arbitration awards: an update' (2013) 23 Contemporary Labour Law 4 42.

1.6 NAMIBIAN'S JUDICIAL REVIEW

Namibia and South Africa have been recommended for implementing constitutions that guarantee the protection of basic labour rights and for undertaking labour reforms to give effect to constitutionally entrenched labour rights.⁸⁴ The aim is to regulate all facets of labour relationships. The current Labour Act has considerably transformed the labour law in Namibia and shaped a new framework for the resolution of labour disputes.⁸⁵ As opposed to the South African position, Namibia's Labour Act⁸⁶ permits for the remedies of appeal and review of an arbitration award.⁸⁷ Section 89(1) of the Labour Act allows an appeal to the LC against an award on a question of fact or law. When applying for an appeal or review the LC must be clear on whether it is dealing with an appeal or undertaking a review.⁸⁸ This is critical as appeal proceedings are different to review proceedings.⁸⁹

In *Shoprite Namibia*⁹⁰ the appellant appealed against the arbitrator's award based on the question of law. The appellant held that the arbitrator erred on the law or on the facts in her finding of the material facts. The court held that s 89(1) of the Labour Act states that one can only appeal an arbitration award on the question of law alone without anything else present, e.g. opinion or fact.⁹¹ In *Mokwena*⁹² the applicant requested the setting aside of the award made by the arbitrator and referring the matter back for fresh conciliation and fresh arbitration. The court held that the review of arbitral awards is administered by s 89 (4) of the Labour Act, read with subsections (5) and (10). The court held that there are four different categories of judicial review.⁹³ The first type of review is related to the irregularities and illegalities in the proceedings before the lower courts. The second category is expected to regulate proceedings before tribunals. The third category is expected to regulate acts of administrative bodies and administrative officials. Lastly, the fourth

⁸⁴ Musukubulili F 'Namibian Labour Dispute Resolution System: Comparison with South Africa' (2014) 35 *Obiter* 127-128.

⁸⁵ Musukubulili F 'Namibian Labour Dispute Resolution System: Comparison with South Africa' (2014) 35 *Obiter* 128.

⁸⁶ Labour Act No 11 of 2007.

⁸⁷ Section 89 of the Labour Act.

⁸⁸ Parker C *Labour Law in Namibia* (2012) 207.

⁸⁹ Parker C *Labour Law in Namibia* (2012) 207.

⁹⁰ *Shoprite Namibia (Pty) Ltd v Paulo and Another* (LCA 02/2010) [2011] NALC 5.

⁹¹ *Shoprite Namibia (Pty) Ltd v Paulo and Another* (LCA 02/2010) [2011] NALC 5 para 2.

⁹² *Mokwena v Shinguadja and Another* (LC 52/2011) [2013] NALCMD 10.

⁹³ *Mokwena v Shinguadja and Another* (LC 52/2011) [2013] NALCMD 10 para 2.

category includes reviews provided by other legislation.⁹⁴ There are only four grounds under the Labour Act for reviewing and setting aside an arbitration award. These grounds comprise of misconduct, gross irregularity in the conduct of the arbitration proceedings, the arbitrator has exceeded his/her power and the award has been obtained improperly.⁹⁵ These grounds are similar to the grounds set out in s 145(2) of the LRA.

1.7 CANADIA'S TEST FOR JUDICIAL REVIEW

Traditionally Canadian law provided for three standards of review available to reviewing courts assessing allegedly substantive irregularities.⁹⁶ 'Standard of review' is the degree of analysis the court will apply in reviewing decisions of a statutory body.⁹⁷ These standards are patent unreasonableness, reasonable *simpliciter*, and correctness.⁹⁸ Patent unreasonableness requires extreme deference to administrative determinations. A patently unreasonable decision is so flawed that no amount of crucial deference can justify the decision.⁹⁹ Correctness allows the court to reconsider a matter afresh.¹⁰⁰ The court accords no respect to the administrative tribunal and assumes its own analysis of the question decided by the tribunal.¹⁰¹ Reasonableness *simpliciter* is where the defect renders a decision unreasonable which might only be apparent after significant analysis of the situation.¹⁰² The appropriate standard of review in a practical case would be determined on the basis of pragmatic and functional analysis. Such an analysis takes

⁹⁴ *Mokwena v Shingudja and Another* (LC 52/2011) [2013] NALCMD 10 para 2.

⁹⁵ Section 89(5)(a) and (b) of the Labour Act.

⁹⁶ Fergus E *From Sidumo to Dunsmuir: The Test for Review of CCMA Arbitration Awards* (unpublished LLD Thesis, University of Cape Town, 2013) 209.

⁹⁷ Salans, Fraser Milner Casgrain and SNR Denton 'Supreme Court of Canada Rewrites Law on Standard of Review in Administrative Law' <http://www.dentons.com/en/insights/articles/2008/april/8/supreme-court-of-canada-rewrites-law-on-standard-of-review-in-administrative-law---april-2008> (accessed 14 November 2014).

⁹⁸ Fergus E *From Sidumo to Dunsmuir: The Test for Review of CCMA Arbitration Awards* (unpublished LLD Thesis, University of Cape Town, 2013) 210.

⁹⁹ Heckman G *Substantive review in appellate courts since Dunsmuir* (2009) 47 *OSGOODE Hall Law Journal* 755.

¹⁰⁰ Heckman G *Substantive review in appellate courts since Dunsmuir* (2009) 47 *OSGOODE Hall Law Journal* 754.

¹⁰¹ Salans, Fraser Milner Casgrain and SNR Denton 'Supreme Court of Canada Rewrites Law on Standard of Review in Administrative Law' available at <http://www.dentons.com/en/insights/articles/2008/april/8/supreme-court-of-canada-rewrites-law-on-standard-of-review-in-administrative-law---april-2008> (accessed 14 November 2014).

¹⁰² Heckman G *Substantive review in appellate courts since Dunsmuir* (2009) 47 *OSGOODE Hall Law Journal* 754.

into account numerous factors, such as: the existence of the privative clause, the nature of the question in issue and the expertise of the tribunal.¹⁰³

The majority in *Dunsmuir v New Brunswick*¹⁰⁴ merged the two standards of reasonableness as a single standard.¹⁰⁵ Accordingly the standard of review in Canadian law are no longer three but two, namely that of correctness and reasonableness.¹⁰⁶ When applying the correctness standard a reviewing court will not take into consideration a decision-maker's reasoning process but rather undertake its own analysis regarding the reasonableness of the question and decide whether it agrees with the determination of the decision-maker.¹⁰⁷ When applying the reasonableness standard a reviewing court must give respectful attention to the reasons offered or which might be offered in support of a decision.¹⁰⁸ Thus the review should focus on whether the reasons given by the tribunal to support the result achieved in terms of the facts and law. Seemingly the standard of review expressed in the Constitutional Court judgment in *Sidumo* is similar to the standard of review with regards to reasonableness expressed in *Dunsmuir*.

1.8 OVERVIEW OF THE CHAPTERS

In this mini thesis, the following will be discussed, with the above as background and the objective of determining whether the decision in *Sidumo* has effectively blurred the lines between appeal and review when reviewing an arbitration award. Whether the standard of reasonableness as expressed in the Constitutional Court judgment in *Sidumo* is an appropriate mechanism for reviewing arbitral awards. Chapter 2 will be a discussion on how labour law and administrative action overlap one another and how courts determine what constitutes as an administrative action.

¹⁰³ Salans, Fraser Milner Casgrain and SNR Denton 'Supreme Court of Canada Rewrites Law on Standard of Review in Administrative Law' available at <http://www.dentons.com/en/insights/articles/2008/april/8/supreme-court-of-canada-rewrites-law-on-standard-of-review-in-administrative-law---april-2008> (accessed 14 November 2014).

¹⁰⁴ *Dunsmuir v New Brunswick* [2008] 1 SCR 190.

¹⁰⁵ Heckman G *Substantive review in appellate courts since Dunsmuir* (2009) 47 *OSGOODE Hall Law Journal* 751-755.

¹⁰⁶ *Dunsmuir v New Brunswick* [2008] 1 SCR 190 para 44-45.

¹⁰⁷ *Dunsmuir v New Brunswick* [2008] 1 SCR 190 para 48.

¹⁰⁸ *Dunsmuir v New Brunswick* [2008] 1 SCR 190 para 48.

Chapter 3 will be a discussion on the standard of reasonableness as determined by *Sidumo* and the standard of process-related review as was the approached taken in *Herholdt*. Analyses will be done to determine whether these two standards of review are creating confusion for lower courts and whether these two standards are threatening to blur the line between appeal and review.

Finally, in chapter 4 concluding remarks will be made in respect of whether this distinction effectively still exists in the context of labour matters, and finally whether it is necessary to maintain the distinction in our context.



CHAPTER 2

ADMINISTRATIVE ACTION: INSIGHT FROM JUDICIAL PRECEDENT

2.1 INTRODUCTION

The classification of powers exercised by a state entity when making decisions in relation to employment has been greatly debated in South Africa.¹⁰⁹ Previously some judges accepted that employees in the public sector were allowed to bring administrative actions against their employers arising from employment-related decisions. Employees alleged that these decisions were in breach of their Constitutional rights to lawful and fair administrative action.¹¹⁰ Accordingly, state employees could choose whether to challenge dismissals and other employment related decisions under PAJA or under the LRA.

The CC judgment in *Chirwa* ended the option of public sector employees to choose between the LRA and PAJA. The majority held that where public sector employees have a cause of action under the LRA, they cannot seek the protection of PAJA. The court also held that dismissals do not constitute administrative action as defined in PAJA and are therefore not subject to review in terms thereof. The aim of the court was to divest the HC of jurisdiction in all matters that may either be arbitrated or resolved under the LRA.¹¹¹ The court held that the LC has exclusive jurisdiction over such matters.

The aim of this chapter is to test the various debates on whether the state as employer's decisions amounts to administrative action. Judicial decisions on this issue are not harmonious. There are two schools of thought on how powers exercised by the state and organs of state must be characterised. One school of thought is of the view that all employment relationships should be regulated by labour law including the right to fair labour practices in terms of s 23 of the

¹⁰⁹ Hoexter C *Administrative Law in South Africa* 2 ed (2012) 210.

¹¹⁰ Grogan J *Labour Litigation and Dispute Resolution* (2010) 68.

¹¹¹ Grogan J *Labour Litigation and Dispute Resolution* (2010) 68.

Constitution¹¹². Accordingly, administrative law, PAJA and the right to just administrative justice in terms of s 33 of the Constitution is excluded.¹¹³ The second school of thought is of the view that the exercise of public power attracts administrative law and labour law and that the employee has the option to choose between the two rights.¹¹⁴

By resolving this confusion the courts discuss s 23 and s 33 of the Constitution¹¹⁵ and how they are separate to one another. Section 23 of the Constitution preserves the right to fair labour practices.¹¹⁶ The LRA was enacted to provide particularity and content to s 23. Section 33 of the Constitution¹¹⁷ preserves the right to just administrative action which is lawful, reasonable and procedurally fair. PAJA was enacted to ensure just administrative action.

Specific consideration will be given to pre-constitutional administrative law which influenced the public employment sector for purpose of protecting public employees. Public sector employees were excluded from the 1956 LRA. An evaluation of the decision in *Zenzile*¹¹⁸ will be the point of departure and how this decision is no longer relevant to the Constitutional era. The discussion that follows will consider the overlap between labour law and administrative law and the school of thought the CC has adopted in terms of defining what constitutes an administrative action.

2.2 THE PRECEDENT IN *ADMINISTRATOR, TRANSVAAL & OTHERS V ZENZILE* AND SUBSEQUENT CASES

In the pre-constitutional era, the *Zenzile* judgment sought to provide clarity with regards to administrative law principles and their application to the contractual relationships between the public sector and its employees.

¹¹² Constitution of the Republic of South Africa, 1996.

¹¹³ *Chirwa v Transnet* [2008] 2 BLLR 97 (CC) para 128.

¹¹⁴ *Chirwa v Transnet* [2008] 2 BLLR 97 (CC) para 128.

¹¹⁵ Constitution of the Republic of South Africa, 1996.

¹¹⁶ Constitution of the Republic of South Africa, 1996.

¹¹⁷ Constitution of the Republic of South Africa, 1996.

¹¹⁸ *Administrator, Transvaal & others v Zenzile & others* (1991) 12 ILJ 259 (A).

In *Zenzile*, employees of the provincial administration were successful in challenging their dismissal for striking. They argued that the decision had been taken without first giving them an opportunity to a hearing. They also contended that they were protected by the principles of administrative law on the basis that they are public servants. Their reasoning was based on the premise that the *audi alteram partem*¹¹⁹ doctrine is a well-established principle of administrative law. They contended that the failure to apply these principles made the decision premature and thus unlawful.

The court of appeal agreed with their argument and reinstated them with retrospective effect. In making the determination, Hoexter JA held that the employees' loss of pay and related benefits was sufficient to review the decision under administrative law. In upholding the appeal, the Appellate Court rejected the averments of the state counsel that the relationship between the two parties amounted to a contract of employment and that the court must base its decision on the principals governing the law of contract. In opposition to this view, Hoexter JA held that there is no reason in principle why the decisions relating to contracts should be approached in some other manner.¹²⁰ The appropriate approach was to ask whether the decision-maker's powers to dismiss are sourced in statute. If this is the case then the decision warranted judicial intervention by way of review.

Hoexter JA's decision was based on the existence of a Code that had been promulgated under the prevailing Public Service Act¹²¹ which regulates conditions of employment within the service. He held that the Code, supported by the Act placed the relationship between the two parties beyond the realm of pure contract. In making this ruling, Hoexter JA, focused on the nature of the relationship between the employer and employee and held as follows:

'[The Court in *Zenzile* was not concerned with the] mere employment under a contract of service between two private individuals, but ... a form of employment which the law will protect. Here the employer and decision-maker is a public authority whose decision to dismiss involved the exercise of a public power. The element of public service injected by statute necessarily entails, so I consider, that the respondents were entitled to the benefit of

¹¹⁹ *Audi alteram partem* means, "let the other side be heard as well". No person should be judged without having a fair hearing first. Each party must be given a fair opportunity to respond to the evidence against them.

¹²⁰ *Administrator, Transvaal & others v Zenzile & others* (1991) 12 ILJ 259 (A) para 38.

¹²¹ Public Service Act, 111 of 1984.

the application of the principles of natural justice before they could be summarily dismissed for misconduct. Where an employee has this protection legal remedies are available to him to quash a dismissal not carried out in accordance with the principles of natural justice ...¹²²

Hence therefore, the employees were entitled to the protection under administrative law, such protection, emanating from the fact that the relationship between them and their employers was partially based on a statutory instrument.¹²³ In essence the judgment in *Zenzile* affords state employees the protection under administrative law, as the relationship between them and their employee's amounts to administrative action.

The judgment in *SA Police Union & Another v National Commissioner of the SA Police Service & Another*¹²⁴(SAPU) rejected the precedent of *Zenzile*. The court's primary reason is based on the fact that the decision in *Zenzile* is no longer applicable since its 'doctrinal underpinnings' is not in line with the constitutional era.¹²⁵ In *SAPU*; the question raised was whether the Commissioner of Police, when acting as an employer, is under a constitutional, statutory or contractual duty to consult with members of the South African Police Service (SAPS) or their representative when unilaterally altering their working hours.

The court agreed that the source of the Commissioner's powers in regard to labour matters is derived from s 24(1) of the South African Police Service Act.¹²⁶ The Act empowers the Minister to make regulations in relation to conditions of service of members and labour relations.¹²⁷ In making regulations the Minister granted the Commissioner the authority to regulate working hours. This gives him the right to exercise this authority unilaterally, or bi-laterally, in terms of existing contracts of employment or collective agreements. The power of the Commissioner is derived from a public source, but the CC has indicated that the source of the power, while

¹²² *Administrator, Transvaal & others v Zenzile & others* (1991) 12 ILJ 259 (A) 32-33.

¹²³ Brassey M 'Back off but back up! Administrative Law rightly yields to Labour Law.' (2009) 2 *Constitutional Court review* 214.

¹²⁴ *SA Police Union & Another v National Commissioner of the SA Police Service & Another* (2005) 26 ILJ 2403 (LC).

¹²⁵ *SA Police Union & Another v National Commissioner of the SA Police Service & Another* (2005) 26 ILJ 2403 (LC) para 67.

¹²⁶ South African Police Service Act 68 of 1995.

¹²⁷ *SA Police Union & Another v National Commissioner of the SA Police Service & Another* (2005) 26 ILJ 2403 (LC) para 51.

relevant is not necessarily decisive. The court held that the nature of the power, its subject matter and whether it involves the exercise of public duty is equally important. Setting the working hours of the police officers is not inherently public. Neither is there a concern for public law as the present issue falls within the ambit of contractual regulation of private employment relations. The powers and functions of the Commissioner arise from employment law and are bound by the constitutional rights to fair labour practices and to engage in collective bargaining. To define that every act of an organ of state amounts to an administrative action will carry the risk of imposing on the State burdens that normally would not be encountered by other actors in the private sphere.¹²⁸ In order for a decision to fall within the definition of administrative action, such a decision must be one which would adversely affect the rights of any citizen and it must have a direct or external legal effect.¹²⁹ In reaching this conclusion Murphy AJ disagreed with two earlier judgments in *Mbayeka & another v MEC for Welfare, Eastern Cape*¹³⁰ and *Simela & others v MEC for Education, Eastern Cape & another*¹³¹.

Mbayeka dealt with an application to the HC seeking a declaration that suspension from employment without emoluments was unconstitutional. Both applicants are employees of the Department of Welfare in the Provincial Government of the Eastern Cape. The applicants were arrested by the police on allegations of fraud and theft relating to the payment of social pension benefits. The respondent argued that the HC had no jurisdiction to hear the matter as it amounts to an unfair labour practice which falls solely within the jurisdiction of the LC. Jafta J held, when the respondent suspended the applicants she exercised a public power. This power is derived from s 22(7) of the Public Service Act¹³². The failure to afford the applicants a hearing before the suspension constituted an unconstitutional administrative action.¹³³

In *Simela*, nine applicants were seeking an order to have their transfers from Ebenezer Majombozi High School to various other schools declared unlawful. The applicants were all

¹²⁸ *SA Police Union & Another v National Commissioner of the SA Police Service & Another* (2005) 26 ILJ 2403 (LC) para 51.

¹²⁹ *SA Police Union & Another v National Commissioner of the SA Police Service & Another* (2005) 26 ILJ 2403 (LC) para 57.

¹³⁰ *Mbayeka & another v MEC for Welfare, Eastern Cape* [2001] 1 All SA 567 (Tk).

¹³¹ *Simela & others v MEC for Education, Eastern Cape & another* [2001] 9 BLLR 1685 (LC).

¹³² Public Service Act 103 of 1994.

¹³³ *Mbayeka & another v MEC for Welfare, Eastern Cape* [2001] 1 All SA 567 (Tk) para 29.

employed as educators by the Department of Education of the Province of the Eastern Cape at Ebenezer Majombozi High School for different periods. Francis AJ held that the decision taken by the respondent to transfer an employee in the absence of a hearing or any consultation preceding the transfer amounts to an unfair administrative act and an unfair labour practice.¹³⁴

Murphy AJ in *SAPU* disagreed with these two judgments based on the argument that neither of these two judgments paid attention to the definition of administrative action defined in PAJA. He further held that the courts in these two judgments based their reason on the assumption that the power to suspend or transfer is sourced in legislation.¹³⁵ What is equally important is the nature of the power and the subject matter. Disciplinary or operational transfers and suspensions are employment or labour matters and not administrative acts.¹³⁶ By defining employer's conduct as administrative action loses their force due to the codification of administrative law and labour law and the full protection of public sector employees by the LRA. He held that courts might have to consider the previous doctrine in light of the constitution and statutory framework.¹³⁷

It is difficult to argue that the decision in *Zenzile* is no longer binding in cases involving public sector dismissal.¹³⁸ In *Police and Prisons Civil Rights Union and others v Minister of Correctional Services and others*¹³⁹ (*POPCRU*) this was the view taken by Plasket J.¹⁴⁰ The matter before the court in *POPCRU* was for the dismissal of several correctional officers at Middledrift Prison for misconduct. It was argued that the decisions taken by the officials of the Department of Correctional Services did not constitute administrative action, as no public power

¹³⁴ *Simela & others v MEC for Education, Eastern Cape & another* [2001] 9 BLLR 1685 (LC) para 54-55 & 59.

¹³⁵ *SA Police Union & Another v National Commissioner of the SA Police Service & Another* (2005) 26 ILJ 2403 (LC) para 60.

¹³⁶ *SA Police Union & Another v National Commissioner of the SA Police Service & Another* (2005) 26 ILJ 2403 (LC) para 60.

¹³⁷ *SA Police Union & Another v National Commissioner of the SA Police Service & Another* (2005) 26 ILJ 2403 (LC) para 66.

¹³⁸ PAJA Newsletter Special issue: The application of PAJA to employment law disputes' available at http://www.justice.gov.za/paja/docs/newsletters/Newsletter%20special%20issue_Labour%20Law%20Sep%2007 (accessed 1 April 2015) at 4.

¹³⁹ *Police and Prisons Civil Rights Union and others v Minister of Correctional Services and others* [2006] 2 All SA 175 (E).

¹⁴⁰ PAJA Newsletter Special issue: The application of PAJA to employment law disputes' available at http://www.justice.gov.za/paja/docs/newsletters/Newsletter%20special%20issue_Labour%20Law%20Sep%2007 (accessed 1 April 2015) at 4.

was exercised.¹⁴¹ Such a decision did not affect the public as a whole. The court, however, was of the opinion that the indefinable concept of public power is not limited to the exercise of power that impact on the public as a whole. The exercise of the power to arrest is an administrative act which will only impact on the arrestee and the complainant. “A decision by the Amnesty Committee of the erstwhile Truth and Reconciliation Commission to grant a person amnesty from the civil and criminal consequences of his or her politically motivated crimes”¹⁴², is another example of an administrative act. The power involved in these instances is derived from a public functionary who is required to exercise it in the interest of the public and not in his or her private capacity.

Plasket J held that in his view:

‘The statutory basis of the power to employ and dismiss correctional officers, the subservience of the respondents to the Constitution generally and s 195 in particular, the public character of the Department and the pre-eminence of the public interest in the proper administration of prisons and the attainment of the purposes specified in s 2 of the Correctional Services Act all strengthen my view that the powers that are sought to be reviewed in this matter are public powers as envisaged by the common law, the Constitution and the PAJA.’¹⁴³

The officers are responsible for the prisoners who are in their custody and care based upon an order of the court. The purpose and nature of their detention is a matter of public concern and interest.¹⁴⁴ Notably, Plasket J notes that the court was bound by the decision in *Zenzile*. The court in *Zenzile* held that the decision of a public authority to dismiss an employee is an exercise of public power. Cases which ruled that public sector dismissals amount to administrative action are no longer applicable.¹⁴⁵ These cases relied on the judgment in *Zenzile* and must be understood in

¹⁴¹ *Police and Prisons Civil Rights Union and others v Minister of Correctional Services and others* [2006] 2 All SA 175 (E) para 52.

¹⁴² *Police and Prisons Civil Rights Union and others v Minister of Correctional Services and others* [2006] 2 All SA 175 (E) para 53.

¹⁴³ *Police and Prisons Civil Rights Union and others v Minister of Correctional Services and others* [2006] 2 All SA 175 (E) para 54.

¹⁴⁴ *Police and Prisons Civil Rights Union and others v Minister of Correctional Services and others* [2006] 2 All SA 175 (E) para 54.

¹⁴⁵ *Chirwa v Transnet* [2008] 2 BLLR 97 (CC) para 148.

light of the history of the public sector employees who were previously excluded from the protection of the LRA.¹⁴⁶

2.3 TRANSNET LTD & OTHERS V CHIRWA: THE RELATIONSHIP BETWEEN ADMINISTRATIVE AND LABOUR LAW

In the case of *Chirwa* the SCA had the opportunity to address the relationship between public sector employment and administrative law.¹⁴⁷ In *Chirwa* the employee was dismissed on the grounds of poor work performance. Chirwa applied to the HC to have her disciplinary proceedings set aside on the bases that the presiding officer was biased and that she was not given the opportunity to obtain legal representation. The HC held that the employer had breached Chirwa's natural justice and ordered her reinstatement. Chirwa's dismissal was set aside and she was awarded the common law remedies of reinstatement and nine months back pay. With the leave of the HC, Chirwa's employer's appealed to the SCA.

Three SCA judges (Conradie JA, Cameron JA, Mpati DP) held that public sector employment decisions are administrative action, while Mthiyane JA and Jafta JA held that such decisions are not administrative actions because they do not amount to exercises of public power.

Cameron JA adopted the view of Plasker J in the case of *POPCRU*. He held that it is difficult to see why the decision of a state organ to dismiss an employee does not constitute administrative action.¹⁴⁸ Transnet is a public entity created by statute and governed by statute, therefore, Transnet's 'every act derives from its public, statutory character, including the dismissal.'¹⁴⁹ The doctrine adopted in *Zenzile* and the cases that followed after it, 'was that employment with a public body attracts the protections of natural justice because the employer is a public authority

¹⁴⁶ *Chirwa v Transnet* [2008] 2 BLLR 97 (CC) para 148.

¹⁴⁷ *Transnet Ltd & others v Chirwa* (2007) (2) SA 198 (SCA).

¹⁴⁸ *Transnet Ltd & others v Chirwa* (2007) (2) SA 198 (SCA) para 51.

¹⁴⁹ *Transnet Ltd & others v Chirwa* (2007) (2) SA 198 (SCA) para 52.

whose employment-related decisions involve the exercise of public power.’¹⁵⁰ Transnet’s conduct therefore constitutes administrative action.

Conradie JA supported the approach of Murphy AJ in *SAPU*. He accepted without reason that the dismissal of Chirwa amounted to administrative action. He further held that through the establishment of the 1996 LRA, dismissals in the public sector can no longer be regarded as administrative acts. He argued that the intention of the legislature through the LRA was to ensure that all unfair dismissal disputes of all employees be dealt with in terms of the LRA.¹⁵¹ Even if Chirwa had a cause of action under PAJA, she is still limited to relief under the LRA. Conradie JA reasoned that the provisions set out in s 158(1)(h) of the LRA confers jurisdiction on the LC to review an administrative act performed by an organ of state as an employer.¹⁵²

Mthiyane JA agreed that Transnet is an organ of state as defined in s 239 of the Constitution¹⁵³ and bound by these principles. The nature of the power or function is important to look at when determining whether the states conduct amounts to administrative action. The identity of the functionary exercising the power or performing the function is secondary. Mthiyane JA holds that the nature of the conduct of Transnet is the termination of a contract of employment. Such conduct does not involve the exercise of any public power or performance of a public function in terms of a statute. Contract of employment does not affect the public and is therefore not governed by administrative law. The power to dismiss Chirwa did not amount to an administrative action. Transnet is merely acting in his capacity as employer.¹⁵⁴

The matter of Chirwa was appealed to the CC. The question on whether the dismissal of a public sector employee amounts to administrative action arose again before the CC. Chirwa believed that she had a right to bring her action under PAJA in the HC because her dismissal amounted to administrative action. Chirwa based her argument on the fact that Transnet had failed to comply with the relevant provisions of the Code of Good Practice: Dismissal.¹⁵⁵ In essence Chirwa is

¹⁵⁰ *Transnet Ltd & others v Chirwa* (2007) (2) SA 198 (SCA) para 52.

¹⁵¹ *Chirwa v Transnet* [2008] 2 BLLR 97 (CC) para 29.

¹⁵² *Chirwa v Transnet* [2008] 2 BLLR 97 (CC) para 29.

¹⁵³ Constitution of South Africa, 1996.

¹⁵⁴ *Transnet Ltd & others v Chirwa* (2007) (2) SA 198 (SCA) para 15-16.

¹⁵⁵ Schedule 7 of the LRA.

invoking her right to fair administrative action on the basis of Transnet's failure to comply with the LRA.

Previously, state employees had no protection under the 1965 LRA¹⁵⁶, however, this position has subsequently been amended by the current LRA. State employees now enjoy protection under the LRA, but still enjoy access to civil courts for relief under PAJA, placing them in a more favorable position to those of the private sector.¹⁵⁷ On the surface, it appears as if dismissals of public sector employees affects their labour rights, and further, (or as well as) their right to administrative justice.¹⁵⁸ These two rights are entrenched in the Constitution, with each containing its own aims and resultant specialised legislation which gives effect to their distinct objectives. This was emphasised in *SAPU*.

The aim of 'labour law as embodied in the LRA is to provide a comprehensive system of dispute resolution mechanisms, forums and remedies which are tailored to deal with all aspects of employment,'¹⁵⁹ Whereas, the aim of administrative justice is to ensure that procedural fairness is achieved in matters between the state and the public.¹⁶⁰ The LRA must be seen as the more appropriate route to pursue, as an employee is protected from arbitrary and irrational decisions, through substantive fairness requirements and a right not to be subjected to unfair labour practices.¹⁶¹

The outcomes of a judicial review of an administrative decision will more often be set aside. Yet an employer is not prevented from restarting disciplinary proceedings, nor is an employee prevented from been dismissed after a fresh hearing that will remove all original defects.¹⁶² Skweyiya J was of the opinion that the forums provided for by the LRA allows for a variety of purpose-built, employment-focused relief, which is not available under the provisions of PAJA.¹⁶³

¹⁵⁶ Labour Relations Act 28 of 1956.

¹⁵⁷ *Chirwa v Transnet* [2008] 2 BLLR 97 (CC) para 40.

¹⁵⁸ *Chirwa v Transnet* [2008] 2 BLLR 97 (CC) para 46.

¹⁵⁹ *Chirwa v Transnet* [2008] 2 BLLR 97 (CC) para 47.

¹⁶⁰ *Chirwa v Transnet* [2008] 2 BLLR 97 (CC) para 47.

¹⁶¹ *Chirwa v Transnet* [2008] 2 BLLR 97 (CC) para 42

¹⁶² *Chirwa v Transnet* [2008] 2 BLLR 97 (CC) para 43.

¹⁶³ *Chirwa v Transnet* [2008] 2 BLLR 97 (CC) para 43.

Irrespective of whether an employer is in the public or private sector, the LRA is the point of departure on matters concerning allegations of unfair dismissal and unfair labour practice.¹⁶⁴ The LRA does not distinguish between the state as an employer and any other employer.

Only acts of an administrative nature are subject to the administrative justice right in s 33 of the Constitution.¹⁶⁵ When determining what constitutes an administrative action, the focus must not be on the position which the functionary occupies but rather on the nature of the power being exercised. Based on the above, the conduct of Transnet would therefore, not constitute administrative action under s 33 of the Constitution.¹⁶⁶

Ngcobo J referred to the principles laid down in *President of the Republic of South Africa and Others v South Africa Rugby Football Union and Others*¹⁶⁷ (SARFU) to determine whether Transnet's conduct amounts to administrative action.¹⁶⁸ In this case the court had to determine when courts may review the exercise of presidential powers. The court also looked at circumstances when a President can be called to testify upon in a court of law. The court emphasised that not all conduct of the State and its organs will amount to administrative action under s 33 of the Constitution¹⁶⁹. Certain acts of the state may amount to administrative action. Similarly the state will from time to time carry out administrative tasks. The focus of the enquiry as to whether the conduct amounts to administrative action is not concerned with the performance by a member of the executive arm of government.¹⁷⁰

The court held:

'[When] determining whether an action should be characterised as the implementation of legislation or the formulation of policy may be difficult. It will, as we have said above, legislation or the formulation of policy may be difficult. It will, [as was said above], depend

¹⁶⁴ *Chirwa v Transnet* [2008] 2 BLLR 97 (CC) para 64.

¹⁶⁵ *Chirwa v Transnet* [2008] 2 BLLR 97 (CC) para 72

¹⁶⁶ *Chirwa v Transnet* [2008] 2 BLLR 97 (CC) para 73 & 150.

¹⁶⁷ *President of the Republic of South Africa and Others v South Africa Rugby Football Union and Others* 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC).

¹⁶⁸ *Chirwa v Transnet* [2008] 2 BLLR 97 (CC) para 129.

¹⁶⁹ Constitution of the Republic of South Africa, 1996.

¹⁷⁰ *President of the Republic of South Africa and Others v South Africa Rugby Football Union and Others* 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) para 141.

primarily upon the nature of the power. A series of considerations may be relevant to deciding on which side of the line a particular action falls. The source of the power, though not necessarily decisive, is a relevant factor. So too is the nature of the power, its subject matter, whether it involves the exercise of a public duty, and how closely it is related on the one hand to policy matters, which are not administrative, and on the other to the implementation of legislation, which is. While the subject matter of a power is not relevant to determine whether constitutional review is appropriate, it is relevant to determine whether the exercise of the power constitutes administrative action for the purposes of s 33. Difficult boundaries may have to be drawn in deciding what should and what should not be characterised as administrative action for the purposes of s 33. These will need to be drawn carefully in the light of the provisions of the Constitution and the overall constitutional purpose of an efficient, equitable, and ethical public administration. This can best be done on a case by case basis.¹⁷¹

According to Ngcobo J, Transnet's power is the termination of employment for poor work performance. The source of the power is derived from the employment contract between Chirwa and Transnet. When Transnet terminated Chirwa's contract of employment, Transnet was exercising its contractual power. Such power does not involve the implementation of legislation, which amounts to administrative action. Termination of Chirwa's employment does not amount to administrative action according Ngcobo J.¹⁷² Section 33 of the Constitution is not concerned with every act of administration executed by an organ of state.¹⁷³ The fact that Transnet is an organ of State, which exercises public power, does not convert the conduct of Transnet in terminating Chirwa's employment contract into administrative action.¹⁷⁴

Instances where courts have defined dismissals by the state as an employer amounted to administrative action; such decisions were derived from the principles of *Zenzile*.¹⁷⁵ Ngcobo J is of the opinion that these principles need to be understood in light of history and the position of

¹⁷¹ *President of the Republic of South Africa and Others v South Africa Rugby Football Union and Others* 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) para 143.

¹⁷² *Chirwa v Transnet* [2008] 2 BLLR 97 (CC) para 142.

¹⁷³ *Chirwa v Transnet* [2008] 2 BLLR 97 (CC) para 142.

¹⁷⁴ *Chirwa v Transnet* [2008] 2 BLLR 97 (CC) para 142.

¹⁷⁵ *Chirwa v Transnet* [2008] 2 BLLR 97 (CC) para 148.

the LRA during the time of *Zenzile*.¹⁷⁶ Previously public sector employees were excluded from the LRA and had no protection against employment decisions made by the state as an employer. In order to protect the public sector employees the courts held that employment decisions made by state employers amount to administrative action. Since the new constitutional era, the position has changed. Section 23 of the Constitution protects all employees, including those in the public sector except those who are specifically excluded from its provisions and the right to fair labour practices. 'Labour and employment rights such as the right to a fair hearing, substantive fairness, and remedies for non-compliance are now codified in the LRA.'¹⁷⁷ It is thus no longer necessary to subject public sector employees to the protection of administrative law. The Constitution does not differentiate between public and private sector employees. The Constitution states that all workers must be treated equally and any deviation from this principle must be justified.¹⁷⁸ Ngcobo J is of the opinion that there is no reason why public sector employees who are protected by the LRA, should be treated differently to the private sector employees and be given more rights.¹⁷⁹ A public sector employee who challenges employment decisions made by state employers, does not have two causes of action, one derived from the LRA and another from the Constitution and PAJA.¹⁸⁰ A public sector employee only has one cause of action and that is under the LRA.¹⁸¹



2.4 RE-AFFIRMING THE DECISION OF THE CONSTITUTIONAL COURT IN *CHIRWA*: THE CASE OF *GCABA V MINISTER OF SAFETY AND SECURITY*

The majority finding in *Chirwa* was re-affirmed in *Gcaba v Minister of Safety & Security & Others*¹⁸². In *Gcaba* the appellant challenged a decision not to appoint or promote him to an upgraded position in the SAPS. The applicant was appointed to the position of station commissioner in Grahamstown. When the position was upgraded the applicant applied for the position, yet he was not appointed. The applicant lodged a grievance with the SAPS, but later

¹⁷⁶ *Chirwa v Transnet* [2008] 2 BLLR 97 (CC) para 148.

¹⁷⁷ *Chirwa v Transnet* [2008] 2 BLLR 97 (CC) para 148.

¹⁷⁸ *Chirwa v Transnet* [2008] 2 BLLR 97 (CC) para 149.

¹⁷⁹ *Chirwa v Transnet* [2008] 2 BLLR 97 (CC) para 149.

¹⁸⁰ *Chirwa v Transnet* [2008] 2 BLLR 97 (CC) para 149.

¹⁸¹ *Chirwa v Transnet* [2008] 2 BLLR 97 (CC) para 149.

¹⁸² *Gcaba v Minister of Safety & Security & Others* (2009) 30 ILJ 2623 (CC).

discarded of this process and instead elected to refer the dispute to the Safety and Security Sectorial Bargaining Council. SAPS failed to attend the pre-arbitration meeting and the applicant withdrew the dispute from the Bargaining Council. The applicant lodged a grievance with the SAPS, but later discarded this process, rather, choosing to refer the dispute to the Safety and Security Sectorial Bargaining Council. The issue confronting the CC was once again whether the failure to promote and appoint Gcaba (a public official) was an administrative action subject to review.

Gcaba contested that his claim was from the start embedded to a large extent in administrative law. His claim was heavily reliant on the right to fair administrative action envisaged by PAJA, while the right to fair labour practices under the LRA amounted to a subsidiary argument.¹⁸³ Gcaba contested that the decision not to appoint him amounted to administrative review and should be set aside. The respondents, however, argued that the applicants claim is a labour matter, therefore, making the LRA applicable. The respondents do not deny the fact that the power to appoint was one exercised by an organ of state. However, the respondents contested that the power exercised by the SAPS is private in nature and vests in the employer. The respondents further held that the decision by the SAPS whether or not to promote the applicant is no different from a decision to dismiss or to change shift arrangements.¹⁸⁴

It was held that employment and labour relationship issues do not extend to administrative action within the scope of PAJA.¹⁸⁵ Section 23 of the Constitution¹⁸⁶ regulates the relationship between employer and employee and guarantees the right to lawful, reasonably and procedurally fair administrative action. Section 33 of the Constitution¹⁸⁷, however, does not regulate the relationship between the state as an employer and employees. By separating these two sections the court sustains the interdependence and inseparability of human rights and acknowledges that conduct in the workplace may give rise to a variety of different claims.¹⁸⁸ When a state employee

¹⁸³ *Gcaba v Minister of Safety & Security & Others* (2009) 30 ILJ 2623 (CC) para 44.

¹⁸⁴ *Gcaba v Minister of Safety & Security & Others* (2009) 30 ILJ 2623 (CC) para 50. Also see *Chirwa v Transnet* [2008] 2 BLLR 97 (CC) para 133-4 and *SA Police Union & Another v National Commissioner of the SA Police Service & Another* (2005) 26 ILJ 2403 (LC) para 51.

¹⁸⁵ *Gcaba v Minister of Safety & Security & Others* (2009) 30 ILJ 2623 (CC) para 64.

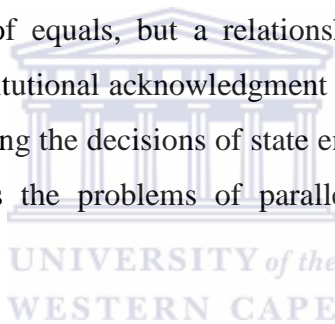
¹⁸⁶ Constitution of the Republic of South Africa, 1996.

¹⁸⁷ Constitution of the Republic of South Africa, 1996.

¹⁸⁸ Hoexter C *Administrative Law in South Africa* 2 ed (2012) 214.

challenges the decision of the state as employer, such conduct has very little or no direct implications or consequences for other citizens, such conduct does not amount to administrative action.¹⁸⁹

The CC approved the distinction drawn by Murphy AJ in *SAPU's* in relation to tendering contracting processes and employment. The court held that there are material differences between tender processes and employment. The Constitution expressly regulates employment relationships in s 23 of the Constitution¹⁹⁰. This, nonetheless, is not the same for procurement and employment relationship is different from the contractual relationship which reinforces procurement.¹⁹¹ The court concludes by stating that the employment decision at issue in *SAPU* was not an administrative action. Removing decisions made by state employers from the ambit of administrative law does not mean that employees are no longer protected. An employment relationship is not a bargaining of equals, but a relationship of demand. Section 23 of the Constitution¹⁹² is an express constitutional acknowledgment of the special status of employment relationships. Importantly, by placing the decisions of state employers within the ambit of labour related issues, the court removes the problems of parallel systems of law and duplicated jurisdiction.¹⁹³



Chirwa and *Gcaba* were considered in *Hendricks v Overstrand Municipality*¹⁹⁴. The LAC in *Hendricks* interpreted s 158(1)(h) of the LRA. The CC in *Chirwa* and *Gcaba* did not deal with s 158(1)(h) when determining whether a state employers conduct in terms of unfair labour practice and dismissal amounts to administrative action.

The appellant in *Hendricks* was the Chief: Law Enforcement and Security at Overstrand Municipality. He was responsible for *inter alia* administering general law enforcement in the

¹⁸⁹ *Gcaba v Minister of Safety & Security & Others* (2009) 30 ILJ 2623 (CC) para 64.

¹⁹⁰ Constitution of the Republic of South Africa, 1996.

¹⁹¹ *Gcaba v Minister of Safety & Security & Others* (2009) 30 ILJ 2623 (CC) para 65.

¹⁹² Constitution of the Republic of South Africa, 1996.

¹⁹³ Hoexter C *Administrative Law in South Africa* 2 ed (2012) 214.

¹⁹⁴ *Hendricks v Overstrand Municipality & another* (CA24/2013) [2014] ZALAC 49; [2014] 12 BLLR 1170 (LAC); (2015) 36 ILJ 163 (LAC).

municipality. The position which Hendrick held was a senior one and he was expected to observe a high degree of integrity and honesty.¹⁹⁵

Hendricks was charged with rude, abusive behavior to a fellow employee; dishonesty, including fraudulent misrepresentation and breaches of the code of conduct. A disciplinary hearing was held and chaired by an independent presiding officer in terms of the Disciplinary Procedure and Code Collective Agreement. Hendricks was found guilty on two charges and Hendricks pleaded guilty to one of the three charges.¹⁹⁶

The presiding officer imposed a sanction of a final written warning valid for 12 months on the first charge, and a suspension without pay for 10 days, coupled with a final written warning valid for 12 months on the second charge.¹⁹⁷

Overstrand Municipality applied to the LC seeking an order for reviewing and setting aside the decision of the presiding officer and replacing it with the sanction of dismissal.¹⁹⁸ The Overstrand Municipality made the application in terms of s 158(1)(h) of the LRA. They argued that the decision made by the presiding officer was irrational and unreasonable and that it can be reviewed on the above grounds 'which are permissible in law'. They further argued that the trust relationship between them and Hendricks has been destroyed and the only rational and reasonable sanction in the present circumstances would be dismissal.¹⁹⁹

The LC held that a review was allowed under s 158(1)(h) and set aside the decision of the presiding officer and substituted it with a sanction of dismissal. The LC characterised the decision of the presiding officer as an administrative action even though the LC did not explicitly state it. The LC set the decision aside on the grounds that the presiding officer's decision was

¹⁹⁵ *Hendricks v Overstrand Municipality & another* (CA24/2013) [2014] ZALAC 49; [2014] 12 BLLR 1170 (LAC); (2015) 36 *ILJ* 163 (LAC) para 2.

¹⁹⁶ *Hendricks v Overstrand Municipality & another* (CA24/2013) [2014] ZALAC 49; [2014] 12 BLLR 1170 (LAC); (2015) 36 *ILJ* 163 (LAC) para 3-4.

¹⁹⁷ *Hendricks v Overstrand Municipality & another* (CA24/2013) [2014] ZALAC 49; [2014] 12 BLLR 1170 (LAC); (2015) 36 *ILJ* 163 (LAC) para 5.

¹⁹⁸ *Hendricks v Overstrand Municipality & another* (CA24/2013) [2014] ZALAC 49; [2014] 12 BLLR 1170 (LAC); (2015) 36 *ILJ* 163 (LAC) para 6

¹⁹⁹ *Hendricks v Overstrand Municipality & another* (CA24/2013) [2014] ZALAC 49; [2014] 12 BLLR 1170 (LAC); (2015) 36 *ILJ* 163 (LAC) para.

irrational and unreasonable. These grounds are set out in s 6(2)(ii) and 6(2)(h) of PAJA. S 1 of PAJA states that any decision taken by an organ of the state when exercising a constitutional or public power or performing a public function in terms of legislation which adversely affects the rights of any person and which has a direct, external legal effect.

Hendricks held that the LC had erred in finding that Overstrand Municipality was entitled to approach the court on review in terms of s 158(1)(h) of the LRA to challenge the finding of the presiding officer. Hendricks argument is based on s 23 and 33 of the Constitution which deals with fair labour practices and just administrative action which was dealt with by the CC in *Chirwa* and *Gcaba*.²⁰⁰

Ncgobo J held in the CC judgment of *Chirwa* that the subject matter of power involved in *Chirwa* was the termination of a contract of employment and that such did not involve an act of administrative even though the employer in *Chirwa* was a state entity. This dictum was endorsed by the CC in *Gcaba* and who further discussed the relationship between the constitutional right to fair labour practices and the right to administrative justice. The CC in *Gcaba* held that employment and labour relationship issues do not amount to administrative action within the meaning of PAJA where the state is an employer.

The CC in *Chirwa* and *Gcaba* supported the general proposition that public sector employees aggrieved by dismissal or unfair labour practices must pursue the remedies set out in s 191 and 193 of the LRA as mandated and circumscribed by s 23 of the Constitution. As previously stated the CC in *Chirwa* and *Gcaba* made no explicit finding in relation to s 158(1)(h) of the LRA.²⁰¹

The LAC in *Hendricks* held that Overstrand Municipality is an organ of state as defined in s 239 of the Constitution. When such a body discipline's a senior employee who holds a public or quasi-public office in law enforcement, it can be seen to be exercising a public power or performing a public function in terms of local authority legislation and any applicable statutory

²⁰⁰ *Hendricks v Overstrand Municipality & another* (CA24/2013) [2014] ZALAC 49; [2014] 12 BLLR 1170 (LAC); (2015) 36 *ILJ* 163 (LAC) para 10.

²⁰¹ *Hendricks v Overstrand Municipality & another* (CA24/2013) [2014] ZALAC 49; [2014] 12 BLLR 1170 (LAC); (2015) 36 *ILJ* 163 (LAC) para 10 – 12.

collective agreement.²⁰² The presiding officer's power arises from the provisions of a statutory collective agreement.²⁰³ Such agreements are not their totality contractual in nature, especially when concluded in a bargaining council between an employers' organisation and trade unions.²⁰⁴ The LAC further held that the structural elements of the agreement arises from the process of collective bargaining, therefore the decision made by the presiding officer qua employer is a decision of an administrative nature by an organ of state performing a public function in terms of the legislation governing local government.²⁰⁵ This position is different to that which was taken by the CC in *Chirwa* and *Gcaba* where the CC in fact held that employment and labour issues does not amount to administrative action.

The LAC held that Overstrand Municipality has a public duty to ensure that there is no corruption and malfeasance from within its ranks and structures. Therefore the decision made by the presiding officer is indeed administrative within in the meaning of PAJA according to the LAC in *Hendricks*²⁰⁶. The corruption and malfeasance of an employee has a direct, external legal effect in its consequences for ratepayers and citizens in general.²⁰⁷ It is however not necessary to classify the decision of the presiding officer as an administrative action in terms of PAJA before a review will be competent under s 158(1)(h) of the LRA. The LC may review a decision of the State acting as employer on any ground 'permissible in law'²⁰⁸. Review under PAJA is only one kind of administrative law review. Other exercises of public power are reviewable on constitutional grounds of legality and rationality²⁰⁹

²⁰² *Hendricks v Overstrand Municipality & another* (CA24/2013) [2014] ZALAC 49; [2014] 12 BLLR 1170 (LAC); (2015) 36 *ILJ* 163 (LAC) para 19.

²⁰³ *Hendricks v Overstrand Municipality & another* (CA24/2013) [2014] ZALAC 49; [2014] 12 BLLR 1170 (LAC); (2015) 36 *ILJ* 163 (LAC) para 19.

²⁰⁴ *Hendricks v Overstrand Municipality & another* (CA24/2013) [2014] ZALAC 49; [2014] 12 BLLR 1170 (LAC); (2015) 36 *ILJ* 163 (LAC) para 19.

²⁰⁵ *Hendricks v Overstrand Municipality & another* (CA24/2013) [2014] ZALAC 49; [2014] 12 BLLR 1170 (LAC); (2015) 36 *ILJ* 163 (LAC) para 20.

²⁰⁶ *Hendricks v Overstrand Municipality & another* (CA24/2013) [2014] ZALAC 49; [2014] 12 BLLR 1170 (LAC); (2015) 36 *ILJ* 163 (LAC) para 20.

²⁰⁷ *Hendricks v Overstrand Municipality & another* (CA24/2013) [2014] ZALAC 49; [2014] 12 BLLR 1170 (LAC); (2015) 36 *ILJ* 163 (LAC) para 20.

²⁰⁸ *Hendricks v Overstrand Municipality & another* (CA24/2013) [2014] ZALAC 49; [2014] 12 BLLR 1170 (LAC); (2015) 36 *ILJ* 163 (LAC) para 21.

²⁰⁹ *Hendricks v Overstrand Municipality & another* (CA24/2013) [2014] ZALAC 49; [2014] 12 BLLR 1170 (LAC); (2015) 36 *ILJ* 163 (LAC) para 21.

2.5 CONCLUSION

Even though dismissals and employment decisions in the public sector are now regulated by the LRA, it does not imply that administrative law is no longer applicable.²¹⁰

It is submitted that employment relationships should not be governed by public law principles such as administrative law as it is not appropriate.²¹¹ Administrative action and labour relations are two different areas of law however they have many common characteristics. Administrative law is part of public law, as opposed to labour law which has elements of administrative law, procedural law, private law and commercial law.²¹² Administrative action does not embrace acts that are regulated by private law.²¹³ The extension of the provisions of the LRA to employees of the state and organs of state based on dismissals are now excluded from administrative law.²¹⁴ In respect of dismissals and unfair labour practices and in respect of all employment related issues, employees are now unable to use PAJA as recourse.²¹⁵

A public sector employee who is aggrieved by the decision of an independent presiding officer who chaired a disciplinary hearing has the recourse to apply to the LC to have the decision reviewed of the presiding officer. The LC can review the decision on the grounds listed in PAJA provided that the decision amounts to an administrative action; in terms of the common law in relation to domestic or contractual disciplinary proceedings; or in accordance with the requirements of the constitutional principle of legality and rationality.²¹⁶ S 158(1)(h) of the LRA is the only remedy available to a State employers aggrieved by the disciplinary sanction imposed

²¹⁰ 'PAJA Newsletter Special issue: The application of PAJA to employment law disputes' available at http://www.justice.gov.za/paja/docs/newsletters/Newsletter%20special%20issue_Labour%20Law%20Sep%2007 (accessed 1 April 2015) at 6.

²¹¹ 'PAJA Newsletter Special issue: The application of PAJA to employment law disputes' available at http://www.justice.gov.za/paja/docs/newsletters/Newsletter%20special%20issue_Labour%20Law%20Sep%2007 (accessed 1 April 2015) at 6.

²¹² *Chirwa v Transnet* [2008] 2 BLLR 97 (CC) para 143.

²¹³ *SA Police Union & Another v National Commissioner of the SA Police Service & Another* (2005) 26 ILJ 2403 (LC) para 51.

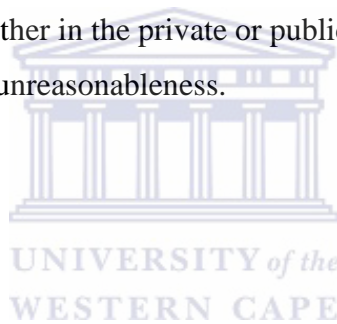
²¹⁴ *Chirwa v Transnet* [2008] 2 BLLR 97 (CC) para 29.

²¹⁵ Grogan *J Labour Litigation and Dispute Resolution* (2010) 77.

²¹⁶ *Hendricks v Overstrand Municipality & another* (CA24/2013) [2014] ZALAC 49; [2014] 12 BLLR 1170 (LAC); (2015) 36 ILJ 163 (LAC) para 29.

by an independent presiding officer²¹⁷. S 191(1)(a) of the LRA expressly restricts these remedies to state and private sector employees who is aggrieved by an unfair labour practice or a dismissal.²¹⁸

The following chapter will be discussing the standard of review as was determined by the CC in *Sidumo*. The SCA in *Sidumo* held that decisions made by a commissioner of the CCMA are administrative action as defined in PAJA and is therefore reviewable in terms of PAJA. The CC in *Sidumo* held that a decision made by a Commissioner does amount to administrative action. It however does not mean that PAJA is automatically applicable to the review of CCMA arbitration awards. CCMA arbitration awards are reviewable on the grounds listed in section 145 of the LRA. However the CC in *Sidumo* determined that the standard of reasonableness is the ground upon which an arbitration award can be reviewed on. Reasonableness suffused the grounds listed in section 145. All employees, whether in the private or public sector can have CCMA arbitration awards reviewed on the ground of unreasonableness.



²¹⁷ *Hendricks v Overstrand Municipality & another* (CA24/2013) [2014] ZALAC 49; [2014] 12 BLLR 1170 (LAC); (2015) 36 *ILJ* 163 (LAC) para 27.

²¹⁸ *Hendricks v Overstrand Municipality & another* (CA24/2013) [2014] ZALAC 49; [2014] 12 BLLR 1170 (LAC); (2015) 36 *ILJ* 163 (LAC) para 27.

CHAPTER 3

THE STANDARD OF REVIEW APPLIED BY LABOUR COURTS

3.1 INTRODUCTION

The issue of reviewing CCMA arbitration awards has been a subject of debate over a number of years.²¹⁹ The core question was: To what extent should the labour courts be able to set aside CCMA awards.²²⁰ Labour courts have constantly been pushing the boundaries of the test for review of CCMA arbitration awards since the enactment of the LRA.²²¹ Over the years, the concept of a review has been interpreted both widely and narrowly by the courts.²²² In 2007, the CC in *Sidumo* clarified and determined the approach that our courts must adopt when reviewing CCMA arbitration awards.²²³ The CC determined that the test to be applied when reviewing awards should be to establish whether the award was made by a ‘reasonable decision-maker.’ Notwithstanding this, the interpretation of what constitutes a review still varies after *Sidumo*.

In 2012, the LAC in *Herholdt* developed the reviewing test further.²²⁴ It was held that an arbitration award can be reviewed on the grounds of latent gross irregularity - a more generous approach to the test determined in *Sidumo*.²²⁵ The above approach allows an arbitration award to

²¹⁹ Rogers P & Naidu C ‘Test for review relooked – is there still scope for process related review or is it limited to Sidumo’s outcome-based approach?’ available at <http://www.lexology.com/library/detail.aspx?g=63b12c19-a56a-4a12-8f31-9b05de51fff5> (accessed 28 October 2014).

²²⁰ Rogers P & Naidu C ‘Test for review relooked – is there still scope for process related review or is it limited to Sidumo’s outcome-based approach?’ available at <http://www.lexology.com/library/detail.aspx?g=63b12c19-a56a-4a12-8f31-9b05de51fff5> (accessed 28 October 2014).

²²¹ Myburgh A ‘The test for review of CCMA arbitration awards: an update’ (2013) 23(4) *Contemporary Labour Law* 31.

²²² Rogers P & Naidu C ‘Test for review relooked – is there still scope for process related review or is it limited to Sidumo’s outcome-based approach?’ available at <http://www.lexology.com/library/detail.aspx?g=63b12c19-a56a-4a12-8f31-9b05de51fff5> (accessed 28 October 2014).

²²³ Rogers P & Naidu C ‘Test for review relooked – is there still scope for process related review or is it limited to Sidumo’s outcome-based approach?’ available at <http://www.lexology.com/library/detail.aspx?g=63b12c19-a56a-4a12-8f31-9b05de51fff5> (accessed 28 October 2014). See also *Herholdt v Nedbank Ltd and Another* (701/2012) [2013] ZASCA 97 para 14.

²²⁴ Myburgh A ‘The test for review of CCMA arbitration awards: an update’ (2013) 23(4) *Contemporary Labour Law* 31.

²²⁵ *Herholdt v Nedbank Ltd* [2012] 9 BLLR 857 (LAC) para 39.

be set aside even if the outcome of the award is one that a reasonable decision-maker could have reached.²²⁶ The award can be set aside if the process through which the award was arrived at was found to be materially wanting.²²⁷ The SCA in *Herholdt* held that the LAC had erred in its development of the review test.²²⁸

The aim of this chapter is to analyse *Sidumo* and *Herholdt* as these two judgments deal with reviews of arbitration awards on the grounds of latent gross irregularity and unreasonableness, respectively. More specifically, the findings of the SCA in *Herholdt* point out the difference between these two grounds.

Further, a comparison will be between the standards of review applied in South Africa and those applied in Canada, with specific consideration of the judgment in *Dunsmuir*.²²⁹ The court in *Dunsmuir* determined the standard for reviews which the reviewing courts should apply in relation to arbitration awards made by adjudicators.

A further comparison will be made between South Africa and Namibia and their judicial review procedures. South Africa and Namibia's labour laws are similar yet different. Namibia's Labour Act allows an aggrieved party the opportunity to have the arbitration award appealed or reviewed. The LRA does not make provision for an appeal against arbitration awards.²³⁰ An aggrieved party can only have the award reviewed on limited grounds as set out in s 145 of the LRA.

²²⁶ *Herholdt v Nedbank Ltd and Another* (701/2012) [2013] ZASCA 97 para 17.

²²⁷ *Herholdt v Nedbank Ltd and Another* (701/2012) [2013] ZASCA 97 para 17.

²²⁸ Myburgh A 'The test for review of CCMA arbitration awards: an update' (2013) 23(4) *Contemporary Labour Law* 31.

²²⁹ *Dunsmuir v New Brunswick* [2008] 1 SCR 190.

²³⁰ Rogers P & Naidu C 'Test for review relooked – is there still scope for process related review or is it limited to Sidumo's outcome-based approach?' available at <http://www.lexology.com/library/detail.aspx?g=63b12c19-a56a-4a12-8f31-9b05de51fff5> (accessed 28 October 2014).

3.2 REVIEWING CCMA AWARDS

As noted, uncertainty arose on the interpretation and application of the narrow grounds of review. The LAC in *Carephone (Pty) Ltd v Marcus NO. & Others*²³¹ and *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others*²³² tried to bring some clarity into the debate.²³³ The employees in *Carephone* were dismissed at the end of 1996, upon which they disputed their dismissal. An attempt at resolving the dispute led to an unsuccessful conciliation, the matter of which was then referred for arbitration, where it was ultimately determined that the employer had to pay compensation for the wrongful dismissal of the employees. The matter was then taken on review to the LC, where it was requested that the Court set aside the arbitration award on the basis that the Commissioner favoured the employees. The employer based its argument on the ground that the Commissioner did not want to grant a postponement of the matter on three occasions at the request of the employer. This resulted in the award being made while the employer was absent. The LC held that the facts were not sufficient to allow for a review under s 145 of the LRA²³⁴ and that the Court did not have the power to allow appeals under s 158 of the LRA.²³⁵ The LC subsequently dismissed the review, but granted leave to appeal against the judgment to the LAC. The LAC confirmed that s 145 of the LRA is the correct section on which a party can rely to review an arbitration award as opposed to s 158(1)(g) of the LRA.²³⁶

The Court in *Carephone* categorised the CCMA as an organ of state which exercises public power and functions when it resolves disputes in terms of the LRA.²³⁷ The Court further held that the Bill of Rights and the constitutional right to fair administrative action bind the CCMA when performing its functions under the LRA.²³⁸ The LAC acknowledges that administrative justice in terms of the Constitution has broadened the grounds of judicial review in

²³¹ *Carephone (Pty) Ltd v Marcus NO. & Others* 1998 11 BLLR 1093 (LAC).

²³² *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* [2001] 9 BLLR 1011 (LAC)

²³³ Van Niekerk A *Law@work* 3ed (2014) 461.

²³⁴ Labour Relations Act No 66 of 1995.

²³⁵ *Carephone (Pty) Ltd v Marcus NO. & others* 1998 11 BLLR 1093 (LAC) para 4.

²³⁶ *Carephone (Pty) Ltd v Marcus NO. & others* 1998 11 BLLR 1093 (LAC) para 27.

²³⁷ *Carephone (Pty) Ltd v Marcus NO. & others* 1998 11 BLLR 1093 (LAC) para 11.

²³⁸ Van Niekerk A *Law@work* 3ed (2014) 461.

administrative actions.²³⁹ The constitutional provision requires the courts to ensure that administrative action is justifiable, to ensure that the outcomes of the decision made by the Commissioner are rational.²⁴⁰ The LAC was of the opinion that the ground of review should not be extended for the wrong reasons. Extending the ground of review by allowing the LC to interfere in conciliation and arbitration decisions made by the Commissioner is for the wrong reasons.²⁴¹ Froneman DJP opined that a reviewing court must determine whether the administrative action is justifiable in terms of the reason given for it. The reviewing court will have to take into account the merits of the case, which threatens the distinction between appeal and review.²⁴² Reviewing courts need to be mindful that they do not substitute their own opinion in the place of the Commissioner's decision when taking the merits into account. They need to determine whether the outcome is rationally justifiable.²⁴³ This will ensure that the distinction between appeal and review is not blurred. Reviewing courts must determine whether there is a rational connection between the decision made and the material evidence available to the Commissioner to ensure that the decision is justifiable.²⁴⁴

The judgment of *Carephone* was criticised by the Court in *Ramdaw*.²⁴⁵ Ms Ziqubu was employed by Shoprite Checkers as a part-time cashier. She had been employed for more or less five years. She was charged with gross misconduct by her employer as she had rung up an item for R2 as opposed to its real value of R20. She was found guilty in her disciplinary hearing and dismissed. Ms Ziqubu referred the dispute to the CCMA where the matter came before an arbitrator. The arbitrator concluded that the dismissal of Ms Ziqubu by Shoprite was a harsh sanction. The arbitrator ordered the reinstatement of Ms Ziqubu.²⁴⁶

Shoprite applied to the LC to have the award reviewed and set aside. The Court rejected the decision in *Carephone* and held that the only grounds for review are those in s 145 of the

²³⁹ *Carephone (Pty) Ltd v Marcus NO. & others* 1998 11 BLLR 1093 (LAC) para 30.

²⁴⁰ *Carephone (Pty) Ltd v Marcus NO. & others* 1998 11 BLLR 1093 (LAC) para 31.

²⁴¹ *Carephone (Pty) Ltd v Marcus NO. & others* 1998 11 BLLR 1093 (LAC) para 33.

²⁴² *Carephone (Pty) Ltd v Marcus NO. & others* 1998 11 BLLR 1093 (LAC) para 36.

²⁴³ *Carephone (Pty) Ltd v Marcus NO. & others* 1998 11 BLLR 1093 (LAC) para 36.

²⁴⁴ *Carephone (Pty) Ltd v Marcus NO. & others* 1998 11 BLLR 1093 (LAC) para 37.

²⁴⁵ 'Review of CCMA Arbitration Awards *Shoprite Checkers (Pty) Ltd v Ramdaw No & Others*' (2001) 22 ILJ 1516.

²⁴⁶ *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Other* [2001] 9 BLLR 1011 (LAC) para 65.

LRA.²⁴⁷ The LC dismissed Shoprite's appeal on the basis that the commissioner's errors did not amount to a gross irregularity in the conduct of the proceedings. There were also no grounds for the Court to interfere with the award of the Commissioner in terms of s 145 of the LRA.²⁴⁸

Shoprite once again appealed the matter to the LAC. The LAC held that the appeal raises the question of whether *Carephone* is good law.²⁴⁹ The Court concluded that when a CCMA commissioner makes an arbitration award, they are exercising public powers. The test for reviewing and setting aside such awards is on the ground of whether the award was rational.²⁵⁰ The LAC held that justifiable and rational may not be synonymous, but that they bear a lot of similarity.²⁵¹ The Court therefore equated rationality with justifiability.

The LC and LAC continued to apply the test of review as set out in *Carephone*.²⁵² They accepted that the power of review does not amount to an appeal, yet they were prepared to set arbitration awards aside on a wider range of circumstances. These circumstances included procedural irregularities on the part of an arbitrator, errors of law made by an arbitrator and failures by arbitrators to take into account relevant evidence in coming to their decisions.²⁵³ In certain cases these two courts were prepared to intervene if the arbitrator made a hasty decision and overturned the decisions of an employer to dismiss an employee.²⁵⁴ In certain circumstances the reviews were based on the specific provisions of s 145 of the LRA as interpreted by the test of rationality or justifiability.²⁵⁵

3.3 THE TEST FOR REVIEW AS DETERMINED IN *SIDUMO*

²⁴⁷ *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Other* (2000) 21 ILJ 1232 (LC) para 29.

²⁴⁸ *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Other* (2000) 21 ILJ 1232 (LC) para 31.

²⁴⁹ *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Other* [2001] 9 BLLR 1011 (LAC) para 3.

²⁵⁰ *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Other* [2001] 9 BLLR 1011 (LAC) para 20.

²⁵¹ *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Other* [2001] 9 BLLR 1011 (LAC) para 25.

²⁵² Le Roux PAK & Leigh Young K 'The role of reasonableness in dismissal: the Constitutional court looks at who has the final say' (2007) 17 *CLL* 24.

²⁵³ Le Roux PAK & Leigh Young K 'The role of reasonableness in dismissal: the Constitutional court looks at who has the final say' (2007) 17 *CLL* 24.

²⁵⁴ Le Roux PAK & Leigh Young K 'The role of reasonableness in dismissal: the Constitutional court looks at who has the final say' (2007) 17 *CLL* 24.

²⁵⁵ Le Roux PAK & Leigh Young K 'The role of reasonableness in dismissal: the Constitutional court looks at who has the final say' (2007) 17 *CLL* 24.

The CC in *Sidumo* attempted to address the issue of a correct standard for review. Sidumo, a security guard, was dismissed by Rustenburg Platinum Refineries after he was captured on videotape allowing employees to pass his check point without searching them. The matter was referred to the CCMA for arbitration. The Commissioner found that Sidumo was guilty of misconduct, but that the dismissal was too harsh a sanction based on his clean record and long service. The Commissioner ordered that Sidumo be reinstated subject to a final warning. The LC could not find any ground upon which to interfere with the award. The LC's decision was based upon the grounds set out in s 145 of the LRA and the test in *Carephone*.²⁵⁶ The LAC was also critical of the Commissioner, but still agreed that, based upon Sidumo's clean lengthy service record, dismissal was a harsh sanction, and dismissed the appeal accordingly. The LAC granted leave to appeal against the judgment to the SCA.

The matter was appealed to the SCA, where the Court ruled that PAJA does apply to CCMA awards. The purpose of PAJA is to give effect to the 'right to administrative action that is lawful, reasonable and procedurally fair' as envisaged in s 33 of the Constitution.²⁵⁷ The discretion to dismiss an employee belongs to the employer. Such discretion must be exercised fairly and interference must be exercised with caution.²⁵⁸ The SCA was of the opinion that PAJA applied to reviews of CCMA awards and that PAJA superseded the LRA.²⁵⁹ The intention to reinstate Sidumo was not rationally connected to the information before the commissioner. The SCA upheld the decision to dismiss Sidumo and set aside the decision of the LAC.²⁶⁰

On further appeal to the CC, Navsa AJ with the concurrence of four judges confirmed that the commissioner is exercising a public power when making an arbitration award. PAJA however does not apply to CCMA awards.²⁶¹

The majority followed the CC's decision in *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs & Tourism and Others*²⁶² to determine the appropriate test for review. The

²⁵⁶ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2007 12 BLLR 1097 (CC) para 25.

²⁵⁷ Van Niekerk *A Law@work* 3ed (2014) 416.

²⁵⁸ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2007 12 BLLR 1097 (CC) para 30.

²⁵⁹ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2007 12 BLLR 1097 (CC) para 42.

²⁶⁰ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2007 12 BLLR 1097 (CC) para 49.

²⁶¹ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2007 12 BLLR 1097 (CC) para 88 and 104.

CC in *Bato Star* had to determine the allocation of fishing quotas. Bato Star was dissatisfied with the allocation that they received for the 2002 - 2005 fishing seasons and as a result sought a review of the allocation. The matter was taken on review to the HC. The review was successful in the HC, but on appeal, the SCA overturned this judgment. The case raised the question: To what extent can a decision be susceptible to review under the new constitutional order?²⁶³ The Court in *Bato Star* held that an administrative award will be reviewable if it is one that a reasonable decision-maker could have reached.²⁶⁴ The determination of what constitutes a reasonable decision is one to be done on a case by case basis.²⁶⁵ The CC further held that the distinctions between appeal and review are significant and must be maintained even when the court is applying reasonableness when reviewing arbitration awards.²⁶⁶ The task of the reviewing court is to ensure that the decision taken by a commissioner falls within the ambit of reasonableness required by the Constitution.²⁶⁷

In concurrence with three other judges, Ngcobo J (the minority judgment in *Sidumo*) held that CCMA arbitration awards do not amount to administrative action and that reviews are limited to the grounds set out in s 145(2) of the LRA.²⁶⁸ According to Ngcobo J the commissioner must afford both parties to the arbitration proceedings a fair hearing.²⁶⁹ When the LC accordingly reviews an award it must ensure that the commissioner has afforded both parties a fair trial.²⁷⁰

When a reviewing court is reviewing an award it needs to determine whether the commissioner has committed an irregularity that has denied either party a fair hearing.²⁷¹ This can be determined by the manner in which the hearing was conducted, the manner in which the

²⁶² *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs & Tourism and Others* 2004 (4) SA 490 (CC).

²⁶³ *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs & Tourism and Others* 2004 (4) SA 490 (CC) para 2.

²⁶⁴ *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs & Tourism and Others* 2004 (4) SA 490 (CC) para 44.

²⁶⁵ *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs & Tourism and Others* 2004 (4) SA 490 (CC) para 45.

²⁶⁶ *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs & Tourism and Others* 2004 (4) SA 490 (CC) para 45.

²⁶⁷ *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs & Tourism and Others* 2004 (4) SA 490 (CC) para 45.

²⁶⁸ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2007 12 BLLR 1097 (CC) para 88 and 163.

²⁶⁹ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2007 12 BLLR 1097 (CC) para 88 and 267.

²⁷⁰ Grogan J *Labour Litigation and Dispute Resolution* (2010) 287.

²⁷¹ Grogan J *Labour Litigation and Dispute Resolution* (2010) 287.

commissioner applied the evidence or the conclusion given by the commissioner derived from the evidence. Minor procedural irregularities or minor errors of reasoning do not constitute grounds for review if they do not materially prejudice a party.²⁷² Where a procedural misdirection or an error of reasoning precludes a party from having a fair hearing, such conduct by the commissioner constitutes a gross irregularity as envisioned by s 145(2)(a)(ii) of the LRA.²⁷³ The LC is then permitted, and bound, to interfere when the conduct of the commissioner amounts to a gross irregularity.²⁷⁴ The effect of the Constitutional Court judgment in *Sidumo* was therefore to supposedly suffuse the requirement of reasonableness into the statutory review grounds.²⁷⁵

3.4 LATENT IRREGULARITY AS A GROUND FOR REVIEWING ARBITRATION AWARDS

‘Gross irregularity’ refers to two types of irregularity, namely, patent and latent irregularity. Patent irregularity derives from procedural irregularity, which is apparent from the records. Latent irregularity stems from the manner in which the decision-maker applied his or her mind.²⁷⁶ Both forms of irregularity challenge the objective of arbitration which is to afford both parties a fair trial on the issues in dispute.²⁷⁷

With regards to latent irregularities one looks at the reasons to determine whether a gross irregularity had occurred in the proceedings as opposed to whether the result is correct.²⁷⁸ The reasoning of the decision-maker must not be confused with the conduct of the proceedings.²⁷⁹ There is a distinction between the reasoning of the decision-maker and the conduct of the proceedings.

²⁷² Grogan J *Labour Litigation and Dispute Resolution* (2010) 287.

²⁷³ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 para 268.

²⁷⁴ Grogan J *Labour Litigation and Dispute Resolution* (2010) 287.

²⁷⁵ Grogan J *Labour Litigation and Dispute Resolution* (2010) 287. See also *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 para 110.

²⁷⁶ Grogan J *Labour Litigation and Dispute Resolution* (2010) 290.

²⁷⁷ Grogan J *Labour Litigation and Dispute Resolution* (2010) 290.

²⁷⁸ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 para 264.

²⁷⁹ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 para 264.

In three different judgments the LAC has set aside the arbitration award on the grounds of latent irregularity.²⁸⁰ These three judgments are *Gaga*,²⁸¹ *Afrox Health*²⁸² and *Herholdt*.²⁸³ In each of these cases the employees were dismissed for serious misconduct, but were reinstated in an arbitration award issued by the commissioner.

In *Gaga*, the employee was employed as a Group Human Resources Manager. *Gaga* was dismissed on the ground of sexual harassment. He had harassed his personal assistant over a period of two years. *Gaga* successfully challenged his dismissal in arbitration proceedings. The matter was taken on review to the LC, where the company was successful in having the award reviewed. The matter was then appealed to the LAC. The LAC held that there is no rational basis justifying the commissioner's conclusion. The commissioner disregarded relevant material evidence and focused too narrowly on whether the complainant had taken offence at the advance made by *Gaga*.²⁸⁴ The LAC held:

'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 grounds of it being a latent gross irregularity, permitting a review in terms of section 145(1) read with section 145(2)(a)(ii) of the LRA.'²⁸⁵

²⁸⁰ Myburgh A 'The LAC's Latest Trilogy of Review Judgments: Is the Sidumo Test in Decline?' (2013) 34 *ILJ* 19

²⁸¹ *Gaga v Anglo Platinum Ltd & others* (2012) 33 *ILJ* 329 (LAC); [2012] 3 *BLLR* 285 (LAC).

²⁸² *Afrox Healthcare Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2012) 33 *ILJ* 1381 (LAC); [2012] 7 *BLLR* 649 (LAC).

²⁸³ *Herholdt v Nedbank Ltd and Another* (701/2012) [2013] ZASCA 97 para 15.

²⁸⁴ *Gaga v Anglo Platinum Ltd & others* (2012) 33 *ILJ* 329 (LAC); [2012] 3 *BLLR* 285 (LAC) para 43.

²⁸⁵ *Gaga v Anglo Platinum Ltd & others* (2012) 33 *ILJ* 329 (LAC); [2012] 3 *BLLR* 285 (LAC) para 44.

The Court in *Gaga* cited the dictum of Ngcobo J in *Sidumo* where he distinguishes between review on grounds of dialectical unreasonableness and substantive unreasonableness.²⁸⁶ In terms of the *dictum*, in order for fairness to be present in the proceedings it is required that a Commissioner take into consideration all the material evidence before him or her when determining the dispute. This was also cited in *Afrox Healthcare* and *Herholdt*.

In *Southern Sun Hotel (Pty) Ltd v CCMA & Others*²⁸⁷ the Court held that process failure is sufficient to set an award aside. In the case, 36 individuals were charged with consumption of the company's beverages and some of them were charged with consuming alcohol on duty. Thirty-two individuals had a disciplinary hearing after three employees resigned and another admitted to the charges. Of the 32 employees only two were found not guilty, one was given a final warning and the remaining 29 were dismissed. Nineteen of the dismissed employees challenged the fairness of their dismissal. The dispute was referred to arbitration. The Commissioner made an award, wherein he found that the dismissals of the employees were procedurally fair, but substantively unfair based upon the company's inconsistent conduct with regard to the disciplinary enquiry. The company applied to the LC to have the award reviewed based on the ground that the commissioner committed a gross irregularity. They argued that the commissioner had failed to apply his mind to a host of materially relevant considerations that arose from the evidence, and that he made material errors of law.

The Court in *Southern Sun Hotel* held the following²⁸⁸:

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

²⁸⁶ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 para 268. See also *Gaga v Anglo Platinum Ltd & others* (2012) 33 ILJ 329 (LAC); [2012] 3 BLLR 285 (LAC) para 44.

²⁸⁷ *Southern Sun Hotel (Pty) Ltd v CCMA & others* (2010) 31 ILJ 452 (LC).

²⁸⁸ *Southern Sun Hotel (Pty) Ltd v CCMA & others* (2010) 31 ILJ 452 (LC) para 17.

the proceedings or whether on the basis of the record of the proceedings, that result is nonetheless capable of justification.’

The fact that the commissioner had erred in disallowing evidence of similar occurrences from being used in the arbitration constituted an irregularity which was sufficient to set aside the award. The Commissioner had failed to have regard to material facts and thereby hindered a full and fair determination of the issues.²⁸⁹

In *Afrox Healthcare* the employee, a night shift nursing supervisor in the intensive care unit at a private hospital operated by Aprox Healthcare, was dismissed for negligence. He had failed to supervise an untrained staff member, Lehong, had failed to act in a responsible manner when deterioration of a patient’s condition was reported. The Commissioner in the arbitration found that the employee was not guilty of negligence during the arbitration and ordered the reinstatement of the employee. The matter was taken on review, but was dismissed by the LC.

The LAC upheld the appeal of the company. The LAC held that the Commissioner had not given proper consideration to the material evidence before him and that he had failed to conduct a proper perusal of some critical aspects of the material which he had disregarded.²⁹⁰ The Commissioner’s conclusion was based largely on the fact that Lehong was not present to testify and thus the employer had failed to show that the employee was negligent.²⁹¹ The Court further held that CCMA arbitration awards must ideally be crisp and to the point.²⁹² However, this does not mean that material evidence which has a bearing on the conclusion of the commissioner must be ignored or left out of consideration.²⁹³ The Court concluded that the award made by the commissioner was not one that a reasonable decision-maker could not make.²⁹⁴

²⁸⁹ *Gaga v Anglo Platinum Ltd & others* (2012) 33 ILJ 329 (LAC); [2012] 3 BLLR 285 (LAC) para 46.

²⁹⁰ *Afrox Healthcare Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2012) 33 ILJ 1381 (LAC); [2012] 7 BLLR 649 (LAC) para 16.

²⁹¹ *Afrox Healthcare Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2012) 33 ILJ 1381 (LAC); [2012] 7 BLLR 649 (LAC) para 16.

²⁹² *Afrox Healthcare Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2012) 33 ILJ 1381 (LAC); [2012] 7 BLLR 649 (LAC) para 16.

²⁹³ *Afrox Healthcare Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2012) 33 ILJ 1381 (LAC); [2012] 7 BLLR 649 (LAC) para 16.

²⁹⁴ *Afrox Healthcare Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2012) 33 ILJ 1381 (LAC); [2012] 7 BLLR 649 (LAC) para 21.

In *Herholdt*, the employee was employed as a financial planner by Nedbank. He was dismissed on the grounds of dishonesty by failing to disclose a conflict of interest arising from him being appointed as a beneficiary in the will of a client. He successfully challenged his dismissal in arbitration proceedings. The matter was taken on review to the LC. The LC upheld the review of the award and set it aside. The matter was then appealed to the LAC. The LAC dismissed the appeal against the judgment of the LC. The matter was once again appealed to the SCA. The issue before the Court in *Herholdt* was whether the test for review of CCMA awards determined in *Sidumo* is in decline.²⁹⁵

The SCA in *Herholdt* was of the view that the confusion with regard to review of CCMA arbitration awards should have been clear after the Constitutional Court judgment in *Sidumo*.²⁹⁶ Arbitration awards can now be brought before a reviewing court on the bases of unreasonableness, which was suffused with the grounds of review in s 145 of the LRA. Gross irregularity in the conduct of the arbitration proceedings in terms of s 145(2)(a)(ii) of the LRA, does not include the conduct of the commissioner where he or she has misconceived the nature of the enquiry.²⁹⁷ Where the result of the commissioner was unreasonable or the commissioner had misconceived the nature of the inquiry constitutes a gross irregularity.²⁹⁸

The SCA in *Herholdt* stated that, when a reviewing court allows an award to be set aside on grounds of latent irregularities, it is lowering the threshold for interference with the award.²⁹⁹ It is also immaterial whether the conclusion reached by the commissioner has been reasonably reached based on the material before the Commissioner.³⁰⁰ This standard recognises that dialectical and substantive reasonableness are fundamentally interlinked, but that latent irregularity as a ground of review will cause an unreasonable substantive outcome.³⁰¹ If the reviewing court is interfering based upon this ground, it will warrant the possibility of prejudice.³⁰²

²⁹⁵ *Herholdt v Nedbank Ltd and Another* (701/2012) [2013] ZASCA 97 para 14.

²⁹⁶ *Herholdt v Nedbank Ltd and Another* (701/2012) [2013] ZASCA 97 para 14.

²⁹⁷ *Herholdt v Nedbank Ltd and Another* (701/2012) [2013] ZASCA 97 para 14.

²⁹⁸ *Herholdt v Nedbank Ltd and Another* (701/2012) [2013] ZASCA 97 para 25.

²⁹⁹ *Herholdt v Nedbank Ltd and Another* (701/2012) [2013] ZASCA 97 para 17.

³⁰⁰ *Herholdt v Nedbank Ltd and Another* (701/2012) [2013] ZASCA 97 para 16.

³⁰¹ *Herholdt v Nedbank Ltd and Another* (2012) 23 ILJ 1789 (LAC) para 39.

³⁰² *Herholdt v Nedbank Ltd and Another* (701/2012) [2013] ZASCA 97 para 16.

The Court further held that the approach taken by the Labour Court on the notion of latent irregularity had originated in a dictum of the minority judgment of Ngcobo J in *Sidumo*.³⁰³ In his judgment Ngcobo J does not explain to what extent an oversight of the facts would warrant the award to be set aside.³⁰⁴ This dictum is contrary to the position endorsed by the majority judgment in *Sidumo*.³⁰⁵ All courts are bound by the majority judgment and therefore the notion of latent irregularity cannot be accepted as a ground to set aside an award by the labour courts.³⁰⁶ It does not mean that a latent irregularity is not a gross irregularity within the ambit of s 145(2)(a)(ii) of the LRA. Where the Commissioner has conducted the incorrect enquiry or conducted the proceedings incorrectly, which will constitute a latent irregularity.³⁰⁷ Material errors of fact, and the weight and relevance attached to the facts before the Commissioner, are not sufficient to set an award aside, except where the consequence of their effect renders the outcome unreasonable.³⁰⁸

3.5 DIALECTIC UNREASONABLENESS AS COINED BY THE LABOUR APPEAL COURT



Dialectic unreasonableness, also known as process related unreasonableness, originates from the process of reasoning of the arbitrator.³⁰⁹ When a reviewing court allows the setting aside of an arbitration award on the ground of process related unreasonableness, it is determining whether the process was reasonable in reaching the decision made by the commissioner.³¹⁰ Dialectic unreasonableness is a term that was coined by the LAC based on the principal adapted by the CC in *New Clicks*.³¹¹ Substantive unreasonableness, also known as result based unreasonableness, is

³⁰³ *Herholdt v Nedbank Ltd and Another* (701/2012) [2013] ZASCA 97 para 18.

³⁰⁴ *Herholdt v Nedbank Ltd and Another* (701/2012) [2013] ZASCA 97 para 19.

³⁰⁵ *Herholdt v Nedbank Ltd and Another* (701/2012) [2013] ZASCA 97 para 20.

³⁰⁶ *Herholdt v Nedbank Ltd and Another* (701/2012) [2013] ZASCA 97 para 20.

³⁰⁷ *Herholdt v Nedbank Ltd and Another* (701/2012) [2013] ZASCA 97 para 20.

³⁰⁸ *Herholdt v Nedbank Ltd and Another* (701/2012) [2013] ZASCA 97 para 25.

³⁰⁹ Rogers P & Naidu C ‘Test for review relooked – is there still scope for process related review or is it limited to *Sidumo*’s outcome-based approach?’ available at <http://www.lexology.com/library/detail.aspx?g=63b12c19-a56a-4a12-8f31-9b05de51fff5> (accessed 28 October 2014).

³¹⁰ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 para 110.

³¹¹ *Minister of Health & Another v New Clicks South Africa (Pty) Ltd & Others (Treatment Action Campaign & Another as amici curiae)* 2006 (2) SA 311 (CC).

the test which was determined in the Constitutional Court judgment in *Sidumo*. The test requires the reviewing courts to determine whether the decision reached by the commissioner is one that a reasonable decision-maker could not have reached.³¹² When applying the result based test the reviewing court is testing the reasonableness of the decision made by the commissioner.³¹³

The Court in *New Clicks* dealt with the issue of review. The dispute arose out of regulations made by the Minister of Health which gives effect to the pricing system for the sale of medicines. The validity of these regulations was challenged in the HC, SCA and CC. The CC held that a decision-maker is bound to take into account all material evidence that is critical in reaching a reasonable decision.³¹⁴ When a decision-maker disregards or fails to take into account material evidence which he or she had to take into consideration, the result can hardly be said to be that of a reasonable decision-maker.³¹⁵

The Court in *Gaga* held that when a commissioner fails to correctly apply his mind to material evidence and unjustifiably formulates a reason without the relevant material evidence, the commissioner will not be able to determine the dispute before him fully and fairly.³¹⁶ The reasoning will unavoidably be tainted by dialectical unreasonableness which will result in a lack of rational connection between the decision and the evidence and most likely an unreasonable outcome.³¹⁷ It is unavoidable for the overlap between the ground of review based on a failure to take into consideration a relevant factor and one that is based on the unreasonableness of a decision.³¹⁸ When a commissioner disregards certain factors that he had to take into account, his or her decision will invariably be unreasonable. An error in the process alone will be sufficient to set aside the award on the ground of it being a latent gross irregularity, and to permit a review in terms of s 145(1) read with s 145(2)(a)(ii) of the LRA.³¹⁹ Legal errors can lead to a

³¹² *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 para 110.

³¹³ Myburgh A 'Sidumo v Rustplats: How have the courts dealt with it?' (2009) 30 ILJ 1 89.

³¹⁴ *Minister of Health & Another v New Clicks South Africa (Pty) Ltd & Others (Treatment Action Campaign & Another as amici curiae)* 2006 (2) SA 311 (CC) para 511.

³¹⁵ *Minister of Health & Another v New Clicks South Africa (Pty) Ltd & Others (Treatment Action Campaign & Another as amici curiae)* 2006 (2) SA 311 (CC) para 511.

³¹⁶ *Gaga v Anglo Platinum Ltd & others* (2012) 33 ILJ 329 (LAC); [2012] 3 BLLR 285 (LAC) para 44

³¹⁷ *Gaga v Anglo Platinum Ltd & others* (2012) 33 ILJ 329 (LAC); [2012] 3 BLLR 285 (LAC) para 44.

³¹⁸ *Gaga v Anglo Platinum Ltd & others* (2012) 33 ILJ 329 (LAC); [2012] 3 BLLR 285 (LAC) para 44.

³¹⁹ *Gaga v Anglo Platinum Ltd & others* (2012) 33 ILJ 329 (LAC); [2012] 3 BLLR 285 (LAC) para 44.

misinterpretation of the reasoning by the arbitrator and cause an irrational disconnection between the decision and the material evidence.³²⁰

The Court in *Samancor*³²¹ stated that an error is not in itself a proper basis for reconsidering an award.³²² In *Samancor* the employee disputed the fairness of his dismissal and the dispute was referred to arbitration. Maloma was employed as a furnace operator by Samancor in August 1996. Maloma was arrested on suspicion of robbery on 20 March 2006. Fourteen days after his arrest the charge was withdrawn, and he was released and returned to work. Later he was re-charged for the same offence. He was then detained for a maximum of 140 days until he was released on bail. Ten days after his second arrest Samancor terminated his employment. There was no hearing before the termination, but a post-dismissal hearing was conducted after he was released. The arbitrator concluded that the termination was both substantively and procedurally unfair and ordered that he be reinstated. The matter was taken on review and the LC set aside the award. An appeal to the LAC was successful and Maloma was awarded compensation. The matter was once again appealed to the SCA.

The SCA held that the LAC was incorrect in stating that the Commissioner should have determined whether the decision to terminate Maloma was fair, and manifestly fair.³²³ Had the award been subject to appeal this approach would have been correct, but the award is subject to review.³²⁴ It is common knowledge that an appeal is not allowed against an arbitration award.³²⁵ Even if the reviewing court is of the opinion that the award was granted incorrectly, there are limited grounds upon which a reviewing court is entitled to interfere.³²⁶ *Sidumo* adopted the

³²⁰ Murphy J 'An Appeal for an Appeal' (2013) 34 *ILJ* 11.

³²¹ *National Union of Mine Workers v Samancor Ltd* (2011) 32 *ILJ* 1618 (SCA); [2011] 11 *BLLR* 1041 (SCA).

³²² *National Union of Mine Workers v Samancor Ltd* (2011) 32 *ILJ* 1618 (SCA); [2011] 11 *BLLR* 1041 (SCA) para 7.

³²³ *National Union of Mine Workers v Samancor Ltd* (2011) 32 *ILJ* 1618 (SCA); [2011] 11 *BLLR* 1041 (SCA) para 7.

³²⁴ *National Union of Mine Workers v Samancor Ltd* (2011) 32 *ILJ* 1618 (SCA); [2011] 11 *BLLR* 1041 (SCA) para 7.

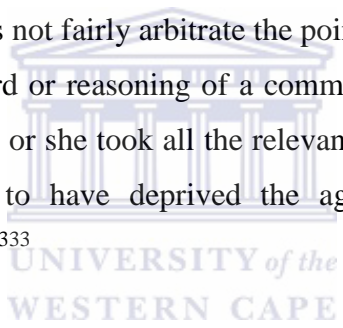
³²⁵ *National Union of Mine Workers v Samancor Ltd* (2011) 32 *ILJ* 1618 (SCA); [2011] 11 *BLLR* 1041 (SCA) para 5.

³²⁶ *National Union of Mine Workers v Samancor Ltd* (2011) 32 *ILJ* 1618 (SCA); [2011] 11 *BLLR* 1041 (SCA) para 5.

approach taken in *Carephone* which allows the setting aside of an arbitration award if it is one a reasonable decision-maker could not have made.³²⁷

The LAC in *Herholdt* expressed the view that the question before a reviewing court is whether the decision of the commissioner is valid even if it is not conclusive.³²⁸ The Court further held that all relevant material evidence and issues must be taken into account in order for the reason to be reasonable. In circumstances where a decision-maker fails to take into account all relevant factors which he or she had to take into account, the decision will not be reasonable in a dialectical sense.³²⁹

One of the duties of a commissioner is to determine the material facts before him or her and to apply the provisions of the LRA to those facts in order to determine whether the dismissal was fair.³³⁰ Where a commissioner does not fairly arbitrate the points in dispute, the reasoning will be unreasonable.³³¹ Whether the award or reasoning of a commissioner is reasonable, is irrelevant when determining objectively if he or she took all the relevant evidence into account.³³² It is not necessary for the commissioner to have deprived the aggrieved party of a fair trial by misconceiving the point in dispute.³³³



This threshold of interference is lower than the standard determined in the Constitutional Court judgment in *Sidumo*. This principle is sufficient to review an award where the commissioner has failed to apply his mind to relevant material facts or issues before him or her which will have the potential to prejudice.³³⁴ This approach is based upon the dictum of Ngcobo J (minority judgment of the Constitutional Court in *Sidumo*).³³⁵ This dictum expressly relates to the provisions of PAJA and the method by which they are to be applied.³³⁶ PAJA has no application to CCMA

³²⁷ *National Union of Mine Workers v Samancor Ltd* (2011) 32 ILJ 1618 (SCA); [2011] 11 BLLR 1041 (SCA) para 5.

³²⁸ *Herholdt v Nedbank Ltd* [2012] 9 BLLR 857 (LAC) para 34.

³²⁹ *Herholdt v Nedbank Ltd* [2012] 9 BLLR 857 (LAC) para 36.

³³⁰ *Herholdt v Nedbank Ltd* [2012] 9 BLLR 857 (LAC) para 39.

³³¹ *Herholdt v Nedbank Ltd* [2012] 9 BLLR 857 (LAC) para 39.

³³² *Herholdt v Nedbank Ltd* [2012] 9 BLLR 857 (LAC) para 39.

³³³ *Herholdt v Nedbank Ltd* [2012] 9 BLLR 857 (LAC) para 39.

³³⁴ *Herholdt v Nedbank Ltd* [2012] 9 BLLR 857 (LAC) para 39.

³³⁵ *Herholdt v Nedbank Ltd and Another* (701/2012) [2013] ZASCA 97 para 23.

³³⁶ *Herholdt v Nedbank Ltd and Another* (701/2012) [2013] ZASCA 97 para 24.

awards and therefore does not apply to reviews under s 145(2) of the LRA.³³⁷ If reviewing courts interfere on the ground that the reasons of the commissioner are not such as to justify the award, they will be applying the decision of the SCA in *Sidumo* which was expressly overruled by the CC.³³⁸ Once again this is not a permissible development of the law.³³⁹

3.6 THE TEST FOR REVIEW REASSESSED IN *GOLD FIELDS MINING SA (PTY) LTD (KLOOF GOLD MINE V CCMA & OTHERS)*

The courts were once again confronted with the issue of the review test in *Gold Fields*³⁴⁰ after the decision of the SCA in *Herholdt*. The SCA no longer has the jurisdiction to hear appeals from the LAC and the LAC now has the final say over appeals, except for constitutional issues in terms of the Constitutional Seventeenth Amendment Act, 2012.³⁴¹

The court in *Gold Fields* to a certain extent followed the approach adopted by the SCA in *Herholdt*.³⁴² These two judgments are a comprehensive statement of the law on reviews based on latent gross irregularity and unreasonableness by the courts.³⁴³

The LAC in *Gold Fields* had to determine whether the award made by the Commissioner was reviewable. In the case, an employee named Moreki was dismissed after being found guilty of serious neglect of his duty. Moreki was employed as a senior sampler. His duties were to take ore samples from measured plotted rock faces in Gold Fields' underground mining operations according to the Stope and Development Sampling Standard. A discrepancy was found in

³³⁷ *Herholdt v Nedbank Ltd and Another* (701/2012) [2013] ZASCA 97 para 24. See also *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2007 12 BLLR 1097 (CC) para 104.

³³⁸ *Herholdt v Nedbank Ltd and Another* (701/2012) [2013] ZASCA 97 para 24.

³³⁹ *Herholdt v Nedbank Ltd and Another* (701/2012) [2013] ZASCA 97 para 24.

³⁴⁰ *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others* (JA 2/2012) [2013] ZALAC 28.

³⁴¹ Rogers P & Naidu C 'Test for review relooked – is there still scope for process related review or is it limited to Sidumo's outcome-based approach?' available at <http://www.lexology.com/library/detail.aspx?g=63b12c19-a56a-4a12-8f31-9b05de51fff5> (accessed 28 October 2014). See also Myburgh A 'The test for review of CCMA arbitration awards: an update' (2013) 23 *Contemporary Labour Law* 4 31 35.

³⁴² Myburgh A 'The test for review of CCMA arbitration awards: an update' (2013) 23(4) *Contemporary Labour Law* 31.

³⁴³ Myburgh A 'The test for review of CCMA arbitration awards: an update' (2013) 23(4) *Contemporary Labour Law* 31.

Moreki's panels. Moreki disputed his dismissal which was referred to arbitration after conciliation. During arbitration the Commissioner found that Moreki was guilty of poor work performance, but held that the sanction of dismissal was too harsh and that the conduct of Moreki's conduct could be corrected and improved. The Commissioner ordered that Moreki be reinstated without back pay.

The matter was taken on review to the LC by Gold Fields. The LC dismissed the review application and held that the Commissioner had miscategorised the conduct of Moreki.³⁴⁴ The Commissioner's decision that the sanction of dismissal was unfair is based on the reasonable decision-makers test determined in *Sidumo*.³⁴⁵ One of the grounds of appeal raised by Gold Fields is that the LC had miscategorised the review as a result based review and not as a process related review, and that the decision that the Court arrived at was incorrect.³⁴⁶

The LAC in *Herholdt* held that awards can be reviewed on a process related ground which is a lesser standard to that which was determined in *Sidumo*.³⁴⁷ The LAC in *Gold Fields* disagreed with this approach. The Court held that *Sidumo* does not suggest that there is a test which requires a simple evaluation of the material evidence before the Commissioner and that based upon this evaluation courts can determine whether the decision of the Commissioner is reasonable.³⁴⁸ The LAC in *Gold Fields* further held that courts must determine whether the Commissioner's decision is one which falls within the ambit of a decision made by a reasonable decision-maker on the basis of the material available to the Commissioner where the applicant alleges that a gross irregularity is present in the proceedings.³⁴⁹

³⁴⁴ *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others* (JA 2/2012) [2013] ZALAC 28 para 11.

³⁴⁵ *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others* (JA 2/2012) [2013] ZALAC 28 para 11.

³⁴⁶ *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others* (JA 2/2012) [2013] ZALAC 28 para 12.

³⁴⁷ *Herholdt v Nedbank Ltd* [2012] 9 BLLR 857 (LAC) para 38-39.

³⁴⁸ *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others* (JA 2/2012) [2013] ZALAC 28 para 12.

³⁴⁹ *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others* (JA 2/2012) [2013] ZALAC 28 para 14.

The Court further held that gross irregularity is not a self-standing ground which is independent of the test determined in *Sidumo*.³⁵⁰ When courts allow awards to be reviewed on the ground that the Commissioner had failed to take material facts into account or took irrelevant facts into account, they are suggesting that there is an extended standard of review.³⁵¹ There is no purpose for the reviewing court to consider and analyse every issue raised during arbitration, and then conclude that the arbitrator had failed to take into account all relevant material facts which allows the setting aside of the award.³⁵² Process related irregularity as a ground of review is not sufficient in itself for interference by the reviewing court.³⁵³ Failure to have regard to material facts defeats the constitutional imperative which requires the award to be rational and reasonable.³⁵⁴

In essence an applicant must be able to establish one of the listed grounds to be present and that the decision reached by the Commissioner is unreasonable.³⁵⁵ The LAC in *Gold Fields* was of the opinion that reasonableness is an additional test. This approach is at odds with what was found by the SCA in *Herholdt*. The SCA in *Herholdt* held that an applicant can have an award reviewed on the listed grounds set out in s 145 of the LRA in addition to unreasonableness as a ground. This is what the CC in *Sidumo* meant when it held that s 145 of the LRA is suffused by reasonableness.

³⁵⁰ *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others* (JA 2/2012) [2013] ZALAC 28 para 15.

³⁵¹ *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others* (JA 2/2012) [2013] ZALAC 28 para 15.

³⁵² *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others* (JA 2/2012) [2013] ZALAC 28 para 15.

³⁵³ *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others* (JA 2/2012) [2013] ZALAC 28 para 17.

³⁵⁴ *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others* (JA 2/2012) [2013] ZALAC 28 para 22.

³⁵⁵ Myburgh A 'The test for review of CCMA arbitration awards: an update' (2013) 23(4) *Contemporary Labour Law* 37.

3.7 THE CANADIAN STANDARD OF REVIEW

Before *Dunsmuir* the courts in Canada recognised three standards of review,³⁵⁶ namely patent unreasonableness, reasonable *simpliciter*, and correctness.³⁵⁷ The appropriate standard of review in a particular case is determined on the basis of a pragmatic and functional analysis. When applying the pragmatic and functional analysis in determining the appropriate standard of review, reviewing courts must take into account a range of factors, such as, the existence of a privative clause; the nature of the issue in question, and the expertise of the tribunal.³⁵⁸ The Court in *Dunsmuir* noted that the existing law was unsatisfactory.³⁵⁹

The appellant in *Dunsmuir* was employed by the Department of Justice for the Province of New Brunswick. His probation was extended twice and the employer reprimanded him on three separate occasions during his employment period. A formal letter of reprimand was given to Dunsmuir warning him that if his work performance did not improve then disciplinary action would be taken which could result in dismissal. A formal letter of termination was delivered to his lawyer as his employer was of the opinion that he was not suited for the position. A grievance was denied and then referred to adjudication under New Brunswick's Public Service Labour Relation Act.³⁶⁰ The adjudicator stated that the termination was *void ab initio*. This was on the basis that Dunsmuir was entitled to procedural fairness in the employer's decision to terminate him and did not receive it.³⁶¹ The adjudicator ordered that Dunsmuir must be reinstated as of the date of dismissal. The adjudicator further held that in the event that Dunsmuir's reinstatement

³⁵⁶ Salans, Fraser Milner Casgrain and SNR Denton 'Supreme Court of Canada Rewrites Law on Standard of Review in Administrative Law' available at <http://www.dentons.com/en/insights/articles/2008/april/8/supreme-court-of-canada-rewrites-law-on-standard-of-review-in-administrative-law---april-2008> (accessed 14 November 2014).

³⁵⁷ Fergus E *From Sidumo to Dunsmuir: The Test for Review of CCMA Arbitration Awards* (unpublished LLD Thesis, University of Cape Town, 2013) 210.

³⁵⁸ Salans, Fraser Milner Casgrain and SNR Denton 'Supreme Court of Canada Rewrites Law on Standard of Review in Administrative Law' available at <http://www.dentons.com/en/insights/articles/2008/april/8/supreme-court-of-canada-rewrites-law-on-standard-of-review-in-administrative-law---april-2008> (accessed 14 November 2014).

³⁵⁹ Salans, Fraser Milner Casgrain and SNR Denton 'Supreme Court of Canada Rewrites Law on Standard of Review in Administrative Law' available at <http://www.dentons.com/en/insights/articles/2008/april/8/supreme-court-of-canada-rewrites-law-on-standard-of-review-in-administrative-law---april-2008> (accessed 14 November 2014).

³⁶⁰ Public Service Labour Relations Act, RSNB 1973, c P-25.

³⁶¹ *Dunsmuir v New Brunswick* [2008] 1 SCR 190 para 15.

order is quashed on judicial review, he would find that the appropriate notice period ought to be eight months.³⁶²

The matter was taken on judicial review. The Court held that the adjudicator did not have jurisdiction to inquire into the reasons for the termination and that he was only allowed to determine whether the notice period was reasonable.³⁶³ The Court held that Dunsmuir had received procedural fairness by virtue of the grievance that was held before the adjudicator. Applying the reasonable *simpliciter* standard, the reviewing court set aside the adjudicator's decision regarding Dunsmuir's reinstatement, but upheld the adjudicator's provisional award of eight months' notice.³⁶⁴

The matter was taken on appeal to the New Brunswick Court of Appeal. The Court held that the correct standard of review was reasonableness *simpliciter* and not correctness. The Court further held that the adjudicator's decision was unreasonable.³⁶⁵ The majority of the Court held that the judicial review system in Canada had proven to be difficult to apply, and reconsidered both the number and definitions of the various standards of review. It held that there should only be two standards of review: correctness and reasonableness.³⁶⁶

The correctness standard will apply to jurisdictional issues and where the question of law is in dispute. The reviewing court will look at the case afresh and determine whether it agrees with the decision of the adjudicator.³⁶⁷ If the reviewing court does not agree with the decision made by the adjudicator, it will substitute its own view and determine the correct decision.³⁶⁸ In essence the court needs to determine whether the decision of the adjudicator is correct.³⁶⁹ This is similar to an appeal procedure which a grievance party cannot use as a remedy to review an arbitration award in South African courts. When reviewing a matter on appeal courts must decide

³⁶² *Dunsmuir v New Brunswick* [2008] 1 SCR 190 para 16.

³⁶³ *Dunsmuir v New Brunswick* [2008] 1 SCR 190 para 17.

³⁶⁴ *Dunsmuir v New Brunswick* [2008] 1 SCR 190 para 19.

³⁶⁵ *Dunsmuir v New Brunswick* [2008] 1 SCR 190 para 22.

³⁶⁶ *Dunsmuir v New Brunswick* [2008] 1 SCR 190 para 34.

³⁶⁷ *Dunsmuir v New Brunswick* [2008] 1 SCR 190 para 50.

³⁶⁸ *Dunsmuir v New Brunswick* [2008] 1 SCR 190 para 50.

³⁶⁹ *Dunsmuir v New Brunswick* [2008] 1 SCR 190 para 50.

whether the decision of the court *a quo* was right or wrong³⁷⁰ which will have to be decided on whether the decision was right or wrong on the facts or the law.³⁷¹ The Court in *Samancor* held that even if the reviewing court does not agree with the decision of the commissioner it does not grant the court the opportunity to substitute its own opinion. There are limited grounds upon which a reviewing court is entitled to interfere in terms of s145 of the LRA.³⁷²

In contrast to the correctness standard, when a reviewing court applies the standard of reasonableness it will have to analysis the qualities that make a decision reasonable.³⁷³ The court will have to look at the process in reaching the decision, as well as the outcomes of the decision of the adjudicator.³⁷⁴ When applying the standard of reasonableness the reviewing court is concerned with justification, transparency and intelligibility within the decision-making process, whether the decision is reasonable and can be justified on the facts and in law.³⁷⁵ The standard of review determined by the CC in *Sidumo* is the reasonable standard of review test. This test requires the reviewing court to determine whether the decision reached by the commissioner is reasonable. The reviewing court must take into consideration the reasons provided by the commissioner and the material evidence which was before the commissioner. ‘There must be a reasonably sustainable fit between the evidence and the outcome.’³⁷⁶ The focus is largely on the outcome of the decision, as opposed to the manner in which the commissioner had arrived at the decision.³⁷⁷

The standard of reasonableness as determined in *Dunsmuir* is not similar to the reasonable decision-makers test as determined in *Sidumo*. The reviewing court in *Sidumo* is not concerned on whether the process in reaching the decision is reasonable. The outcomes of the decision

³⁷⁰ Fergus E ‘The distinction between appeal and reviews – Defining the limits of the labour court’s powers of review’ (2010) 31 *ILJ* 1556 1557.

³⁷¹ Hoexter G *Administration Law in South Africa* 2 ed (2012) 108.

³⁷² *National Union of Mine Workers v Samancor Ltd* (2011) 32 *ILJ* 1618 (SCA); [2011] 11 *BLLR* 1041 (SCA) para 5.

³⁷³ *Dunsmuir v New Brunswick* [2008] 1 SCR 190 para 47.

³⁷⁴ *Dunsmuir v New Brunswick* [2008] 1 SCR 190 para 47.

³⁷⁵ *Dunsmuir v New Brunswick* [2008] 1 SCR 190 para 47.

³⁷⁶ Le Roux PAK & Leigh Young K ‘The role of reasonableness in dismissal: the Constitutional court looks at who has the final say’ (2007) 17 *CLL* 29.

³⁷⁷ Rogers P & Naidu C ‘Test for review relooked – is there still scope for process related review or is it limited to Sidumo’s outcome-based approach?’ available at <http://www.lexology.com/library/detail.aspx?g=63b12c19-a56a-4a12-8f31-9b05de51fff5> (accessed 28 October 2014).

made by the Commissioner must be reasonable. The Court in *Dunsmuir* held that a reviewing court must be concerned with justification, transparency and intelligibility within the decision-making process. The reviewing court will have to determine whether the reasoning of the adjudicator is reasonable. In order to determine whether the decision made by the adjudicator is reasonable the reviewing court will have to look at the process of articulating the reasons and the outcomes of the decision made by the adjudicator.³⁷⁸ In essence the reviewing court needs to determine whether the process in reaching the decision is reasonable.

3.8 COMPARISON WITH NAMIBIA'S JUDICIAL REVIEW PROCEDURE

As previously stated, the LRA does not allow a right of appeal against an arbitration award. The drafters of the LRA intentionally rejected the possibility of an appeal.³⁷⁹ They believed that the exclusion of an appeal against the arbitrator's award would speed up the process and free it from the legalism and costs that accompany appeal proceedings.³⁸⁰ Inherent delays in finalising disputes are common in both the South African and Namibian court systems, which is contrary to the objectives of labour legislation.³⁸¹

The delays in finalising disputes did not stop Namibia from permitting an aggrieved party the choice between an appeal against or a review of arbitration proceedings, as opposed to the position in South Africa.³⁸² Appeals in Namibia are permitted on the basis of art 12(1)(a) of the Namibian Constitution,³⁸³ which ensures that parties to arbitration proceedings are guaranteed a right to a fair trial.³⁸⁴ Arbitration proceedings are considered to be a forum for the purpose of

³⁷⁸ *Dunsmuir v New Brunswick* [2008] 1 SCR 190 para 47.

³⁷⁹ *Herholdt v Nedbank Ltd and Another* (701/2012) [2013] ZASCA 97 para 9.

³⁸⁰ The Explanatory Memorandum to the Labour Relations Act 1995 16 *ILJ* 278 318.

³⁸¹ Musukubili F & van der Walt 'The Namibian Labour Dispute Resolution System: Some Lessons from South Africa' (2014) 35(1) *Obiter* 133. See also *Herholdt v Nedbank Ltd* [2012] 9 BLLR 857 (LAC) para 53.

³⁸² Musukubili F & van der Walt 'The Namibian Labour Dispute Resolution System: Some Lessons from South Africa' (2014) 35(1) *Obiter* 133.

³⁸³ Constitution of the Republic of Namibia (amended 1998).

³⁸⁴ Musukubili F & van der Walt 'The Namibian Labour Dispute Resolution System: Some Lessons from South Africa' (2014) 35(1) *Obiter* 133.

resolving labour disputes. In South Africa, the CCMA is an administrative body as defined in s 33 of the Constitution.³⁸⁵

Appeals against arbitration proceedings can only be done on limited grounds. They can be done based on any question of law, of fact, or of a combination of both.³⁸⁶ In *Shoprite Namibia* the appellant appealed on question of law against the arbitrator's award. The appellant was of the opinion that the arbitrator had erred on the law or on the facts in her finding of the material evidence. The Court held that s 89 (1)(a) of the Namibian Labour Act permits a court to hear an appeal on a question of law alone where the matter does not fall within the ambit of s 89(1)(b) of the Labour Act. Section 89 (1)(b) states that a party to a dispute may appeal to the Labour Court against an arbitrator's award, where an award in a dispute was initially referred to the Labour Commissioner on a question of fact, law or mixed fact and law. In essence the court cannot hear an appeal on a question of fact or both law and fact.³⁸⁷

The Court in *JB Cooling & Refrigeration*³⁸⁸ reaffirmed that when an arbitration award is appealed against in terms of s 86(1)(a) of the Labour Act³⁸⁹, but does not fall within the ambit of s 86(1)(b), such appeal must be on a question of law alone.³⁹⁰ In order for a court to determine whether the appeal is on a question of law or fact, the reviewing Court will have to determine whether the LAC made the correct decision and order. In order for a court to determine that the decision made by the arbitrator is the correct one, it will first have to establish the facts which were common cause or not in issue before the arbitrator and then determine the relevant findings that arbitrator made.³⁹¹

An arbitration award may be reviewed where the aggrieved party alleges a defect in the arbitration proceedings.³⁹² In terms of s 89(5) of the Labour Act³⁹³, an award can be set aside on

³⁸⁵ Musukubili F & van der Walt 'The Namibian Labour Dispute Resolution System: Some Lessons from South Africa' (2014) 35(1) *Obiter* 133.

³⁸⁶ Section 89(1)(a) and (b) of the Labour Act 11 of 2007 (Labour Act).

³⁸⁷ *Shoprite Namibia (Pty) Ltd v Paulo and Another* (LCA 02/2010) [2011] NALC 5 para 2.

³⁸⁸ *JB Cooling & Refrigeration CC v Kavendjaa & Others* (LCA 15/2010) [2012] NALC 8.

³⁸⁹ Labour Act 11 of 2007

³⁹⁰ *JB Cooling & Refrigeration CC v Kavendjaa & Others* (LCA 15/2010) [2012] NALC 8 para 6.

³⁹¹ *JB Cooling & Refrigeration CC v Kavendjaa & Others* (LCA 15/2010) [2012] NALC 8 para 11.

³⁹² Section 89(4) of the Labour Act.

³⁹³ Labour Act 11 of 2007

the grounds of misconduct, gross irregularity in the conduct of the arbitration proceedings, that the commissioner exceeded his/her power, or that award has been improperly obtained. These grounds are similar to the grounds set out in s 145(2) of the LRA³⁹⁴.

In *Atlantic Chicken*³⁹⁵ the applicant had brought a decision on review and fought to have it set aside. The LAC held that a review does not allow the court to reconsider the award made by the arbitrator.³⁹⁶ A judicial review is concerned with the decision-making process as opposed to the arbitrator's decision.³⁹⁷ In essence the applicant's grievance must be against the procedure followed during the arbitration proceedings.³⁹⁸ This is similar to process related unreasonableness. The reviewing court will have to determine whether the process followed by the commissioner in reaching the decision was reasonable. This generous approach allowed by the LAC in *Herholdt* was rejected by the SCA in *Herholdt*. The SCA held that an award can be reviewed on the grounds set out in s 145 of the LRA which is suffused with the standard of reasonableness as determined in *Sidumo*. The Court in *Atlantic Chicken* held that awards can only be reviewed on the grounds set out in s 89(4) of the Labour Act³⁹⁹, but the grievance party needs to prove that there was a defect in the process during the arbitration.⁴⁰⁰

3.9 CONCLUSION

Arbitration awards can only be reviewed in exceptional cases.⁴⁰¹ The aim of the legislature was to ensure that CCMA awards would be final and only be interfered with in limited circumstances.⁴⁰² The narrow grounds of review ensure that parties are bound to the finding of the commissioner even if the commissioner has erred on the facts or the law.⁴⁰³

³⁹⁴ Labour Act 11 of 2007

³⁹⁵ *Atlantic Chicken Company (Pty) Ltd v Mwandangi & Other* (LC 105/2011) [2012] NALC 11.

³⁹⁶ *Atlantic Chicken Company (Pty) Ltd v Mwandangi & Other* (LC 105/2011) [2012] NALC 11 para 5.

³⁹⁷ *Atlantic Chicken Company (Pty) Ltd v Mwandangi & Other* (LC 105/2011) [2012] NALC 11 para 5.

³⁹⁸ *Atlantic Chicken Company (Pty) Ltd v Mwandangi & Other* (LC 105/2011) [2012] NALC 11 para 5.

³⁹⁹ Labour Act 11 of 2007

⁴⁰⁰ *Atlantic Chicken Company (Pty) Ltd v Mwandangi & Other* (LC 105/2011) [2012] NALC 11 para 5.

⁴⁰¹ Du Toit D *et al Labour Relations Law* 5 ed (2006) 198.

⁴⁰² Du Toit D *et al Labour Relations Law* 5 ed (2006) 198.

⁴⁰³ Du Toit D *et al Labour Relations Law* 5 ed (2006) 198.

A reviewing court can only interfere with an arbitration award if the conduct of the commissioner amounts to gross irregularity. The conduct will only amount to gross irregularity where the commissioner had not afforded either party the opportunity of a fair trial. This will ensure that the decision made by the commissioner is reasonable and without procedural errors or poor reasoning, unless the commissioner misunderstood the issue before him or her.⁴⁰⁴ Inadequate reasoning or failure to take into account all relevant factors will not make the commissioner's decision unreasonable.⁴⁰⁵ This portrays that errors of law and fact are not important, yet these errors are in certain circumstances very important.⁴⁰⁶ These errors determine whether the award is substantively unreasonable or not.

In the following chapter, concluding remarks will be made in respect to whether the standard of review determined in *Sidumo* is an appropriate mechanism for reviewing arbitral awards and whether the distinction between review and appeal is threatened.



⁴⁰⁴ Fergus E 'Reviewing an Appeal: A response to Judge Murphy and the SCA' (2014) 35 *ILJ* 47-59.

⁴⁰⁵ Fergus E 'Reviewing an Appeal: A response to Judge Murphy and the SCA' (2014) 35 *ILJ* 47-59.

⁴⁰⁶ Fergus E 'Reviewing an Appeal: A response to Judge Murphy and the SCA' (2014) 35 *ILJ* 47-59.

CHAPTER 4

CONCLUSION

The aim of this thesis was to determine whether the standard of reasonableness as expressed by the Constitutional Court in *Sidumo* is an appropriate mechanism for reviewing arbitral awards. S 33(1) of the Constitution⁴⁰⁷ requires that administrative action must be 'reasonable'.⁴⁰⁸ In order to determine whether a decision made by the Commissioner is reasonable or unreasonable is often thought to be an incurably substantive undertaking. There is a fear that courts will be drawn into the merits of the decision made by the Commissioner, which blurs the distinction between appeal and review.⁴⁰⁹

It is submitted that reviewing an arbitration award on the grounds of reasonableness does threaten the distinction between appeal and review, but to a limited extent where it is necessary for the court to scrutinise the merits of the Commissioner's decision.⁴¹⁰ It is impossible to determine whether a decision falls within the ambit of reasonableness without taking into consideration the material evidence before the Commissioner, with emphasis placed on various factors, inclusive of the purpose the decision sought to achieve.⁴¹¹ The distinction between appeal and review can be best explained by distinguishing between review as a process and a remedy.⁴¹² In the process of review, a reviewing court can scrutinise the arbitration award – but not to the extent where the court sets aside a commissioner's decision with which it does not agree.⁴¹³ The Court in *Bato Star* recognised this danger.⁴¹⁴ A reviewing court must determine whether or not the decision of a Commissioner falls within the ambit of reasonableness as determined in *Sidumo*.⁴¹⁵

⁴⁰⁷ Constitution of the Republic of South Africa, 1996.

⁴⁰⁸ Hoexter G *Administration Law in South Africa* 2 ed (2012) 327.

⁴⁰⁹ Hoexter G *Administration Law in South Africa* 2 ed (2012) 327.

⁴¹⁰ Hoexter G *Administration Law in South Africa* 2 ed (2012) 351.

⁴¹¹ Hoexter G *Administration Law in South Africa* 2 ed (2012) 351.

⁴¹² Hoexter G *Administration Law in South Africa* 2 ed (2012) 352.

⁴¹³ Hoexter G *Administration Law in South Africa* 2 ed (2012) 352.

⁴¹⁴ *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs & Tourism and Others* 2004 (4) SA 490 (CC) para 45.

⁴¹⁵ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 para 109.

An award made by a Commissioner will be unreasonable if it could not have been reached by a reasonable decision-maker as determined by the Constitutional Court in *Sidumo*.

The Courts in *Herholdt* and *Gold Fields* ‘only dealt with latent irregularity and unreasonableness in the context of factual findings made by Commissioners in relation to the issue of guilt.’⁴¹⁶ These two judgments have no bearings on reviews based on patent irregularity or error of law.⁴¹⁷ The SCA in *Herholdt* had to determine whether the LAC was correct in developing the test of review and extending the grounds to permit reviews based on latent gross irregularity which is a lesser standard than the standard determined in *Sidumo*.

Herholdt and *Gold Fields* do not prevent courts the opportunity to review process-related reviews, but both the SCA and the LAC held that it will not be sufficient enough to set an award aside on such a ground.⁴¹⁸ According to the SCA in *Herholdt* courts can review awards on the grounds set out in s 145 of the LRA and on the ground of reasonableness. This approach reaffirms the decision made by the CC in *Sidumo* that s 145 of the LRA⁴¹⁹ is suffused with reasonableness. The LAC in *Gold Fields* held that awards can be reviewed on the grounds set out in s 145 of the LRA, with unreasonableness as an additional requirement. This approach conflicts with the approach taken by the CC in *Sidumo*. The Courts in both cases held that the awards had failed the *Sidumo* test and therefore cannot be set aside. In essence an unhappy party must be able to prove that the award was unreasonable in order for the award to be set aside.

In *Sidumo*, Ngcobo J held that it is required of a commissioner to apply his/her mind to the issues that are material to the determination of the dispute in order for the proceedings to be fair.⁴²⁰ This dictum was endorsed by the LAC in *Herholdt*, *Gaga* and *Afrox Health*. Both the SCA and

⁴¹⁶ Myburgh A ‘The test for review of CCMA arbitration awards: an update’ (2013) 23(4) *Contemporary Labour Law* 40.

⁴¹⁷ Myburgh A ‘The test for review of CCMA arbitration awards: an update’ (2013) 23(4) *Contemporary Labour Law* 40.

⁴¹⁸ Myburgh A ‘The test for review of CCMA arbitration awards: an update’ (2013) 23(4) *Contemporary Labour Law* 42.

⁴¹⁹ Labour Relations Act No 66 of 1995.

⁴²⁰ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 para 267.

the LAC in *Herholdt* and *Gold Fields* either expressly or implicitly rejected the dictum of Ngcobo. The Courts in both *Herholdt* and *Gold Fields* held that an applicant will only succeed with a review based on the Commissioner's failure to consider material facts, where the applicant can establish that this resulted in the award being substantively unreasonable and failing the *Sidumo* test.⁴²¹

The SCA in *Herholdt* was critical of the dictum in two respects. The SCA held that the dictum is in conflict with the historical meaning of a gross irregularity.⁴²² The SCA further held that the dictum was in conflict with the approach endorsed by the majority judgment by the CC in *Sidumo*. The LAC in *Gold Fields* does not discuss the dictum of Ngcobo J. However the LAC in *Gold Fields* implicitly rejects the dictum of Ngcobo J. The Court held that where an applicant alleges gross irregularity in the proceedings, courts must determine whether the award is unreasonable. This approach conflicts with Ngcobo J's dictum which allows courts to review awards based on the ground of gross irregularity irrespective of whether the result was reasonable.⁴²³

When courts are determining whether the *Sidumo* test has been met, they should not focus on the errors committed by the Commissioner. Instead the court should holistically analyse all the material evidence that was before the Commissioner in order to determine whether the result of the award is capable of reasonable justification. There are those who contend that after the judgment of *Herholdt* and *Gold Fields*, succeeding on review will be more difficult.⁴²⁴ Consideration needs to be taken into account on the fact that the LAC after *Sidumo* has set aside awards or confirmed the setting aside on review in numerous judgments on the basis of process-

⁴²¹ *Herholdt v Nedbank Ltd and Another* (701/2012) [2013] ZASCA 97 para 25. See also *Gold Fields* (JA 2/2012) [2013] ZALAC 28 para 15.

⁴²² *Herholdt v Nedbank Ltd and Another* (701/2012) [2013] ZASCA 97 para 19. See also Myburgh A 'The test for review of CCMA arbitration awards: an update' (2013) 23 Contemporary Labour Law 4 35.

⁴²³ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 para 267.

⁴²⁴ Myburgh A 'The test for review of CCMA arbitration awards: an update' (2013) 23(4) *Contemporary Labour Law* 42. See also Rogers P & Naidu C 'Test for review relooked – is there still scope for process related review or is it limited to Sidumo's outcome-based approach?' <http://www.lexology.com/library/detail.aspx?g=63b12c19-a56a-4a12-8f31-9b05de51fff5> (accessed 28 October 2014).

related unreasonableness.⁴²⁵ The arbitration awards in these cases had failed the *Sidumo* test. The LAC in *Herholdt* held that process-related errors are sufficient to have an award set aside without the *Sidumo* test being met.⁴²⁶ An arbitration award will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material before them as was determined in *Sidumo*.⁴²⁷ Courts cannot simply set aside an award on (even material) errors of fact, including the weight and relevance attached to particular facts, unless the outcome is unreasonable.⁴²⁸

In *Herholdt* and *Gold Fields* the SCA and LAC concluded that the Commissioner's award was unreasonable. The Commissioner in both cases held that the employees were guilty of misconduct and that dismissal was a fair sanction. The SCA and LAC held that the awards had failed the *Sidumo* test. Seemingly there has been a development in a different direction with regards to the review standard, which allows courts to set aside an award on the grounds of a latent irregularity as opposed to gross irregularity. Accordingly, if courts can determine on review that the outcome of an award was objectively wrong, an award will more often than not be set aside on the ground of unreasonableness.⁴²⁹

In conclusion, both courts were correct in stating that the awards had failed the *Sidumo* test as this was the standard determined by the CC in *Sidumo*. The LAC was incorrect in allowing awards to be set aside on the ground of latent irregularity. The LAC did not recognise the majority judgment of the CC in *Sidumo* which is binding on all lower courts including the SCA. In essence the LAC was incorrect in extending the grounds of review, to allow arbitration awards to be set aside on the ground of latent gross irregularity. Therefore the standard of reasonableness as determined by the Constitutional Court in *Sidumo* is an appropriate mechanism for reviewing arbitral awards.

Word Count: 26 183 words

⁴²⁵ See for example; *Gaga v Anglo Platinum Ltd & others* (2012) 33 ILJ 329 (LAC); [2012] 3 BLLR 285 (LAC); *Afrox Healthcare Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2012) 33 ILJ 1381 (LAC); [2012] 7 BLLR 649 (LAC); *Herholdt v Nedbank Ltd* [2012] 9 BLLR 857 (LAC) para 39. See also Myburgh A 'The test for review of CCMA arbitration awards: an update' (2013) 23(4) *Contemporary Labour Law* 42.

⁴²⁶ Myburgh A 'The test for review of CCMA arbitration awards: an update' (2013) 23(4) *Contemporary Labour Law* 42.

⁴²⁷ *Herholdt v Nedbank Ltd and Another* (701/2012) [2013] ZASCA 97 para 25.

⁴²⁸ *Herholdt v Nedbank Ltd and Another* (701/2012) [2013] ZASCA 97 para 25.

⁴²⁹ Myburgh A 'The test for review of CCMA arbitration awards: an update' (2013) 23(4) *Contemporary Labour Law* 42.

5. BIBLIOGRAPHY

5.1 Books

Du Toit D *et al Labour Relations Law* 5 ed (2006) Cape Town: LexisNexis Butterworths
Gorgan J *Labour Litigation and dispute resolution* (2010) Cape Town: Juta & Co Ltd.
Hoexter C *Administrative Law in South Africa* (2012) Cape Town: Juta & Co Ltd.
Parker C *Labour Law in Namibia* (2012) Windhoek: University of Namibia Press.
Van Niekerk A *Law @ Work* (2008) Cape Town: LexiNexis.

5.2 Cases

Administrator, Transvaal, and Others v Zenzile and Others 1991 (1) SA 21 (A).
Afrox Healthcare Ltd v Commission for Conciliation, Mediation & Arbitration & others (2012) 33 ILJ 1381 (LAC); [2012] 7 BLLR 649 (LAC).
Atlantic Chicken Company (Pty) Ltd v Mwandingi & Other (LC 105/2011) [2012] NALC 11.
Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others 2004 (7) BCLR 687 (CC).
Carephone (Pty) Ltd v Marcus NO. & others 1998 11 BLLR 1093 (LAC).
Chirwa v Transnet [2008] 2 BLLR 97 (CC).
Dunsmuir v New Brunswick [2008] 1 SCR 190.
Gaga v Anglo Platinum Ltd & others (2012) 33 ILJ 329 (LAC); [2012] 3 BLLR 285 (LAC).
Gcaba v Minister of Safety & Security & Others (2009) 30 ILJ 2623 (CC).
Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others (JA 2/2012) [2013] ZALAC 28; [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC) (4 November 2013).
Hendricks v Overstrand Municipality & another (CA24/2013) [2014] ZALAC 49; [2014] 12 BLLR 1170 (LAC); (2015) 36 ILJ 163 (LAC).
Herholdt v Nedbank Ltd [2012] 9 BLLR 857 (LAC).
Herholdt v Nedbank Ltd and Another (701/2012) [2013] ZASCA 97.

JB Cooling & Refrigeration CC v Kavendjaa & Others (LCA 15/2010) [2012] NALC 8.

Mbayeka & another v MEC for Welfare, Eastern Cape [2001] 1 All SA 567 (Tk).

Mediation and Arbitration and Others (JA 2/2012) [2013] ZALAC 28.

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

Minister of Health & Another v New Clicks South Africa (Pty) Ltd & Others (Treatment Action Campaign & Another as amici curiae) 2006 (2) SA 311 (CC).

Mokwena v Shingujadja and Another (LC 52/2011) [2013] NALCMD.

National Union of Mineworkers & Another v Samancor Ltd (Tubatse Ferrochme) & other (2011) 32 ILJ 1618 (SCA); [2011] 11 BLLR 1041.

Police and Prisons Civil Rights Union and others v Minister of Correctional Services and others [2006] 2 All SA 175 (E).

Rustenburg Platinum mines Ltd v CCMA & others [2004] 1 BLLR 34 (LAC).

Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration 2007 (1) SA 576 (SCA).

SA Police Union & Another v National Commissioner of the SA Police Service & Another (2005) 26 ILJ 2403 (LC).

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

Simela & others v MEC for Education, Eastern Cape & another [2001] 9 BLLR 1685 (LC).

Shoprite Checkers (Pty) Ltd v Ramdaw NO & Other [2001] 9 BLLR 1011 (LAC).

Shoprite Namibia (Pty) Ltd v Paulo and Another (LCA 02/2010) [2011] NALC.

Southern Sun Hotel (Pty) Ltd v CCMA & other s (2010) 31 ILJ 452 (LC).

Transnet Ltd & others v Chirwa (2007) (2) SA 198 (SCA).

5.3 Internet Articles

Deonarain N & Tulk R ‘An end to dual causes of action in public sector dismissals’ available at <http://www.bowman.co.za/News-Blog/Blog/AN-END-TO-DUAL-CAUSES-OF-ACTION-IN-PUBLIC-SECTOR-DISMISSALS-NADIRA-DEONARAIN-REGHANA-TULK> (accessed 5 January 2015).

PAJA Newsletter Special issue: The application of PAJA to employment law disputes' available at

[http://www.justice.gov.za/paja/docs/newsletters/Newsletter%20special%20issue Labour%20Law%20Sep%202007](http://www.justice.gov.za/paja/docs/newsletters/Newsletter%20special%20issue%20Labour%20Law%20Sep%202007) (accessed 1 April 2015).

Rogers P & Naidu C 'Test for review relooked – is there still scope for process related review or is it limited to Sidumo's outcome-based approach?' available at <http://www.lexology.com/library/detail.aspx?g=63b12c19-a56a-4a12-8f31-9b05de51fff5> (accessed 28 October 2014).

Salans, Fraser Milner Casgrain and SNR Denton 'Supreme Court of Canada Rewrites Law on Standard of Review in Administrative Law' available at <http://www.dentons.com/en/insights/articles/2008/april/8/supreme-court-of-canada-rewrites-law-on-standard-of-review-in-administrative-law---april-2008> (accessed 14 November 2014).

5.4 Journal Articles

Brassey M 'Back off but back up! Administrative Law rightly yields to Labour Law.' (2009) 2 *Constitutional Court review* 209 237.

Fergus E 'Reviewing an Appeal: A response to Judge Murphy and the SCA' (2014) 35 *ILJ* 47 78.

Fergus E 'The distinction between appeal and reviews – Defining the limits of the labour court's powers of review' (2010) 31 *ILJ* 1556 1574.

Heckman G 'Substantive review in appellate courts since Dunsmuir' (2009) 47 *OSGOODE Hall Law Journal* 751 785.

Hoexter C 'Clearing the Intersection? Administrative Law and Labour Law in the Constitutional Court' 2008 (1) *Constitutional Court Review* 209 234.

Le Roux PAK & Leigh Young K 'The role of reasonableness in dismissal: the Constitutional court looks at who has the final say' (2007) 17 *CLL* 21 30.

Murphy J 'An Appeal for an Appeal' (2013) 34 *ILJ* 1 18.

Myburgh A 'Sidumo v Rustplats: How have the courts dealt with it?' (2009) 30 *ILJ* 1 24.

Myburgh A 'The LAC's Latest Trilogy of Review Judgments: Is the Sidumo Test in Decline?' (2013) 34 *ILJ* 19 27.

Myburgh A 'The test for review of CCMA arbitration awards: an update' (2013) 23(4) *Contemporary Labour Law* 31 42.

Musukubulili F 'Namibian Labour Dispute Resolution System: Comparison with South Africa' (2014) 35 *Obiter* 126 135.

The Explanatory Memorandum to the Labour Relations Act 1995 16 *ILJ* 278 318.

5.5 Legislation

Arbitration Act 42 of 1965.

Constitution of the Republic of Namibia (amended 1998).

Constitution of South Africa, 1996.

Labour Act No 11 of 2007.

Labour Relations Act 28 of 1956.

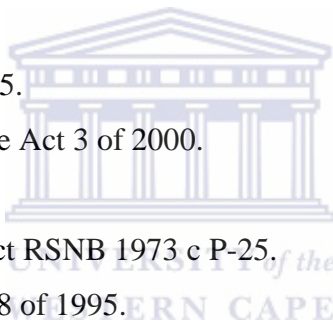
Labour Relations Act No 66 of 1995.

Promotion of Administrative Justice Act 3 of 2000.

Public Service Act 103 of 1994.

Public Service Labour Relations Act RSNB 1973 c P-25.

South African Police Service Act 68 of 1995.



5.6 Thesis

Fergus E *From Sidumo to Dunsmuir: The Test for Review of CCMA Arbitration Awards* (unpublished LLD Thesis, University of Cape Town, 2013).