SIDUMO REVISITED

by

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DECLARATION

I, MARTHINUS JOHANNES BOYENS, declare that the work presented in this dissertation has not been submitted before for any degree or examination and that all the sources I have used or quoted have been indicated and acknowledged as complete references. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the Magister Legum Degree in Labour Law.

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Marthinus Johannes Boyens
ACKNOWLEDGEMENT

Gloria in excelsis Deo

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SUMMARY

The primary purpose of this treatise is to revisit and reconsider the development of the review test set out in the Constitutional Court judgment of Sidumo & another v Rustenburg Platinum Mines Ltd & Others (2007) 28 ILJ 2405 (CC) and consequently ascertain the correct approach to be adopted by our Labour Courts in the application of such test. The secondary purpose, entail the determination of the extent to which Labour Court judges interfere with the merits of awards and the resulting impact on the distinction between appeal and review. In order to establish whether the test for review was correctly developed and to determine whether our review proceedings deter recurrent interference by our judges, an edifying consideration of judicial review in South Africa, an extensive analysis of various judgements pertaining to such development, followed by a comprehensive comparison with the United Kingdom`s application of review proceedings and judicial composition are made. The research methodology is based on a contour of Sidumo, commencing with the Sidumo judgment, followed by three contentious Labour Appeal Court judgments and concluding with a Supreme Court of Appeal judgement, which clarifies the operation of the review test. The contour is interlinked with the notion of reasonableness.

The primary research findings are identified in the judgment of Herholdt v Nedbank Ltd (2013) 34 ILJ 2795 (SCA). The judgment, concluding the Sidumo contour, underlines the current position in our law and consequent narrower approach. A comparison made with the United Kingdom, differentiate between such approach implemented by our courts and the strict gross unreasonableness approach applied by Employment Appeal Tribunals, recognising the finding, that our Labour Court judges ardently interfere with the merits of awards. In the conclusion it is submitted that our labour law jurisprudence will constantly evolve, dictated by our courts interpretation of lawfulness, reasonableness and fairness.
On 5 October 2007, the Constitutional Court handed down a significant and historical judgment concerning our labour-law jurisprudence, in *Sidumo v Rustenburg Platinum Mines*. This judgment was eagerly awaited by both employers as well as employees and was of significant importance to the Commission for Conciliation, Mediation and Arbitration and other relevant bargaining councils. However, the findings encapsulated in *Sidumo* were not without controversy. At that time, as well as at present, there were various debates regarding the key findings by the Constitutional Court in relation to the court a quo. Such key findings entailed firstly, that the commissioner is not required to show a measure of deference concerning the decision of employer, as held by the Supreme Court of Appeal, and that the commissioner must subsequently decide whether the decision of the employer was fair in considering all the relevant circumstances, thus rejecting the professed reasonable-employer test in our law. Secondly, the court held that the review grounds, legislated under the Promotion of Administrative Justice Act (PAJA), do not apply and thus held that commissioners are obliged to make reasonable decisions within the provisions of section 145 of the Labour Relations Act (LRA). However, the principal and most significant finding made by the Constitutional Court, entailed the suffusion of the Constitutional ground of reasonableness into section 145 of the LRA. This pronouncement involved the application of the so-called *Sidumo* test and thus sought to give a sense of direction concerning the review grounds within section 145. It was set out as a stringent result-based test, ascertaining whether the decision reached by the commissioner was one that a reasonable decision-maker could not have reached. The test will only be met if the result of the award falls outside a notional band of reasonable decisions and, consequently in the process, maintaining the distinction between an appeal and review.

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1 [2007] 12 BLLR 1097 (CC).
2 Hereafter referred to as CCMA.
3 Hereafter referred to as SCA.
4 3 of 2000.
5 66 of 1995.
However, the redoubtable finding in *Sidumo* was deflated by a trio of contentious Labour Appeal Court judgments. *Gaga v Anglo Platinum Ltd*,\(^7\) *Afrox Healthcare Ltd v CCMA*\(^8\) and *Herholdt v Nedbank*,\(^9\) endeavoured to clarify the operation of the review test and in the process introduced a more lenient and relaxed approach to the application of CCMA-arbitration reviews. These judgments were all formulated on the minority judgment in *Sidumo* concerning Ngcobo J’s gross irregularity *dictum* and endorsing the so-called test for prejudice, confirming that CCMA awards can be reviewed on section 145 and on the additional ground of unreasonableness, resulting in the diluting of the test set out in *Sidumo* and consequently opening the door for more frequent interference of arbitration awards by our Labour Courts.

Such misapplication and deviation from the *Sidumo* contour by the Labour Appeal Court, distorted the proverbial line between appeal and review and thus encouraged applicants on review to rather base their application on a gross irregularity or *dialectical unreasonableness*.\(^{10}\)

Accordingly, the SCA in *Herholdt v Nedbank Ltd*,\(^11\) and a subsequent LAC judgment of *Gold Fields Mining SA (Pty) Ltd v CCMA*,\(^12\) stepped in and sought to correct such broad approach established by the trio of judgments, by ascertaining a more restricted approach. Such re-establishment of the *Sidumo* contour reflected the true meaning set out in section 145 of the LRA, relating to the review ground of gross irregularity, as well as the stringent nature of the *Sidumo* test.\(^{13}\) Therefore, ensuring that awards are not lightly interfered with and preserving the distinction between appeal and review.

Even though the *Sidumo* contour has been re-established and developed, the concern is, however, the extent of interference by our Labour Court judges that remains in the application of our review proceedings.

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\(^{7}\) (2012) 33 *ILJ* 329 (LAC).
\(^{8}\) (2012) 33 *ILJ* 1381 (LAC).
\(^{9}\) (2012) 23 *ILJ* 1789 (LAC).
\(^{10}\) *Infra* Ch 4.
\(^{11}\) (2013) 34 *ILJ* 2795 (SCA).
\(^{13}\) *Infra* Ch 5.
In revisiting *Sidumo*, the research design and theme are illustrated in the form of a contour, which entails the assessment of the origin and basis of our review proceedings, the 2007 judgment of *Sidumo*, the trio of contentious Labour Appeal Court judgments and culminates in the evaluation of the contemporary judgments of *Herholdt* and *Gold Fields*. The core aspect-forming part of the research, and subsequently the *Sidumo* passage, is the notion of *reasonableness*. Such notion was entrenched by *Sidumo* into our labour jurisprudence and in particular into section 145. Even though *Sidumo* based such suffusion on the Constitutional standard of *reasonableness*, Navsa AJ, interestingly relied on *Bato Star Fishing v Minister of Environmental Affairs and Tourism*, 14 which in turn made reference to *R v Chief Constable of Sussex*, 15 where Lord Cooke established a simpler test for *unreasonableness*. Such reliance and consideration of the United Kingdom’s jurisprudence, prompt a comparative approach in considering the application of the notion of *reasonableness* in the United Kingdom and in particular the judicial medium 16 applying such notion.

Such comparative analyses, emphasises the lighter test for *unreasonableness* endorsed by our Labour Courts in comparison with the more stringent test for gross *unreasonableness* in the United Kingdom, thus prompting our Labour Court judges to interfere with the merits of a particular case. Even though the *Sidumo* contour culminates in the narrowing of such interference by our Labour Court judges, the question remains what the motive for such interference is illustrated by the broad application of the notion of *reasonableness* and consequently, how to prevent such interference. The true intention of the legislature, reflected in the course of the treatise, is to maintain a unique distinction between appeal and review. Such distinction is, however, to a certain extent, distorted in the application of our review proceedings. Therefore, the ultimate consideration is whether the notion of *reasonableness* can be applied by our Labour Court judges with a measure of confidence in our CCMA commissioners and in the process limit the interference regarding the merits and thus upholding the distinction between appeal and review.

14 2004 (4) SA 490 (CC).
15 [1998] All ER (D) 568.
16 Employment Tribunals & Employment Appeal Tribunals.
CHAPTER 2
BACKGROUND OF REVIEW PROCEEDINGS

2.1. INTRODUCTION

One of the key issues that had to be attended to in *Sidumo & Another v Rustenburg Platinum Mines Ltd*, related to the aspects of review proceedings and the subsequent application of same by our Labour Courts. In order to comprehend the noteworthiness of the finding, it is imperative to understand the foundation of the review proceedings in our labour law. Therefore, this chapter will proceed with a brief consideration of the basis of the grounds for review found in the Labour Relations Act (LRA) and setting out the essential distinction between appeals and the grounds for review in section 145 of the LRA.

In establishing the basis and origin of the grounds for review, the chapter will refer to the Arbitration Act, signifying the intention of the legislature when drafting the above mentioned legislation. However, since the advent of the Constitutional era, the basis of reviews is based on the constitutional principle “that all administrative action must be reasonable.” Conversely, this resulted in the labour courts looking at arbitration awards afresh and consequently decided what the court would have done as the court of first instance, resulting in the consideration of the merits of the case and as a result distorting the distinction between appeal and review. The basis is thus to consider the determination of such distinction. In the past, such distinction was based on the well-known case of *R v Dhlumayo*, setting out recognisable principles for appeal. However, the new distinction is based on whether the decision is capable of justification, thus falling within range of the reasonable decision maker. The judgment of *Carephone (Pty) Ltd v Marcus* in this regard will thus be considered, in particular

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17 [2007] 12 BLLR 1097 (CC).
19 42 of 1965.
20 S 33(1) of the Constitution provides that: “(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
21 1948 (2) SA 678 (A).
the laying of the basis for the *Sidumo* contour and the ultimate course of preservation of such distinction.

The relevance of the distinction between appeals and reviews will be noted in the development of *Sidumo*, where the courts continuously endeavour to summon a stricter approach in review proceedings and thus command for the preservation of such distinction.

The abovementioned *rationality*, also interpreted as *reasonableness*, will be considered in the discussion of the *Carephone* judgment. The application of the notion of *reasonableness* can be applied effortlessly in the review of the “penalty” imposed. However, the review of “factual findings”, “sanctions” and “discretion”\(^{23}\) presents a difficulty.\(^ {24}\)

### 2.2. FOUNDATION OF REVIEW PROCEEDINGS IN SOUTH AFRICAN JURISPRUDENCE

In South African labour law, judicial review concerns the process where a superior court, in particular the Labour Court, is endowed with the power to determine, scrutinise and set aside awards made by organs of state and private or individual bodies on the basis of certain grounds of review.\(^ {25}\)

Prior to 1994, the South African common law governed the “inherent” jurisdiction of the Supreme Court, providing the High Court with the power to oversee the legality of all the actions of the state organs.\(^ {26}\) However, in the post-democratic era, the High Court now enjoys the exercise of such powers, not in terms of our common law, but under the Constitution\(^ {27}\) and subsequent legislation enacted accordingly.\(^ {28}\)

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\(^{23}\) Decision relating to postponement, compensation, severance pay.

\(^{24}\) Myburgh “Reviewing of CCMA Arbitration Awards” LLM course-work lecture, Nelson Mandela Metropolitan University, 1 March 2014.

\(^{25}\) Grogan *Labour Litigation and Dispute Resolution* (2013) 278.

\(^{26}\) *Ibid.*

\(^{27}\) The Constitution.

\(^{28}\) Grogan *Labour Litigation and Dispute Resolution* 278.
Private arbitrations on the other hand were and are still continuing to be regulated by legislation. The Arbitration Act,\(^\text{29}\) in section 33(1), sets out specific grounds to challenge a matter on review:

“(1) Where –

(a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or
(b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or
(c) an award has been improperly obtained,

the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.”

It is accordingly not surprising that the legislature in 1995 based the LRA on such conservative piece of legislation, in formulating a narrow review action in labour disputes, making it more difficult for parties to succeed. Thus, section 145(2) of the LRA is mirrored on section 33 of the Arbitration Act, where it provides:

“(2) A defect referred to in subsection (1), means –

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

Such limited scope contained in section 145 produced a school of interpretation, justifying that proceedings against arbitration awards could be instituted not only under the auspices of section 145, but also under section 158(1)(g) of the LRA based on the Labour Court’s discretion, subject to section 145, to:

“review the performance or purported performance of any function provided for in this Act on any grounds that are permissible in law”.\(^\text{30}\)

\(^{29}\) 42 of 1965.

\(^{30}\) S 158(1)(g).
Such interpretation had consequently been regarded as a permissible course for reviewing arbitration awards. However, Froneman DJP, in Carephone, in referring to the judgment of the court *a quo*, confirmed Mlambo J’s refusal to invoke the power of review in terms of section 158(1)(g), and his conclusion that review of arbitration proceedings under the auspices of the Commission must proceed under section 145 of the LRA.\(^{31}\)

Such strict nature of the LRA is observable in the abolition of the right to appeal against decisions of the Industrial Court in terms of the LRA. Such right to appeal was replaced with the right to take the commissioner’s decision only on review to the Labour Court. It is thus apparent, from the inception of the LRA, that legislature sought to limit the potential grounds of review and the measure of interference by the Labour Court. The process of referring a decision or ruling to a superior court was thus restricted to that of review proceedings.

### 2.3. THE DISTINCTION BETWEEN APPEALS AND REVIEWS

The Labour Court is only endowed with review powers in relation to awards and rulings by CCMA or bargaining council commissioners, where the Labour Appeal Court on the other hand, hears appeals from the Labour Court itself. Even though appeals and reviews are of similar nature and purpose, there are various differences that provide a clear distinction between them.\(^{32}\)

Appeals entails a re-hearing, concerned with the merits limited to the evidence on record and questions whether the decision of the court *a quo* was correct.\(^{33}\) Conversely, reviews are not concerned with the merits of the evidence on record, as this limited rehearing only questions whether the procedure implemented was formally and procedurally correct.\(^{34}\) Appeal is thus directed at the result of the hearing, where review is focused on the method by which the result was reached.\(^{35}\)

\(^{31}\) *Carephone v Marcus* par 29.


\(^{33}\) *Ibid.*

\(^{34}\) *Ibid.*

\(^{35}\) *Ibid.*
The LRA thus provides a limited platform to challenge the procedure implemented by the arbitrator. Such limited grounds include gross irregularities committed by the arbitrator in the conduct of proceedings, arbitrators exceeding their powers and misconduct committed by arbitrators in the performance of their duties. However, since the enactment of the LRA the Labour Courts started to push the boundaries, with the view that our Labour Courts should have the power to do more than merely review the procedure implemented by the arbitrator, resulting in the distortion of such clear distinction established by our common law. This deviation is the result of value judgments made by our Labour Court judges, resulting in the interference with the arbitrator’s decision and consequently opening the door for the review of the merits.

2.3.1. *R v Dhlumayo*

This judgment of the Appellate Division (as it then was) emphasised the importance that a distinction must be maintained between review and appeal. Davis AJA held that, if the Appellate Court is satisfied that the judicial officer in the court of first instance has erred, the Appellate Court will reverse such decision whether or not there has been concurrence in the judicial officer’s finding of fact by an intermediate Appellate Court.

The Honourable appellant judge consequently summarised his conclusion in the form of principles which should guide the Appellate Court in appeal relating to facts. Some of such noteworthy principles bear repeating. For instance, the trial judge has advantages, which the Appellate Court cannot have, in that the trial judge experiences the atmosphere of the trial, seeing and hearing the witnesses. The Appeal Court could

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37 Van Tonder *Labour Court Practice* 299.
39 Van Tonder *Labour Court Practice* 300.
40 The Appellate Division was created as a purely Appellate Court superior to the provincial divisions. In 1994 the Constitutional Court was created with jurisdiction superior to the Appellate Division but only in constitutional matters. In 1997 the Appellate Division became the Supreme Court of Appeal and the provincial divisions became High Courts.
41 Davis AJA in *R v Dhlumayo* 594, explained that, although our method of dealing with appeals is in most respects like that in England, we know nothing of the English practice in regard to “concurrent findings of fact by two courts”, which has sometimes been said to increase still further the reluctance of the final Appellate Court to interfere.
thus hardly ever be in a better position than the trial judge with regard to the demeanour of the witness, and consequently be very reluctant to upset the findings of the trial judge. In observing particular people at the trial, the trial judge is in a better position than the Appellate Court in drawing inferences. Furthermore, should there be a misdirection of fact by the trial judge, it is presumed that his conclusion is correct and the Appellate Court will reverse such decision only where it is convinced that it is wrong. Thus, if the Appellate Court is left in doubt as to the correctness of the conclusion by the court a quo, then the court will uphold it. Should the trial judge have overlooked certain facts or probabilities, the Appellate Court would tend to disregard his findings, as a whole or in part, and thus come to its own conclusion. Accordingly, the Appellate Court is determined to seek reasons adverse to the conclusion of the trial judge. As no judgment can ever be “perfect and all-embracing”, and just because a matter has not be mentioned, it does not imply that it should not be considered.  

In consideration of these principles, it is evident that the court, in an appeal of fact, will interfere where other facts and probabilities have been overlooked. This is however, similar in nature to the notion that an award can be set aside if it is not justifiable with regard to the reasons given. This notion set out in Carephone thus clouds the distinction between appeal and review, in that mistakes of fact and law, subject to certain exceptions, are insufficient grounds for interference.

2.3.2. CAREPHONE AND THE STANDARD OF REVIEW

In Carephone the LAC had to establish the “nature” and “extent” of the court’s powers relating to the review of CCMA arbitration awards. The “extent” of such powers was confirmed to be limited to section 145. The “nature” of the court`s powers was based on the administrative-justice section in the Bill of Rights, confirming that, although the CCMA was not judicial in nature, it was both bound by the constitutional provision

42 R v Dhlumayo 594.
44 Infra par 2.3.2.
45 Toyota par 39.
46 Carephone v Marcus par 2.
47 Supra ft 20.
48 Supra ft 4.
governing organs of state and public administration, as well as the Bill of Rights. Therefore, such administrative status, obliged CCMA commissioners to ensure fairness, impartiality, equitability and an unbiased approach during such proceedings. Froneman DJP thus expressed and described the above mentioned limitations:49

“The constitutional imperatives for compulsory arbitration under the LRA are thus that the process must be fair and equitable, that the arbitrator must be impartial and unbiased, that the proceedings must be lawful and procedurally fair, that the reasons for the award must be given publicly and in writing, that the award must be justifiable in terms of those reasons and that it must be consistent with the fundamental right to labour practices.”50

The constitutional imperatives referred in the above mentioned dictum, “that the award must be justifiable in terms of those reasons given”51 introduces, according to Froneman DJP:

“a requirement of rationality in the merit or outcome of the administrative decision. This goes beyond mere procedural impropriety as a ground for review, or irrationality only as evidence of procedural impropriety”.52

Therefore, the scope of review of arbitration awards was extended as well as a need for the consideration of the merits of the outcome established. Consequently, the review of such awards would no longer be limited to procedural wrongdoing nor evidence thereof.53 However, the honourable judge advised that it would be inaccurate to attempt to distort the distinction between review and appeal.54

Froneman DJP, in his observation of the plain meaning of justifiable,55 explained that such meaning does not require the abolition of the difference between review and appeal, in that it does not require administrative action “to be just, justified and correct”, but merely requires the aptitude in demonstrating to be “just, justified and correct”.56

49 Carephone v Marcus par 20.
50 Ibid.
51 S 33(2) and item 23(b) of schedule 6 of the Constitution.
52 Carephone v Marcus par 31.
53 Ibid.
54 Carephone v Marcus par 32.
55 According to the New Shorter Oxford English Dictionary “justifiable” means “able to be legally or morally justified, able to be shown to be just, reasonable, or correct; defensible”. It does not mean “just”, “justified” or “correct” – see Carephone v Marcus par 32.
56 Carephone v Marcus par 31.
To limit such distinction between review and appeal, Froneman DJP emphasised that of importance is:

“the constitutional separation of the executive, legislative and judicial authority of the state administration, as well as the foundational values of accountability, responsiveness and openness in a democratic system of government (s 1(d) of the Constitution). The former provides legitimacy for the judicial review of administration action (but not for judicial exercise of executive or administrative authority), whilst the latter provides the broad conceptual framework within which the executive and public administration must do its work, and be assessed on review”.57

“When the Constitution requires administrative action to be justifiable in relation to the reasons given for it, it thus seeks to give expression to the fundamental values of accountability, responsiveness and openness. It does not purport to give courts the power to perform the administrative function themselves, which would be the effect if justifiability in the review process is equated to justness or correctness.”58

The LAC evidently accepted that, in determining whether administrative action is justifiable in terms of the reasons given for it, value judgments will have to be made, resulting in the consideration of the merits of the matter.59 Nevertheless, the court expounded the fact that such value judgment will only be in order, if the judge determining the issue, merely considers the merits of the case to determine whether the outcome of such administrative action is “rationally justifiable”, and not substitute such order with his/her own opinion.60

In a similar view, O'Regan J, in Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism61 emphasised that the distinction between appeals and reviews remains important:

“Although the review functions of the court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.”62

57 Carephone v Marcus par 34.
58 Carephone v Marcus par 35.
59 Carephone v Marcus par 36.
60 Ibid.
61 2004 (4) SA 490 (CC).
62 Bato Star Fishing v Minister of Environmental Affairs and Tourism par 45.
In considering the above mentioned substantive rationale required of administrative decision-makers, Froneman DJP, in Carephone considered certain formulations, enabling such aptitude. The honourable judge, however, redefined such formulations, based on the concept of justifiability and formulated the subsequent test:

“is there a rational objective basis justifying the connection made by the administrative decision maker between the material properly available to him and the conclusion he or she eventually arrived at?”

2.4. CONCLUSION

The test emphasised in Carephone thus forms the basis for the Sidumo contour and expected difficulty in formulating same. The substantiation of the arbitrators own opinion on the correctness of the outcome and decisions not falling within the bounds of reasonableness remains a concern and the vocal point of the Sidumo contour and the dominant feature in the distinction between appeal and review.

The strict nature of the distinction between appeal and review embed in section 145 of the LRA, remains the ultimate barricade and subsequent guard in the prevention of the disturbance of such distinction. However, as will be noted in the Sidumo contour established in the subsequent chapter, the so-called infusion of the concept of reasonableness, with origins in Carephone, does not bring a complete finality to the correct approach for the review of CCMA-arbitration awards. The Sidumo contour may have positioned a firm platform with the outcome-based review test, however it is contemporary Labour Court and Labour Appeal Court judgments which bring to a close the Sidumo contour.

As mentioned above, Sidumo remains the foundation and starting point in the development of the review of arbitration awards and the decisive prevention of the consideration of the merits by the Labour Courts of such awards. The establishment

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63 Many formulations have been suggested for this kind of substantive rationality required of administrative decision-makers, such as “reasonableness”, “rationality”, “proportionality” and the like (Cf. e.g. Craig, Administrative Law, above, at 337-349; Schwarze, European Administrative Law, 1992 at 677). sic Carephone v Marcus par 37.
64 Carephone v Marcus par 37.
65 Van Tonder Labour Court Practice (2014) 300.
and subsequent advance of the *Sidumo* test as well as the Labour Court’s application of the notion of *reasonableness* are to be considered.
CHAPTER 3
THE CONSTITUTIONAL COURT JUDGMENT – SIDUMO

3.1. INTRODUCTION

The judgment of Sidumo is without a doubt the prominent source concerning the application of review proceedings by our Labour Courts. Various jurisprudential conclusions were made by both majority and minority judgments, introducing various notions into our law. One of such concepts, partly developed by the Carephone judgment, is the standard of review which ought to be applied by our Labour Courts. In essence, Sidumo continued where Carephone left off and with great command introduced the new approach to be followed.

After a brief reflection on the background of the Sidumo saga, this chapter advances and considers the judgment of the Supreme Court of Appeal, where the SCA disagreed with the approach adopted by Labour Appeal Court in treating the mine’s challenge to the decision as an appeal. Cameron JA, referred to the distinction between appeal and review, and expressed that one should not lose sight of the fact that the line between review and appeal is difficult to draw, “as process-related reviews can never blind themselves to the substantive merits of the outcome and will predominantly involve the consideration of substantial merits”, as concluded in Carephone. The SCA, in endorsing the fact that CCMA commissioners are subject to Promotion of Administrative Justice Act, (PAJA) conceded that under PAJA there will always be a consideration of the merits, as the commissioner must scrutinize the connection

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66 Rustenburg Platinum Mines Ltd v CCMA (2006) 27 ILJ 2076 (SCA) par 30: it asked whether considerations existed, which the commissioner had taken into account, that were “capable of sustaining” his finding. In effect, the LAC asked whether there was material on record that could support the view that, despite his errors, the commissioner had nevertheless “got it right”.

67 Rustenburg Platinum Mines Ltd v CCMA par 30 – 31: with an appeal, the inquiry is whether the record contains material showing that the decision – notwithstanding any errors of reasoning – was correct. This is because in an appeal, the only determination is whether the decision is right or wrong. In a review, the question is not whether the decision is capable of being justified (or, as the LAC thought, whether it is not so incorrect as to make intervention doubtful), but whether the decision-maker properly exercised the powers entrusted to him or her. The focus is on the process, and on the way in which the decision-maker came to the challenged conclusion.


69 3 of 2000.
between the decision and the reason given for it by the decision-maker and consequently determine the rationality of such decision.\textsuperscript{70}

The majority in the Constitutional Court judgment of \textit{Sidumo}, however had contrasting views. The remainder of this chapter progressed to the analysis of such judgment and, in particular considers the notion of the infusion of the concept of reasonableness into section 145 of the LRA. The comprehensive judgment of Navsa J, indicates the refutation of the majority to entertain the conception of the SCA regarding PAJA, and subsequently formulated the \textit{standard of review}, based on the abovementioned infusion of reasonableness into section 145.

However, according to the minority, such standard of review appends an additional ground for review. Ngcobo J, emphasised that this approach tends to blur the line between an appeal and a review, as the requirement of rationality in the merit or outcome of the administrative decision, goes beyond mere procedural impropriety as a ground for review, or irrationality only as evidence of procedural impropriety.\textsuperscript{71}

The majority judgment is the prevailing and ultimate guide, establishing a resolute standard of review, but in the development deteriorating the strict nature of such review process.

\textbf{3.2. BACKGROUND AND BRIEF OVERVIEW}

The first applicant, Mr Z Sidumo, a long-standing employee and part of the security personnel of Rustenburg Platinum Mines Ltd, was stationed at the Rustenburg facility on 20 January 2000. This high-security facility near Rustenburg, where Mr Sidumo was responsible for access control, provided benefaction services, separating high-grade precious metals such as platinum, rhodium and gold from lower-grade concentrate.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{70} \textit{Rustenburg Platinum Mines Ltd v CCMA} par 31.
\item \textsuperscript{71} \textit{Sidumo v Rustenburg Platinum Mines Ltd} [2007] 12 BLLR 1097 (CC) par 242.
\end{itemize}
\end{footnotesize}
Owing to the extremely valuable nature of these metals and increasing losses due to theft, rigorous and meticulous search procedures formed part of the overall effort to protect these metals.

Subsequently, Mr Sidumo failed to apply these established and detailed individual search procedures and was subjected to an internal disciplinary hearing, where he was found guilty and after an internal appeal, was dismissed for negligently failing to apply these search procedures. Mr Sidumo contested this dismissal, as he had a clean disciplinary record leading up to the dismissal and consequently referred an unfair-dismissal dispute to the CCMA in terms of section 191(1)(a) of the LRA.\footnote{66 of 1995.}

At the CCMA, the conciliation failed and Mr Sidumo, in terms of section 191(5)(a) of the LRA, successfully challenged his dismissal under the compulsory arbitration provisions of the LRA. The Commissioner found that there was enough basis to establish misconduct, but held that a dismissal was not an appropriate or fair sanction in the circumstances, as Sidumo had 14 years’ service and a clean disciplinary record. Mr Sidumo was therefore reinstated, with three months’ compensation, subject to a final written warning.

The mine, in terms of section 145 of the LRA, applied to the Labour Court to review and set aside the Commissioner’s award. The subsequent interpretation and application of section 145 of the LRA formed part of highly contested arguments by both counsels concerned, and formulated one of the key eventual findings of this case. The Labour Court held that the award did not contain any reviewable irregularity and dismissed the application with costs.

This decision by the Labour Court prompted Rustenburg Platinum Mine to lodge an review application to the Labour Appeal Court. The Appeal Court confirmed that the sanction of dismissal was too harsh and the decision of the commissioner was thus held to be justified. The Labour Appeal Court dismissed the Mine’s appeal with costs.
Rustenburg Platinum Mine, undeterred, did not accept the outcome and appealed to the Supreme Court of Appeal. The Supreme Court of Appeal found that the dismissal of Mr Sidumo was fair and overturned both the decisions of the Labour Court and the Labour Appeal Court.

After the successful appeal, Mr Sidumo, under the auspices of COSATU\textsuperscript{73} and after a successful application for condonation, applied to the Constitutional Court for leave to appeal the judgment of the Supreme Court of Appeal.

### 3.3. SUPREME COURT OF APPEAL

The SCA in \textit{Rustenburg Platinum Mines Ltd v CCMA},\textsuperscript{74} in exercising its new proclaimed status, followed a different approach to that of the LAC. In considering the proper test to be applied when reviewing CCMA awards, the court revisited a lengthy debate generated by the abolition of the right to appeal against arbitration awards, permitted by the 1956 LRA and then subsequently substituted by a review process, set out in section 145 of the LRA on specific grounds.\textsuperscript{75} This process furthermore, in terms of section 158(1)(g), empowers our labour courts to review the performance of any function provided for in the act on specific grounds.\textsuperscript{76} This debate was deemed to be settled in the judgment of \textit{Carephone}, where the court held that section 145 of the LRA was suffused to the interim constitutional standard, providing that there must be a rational objective basis, justifying the connection made in the outcome of administrative decisions in relation to the reasons given for it by the commissioners.\textsuperscript{77} However, in considering the proper test for review proceedings, the SCA had an opportunity to assert its own view on the jurisprudence.\textsuperscript{78} In this undisputed judgment of Cameron JA, held:

> "In my view, PAJA by necessary implication extended the grounds of review available to parties to CCMA arbitrations. In interpreting the LRA, and the impact...

\textsuperscript{73} Congress of South African Trade Unions as second applicant.
\textsuperscript{74} (2006) 27 ILJ 2076 (SCA).
\textsuperscript{75} Grogan and Gauntlett “Back to the basics The SCA revisits review” 2006 Vol 28 Pt 3 Employment Law Journal par 16.
\textsuperscript{76} \textit{Ibid}.
\textsuperscript{77} Grogan 2007 Employment Law Journal par 19.
\textsuperscript{78} \textit{Ibid}.
on it of the later enactment of PAJA, the Constitution obliges us to promote the
spirit, purport and objects of the Bill of Rights. This means that, without losing sight
of the specific constitutional objectives of the LRA, and the constitutional values it
embodies, we must in interpreting it give appropriate recognition to the right to
administrative justice under the final Constitution and the legislation that gives
effect to it.⁷⁷⁹

Consequently, the SCA formulated its conclusion on the basis of the Constitution⁸⁰
itself and subsequent legislation that gives effect to it. Pertaining to the Constitution,
one must first consider the interim-Constitution⁸¹ requirement that administrative action
must be “justifiable in relation to the reason given for it”. This requirement was taken
further in Carephone, which held that this requirement ought to be encapsulated into
section 145(2) of the LRA.⁸² However, the above mentioned administrative action was
superseded upon the enactment of the PAJA, which gave effect to the constitutional
right to lawful, reasonable and procedurally fair administrative action. This
constitutional setting in which the PAJA was enacted, giving effect to broad
administrative justice, in particular with regards to the review process, supersedes the
restricted provisions of section 145 of the LRA, even though the latter being a
“specialised statute”.⁸³

Thus, the SCA concluded firstly, that section 6(2) of the PAJA and the subsequent
requirement that administrative action must be justifiably connected to the reason
given for it, is the legislative embodiment of the grounds of review to which arbitration
parties become entitled to under the Constitution; and secondly, that awards made by
CCMA commissioners are subject to the PAJA, in that it falls within the legislative
framework of administrative action.⁸⁴

The SCA now subsequently shifted its attention to the application of the review test by
the court a quo and ascertained whether the LAC applied these required grounds
correctly. Even though the LAC in Carephone was not prepared to entertain the
broader application of a review reflected in section 158(1)(g), the SCA in Sidumo

⁷⁷⁹ Rustenburg Platinum Mines Ltd v CCMA par 23.
⁸⁰ The Constitution.
⁸¹ 200 of 1993.
nevertheless relied to a great extent on Carephone with regards to the rational objective test set out by the LAC.

Cameron AJ, thus referred to the test formulated in Carephone and concluded, based on the fundamental values, that such test:

“was directly based on the wording contained in the very last part of item 23(2) of Schedule 6 to the Constitution which was part of the wording of sections 33(1) and (2) of the Constitution pending the promulgation of the national legislation which, as it turned out, was PAJA”

The SCA held that such approach taken by Carephone, compared it to administrative concepts such as reasonableness, rationality and proportionality, and confirmed Carephone’s conscientious advance, that the abovementioned approach could distort the clear distinction between appeal and review. It is for that reason that the SCA based its judgment and subsequent conclusion on the fact that both Carephone and PAJA required the court a quo to consider whether the commissioner’s decision to reinstate Mr Sidumo was:

“rationally connected to the information before him and to the reasons he gave for it”

The SCA therefore concluded that the court a quo incorrectly enquired whether there were factors sustaining the Commissioner’s findings, thus considering the merits and thereby treating the matter as an appeal, rather than a review. The SCA concluded:

“Nor does PAJA oblige us to pick and choose between the commissioner’s reasons to try to find sustenance for the decision despite the bad reasons. Once the bad

85 Froneman DJP, in Carephone thus set the test: is there a rationally objective basis justifying the connection made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at?
86 Values of accountability, responsiveness and openness.
87 Sidumo v Rustenburg Platinum Mines Ltd par 38.
88 Substantive rationality.
89 Sidumo v Rustenburg Platinum Mines Ltd par 39.
90 Rustenburg Platinum Mines Ltd v CCMA.
91 Sidumo v Rustenburg Platinum Mines Ltd par 45.
92 Ibid.
93 Sidumo v Rustenburg Platinum Mines Ltd par 46.
reasons played an appreciable or significant role in the outcome, it is, in my view, impossible to say that the reasons given provide a rational connection to it.”

3.4. CONSTITUTIONAL COURT

3.4.1 MAJORITY JUDGMENT

Navsa AJ, initially proceeded with a lengthy assessment of the SCA judgment and concurred with the court a quo that the CCMA commissioner’s exercise was administrative action in conducting arbitration proceedings within the ambit of the LRA. However, the Constitutional Court questioned whether the review provisions of PAJA are automatically applicable in the present context. In order to establish whether PAJA applied, the honourable judge considered both the LRA and PAJA, in particular the legislature’s intention and consequently found that the LRA was purposefully enacted to provide an exclusive dispute-resolution basis for labour matters, otherwise known as the Labour Court. It was thus concluded by Navsa AJ, that the SCA had erred in finding that PAJA applied arbitration awards in terms of the LRA.

The Constitutional Court subsequently proceeded and addressed the essential issue of the standard of review.

*The standard of review*

The Constitutional Court in essence formulated the standard of review, by amalgamating previous standards set by the courts, with the fundamental notion of *reasonableness* extracted from legislation regulating administrative action.

Navsa AJ, contended firstly that, because the provisions of the LRA must be interpreted in compliance with the Constitution, the court is thus obliged to interpret

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94 *Sidumo v Rustenburg Platinum Mines Ltd* par 48.
95 *Sidumo v Rustenburg Platinum Mines Ltd* par 94.
96 Ibid.
97 *Sidumo v Rustenburg Platinum Mines Ltd* par 80.
98 *Sidumo v Rustenburg Platinum Mines Ltd* par 104.
99 The Constitutional Court found that review constituted administrative action.
100 S 3 of the LRA provides that any person applying this Act must interpret its provisions-
(a) to give effect to its primary objects;
(b) in compliance with the Constitution; and
section 145 of the LRA in a manner that confirms that administrative action by the CCMA is lawful, reasonable and procedurally fair. The court secondly, reverted to the Carephone judgment, where the LAC held that section 145 of the LRA was suffused to the interim constitutional standard, providing that there must be a rational objective basis, justifying the connection made in the outcome of administrative decisions in relation to the reasons given for it by the commissioners. Navsa AJ, thus relied on the equivalent constitutional standard in the final Constitution and concluded that such reasonableness standard, dealt with in Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs, should now suffuse section 145 of the LRA. The learned Judge in Bato Star acknowledged the fact that reasonableness brings about a substantive component, resulting in the consideration of the merits, in a vast number of such review proceedings. Yet it was emphasised that the distinction between appeals and reviews remains significant.

Navsa AJ, consequently referred to Professor Hoexter’s explanation on review for reasonableness, where it is argued that such review does threaten the distinction between appeal and review:

“The Labour Court in reviewing the awards of commissioners inevitably deals with the merits of the matter. This does tend to blur the distinction between appeal and review. She points out that it does so in the limited sense that it necessarily entails scrutiny of the merits of administrative decisions. She states that the danger lies, not in careful scrutiny, but in ‘judicial overzealousness in setting aside administrative decisions that do not coincide with the judge’s own opinions’. This Court in Bato Star recognised that danger. A judge’s task is to ensure that the

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101 Sidumo v Rustenburg Platinum Mines Ltd par 105.
102 S 33 of the Constitution provides that “everyone has the right to administrative action that is lawful, reasonable and procedurally fair”.
103 In determining the proper meaning of s 6(2)(h) of PAJA in the light of the overall constitutional obligation upon administrative decision-makers to act “reasonably”, the approach of Lord Cooke provides sound guidance. Even if it may be thought that the language of s 6(2)(h), if taken literally, might set a standard such that a decision would rarely if ever be found unreasonable, that is not the proper constitutional meaning which should be attached to the subsection. The subsection must be construed consistently with the Constitution and in particular s 33 which requires administrative action to be “reasonable”. Section 6(2)(h) should then be understood to require a simple test, namely that an administrative decision will be reviewable if, in Lord Cooke’s words, it is one that a reasonable decision-maker could not reach. par 44.
104 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC).
105 Sidumo v Rustenburg Platinum Mines Ltd par 106.
106 Sidumo v Rustenburg Platinum Mines Ltd par 108.
decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.\(^{108}\)

Professor *Hoexter* formulated and based such assertion on the *Bato Star* judgment, where O’Regan J, referred to the test set out by Lord Cooke in *R v Chief Constable of Sussex*,\(^{109}\) where Lord Cooke regretted the fact that the *Wednesbury* formula\(^{110}\) had been established in the UK courts and relied upon a more simple test of:

> “whether the decision in question was one which a reasonable authority could reach”.\(^{111}\)

It is thus the abovementioned view and dictum that was cited in *Bato Star Fishing*, confirming the confusing nature of the *Wednesbury* test and that the approach of Lord Cooke provides proper sound guidance:

> “In determining the proper meaning of section 6(2)(h) of PAJA in the light of the overall constitutional obligation upon administrative decision-makers to act reasonably.”\(^{112}\)

> “Section 6(2)(h) should then be understood to require a simple test, namely, that an administrative decision will be reviewable if, in Lord Cooke’s words, it is one that a reasonable decision-maker could not reach.”\(^{113}\)

*Sidumo* thus encapsulated this approach and in summation held that the preferred approach\(^{114}\) is that section 145 is now suffused by the constitutional standard of

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\(^{108}\) Ibid.

\(^{109}\) *Regina v Chief Constable of Sussex; ex parte international trader’s ferry limited House of Lords [1998] All ER (D) 568.*

\(^{110}\) See Donnelly, Hare, Jowell and Woolf *De Smith`s Judicial Review* 7\(^{th}\) ed (2013) 551: the so-called “*Wednesbury* reasonableness test” is where Lord Greene, M.R. stated that the courts can only interfere if a decision “is so unreasonable that no reasonable authority could ever come to it”. Although vague and confusing, this formulation endeavoured to point out that judges should not lightly interfere with the decisions of officials. In exercising their powers of review, the judges ought not place themselves in the position of the competent authority and test such decision in accordance with their own sense of reasonableness. In doing this, the court will engage in considering the merits of the decision. Thus, according to Lord Greene in *Wednesbury*, unreasonableness under his definition would require something overwhelming. There has subsequently been various attempts to reformulate the *Wednesbury* test, however, such reformulation amounts to no more than a helpful guide to the parameters.

\(^{111}\) Donnelly *et al De Smith’s Judicial Review* 551.

\(^{112}\) *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* par 44.

\(^{113}\) Ibid.

\(^{114}\) Froneman DJP in *Carephone* held that s 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it *Sidumo* par 110.
reasonableness, as explained in *Bato Star*.\(^{115}\) Navsa AJ, consequently confirmed such standard:

“Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?”\(^{116}\)

Navsa AJ, in addition held that the application of the standard will not only give effect to the constitutional right to fair practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair.\(^{117}\)

### 3.4.2. MINORITY JUDGMENT

In his minority judgment, Ngcobo J discarded the view endorsed by the majority that CCMA awards constitute administrative action and held that CCMA awards are subject only to review on the grounds set out in section 145. The learned judge expressed his aversion in respect of the above in that it “bedevilled the proper approach to the determination of the ambit of review under section 145”.\(^{118}\)

Ngcobo J, argued that such approach construed by the majority, introduced:

“a requirement of rationality in the merit or outcome of the administrative decision [which] goes beyond mere procedural impropriety as a ground for review, or irrationality only as evidence of procedural impropriety”.\(^{119}\)

Subsequently, the minority emphasised that this approach tends to blur the line between an appeal and a review.\(^{120}\) The reviewing court does not determine whether the result is correct, but whether a gross irregularity\(^{121}\) occurred in the proceedings.

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\(^{115}\) *Sidumo v Rustenburg Platinum Mines Ltd* par 110.

\(^{116}\) Ibid.

\(^{117}\) Ibid.

\(^{118}\) *Sidumo v Rustenburg Platinum Mines Ltd* par 242.

\(^{119}\) Ibid.

\(^{120}\) Relying on *Carephone*, the Labour Appeal Court was mindful of the fact that the standard of review would “almost inevitably, involve the consideration of the ‘merits’”. It cautioned that when determining justifiability, a court should bear in mind that it is considering the merits, “not in order to substitute [its] own opinion on the correctness [of the merits], but to determine whether the outcome is rationally justifiable”. The Labour Appeal Court was indeed at pains to emphasise that “it would be wrong to read into [section 33 of the Constitution] an attempt to abolish the distinction between review and appeal”.

\(^{121}\) Infra ft 71.
The minority recognised that it may be difficult to draw the line, but held that there exists a clear line and such line must be maintained. Consequently, Ngcobo J, articulated that the proper approach in determining whether to interfere with a commissioners award, is whether:

“the conduct of the commissioner falls into any of the grounds of review set forth in section 145(2) of the LRA, namely, misconduct in relation to his or her duties, gross irregularity in the conduct of the arbitration proceedings, or acting in excess of his or her powers. These grounds of review must be interpreted in the light of the constitutional constraints referred to above and the primary objective of the LRA. This is the interpretive injunction contained both in section 39(2) of the Constitution and in the LRA”.

The learned judge therefore emphasized that the commissioner is required to act fairly in the determination of unfair dismissal disputes. The parties must be afforded a fair trial and have the right to have their cases fully and fairly determined. The minority explicated that fairness in the determination of an unfair dismissal disputes, requires the commissioner to apply his/her mind to the issues that are material to the determination of the dispute. Ngcobo J, continued and held that one of the duties of a commissioner in the determination of an unfair dismissal dispute is to determine such material facts and consequently apply the provisions of the LRA to those facts in establishing whether or not the dismissal was fair. Thus, if a commissioner fails to apply his/her mind to a matter which is material to the determination of such fairness,

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122 Sidumo v Rustenburg Platinum Mines Ltd par 244.
123 Sidumo v Rustenburg Platinum Mines Ltd par 164.
124 Sidumo v Rustenburg Platinum Mines Ltd par 165.
125 Sidumo v Rustenburg Platinum Mines Ltd par 266: The requirement of fairness in the conduct of arbitration proceedings is consistent with the LRA and the Constitution. First, a CCMA commissioner is required by s 138(1) of the LRA “to determine the dispute fairly and quickly”. Second, in terms of s 34 of the Constitution, everyone has the right to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court of law or an independent and impartial tribunal. The CCMA and Labour Courts were established to resolve labour disputes. CCMA arbitrations provide independent and impartial tribunals contemplated in s 34 of the Constitution. The right to a fair hearing before a tribunal lies at the heart of the rule of law. And a fair hearing before a tribunal is a prerequisite for an order against an individual, and this is fundamental to a just and credible legal order. A tribunal like the CCMA is obliged to ensure that the proceedings before it are always fair. And finally, s 23 of the Constitution guarantees to everyone the right to fair labour practices.
126 Sidumo v Rustenburg Platinum Mines Ltd par 267.
127 Ibid.
128 Supra – ft 65.
129 Sidumo v Rustenburg Platinum Mines Ltd par 267.
it will be a deficient trial, based on the lack of fairness\textsuperscript{130} and subsequently commits a gross irregularity\textsuperscript{131} in the conducting of the arbitration proceedings, resulting in the ensuing arbitral award to be reviewed and set aside.\textsuperscript{132}

**Ngcobo’s “gross-irregularity” dictum**

The minority judgment in exploring the meaning\textsuperscript{133} of “gross irregularity” considered the correct interpretation, based on constitutional provisions. Ngcobo J, inferred that because the commissioner performs a public function and exercises public power, such commissioner is thus subject to constitutional provisions in the exercise of such public power.\textsuperscript{134} Therefore, the learned judge interpreted “gross irregularity” in the context of the right to fair labour practices set out in section 23 of the Constitution as well as the objectives and obligations under the LRA.\textsuperscript{135} Ngcobo J, in considering the meaning of “gross irregularity”, referred to *Goldfields* and observed the distinction made by Schreiner J, relating to the two potential types of gross irregularity in arbitration proceedings.\textsuperscript{136} The learned judge in *Goldfields*, firstly distinguished between *patent irregularities*, which concerns procedural irregularities that take place overtly in the conducting of arbitration proceedings and secondly, *latent irregularities*, which relates to errors committed in the manner the decision-maker applied his/her mind.\textsuperscript{137} According to Grogan\textsuperscript{138} “the rationale for incorporating *latent irregularities* in the review grounds is that both forms of irregularity undermine the very objective of arbitration – to afford both parties ‘a fair trial’ on the issues”.

Therefore, through the consideration of the correct interpretation and subsequent meaning of the review grounds in section145(2)(a),\textsuperscript{139} the minority, in referring to constitutional and statutory provisions held that arbitration proceedings should be

\begin{itemize}
\item \textsuperscript{130} *Ibid.*
\item \textsuperscript{131} *Infra – ft 77*
\item \textsuperscript{132} *Sidumo v Rustenburg Platinum Mines Ltd* par 165.
\item \textsuperscript{133} Based on s 33 of the Arbitration Act.
\item \textsuperscript{134} *Sidumo v Rustenburg Platinum Mines Ltd* par 260.
\item \textsuperscript{135} *Ibid.*
\item \textsuperscript{136} *Sidumo v Rustenburg Platinum Mines Ltd* par 264.
\item \textsuperscript{137} See Grogan’s comments in *Labour Litigation and Dispute Resolution* (2013) 290 – 294.
\item \textsuperscript{138} Grogan *Labour Litigation and Dispute Resolution*.
\item \textsuperscript{139} A defect referred to in ss (1), means- (a) that the commissioner - (ii) committed a gross irregularity in the conduct of the arbitration proceedings.
\end{itemize}
conducted in a fair manner and parties afforded a fair trial. Ngcobo J, therefore concluded and found that:

“Fairness in the conduct of the proceedings requires a commissioner to apply his or her mind to the issues that are material to the determination of the dispute. One of the duties of a commissioner in conducting an arbitration is to determine the material facts and then to apply the provisions of the LRA to those facts in answering the question whether the dismissal was for a fair reason. In my judgment where a commissioner fails to apply his or her mind to a matter which is material to the determination of the fairness of the sanction, it can hardly be said that there was a fair trial of issues.”140

... 

“It follows therefore that where a commissioner fails to have regard to material facts, the arbitration proceedings cannot in principle be said to be fair because the commissioner fails to perform his or her mandate. In so doing, in the words of Ellis, the commissioner’s action prevents the aggrieved party from having its case fully and fairly determined. This constitutes a gross irregularity in the conduct of the arbitration proceedings as contemplated in section 145(2)(a)(ii) of the LRA. And the ensuing award falls to be set aside not because the result is wrong but because the commissioner has committed a gross irregularity in the conduct of the arbitration proceedings.”141

Ngcobo’s gross-irregularity dictum, in essence, relates to whether the commissioner failed to have regard to material facts, resulting in the arbitration proceedings not being fair, because the commissioner failed to have regard to material facts.

3.5. CONCLUSION

The standard of review set out by the majority in Sidumo is based on the notion of reasonableness. Accordingly, a court determining such reasonableness of a decision, must ensure that the decision falls within the bounds of reasonableness as required by the Constitution. In doing so, the court delegated to determine such matter, should enquire whether the decision is one that a reasonable decision-maker could not have reached. In exercising the above mentioned and consequently assessing the reasonableness of the award or decision, the court may well find that it would have arrived at a different decision to that reached by the commissioner.142 Consequently, this creates a difficulty and the courts should thus constantly remind themselves that

140 Sidumo v Rustenburg Platinum Mines Ltd par 267.
141 Sidumo v Rustenburg Platinum Mines Ltd par 268.
142 Fidelity Cash Management Service v CCMA [2008] 3 BLLR 197 (LAC) par 98.
the task in determining the fairness of the decision does not rest with the court, but with the commissioner. Save for legitimate scrutiny, such interference will undermine the review process.  

According to Zondo JP, in *Fidelity Cash Management Service v CCMA*, *Sidumo* attempts to attain an uneasy balance between two extremes, interfering too easily on the one hand, and refraining from interfering on the other. In essence *Sidumo* adopted a balanced approach, indicative of the fact that the core of such approach is the notion of reasonableness, which is construed on the constitutional requirement that administrative action must be lawful, reasonable and procedurally fair. Even though the test set out by *Sidumo* is a stringent one, that will ensure that awards are not lightly interfered with, the concern remains that awards may still be easily interfered with, breaching the proverbial line between appeal and reviews. The *Sidumo* judgment as a whole might have entrenched qualified jurisprudential principles. However, this balanced approach adopted by *Sidumo* in the determination of the standard of review, is open-ended and in the author’s opinion, failed to protect the strict nature of the review grounds, as intended by legislature.

Consequently, this created a flurry of judgments in the aftermath of *Sidumo*, resulting in dissimilar views and the further pursuit to develop the standard of review. The uncertain period in the contour of the *Sidumo* saga was initially based on the three judgments of *Gaga*, *Afrox Healthcare* and *Herholdt*, where the Labour Appeal Court sought to clarify the approach adopted by *Sidumo* and to develop the review test further. The foundation of such development is the view that awards can be reviewed both on the grounds listed in section 145 of the LRA and the ground of unreasonableness, and furthermore, that there are two broad types of reviews: result-based reviews and process-related reviews. Such development is thus limited to reviews based on a latent gross irregularity and unreasonableness. However, there

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144 *Fidelity Cash Management Service v CCMA* par 99.
145 *Fidelity Cash Management Service v CCMA* par 100.
149 Myburgh “The LAC’s latest trilogy of review judgments: Is the Sidumo test in Decline?” 2013 34 *ILJ* 19 19.
150 Myburgh 2013 *ILJ* 27.
would be a final pronouncement in the shadow of the three LAC judgments, and in order to analyse the most recent assertion, it is thus imperative to consider such trilogy.\textsuperscript{151}

\textsuperscript{151} Myburgh 2013 \textit{ILJ} 1.
4.1. **INTRODUCTION**

The majority in the Constitutional Court judgments of *Sidumo* established a stringent test for review, curtailing to a certain extent the interference by Labour Court judges in the awards of commissioners. It would be expected that subsequent judgments would continue in the pursuit of the further development of the so-called *Sidumo* test. However, the jurisprudence that followed the *Sidumo* judgment was by all means contentious, since the fundamental starting point of each of the Labour Appeal Court judgments, was the minority judgment in *Sidumo*, Ngcobo’s gross-irregularity dictum. Besides the endorsement of such minority view, one judgment in particular, went as far as to conclude that an award can be set aside, without establishing the *Sidumo* test. Consequently, this departure from the *Sidumo* contour and broader view, resulted in the further relaxation of the distinction between appeals and reviews.

In considering the above mentioned litigious judgments, I shall set out the focal dictum of each and subsequently analyse such pronouncement in relation to the development of the *Sidumo* test. In order to appreciate the nature of the terms referred to by the various judgments and to avoid unnecessary reiteration, a summation by Myburgh,\(^{152}\) setting out a range of meanings and descriptions are relied upon.\(^{153}\)

4.2. **GAGA v ANGLO PLATINUM LTD**\(^{154}\)

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\(^{153}\) Myburgh 2013 *Contemporary Labour Law* 31-32: “‘Section 145’ or ‘the grounds listed in s 145’: the reviewable defects of misconduct, gross irregularity and excess of powers listed in s 145(2) of the LRA, ‘Latent irregularity’: an irregularity which occurs in the mind of a commissioner at the time of writing his or her award and appears from it – for example, that material facts were ignored. It equates to an act of dialectical unreasonableness. ‘Patent irregularity’: an irregularity which occurs during the course of the arbitration proceedings and which constitutes a breach of the rules of procedural fairness. ‘Substantive unreasonableness’: an unreasonable result. ‘Dialectical unreasonableness’: an unreasonable process failure (in the cognitive sense) involving, for example, the failure by a commissioner to consider material facts. ‘Process-related review’: a review application based on an attack on a commissioner’s reasoning and findings of fact, which typically highlights the failure to consider material facts and errors of fact.”

\(^{154}\) (2012) 33 *ILJ* 329 (LAC).
The LAC was tasked to establish whether there was a rational basis justifying the commissioner’s conclusion that there was no sexual harassment committed by the group human-resources manager with his personal assistant. The said employee appealed to the LAC, after the employer successfully reviewed the commissioner’s award. The LAC thus had to ascertain whether the commissioner ignored the material facts and considerations and subsequently failed to apply his mind accurately to such material evidence. Murphy AJA held as follows:

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

The said dictum in Gaga, is based on the pronouncement of Ngcobo J, in Sidumo. It emphasises the principle that the failure by the commissioner to apply her mind to the material facts, prevents the party from having their matter determined on a fair basis and thus constitutes a latent irregularity, justifying the setting-aside of an award. Such approach in Gaga is thus confirmed by the citation of Ngcobo`s gross-irregularity dictum, in support of the LAC’s finding. Murphy AJA, however, continued and

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155 The CCMA award was set aside on review by the Labour Court.
156 Gaga v Anglo Platinum Ltd par 43.
157 Gaga v Anglo Platinum Ltd par 44.
158 Myburgh 2013 ILJ 21.
159 Murphy AJA in Gaga v Anglo Platinum Ltd par 44; set out that, in the minority judgment in Sidumo Ngcobo J, (as he then was) in effect distinguished review on grounds of dialectical unreasonableness from substantive unreasonableness, when he observed: “It follows therefore that where a commissioner fails to have regard to material facts, the arbitration proceedings cannot in principle be said to be fair because the commissioner fails to perform his or her mandate. In so doing the commissioner’s action prevents the aggrieved party from having its case fully and fairly determined. This constitutes a gross irregularity in the conduct of the arbitration, as contemplated in section 145(2)(a)(ii) of the LRA. And the ensuing award falls to be set aside not because the result is wrong but because the commissioner has committed a gross irregularity in the conduct of the arbitration proceedings.”
expounded the two forms of unreasonableness,\textsuperscript{160} by referring to \textit{dialectical unreasonableness}, which constitutes an unreasonable process failure, occurring in the mind of the commissioner and \textit{substantive unreasonableness} comprising of an unreasonable result.\textsuperscript{161} The learned judge contended that an unreasonable-process failure, for example, the failure by a commissioner to consider the material facts, will recurrently amount in an unreasonable result. Thus concluding that \textit{dialectical unreasonableness} and \textit{substantive unreasonableness} will often overlap, however, the unreasonable-process failure itself will be sufficient to sustain a review.\textsuperscript{162}

As a result, the LAC concluded that the commissioner’s irregularity in excluding similar-fact evidence is sufficient to uphold the review,\textsuperscript{163} in that such absence of similar-fact evidence has a bearing on the determination of a appropriate sanction in this case\textsuperscript{164} and a failure to have regard to same, hamper a full and fair determination of the issues.\textsuperscript{165}

\textbf{4.3. \textit{AFROX HEALTHCARE LTD} v \textit{COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION}\textsuperscript{166}}

The issue to be determined by the LAC, was whether the reasonableness of the commissioner’s award, in which it was found that the appellant had led no evidence to substantiate the charges tendered against the employee, based on alleged negligence, in that the employee failed to supervise untrained nursing staff, resulting in the death of a patient. This failure to present such evidence consequently resulted in the conclusion by the commissioner that there was no negligence on the part of the employee.\textsuperscript{167} Mlambo JP, held as follows:

“The fact of the matter is that the reasonable decision maker yardstick crafted in \textit{Sidumo}, viewed in proper context, is none other than that in the absence of a “rational objective basis” between the decision arrived at and the material placed

\begin{footnotes}
\item[\textsuperscript{160}] \textit{Southern Sun Hotel Interests (Pty) Ltd} v \textit{CCMA} [2009] 11 BLLR 1129 (LC) par 14-17.
\item[\textsuperscript{161}] Myburgh 2013 \textit{Contemporary Labour Law} 32.
\item[\textsuperscript{162}] Myburgh 2013 \textit{ILJ} 20.
\item[\textsuperscript{163}] \textit{Gaga} v \textit{Anglo Platinum Ltd} par 46.
\item[\textsuperscript{164}] \textit{Gaga} v \textit{Anglo Platinum Ltd} par 47.
\item[\textsuperscript{165}] Myburgh 2013 \textit{ILJ} 21.
\item[\textsuperscript{166}] (2012) 33 \textit{ILJ} 1381 (LAC).
\item[\textsuperscript{167}] \textit{Afrox Healthcare Ltd} v \textit{Commission for Conciliation, Mediation & Arbitration} par 5.
\end{footnotes}
before the decision maker, the relevant decision is clearly not one which a reasonable decision maker would have arrived at.\textsuperscript{168}

The LAC in \textit{Afrox Healthcare} thus found that the above mentioned reasonable decision-maker yardstick as per \textit{Sidumo} is equivalent to the absence of a “rational objective basis” between the decision arrived at and the material facts before such decision-maker; thus in essence relying on Ngcobo J’s gross-irregularity \textit{dictum}.\textsuperscript{169}

In drawing the above dictum, the LAC assessed the commissioner’s reasoning in relation to the material placed before him and subsequently established such failure, where there is an absence of a rational objective basis between them.\textsuperscript{170} In considering the consequences of such failure, the LAC in \textit{Afrox Healthcare} accordingly centred its finding firstly, on the distinction between two types of reviews, the first of which where the commissioner failed to consider all the material evidence and secondly, how the commissioner treated such evidence in determining the award.\textsuperscript{171} The former is the challenge entertained in \textit{Afrox Healthcare, inter alia}, a process-related review.\textsuperscript{172} On the pronouncement of the issues in dispute, Mlambo JP, clarified his view in relation to that of the commissioner, in respect of having a different analysis. Mlambo JP, confirmed that the LAC is not responsible for determining the fairness of the dismissal.\textsuperscript{173} Thus, respecting the proverbial line between appeal and review. The LAC proceeded and thus argued that such view entertained by the said court, is based on the holistic analysis of the evidence, which the commissioner in arriving at his decision, did not take into consideration.\textsuperscript{174} Thus, failing to consider the material placed

\textsuperscript{168} \textit{Afrox Healthcare v CCMA} par 21.
\textsuperscript{169} \textit{Ibid}.
\textsuperscript{170} Myburgh 2013 \textit{ILJ} 22.
\textsuperscript{171} \textit{Ibid}.
\textsuperscript{172} \textit{Ibid}.
\textsuperscript{173} Mlambo JP, in \textit{Afrox Healthcare v CCMA} par 18; held that “It will often happen that, in assessing the reasonableness or otherwise of an arbitration award or other decision of a CCMA commissioner, the court feels that it would have arrived at a different decision or finding to that reached by the commissioner. When that happens, the court will need to remind itself that the task of determining the fairness or otherwise of such a dismissal is in terms of the Act primarily given to the commissioner and that the system would never work if the court would interfere with every decision or arbitration award of the CCMA simply because it, that is the court, would have dealt with the matter differently. Obviously, this does not, in any way, mean that decisions or arbitration awards of the CCMA are shielded from scrutiny of the Labour Court on review.” \textit{Afrox Healthcare v CCMA} 16.
before him, in particular certain critical considerations, leading him to arrive at an unreasonable result.

Mlambo JP, relied a great deal on Ngcobo and the dictum in Another v New Clicks South Africa (Pty) Ltd and Others, in concluding that the commissioner failed the Sidumo test, in that the said commissioner failed to apply his mind to the material evidence, which had a bearing on the ultimate conclusion, resulting in the award being unreasonable.

4.4. **HERHOLDT v NEDBANK LTD**

The primary judgment of the three and subsequent derivation of the contemporary conclusion by the SCA, concerned a probe into whether the commissioner committed a reviewable defect, by ruling that the employee, a financial planner, did not act with dishonest intent, when he failed to disclose to his employer that he was a beneficiary in a dying client’s will, as per Nedbank’s conflict-of-interest policy. The appeal was set aside by the LAC, upholding the judgment of the Labour Court, that the dismissal was substantially fair. Murphy AJA, pronounced:

> “One of the duties of a commissioner is to determine the material facts and then to apply the provisions of the LRA to those facts in answering the question whether the dismissal was for a fair reason. Commissioners who do not do so do not fairly adjudicate the issues and the resulting decision and award will be unreasonable. Whether or not an arbitration award or decision or finding of a commissioner is

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175 Ibid.
176 Mlambo JP, in Afrox Healthcare v CCMA 19: In considering the abovementioned lapse by the commissioner, Mlambo JP, referred to the judgment of National Union of Mine Workers v Samancor Ltd, where the SCA overturned the judgment of the LAC, holding that the court a quo incorrectly approached the matter as an appeal and not review. The SCA in Samancor thus found that the LAC failed the application of the Sidumo test, in that the material before the commissioner cast no doubt that his decision was not so unreasonable that it could not have been reached by a reasonable decision-maker.
177 Another v New Clicks South Africa (Pty) Ltd par 511: “There is obviously an overlap between the ground of review based on failure to take into consideration a relevant factor and one based on the unreasonableness of the decision. A consideration of the factors that a decision maker is bound to take into account is essential to a reasonable decision. If a decision maker fails to take into account a factor that he or she is bound to take into consideration, the resulting decision can hardly be said to be that of a reasonable decision maker.”
178 2006 (1) BCLR 1 (CC) at par 511.
179 Myburgh 2013 ILJ 23.
181 Myburgh 2013 Contemporary Labour Law 32.
reasonable must be determined objectively with due regard to all the evidence that was before him or her and what the issues were. There is no requirement that the commissioner must have deprived the aggrieved party of a fair trial by misconceiving the whole nature of enquiry. The threshold for interference is lower than that, it being sufficient that the commissioner has failed to apply his mind to certain of the material facts or issues before him, with such having potential for prejudice and the possibility that the result may have been different. This standard recognises that dialectical and substantive reasonableness are intrinsically interlinked and that latent process irregularities carry the inherent risk of causing an unreasonable substantive outcome.\textsuperscript{182}

In the analysis of the abovementioned dictum, several key legal actualities can be drawn in respect of the test for review, the standard of review and impact on \textit{Sidumo}. The dictum is based on the premise that one of the duties of a commissioner is to consider the material facts before him/her and then subsequently applying his/her mind in establishing the fairness of the dismissal.

Thus, at the outset, a failure by a commissioner to consider the material facts, will result in the unfair adjudication of the dispute and the award thus being unreasonable.\textsuperscript{183} Such unreasonableness relates to the failure by the commissioner to determine the material facts, resulting in the unfairness of the award.\textsuperscript{184} Thus, such failure, could either constitute a \textit{gross irregularity} as per Ngcobo J’s gross irregularity dictum or \textit{dialectical unreasonableness}, demonstrating an unreasonable-process failure, as a result of failure by commissioner to consider material facts.\textsuperscript{185} Therefore, such failure to consider the material facts, results in either a \textit{gross irregularity} or an \textit{unreasonable-process failure}, resulting in the award being \textit{unreasonable}.

\textsuperscript{182} \textit{Herholdt v Nedbank Ltd} par 39 – emphasised by Myburgh in Myburgh 2013 \textit{Contemporary Labour Law} 32.
\textsuperscript{183} \textit{Herholdt v Nedbank Ltd} par 39.
\textsuperscript{184} \textit{Herholdt v Nedbank Ltd} par 32.
\textsuperscript{185} Myburgh 2013 \textit{Contemporary Labour Law} 32; Dialectical unreasonableness was a term coined by the LAC based principally on the finding by the Constitutional Court in Minister of Health & Another v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign & Another as \textit{amici curiae}) 2006 (2) SA 311 (CC) at par 511: “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.”
Secondly, Murphy AJA, expounded on such substantive unreasonableness of the award, referred to as “Sidumo test”, and held that the notion of reasonableness is determined objectively, in the consideration of all the evidence that was before the commissioner and does not require that such failure by the commissioner amounts to the misconceiving of the whole nature of the enquiry. It is thus sufficient that the commissioner only had to misconstrue certain of the material evidence before him, which has the potential for prejudice and possibility that the result may be different. Therefore, based on the fact that dialectical unreasonableness bears the potential risk of causing an unreasonable-substantive outcome, the notion of both dialectical and substantive unreasonableness are interlinked.

It is thus evident from such interpretation, that Murphy AJA, endorsed a lighter test for prejudice. In order to comprehend such undemanding test to succeed on review, Myburgh explains that one of three tests for prejudice theoretically stands to be satisfied where a commissioner failed to apply his/her mind to the material facts. Such tests for prejudice are set out on the hypothetical analysis of whether the result of the award:

(1) may have been different;
(2) would have been different; or
(3) is rendered unreasonable,

if the commissioner had considered the facts ignored by him/her.

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186 Myburgh 2013 Contemporary Labour Law 32: Substantive unreasonableness is encompassed in the test set in par 110 of the majority judgment of the Constitutional Court in Sidumo & Another v Rustenburg Platinum Mines Ltd [2007] 12 BLLR 1097 (CC): “Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?”

187 Ibid.

188 Herholdt v Nedbank Ltd par 39.

189 Ibid.

190 Ibid.

191 Myburgh 2013 Contemporary Labour Law 33.

192 A reasonable commissioner could not have reached the decision in question in the light of the facts which were ignored.

193 Myburgh 2013 Contemporary Labour Law 33.
Murphy AJA, accentuates in his dictum that it is sufficient that the failure by the commissioner to apply his/her mind to only some of the material facts before him/her, resulting in the potential for prejudice and the possibility that the result may be different. It is thus the lightest of the abovementioned tests for prejudice, and if such straightforward test is met, the award will be set aside on the grounds of either a gross irregularity or dialectical unreasonableness, without the result of the award being substantively unreasonable. An award can thus be set aside on process-related grounds, without establishing the Sidumo test.

In reaching such conclusion, the Labour Appeal Court subsequently endorsed the view of the court a quo and held that the commissioner committed a gross irregularity by ignoring relevant evidence and failed to apply his/her mind to a number of material issues. The LAC thus dismissed the appeal.

### 4.5. CONCLUSION

In summation, the judgments of Gaga, Afrox Healthcare and Herholdt did not endorse nor develop the Sidumo test in a constructive approach. Instead, these Labour Appeal Court judgments endorsed and widened the approach by the Labour courts in relation to the interference of arbitration awards. The legal position established by the said judgments, confirmed that CCMA awards can be reviewed on section 145 grounds and, in addition on the basis of unreasonableness. Furthermore, concerning the types of reviews, the judgments concluded that there are two different types, that being patent irregularities and latent irregularities. In addition, it was also established that substantive unreasonableness and dialectical unreasonableness equate to two different categories of unreasonableness. The former, concerns the Sidumo test, based on the unreasonableness of the award and the latter, where a commissioner

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195 Ibid.
196 Herholdt v Nedbank Ltd par 57.
197 Herholdt v Nedbank Ltd par 58.
198 Myburgh 2013 ILJ 27.
199 Ibid.
200 Ibid.
fails to apply his mind to the material facts.\textsuperscript{201} Herholdt, in particular, ascertained that \textit{substantive unreasonableness} and \textit{dialectical unreasonableness} are interlinked, in that an unreasonable-process failure will often lead to an unreasonable result. Pertaining to Ngcobo’s gross-irregularity dictum, where a commissioner fails to apply his mind to the material facts, resulting in the unfair adjudication of the dispute and thus constitutes a latent irregularity, which accordingly equates to dialectical unreasonableness.\textsuperscript{202}

The concern is the effortless interference in the review of such gross irregularity or \textit{dialectical unreasonableness}, based on the potential for prejudice-test. This interference by the Labour Courts is even more simplified, as a result of the interlinking of \textit{substantive unreasonableness} and \textit{dialectical unreasonableness}. Thus, based on this light test for review, a mere failure by the commissioner to consider the material facts, that might “potentially” cause an unreasonable substantive outcome, causes the award to be set aside. Therefore, this interference of the proverbial line between appeals and reviews and the ensuing relaxation of such distinction result in there being even no need to show substantial unreasonable, but a mere potential for prejudice as a result of the commissioner’s failure to consider the material facts, or the unfair adjudicating of the hearing itself, which is sufficient to set aside the award. The direction followed by the Labour Appeal Court judgments and in particular Herholdt, makes it therefore easier to succeed on review than on appeal.\textsuperscript{203} which contradicts the objectives of the legislature, in that disputes under the LRA must be resolved expeditiously.\textsuperscript{204}

This misapplication of the \textit{Sidumo} test encouraged applicants on review to rather base their application on a gross irregularity or \textit{dialectical unreasonableness}.\textsuperscript{205} This created a deviation from the \textit{Sidumo} contour, resulting in the unjustifiable relaxation of the grounds of review, in divergence of the intention of the Legislature. Where \textit{Sidumo} attempted to correct such unjustifiable inclination with a more stringent test, Gaga,

\textsuperscript{201} Ibid.
\textsuperscript{202} Ibid.
\textsuperscript{203} Myburgh 2013 \textit{Contemporary Labour Law} 33.
\textsuperscript{204} Myburgh 2013 \textit{Contemporary Labour Law} 34.
\textsuperscript{205} Myburgh 2013 \textit{ILJ} 29.
Afrox Healthcare and Herholdt slacken such view endorsed by the Constitutional Court. It was thus up to the Supreme Court of Appeal\textsuperscript{206} and a subsequent Labour Appeal Court judgment to set the matter straight and recoup the more inflexible approach to be followed by Labour Court judges, and thus maintain the strict distinction between appeal and review.

\textsuperscript{206} COSATU intervened as \textit{amicus curiae} and proceeded with the appeal.
CHAPTER 5
THE CONTEMPORARY JUDGMENTS OF SCA AND LAC –
THE RESPONSE

5.1 INTRODUCTION

The SCA judgment in *Herholdt v Nedbank Ltd*[^207^] and subsequent LAC judgment in *Gold Fields Mining SA (Pty) Ltd v CCMA*[^208^] sought to correct the broad approach established by the trilogy[^209^] in endorsing a more restricted approach, based on the true intention of the legislature. In essence, the judgments emphasised the true meaning[^210^] set out in section 145 of the LRA concerning the review ground of gross irregularity, as well as the stringent nature of the *Sidumo* test, ensuring that awards are not lightly interfered with, and preserving the distinction between appeal and review[^211^].

The divergence from *Sidumo* purged the notion of *reasonableness*, resulting in the distortion of the proverbial fine line between appeals and reviews. It is thus evident that the notion of *reasonableness* holds the key in process-related reviews. Without the reliance thus on the sound conception of the *Sidumo* test, it is merely required that the arbitrator applied his mind to the material facts in establishing whether the dismissal was for a fair reason. Such simple application formed the basis for the LAC judgment in *Herholdt*. This misapplication of the *Sidumo* test encouraged applicants on review to rather base their application on a gross irregularity or *dialectical unreasonableness*.[^212^]

Hence, the SCA in *Herholdt* and LAC in *Gold Fields* endorsed the *suffusion* of the constitutional standard of *reasonableness*, albeit it based on different approaches. *Herholdt* (SCA) established that awards can be reviewed both on the listed ground in section 145 and on the ground of unreasonableness. *Gold Fields* to the contrary, held

[^209^]: See Chap 4.
[^210^]: S 33 of the Arbitration Act.
[^211^]: Myburgh 2013 Contemporary Labour Law 34.
that awards are only reviewable on the section 145 listed grounds, if the additional requirement of unreasonableness are met.213

The chapter will commence with an analysis of the SCA judgment of Herholdt, in considering the historical view of the meaning of a gross irregularity and in addition, the operation of the Sidumo test. The significant aspect of the analyses, concerns the rejection by the SCA of the inaccurate development of the review test by the court a quo. The analysis culminates in the consideration that the SCA narrowed the scope for interference by Labour Court judges and in the process preserved the distinction between appeal and review.

Gold Fields was the first judgment dealing with the review test that followed the SCA judgment. Even though Gold Fields endorsed the Sidumo test and was in line with the development established by the SCA in Herholdt, the judgment recognised an excessive approach, with a more burdensome requirement to succeed on review. In considering that both judgments endorsed the notion of unreasonableness, the approach of the SCA is to be preferred,214 and it is thus futile to dabble in the analysis of the Gold Fields judgment. However, the author deems it fit to consider a brief collective comparison of the two judgments and in the process to emphasise the current position in our law.

5.2 HERHOLDT v NEDBANK LTD

The development of the review test was at the core of this Supreme Court of Appeal judgment. The particular development in question, concerned the court a quo’s relaxation of the grounds to challenge CCMA awards on review,215 in that the LAC endorsed the lightest test for prejudice,216 and concluded that if such straightforward test is met, the award will be set aside on the grounds of either a gross irregularity or dialectical unreasonableness, without the need to establish the Sidumo test,

215 Myburgh 2013 Contemporary Labour Law 34.
216 See Chap 4.
consequently, encouraging applicants on review to rather base their application on a gross-irregularity or dialectical unreasonableness.

In the analysis of the inaccurate development of the review test by the LAC, the SCA in Herholdt sought to reaffirm the position in our law. Such jurisprudence is emphatically summated and thus captured as the current position in our law. Honourable judges Cachalia and Wallis, in the process of scrutinising the LAC judgment, sought to underlie and re-establish the importance and preservation of the distinction between appeal and review.

In concluding that the LAC had erred in its development of the review test,217 the SCA considered the historical view of the meaning of a gross irregularity and in addition, the operation of the Sidumo test. Such considerations set the basis for the conclusion and the subsequent rejection of the LAC’s development of the review test. In reaching such conclusion, the SCA dealt with and subsequently analysed the formulation of the incorrect development by setting out the notions of latent irregularities and dialectical unreasonableness, which formed the basis of the Labour Appeal Court judgment.

5.2.1 GROSS IRREGULARITY

The legislature, with the intention of formulating an informal and expeditious resolution of disputes arising from the Labour Relations Act, selected arbitration as the dispute-resolution mechanism and consequently mirrored section 145(2) on corresponding legislation218 in the Arbitration Act.219 The drafters of the LRA thus emphasised, through such limited grounds contained in section 145(2), the intention to deter parties in challenging arbitration awards and impede upon the inexpensive and expeditious resolution of such disputes.220

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218 S 33.
219 42 of 1965.
220 Herholdt v Nedbank Ltd par 9.
One of such narrow grounds contemplated in section 145(2) and which is also reflected in the Arbitration Act, is that of a *gross irregularity*. This ground of review concerns the conduct of the proceedings, rather than the merits of the decision.\(^{221}\)

The SCA was thus of the view that the legislature intended a *gross irregularity*, as reflected in section 145(2), to be based on the corresponding legislation contained in section 33 of the Arbitration Act, and consequently interpreted to relate to the conduct of the proceedings, where the commissioner misconceives the whole nature of the enquiry. This high standard for setting aside an award, is thus indicative of the historical intention of the legislature in preventing the effortless interference of arbitration awards.\(^{222}\)

A further advance in challenging an award on the ground of a *gross irregularity*, was developed in the Constitutional judgment of *Sidumo v Rustenburg Platinum Mines Ltd*\(^{223}\). This advance was significant, as it related to the suffusion of the constitutional standard of reasonableness.\(^{224}\) The SCA thus assessed and set out the legal position after *Sidumo*.

### 5.2.2 THE OPERATION OF THE SIDUMO TEST

The SCA clarified the operation of the *Sidumo* test and subsequently concluded that the unreasonable test set out in *Sidumo* concerned the holistic examination by the reviewing court of all the merits, and consequently assessing whether the award was one that a reasonable decision-maker could not reach.\(^{225}\) The reasoning of the commissioner is to be considered, enabling the reviewing court to ascertain whether the result reached by such commissioner could have reasonably been reached by taking such route. Thus, Cachalia JA and Wallis JA confirmed the operation of the *Sidumo* test and concluded that the legal position after *Sidumo* entailed that:

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\(^{221}\) *Herholdt v Nedbank Ltd* par 10 – it was held that a “gross irregularity” is committed where decision-makers misconceive the whole nature of the enquiry and as a result misconceive their mandate or their duties in conducting the enquiry.

\(^{222}\) Myburgh 2013 *Contemporary Labour Law* 34 – Myburgh refers to this as the “historical meaning”.

\(^{223}\) [2007] 12 BLLR 1097 (CC).

\(^{224}\) Myburgh 2013 *Contemporary Labour Law* 34.

\(^{225}\) *Herholdt v Nedbank Ltd* par 12.
“Reviews could be brought on the unreasonableness test laid down by the Constitutional Court and the specific grounds set out in ss 145(2)(a) and (b) of the LRA. The latter had not been extinguished by the Constitutional Court but were to be ‘suffused’ with the constitutional standard of reasonableness. What this meant simply is that a ‘gross irregularity in the conduct of the arbitration proceedings’ as envisaged by s 145(2)(a)(ii) of the LRA, was not confined to a situation where the arbitrator misconceives the nature of the enquiry, but extended to those instances where the result was unreasonable in the sense explained in that case.”

The SCA accordingly concluded that commissioners commit a gross irregularity if they misconceive the whole nature of the enquiry or if they produce an unreasonable award. The former is based on the historical meaning of a gross irregularity and the latter on the Sidumo test.

It might thus be interpreted that this SCA judgment both narrowed and widened the test for gross irregularity. However, with reference to Sidumo, it was emphasised by the SCA, that even though the reviewing court exercises the assessment and scrutiny of the merits, the court should always be conscientious in avoiding “judicial overzealousness in setting aside administrative decisions that do not coincide with the judge’s own opinions”. Hence, the SCA referred to the judgment of Fidelity Cash Management Service v CCMA and held:

“The LAC subsequently stressed that the test ‘is a stringent [one] that will ensure that ... awards are not lightly interfered with’ and that its emphasis is on the result of the case rather than the reasons for arriving at that result. The Sidumo test will, however, justify setting aside an award on review if the decision is disconnected with the ‘evidence’ or is ‘unsupported by any evidence’ and involves speculation by the commissioner.”

To outline, the SCA endorsed the view that the Sidumo test will ensure that awards are not lightly interfered with, by only placing emphasis on the result of the case, thus assessing whether the award was one that a reasonable decision-maker could not reach. It is therefore evident that the approach endorsed by the SCA is to preserve

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226 Herholdt v Nedbank Ltd par 14.
227 Myburgh 2013 Contemporary Labour Law 34.
228 Ibid.
229 Supra ft 21.
230 Herholdt v Nedbank Ltd par 13.
232 Herholdt v Nedbank Ltd par 13.
the distinction between review and appeal and not simply set aside an award if the reviewing court would have reached a different conclusion.

Sidumo established a sound advance in respect of the grounds of review and thus established a clear position for such test for review. However, such progressive view, which preserved the distinction between appeal and review, was distorted by subsequent judgments, in particular the LAC judgment in Herholdt. Such judgments aimed at providing a more generous standard for the review of CCMA-arbitration awards. The SCA therefore sought to bring an end to such counter-development in considering and analysing the pivotal formulation set out by the LAC, under the heads of latent irregularity and dialectical unreasonableness.

5.2.3 LATENT IRREGULARITY

The SCA defined a latent irregularity as the failure by the arbitrator to take into account a material fact in determining the arbitration. The court also described such irregularity to include the converse, where the commissioner took into account a totally irrelevant fact. Should the abovementioned irregularities occur, it is perceived as a latent irregularity and it subsequently justifies the setting aside of the award.

In considering the approach endorsed by the LAC, honourable judges Cachalia and Wallis analysed and considered the authority relied upon by the court a quo. The LAC in Herholdt relied upon an approach established in Southern Sun Hotel Interests (Pty) Ltd v CCMA. The basis of this approach, according to the SCA, concerns dual considerations. Firstly, the threshold for interference with the award of the

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233 Ibid.
234 Supra ft 18.
235 Herholdt v Nedbank Ltd par 14.
236 Herholdt v Nedbank Ltd par 15.
237 Also referred to as a process-related unreasonableness.
238 Herholdt v Nedbank Ltd par 16.
239 Ibid.
240 Southern Sun Hotel Interests (Pty) Ltd v CCMA par 17 – The court held that “If a commissioner fails to take material evidence into account, or has regard to evidence that is irrelevant, or the commissioner commits some other misconduct or a gross irregularity during the proceedings under review, and a party is likely to be prejudiced as a consequence, the commissioner’s decision is liable to be set aside regardless of the result of the proceedings or whether on the basis of the record of the proceedings, that result is nonetheless capable of justification.”
commissioner is lower as the interference established in *Sidumo* and secondly, it is irrelevant whether the result reached by the commissioner is one that could have been reasonably reached with the material before such commissioner. It was concluded by the SCA that the mere possibility of prejudice will suffice to warrant interference by the reviewing court. The premise of the abovementioned approach, is the dictum of the minority judgment of Ngcobo J, (as he then was) in *Sidumo*.

The SCA, in analysing the minority judgment, disregarded the dictum of Ngcobo J, as such approach is contrary to that of the majority judgment in *Sidumo*.

The SCA held that such approach cannot be accepted.

Despite the rejection of Ngcobo J’s dictum, the SCA contended that a *latent irregularity* may well equate to a gross irregularity within the meaning of section 145(2)(a)(ii), but only in a narrower sense, “where the decision-maker has undertaken the wrong enquiry or undertaken the enquiry in the wrong manner”.

The SCA thus substantially limited the approach endorsed by the LAC, in concluding that the court cannot merely rely on the failure by the commissioner to apply his mind to the material facts, to succeed on review. In order to succeed on review, the

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241 *Herholdt v Nedbank Ltd* par 17.
243 “Fairness in the conduct of the proceedings requires a commissioner to apply his or her mind to the issues that are material to the determination of the dispute. One of the duties of a commissioner in conducting an arbitration is to determine the material facts and then to apply the provisions of the LRA to those facts in answering the question whether the dismissal was for a fair reason. In my judgment, where a commissioner fails to apply his or her mind to a matter which is material to the determination of the fairness of the sanction, it can hardly be said that there was a fair trial of issues.”
244 *Herholdt v Nedbank Ltd* par 19.
245 *Herholdt v Nedbank Ltd* par 20 – the majority, in contrast, held that the arbitrator had erred in certain respects in making his award, in particular in holding that the relationship of trust between employer and employee had not been breached, but held that it was nonetheless an award that a reasonable decision-maker could make in the light of all the facts. In other words, the approach of the majority was clearly inconsistent with the approach suggested by Ngcobo J. As we, and all courts, are bound by the majority judgment the development of the notion of latent irregularity, in the sense that it has assumed in the labour courts, cannot be accepted.
246 *Herholdt v Nedbank Ltd* par 21.
247 Relying on Ngcobo J’s dictum.
248 Myburgh 2013 *Contemporary Labour Law* 35.
applicant has to establish that the result was unreasonable. In addition, the SCA reiterated that such limited application of a *latent irregularity* should be based on the historical meaning of a “gross irregularity” and subsequently read together with the *Sidumo* test, in the instance where the commissioner produces an award which fails the *Sidumo* test. Accordingly, the SCA adopted a considerably narrower approach than that of the LAC and rejected the basis for the approach set out by the court *a quo*.

The SCA in *Herholdt*, however, continued and scrutinised the inaccurate development of the review test by the LAC, by consequently considering the other formulation set out by the LAC in support of such development.

### 5.2.4 DIALECTICAL UNREASONABLENESS

The SCA briefly considered the notion of *dialectical unreasonableness*, in defining it as an unreasonableness flowing from the process of reasoning adopted by the commissioner. The LAC based its interpretation on whether the arguments and thought process of the commissioner were reasonable. This approach adopted by the LAC, was based on Ngcobo J’s dictum in the Constitutional Court judgment of *New Clicks*. However, the SCA found that the above mentioned dictum related to the provisions of PAJA and the manner in which they are to be applied and thus concluded:

“As PAJA does not apply to reviews under s 145(2) of the LRA it is of no application to CCMA awards. Second, if applied by considering the reasoning of a CCMA arbitrator and determining that the reasons given for making an award are not such

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249 Ibid.
250 Ibid.
251 *Herholdt v Nedbank Ltd* par 22 – in referring to the LAC: “There is no requirement that the commissioner must have deprived the aggrieved party of a fair trial by misconceiving the whole nature of [the] enquiry. The threshold for interference is lower than that: it being sufficient that the commissioner has failed to apply his mind to certain of the material facts or issues before him, with such having potential for prejudice and the possibility that the result may have been different.”

252 *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (8) BCLR 872 (CC) par 511 – the Constitutional Court concluded: “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.”

253 *Herholdt v Nedbank Ltd* par 24.
as to justify that award, its effect is to resuscitate this court’s decision in *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration*, supra, even though that decision was expressly overruled in *Sidumo*. Once again that is not a permissible development of the law.\(^{254}\)

Hence, the SCA held that the reliance on such passage from *New Clicks*, has no basis for the development of the review test.

### 5.2.5 CONCLUSION

In concluding its finding, the SCA summarised the current legal position as follows:

“In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.”\(^{255}\)

In analysing the abovementioned summation, key jurisprudential points\(^{256}\) can be established. Firstly, there will be a ground for review, if a defect in the proceedings falls within one of the grounds of section 145(2)(a) of the LRA. Thus, for the defect to equate to a gross irregularity, as contemplated in section 145(2)(a), the commissioner must have misconceived the nature of the enquiry or arrived at an unreasonable result.

Secondly, a commissioner committing a material error of fact or failing to consider certain evidence, will not as such be sufficient for an award to be set aside,\(^{257}\) except, if it can be established that, because of the effect of such errors committed by the commissioner,\(^{258}\) the result of the award is rendered unreasonable.

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\(^{254}\) *Ibid.*

\(^{255}\) *Herholdt v Nedbank Ltd* par 25.

\(^{256}\) Myburgh 2013 *Contemporary Labour Law* 34.

\(^{257}\) Myburgh 2013 *Contemporary Labour Law* 36.

\(^{258}\) *Process-related review.*
The SCA in *Herholdt* therefore increased the test for prejudice in comparison to the light test set out by the LAC in *Herholdt,* and consequently narrowed the scope for interference and in the process preserved the distinction between appeal and review.

Even though the SCA was critical about the LAC’s development of the review test, it nevertheless concluded that the LAC found that the result of the award failed the *Sidumo* test and consequently upheld the LAC’s judgment.

### 5.3 A COMPARISON OF HERHOLDT AND GOLD FIELDS

The *Gold Fields* judgment was the first LAC judgment to follow the above mentioned SCA judgment, in making reference to the review test. The appeal to the LAC was based on the contention that the Labour Court incorrectly dismissed the appellants’ claim that the arbitrator committed a process-related irregularity when he miscategorised the respondents’ conduct as poor performance and not that of misconduct, resulting in the arbitrator’s failure to properly apply his mind to the facts.

Taking into account that the *Gold Fields* judgment directly followed the SCA judgment in *Herholdt,* certain key legal positions can by surmised and compared.

The SCA in *Herholdt* and LAC in *Gold Fields* dealt mainly with *latent irregularities* and *unreasonableness,* relating to factual findings made by the commissioner in establishing the guilt of the employee. Broader sources for reviews, such as lack of jurisdiction, errors of law and patent irregularities were not dealt with by the judgments.

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259 Myburgh 2013 Contemporary Labour Law 36.
260 Myburgh 2013 Contemporary Labour Law 36.
261 *Gold Fields Mining SA (Pty) Ltd v CCMA* par 11 – The Labour Court dismissed the review application and did so on *inter alia* the following bases:
   (i) that although the arbitrator had miscategorised Moreki’s [third respondent] conduct as poor performance instead of misconduct, this was immaterial and not unreasonable;
   (ii) that while the sanction of dismissal was actually fair, the arbitrator’s decision that it was unfair passed the test set in *Sidumo*; and
   (iii) that the appellant brought predominantly a result-based review.
262 *Gold Fields Mining SA (Pty) Ltd v CCMA* par 1.
263 Myburgh 2013 Contemporary Labour Law 40.
Both *Herholdt* and *Gold Fields* therefore endorsed the *suffusion* of the constitutional standard of *reasonableness*. *Herholdt* established that awards can be reviewed both on the listed ground in section 145 and on the ground of unreasonableness; conversely *Gold Fields* held that awards are only reviewable on the section 145 listed grounds, if the additional requirement of unreasonableness is met.\(^{265}\)

Furthermore, concerning reviews based on the failure by commissioners to consider the material facts, *Herholdt* and *Gold Fields* jointly found in essence that a review based on the commissioners’ failure to consider the material facts, will only be reviewable if it is established that such gross irregularity caused the result of the award to be substantively unreasonable.\(^{266}\) In making this finding, both the judgments rejected Ngcobo J’s gross-irregularity *dictum* and the potential-for-prejudice test set out in *Herholdt* (LAC), limiting the basis of review.

In addition, the LAC in *Gold Fields* held that, where the commissioner fails to identify the dispute to be arbitrated, does not understand the nature of the dispute to be arbitrated or that the commissioner does not deal with the substantial merits of the dispute, it would, provided that the award also failed the *Sidumo* test, qualify as additional errors within a gross irregularity.\(^{267}\)

The most essential aspect, the operation of the *Sidumo* test, was addressed and confirmed by both judgments. In maintaining the distinction between an appeal and a review, both judgments emphasised that the *Sidumo* test will only be met if the result of the award falls outside a notional band of reasonable decision.\(^{268}\) This endeavour, to maintain the abovementioned division, was stressed by both *Herholdt* and *Gold Fields*, in finding that the courts should not simply focus on the errors committed by the commissioner in determining whether the *Sidumo* test is met, but should rather engage

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\(^{265}\) Myburgh 2013 *Contemporary Labour Law* 40.

\(^{266}\) Myburgh 2013 *Contemporary Labour Law* 41.

\(^{267}\) Ibid.

\(^{268}\) Ibid.
in a holistic analyses of all the material evidence in order to establish if the award is capable of reasonable justification.\textsuperscript{269}

It could well be contended that the aforementioned jurisprudence makes it more difficult to succeed on review, nonetheless both these judgments are rooted in \textit{Sidumo}, and endorsed same, resulting in a development which places us back on track and consequently embodies the true intention of the legislature with minimal interference in the awards of the arbitrators.

\section*{5.4 CONCLUSION}

The \textit{Sidumo} test, based on the notion of \textit{reasonableness}, set the platform for sound jurisprudential development, seeking to preserve the true intention of the legislature and maintain the differentiation between appeals and reviews. The interference of commissioners’ awards was thus limited, encouraging the Labour Court judges not to delve into the merits of the case, but upholding the true nature of review proceedings. Such desired development by our courts was accordingly not entertained by post \textit{Sidumo} LAC judgments, as they disregarded the test set out in \textit{Sidumo}, and to the contrary, formulated the basis of their judgments on the minority’s view in \textit{Sidumo}. Such non-reliance on the \textit{Sidumo} test by the trilogy judgments\textsuperscript{270} caused the relaxation of the grounds of review and the subsequent effortless interference by Labour Court judges. This straightforward approach was based on the mere failure by the commissioner to consider the material facts that might “potentially” cause an unreasonable, substantive outcome, causing the award to be set aside and making it thus easier to succeed on review. The deviation of the \textit{Sidumo} contour, however, caused the Supreme Court of Appeal to step in and correct the broad approach established by the trilogy judgments, in particular the LAC judgment of \textit{Herholdt}. The SCA confirmed the suffusion of the notion of \textit{reasonableness} as set out in \textit{Sidumo} and relied on a more holistic approach, narrowing the scope for interference and in the process preserving the distinction between appeal and review.

\textsuperscript{269} Ibid.
\textsuperscript{270} \textit{Gaga v Anglo Platinum Ltd; Afrox Healthcare v CCMA; Herholdt v Nedbank.}
In summation, concerning the current position in our law, the development of the review function of the Labour Court affords an aggrieved party an opportunity to approach the court and challenge the award of the commissioner. Provided firstly, that in terms of *Sidumo*, the Labour Court is satisfied that the decision reached by the commissioner is not one that a reasonable decision-maker could have reached and secondly, in terms of *Herholdt* (SCA), that the result arrived at by the commissioner is unreasonable and in the event of errors of fact committed by such commissioner, it can only be reviewable, if the effect of such error renders the outcome to be unreasonable.

The *Sidumo* contour seems to have been concluded for now. However, there is no doubt that the Labour Court’s review function will be developed once again in the near future. The question, however, remains, to which extent? Shall we see the Labour Courts reverting to a more relaxed approach, seeing it fit to challenge the limits of interference of arbitration awards, or will the Labour Court continue to develop this strict, controlled advance based on *reasonableness*?

As for now, the notion of *reasonableness* is thus the pivot of the review test and future development. *Reasonableness* ingrain a sense of structure and finality to the grounds for review and is seen as the rational factor concerning the review of arbitration awards. A comparable line can be drawn with the *Sidumo* contour, as *reasonableness* is a constant dynamic in the development of the review test. The origin of the *reasonableness* concept in review proceedings, is obviously found in the suffusion of the Constitutional standard of *reasonableness* into the section 145 grounds for review. Hence, the concept of *reasonableness* forms the ultimate foundation in such review proceedings.
CHAPTER 6
THE NOTION OF REASONABLENESS

6.1 INTRODUCTION

The significance of the notion of *reasonableness* in the judicial review of arbitration awards was comprehensively accentuated in the course of this treatise. *Reasonableness*, without a specific legal meaning, has integrated our law as one of the standards for judicial review for administrative action, construed in section 33(1) of the Constitution. The abovementioned section provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. The use of reasonableness thus in such context, as confirmed by the suffusion of reasonableness into section 145 of the LRA, means that if the administrative action is deemed not to be reasonable, the matter is reviewable. No specific meaning can be induced to *reasonableness*; thus the chapter will proceed in a brief consideration of the elements of *reasonableness*, setting out and considering *rationality* and *proportionality*. Although the hypothesis of the subject matter is important, it is the origin and nature of the application of *reasonableness* that must form part of an in-depth consideration.

The encapsulation of the notion of *reasonableness* and subsequent application of same in our labour jurisprudence were introduced by *Bato Star Fishing v Minister of Environmental Affairs and Tourism*, when it made reference to the so-called “Wednesbury reasonableness test”. Such reference to English Law was consequently endorsed by Navsa J, in *Sidumo* and thus paved the way to set the platform for the confirmation that commissioners exercise administrative action and the subsequent suffusion of section 145 with the notion of *reasonableness*, culminating in the establishment of the so-called “Sidumo test”. However, the comparable nature between South Africa and the United Kingdom (UK) jurisprudence, should be considered against the backdrop of each jurisdictions dispute-resolution system and subsequent judicial-review procedure, in particular the extent of the notion of

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271 Supra Chap 3.
272 2004 (4) SA 490 (CC).
273 S 33(1) of the Constitution.
reasonable. Therefore, the chapter will set out a comparative study of the UK’s dispute resolution system, as well as the nature of judicial appeal and review.

The purpose of such comparison is to recognise the problem within the application of our review proceedings and present a platform for future development of our review test, particularly the reconfiguration of the CCMA composition and the endorsement and development of a narrow application to review proceedings.

6.2 THE SUFFUSED NOTION OF REASONABLENESS

According to Sidumo, the notion of reasonableness entrenched in section 33(1) of the Constitution is suffused into section 145 of the LRA.274 Hence, the suffused notion of reasonableness stems from “reasonable administrative action”275 and thus as a result, equates to administrative law. It is consequently accepted in our law that in an administrative-law sense, the notion of reasonableness comprises of two elements,276 rationality and proportionality.

6.2.1 RATIONALITY

Rationality is one facet of reasonableness277 and in essence it means that a decision must be supported by evidence and information before the commissioner, as well as the reason given for it.278 A decision, based on the support of the evidence and material, is thus irrational, if it is unreasoned and lacking perceived logic or clear justification.279 An example of an irrational decision is where there is an absence of a logical connection between the evidence and material before the commissioner as well as the apparent reasons for the decision.280 The abovementioned consideration was adequately surmised by the LAC judgment in Carephone.281

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274 Even though the Majority in Sidumo concluded that PAJA does not apply to CCMA arbitration awards, it concluded that such arbitrations amount to administrative action.
275 S 33(1) of Constitution.
278 Hoexter Administrative Law in South Africa 340.
279 Jowell et al De Smith’s Judicial Review 11-036 559.
280 Jowell et al De Smith’s Judicial Review 11-037 559.
281 Supra Chap 3.
“Is there a rational objective basis justifying the conclusion made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at?”

The summation was thus applied and approved by the SCA in *Trinity Broadcasting v Independent Communications Authority of South Africa*, which consequently recognised rationality as a ground for review.

However, in *Sidumo*, the Constitutional Court was more concerned with the constitutional standard of *reasonableness*, encapsulated in section 33(1) of the Constitution, than the specific grounds of review in the PAJA. Therefore, the fact that *Sidumo* focused particularly on *reasonableness* only and being silent as to *rationality*, is indicative that the two grounds might come to the same thing.

However, according to *Hoexter*: “they should certainly continue to be regarded as separate and more or less independent grounds of review – not only because the PAJA lists them as separately but also because reasonableness goes beyond mere rationality” (own emphases).

As established, the terms *rationality* and *reasonableness* are often used interchangeably, however, *rationality* is only one facet of *reasonableness* and not all there is to *reasonableness*.

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282 Carephone v Marcus par 37.
283 2004 (3) SA 346 (SCA).
284 S 6(2) of the PAJA 3 of 2000.
285 *Hoexter Administrative Law in South Africa* 341.
286 *Supra* ft 5.
287 *Hoexter Administrative Law in South Africa* 343.
288 Ibid.
289 Jowell et al De Smith’s Judicial Review 11- 036 559.
6.2.2 PROPORTIONALITY

The notion of proportionality requires the decision-maker to achieve a fair balance and thus “to avoid the imbalance between the adverse and beneficial effects of an action and to encourage the administrator to consider both the need for the action and the possible use of less drastic or oppressive means to accomplish the desired end”. The fundamentals that are thus drawn from the notion are the balance of relevant considerations and the appropriateness or acceptability of the decision. The notion may be basically defined as “to use a sledgehammer to crack a nut”.

Even though the notion of proportionality derives from German law, it is very similar to the so-called “Wednesbury reasonableness test”, where Lord Greene, M.R. stated that the courts can only interfere if a decision:

“is so unreasonable that no reasonable authority could ever come to it”.

Although vague and confusing, this formulation endeavours to point out that judges should not lightly interfere with the decisions of officials. In exercising their powers of review, the judges ought not to place themselves in the position of the competent authority and test such decision in accordance with their own sense of reasonableness. In doing this, the court will engage in considering the merits of the decision. Therefore, according to Lord Greene in Wednesbury, unreasonableness under his definition would require something overwhelming.

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290 Jowell et al De Smith’s Judicial Review 11- 075 585.
291 Ibid.
292 Ibid.
293 Jowell et al De Smith’s Judicial Review 11- 075 585 – “the courts evaluate whether manifestly disproportionate weight has been attached to one or other considerations relevant to the decision”.
294 Jowell et al De Smith’s Judicial Review 11- 075 585 – “the courts consider whether there has been a disproportionate interference with the claimant’s rights or interests. There will of course always be an examination of rationality in its narrow sense of logical connection between ends and means”.
295 Ibid.
296 Ibid.
298 Ibid.
299 Ibid.
300 Ibid.
There have subsequently been various attempts to reformulate the *Wednesbury* test, however, such reformulation amounts to no more than a helpful guide to the parameters.\(^{301}\) Lord Cooke, in *R v Chief Constable of Sussex*,\(^{302}\) regretted the fact that the *Wednesbury* formula had been established in the UK courts and beyond.\(^{303}\) Lord Cooke subsequently relied upon a more simple test of:

“whether the decision in question was one which a reasonable authority could reach.”\(^{304}\)

It is the abovementioned view and dictum that were cited in *Bato Star Fishing*, confirming the confusing nature of the *Wednesbury* test and that the approach of Lord Cooke provides proper sound guidance:

“In determining the proper meaning of section 6(2)(h) of PAJA in the light of the overall constitutional obligation upon administrative decision-makers to act reasonably.”\(^{305}\)

“Section 6(2)(h) should then be understood to require a simple test, namely, that an administrative decision will be reviewable if, in Lord Cooke’s words, it is one that a reasonable decision-maker could not reach.”\(^{306}\)

This approach was accordingly endorsed by the Honourable Acting Judge Navsa in *Sidumo*:

“The reasonableness standard was dealt with in *Bato Star*. In the context of section 6(2)(h) of PAJA, O’Regan J said the following: “[A]n administrative decision will be reviewable if, in Lord Cooke’s words, it is one that a reasonable decision-maker could not reach.”\(^{307}\)

This subsequently paved the way to set the platform for the confirmation that commissioners exercise administrative action with subsequent suffusion of section 145

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\(^{301}\) Jowell *et al* *De Smith’s Judicial Review* 11- 024 554.

\(^{302}\) [1998] All ER (D) 568.

\(^{303}\) Jowell *et al* *De Smith’s Judicial Review* 11- 024 554.

\(^{304}\) Ibid.

\(^{305}\) *Bato Star Fishing v Minister of Environmental Affairs and Tourism* par 44.

\(^{306}\) Ibid.

\(^{307}\) *Sidumo v Rustenburg Platinum Mines Ltd* par 107.
of the LRA with the concept of *reasonableness*\(^{308}\) and the resulting establishment of the so-called “*Sidumo* test”. With the application of the *Wednesbury* standard preferred by the UK courts, *reasonableness* is a more stringent test, based on a standard requiring perversity, \(^{309}\) irrationality or extreme unreasonableness, in comparison to such application in South Africa. The extent of the application of the notion of *reasonableness* in South Africa, compared to the application in the UK, should thus be considered and analysed.

### 6.3 THE COMPARATIVE ELEMENT OF REASONABLENESS WITHIN THE UNITED KINGDOM’S LEGAL SYSTEM

With the reliance on Lord Cooke’s dictum, *Sidumo* ultimately reached the conclusion that the requirement of *reasonableness* for just administrative action must be suffused into section 145. Accordingly, our labour jurisprudence was influenced by English administrative law. \(^{310}\) It therefore warrants assessing whether the notion of *reasonableness* is applied similarly to that of Employment Law in the UK, and consequently, the comparative nature of the application of *reasonableness* between South Africa and the UK. An apparent and logical commencement of such comparison is the practical application of the notion of *reasonableness* and, in particular, the respective judicial medium that initiates such application.

Employment-dispute resolution in the UK comprises of a twofold system, based on the Advisory, Conciliation and Arbitration Service (ACAS) Arbitration Scheme,\(^{311}\) which provides that aggrieved parties to unfair dismissal disputes, may after conciliation, agree in writing to refer their dispute to arbitration by an arbitrator appointed by ACAS, as an alternative to the Employment Tribunal (ET) hearings.\(^{312}\) The alternative arbitration introduced by ACAS, adopts an inquisitorial approach,\(^{313}\) providing for a more informal, speedier, more private and less costly alternative\(^{314}\) to an Employment Tribunal case. Legal representation is not necessary and strict adherence to legal

\(^{308}\) S 33(1).
\(^{310}\) *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 K. B.
\(^{311}\) *Hardy Labour Law and Industrial Relations in Great Britain* 3\(^{rd}\) ed (2007) 92 70.
\(^{312}\) *Hardy Labour Law and Industrial Relations in Great Britain* 80 62.
\(^{313}\) Selwyn Selwyn’s *Law of Employment* 1.13 5.
\(^{314}\) *Hardy Labour Law and Industrial Relations in Great Britain* 80 62.
principles and legal precedents will not be entertained, even though the arbitrator makes an award which is binding on the parties.\textsuperscript{315} It could thus be said that the arbitration proceedings in accordance with ACAS is a great deal similar to that of the CCMA. However, contrary to that of the ETs,\textsuperscript{316} there is an exclusion of an appeal procedure, which provides that the parties may appeal only in instances of a serious irregularity. Therefore, for the purpose of analysing and comparing the practical application of \textit{Reasonableness}, the judicial medium of Employment Tribunal’s takes preference.

\textbf{6.3.1 EMPLOYMENT TRIBUNALS AND THE CCMA}

In order to assess the intended comparison and attaining the ultimate conclusion, the jurisdiction, procedure, composition as well as the appeal and review procedure of the ETs are considered and consequently compared to those of the CCMA. Such comparison, in particular the evaluation of the composition and appeal and review procedure, identifies the dilemma in the application of review proceedings in our labour jurisprudence.

\textbf{6.3.1.1 EMPLOYMENT TRIBUNALS}

ETs form part of a specialised system of inferior labour courts in the UK,\textsuperscript{317} with its jurisdiction expanded to cover almost all the statutory individual rights, for instance, complaints of unfair dismissal, redundancy payment, failure to consult over proposed redundancies, equal pay, breach of employment provisions of legislation, unjustifiable discipline, etc.\textsuperscript{318} The procedure governing the ETs is the Employment Tribunals regulations 2013\textsuperscript{319} and, in contrast to the CCMA, the adversarial system prevails, shifting the responsibility on each party to present and prove its own case, with no investigating power by the commissioner and no power to promote or order a compromise between the parties.\textsuperscript{320} The nature of the system consequently creates

\begin{itemize}
\item \textsuperscript{315} Selwyn Selwyn’s \textit{Law of Employment} 1.13 5.
\item \textsuperscript{316} Hardy \textit{Labour Law and Industrial Relations in Great Britain} 96 72.
\item \textsuperscript{317} Selwyn Selwyn’s \textit{Law of Employment} 1.41 9.
\item \textsuperscript{318} Hardy \textit{Labour Law and Industrial Relations in Great Britain} 90 68.
\item \textsuperscript{319} The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 No 1237.
\item \textsuperscript{320} Hardy \textit{Labour Law and Industrial Relations in Great Britain} 93 70.
\end{itemize}
the need for legal representation, unlike the CCMA, where such legal representation is not common.\textsuperscript{321}

Conversely, the Employment Tribunals, like the CCMA, act much more speedily than ordinary courts and, with national jurisdiction, are more accessible to complainants.\textsuperscript{322} Even though ETs are subject to the adversarial system, they are more informal, with no complicated pleadings and not bound by normal rules of evidence.\textsuperscript{323}

A significant and interesting distinction between Employment Tribunals and the CCMA, is its tripartite composition.\textsuperscript{324} The ETs consist of a legal chairman and two lay members. The legal chairman is required to have at least seven years’ experience as a solicitor or barrister and is drawn from a panel of chairmen appointed by the Lord Chancellor.\textsuperscript{325} The two lay members, one with employment and the other with industrial experience,\textsuperscript{326} are selected on a part-time basis from a panel drawn up after consultations with employers’ organisations and trade unions.\textsuperscript{327} In South Africa however, irrespective of whether there is only one presiding commissioner, the governing body of the CCMA may simply appoint an adequately qualified person\textsuperscript{328} as a commissioner and no need for legal qualifications is required. The presumption may thus be made that Employment Tribunals, with their tripartite legal-experience background, are superior to and more capable in assessing the merits of a matter than the commissioners of the CCMA. Consequently, in contrast to the CCMA, such superior judgments are of a better quality,\textsuperscript{329} resulting in a different nature and application of review and appeal proceedings.

Arguably, the core-functioning of ETs and the CCMA is different, in particular its composition. Hence, the comparison between the two legal systems consequently identifies a key consequence of the CCMA’s composition, namely the interference of

\textsuperscript{321} Hardy \textit{Labour Law and Industrial Relations in Great Britain} 94 71.
\textsuperscript{322} Hardy \textit{Labour Law and Industrial Relations in Great Britain} 93 70.
\textsuperscript{323} Ibid.
\textsuperscript{324} Hardy \textit{Labour Law and Industrial Relations in Great Britain} 92 69.
\textsuperscript{325} Selwyn Selwyn’s \textit{Law of Employment} 1.42 9.
\textsuperscript{326} Hardy \textit{Labour Law and Industrial Relations in Great Britain} 92 69.
\textsuperscript{327} Selwyn Selwyn’s \textit{Law of Employment} 1.42 9.
\textsuperscript{328} S 117 of the LRA 66 of 1995.
\textsuperscript{329} Hardy \textit{Labour Law and Industrial Relations in Great Britain} 92 69.
the commissioners’ awards by our courts. The basis of such identification is reliant on the comparison between the appeal and review proceedings of the two systems, which ultimately depends on the notion of *reasonableness*.

Even though our labour legislation and jurisprudence are suffused with the notion of *reasonableness* derived from administrative law and consequently influenced by Lord Cooke’s dictum set out in *Bato Star* and confirmed in *Sidumo*, the subsequent consideration is in respect of the UK’s inferior courts and not administrative tribunals.

### 6.3.1.2 REVIEW AND APPEAL PROCEDURES

In the UK, an application for review may be made only on the ground that there has been an error in the proceedings and may not be based on the contention that the employment tribunal has committed an error in law. Such contention must be entertained through an appeal process to the Employment Appeal Tribunal (EAT).

In order to succeed in such an application to the EAT, it must be established that the ET “misdirected themselves in law, or entertained the wrong issue, or proceeded on a misapprehension or misconstruction of the evidence, or taken matters into account which were irrelevant to the decision, or reached a decision which no reasonable employment tribunal, properly directing themselves in law, could have arrived at”.

The first four of the aforementioned grounds are very similar to Ngcobo’s gross irregularity dictum, where the commissioner commits a *latent irregularity*, occurring in the mind of the commissioner at the time of writing the award, and where it appears that the material facts were ignored, causing the commissioner to misconceive the whole nature of the enquiry. The latter, based on *reasonableness*, is identical to the notion encapsulated in *Sidumo* and subsequent suffusion into section

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330 *Supra* ft 37.
331 Selwyn Selwyn’s Law of Employment 20.117 497.
332 *Ibid*.
333 Selwyn Selwyn’s Law of Employment 20.138 499.
334 *Supra* Chap 3.
335 Myburgh 2013 *Contemporary Labour Law* 34 – definition of latent irregularity.
336 *Herholdt v Nedbank* par 10.
145. Debatably, with reference to section 145 of the LRA, our review proceedings are a combination of the UK’s appeal and review actions.

The issue, however, is the application of the notion of *reasonableness* and the measure of interference by the courts. In the UK, the EAT would not normally interfere with decisions of the ETs, unless if it is possible to say, according to Lord Justice May:337 “My word, that was certainly wrong!”338 If there are reasonable grounds to support the decision, the EAT would not interfere and will thus only do same if there has been a measure of extreme *unreasonableness*.339 In *East Berkshire Health Authority v Matadeen*340 the EAT held that “perversity” is a ground for interference with an employment tribunal’s decision, in the event where such decision “was not a permissible option” or was “a conclusion that offends reason” or “so outrages in its defiance of logic or of acceptable standards of industrial relations”.341 The principle of none interference is based on the premise that the lay members of the tribunal ought to exercise their experience and industrial judgment concerning questions of law and decisions to be reached.342 Accordingly, the consideration and weight to be attached to the evidence remains the sole task of the ET and it is thus not permissible for the EAT to replace the outcome of the decision with their own views.343

Contrary to the approach in the UK, the South African Labour Courts tend to exploit the reasonable decision-maker and rationality test, by endorsing a more relaxed approach to the application of *reasonableness* and gross irregularity.344 Hence, in assessing whether the decision was not one that a reasonable decision-maker could have arrived at, the door is opened for the Labour Court to interfere and consequently permit “merit reviews”.345 In practice some of our Labour Court judges are prepared to go further than others when it comes to the reviewing of the merits, even though it is contended that they are upholding the distinction between appeal and review and

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338 Selwyn Selwyn’s Law of Employment 20.138 499.
339 *Wednesbury* standard.
341 Selwyn Selwyn’s Law of Employment 20.138 499.
343 Selwyn Selwyn’s Law of Employment 20.138 499.
345 Van Tonder Labour Court Practice (2014) 300.
are not concerned with the correctness of the decision.\textsuperscript{346} Even with the recent re-establishment and development of the \textit{Sidumo} test and consequent stringent test to be applied by our Labour Courts\textsuperscript{347} in review proceedings, it will not necessarily prevent such interference in its totality. The problem is consequently to establish the cause of such interference and the prevention thereof subsequently.

Guidance is sought by the mode of the approach and composition of the United Kingdom’s ETs. The reality of the matter is that the EAT seldom interferes with the decisions of the ETs and if so, only in cases of extreme \textit{unreasonableness}. The premise of such limited interference is fairly obvious: the reason lies in the composition of the ETs, and as a result of such composition, the strict test applied by the EAT for \textit{unreasonableness}.

To put it in perspective, the EAT will not necessarily interfere with a decision of a ET, while being well aware that the basis of such decision was formulated and made by a legal chairman with seven years’ legal experience as a solicitor and two lay members with extensive experience in industry and employment respectively. The lay members, acting as neutral arbiters, rely on their experience in industrial relations to enhance the quality of the decision.\textsuperscript{348} The tripartite structure provides for one equal vote by each member, and taking into account the diverse background of the members, 96\% of all decisions reached are unanimous, including decisions where the legal chairman does not have the support of one of the “wingmen” and are thus outvoted by the two lay members.\textsuperscript{349}

Therefore, in comparing such advanced composition with that of the CCMA, it is apparent that our requirements for the appointment of CCMA commissioners are inferior. Section 117 of the LRA merely provides that:

“(1) The governing body must appoint as Commissioners as many adequately qualified persons as it considers necessary to perform the functions of commissioners by or in terms of this Act or any other law.”

\begin{itemize}
  \item \textsuperscript{346} Ibid.
  \item \textsuperscript{347} Supra Chap 5.
  \item \textsuperscript{348} Hardy \textit{Labour Law and Industrial Relations in Great Britain} 92 69.
  \item \textsuperscript{349} Selwyn Selwyn’s \textit{Law of Employment} 1.42 9.
\end{itemize}
According to the CCMA, the Commissioners are appointed by the Governing Body of the CCMA on the strength of their experience and expertise in labour matters, particularly dispute prevention and dispute resolution. In addition, the CCMA Commissioner Appointment and Recruitment Process sets out minimum requirements for appointment of an entry level – level B Commissioner. It provides that such aspirant applicant must have at least four years’ experience in industrial relations, labour law or conducting conciliations, arbitrations and facilitations, supported by relevant tertiary qualifications or NQF 5 equivalent, preferably in labour law, good knowledge of labour law, good knowledge of conciliation, arbitration and mediation processes and principles, good knowledge of the labour market and the different relevant factors.

In some instances, such “adequately qualified” commissioners possess a measure of experience and expertise that is more advanced than most legal practitioners, and the assertion made is not done without the necessary respect towards the majority of the CCMA commissioners. However, the interference by the Labour Court judges is based on the disproportionate gap in legal knowledge, legal experience, legal qualifications, legal skill and interpretation of our labour jurisprudence and labour legislation. Before stepping up to the bench, the majority of these Labour Court judges, practised for decades as advocates and attorneys and thus litigated on a daily basis. Measured down to the minimum requirements for the appointment as a commissioner, the disproportionate gap in legal knowledge, experience and qualifications is evident. It is thus as a result of such imbalance, which warrants the subjective perception by the Labour Court judges, that the majority of the CCMA commissioners are lacking the required ability to assess the legal issues and apply their minds to the merits and judgment of the case, and so come to the conclusion that the decision reached by a

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352 CCMA http://www.ccma.org.za/Display.asp?L1=54_2 – Other requirements includes a valid Driver’s Licence; Computer literacy; Analysis, Problem-solving, Judgment; Decision-making, Resilience, Listening, Communication; Negotiating and Influencing; Diversity awareness, Conflict management; Diplomacy; Interpersonal relations & Sound Ethics.
commissioner is not one that a reasonable decision-maker could have reached on the evidential material available.\textsuperscript{353}

6.4 CONCLUSION

The notion of reasonableness is the decisive test applied by our labour courts in review proceedings and is confined within the restored and redeveloped \textit{Sidumo} test. The origin of reasonableness in the review of employment matters, is based on an administrative-law influence\textsuperscript{354} and the \textit{Wednesbury} test, conveyed into our labour jurisprudence by \textit{Bato Star Fishing} and expanded upon by \textit{Sidumo}. As established and confirmed by the preceding chapters, the notion of reasonableness is surmised within the test applied to establish whether the decision reached by the commissioner is one that a reasonable decision-maker could not have reached with the evidential material available.

The need for the restitution and subsequent development of the abovementioned test, is based on the assertion that a more relaxed test simplifies the interference by Labour Court judges with the awards of the commissioners, and thus breaches the common line between appeals and reviews. Such merit reviews are in conflict with the true intention of the legislature. The attempt to narrow the scope of interference is found in the \textit{Sidumo} test. However, even though the test is characterized by stricter grounds than in the past,\textsuperscript{355} the test remains a double-edged sword, hinging upon the notion of reasonableness.

Even though reasonableness must now be added as one of the section 145 grounds in order to set aside the award, the notion nevertheless also creates a backdoor for Labour Court judges to partake in the consideration of the merits of the award. Applying a lighter test for unreasonableness, in comparison with the more stringent test for gross unreasonableness in the UK, prompts the Labour Court judges to without doubting consider the merits of the case. With a greater tolerance for unreasonableness, the majority of Labour Court judges assess whether the decision

\textsuperscript{353} Van Tonder \textit{Labour Court Practice} 300.
\textsuperscript{354} S 33(1) of the Constitution.
\textsuperscript{355} \textit{Supra} Chap 5.
reached by the commissioner is one that a reasonable decision-maker could not have reached and consequently find that the decision has been in fact in accordance with the thinking of a reasonable decision-maker.

The derivation of such finding by the Labour Court is, however, the interference with the award itself. Such interference originates in the subjective consideration of the Labour Court judge, that the commissioner’s capability to adjudge the merits and apply the law accordingly, is not adequate. Such subjective contemplation is based on the gap between Labour Court judges and commissioners. Our Labour Court judges, unlike the EAT in the UK, breach the fine line between appeal and review to assess whether the commissioner has made the correct decision, and consequently alter the result if it “is not one that a reasonable decision-maker could have made”.

In order to prevent such mistrust in the legal abilities of our commissioners, it is my respectful view that the CCMA need to re-evaluate the recruitment, training and appointment of commissioners. It is agreed that a carbon copy of the United Kingdom’s Employment Tribunals’ composition would not be financially viable within the budget constraints of the CCMA and therefore interfere with our expeditious resolution regarding the dispute structure, as there are not sufficient resources to establish a tripartite commission, nor to appoint senior attorneys or advocates on a comprehensive basis. However, subject to non-discrimination, the CCMA may be able to give preference to legal practitioners with relevant qualifications and experience, followed by a process where non-legal practitioners are appointed on the premise that they at least have a tertiary qualification in labour law and eight years’ experience in an industrial-relations capacity. Such a proposal to attain formal qualifications is not unfounded. In 2013, the CCMA\footnote{CCMA “A New Labour Dispute Resolution Practice Qualification to be launched” (15 October 2013) \url{http://www.ccma.org.za/ViewNews.asp?NID=205} (accessed 14-11-14).} embarked on an initiative to partner with Public Universities\footnote{The University of the Western Cape, the Nelson Mandela Metropolitan University, the University of the Witwatersrand, the University of the Free State and Stellenbosch University.} to develop and deliver a qualification in Labour-Resolution Practice", which will in due course replace the current CCMA candidate-training programme.\footnote{CCMA \url{http://www.ccma.org.za/ViewNews.asp?NID=205}.} The qualification will be at a post-graduate level, equivalent to a NQF level 8 and intend to “prepare graduates who are ready for practice, both skilled and well-rounded
practitioners”. The qualification will include “all core aspects of the current CCMA commissioner training; training in substantive law and in-depth technical skills training on arbitration and conciliation; components on soft-skills, social justice, ethics, diversity and other topics”.359 The programme commenced in 2014.

Consequently, such qualification and proposed increased level of eight years’ required experience, together with the suggested preference to legal practitioners, attempt to narrow the gap between the Labour Court judges and CCMA commissioners. Ultimately, Labour Court judges will always have superior understanding and application of the law. However, the perception that our CCMA commissioners are not able to reach a decision that a reasonable decision-maker could have reached, could be avoided by instilling a sense of confidence in our commissioners, based on the increased level of knowledge and skill within the broad labour-relations arena in South Africa.

CHAPTER 7
CONCLUSION

In considering and analysing the contour of Sidumo, the principal objective of this treatise was to identify the correct test to be applied in review proceedings stemming from the CCMA. The consideration and analyses of the development of the review test were based on various judgments seeking to expand upon such test. Sidumo, was obviously the primary consideration, forming the basis and departure of the contour, followed by a trilogy of contentious Labour Appeal Court judgments, deluding the contour with an inexact development, resulting in a wider application of the review test. Such deviation from Sidumo impelled the Supreme Court of Appeal and an ensuing judgment in the Labour Court to rectify such misapplication, by reaffirming the application of the Sidumo test and supporting a narrower and stringent approach, thus maintaining the strict distinction between appeal and review. A further objective, deriving from the principal purpose of this treatise, was to consider the proverbial distinction between appeal and review and the consequent extent of the distortion of such distinction, caused by the interference of our Labour Court judges in the awards of the commissioners. The treatise’s objectives were integrated by a constant and continuous thread of reasonableness, forming the basis for the Sidumo test and application of the interference by our Labour Court judges.

The Sidumo contour was based on the standard of review, set out by the majority in the Sidumo judgment and supported by the notion of reasonableness. It was confirmed that a reviewing court must ensure that a commissioner’s decision falls within the bounds of reasonableness. The court delegated with such determination, should enquire whether such is one that a reasonable decision-maker could not have reached. Such consideration formed the basis for the Sidumo contour. The Sidumo tests set the platform for sound jurisprudential development, seeking to preserve the true intention of the legislature and to maintain the differentiation between appeals and reviews.

An additional consideration and assessment had to be made of the three controversial judgments. Gaga, Afrox Healthcare and Herholdt sought to clarify the approach
adopted by *Sidumo*, and endorsed a wider application to review proceedings, confirming that CCMA awards can be reviewed on section 145 grounds and on the basis of *unreasonableness*. Moreover, the approach was more simplified in *Herholdt*, in finding that a mere failure by a commissioner to consider the material facts that might potentially cause an unreasonable substantive outcome, causes the award to be set aside. Such non-reliance on the *Sidumo* test was caused the relaxation of the grounds of review and the subsequent ardent interference by Labour Court judges. Such divergence from the *Sidumo* contour was averted by the Supreme Court of Appeal judgment on *Herholdt* and subsequent Labour Appeal Court judgment in *Gold Fields*. In particular, the SCA judgment of *Herholdt* contained the decisive response emphasized in the objective of the treatise. The SCA confirmed the *suffusion* of the notion of *reasonableness* as set out in *Sidumo* and relied on a more holistic approach, narrowing the scope for interference by Labour Court judges, preserving the distinction between appeal and review and in the process, culminating the *Sidumo* contour.

The primary finding of this treatise concerns the current position in our law relating to the test for review. The premise of such review test to applied by our Labour Courts, affords an aggrieved party to approach the court and challenge the award of the commissioner. Such challenge would only be entertained if the Labour Court is satisfied that the decision reached by the commissioner, is not one that a reasonable decision-maker could have reached in the court, and that the result arrived at by the commissioner is unreasonable.

In considering the distinction between appeal and review and the subsequent extent of the distortion of such distinction, the true intention of the legislature was emphasised and analysed. However, it was the comparative study made with the relevant law of the United Kingdom, that identified the defect in the application of our review proceedings, in creating a backdoor for our Labour Court judges to consider the merits or not of a specific case.

In comparing our labour jurisprudence with that of the United Kingdom, it was found that the test of *unreasonableness* applied by our courts, is clearly lighter than the stringent test for gross *unreasonableness* applied in the United Kingdom. In addition, it was found that the composition of the United Kingdom’s Employment Tribunal, is to
a larger extent based on legal experience and legal qualifications than the composition of the CCMA.

The resulting secondary finding of the treatise underlines the light test of unreasonableness applied by our courts and the measure of distrust in the ability of our commissioners, consequently confirming the backdoor for our labour court judges, enabling them to consider the merits of the dispute without difficulty and finding that the decision reached by the commissioner is one that a reasonable decision-maker could not have reached. The extent of interference into the merits is thus established and accentuated against the strict backdrop of the United Kingdom’s limited interference.

Even though the Sidumo contour concluded with the contemporary SCA and LAC judgments, there is the capacity for a great deal of further development in our labour-law jurisprudence and labour-law judicial system, in particular the review test. In order to abide by the legislature’s true intention and maintain the distinction between appeal and review, the required development of such review test should entail a stricter and narrower approach, based on gross unreasonableness, as reflected in the comparative study. The judicial structure is currently also in a phase of development and will as well require a narrowed approach to commissioner recruitment. All things considered, our labour-law jurisprudence and judicial system should constantly evolve to fit our constitutional needs and social order as well as employment demands, which will ultimately be dictated by our courts interpretation of lawfulness, reasonableness and fairness.
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