

THE GROUNDS FOR REVIEW OF CCMA AWARDS

by

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submitted in partial fulfilment of the requirements for the degree

MAGISTER LEGUM

in the

FACULTY OF LAW

UNIVERSITY OF PRETORIA

PROMOTER: PROF BPS VAN ECK

PRETORIA

NOVEMBER 2014

SUMMARY

The grounds for review of arbitration awards are stipulated in section 145 of the Labour Relations Act No 66 of 1995 (hereinafter the “LRA”). However, the Commission for Conciliation, Mediation and Arbitration (hereinafter the “CCMA”) is an organ of state and therefore bound by the Constitution of the Republic of South Africa No 108 of 1996 (hereinafter the “1996 Constitution”). Therefore, the issuing of an arbitration award is bound by section 33 of the 1996 Constitution which requires that administrative should be lawful, reasonable and procedurally fair. It is for this reason that the Constitutional Court (hereinafter the “CC”) in *Sidumo & another v Rustenburg Platinum Mines Ltd* [2007] 12 BLLR 1097 (CC) held that section 145 of the LRA is suffused by the constitutional standard of “reasonableness”. The CC in *Sidumo* subsequently confirmed that the standard of review is whether the decision reached by the CCMA commissioner is one that a reasonable decision-maker could not reach.

This dissertation seeks to determine how this standard as laid down in *Sidumo* influenced the courts’ interpretation of the grounds for review and whether there is certainty by the courts on the interpretation of this test.

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CHAPTER 1

INTRODUCTION

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A. CONTEXTUAL BACKGROUND

The Commission for Conciliation, Mediation and Arbitration (hereinafter the “CCMA”) was established on 01 January 1996 by the Labour Relations Act No 66 of 1995 (hereinafter the “LRA”)¹ in order to give effect to one of the core purposes of the LRA, namely to promote the effective resolution of labour disputes.² The CCMA’s main duties are to conciliate workplace disputes and to arbitrate certain disputes that remained unresolved after conciliation.³ During the first ten years of the CCMA’s existence, an average of 120 000 cases were referred to it annually. This amounts to more than one million disputes in total which have been referred to the CCMA.⁴ The CCMA is undoubtedly the most successful labour dispute resolution system in South Africa as it provides an unmatched level of access to cheap and quick dispute resolution to employees.⁵ Fundamental to its success are the short time periods for referring disputes, simplified dispute referral forms, compulsory conciliations of all disputes, an approach to arbitration that seeks to focus on the merits of the case rather than technicalities, restriction on legal representation, no right of appeal against arbitrators’ decisions and restrictions on the grounds for judicial review of arbitration awards.⁶

¹ Chapter VII Part A.

² S 1(d)(iv) of the LRA.

³ S 115 of the LRA.

⁴ <http://www.ccma.org.za/Display.asp?L1=36&L2=21>. Also, see Bernikow (2007) *LDD* 16.

⁵ Benjamin (2014) *ILJ* 22.

⁶ Benjamin (2009) *ILJ* 26.

The CCMA is an administrative body whose appointed commissioners are mere mortals capable of making mistakes,⁷ and therefore their decisions, although described as “final and binding”,⁸ are subject to judicial review.⁹ A party that is aggrieved with an arbitration award generally only has the remedy of review in terms of the LRA as there is no appeal procedure stipulated in the LRA.¹⁰

Section 145(1) of the LRA provides that any party to a dispute, who alleges a defect in any arbitration proceedings under the auspices of the CCMA, may apply to the Labour Court (hereinafter the “LC”) for an order setting aside the arbitration award. The definition of such a defect is stipulated in section 145(2) of the LRA. Such an application for review must be initiated within six weeks from the date that the award was served on the applicant¹¹ or, if the alleged defect entails corruption, within six weeks of discovery thereof.¹² A party may apply for the condonation of the application on “good cause shown”.¹³

Approximately one in ten CCMA awards are taken on review to the LC, which means that a total of 1 700 review applications are launched each year during the first decade of the operation of the CCMA.¹⁴ This is an alarming situation, as it takes an average of 23 months from the date of the arbitration award to the date that the review application is heard by the LC.¹⁵ After the LC has made a ruling, the matter can further be appealed against to the Labour Appeal Court (hereinafter the “LAC”) which can further prolong the process. It is clear that even though the CCMA is effective in resolving disputes quickly, the review process is in effect undermining the success of the CCMA in terms of expeditious dispute resolution.

The question that needs to be answered is whether this huge number of review applications lodged is truly due to poor awards being written by commissioners, or

⁷ Botma and Van Der Walt (Part 1)(2009) *Obiter* 330.

⁸ S 143(1) of the LRA.

⁹ Fergus and Rycroft (2012) *Acta Juridica* 170.

¹⁰ S 5(Aa) of the EEAB, 2012, did however amend s 10 of the EEA in order to allow disputes regarding unfair discrimination based on sexual harassment or any other case where the employee earns less than the earnings threshold as determined by the Minister in accordance with s 6(3) of the BCEA, to be arbitrated at the CCMA. S 5(c) of the EEAB, 2012 determines that in these circumstances, the arbitration award may be taken on appeal to the Labour Court within 14 days of the date of the award.

¹¹ S 145(1)(a) of the LRA.

¹² S 145 (1)b) of the LRA.

¹³ S 145(1A).

¹⁴ *Tokiso Review 2006-7* at 41.

¹⁵ *Idem* 45.

whether there are some other reasons for this tendency. It is well known that many employers use the review process only to delay the enforcement of arbitration awards and hopefully the new amendments to section 145 of the LRA¹⁶ will improve the situation. Another reason for this could be that parties are unsure precisely what the grounds of review entail as this is a grey area which is not truly understood. This is due to the fact that various courts are giving different interpretations of the grounds of review and it is my submission that if there can be more certainty regarding the correct test for review, fewer review applications would be lodged to the LC. This would inevitably lead to disputes being resolved more swiftly and cost effective which would be in line with the purpose for which the dispute resolution systems were created in the first place.

The nature and extent of the right to review CCMA awards has been a controversial issue since the enactment of the LRA and the courts have been confronted with various challenges in this regard.

One of these challenges was the fact that the LRA, despite review in terms of section 145 of the LRA, also makes provision for review in terms of section 158(1)(g). Before its amendment, section 158(1)(g) provided that:

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

After various attempts by the courts to answer the question whether the LC could also, despite section 145 of the LRA, review CCMA awards under the broader grounds of review in terms of section 158(1)(g) of the LRA, the Court in *Carephone (Pty) Ltd v Marcus NO*¹⁷ concluded that the review of arbitration proceedings is limited to the grounds as provided for in section 145 of the LRA.

Section 158(1)(g) was subsequently amended by replacing “despite” with “subject to” and it is now widely accepted that review proceedings of arbitration awards must be initiated in terms of section 145 of the LRA.¹⁸

¹⁶ See fn 78.

¹⁷ *Carephone (Pty) Ltd v Marcus NO* [1998] 11 BLLR 1093 (LAC).

¹⁸ Botma and Van Der Walt (Part 1)(2009) *Obiter* 342.

Another challenge that the courts are currently facing is with regards to the administrative nature of CCMA awards and the implication thereof. In *Carephone*, the Court held that the CCMA is an organ of state in terms of the Constitution of the Republic of South Africa No 200 of 1993 (hereinafter the “1993 Constitution”) and therefore the CCMA is bound by the Bill of Rights and subject to the basic values and principles governing public administration. The Court further held that the CCMA therefore has a constitutional duty to dispense administrative action which is lawful, reasonable and procedurally fair and justifiable in relation to the reasons given for it.¹⁹ The Court concluded that the test for review is thus whether there is a “rational objective basis justifying the connection made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at”.²⁰ The Court in *Shoprite Checkers (Pty) Ltd v Ramdaw NO*²¹ went further and held that public power must be exercised rationally and therefore the decision made by a public agency must be “rationally related” to the purpose the decision making power was given.

The Constitutional Court (hereinafter the “CC”) in *Sidumo & another v Rustenburg Platinum Mines Ltd*²² finally provided a light at the end of the tunnel in resolving the issue regarding the correct test for review. The majority of the Court found that an arbitration award does amount to administrative action within the meaning of section 33 of the Constitution of the Republic of South Africa No 108 of 1996 (hereinafter the “1996 Constitution”).²³ The result of this is that section 145 of the LRA is now suffused by the constitutional standard of reasonableness²⁴ and the test for review is therefore whether the decision reached by the commissioner is one that a reasonable decision-maker could reach.

It is therefore clear that the courts have difficulty in dealing with the issue regarding the grounds for review of CCMA awards and the test that applies to them. The purpose of this dissertation is to examine how the courts interpreted the grounds for

¹⁹ S 33 and Sch 6 item 23(b) of the 1996 Constitution.

²⁰ At 1435E.

²¹ *Shoprite Checkers (Pty) Ltd v Ramdaw NO* [2001] 9 BLLR 1011 (LAC).

²² *Sidumo & another v Rustenburg Platinum Mines Ltd* [2007] 12 BLLR 1097 (CC).

²³ Despite this, the Court found that PAJA is not applicable in s 145(2) reviews.

²⁴ In contrast with *Carephone*, which 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.

review of CCMA awards before *Sidumo* and how the test of reasonableness as laid down by *Sidumo* influenced the courts' interpretation of these grounds. It will in conclusion be investigated whether there is currently clarity about the grounds for review, and if not, how this should be rectified.

B. RESEARCH QUESTION

An arbitration award is reviewable on the grounds as set out in section 145 of the LRA. The test for review, which was laid down in *Sidumo*, is whether the decision made by the commissioner is one that a reasonable decision-maker could make. Therefore, in order to succeed with a review application, one or more of the grounds as set out in section 145 of the LRA must be present and because of the existence of such ground/s the result of the award is unreasonable.

In order to test the validity of this statement, the following question has been formulated and needs to be answered:

- How did the courts interpret the grounds of review of CCMA awards before *Sidumo* and how did the test of reasonableness as laid down by *Sidumo* influence the courts' interpretation of these grounds?

C. IMPORTANCE OF THE STUDY

As indicated above, a vast number of disputes are arbitrated by the CCMA which are all subject to being reviewed in terms of section 145 of the LRA. It is important that the grounds and the test for review are fully understood in order to avoid the LC from being overwhelmed with unnecessary review applications. Not only will this lead to significant cost savings, but it will also be in line with the aim of the LRA, namely the resolution of labour disputes in an efficient and quick manner.

D. RESEARCH METHODOLOGY

A critical analysis of applicable statutes, case law, books and articles will be done. A comparative analysis of different foreign countries will also be done. The basis of this investigation will be a study of different sources.

The dissertation will commence with a chapter discussing the South African labour dispute resolution framework and in particular the functions and roles of the CCMA,

the LC and the LAC. Special attention will be given to the LC's power to review arbitration awards, as opposed to an appeal process.

The next chapter will analyse how the courts interpreted the grounds for review before *Sidumo* and, in particular, how the LAC in *Carephone* applied the test for review. With regards to case law that was decided after *Carephone*, the chapter will further discuss whether *Carephone* was correct in its interpretation of the grounds for review.

In the following chapter, a critical analysis of the CC's interpretation of the test for review in *Sidumo* will be done. This will be followed by a discussion on how the test of reasonableness as laid down by *Sidumo* influenced the courts' interpretation of the grounds for review of CCMA awards.

Australia's and New Zealand's labour dispute resolution system will be discussed in the next chapter and, in particular, which aspects of their labour dispute resolution systems, could be adopted into South African labour law.

The dissertation will conclude with recommendations that can be considered in order to improve the confusion regarding the test for review of CCMA awards.

CHAPTER 2

THE SOUTH AFRICAN LABOUR DISPUTE RESOLUTION FRAMEWORK

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A. INTRODUCTION

The LRA²⁵ brought about a significant change in the statutory industrial relations system of South Africa.²⁶ These changes were enacted due to the shortcomings and problems experienced with the previous system which was characterised by high costs, prolonged legal action and low settlement rates.²⁷ The Industrial Court further did not form part of the formal judicial hierarchy, nor did it have the status of a high court. It could therefore be said that the Industrial Court was a court in name only.²⁸ The LRA had the goal of addressing these problems by abolishing the Industrial Court, together with its wide definition of “unfair labour practices”, and established the CCMA, Bargaining Councils, the LC and the LAC as the forums for labour

²⁵ No 66 of 1995.

²⁶ Du Toit et al (2006) 5.

²⁷ Bendeman (2007) *AJCR* 138.

²⁸ Steenkamp & Bosch (2012) *Acta Juridica* 121.

dispute resolution. These forums were established in order to give effect to one of the primary objects of the LRA, namely “to promote the effective resolution of labour disputes.”²⁹

In this chapter, a brief overview regarding the roles and the functioning of the CCMA, the LC and the LAC will be given. The dispute resolution functions of bargaining councils are almost identical to those of the CCMA, and therefore a separate discussion regarding bargaining councils would be superfluous.³⁰

B. THE CCMA

1. Introduction

The CCMA, which can be regarded as the primary dispute resolution forum created by the LRA, was established by section 112 of the LRA.³¹ The CCMA is an independent body which has jurisdiction in all the nine provinces of South Africa.³² The main purpose of the CCMA is to provide social justice in the employment arena through the expeditious and cost effective resolution of labour disputes by means of conciliation and arbitration.³³ Benjamin³⁴ states that the CCMA is especially successful in providing enhanced and expedited access to dispute resolution to employees who generally would not otherwise have had the resources to institute litigation proceedings against their employers.

An employee must refer a dispute to the CCMA within a certain time frame,³⁵ after which the CCMA must attempt to resolve the dispute via conciliation within 30 days.³⁶ If the commissioner, after conciliation, has certified that the dispute

²⁹ S 1(d)(iv) of the LRA.

³⁰ S 52(1) of the LRA determines that a bargaining council may only perform dispute resolution functions if it is accredited by the CCMA for that purpose, or if it appoints an accredited agency to perform those functions for it. When the council is accredited, it effectively assumes the dispute resolution functions of the CCMA and parties falling within the registered scope of the council are obliged to resolve disputes through the council.

³¹ Van Niekerk et al (2012) 434. According to the CCMA's 2012/2013 Annual Report, the CCMA receives an average of 679 new case referrals each working day and has a settlement rate of 73 percent.

³² S 113 & 114 of the LRA.

³³ S 115 of the LRA. Benjamin (2014) *ILJ* 23.

³⁴ *Idem* 22.

³⁵ S 191(1)(b) of the LRA determines that a dispute regarding an alleged unfair dismissal must be referred within 30 days, while a dispute regarding an alleged unfair labour practice must be referred within 90 days. S 10(2) of the EEA further determines that a dispute regarding unfair discrimination must be referred within six months.

³⁶ S 191(5) of the LRA.

remains unresolved, or 30 days have expired since the CCMA has received the referral and the dispute remains unresolved, the dispute may be referred for arbitration or the LC, or industrial action may be taken.³⁷

2. Conciliation at the CCMA

After a dispute has been referred to the CCMA, the CCMA must appoint a commissioner to first attempt to resolve the matter through conciliation.³⁸ The commissioner can do this by mediating the dispute, conducting a fact-finding exercise or by making a recommendation to the parties in the form of an advisory award.³⁹ The commissioner is the master of the process and may determine how the conciliation proceedings must be conducted.⁴⁰ The commissioner is given a wide set of powers that may be exercised during the conciliation, or during a subsequent arbitration, which includes the power to subpoena any person for questioning, call an expert witness or administer an oath.⁴¹

Conciliation proceedings are normally conducted in an informal manner and are regarded as confidential.⁴² In conciliation proceedings, a party may only be represented by a director or employee of the employer party to the dispute, or a member of a close corporation and any member, office bearer or official of the trade union representing the employee party, or any employer's organisation representing the employer party.⁴³ Legal representation is not permitted.

If the conciliation process is successful and the parties have reached an agreement, the commissioner must assist the parties in drafting a written settlement agreement. This agreement may be made an arbitration award⁴⁴ or an order of court.⁴⁵ If the parties are not able to settle the matter, the commissioner must issue a certificate stating whether the dispute must be referred to arbitration or the LC, should the

³⁷ *Ibid.*

³⁸ S 135(1) of the LRA.

³⁹ S 135(3) of the LRA.

⁴⁰ Grogan (2007) 559.

⁴¹ S 142(1) of the LRA. Also, see Steenkamp & Bosch (2012) *Acta Juridica* 123 on their concerns regarding commissioners who abuse their powers in order to obtain a settlement.

⁴² *Idem* 123.

⁴³ CCMA Rule 25(1)(a).

⁴⁴ S 142A of the LRA.

⁴⁵ S 158(1)(c) of the LRA.

employee decide to pursue the matter further. The forum that would be applicable will be determined by the type of dispute.

3. Arbitration at the CCMA

If the conciliating commissioner has certified that a dispute remains unresolved, the employee has 90 days to refer the dispute for arbitration.⁴⁶ In terms of the LRA, the CCMA must arbitrate unresolved disputes with regards to:

- a dismissal related to the employee's conduct or capacity;⁴⁷
- constructive dismissals or where the employer provided the employee with substantially less favourable conditions or circumstances at work after a transfer of a business as a going concern;⁴⁸
- the employee does not know the reason for the dismissal;⁴⁹
- unfair labour practices;⁵⁰
- the interpretation of collective agreements which does not make provision for dispute resolution procedures;⁵¹
- the exercise of organisational rights;⁵² and
- where parties to a workplace forum is not successful in reaching an agreement on a matter which is reserved for joint-decision making.⁵³

An arbitration hearing is regarded as a hearing *de novo* in which a party to the dispute may give evidence, call witnesses, question the witnesses of any party and address concluding arguments to the commissioner.⁵⁴ In contrast with conciliation proceedings, a party to the arbitration proceedings may be represented by a legal practitioner.⁵⁵ The need for expeditious, informal and affordable procedures that take

⁴⁶ S 136(1) of the LRA.

⁴⁷ S 191(5)(a)(i) of the LRA. See, for example *NAAWA v Pretoria Precision Castings (Pty) Ltd* (1985) 6 ILJ 369 (IC); *Sun Couriers (Pty) Ltd v CCMA & Others* (2002) 23 ILJ 189 (LC).

⁴⁸ S 191(5)(a)(ii) of the LRA. See, for example *Smith v Magnum Security* [1997] 3 BLLR 336 (CCMA); *Goliath v Medscheme (Pty) Ltd* (1996) 17 ILJ 981 (LAC).

⁴⁹ S 191(5)(a)(iii) of the LRA.

⁵⁰ S 191(5)(a)(iv) of the LRA. See, for example *Solidarity obo Kerns v Muau & Others* (2007) 28 ILJ 1146 (LC); *Sithole v Nogwaza NO & Others* (1999) 20 ILJ 2710 (LC).

⁵¹ S 24(1) & (2) of the LRA.

⁵² S 21(4) of the LRA.

⁵³ S 86(7) of the LRA.

⁵⁴ S 138(2) of the LRA.

⁵⁵ CCMA Rule 25(1)(b)(1). However, CCMA Rule 25(1)(c) states that if the dispute is with regards to an unfair dismissal relating to the employee's conduct or capacity, the parties are not entitled to legal representation unless the commissioner and all other parties consent or if the commissioner

place before accessible and specialist dispute resolution institutions is the main reason for the limitation on legal representation.⁵⁶

Van Eck⁵⁷ suggests that the limitation on legal representation should be extended beyond disputes relating to dismissals on the grounds of conduct and capacity and to include unfair labour practice disputes, constructive dismissal disputes and disputes regarding the non-renewal of fixed term contracts. However, I am of the opinion that legal representation is essential in arbitration proceedings and enhances the expeditious resolution of disputes. Legal practitioners are more experienced in defining the dispute and thereby assist the CCMA in narrowing the relevant issues. They are generally well prepared for the hearings and thereby make the task of the commissioner easier.

The arbitrating commissioner has a wide discretion regarding the form that the arbitration proceedings must take as the LRA requires commissioners to “conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly” and also “with the minimum of legal formalities”.⁵⁸ After the arbitration hearing has been concluded, the commissioner must issue an award within 14 days.⁵⁹ If the commissioner has determined that a dismissal is unfair, he may order the employer to reinstate the employee, re-employ the employee or order the employer to compensate the employee.⁶⁰ Any party to the dispute who alleges that an irregularity has occurred during the arbitration proceedings, may request the LC to review the award.⁶¹

4. Conciliation-Arbitration (Con-Arb)

The purpose of the con-arb procedure is to expedite the dispute resolution process at the CCMA and entails that the arbitration is conducted immediately after the

determines that, under the particular circumstances, it would be unreasonable not to allow legal representation.

⁵⁶ Van Eck (2012) *TSAR 775*; Benjamin (1994) *ILJ 260*. Also see *The Law Society of the Northern Provinces v Minister of Labour and Others* (GNP)(unreported case no 61197/11, 11-10-2012) where the Court confirmed that CCMA Rule 25(1)(c) is constitutional.

⁵⁷ Van Eck (2012) *TSAR 785*.

⁵⁸ S 138(1) of the LRA.

⁵⁹ S 138(7) of the LRA.

⁶⁰ S 193(1) of the LRA.

⁶¹ S 145 of the LRA.

conciliation has been certified as unsuccessful.⁶² Benjamin⁶³ notes that the con-arb process has significantly reduced the period taken to resolve disputes. In disputes regarding unfair dismissals or unfair labour practices relating to probation, the CCMA must proceed to arbitration immediately after certifying that the conciliation was unsuccessful.⁶⁴ The con-arb procedure may also be followed in other cases not relating to probation. However, in such cases the parties may object to the con-arb process.⁶⁵

C. THE LABOUR COURT

1. Introduction

Before 1995, labour disputes were adjudicated by the Industrial Court. Despite its name, it was held that the Industrial Court was neither a superior court nor indeed a court of law and was only seen as an administrative tribunal.⁶⁶ As stated previously, the former Industrial Court did not have the same status as a high court. The notion of a specialist court for labour disputes with the same status as a high court first came into realisation with the LRA in 1995.⁶⁷ The Explanatory Memorandum to the Labour Relations Bill⁶⁸ provided the following rationale for the creation of the LC:

“Consistency in the interpretation and application of the law will be enhanced by the creation of a Labour Court with the same status as a division of the Supreme Court and with national jurisdiction. The Court will have exclusive jurisdiction over labour matters.”⁶⁹

The LC was subsequently established by section 151 of the LRA and consists of a Judge President, a Deputy Judge President and ordinary judges, appointed from the ranks of either existing High Court judges or legal practitioners.⁷⁰ The LC is

⁶² Ferreira (2004) *Politeia* 81. The LRAB, 2010 proposed that all disputes should be dealt with by “con-arb” unless the commissioner and all the parties agree that “con-arb” is not appropriate or the commissioner concludes that it is unreasonable. This proposal has however not been incorporated in the LRAB, 2012.

⁶³ Benjamin (2009) *ILJ* 32.

⁶⁴ S 191(5A) of the LRA.

⁶⁵ CCMA Rule 17(2) determines that the objection must be made in writing at least seven days before the date of arbitration.

⁶⁶ *SA Technical Officials Association v President of the Industrial Court* (1985) 6 *ILJ* 186 (A); Van Niekerk et al (2012) 442.

⁶⁷ Steenkamp & Bosch (2012) *Acta Juridica* 133.

⁶⁸ No 66 of 1995.

⁶⁹ *Ibid.*

⁷⁰ S 152(1) of the LRA. Also, see Grogan (2001) 309 – 310.

constituted before a single judge⁷¹ and may sit in as many separate courts as the available judges may allow.⁷²

2. Powers of the Labour Court

The LC was provided with four powers relevant to dismissal and unfair labour practice disputes namely, to adjudicate disputes regarding unfair dismissals in terms of section 191(5)(b) of the LRA or disputes referred to the LC by the director of the CCMA in terms of section 191(6); to review CCMA awards in terms of section 145; to interdict actions of employers before dismissals or unfair labour practices are effected; and to enforce awards.⁷³

For the purposes of this dissertation, the most important power the LC has is to review CCMA awards in terms of section 145 of the LRA. It should be noted that the LRA does not make provision for an appeal of a CCMA award to the LC. This means that a court may only determine the legality of a CCMA commissioner's decision and may not enquire whether a decision on the facts or the law was correctly found or interpreted.⁷⁴ It is evident that errors of fact or law are not *per se* grounds for taking an arbitration award on review. It is only reviewable when such an error of fact or law can be ascribed to one or more of the grounds in section 145 of the LRA.⁷⁵

The distinction between appeal and review can be difficult to determine and the review courts must be wary not to enter into the merits of the matter in order to determine whether the CCMA commissioner's decision was right or wrong. The CC in *Sidumo* explained the distinction as follows:⁷⁶

“At times, it may be difficult to draw the line. There is, however, a clear line and this line must be maintained. The drafters of the LRA were mindful of the distinction between review and appeal and they wanted this distinction to be maintained. What they sought to introduce was a simple, quick, cheap and non-legalistic approach to the adjudication of unfair dismissals.”

In terms of the previous LRA, parties who were dissatisfied with the decisions of the Industrial Court could appeal first to the LAC and then to the former Appellate

⁷¹ S 152(2) of the LRA.

⁷² S 152(3) of the LRA.

⁷³ Grogan (2007) 564.

⁷⁴ Botma & Van der Walt (Part 1) (2009) *Obiter* 332.

⁷⁵ *Idem* 335.

⁷⁶ At para 244.

Division of the Supreme Court. The Court had to determine whether, based on the evidence, it would have come to the same conclusion. This appeal process was rejected by the legislature who considered the appeal process as a hindrance to the quick and cheap resolution of labour disputes. The Explanatory Memorandum to the Labour Relations Bill⁷⁷ explains the rationale behind the introduction of the concept of judicial review by the LC as follows:

“The absence of an appeal from the arbitrator's award speeds up the process and frees it from the legalism that accompanies appeal proceedings. It is tempting to provide for appeals because dismissal is a very serious matter, particularly given the lack of prospects of alternative employment in the present economic climate. However, this temptation must be resisted as appeals lead to records, lengthy proceedings, lawyers, legalism, inordinate delays and high costs.”

It is questionable whether the legislature has indeed succeeded, through the implementation of the review process, in its intention to keep the resolution of labour disputes as speedy and inexpensive as possible. In practice, review applications normally take years to be resolved which also has a negative impact on reinstatement as remedy.⁷⁸ Also, the most review applications are filed and opposed by instructed lawyers and advocates which inevitably leads to higher costs.

3. Jurisdiction of the Labour Court

The LC has jurisdiction in all the nine provinces of South Africa.⁷⁹ The LC may also perform its functions at any place in South Africa,⁸⁰ unlike the CCMA which must establish offices in each of the nine provinces. The LC has concurrent jurisdiction with the civil courts in any matter concerning a contract of employment⁸¹ and concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the 1996 Constitution and arising from –

⁷⁷ No 66 of 1995.

⁷⁸ The LRAB, 2012 has however attempted to resolve this by stating that the operation of an arbitration award can be suspended if security is provided by the applicant. The applicant must further apply for a date for the hearing of the review application within six months of commencing proceedings. The courts are further obliged to deliver judgment within six weeks, unless exceptional circumstances exist.

⁷⁹ S 156(1) of the LRA.

⁸⁰ S 156(3) of the LRA.

⁸¹ S 77(3) of the BCEA.

- employment and labour relations;
- any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as employer; and
- the application of any law for the administration of which the Minister is responsible.⁸²

The problem with this provision is that it creates a scenario where the LC and the High Court will have concurrent jurisdiction in almost all labour disputes. This is due to the fact that section 23(1) of the 1996 Constitution guarantees everyone's right to fair labour practices, which covers most, if not all, matters regulated by labour legislation such as the LRA.⁸³ Van Eck and Mathiba⁸⁴ question why the LC was given exclusive jurisdiction in the first place and states that this has only led to a decade of uncertainty and wasted legal costs.⁸⁵

The issue regarding the overlapping of jurisdiction has been severely criticized by Zondo JP on the grounds that "it creates uncertainty [if] various courts have different jurisdictions and powers in relations to virtually the same dispute".⁸⁶ The labour forums were established for specific reasons, which include that labour disputes should be finalized expeditiously, that employees cannot afford high legal costs and the fact that specialized dispute resolution institutions, clothed with exclusive jurisdiction, are more likely to develop uniform and coherent labour law principles.⁸⁷

Considering the above reasons, the necessity of legislation making provision for the LC and the High Court to have concurrent jurisdiction needs to be questioned. The main problem with the fact that the High Court has jurisdiction in employment and labour disputes is that it undermines and defeats the objective of the LRA and the Act as a whole.⁸⁸ Section 1(d)(iv) of the LRA clearly states that the main purpose of the LRA is the promotion of effective resolution of labour disputes.

⁸² S 157(2) of the LRA.

⁸³ Van Eck & Mathiba (2014) *ILJ* 867.

⁸⁴ *Ibid.*

⁸⁵ *Idem* 864.

⁸⁶ *Langeveld v Vryburg Transitional Local Council & Others* [2001] 5 BLLR 501 (LAC) para 64.

⁸⁷ *Chirwa v Transnet Ltd* [2006] 2 BLLR 97 (CC).

⁸⁸ *Idem* para 65.

This overlapping of jurisdiction has led to the unacceptable practice of forum shopping in that employees can rely on their common law contractual rights or their statutory labour rights when their services are terminated.⁸⁹ The Supreme Court of Appeal (hereinafter the “SCA”) in *South African Maritime Safety Authority v McKenzie*⁹⁰ has however finally intervened and held that where employees claim that their dismissals are unfair or that they have been subject to an unfair labour practice, the LRA establishes the mechanism for resolving disputes arising from that claim. The Court further held that because the matter is comprehensively dealt with in the LRA, it is unnecessary to imply a term into contract of employment of employees dealing with the same subject matter and overlapping with the statutory scheme of remedies. Employees should refrain from approaching the civil courts in employment disputes which are specifically earmarked for determination by labour legislation.

D. THE LABOUR APPEAL COURT

1. Introduction

The LAC was established as “a court of law and equity”⁹¹ and is the final court of appeal in respect of all judgments and orders made by the LC.⁹² Access to the LAC is only obtained with the leave of the judge who made the order or delivered the judgement against which appeal is sought, or with leave of the LAC.⁹³ Leave to appeal shall only be granted if there is a reasonable prospect that another court may come to a different decision.⁹⁴ The LAC is constituted before three judges whom are designated by the Judge President⁹⁵ and no judge of the LAC may sit in the hearing of an appeal against a judgment or an order given in a case that was heard before that judge.⁹⁶

⁸⁹ See *Fedlife Assurance Ltd v Wolfaard* (2001) 22 ILJ 2407 (SCA); *Old Mutual Life Assurance Co SA Ltd v Gumbi* [2007] 8 BLLR 699 (SCA); *Boxer Superstores Mthatha v Mbenya* [2007] 8 BLLR 693 (SCA).

⁹⁰ *South African Maritime Safety Authority v McKenzie* (2010) 31 ILJ 529 (SCA).

⁹¹ S 167(1) of the LRA.

⁹² S 167(2) of the LRA.

⁹³ S 166(1) & (2) of the LRA; *Grogan* (2001) 314.

⁹⁴ *Du Toit et al* (2006) 174.

⁹⁵ S 168(2) of the LRA.

⁹⁶ S 168(3) of the LRA.

2. Jurisdiction of the Labour Appeal Court

The LAC has, subject to the Constitution, jurisdiction to hear and determine all appeals against the final judgments and the final orders of the LC and to decide questions of law reserved for it in terms of section 158(4) of the LRA.⁹⁷ The LRA further states that, subject to the Constitution, no appeal lies against any decision by the LAC in respect of matters within its jurisdiction.⁹⁸

It is submitted that the drafters of the LRA failed to take into account the hierarchy of courts as intended by the Constitution when considering the status of the LAC.⁹⁹ The Constitution provided that the SCA is the “highest court of appeal except in constitutional matters”.¹⁰⁰ This resulted in appeals being lodged against decisions of the LC to the SCA, even though it was the intention of the LRA that the LAC should be the court of final appeal in respect of appeals from the LC.¹⁰¹

The Constitution Seventeenth Amendment Act, 2012 (hereinafter the “CSAA, 2012”)¹⁰² has now intervened and restored the status of the LAC as the court of final appeal in respect of appeals from the LC. The amended section 168(3) of the 1996 Constitution now states that:

“The Supreme Court of Appeal may decide appeals in any matter arising from the High Court of South Africa or a court of status similar to the High Court of South Africa, except in respect of labour or competition matters to such extent as may be determined by an Act of Parliament.”

The effect of this provision is that the CC is now the only court with a higher status than the LAC. This will also lead to disputes being resolved more quickly and cost-effective as litigants can no longer approach the SCA in labour disputes. I agree with Van Eck & Mathiba¹⁰³ who state that, even though the CSAA, 2012 is a positive development, it is disappointing that the legislature has left the original status of the LC with its concurrent jurisdiction with the High Court in constitutional matters intact.

⁹⁷ S 173(1) & (2) of the LRA.

⁹⁸ S 166(4) of the LRA; Du Toit et al (2006) 174.

⁹⁹ Van Eck & Mathiba (2014) *ILJ* 863.

¹⁰⁰ S 168(3) of the 1996 Constitution.

¹⁰¹ Van Eck & Mathiba (2014) *ILJ* 863 – 864.

¹⁰² Assented to in *Gazette* 36128 on 1 February 2013.

¹⁰³ Van Eck & Mathiba (2014) *ILJ* 877.

E. CONCLUSION

The LRA established the CCMA, Bargaining Councils, the LC and the LAC in order to effectively resolve labour disputes in South Africa. It has been held that an effective dispute resolution system is one that is properly structured and functioning, and resolves disputes quickly and finally.¹⁰⁴ The CCMA is undoubtedly the most successful labour dispute resolution system in South Africa as it provides an unmatched level of access to cheap and quick dispute resolution to employees.¹⁰⁵

The LC does not have any power to entertain an appeal of an arbitration award but was instead provided with the power to review such awards. This is in order to ensure the speedy and cost effective resolution of labour disputes.

There is, however, uncertainty on precisely what the test for review of CCMA awards entails and this leads to a large number of review applications being launched to the LC which undermines the principle of effective labour dispute resolution.¹⁰⁶ Therefore, in the following chapter, various court judgements will be analysed in order to determine whether there is clarity on the correct test for review. The chapter will start with a discussion of the forerunner to “reasonableness”, as defined by *Sidumo*, namely “rational justifiability” and the judgement of *Carephone*.

¹⁰⁴ Steenkamp & Bosch (2012) *Acta Juridica* 121; *Pep Stores (Pty) Ltd v Laka NO & Others* (1998) 19 *ILJ* 1534 (LC).

¹⁰⁵ Benjamin (2014) *ILJ* 22.

¹⁰⁶ As contemplated by s 1(d)(iv) of the LRA.

CHAPTER 3

THE REVIEW OF ARBITRATION AWARDS: BEFORE *SIDUMO*

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A. INTRODUCTION

Section 145(1) of the LRA provides that any party to a dispute who alleges that a defect exists in any arbitration proceedings, may apply to the LC for an order setting aside the arbitration award. Section 145(2) further provides that a defect means:

- “(a) that the commissioner-
- (i) committed misconduct in relation to the duties of the commissioner as an arbitrator;¹⁰⁷
 - (ii) committed a gross irregularity in the conduct of the arbitration proceedings;¹⁰⁸ or
 - (iii) exceeded the commissioner’s power;¹⁰⁹ or
- (b) that the award has been improperly obtained”.¹¹⁰

Section 39(2) of the 1996 Constitution *inter alia* determines that courts must promote the spirit, purport and objectives of the Bill of Rights when interpreting any

¹⁰⁷ For example, if a commissioner was biased and not impartial. See *Reunert Industries v Naiker* (1997) ILJ 1393 (LC); *Venture Holdings Ltd t/a Williams Hunt Delta v Biyana* (1998) ILJ 1266 (LC). The Code of Conduct for CCMA commissioners provides that commissioners must “disclose any interest or relationship likely to affect their impartiality or which might create a perception of partiality” [item 4].

¹⁰⁸ For example, if a commissioner grants legal representation inappropriately. See *Ndlovu v CCMA Commissioner Mullins* [1999] 3 BLLR 231 (LC).

¹⁰⁹ For example, if a commissioner determine issues which are not in dispute. See *Northern Transvaal Motors v Phatudi NO* J61/98 (unreported) (LC).

¹¹⁰ This relates to the misconduct of a party to the dispute and not the commissioner. For example a party resorting in bribery or fraud to obtain an award. See *Moloi v Euijen NO* (1997) ILJ 1372 (LC).

legislation. This is also the case when courts have to interpret the LRA, and more specifically, section 145 of the LRA.

The courts have on several occasions been confronted by whether section 145 of the LRA can be interpreted in line with the 1996 Constitution as required by section 39(2) of the 1996 Constitution. This is mainly due to the fact that section 33 of the 1996 Constitution¹¹¹ provides for a much broader test for review as opposed to section 145 of the LRA. It has subsequently been argued that section 145 of the LRA is unconstitutional. In this chapter, the most significant court cases will be discussed and in particular how these courts have developed the test for review in accordance with the Constitution.

B. *Carephone (Pty) Ltd v Marcus NO*

In *Carephone*, the Court had to decide whether an arbitration award in which a commissioner refused to grant a number of postponements, was reviewable. Prior to *Carephone*, arbitration awards were subject to review on the procedural grounds provided for in section 145 of the LRA only.¹¹²

The LC dismissed the review application based on its opinion that there were no proper grounds for review under section 145 of the LRA and that the LC does not have the power to review the award in terms of section 158(1)(g) of the LRA.

Section 158(1)(g) of the LRA states the following:

“(1) The Labour Court may-
(g) subject to section 145, review the performance or purported performance of any function provided for in this Act on the grounds that are permissible in law;”

Even though the review application in the LC was brought in terms of section 145 of the LRA, it was argued that the Court should give consideration to the wide grounds

¹¹¹ S 33(1) of the 1996 Constitution confers to everyone the right to administrative action that is lawful, reasonable and procedurally fair. Also see Currie & de Waal (2005) 641 – 682 on a discussion regarding “just administrative action”.

¹¹² Fergus & Rycroft (2012) *Acta Juridica* 176.

as contained in section 158(1)(g) of the LRA.¹¹³ The basis for this argument was that the grounds in section 145 of the LRA are narrower than those provided for by section 24 of the 1993 Constitution¹¹⁴ and therefore section 158(1)(g) of the LRA, which provides for review on “any grounds permissible by law” should rather be considered.¹¹⁵ It was therefore argued that section 145 of the LRA, which provides for specified, limited grounds for review, violates the 1993 Constitution.¹¹⁶ However, Mlambo J held the view that arbitration awards can only be governed by section 145 and not by section 158(1)(g) of the LRA.¹¹⁷

The debate regarding the correct test for review was further scrutinised by the LAC which had to address the issue whether the broader grounds of review as provided for in section 158(1)(g) had the effect of nullifying the narrower grounds of review in terms of section 145(2) of the LRA.¹¹⁸ The Court noted that the phrase “despite section 145” as used in section 158(1)(g) was problematic and that there is a perception that section 145 provides for a more limited type of review than is required by the 1993 Constitution.¹¹⁹ The Court concluded that section 158(1)(g) of the LRA is not applicable to arbitration awards and shall only be relevant in cases that is not covered by section 145 or 158(1)(h) of the LRA.¹²⁰ The Court further held that section 145 of the LRA was not unconstitutional and therefore it must be interpreted in accordance with the 1993 Constitution.

In determining whether section 145 is unconstitutional, the Court first had to determine whether section 24 of the 1993 Constitution is applicable in the issuing of an arbitration award. Once this was established, the Court had to determine whether section 145 of the LRA is in conflict with section 24 of the 1993 Constitution.

¹¹³ Review in terms of s 158(1)(g) of the LRA is applicable to all decisions and rulings of the CCMA other than arbitration awards, such as condonation applications.

¹¹⁴ S 24(d) of the 1993 Constitution determined that administrative action should be justifiable in relation to the reasons given for it.

¹¹⁵ *Whitewar-Nel* (1999) *ILJ* 1484.

¹¹⁶ *Ibid.*

¹¹⁷ Before *Carephone* the Labour Courts gave conflicting judgments regarding this issue. See, for example *Edgars Stores (Pty) Ltd v Director, CCMA* [1998] 1 BLLR 34 (LC); *Kynoch Feeds (Pty) Ltd v CCMA* (1998) 19 *ILJ* 836 (LC); *Ntshangane v Speciality Metals CC* [1998] 3 BLLR 305 (LC).

¹¹⁸ *Botma & Van der Walt (Part 1)* (2009) *Obiter* 342.

¹¹⁹ *Mischke* (1998) *CLL* 17.

¹²⁰ *Sharpe* (2000) *ILJ* 2163.

The LAC held that the CCMA is a public organ which is created by statute and stated that when it conducts compulsory arbitration in terms of the LRA, it involves the exercise of a public power and function.¹²¹ The Court therefore held that the CCMA is an organ of state¹²² which, in terms of section 4 of the 1993 Constitution, is bound by the Bill of Rights and subsequently section 24 of the 1993 Constitution which provides for just administrative action.¹²³ The Court further correctly found that the judicial nature of an arbitration award does not necessarily imply that it cannot be classified as administrative action.¹²⁴ Administrative action can take many forms which include actions that are judicial in nature. The Court subsequently held that the issuing of an arbitration award constituted administrative action as contemplated by section 24 of the 1993 Constitution.

The Court therefore found that the 1993 Constitution requires that arbitration under the LRA must be procedurally fair and equitable, the arbitrator must be impartial and unbiased, the proceedings must be lawful, the reasons for the award must be given publicly and in writing, the award must be justifiable in terms of those reasons and that the award must be consistent with the fundamental right to fair labour practices.¹²⁵ Failure to comply with these standards constitutes an excess of powers by the commissioner concerned.¹²⁶

The LAC concluded that section 145 of the LRA is not in conflict with the 1993 Constitution and that the review of CCMA awards must be brought in terms of section 145 and not 158(1)(g) of the LRA. The LAC dismissed the argument that the grounds of review under section 145 of the LRA were so limited that it did not comply with the Constitutional demands. In making its decision the Court interpreted the wording of section 158(1)(g) and stated:¹²⁷

¹²¹ At para 11.

¹²² Van Jaarsveld & Van Eck (2005) 382. S 239 of the 1996 Constitution defines an “organ of state” to include “any other functionary or institution – (ii) exercising power or performing a public function in terms of any legislation.”

¹²³ Van Niekerk et al 2012 446. Also see *Kynoch Feeds (Pty) Ltd v CCMA & Others* (1998) 19 ILJ 836 (LC); *Standard Bank of South Africa Ltd v CCMA & Others* [1998] 6 BLLR 622 (LC).

¹²⁴ At para 19; *Whitear-Nel* (1999) ILJ 1485.

¹²⁵ At para 20.

¹²⁶ In accordance with s 145(2)(a)(iii) of the LRA.

¹²⁷ At para 28.

“It is necessary to attempt to interpret s 145 in a manner which is consistent with the Constitution.... It is capable of such an interpretation. If the result means that the word “despite” in s 158(1)(g) should be read as “subject to”, then so be it. It is a lesser evil than ignoring the whole of s 145, including its sensible provisions relating to time limits.”

Section 158(1)(g) was subsequently amended by replacing “despite” with “subject to” and it is now widely accepted that review proceedings of arbitration awards must be initiated in terms of section 145 of the LRA.¹²⁸ Whitear-Nel¹²⁹ makes the sound argument that the inclusion of the words “despite section 145” in section 158(1)(g) of the LRA was extremely confusing and the Court’s interpretation thereof was evidence of a judge having to stretch the ordinary meaning of words to make sense of poor legal drafting.

As the making of an arbitration awards constitutes administrative action, a commissioner is subject to section 24 of the 1993 Constitution which requires fair administrative action. Fair administrative action is not limited to elements of procedural fairness only, but also contains elements of “rationality” or “justifiability”.¹³⁰ It is for this reason that the Court found that a decision by a commissioner must be “justifiable in relation to the reason given for it.” Or, put differently, 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 (hereinafter the “justifiability”-test)?¹³¹ It thus provides for a very wide test of review.

The Court further stated that, in applying this test, value judgements will have to be made which will inevitably involve a consideration of the merits of the matter.¹³² At first glance it seems that this approach will move the courts dangerously close to the appeal process.¹³³ The Court, however, justified this by stating that:¹³⁴

“As long as the judge determining the issue is aware that he or she enters the merits not in order to substitute his or her opinion on the correctness thereof,

¹²⁸ Botma and Van Der Walt (Part 1)(2009) *Obiter* 342.

¹²⁹ Whitear-Nel (1999) *ILJ* 1485.

¹³⁰ Le Roux (2001) *CLL* 118.

¹³¹ At para 37.

¹³² At para 36.

¹³³ Du Toit et al (2006) 168.

¹³⁴ *Ibid.*

but to determine whether the outcome is rationally justifiable, the [review] process will be in order.”

The ordinary meaning of the word “justifiability” does not equate to an appeal which entails that the outcome must be just, justified or correct.¹³⁵ This view is in accordance with decisions of the High Courts which indicate that the “essence of justifiability is that the decision must be capable of objective substantiation”.¹³⁶ Du Toit et al¹³⁷ however argue that it is difficult to conceive of a ground of appeal which, in principle, could not also be brought under the scope of review and states that the distinction appears to be one of degree.

The result of *Carephone* remains, however, that the court will not only review the procedural correctness of the CCMA award, but will also consider the merits of the matter in order to determine if the reasons given for the decision are rationally justifiable.¹³⁸ As a result, arbitration awards could now be reviewed on procedural, as well as substantive grounds.¹³⁹

C. CAREPHONE REVISITED

1. Introduction

The *Carephone*-case was the first important step in the development of the test for review. However, the confusion regarding the test was far from resolved. The “justifiability”-test had only been applied for two years, when the LAC in *Toyota South Africa Motors Pty (Ltd) v Radebe*¹⁴⁰ casted serious doubt on whether arbitration awards can be reviewed only on the basis that they are not “justifiable”.¹⁴¹

¹³⁵ At para 32. See, for example *City Lodge Hotels Ltd v Gildenhuis NO* (1999) 20 ILJ 2332 (LC) where the Court refrained itself from entering into the merits of the case and dismissed the review application brought by the employer, even though the Court admitted that there were factors pointing towards the employee’s guilt.

¹³⁶ *Whitear-Nel* (1999) ILJ 1486; *Shoprite Checkers (Pty) Ltd v CCMA & Others* (1998) 19 ILJ 892 (LC).

¹³⁷ Du Toit et al (2006) 169.

¹³⁸ Van Jaarsveld & Van Eck (2005) 382; Van Niekerk et al (2012) 446.

¹³⁹ Fergus & Rycroft (2012) *Acta Juridica* 177.

¹⁴⁰ *Toyota South Africa Motors Pty (Ltd) v Radebe & Others* [2000] 3 BLLR 243 (LAC).

¹⁴¹ Grogan (2000) *ELJ* 10.

2. *Toyota South Africa Motors Pty (Ltd) v Radebe*

In *Radebe*, the LAC *inter alia* had to consider the implication and applicability of the “justifiability”-test as laid down by *Carephone*. Nicholson JA expressed his doubt over the correctness of the *Carephone* decision and provided three reasons for his misgivings:

Firstly, the judge felt that the “justifiability”-test violates the distinction between appeals and reviews.¹⁴² The judge was of the opinion that an attack on an award on the basis that it is not justifiable with regard to the reasons given amounts, to all intents and purposes, to an appeal.¹⁴³ The judge felt that the broadness of the “justifiability”-test shall have the effect that a matter can be reviewed based on a misdirection of fact, which in effect amounts to an appeal. The word “gross” preceding the word “irregularity” in section 145 indicates that the legislature is undoubtedly intending something more than a mistake of fact and law.

Whitear-Nel¹⁴⁴ confirms this and states that it is unavoidable for a court to determine the appropriateness of an award, without considering the merits of that award as an appeal hearing. He proposes that the legislature should intervene to provide for a mechanism for appeal against arbitration awards. I agree with this and am of the opinion that an appeal process might as well be implemented considering the fact that review applications generally takes years before it is heard by the LC. This is not in line with the purpose for which a review process, instead of an appeal process, was introduced in the LRA.

Sharpe¹⁴⁵ notes that, in general, courts tend to be able to make the distinction between an appeal and review in review applications. It is only in the misinterpretation cases where the award, wrong or right, is set aside because of the court’s misapplication of the standard, where the judges do not seem to properly distinguish between appeal and review.¹⁴⁶

¹⁴² At para 33.

¹⁴³ At para 34.

¹⁴⁴ Whitear-Nel (1999) *ILJ* 1488.

¹⁴⁵ Sharpe (2000) *ILJ* 2165 – 2167.

¹⁴⁶ *Idem* 2168.

Secondly, Nicholson JA viewed the “justifiability”-test as an independent ground of review upon which an award can be attacked. It therefore does not form part of section 145 of the LRA which provides for a limited amount of grounds only. Thirdly, the Court indicated that the “justifiability”-test was only made *obiter* in *Carephone* and therefore is not binding in law.

It is thus clear that Nicholson JA felt that arbitration awards may only be reviewed on the grounds as set out in section 145 of the LRA and as such there is no room for the “justifiability”-test as laid down in *Carephone*.

Garbers¹⁴⁷ is of the view that every argument provided by Nicholson JA can be challenged as to its understanding of section 145 of the LRA, the Constitution and what happened in *Carephone*. To substantiate this he indicates some certain truths about the CCMA, section 145 of the LRA and some fundamental weaknesses in the judgement, namely:¹⁴⁸

- There is no dispute that the CCMA is an administrative tribunal and therefore bound by the Constitution;
- The CCMA is a creature of nature and may only perform duties imposed by the LRA.¹⁴⁹ This means that although the CCMA is afforded the discretion to make decisions regarding its jurisdiction and powers, the exercise of that discretion is subject to review based on the ground of “excess of powers”;
- Section 39 of the Constitution specifically instructs the courts to take the Constitution into consideration when interpreting legislation such as the LRA. In interpreting legislation, courts must further give meaning to a statutory provision in a way that accords with the Constitution, before it finds an infringement on basic rights. *Carephone* applied these principles by stating that it is possible to give an interpretation of section 145 of the LRA which accords with the Constitution;

¹⁴⁷ Garbers (2000) *CLL* 85.

¹⁴⁸ *Ibid.*

¹⁴⁹ S 115(4) of the LRA.

- The Court in *Carephone* therefore never developed an independent ground for review into section 145 of the LRA. The Court simply recognised that the CCMA is a creature of nature and must therefore perform its duties in accordance with the Constitution;
- If the application of the broad right to fair administrative action, as provided by the Constitution, brings about a blur between appeals and reviews, then so be it. It is not the responsibility of the LAC to ignore the Constitution in order to pursue the intention of the legislature;
- Section 145 of the LRA determines that only irregularities have to be gross before they constitute a reviewable defect. “Excess of power” as a ground does not have to be gross;¹⁵⁰
- It would be wrong to suggest that the principles regarding the justifiability-test in *Carephone* were only made *obiter*. The Court in *Carephone* interpreted section 145 of the LRA in a certain fashion and the Court came to its conclusion using that interpretation. It must therefore be binding, unless palpably wrong;
- Even though the judges in *Radebe* attacked *Carephone* on the basis of blurring the distinction between appeal and review, they themselves never indicated what the difference was. In fact, it seems that Zondo AJP regarded appeal and review as the same thing when he stated that “[a] court of appeal or a review court will not lightly overturn a finding of fact made by a trier of fact who has the benefit of hearing and seeing witnesses in the witness box except in defined cases”.

However, *Carephone* did fail to adequately address the relationship between section 145(2) of the LRA as a whole, the justifiability requirement and the degree on which they were interdependent. The Court did not hold that the constitutional imperatives established independent grounds for review in addition to those that are provided for

¹⁵⁰ The Court in *Carephone* based its decision on the “excess of power” ground of review and not the ground of “gross irregularity”.

in section 145(2) of the LRA and it is unsure whether this was the intention of the Court.¹⁵¹ It can, however, be deducted from the following held by the Court:¹⁵²

“Accordingly, the only bases for review are (1), that the facts amount to misconduct or gross irregularity or impropriety under section 145(2)(a)(i) to (ii) and section 145(2)(b) of the LRA, **or (2), that his actions are not justifiable in terms of the reasons given for them and that he has accordingly exceeded his constitutionally constrained powers under section 145(2)(a)(iii) of the Act.**” (my emphasis)

The Court in *Carephone* thus extended the grounds of review in terms of section 145 to the effect that an award would be reviewable in terms of section 145(2)(a)(iii) if the award is not justifiable in terms of the reasons given. It is disappointing that the Court failed to indicate if this test also applies to section 145(2)(a)(i) and section 145(2)(a)(ii) of the LRA.

Fergus¹⁵³ states that *Carephone*'s location of the justifiability enquiry within “excess of powers” was unfortunate. According to her, section 33 of the Constitution establishes a right to just administrative action and not necessarily a corresponding power. She states that if it did, then it would result in an extraordinarily generous construction of “excess of powers” which would allow undue judicial interference with CCMA awards. It would mean that a commissioner is exceeding its powers when it reaches conclusions that are not reasonable. She proposes that section 33 of the Constitution should rather establish a check on the exercise of commissioners' powers than imposing a power on commissioners to act reasonably. It is my submission that *Carephone* should not be interpreted as imposing a power on commissioners to act reasonably and that it is not *Carephone*'s intention that a matter is reviewable only based on the fact that the commissioner exceeded his powers. It is only reviewable if the commissioner's conduct of exceeding his or her powers results in the award not being justifiable in terms of the reasons given for it.

Fergus¹⁵⁴ further criticizes *Carephone* in stating that interpreting section 33 of the Constitution in this way, would threaten the separation of powers between the legislature and judiciary. She argues that should the power of CCMA commissioners

¹⁵¹ Botma & Van der Walt (Part 1)(2009) *Obiter* 343.

¹⁵² At Para 53.

¹⁵³ Fergus PhD Thesis (2013) 63.

¹⁵⁴ *Idem* 64.

to resolve labour disputes be subject to the requirement that the disputes must be resolved reasonably in every instance, failures by commissioners to reach reasonable conclusions would deprive them of the right to have exercised that power in the first place.

The Court in *Country Fair Foods (Pty) Ltd v CCMA*¹⁵⁵ however confirmed that a commissioner would be exceeding its powers if his award is not justifiable in relation to the reasons given. The Court went further and held that this could also amount to misconduct in terms of section 145(2)(a)(i) or a procedural irregularity in terms of section 145(2)(a)(ii):¹⁵⁶

“In appropriate circumstances infractions of those imperatives may constitute the commission by the commissioner of a gross irregularity in the conduct of the arbitration proceedings as envisaged in section 145(2)(a)(ii) (or, for that matter, misconduct in relation to his or her duties as arbitrator as envisaged in section 145(2)(a)(i).”

Country Fair Foods thus answered the question whether the “justifiability”-test also applies to the other grounds of review provided for in the LRA, which *Carephone* neglected to address.

It is submitted that *Carephone* is a good and well-constructed judgment and correctly supported by the Court in *Country Fair Foods*. Even though it can be criticised in some aspects as stated by Fergus above, it provided a significant step in the development of the correct test for review. I agree with Garbers when he states that *Carephone* did not introduce a new ground for review, but simply reminded us of the overriding importance of the Constitution and the effect the Constitution has on the interpretation of legislation such as the LRA.¹⁵⁷ This approach is also in line with the generally accepted principle that litigants cannot bypass ordinary legislation and rely directly on a constitutional provision in the absence of a constitutional challenge to that legislation.¹⁵⁸ It is clear that “justifiability” is only derived from the Constitution and it does not amount to an independent ground for review. In describing the distinction between appeal and review, *Carephone* also shed some light on the

¹⁵⁵ *Country Fair Foods (Pty) Ltd v CCMA* [1999] 11 BLLR 1117 (LAC).

¹⁵⁶ At Para 8.

¹⁵⁷ Garbers (2000) *CLL* 82.

¹⁵⁸ Botma & Van der Walt (Part 1)(2009) *Obiter* 345.

purpose and nature of review proceedings. The Court further finally answered the question whether CCMA awards can be reviewed in terms of section 158(1)(g) of the LRA.

2. *Shoprite Checkers (Pty) Ltd v Ramdaw NO*

In *Ramdaw*, the LAC was required to address the correctness of *Carephone* and confirmed that the “justifiability”-test for review as laid down in *Carephone* was the appropriate test. In reaching its conclusion, the Court had the task to determine whether an award was rather reviewable based on “rationality” as opposed to “justifiability”. This was due to the CC’s decision in *Pharmaceutical Manufacturers Association of SA; in re: Ex parte application of the President of the RSA & Another*¹⁵⁹ where the Court held that public power must be exercised rationally.

The LAC did not answer the question whether CCMA awards constitute administrative action, even though this was the primary question before it as this was an appeal against the LC’s decision that the issuing of an arbitration award did not constitute an administrative action. The LAC instead confirmed that the CCMA is exercising public power when conducting compulsory arbitrations and that this power must be exercised rationally. If it is irrational, it can be set aside by the court.¹⁶⁰ It would therefore be immaterial to consider the administrative nature of CCMA awards, if “rationality” and “justifiability” bore the same meaning. Zondo JP stipulated that if this was the case, then there seems to be no reason to tamper with the decision of this Court in *Carephone* because the rationality ground of review emanating from the decision of the CC in *Pharmaceutical Manufacturers* would then be already accommodated in *Carephone*. If, however, the two terms do not bear the same meaning, then a need might exist to consider whether *Carephone* was correctly decided and whether it should be departed from.¹⁶¹ Zondo JP then held that:¹⁶²

¹⁵⁹ *Pharmaceutical Manufacturers Association of SA; in re: Ex parte application of the President of the RSA & Another* (2000) 2 SA 674 (CC).

¹⁶⁰ At Para 21.

¹⁶¹ *Ibid.*

¹⁶² At Para 25.

“In light of this I am of the view that, although the terms ‘justifiably’ and ‘rational’ may not, strictly speaking, be synonymous, they bear a sufficiently similar meaning to justify the conclusion that rationality can be said to be accommodated within the concept of justifiability as used in *Carephone*. In this regard I am satisfied that a decision that is justifiable cannot be said to be irrational and a decision that is irrational cannot be said to be justifiable.”

The Court subsequently confirmed that, because the making of CCMA awards constitutes the exercise of public power, the constitutional requirement of “rationally” becomes a ground for review.¹⁶³

Botma & van der Walt¹⁶⁴ are of the opinion that this is in conflict with *Carephone* and states that the Court seemed to have adopted “rationality” as a ground for review that is severable from the grounds specifically provided for in section 145. This is confirmed by Fergus¹⁶⁵ who states that it is regrettable that the Court did not acknowledge the distinction between “justifiability” and “rationality”. She states that the Court’s oblique references to trivial discrepancies between “justifiability” and “rationality” did not assist in refining the meaning of the *Carephone* standard. Fergus and Rycroft¹⁶⁶ further argue that the LAC failed to emphasise that it was the connections made by commissioners between their reasons and their awards, and their reasons and the evidence before them, which were required to be rational or justifiable. The implication of this is that the distinction between appeal and review is obscured as there is uncertainty whether outcome rather than reasoning process forms the basis of such review.

Wesley¹⁶⁷ states that, notwithstanding the ambiguities in the judgement, the right outcome has been reached. He states that if CCMA awards constitute administrative action, either in terms of section 33 of the Constitution or the Promotion of Administrative Justice Act 3 of 2000 (hereinafter the “PAJA”), then review on the basis of rationality is available. This is due to the fact that the PAJA provides that administrative action may be reviewed *inter alia* because a decision is not rationally

¹⁶³ At Para 26.

¹⁶⁴ Botma & Van der Walt (Part 1)(2009) *Obiter* 346.

¹⁶⁵ Fergus PhD Thesis (2013) 79.

¹⁶⁶ Fergus & Rycroft (2012) *Acta Juridica* 178 - 179.

¹⁶⁷ Wesley (2001) *ILJ* 1520.

connected to the information before the decision-maker or the reason given for it by the decision-maker.¹⁶⁸

D. CONCLUSION

In this Chapter, it has been established that the courts regard the CCMA as an organ of state and as such are bound by the administrative justice provision of the Constitution. The effect of this is that the making of an arbitration award is regarded as an administrative action. The Court in *Carephone* further established that section 145 of the LRA is not in conflict with the Constitution and therefore the grounds of review as provided for in section 145(2) has to comply with the constitutional standard of rational justifiability. The Court in *Carephone* thus extended the grounds of review in terms of section 145 to the effect that an award would be reviewable if the award is not justifiable in terms of the reasons given.

The *Carephone*-judgment was the first meaningful step in developing the correct test for review. Unfortunately, in doing so, it simultaneously provided confusion and courts gave different interpretations of rational justifiability. This was exactly what happened in *Ramdaw* where the Court concluded that the exercise of public power must be “rationally related” to the purpose for which the power was given. The Court however upheld the “justifiability”-test as held by *Carephone* by stating that the terms “justifiable” and “rational” are sufficiently similar.

It is evident that the courts have adopted different approaches in dealing with the relationship between section 145 of the LRA and the constitutional standards that apply to them. After the *Ramdaw* decision, the time was ripe for a judgement that would provide some certainty on exactly what the correct test for review is. In the following chapter, the CC’s decision in *Sidumo* will be analysed and a determination will be made whether it finally provided some clarity on the test for review.

¹⁶⁸ *Idem* 1517. It should be noted that the PAJA was assented to in February 2000 and commenced on 30 November 2000. The PAJA was therefore not applicable when the decisions of *Carephone* and *Ramdaw* were made.

CHAPTER 4

THE REVIEW OF ARBITRATION AWARDS: *SIDUMO* AND BEYOND

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A. INTRODUCTION

In the previous chapter it was shown that the case of *Carephone* was decided under the 1993 Interim Constitution, which provided that administrative action should be justifiable in relation to the reasons given for it.¹⁶⁹ The Court therefore concluded that the test for review was whether the decision of the commissioner is justifiable in relation to the reason given for it. The wording of the justifiability clause has, however, been changed by the 1996 Constitution and states that administrative action should be lawful, reasonable and procedurally fair.¹⁷⁰

The question that arises is whether the principles of review as captured by *Carephone* still apply and whether the change in wording is essential in the way that

¹⁶⁹ S 24(d) of the 1993 Constitution.

¹⁷⁰ S 33(1) of the 1996 Constitution.

section 145 of the LRA must be interpreted. In this chapter, the CC's decision in *Sidumo* will be analysed in order to answer this question.

B. SIDUMO V RUSTENBURG PLATINUM MINES CC

1. Introduction

In *Sidumo*, the Court had to decide whether a CCMA commissioner's decision that the dismissal of a security guard was not a fair sanction, was reviewable. In reaching its conclusion that the arbitration award was not reviewable, the Court considered two important questions. Firstly, the Court had to evaluate whether CCMA arbitration awards constitute administrative action and subsequently whether the PAJA would be applicable in the review of arbitration awards. Secondly, the Court had to consider whether section 145 of the LRA was constitutionally compliant. Each of these questions will be dealt with hereunder.

2. The Administrative Nature of CCMA Awards.

As discussed in the previous chapter, the Court in *Carephone* held that the making of arbitration awards constitute administrative action which was also confirmed by the CC in *Sidumo*.¹⁷¹ After *Carephone*, the PAJA was enacted in order to give effect to section 33 of the Constitution.¹⁷² The Court in *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism*¹⁷³ confirmed that the validity of administrative action must be based on the grounds of review laid down in section 6(2) of the PAJA and not directly on section 33 of the Constitution when it stated that:¹⁷⁴

“The cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past. And the authority of PAJA to ground such causes of action rests squarely on the Constitution.”

¹⁷¹ In contrast with the SCA which held that arbitration awards do not amount to administrative action. See Hoexter (2008) *CCR* 213 where it is submitted that, although this finding of the CC is an improvement on the confusion created by the Court in *Minister of Health v New Clicks South Africa (Pty) Ltd* (2006) 2 SA 311 (CC), the judgment is evidence of the intrinsic difficulty of deciding what is and what is not administrative action.

¹⁷² S 33(3) of the 1993 Constitution specifically provides that national legislation must be enacted to give effect to the right to just administrative action and that it must provide for the review of administrative action either by a court or independent and impartial tribunal.

¹⁷³ *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism* (2004) 4 SA 490 (CC).

¹⁷⁴ At para 25.

Taking this into account and the fact that the Court confirmed that the making of arbitration awards constitute administrative action, one would expect that the PAJA must be applicable when reviewing arbitration awards.

However, in finding that the PAJA is not applicable in the reviewing of arbitration awards, the Court in *Sidumo* had regard to the need for expeditious labour dispute resolution as contemplated by the LRA.¹⁷⁵ The Court referred to the purpose of the LRA to “provide a system of labour courts to determine disputes of right in a way that would be accessible, speedy and inexpensive, with only one tier of appeal”.¹⁷⁶ The CC therefore found that section 145 of the LRA, with its limited grounds of review, is more in line with the purpose of the LRA than the broad grounds of review as contained in the PAJA. It was argued by the Court that if the PAJA were to be applied in review applications, then section 6 of the PAJA would not allow for the exclusivity of the LC,¹⁷⁷ thus enabling the High Courts to review arbitration awards.¹⁷⁸ This would lead to an unacceptable practice of forum-shopping by litigants.¹⁷⁹

The Court further stated that section 145 of the LRA constitutes national legislation in respect of administrative action for the purposes of section 33(3) of the 1996 Constitution¹⁸⁰ within the specialised labour law sphere.¹⁸¹ The Court found that nothing in section 33 of the Constitution precludes specialized legislative regulation of administrative action such as section 145 of the LRA alongside general legislation such as the PAJA.¹⁸² The Court therefore found that section 145 of the LRA a specialised provision that trumps the more generalised provisions of the PAJA.¹⁸³

Partington,¹⁸⁴ however, states that it is important to remember that the principle that specialised legislation (such as the LRA) trumps general legislation emanates from English law and is designed to give effect to the intention of the legislature. He therefore argues that the difficulty in applying this principle blindly, in the South

¹⁷⁵ Fergus & Rycroft (2012) *Acta Juridica* 180.

¹⁷⁶ At para 94.

¹⁷⁷ As contemplated by s 157(1) of the LRA.

¹⁷⁸ Partington (2008) *Obiter* 227.

¹⁷⁹ *Ibid.*

¹⁸⁰ See fn 172.

¹⁸¹ At para 89.

¹⁸² At para 91. Hoexter (2008) *CCR* 212.

¹⁸³ Van Niekerk et al (2012) 447.

¹⁸⁴ Partington (2008) *Obiter* 229.

African context, is that our legislature's intention is always subject to the Constitution, and should always be constitutionally aligned. According to Partington, the Court's approach did not have regard to this fact and in the process ignored that the legislature, in enacting section 145 of the LRA, by no means actually intended to make provision for the right to administrative action as it should have done. Had the legislature done so, the wider grounds of review as contained in section 6 of the PAJA would have been included into section 145 of the LRA.

Although there are some merits in his argument, it is submitted that the Court came to the correct conclusion in deciding that the PAJA is not applicable in the review of arbitration awards. This is because of the fact that one has to take regard to section 210 of the LRA which confirms the applicability of the LRA in the case of a conflict between its provisions and that of any other legislation, save for the Constitution or any other legislation specifically indicated.¹⁸⁵ If the legislature intended for the PAJA to be applicable, it would have amended or repealed section 210 of the LRA with the enactment of the PAJA.¹⁸⁶

3. The Constitutionality of Section 145 of the LRA

After the Court confirmed that the making of arbitration awards is administrative action and that the PAJA is not applicable in review applications, the Court still had to determine what the proper standard of review was under the 1996 Constitution. This was due to the fact that the wording of the just administrative action clause of the Constitution under which *Carephone* was decided has changed prior to *Sidumo* and the 1996 Constitution now required that administrative action should be lawful, reasonable and procedurally fair.¹⁸⁷ In assessing whether section 145 of the LRA is constitutionally compliant, the Court referred to *Carephone* and stated:¹⁸⁸

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

¹⁸⁵ At para 99.

¹⁸⁶ *Ibid.*

¹⁸⁷ S 33(1) of the 1996 Constitution.

¹⁸⁸ At para 106.

As a result, Navsa AJ held that *Carephone* no longer applied and held that to the extent that *Carephone* held that section 145 of the LRA was suffused by the constitutional standard that required that the outcome of an administrative decision must be justifiable in relation to the reasons given for it, the correct approach would be to regard section 145 of the LRA as suffused by a constitutional standard of “reasonableness”.¹⁸⁹ The Court confirmed that the standard of review is the one explained in *Bato Star*, namely whether the decision reached by the commissioner is one that a reasonable decision-maker could not reach?¹⁹⁰ Applying this standard will not only give effect to the constitutional right to fair labour practices, but also the right to administrative action that is lawful, reasonable and procedurally fair.¹⁹¹

C. THE COURTS’ RESPONSE TO *SIDUMO*

1. Introduction

Now that the test for the review of arbitration awards has been determined by the Court in *Sidumo*, the question arises how this standard of reasonableness should be interpreted and applied. After *Sidumo*, the Courts have adopted various views on the correct interpretation of the test for review as laid down by *Sidumo*. What follows is an analysis on how different courts have applied the standard of reasonableness.

2. Reasonableness as Standard or Ground

As indicated earlier, it could be deduced that the Court in *Carephone* applied the “justifiability”-test as a standard of review and not as an independent ground on which an arbitration award could be reviewed. However, after *Sidumo*, the LAC in *Fidelity Cash Management Service v CCMA and Others*¹⁹² casted some doubt as to whether reasonableness must be regarded as a standard or ground of review. From *Fidelity* it could be inferred that a commissioner’s decision could be reviewed on the basis of unreasonableness only which need not be associated with the grounds of review in section 145 of the LRA. This is confirmed when the Court stated that:¹⁹³

“I deal with this issue of unreasonableness of a CCMA arbitration award as a ground of review later in this judgment.”

¹⁸⁹ Para 110. Also, see Van Niekerk et al (2012) 447.

¹⁹⁰ At para 110.

¹⁹¹ *Ibid.*

¹⁹² *Fidelity Cash Management Service v CCMA and Others* [2008] 3 BLLR 197 (LAC).

¹⁹³ At para 92.

The LAC in *Fidelity* therefore applied reasonableness as an independent ground for review which is further evident when the Court held the following:¹⁹⁴

“Nothing said in *Sidumo* means that the CCMA’s arbitration award can no longer be reviewed on the grounds, for example, that the CCMA had no jurisdiction in a matter or any of the other grounds specified in section 145 of the Act. If the CCMA had no jurisdiction in a matter, the question of the reasonableness of its decision would not arise. Also, if the CCMA made a decision that exceeds its powers in the sense that it is *ultra vires* its powers, the reasonableness or otherwise of its decision cannot arise.”

After *Fidelity*, the LC in *Kievits Kroon Country Estate (Pty) Ltd v CCMA and Others*¹⁹⁵ came to a similar conclusion where a review application was instituted on various grounds including gross irregularity, misconduct and the lack of a rationally justifiable connection between the commissioner’s decision and the evidence before him.¹⁹⁶ The Court went further than *Fidelity* and came to the conclusion that reasonableness is the only ground for review when it stated that:¹⁹⁷

“The test in review applications is whether the decision arrived at by the commissioner is one that no other reasonable decision maker would not have arrive at. The applicant has relied on grounds of review that are no longer part of our law.”

The SCA has recently in the matter of *Herholdt v Nedbank Ltd (COSATU as amicus curiae)*¹⁹⁸ also concluded that reasonableness is an independent ground of review when it stated the following:¹⁹⁹

“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.”

I agree with Botma and van der Walt²⁰⁰ who are of the opinion that reasonableness should only apply as a standard of review and state that the only way that it can be introduced as an independent ground of review is if the constitutionality of section

¹⁹⁴ At para 101.

¹⁹⁵ *Kievits Kroon Country Estate (Pty) Ltd v CCMA and Others* [2011] 3 BLLR 241 (LC).

¹⁹⁶ At para 21.

¹⁹⁷ At para 28.

¹⁹⁸ *Herholdt v Nedbank Ltd (COSATU as amicus curiae)* (2013) 34 ILJ 2795 (SCA).

¹⁹⁹ At para 14.

²⁰⁰ Botma & Van der Walt (Part 2) (2009) *Obiter* 541.

145 is challenged. The constitutionality was, however, never challenged in *Sidumo* and therefore the Court could not consider it.

It is submitted that the Court in *Sidumo* relied heavily on *Carephone* and it could therefore also be deduced that *Sidumo* intended that reasonableness should serve as a standard and not as an independent ground of review. The Court in *Sidumo* further consistently described reasonableness as a standard rather than a ground for review. The Court made it clear that it only deviates from *Carephone* to the extent that “justifiability” is now replaced by “reasonableness” when it stated that section 145 of the LRA is now suffused by the constitutional standard of reasonableness.²⁰¹ It is therefore submitted that reasonableness must be regarded as a standard, rather than an independent ground, of review.

3. Standard of Reasonableness Applied

Now that it has been established that reasonableness must be applied as a standard of review, the question arises how this standard should be applied. According to Ray-Howett²⁰² there are two possible approaches, namely the austere or deferent approach and the generous or interventionist approach. What follows is a discussion on each of these approaches and an indication of what approach should be preferred.

3.1 The Austere or Deferent Approach

This approach was best described by the SCA in *Sidumo* who summarised it as follows:²⁰³

“The question on review is not whether the record reveals relevant considerations that are capable of justifying the outcome. That test applies when a court hears an appeal: then 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.”

The Court noted that the LAC in *Sidumo*²⁰⁴ did not apply this test. Instead, it asked whether any considerations existed, which the commissioner had taken into account,

²⁰¹ At para 110. *Ibid.*

²⁰² Ray-Howett (2008) *ILJ* 1620.

²⁰³ *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA & Others* [2006] 11 BLLR 1021 (SCA) at para 30.

that were capable of justifying 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”.²⁰⁵ The Court noted that, in approaching the matter in this manner, the LAC treated the review application as an appeal.

The SCA was therefore of the opinion that the courts should rather focus on the commissioner’s process of reasoning and if the process is sufficiently defective, then the award may be reviewed.²⁰⁶ This is the case notwithstanding the fact that there exists material that was before the commissioner that could ultimately justify the decision, albeit for reasons other than those relied on by him or her.²⁰⁷

Although the CC in *Sidumo* did not expressly confirm the approach of the SCA, it can be deduced that the CC also followed the austere approach when it stated the following:²⁰⁸

“This is one of those cases where decision makers acting reasonably may reach different conclusions. The LRA has given the decision-making power to a commissioner”.

Ray-Howett²⁰⁹ states that, after reading the judgment, it is evident that the CC in *Sidumo* analysed the reasoning process followed by the commissioner. This is based on the CC’s ruling that the commissioner did not act unreasonably primarily on the basis that, while the commissioner’s reasoning process was defective in one or two instances, these defects were not sufficiently serious to warrant a review of the ultimate decision.²¹⁰

3.2 The Generous or Interventionist Approach

In contrast with austere approach, the Court in *Fidelity* interpreted the standard of review as follows:²¹¹

“However, other reasons upon which the commissioner did not rely to support his or her decision or finding but which can render the decision reasonable or

²⁰⁴ *Rustenburg Platinum Mines Ltd v CCMA & Others* [2004] 1 BLLR 34 (LAC).

²⁰⁵ *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA & Others* [2006] 11 BLLR 1021 (SCA) at para 30.

²⁰⁶ Ray-Howett (2008) *ILJ* 1620.

²⁰⁷ *Ibid.*

²⁰⁸ At para 119.

²⁰⁹ Ray-Howett (2008) *ILJ* 1620.

²¹⁰ At paras 113 – 119.

²¹¹ At para 102.

unreasonable can be taken into account. This would clearly be the case where the commissioner gives reasons A, B and C in his or her award but, when one looks at the evidence and other material that was legitimately before him or her, one finds that there were reasons D, E and F upon which he did not rely but could have relied which are enough to sustain the decision.”

According to this approach, the focus is not on the way that the commissioner arrived at his decision, but on the relationship between the conclusions and the evidence as a whole.²¹² The courts may therefore rely on evidence or reasons not relied upon by the commissioner to determine whether his findings are reasonable or not.²¹³ The reasonableness enquiry is therefore an objective one.²¹⁴

3.3 Which Approach is to be Preferred?

As stated earlier, the legislature introduced the review process, in contrast with an appeal process, in order to ensure that labour disputes are resolved expeditiously. The danger in following the interventionist approach as adopted in *Fidelity* is that it blurs the distinction between the appeal and review procedure. According to this approach, the courts are compelled to try to find its own reasons to justify the commissioner’s findings and thereby inevitably drawing the court into stepping into the shoes of the commissioner by substituting the commissioner’s reasoning with that of its own.²¹⁵ This for all purposes amounts to an appeal.

It is submitted that the deferent approach, as adopted by *Sidumo*, be preferred. This approach entails that if the erroneous reasons given by the commissioner can be ascribed to a ground of review in terms of section 145 of the LRA, then the award must be reviewable regardless whether or not the decision can be justified by other evidence or material that was before the commissioner. If this approach is followed, it will ensure the distinction between appeal and review. This approach was also confirmed in *Ramdaw* where the Court held the following:²¹⁶

“In my view it is within the contemplation of the dispute resolution system prescribed by the Act that there will be arbitration awards which are unsatisfactory in many respects but which nevertheless must be allowed to

²¹² Ray-Howett (2008) *ILJ* 1621. Also see *Sidumo* at paras 105 – 110; *Fidelity* at para 102; *Edcon Ltd v Pillemer NO & Others* (2009) 30 *ILJ* 2642 (SCA) at para 16.

²¹³ *Idid*.

²¹⁴ Fergus PhD Thesis (2013) 156.

²¹⁵ Ray-Howett (2008) *ILJ* 1631.

²¹⁶ *Ramdaw* at para 101.

stand because they are not so unsatisfactory as to fall foul of the applicable grounds of review”.

The Court noted that without such contemplation, the LRA’s objective of the expeditious resolution of disputes would have no hope of being achieved.²¹⁷

Ray Howett²¹⁸ states that the deferent approach does not mean that any defect in the reasoning process should constitute a reviewable irregularity. He makes a valid point when he argues that it rather encourages the courts to adopt an approach which focuses on the commissioner’s reasoning and, if a material defect in the process exists, then review for want of reasonableness.²¹⁹

Despite the deferent approach being preferred, it seems that the interventionist approach is currently being followed by the courts. It is submitted that the latter approach was recently confirmed by the SCA in *Herholdt*²²⁰ when it held the following:

“The reasons are still considered in order to see how the arbitrator reached the result. That assists the court to determine whether that result can reasonably be reached by that route. If not, however, the court must still consider whether, apart from those reasons, the result is one a reasonable decision-maker could reach in the light of the issues and the evidence.”

Myburgh²²¹ is of the opinion that the Court in *Herholdt* succeeded in holding the line between a review and an appeal by engaging in a holistic analysis of all the evidence before the commissioner in order to determine whether the result of the award is capable of reasonable justification. I, however, disagree with this and submit that the approach used by the Court amounts to the interventionist approach which for all purposes entails an appeal process which is not in line with *Sidumo*.

D. CONCLUSION

The 1996 Constitution brought a change in the wording of the just administrative action clause and it now requires that administrative action should be lawful, reasonable and procedurally fair. *Carephone* was decided during the 1993 Interim

²¹⁷ *Ibid.*

²¹⁸ Ray-Howett (2008) *ILJ* 1634.

²¹⁹ *Ibid.*

²²⁰ *Herholdt v Nedbank Ltd (COSATU as amicus curiae)* (2013) 34 *ILJ* 2795 (SCA).

²²¹ Myburgh (2013) *CLL* 41.

Constitution and it was therefore necessary to determine whether this new wording of the justifiability clause had any impact on the test for review as laid down by *Carephone*.

The CC in *Sidumo* confirmed that, due to the different Constitution under which *Carephone* was decided, *Carephone* could no longer apply. The Court subsequently found that to the extent that *Carephone* held that section 145 of the LRA was suffused by the constitutional standard that required that the outcome of an administrative decision must be justifiable in relation to the reasons given for it, the correct approach would be to regard section 145 of the LRA as suffused by a constitutional standard of “reasonableness”. The Court confirmed that the standard of review is the one explained in *Bato Star*, namely whether the decision reached by the commissioner is one that a reasonable decision-maker could not reach?

The question that needed to be answered was how this standard should be applied. Various courts confirmed that reasonableness should be regarded as an independent ground for review, while others were of the opinion that it should be regarded as a standard of review. It was submitted that the correct approach is to regard reasonableness as a standard that is intertwined with the grounds set out in section 145 of the LRA.

A further difficulty lies in the correct application of the standard of review. This standard can be applied in two ways, namely in terms of the austere or deferent approach or the generous or interventionist approach. It is submitted that the deferent approach is in line with the test for review as defined by the CC in *Sidumo* and that the interventionist approach for all purposes amounts to an appeal process. It is submitted that the Court in *Herholdt* has misinterpreted *Sidumo* when it confirmed that the interventionist approach is the correct test for review. Hopefully there can be another CC judgment in the near future to bring the test for review back to what was truly intended by *Sidumo*.

CHAPTER 5

COMPARATIVE STUDY: AUSTRALIA AND NEW ZEALAND

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A. AUSTRALIA

1. Introduction

The labour dispute resolution forum of Australia is named the Fair Work Commission (hereinafter the “FWC”) and was established by the Fair Work Act, 2009 (hereinafter the “FW Act”). The FWC has a range of functions and powers, including:²²²

- facilitating collective bargaining;
- approving enterprise agreements;
- adjusting minimum wages and award conditions;
- dealing with unfair dismissal claims;
- dealing with industrial action; and
- settling workplace disputes.

Like the CCMA, the FWC was established to provide quick, informal and flexible resolution of labour disputes.²²³ A party may be represented in a matter before the

²²² Explanatory Memorandum to the Fair Work Bill 2008.

²²³ *Ibid.*

FWC by a lawyer or paid agent only with the permission of the FWC.²²⁴ The FWC may grant permission for a person to be represented by a lawyer or paid agent in a matter if:²²⁵

- it would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter; or
- it would be unfair not to allow the person to be represented because the person is unable to represent him- or herself effectively; or
- it would be unfair not to allow the person to be represented taking into account fairness between the person and other parties to the matter.

2. Challenging decisions by the FWC

From the above it is clear that there are various similarities between the CCMA and the FWC. However, the FW Act does not make provision for a review process against awards as is known under the LRA. Instead, appeals must first be lodged to a Full Bench of the FWC itself.²²⁶ The Full Bench must, however, first grant permission to hear the appeal²²⁷ which will only be granted in cases of unfair dismissal disputes where it is in the public interest to allow an appeal.²²⁸

Where the original decision involved the exercise of a significant level of discretion, it is not enough that the Full Bench would have reached a different conclusion. The Full Bench may only intervene on the limited ground that some error has been made in exercising the discretion. A list of such errors was set out in the matter of *House v The King*,²²⁹ namely that the decision-maker has:²³⁰

²²⁴ S 596(1) of the FW Act.

²²⁵ S 596(2) of the FW Act. This section is similar to CCMA Rule 25(1)(c) which *inter alia* states that a commissioner must consider the nature of the questions of law raised by the dispute, the complexity of the dispute, the public interest and the comparative ability of the opposing parties to deal with the dispute in deciding whether to allow legal representation.

²²⁶ S 613 of the FW Act. The appeal application must be lodged within 21 days of the award. If the 21 days have lapsed, a party may apply for an extension of time. Appeal matters are generally listed for hearing within 8 weeks of the FWC receiving the application. If the application included a request to stay all or part of an award, a stay order hearing will be listed within 7 days of the lodgment.

²²⁷ *Ibid.*

²²⁸ S 400 of the FW Act.

²²⁹ *House v The King* (1936) 55 CLR 499 at 505. A further illustrative list of errors which may be made by a Tribunal is set out in *Craig v The State of South Australia* (1995) 184 CLR 163 and approved in *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323.

²³⁰ Explanatory Memorandum to the Fair Work Bill 2008 at paragraph 2323.

- acted upon a wrong principle;
- been guided by irrelevant factors;
- mistaken the facts; or
- failed to take some material consideration into account.

It is evident that these grounds resemble that of section 145 of the LRA but with the exception that it requires no standard of reasonableness as required by the South African labour law.

In each appeal, the Full Bench needs to determine two issues, namely whether permission to appeal should be granted, and whether there has been an error in the original decision. Permission to appeal is not easily granted and the Court in *Coal & Allied Mining Services Pty Ltd v Lawler and Others*,²³¹ described the test as “a stringent one”. The FWC must not grant permission to appeal unless it considers that it is in the public interest to do so.²³² The task of assessing whether the public interest test is met is a discretionary one involving a broad value judgment.²³³

If permission is granted, the appeal will be heard by the Full Bench in the form of a hearing *de novo*. The Full Bench will normally deal with an appeal on the basis of the evidence in the proceedings which led to the award that is being appealed. The Full Bench may however accept further evidence or take into account any other information or evidence where appropriate.²³⁴ A decision of a majority of the members on the Full Bench prevails or, if there is no majority, the decision of the Commission Member who has seniority prevails.²³⁵

An aggrieved party may only approach the Federal Court for relief after the appeal process at the FWC is finalized. Only disputes dealing with questions of law may be referred to the Federal Court by the President of the FWC.²³⁶ If the Federal Court

²³¹ *Coal & Allied Mining Services (Pty) Ltd v Lawler and Others* (2011) 192 FCR 78 at 43.

²³² S 400 of the FW Act.

²³³ In *GlaxoSmithKline Australia (Pty) Ltd v Makin* [2010] FWAFB 5343 a Full Bench of the FWC identified some of the considerations that may attract the public interest:

“... the public interest might be attracted where a matter raises issues of importance and general application, or where there is a diversity of decisions at first instance so that guidance from an appellate court is required, or where the decision at first instance manifests an injustice, or the result is counter intuitive or that the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters ...”.

²³⁴ S 607 of the FW Act.

²³⁵ S 618(3) & (4) of the FW Act.

²³⁶ S 608 of the FW Act.

arrives at a different conclusion than the FWC, the FWC must vary its decision in such a way as to make it consistent with the Federal Court.²³⁷

In essence, there are two major differences between the Australian and the South African review processes. Firstly, there is no standard of reasonableness that is required in reviewing awards. Secondly, the Australian law makes provision for an internal appeal to the FWC before the matter can be taken to the courts. This is significantly different from the LRA, where aggrieved parties must directly approach the LC for the review of an arbitration award.

B. NEW ZEALAND

1. Introduction

New Zealand employment law is regulated by various statutes of which the Employment Relations Act, 2000 (hereinafter the “ER Act”) is the most significant. The resolution of labour disputes involves mediation in the first instance, then adjudication by the Employment Relations Authority (hereinafter the “ERA”)²³⁸ and finally the Employment Court (hereinafter the EC).²³⁹ The labour dispute resolution institutions, as established by the ER Act, can only deal with a “employment relationship problem”, which is defined as “a personal grievance,²⁴⁰ a dispute, and any other problem relating to or arising out of an employment relationship, but does not include any problem with the fixing of new terms and conditions of employment”.²⁴¹

2. Mediation

Unlike South Africa, mediation and adjudication are performed by separate institutions in New Zealand.²⁴² This recognizes that different skills are required for mediation and adjudication, and the legal expertise required of adjudicators is not necessary to the same degree for mediators.²⁴³ Mediation is performed by the Department of Labor Mediation Services and is compulsory before a matter can be

²³⁷ *Ibid.*

²³⁸ S 156 of the ER Act.

²³⁹ Roth (2013) *CLLPJ* 877.

²⁴⁰ In terms of S 103(1)(a) of the ER Act, unjustified dismissals fall within the personal grievance category.

²⁴¹ S 5 of the ER Act.

²⁴² In South Africa, the CCMA performs both mediation and arbitration functions.

²⁴³ Roth (2013) *CLLPJ* 886.

referred for adjudication by the ERA or the EC. According to Roth,²⁴⁴ the reason for the spilt between the institutions is to set up a hurdle to accessing adjudication, which would act as an incentive for the parties to settle.

The ERA or the EC must first make a determination whether a good faith attempt has been made to use mediation, before a matter can be referred for adjudication. The ERA or the EC must direct that mediation be used unless it is considered that mediation will not contribute constructively to resolving the matter, will not be in the public interest or will undermine the urgent or interim nature of the proceedings.²⁴⁵ It is thus clear that mediation is favoured over other forms of dispute resolution under the ER Act.²⁴⁶

3. Adjudication by the ERA

The ERA is established by the ER Act²⁴⁷ and is the labour dispute resolution system in New Zealand which has similar functions than the CCMA and the FWC. Like the CCMA and the FWC, the ERA was established to provide quick, cost effective, informal and accessible resolution of employment disputes.²⁴⁸ The ERA has the role of resolving employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities.²⁴⁹ The ERA was established as an inquisitorial body which conducts “investigation meetings” in the course of which it can call for evidence from the parties or any other person, call and examine any witnesses, interview any of the parties or any person at any time before, during or after an investigation meeting²⁵⁰ and generally follow any procedure it deems appropriate so long as it complies with the principles of natural justice and acts “in a manner that is reasonable, having regard to its investigative role”.²⁵¹ In the adjudication of unjustified dismissal cases, the ERA must make a determination whether the dismissal was both substantively

²⁴⁴ *Ibid.*

²⁴⁵ S 159 & 188(2)-(3) of the ER Act.

²⁴⁶ This is confirmed by s 3(a)(v) & (vi) of the ER Act which states that the object of the ER Act is to promote “mediation as the primary problem-solving mechanism” and to reduce “the need for judicial intervention.” S 143(b) of the ER Act further states that the purpose of the dispute resolution institutions is “to recognise that employment relationships are more likely to be successful if problems in those relationships are resolved promptly by the parties themselves”.

²⁴⁷ S 156 of the ER Act.

²⁴⁸ S 101 & 143 of the ER Act.

²⁴⁹ S 157(1) of the ER Act.

²⁵⁰ S 160(1) of the ER Act.

²⁵¹ S 173(1) of the ER Act. Also see Roth (2013) *CLLPJ* 888.

and procedurally justifiable, which is similar to South Africa's position.²⁵² However, unlike the CCMA, the ERA may refer a question of law to the EC for its opinion and delay the proceedings until it receives the court's opinion on that question.²⁵³

4. Challenging decisions by the ERA

New Zealand, like Australia, does not have a review process as is known under the LRA, but instead, parties aggrieved by an ERA decision may appeal to the EC.²⁵⁴ The party referring the matter for appeal, may request that the matter be heard *de novo*. The decision of the EC will then replace that of the ERA.²⁵⁵ It is thus clear that the scope of EC appeals is much wider than what is permissible in terms of section 145 of the LRA. Parties who do not wish to have a hearing *de novo*, may choose to limit their appeals to specific questions or legal issues.²⁵⁶ Review proceedings may only be instituted when procedural challenges are raised against ERA decisions.²⁵⁷ Review proceedings may, however, not be instituted where a right to appeal exists.²⁵⁸

C. CONCLUSION

Both Australia and New Zealand have specialized labour dispute resolution institutions which are similar to the position in South Africa. The CCMA's equivalent in Australia is the FWC, while New Zealand has the ERA. A striking similarity between these institutions is that they were all established to ensure quick, informal, cost effective and flexible resolution of labour disputes. Despite the similarities, these countries have different ways of challenging decisions by the primary dispute resolution institution. Of these countries, South Africa is the only one which has a review process in which the review court is limited to the record of the arbitration proceedings before the CCMA. Both Australia and New Zealand have an appeal process in terms of which the matter may be heard anew. Due to the fact that the ER

²⁵² According to s 103A(2) of the ER Act, the test whether a dismissal is justifiable is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

²⁵³ S 177(1) of the ER Act.

²⁵⁴ S 179 of the ER Act. In terms of s 179(2) of the ER Act, a party has 28 days after the decision by the ERA to refer the matter for appeal to the EC.

²⁵⁵ S 183 of the ER Act.

²⁵⁶ S 179(4) of the ER Act.

²⁵⁷ S 183(3) & 194 of the ER Act.

²⁵⁸ S 194(3) of the ER Act.

Act does not provide any specific grounds on which a matter may be taken on appeal, a very wide scope of appeal is provided for in New Zealand.

It is my opinion that such an appeal system is not advisable as it would lead to a vast amount of cases being taken on appeal. I would, however, recommend that the Australian appeal procedure be adopted by the South African labour dispute resolution system to a certain extent. I would advise that the CCMA implement an internal appeal process before the matter may be challenged through the LC. Permission, which should not easily be granted, should further be required by a panel from the CCMA before the appeal may be heard. This would result in a massive reduction of review applications being lodged to the LC as the vast majority of unfair dismissal matters will be finalized at CCMA level.

CHAPTER 6

CONCLUSION AND RECOMMEDATIONS

The LRA established the CCMA, Bargaining Councils, the LC and the LAC in order to effectively resolve labour disputes in South Africa. The CCMA is the primary institution in resolving labour disputes in South Africa through conciliation and arbitration. The LC does not have any power to entertain an appeal of an arbitration award but was instead provided with the power to review such awards. The grounds on which an arbitration award can be taken on review are contained in section 145 of the LRA. However, these grounds must be interpreted in terms of the 1996 Constitution which requires that administrative action must be lawful, reasonable and procedurally fair. The CC in *Sidumo* therefore determined that section 145 of the LRA is suffused the constitutional standard of “reasonableness”. The Court confirmed that the standard of review is the one explained in *Bato Star*, namely whether the decision reached by the commissioner is one that a reasonable decision-maker could not reach?

After *Sidumo*, the courts have given different interpretations on how the test for review of arbitration awards should be applied. Various courts confirmed that reasonableness should be regarded as an independent ground for review, while others were of the opinion that it should be regarded as a standard of review. It is submitted that the correct approach is to regard reasonableness as a standard that is intertwined with the grounds set out in section 145 of the LRA.

Another difficulty lies in the correct application of the standard of review. This standard can be applied in two ways, namely in terms of the austere or deferent approach or the generous or interventionist approach. It is submitted that the deferent approach is in line with the test for review as defined by *Sidumo* and that the interventionist approach for all purposes amounts to an appeal process.

Current case law, and in particular the SCA in *Herholdt*, indicates that the courts prefer the interventionist approach, which, in my opinion, for all purposes amounts to an appeal. Taking this into account, together with the fact that it takes an average of 23 months from the date of the arbitration award to the date that the review

application is heard by the LC,²⁵⁹ one needs to question the necessity of a review process at all. The legislature specifically opted for a review process instead of an appeal process in order to ensure quick labour dispute resolution. I would suggest that the LRA be amended to only make provision for an appeal process as the case in Australia and New Zealand. Similar to Australia, there should, however, first be an internal appeal process within the CCMA, before a matter can be taken to the LC. Permission should first be granted by a panel of the CCMA, before a party may appeal internally within the CCMA. However, this permission should not be granted easily. This would have the effect of significantly reducing the amount of matters being referred to the LC for determination.

²⁵⁹ See fn 15.

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