THE CRITERION OF JUSTIFIABILITY AS A GROUND FOR REVIEW FOLLOWING SIDUMO v RUSTENBURG PLATINUM MINES (2007) 12 BLLR 1097 (CC)

by

HERBERT ROBERT JAMES FALCONER FISCHAT

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Supervisor: Prof JA van der Walt
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I, Herbert Robert James Falconer Fischat student number 207033302, hereby declare that the treatise for LLM (Labour Law) is my own work and that it has not previously been submitted for assessment or completion of any postgraduate qualification to another University or for another qualification.

HRJF Fischat
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Port Elizabeth
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SUMMARY

This treatise will focus on the review of labour arbitration awards provided for under the oversight of the Commission for Conciliation, Mediation and Arbitration (CCMA), bargaining councils, statutory councils, accredited private agencies and approved private arbitration tribunals. The general grounds of review applicable to the arbitration awards of the different bodies are set out. Thereafter the case of Carephone (Pty) Limited v Marcus NO & others (1998) 19 ILJ 1452 (LAC) is analysed and the core principles pertaining to the justifiability test are clarified for the first time in the forum of the Labour Appeal Court. The judicial rationale for the relevance and applicability of the test to CCMA arbitration proceedings and criticisms of the test are examined.

The justifiability tests are only applicable to review proceedings in CCMA matters and not available to private arbitration review matters. There are however three approaches which are being suggested for the application of the justifiability tests to private arbitration review. Firstly, it is suggested that the Arbitration Act could be interpreted to include the justifiability test under the statutory review grounds. Secondly, the arbitration agreements could be interpreted to include an implied term that the arbitrator is under a duty to give justifiable awards. Finally, it can be submitted that the law should be developed by reading into all arbitration agreements the ability to arbitrators to give justifiable awards.

Since the judgment of Sidumo v Rustenburg Platinum Mines [2007] 12 BLLR 1097 (CC) various critical questions arose in relation to the interpretation and application for the purpose of dealing with subsequent review applications. Firstly, this research paper will seek to establish whether the courts in subsequent matters to the Sidumo judgment have interpreted reasonableness as a test or ground for review. Secondly the research paper will scrutinise case law whether the reviewing court is entitled to rely on and consider reasons other than those provided for by the commissioner in his award to determine inter alia, the reasonableness of his decision arrived at.
The Constitutional Court in the *Sidumo* case rejected the so-called employer’s test, stating that ultimately the commissioner’s sense of fairness is what must prevail and not the employer’s view. Consequently an impartial determination whether or not a dismissal was fair is likely to promote labour peace amongst the labour force. The test arrived at by the Constitutional Court in the *Sidumo* case for determining whether a decision or arbitration award of a CCMA commissioner is reasonable, is a stringent test that will ensure that such awards are not easily interfered with. The question to be asked in determining whether there has been compliance with the standard is whether the decision of the commissioner is one which a reasonable decision maker could have reached. This approach will underpin the primary objectives of the Labour Relations Act which is the effective resolution of disputes. This finding will be apparent from important cases decided and discussed after the *Sidumo* landmark ruling.
Arbitration is arguably the most common form of dispute resolution in the labour context. Labour arbitration proceedings are conducted under the auspices of a variety of bodies. They include the Commission for Conciliation, Mediation and Arbitration (CCMA), bargaining councils, statutory councils, accredited private agencies and private arbitration tribunals. The arbitration proceedings conducted under the rules of the CCMA are strictly compulsory, while the proceedings conducted under accredited bodies may be voluntary. A general characteristic common to all arbitration proceedings is that arbitration awards are subject to limited review, but not to appeal.

The distinction between appeals and review is that appeals concern whether the conclusion of the decision-maker is correct on the merits, while reviews concern the manner in which the decision-maker reached the conclusion. These procedures may be co-extensive, yet they are essentially different in nature. However, the remedy is not entirely new in South African jurisprudence. It has been recognised as a tool or procedure to challenge the decisions or proceedings of inferior courts, both civil and criminal, including tribunals or boards that perform judicial, quasi-judicial or administrative functions. This is confirmed by section 24 of the Supreme Court Act 59 of 1959 and section 302 of the Criminal Procedures Act 51 of 1977.

Different forms or types of reviews exist. Where a statutory review procedure is prescribed, the court is not required to hear *viva voce* evidence previously led or adduced before a lower court or tribunal in order to determine whether such a court or tribunal was correct in its finding. In a criminal matter, the judge, who in terms of section 303 receives documents in chambers from the Registrar, must decide on the basis of these whether the proceedings in the Magistrate’s Court were in accordance with

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1 *Coetzee v Lebea NO & Another* (1999) 20 ILJ 129 (LC) at 133A-B; *County Fair Foods (Pty) Ltd v CCMA & Others* (1999) 20 ILJ 170 (LAC) at 1712 G-H.

2 *Coetzee v Lebea NO & Another* supra at 1333 B-C. The Labour Court recognised that this is particularly the case where the subject of the review is the very process of reasoning of the commissioner.
justice. If he or she concludes that all the relevant legal rules were complied with and an appropriate sentence was imposed, he or she will certify on the record that the proceedings in the Magistrate’s Court were in order.³

If, however, the judge is uncertain about the question whether the relevant legal rules were complied with during the Magistrate Court’s proceedings, he or she will seek information from the Magistrate who dealt with the case.⁴ If, however, the reviewing judge’s uncertainty is eliminated neither by the information that he or she has not obtained from the Magistrate nor by the comments of the Director of Public Prosecutions, he or she places the record for consideration before a court that sits, as a court of appeal. This results that two judges have to sign the judgment in which a correction is made.⁵ Section 304(4) of the Criminal Procedures Act makes express provision for special reviews for cases in inferior courts that are not subject to automatic review. This usually happens where there exists a possibility that the proceedings in a lower court may not have been in accordance with justice and the matter will be referred to a judge in a manner other than stated in section 303⁶ of the Criminal Procedures Act.

South African jurisprudence also provides for judicial review. As the name indicates, judicial review of administrative action has traditionally been the preserve of the courts. More precisely, as far as common law judicial review goes, it has been the preserve of superior courts.⁷

However, the Promotion of Administrative of Justice Act (PAJA)⁸ envisages the possibility of judicial review by institutions other than the judiciary or Magistrates Courts. Section 6 of the PAJA is a codification of the common law grounds of judicial review of administrative action.⁹ The grounds for review must be interpreted and applied with reference to both their common law and their new constitutional and

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⁴ S v Motaung 1980 (4) SA 131 (T).
⁵ Cf S v Motaung 1980 (4) SA 131 (T).
⁶ S v Sithole 1988 (4) SA 177 (T).
⁸ Act 3 of 2000.
⁹ Bato Star Fishing v Minister of Environmental Affairs and Tourism 2004 (4) SA 490 (CC).
legislative context. The body of common law rules and principles dealing with the control of administrative power has been absorbed into the constitutional right to administrative justice.

Though section 6 of PAJA is a codification in the sense that the statutory list of grounds of review largely follows those of the common law, there is nevertheless an important difference between common law grounds and those of PAJA. The new constitutional dispensation introduced new labour legislation by way of the Labour Relations Act (LRA),\textsuperscript{10} which replaced the former Industrial Relation Act of 1956, which gave rise to the establishment of the Commission for Conciliation, Mediation and Arbitration (CCMA).\textsuperscript{11} The CCMA is an independent juristic body. By establishing this dispute resolution body, the legislature attempted to introduce mechanisms to ensure the speedy, cost effective and final resolution of labour disputes. Section 1 refers to “the effective resolution of labour disputes” as one of the primary objectives of the LRA. Section 138 specifies that a commissioner may conduct an arbitration in such a manner so as to “determine the dispute fairly and quickly” and, in terms of section 143(1), an arbitration award is “final and binding and may be enforced as if it were an order of the labour court.” It sometimes does occur that commissioners make mistakes in making awards. It is precisely for this reason that there must be mechanisms in place to challenge defective arbitration awards. It is for this particular reason that the legislature thought it fit to provide for a review remedy in labour arbitration proceedings.

Section 145 of the LRA provides that any party to a dispute who alleges a defect in any arbitration proceedings that came before the CCMA may apply to the Labour Court for an order setting aside the arbitration award as a result of a defect in the arbitration proceedings. Although the grounds for review are recognised in the LRA, it invariably happens that employers and employees are dissatisfied with the outcome of arbitration awards for reasons not contemplated in section 145 and are consequently seeking opportunities to challenge arbitration awards on grounds that fall outside the ambit of section 145. It is apparent from scrutiny of recent case law that employers and employees have made bold attempts to have arbitration awards

\textsuperscript{10} Act 66 of 1995 hereinafter referred to as the LRA.
\textsuperscript{11} Hereinafter referred to as the CCMA.
reviewed in terms of section 158(1)(g) of the LRA insofar as it provides for a possible remedy, without being limited or restricted to the prescribed or permissible grounds of review. Applicants for review in terms of this proviso have attempted to broaden the grounds of review by alleging that arbitrators have engaged in administrative action. They justify their reliance on the justifiability and reasonableness principles provided for in the interim Constitution\textsuperscript{12} and the final Constitution of the Republic of South Africa Act\textsuperscript{13} and section 6(2) of the Promotion of Administration of Justice Act.\textsuperscript{14}

This is but one of the numerous challenges that our courts are confronted with when dealing with the review of arbitration awards. In this research paper, leading cases that came before our courts, such as Carephone (Pty) Ltd v Marcus NO & Others;\textsuperscript{15} Toyota South Africa Motors (Pty) Ltd v Radebe;\textsuperscript{16} Shoprite Checkers (Pty) v Ramdaw NO & Others and the Constitutional Court case of Sidumo & Another v Rustenburg Platinum Mines Limited & Others,\textsuperscript{17} will be critically analysed and commented on.

It should be noted, however, that section 33 of the Arbitration Act\textsuperscript{18} and section 145 of the LRA are virtually identical in wording. Despite this similarity, the courts have interpreted the grounds of review slightly differently. The most significant difference lies in the application of the justifiability test as set out in the leading case of Carephone (Pty) Ltd v Marcus NO & Others.\textsuperscript{19} This test applies in the review of CCMA arbitration proceedings, but does not apply in private arbitration review.

Justifiability is an essential requirement in the current constitutional dispensation, as the new democratic order is based on a culture of justification.\textsuperscript{20} This represents a significant shift from the former Nationalists Party regime of parliamentary sovereignty, where state power was left unchecked. The new dispensation pursues

\begin{itemize}
\item Act 200 of 1993.
\item Act 108 of 1996.
\item Act 3 of 2000.
\item [1998] 11 BLLR 1093 (LAC).
\item [2000] 3 BLLR 1093 (LAC).
\item 2008 2 SA 24 (CC).
\item No 65 of 1965.
\item [1998] 11 BLLR 1093.
\item Mureinik "A bridge to where? Introducing the Interim Bill of Rights" (1994) 10 SAJHR 31 at 32.
\end{itemize}
a culture of accountability, transparency and responsiveness, which are enshrined as the founding values of the new South African Constitution.21

The Constitution is committed to controlling power exercised by the State, as well as that exercised between private individuals.22

This research paper aims to fulfil four primary objectives. Firstly, to set out the general principles concerning the review of arbitration proceedings conducted under the auspices of the dispute resolution bodies identified above. Secondly, it aims to clarify the principles relating to the justifiability test and to discuss the comments on and criticisms of this test. Thirdly, it intends to provide a framework within which the justifiability test ought to be applied to the review of private arbitration proceedings. Finally, it attempts to discern the review provisions applicable to arbitration proceedings conducted under the auspices of collective bargaining agents and accredited private agencies, and to determine whether the justifiability test applies to the review of these arbitral bodies.

Having regard to the above as background, and with the objective of determining the role played by justifiability in the review of labour arbitration awards, the court’s interpretation of the proper approach to follow in the exercise of its review function will be discussed.

Chapter One contains brief introductory remarks. Chapter Two will provide an overview of the nature of the arbitral bodies that will be considered in the study, presenting the context within which arbitration review is discussed. Thereafter the subsequent sections will detail the review provisions applicable to each arbitration tribunal. As the primary body involved in compulsory dispute resolution in the labour context, the CCMA will be discussed first. An analysis of private arbitration review will follow, as this represents the epitome of consensual arbitration proceedings. Arbitration under collective bargaining agents and accredited agencies will then be examined with reference to the two extremities on the continuum of compulsion.

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22 S 8 of the Constitution.
Chapter Three will present a review of CCMA arbitration proceedings, describing the general principles of review in terms of section 145 of the LRA. It will also focus on the criteria of justifiability and CCMA arbitration award reviews. The Carephone (Pty) Ltd v Marcus NO & Others\(^\text{23}\) will be discussed, as well as the correct interpretation of the justifiability test. Judicial comments and criticisms will be expressed and the accepted basis for the application of the justifiability test will be presented. The test for reviewing arbitration awards in terms of the section 145 of the LRA for the purpose of establishing its implications for subsequent review proceedings will be discussed.

Chapter Four will deal with the justifiability test and CCMA arbitration award reviews which will appear from the leading case of Carephone (Pty) Ltd v Marcus NO & Others. This will be followed with a discussion of the concepts of public power and rationality and its influences on the justifiability test. Thereafter there will be a critique of the justifiability test as an instance and standard of review.

Chapter Five concerns a detailed discussion and analysis of the Constitutional Court case of Sidumo v Rustenburg Platinum Mines Limited & Others\(^\text{24}\) and the review of CCMA arbitration awards.

Chapter Six will deal with case law, which mirrors the principles established subsequent to Sidumo in order to put it into proper context with regard to justifiability in the review of arbitration awards. A discussion of case law and the implementation of the relevant legal principles applicable to sanction following dismissals will be scrutinised. The discussion will also focus on the applicability of the reasonableness standard and its application to jurisdictional reviews.

Chapter Seven will deal with the general review in respect of private arbitration proceedings. The general review principles in terms of section 33 of the Arbitration Act will be examined. The judiciary has rejected the application of the justifiability test to private arbitration proceedings. An argument will be put forward proposing three methods of developing the law to allow the review of the justifiability test in


\(^{24}\) [2007] 12 BLLR 1097 (CC); 2008 2 SA 24 (CC).
private arbitration awards. It will also be considered whether the reasonable standard as introduced by *Sidumo* will have any influence and impact on the review of private arbitration awards in terms of section 33 of the Arbitration Act 42 of 1965 and whether parties to a dispute can agree that an award would be reviewable on the same grounds and subject to the same test as an CCMA award.

Chapter Eight will present the conclusions that can be drawn from the Constitutional Court rulings of *Sidumo* and its effect on review proceedings in terms of the LRA.
2.1 INTRODUCTION

In the labour context, arbitration is a useful means of dispute resolution. In the interest of good labour relations, it is advantageous to have a final and binding decision that is speedily made. Four categories of arbitration tribunals will be dealt with in this research paper. Three of these tribunals are used strictly in the labour context. They are the CCMA, arbitration tribunals under the auspices of collective bargaining agents, and private agencies accredited by the CCMA to perform arbitral functions in the labour environment. The fourth forum comprises unaccredited private arbitrators or arbitration panels. While private arbitrators are employed in the arbitration proceedings concerning virtually any subject matter, they have also been employed extensively in the labour context. However, private arbitrators need not be accredited by the CCMA to perform their dispute resolution functions.

This chapter will describe the nature of these bodies in some detail. Their specific characteristics are particularly relevant to the application of the justifiability test in the review of awards arising from the arbitration proceedings conducted under each forum.

2.2 COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION (CCMA)

The CCMA is a statutory body established as a simple mechanism for effective labour dispute resolution. The LRA sets precise guidelines as to the manner in which its proceedings are to be conducted. This statutory regulation is indicative of state control over CCMA arbitration proceedings, disputant parties having relatively less power over the proceedings.

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25 Amalgamated Clothing & Textile Workers Union of SA v Veldspun (1993) 14 ILJ (A) at 1435 I-J.
26 Preamble to the Labour Relations Act 66 of 1995.
2.2.1 NATURE OF CCMA

The CCMA is a juristic person. It is independent of the state, of any political party, trade union, employer, employers’ organisation and any federation of trade unions. It has a statutory duty to maintain offices in each of the nine provinces of the Republic of South Africa, thus enhancing accessibility to justice for all parties to employment relationships. A governing body, consisting of an independent chairperson, nine members and a director, governs the CCMA. The chairperson and members are nominated by NEDLAC and appointed by the Minister of Labour for a period of three (3) years. The members represent organised labour organised business and the state in equal parts.

The CCMA is designed to be self-regulating in that it may make rules concerning its fees, policies, procedures, practices and any other matter incidental to the performance of its functions. Its main function is to conciliate any dispute referred to it in terms of the LRA, failing which it must arbitrate the matter, if such is required by the LRA, or if all the relevant parties to a dispute under the jurisdiction of the Labour Court have so consented.

2.2.2 DISPUTE JURISDICTION

The territorial jurisdiction of the CCMA includes all the provinces of the Republic of South Africa. The LRA provides a limited set of disputes over which the CCMA has jurisdiction. The more serious issues are reserved for adjudication by the Labour Court, while the CCMA is charged with the duty of resolving common labour disputes. The CCMA is also authorised to resolve disputes referred to the CCMA in terms of the LRA and those concerning matters of mutual interest.

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27 S 112 of the LRA.
28 S 113 of the LRA.
29 S 114(3) of the LRA.
30 NEDLAC is defined in s 213 of the LRA as the National Economic Development and Labour Council.
31 S 116(3) of the LRA.
32 Ss 115(2)(c A) and 115(2A) of the LRA.
33 S 114 of the LRA.
34 S 133(1)(a) read with s 134 of the LRA.
When considering the disputes referred to the CCMA in terms of the LRA, Du Toit et al provide a useful distinction between disputes concerning the application and interpretation of the LRA, and specific disputes with prescribed procedures.\textsuperscript{35} Examples of the former category are disputes concerning the interpretation or application of the LRA in relation to the freedom of association (conciliation jurisdiction only)\textsuperscript{36} and those concerning the interpretation or application of the LRA provisions concerning organisational rights.\textsuperscript{37} Examples of the latter category are refusals of parties to closed shop agreements to admit registered trade unions to the agreement, unfair labour practice disputes and unfair dismissal disputes.\textsuperscript{38} Disputes of mutual interest may also be referred to the CCMA for arbitration, whether the parties to the dispute are collective bargaining agents or employers and employees.\textsuperscript{39} Where a dispute falls within the jurisdiction of the Labour Court, the disputant parties may consent to the jurisdiction of the CCMA, and the CCMA would be obliged to conduct the necessary arbitration hearing.\textsuperscript{40}

2.2.3 ARBITRATOR: COMMISSIONERS OF CCMA

2.2.3.1 APPOINTMENT OF COMMISSIONERS

Adequately qualified commissioners and senior commissioners perform the dispute resolution functions of the CCMA.\textsuperscript{41} The CCMA governing body appoints these commissioners for a fixed period, either on a full-time or part-time basis. When appointing commissioners, the governing body is required to pay due regard to the demographics of the country regarding the issues of race and gender, as well as their independence and competency. Commissioners must act in accordance with the Code of Conduct prepared by the governing body of the CCMA, which emphasises integrity and independence. These values are reflected in the grounds for removal of

\textsuperscript{36} S 9 of the LRA.
\textsuperscript{37} S 22(1) of the LRA.
\textsuperscript{38} S 191(5)(a)(i)-(iii) of the LRA.
\textsuperscript{39} S 133(1)(a) read with s 134 of the LRA.
\textsuperscript{40} S 115(1)(b)(ii) and sn 133(2)(b) of the LRA.
\textsuperscript{41} S 133(1) and s 117(2)(a)(ii) of the LRA.
CCMA commissioners, namely serious misconduct, incapacity and material violation of the Code of Conduct.42

On referral of a dispute, the CCMA is obliged to appoint a commissioner to conciliate the matter.43 Where a post-conciliation certificate indicates that the matter has not been resolved, and if any party to the dispute requests the arbitration within 90 days of failure of conciliation, an arbitrating commissioner must be appointed.44 The CCMA is also obliged to appoint a commissioner to arbitrate if all parties to a dispute falling within the jurisdiction of the Labour Court have consented in writing.45 The parties to a dispute have limited influence on the appointment of the commissioner. Any party to the dispute may apply to the CCMA Director that a senior commissioner be appointed to arbitrate.46

2.2.3.2 POWERS OF COMMISSIONERS

Section 142 of the LRA sets out in clear terms the various powers that commissioners hold in attempting to resolve disputes between parties. Commissioners may subpoena persons to give information at either a conciliation or arbitration of a dispute.47 Commissioners may subpoena persons who are believed to have in their possession any books, documents or objects for questioning or to produce such items.48 In addition, experts may be subpoenaed to give evidence that is relevant to the dispute.49

42 S 117(7) of the LRA.
43 S 135(1) of the LRA.
44 S 136(1) of the LRA.
45 S 133(2)(b) read with s 135 and s 141 of the LRA.
46 S 137 of the LRA.
47 S 142(1)(a) and s 142(2) of the LRA.
48 S 142(1)(b) of the LRA.
49 S 142(1)(c) of the LRA.
2.2.4 NATURE OF CCMA PROCEEDINGS

2.2.4.1 CONCILIATION

The term conciliation means to reconcile or bring together, especially opposing sides in an industrial dispute.\(^{50}\) By its very nature, it is private, confidential and without prejudice. It is intended to allow the parties to arrive at their own solution, rather than enforcing the law. In practice, however, the conciliation of rights disputes takes place in the shadow of the law and is affected by the commissioner as well as the parties’ perceptions of the legal context.\(^{51}\) In such situations, imbalances of power and the competence of the parties are sometimes difficult to handle without exposing a commissioner to the perception of bias.

These problems are sometimes aggravated by the exclusion of advocacy groups from conciliation by virtue of CCMA rule 25(1). It frequently happens that a commissioner encourages the opposing parties to settle the dispute, which may be seen as a goal in itself. On the other hand, conciliation may become a process in which the neutral expert evaluates the merits of the dispute and shuttles between parties seeking bottom lines and ultimately pressuring them to accept a recommendation that the “expert” considers appropriate or reasonable. The Labour Court has in the past warned that a commissioner should not advise parties on matters of substance and should be careful not to place them under undue pressure to settle.\(^{52}\)

2.2.4.2 CONCILIATION ARBITRATION (CON-ARB)

Conciliation arbitration (“con-arb”) is a process where an arbitration hearing takes place immediately after conciliation has failed. It is therefore in many respects similar to mediation arbitration (“med-arb”), in which the parties first attempt to reach settlement through negotiation, assisted by a third party. If, however, the parties are


\(^{51}\) See Faure t/a Faure Bros v Marais (1999) 20 ILJ 1794 (LC).

\(^{52}\) See Kasipersad v CCMA [2003] 2 BLLR 187 (LC).
unable to reach a settlement, they may request the third party to determine and identify the issues through arbitration.

This approach is efficient, as it maintains pressure to settle, yet at the same time it allows the parties to retain ownership of the outcome if mediation fails.\(^{53}\) It could also significantly reduce the cost of these processes. This would be the case where arbitration follows immediately after mediation and no time is wasted between the two processes, and where the parties agree that the arbitrator may take into account some or all of the information supplied during the conciliation process.

The con-arb process is governed by the same rules and principles as conciliation and arbitration.

### 2.2.4.3 ARBITRATION REFERRED TO CCMA UNDER LRA

Arbitration can be described as a process in which a neutral person makes a decision on a specified range of disputed issues.\(^{54}\) It is in many respects similar to litigation; however, it is less formal. Arbitration developed as a consensual and often expedited process to resolve factual disputes once and for all. Arbitration is primarily designed, whether compulsory, as under the LRA, or voluntary, to finally dispose of a dispute. One may therefore not split a single matter into discrete parts and seek to arbitrate one part while litigating another.\(^{55}\) In contrast, the process through which the CCMA determines picketing rules in terms of section 69(5) is not arbitration, since arbitration lacks the flexibility that is required for this purpose and the rules can be varied by a commissioner.\(^{56}\) Although questions of law as well as interest disputes may be arbitrated, arbitration is primarily used to resolve factual disputes and is usually a hearing *de novo* all the disputed issues.\(^{57}\) It would appear that

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56 *Shoprite Checkers v SACCAWU* J 1404/06 & JR (unreported) (LC) 8 September 2006 at paras 7 and 10.
57 *County Fair Foods (Pty) Ltd v CCMA & Others* (1999) 20 ILJ 1701 (LAC).
arbitration in many respects resemble adjudication, it remains by and large a quasi-judicial process rather than adjudication.\textsuperscript{58}

Arbitration under the LRA must be a fair and equitable process. It is therefore very important that arbitrators must at all material times remain fair, impartial and unbiased. The arbitrators must have jurisdiction from the parties to arbitrate the proceedings and may not exceed their powers. Their decisions must be consistent with the Act and the Constitution. Any award must be justifiable and consistent with the information placed by the parties before the arbitrator and the reasons given for it.\textsuperscript{59}

In con-arb proceedings the conciliating commissioner must immediately proceed to arbitrate the dispute if conciliation fails. In all other cases, if a dispute remains unresolved after conciliation, the CCMA must arbitrate the dispute where the Act requires the dispute to be arbitrated and any party to the dispute has requested that the dispute be resolved through arbitration. This will also be the case where all parties to a dispute in respect of which the Labour Court has jurisdiction have consented in writing to arbitration under the auspices of the CCMA in terms of the provisions of section 133(3) of the LRA.

Furthermore, a remedy for any defect in the arbitration process may only be sought through the Labour Court by way of review proceedings in terms of the provisions of Section 145 of the LRA.

It is clear from the brief exposé that in CCMA arbitrations, the LRA regulates the issues that would be agreed upon by parties and specified in an arbitration agreement in a private arbitration held in terms of the Arbitration Act. The imperatives set out in the LRA generally give the commissioners wide discretion to ensure that CCMA proceedings are fair and just. Commissioners are bound to follow any codes of good practice established by NEDLAC or guidelines published by the CCMA that are relevant to the matters being considered in arbitration proceedings.\textsuperscript{60}

\textsuperscript{58} Carephone (Pty) Limited v Marcus NO (1998) 19 ILJ 1425 (LAC).
\textsuperscript{59} Shoprite Checkers (Pty) Ltd v Ramdaw NO [2001] 9 BLLR 1011 (LAC).
\textsuperscript{60} S 138(6) of the LRA.
They must also follow any provisions laid down in the LRA for specified types of disputes and all legal principles of South African law.61

2.2.4.4 COMPULSORY OR VOLUNTARY ARBITRATION

Certain labour disputes must be arbitrated by the CCMA, while in other matters, the parties to the dispute may elect to refer the matter to the CCMA by consent. Both instances will be discussed briefly below.

2.2.4.4.1 COMPULSORY ARBITRATION

Certain matters are reserved for adjudication by the CCMA. An example in this regard is unfair dismissal disputes, that must be referred to the relevant bargaining council; failing the existence of such, to the CCMA, and not to the Labour Court or any other forum.62 These arbitration proceedings are compulsory in terms of the LRA. It is noteworthy that employers and employees involved in essential services63 and maintenance64 services are prohibited from participating in strikes and lock-outs.65 If a dispute of mutual interest cannot be solved by agreement between the parties, they are compelled to participate in arbitration proceedings, either under the auspices of the CCMA or bargaining council with the relevant jurisdiction in terms of Section 74 and Section 75 of the LRA.

The CCMA Commissioner must attempt to settle the dispute through conciliation. In the event of the dispute remaining unresolved, the matter must be arbitrated by a Commissioner once a certificate to this effect is issued and at the request of a disputant party.66

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61 Le Roux v CCMA & Others (2000) 21 ILJ 1366 (LC) at 1373 B-H.
62 S 191(1) (a) of the LRA.
63 An "essential service", as defined in s 213 of the LRA, includes services the interruption of which endangers life, personal safety or health of the whole or any part of the population, the Parliamentary service and the South African Police Service.
64 S 75(1) of the LRA defines “maintenance service” as one where “the interruption of that service has the effect of material physical destruction to any working area, plant or machinery”.
65 Ss 65(1)(d)(i) and (ii) of the LRA. In terms of s 70(2) of the LRA, the Essential Services Committee is required to investigate disputes as to whether a service can be categorised as “essential” or “maintenance”.
66 S 136(1) of the LRA.
2.2.4.4.2 VOLUNTARY ARBITRATION

Disputes that ordinarily fall under the jurisdiction of the Labour Court may be referred by consent of the parties to the CCMA for arbitration, provided conciliation by the CCMA has failed.\(^{67}\) In these circumstances, the Commissioner is not limited to the usual remedies, and may make any order that the Labour Court would have authority to make in the circumstances.\(^{68}\) Consensual arbitration by the CCMA is limited to rights disputes; these are disputes concerned with the established legal rights of employers and employees, rather than the negotiation of new rights, which are usually called disputes of interest.\(^{69}\) Voluntary arbitration proceedings by CCMA are reviewable by the Labour Court, although the applicable grounds of review are unclear.\(^{70}\) The question is whether the private arbitration grounds of review, or the CCMA review grounds, apply to voluntary proceedings. The relevant statute applicable in the review of the arbitral proceedings is determined largely by the nature of the process as either statutory or voluntary. However, section 145 of the LRA seems absolute. It states that “any party to a dispute who alleges a defect in any arbitration proceedings” under the auspices of the CCMA must be reviewed in terms of the LRA.\(^{71}\)

2.3 PRIVATE ARBITRATION

Private arbitration is a form of dispute resolution proceedings, in terms of which a third party or arbitration panel is elected by the disputant parties to hear the matter and after consideration of all the evidence, give a final and binding decision.

Formerly, private arbitration was regulated in terms of the common law.\(^{72}\) In modern times, arbitration has been regulated by various pieces of legislation. At first,

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\(^{67}\) S 141(1) of the LRA.

\(^{68}\) S 141(6) of the LRA.


\(^{70}\) Du Toit *et al* 589 and 623; *Department of Labour v Cowling* NO D498/98.

\(^{71}\) S 145(1) read with s 145(2) of the LRA.

provincial statutes governed arbitration proceedings. In *Nkuke v Kindi*, the court stated that the Cape Arbitration Act did not repeal the common law, but rather provided a more efficient means of submitting disputes to arbitration and enforcing awards made by arbitrators. This applies equally to the current Arbitration Act, which is the national legislation that repealed the provincial statutes and currently regulates private arbitration proceedings. Although CCMA arbitration is now the routine method of accessing this form of alternate dispute resolution in labour matters, private arbitration has been used increasingly in industrial disputes.

### 2.4 NATURE OF PRIVATE ARBITRATION

The term “arbitrators” literally means “accepted persons”, who have agreed to pronounce a decision. It follows then that private arbitration is built on the fact that it is consensual in nature. Parties to the dispute must agree on the referral of the dispute to arbitration. In practice, this is obviously dependent on the wide discretion left to the parties to determine the exact regulation of their own arbitration proceedings.

The submission to arbitration is incorporated in an arbitration agreement, which is often concluded on an ad hoc basis when the dispute arises. Such agreement deals solely with the dispute at hand; any dispute not provided for in terms of the agreement will be excluded from the referral to arbitration. Alternatively, the relevant parties may agree that all or specific future disputes that arise between them be referred to arbitration in terms of an automatic arbitration agreement, or in terms of an arbitration clause in another contract.

In both international practice and South African law, private arbitration proceedings may not be initiated or conducted against a person who is not a party to the

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73 Arbitration Act of the Cape of Good Hope Act 29 of 1898; Arbitration Act of Natal Act 24 of 1898.
74 1912 CPD 529 at 532.
75 *Hyperchemicals International (Pty) Ltd v Maybaker Agrichem (Pty) Ltd & Another* 1992 (1) SA 80 (T) at 98.
76 42 of 1965.
77 See Butler and Finsen *Arbitration in South Africa: Law and Practice* at 23 where they state that there is no joinder of parties to arbitration.
arbitration agreement. The agreement must be recorded in writing in order for the Arbitration Act to apply.\textsuperscript{78} An agreement will, however, give rise to enforceable contractual obligations in terms of common law, regardless of whether or not the Act applies. The agreement need not be signed by the parties, provided that they have adopted the agreement and acted on it.\textsuperscript{79}

The arbitration agreement plays a central role, in that the parties to the dispute agree explicitly on the issues in dispute, the identity and powers of the arbitrator, the procedure to be followed at the hearing, and any other terms they desire. Where the agreement is silent on an issue, the basic provisions set out in the Arbitration Act will apply.\textsuperscript{80}

The arbitration agreement is a legally binding document. Generally, the arbitration agreement may only be terminated by the consent of all the parties to such agreement. The High Court also has the power, on application by any of the parties and on good cause shown, to set aside an arbitration agreement, to order that a particular dispute not be referred to arbitration, and to order that an arbitration agreement shall cease to have effect with reference to any dispute referred.\textsuperscript{81}

The arbitration proceedings are generally held in private.\textsuperscript{82} The only individuals present at the hearing are the arbitrator, the disputant parties and, if the parties have agreed that representatives be permitted, such representatives. Other parties may be present with the consent of all parties to the dispute. Witnesses should not be permitted in the hearing before they give evidence, as their attendance may influence the evidence they later give.

The parties may agree on a specific procedure to be followed in the hearing, or they may choose to allow the arbitrator to direct the form of the proceedings. The only constraint is that principles of natural justice and legitimacy must be recognised.\textsuperscript{83}

\textsuperscript{78} S 1 of the Arbitration Act.
\textsuperscript{79} Fassler, Kamstra & Holmes v Stallion Group of Companies (Pty) Ltd 1992 3 SA 825 (W).
\textsuperscript{80} Brand, Lötter, Mischke and Steadman Labour Dispute Resolution (1997).
\textsuperscript{81} S 3(2) of the Arbitration Act.
\textsuperscript{82} Brand et al Labour Dispute Resolution 143.
The procedure is generally less formal than that of a court of law and thus allows for the amicable and speedy resolution of disputes.

Unlike some foreign jurisdictions, the constitutional of access to court and the general principles of contract in South African law dictate that parties may not oust the jurisdiction of the courts in its entirety. Parties are not permitted to exclude the powers of the court as laid down in the Arbitration Act. They may not include a clause in their contract that excludes the jurisdiction of the courts to set aside the arbitration agreement or to appoint an arbitrator where the parties cannot agree to the identity of the arbitrator themselves. However, where parties refer a labour matter to private arbitration, the Labour Court, rather than the High Court, will have jurisdiction in the review of the award or in other matters arising incidental to the arbitration.

2.4.1 POWERS OF ARBITRATOR

Formerly, the powers of arbitrators lay solely within the constraints of the arbitration agreement. However, the Arbitration Act now sets out the various powers of a private arbitrator or arbitration tribunal. These powers may be altered by consent of the parties, and such alterations must be duly recorded in the arbitration agreement. Arbitrators may require that the discovery of documents be made by a party, subject to any legal objection. Arbitrators may also require that a party be allowed to inspect any property involved in the dispute. Arbitrators may summons witnesses to give evidence at the arbitration hearing. The arbitrator may appoint a commissioner to take evidence from a person not present at a hearing and forward the evidence to the arbitrator, as if the court had appointed the commissioner.

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84 See Brown and Marriot ADR Principles and Practice (1999) 54 fn 24 where the writers state that certain arbitral parties in Switzerland are permitted in terms of article 192 of the Swiss Act to exclude the jurisdiction of certain courts to set aside an award.

85 Hyperchemicals International (Pty) Limited & Another v Maybaker Agrichem (Pty) Ltd & Another supra at 90.

86 S 157 of the LRA.

87 S 14 of the Arbitration Act.
Arbitrators may determine the time and venue of the arbitration proceedings. During the proceedings, they may administer oaths or take affirmations of the parties and witnesses giving evidence. Subject to legal objections, arbitrators may examine witnesses and the parties and may require that they produce any books or documents or things as could be compelled on the trial of an action. In addition, arbitrators may receive evidence given by affidavit, if the parties so consent or on an order of court.

2.5 CONCLUSION

The dispute resolution system for labour matter is complex. The main arbitral mechanism, the CCMA, was structured on the private arbitration system already in place. While the CCMA is an independent, juristic body, it is subject to substantial state control through the provisions laid down in the LRA. The CCMA arbitration proceedings are generally compulsory in initiation and are regulated statutorily. The disputant parties have little input in the identity of the Commissioner selected to hear their matter, as Commissioners are appointed by the CCMA.

The LRA also provides for collective bargaining agents, which play an important role in the resolution of limited labour disputes. Council parties to these bargaining agents are obliged to follow the dispute resolution procedures provided by the bargaining agent. The bargaining agent does, however, have territorial jurisdiction over all employers and employees within its scope. Bargaining agents accredited to perform dispute resolution functions may appoint a permanent arbitration panel. Alternatively, they may appoint arbitrators on an ad hoc basis. The influence of the individual parties on the appointment of the arbitrator, the powers of the arbitrator and the regulation of the proceedings depend largely on the constitution of the bargaining agent and its collective agreements.

Unaccredited bargaining agents must refer the dispute to accredited agencies or the CCMA. While the LRA does not make express provision for arbitration by

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unaccredited private arbitrators, it is possible that matters could be referred to such arbitrators.

It is important to note that public sector bargaining councils and statutory councils are established compulsorily. Parties are forced to join the councils and submit to their practices, regardless of whether or not they wish to do so, whereas private sector bargaining councils are established voluntarily and parties submit to the jurisdiction of such councils at their own will. While parties may elect to refer disputes to private accredited agencies, unaccredited agencies have been used increasingly in the labour context. Private arbitration proceedings are marked with distinctive characteristic of voluntariness. The combination of arbitral mechanisms in the labour context affords all varieties of disputant parties the option of arbitration proceedings, rather than court proceedings, which are more expensive and cumbersome. The forums all achieve the same purpose, yet they were established at different times and possess distinguishing characteristics.
CHAPTER THREE
REVIEW OF ARBITRATION AWARDS CONDUCTED UNDER
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION
(CCMA)

3.1 INTRODUCTION

The commissioners of the CCMA are required to give their arbitral decisions in written and reasoned awards. These arbitration awards are final and binding. They may not be appealed, but are subject to limited grounds of review, as set out in the LRA.89 The grounds for review are misconduct of the arbitrator; gross irregularities in procedure; ultra vires acts; and improperly obtained awards. These review provisions are virtually identical to the grounds of review applicable to private arbitration.90

The most noteworthy difference in the review of these two varieties of arbitration proceedings is that the so-called “justifiability test” applies only in CCMA review.91 This chapter will discuss the principles developed by the courts in interpreting the statutory review grounds applicable to CCMA arbitration awards.

3.2 COMMISSIONER’S ARBITRATION AWARD

After consideration of all the evidence adduced at an arbitration hearing, CCMA commissioners make findings of fact and apply the law in order to give decisions on the issues in dispute. These findings must be set out in written, signed awards.92 The award must contain brief reasons for the decision and must be clear and

89 S 145(2) of the LRA.
90 S 33(1) of the Arbitration Act 42 of 1965.
91 Carephone (Pty) Ltd v Marcus NO & Others (1998) 19 ILJ 1425 (LAC).
92 S138(7) of the LRA.
The commissioner may make any appropriate award. This will include awards that give effect to any collective agreement, and those that give expression to the provisions and the primary objects of the LRA and declaratory orders, as well as cost orders, provided that they are in accordance with the requirements of the law, fairness and the rules of the CCMA. The LRA limits the remedies that a commissioner may grant in disputes concerning unfair dismissals and unfair labour practices.

While a commissioner may generally make any reasonable order, including a re-instatement or re-employment or compensation order, an order of re-instatement and re-employment must be made in certain circumstances. Re-instatement and re-employment may be granted with effect from any date, provided it is no earlier than the date of dismissal. Any compensation payable must be just and equitable in the circumstances and may not exceed the equivalent of 12 months’ remuneration. These limitations to compensation apply in addition to the amounts to which the employee is entitled in terms of any law, collective agreement or employment contract.

3.3 CONTESTING CCMA ARBITRATION AWARDS

All CCMA awards are final and binding; they are not subject to appeal. As a result, the courts may not enter into the merits of the dispute in order to substitute their own opinions. The Labour Court may, however, review defective awards on limited statutory grounds. The court has been at pains to maintain the distinction between

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93 Du Toit et al Labour Relations Law: A Comprehensive Guide 303-506 state that a vague and unclear award will be unenforceable, unless the commissioner cures the ambiguity or error by varying the award, in terms of s 144(b) of the LRA.

94 S 138(9) of the LRA.

95 S 138(10) of the LRA.

96 S 193(1) and (4) of the LRA.

97 S 193(1)(a) and (b) of the LRA.

98 S 194(1) and (4) of the LRA. See also s 187 and s 194(3) of the LRA.

99 S 195 of the LRA.

100 Carephone (Pty) Ltd v Marcus NO & Others supra; County Foods (Pty) Ltd v CCMA & Others (1999) 21 ILJ at 1706 D-F and 1712G-H; Purefresh Foods (Pty) Ltd v Dayal & Another (1999) 20 ILJ 1590 (LC); Smuts v Adair (1999) 20 ILJ 931 (LC) at 938B.

appeals and reviews in regard to CCMA arbitration awards. The LRA aim to provide effective disputes is the principal motive for confining the remedies of aggrieved parties. The finality of CCMA awards and the limits of the Labour Courts review powers require that commissioner’s exercise their functions with caution.

The review grounds applicable to private arbitration awards under the Arbitration Act and those applicable to CCMA awards under the LRA are substantially similar in form, and in judicial interpretation and application. The significant difference between these grounds of review is that the justifiability test applies only in CCMA review. This test, laid down in the contentious case of Carephone (Pty) Ltd v Marcus NO & Others, requires that CCMA awards are justifiable in relation to the reasons given for them.

3.3.1 PROCEDURE FOR SETTING ASIDE AN AWARD

Section 145(1) of the LRA sets out specific procedures to be followed when applying for the review of a CCMA arbitration award. The aggrieved party must apply to the Labour Court within six weeks of the date in which the award is delivered to the disputant parties. The only exception to this rule is where the applicant wishes to rely on a review ground that relates to corruption. In such cases, the application must be made within six weeks of the date on which the applicant has discovered the corruption. The Labour Court may condone the late filing of an application for review on good cause. In the application, the aggrieved party must allege a defect in the arbitration proceedings, as defined in section 145(2) of the LRA. These grounds for review will be discussed below.
3.3.2 STATUTORY GROUNDS FOR REVIEW

Formerly, there was judicial uncertainty and confusion as to the LRA review provisions applicable to defective CCMA awards.\textsuperscript{108} The uncertainty arose due to the existence of a general review provision in section 158(1)(g) of the LRA, and its reference to the review provision in section 158(1)(g) of the LRA and its reference to the review provision relating specifically to CCMA awards in section 145.

Prior to the 2002 amendments to the LRA, section 158(1)(g) stated that “despite section 145”, the Labour Court could review all acts and omissions performed in terms of the LRA. The Labour Appeal Court, however, settled the matter, holding that section 158(1)(g) bestows wide powers on the Labour Court to review all functions other than the arbitral function reviewable in terms of section 145(1)(g), which now reads that “subject to section 145” the court may review all functions performed in terms of the LRA. Therefore, section 145 of the LRA, and not section 145(1)(g) applies to the review of CCMA arbitration awards.

In review proceedings, the onus is on the applicant to prove a defect in the CCMA arbitration award.\textsuperscript{109} A reviewable defect is defined as follows:

"145. Review of arbitration awards

(2) A defect referred to in subsection (1), means –
(a) that the Commissioner –
(i) committed misconduct in relation to the duties of the
Commissioner as an arbitrator;
(ii) committed a gross irregularity in the conduct of the arbitration
proceedings; or
(iii) exceeded the commissioner's powers;
(b) that an award has been improperly obtained."

Certain policy considerations came into play in the interpretation of section 145(2). The general nature of CCMA arbitration as a compulsory course of action has resulted in the courts finding that these review grounds need not be narrowly

\textsuperscript{108} In support of the application of s 158(1)(g), see Kynoch Feeds (Pty) Ltd v CCMA & Others (1998) 19 ILJ 836 (LC); Shoprite Checkers (Pty) Ltd v CCMA & Others (1998) 19 ILJ 890 (LC); Toyota SA Manufacturing (Pty) Ltd v Radebe & Others (1998) 19 ILJ 1610 (LC) at 1614.

\textsuperscript{109} S 145(1) of the LRA.
construed.\textsuperscript{110} Other factors relevant to this conclusion include the history of labour dispute resolution in South Africa, the necessity of a fast and effective dispute resolution process, the supervisory role played by the Labour Court in relation to CCMA, and the objects of the Labour Relations Act.\textsuperscript{111} One must bear in mind that the respondent in CCMA arbitration proceedings does not submit to the process voluntarily and that the right of appeal is statutorily excluded.\textsuperscript{112}

In addition, the interpretation of section 145(2) is influenced by case law concerning private arbitration, as the Labour Court has often utilised these cases in discerning the principles applicable to CCMA review matters. The general principles of legal interpretation require that this case law applies only insofar as it is consistent with the objects of the LRA and the intention of the legislature in providing this form of dispute resolution.\textsuperscript{113}

The interpretation and application of the review grounds will be discussed in detail below. The review categories are not mutually exclusive; no attempt has been made to compile an exhaustive list of instances justifying review under each of the bases.

\textbf{3.3.2.1 SECTION 145(2)(a)(I): MISCONDUCT OF COMMISSIONER}

A CCMA award is defective, and thus reviewable, where commissioners commit misconduct in relation to their arbitral duties.\textsuperscript{114} This may be the direct result of the uncertainty surrounding this review ground, or may be due to the statutory regulation of the duties of commissioners and the commissioners’ knowledge of these duties. The breadth of this ground of review hinges on the nature of the arbitral duties and powers of commissioners.

A distinction has been made between the substantive and the procedural duties of arbitrating commissioners. An example of a substantive duty is the duty to seek a

\begin{itemize}
\item[110] Standard Bank of South Africa Limited v CCMA & Others supra at 907 E – 907F.
\item[111] Pep Stores (Pty) Ltd v Laka NO & Others supra at 956 H -958 E.
\item[112] Reunert Industries (Pty) Ltd v Naicker & Others supra at 1635 E-I.
\end{itemize}
lawful, just, fair and proper decision.\textsuperscript{115} The procedural duties of commissioners concern the duty to comply with the provisions of the LRA and the principles of natural justice. While the substantive duties are closely related to the assessment of the evidence and the reasoning process are considered to be instances of misconduct, these irregularities have also been dealt with under the review ground of gross irregularities in the review process.

\textit{Definition}

The term “misconduct” was defined in the matter of \textit{Dickenson & Brown v Fisher's Executors}\textsuperscript{116} as the existence of some wrongful, improper or \textit{mala fide} conduct on the part of the Commissioner, and involves some degree of turpitude. A gross mistake or fact of law may be construed as evidence of misconduct on the part of the commissioner. Gross carelessness and gross negligence may also indicate misconduct on the part of the commissioner. The term legal misconduct as used in English law concerns failure to conduct the arbitration proceedings in terms of the stated legal obligations imposed on arbitrators.\textsuperscript{117} The conduct complained of need not include a moral turpitude.\textsuperscript{118} Misconduct in this sense is not reviewable in South African law.\textsuperscript{119}

The Labour Court relies heavily on private arbitration case law in defining the term “misconduct”, but it has taken account of the differences between CCMA is not guilty of misconduct and private arbitration. It however, rejects the private arbitration principle that an arbitrator that makes a \textit{bona fide} mistake in law is not guilty of misconduct.\textsuperscript{120} However, in the matter of \textit{Le Roux v CCMA & Others},\textsuperscript{121} the Labour Court stated that “in general” the parties are bound by the commissioner’s decision despite a \textit{bona fide} error of fact or law. The new constitutional dispensation requires

\textsuperscript{115} \textit{Reunert Industries (Pty) Ltd v Naicker & Others supra} at 1634. Note that the court did not consider it necessary that commissioners in fact “achieve” lawful, just, fair and proper decisions.

\textsuperscript{116} 1915 Appellate Division 166 at 175-6.

\textsuperscript{117} \textit{Hyperchemicals International (Pty) Ltd & Another v Maybaker Agrichem (Pty) Ltd & Another} 1992 1 SA 80 (W) at 94.

\textsuperscript{118} Cowling "Finality in Arbitration" (1994) \textit{SALJ} 306 at 307.

\textsuperscript{119} \textit{Reunert Industries (Pty) Ltd v Naicker & Others supra} at 1635 C-E.

\textsuperscript{120} \textit{Pep Stores (Pty) Ltd v Laka NO & Others supra} at 960.

\textsuperscript{121} (2000) 21 \textit{ILJ} 1366 (LC).
that decisions made by a statutory body be given in accordance with the law and that parties who are summoned to appear before such bodies as the CCMA may expect that the law be recognised and applied correctly.

Commissioners are required to apply and follow judgments of the Labour Court in terms of the general system of precedent.\(^\text{122}\) As a result, *bona fide* errors of law in CCMA awards are reviewable. It should be noted, however, that errors of fact, whether *bona fide* or not, are not reviewable.\(^\text{123}\)

However, where a commissioner is mistaken in law, the award will be set aside only if the error resulted in an injustice being done.\(^\text{124}\) An injustice is considered to occur when a party is deprived of a fair hearing, or where the commissioners fail to apply their minds to the matter before them. This may happen when the commissioner fails to consider evidence adduced at a hearing by ignoring it or by relying on evidence not adduced at the hearing. Commissioners may reject the application of an established legal principle in law by providing brief reasons for such rejection.\(^\text{125}\)

Commissioners may conduct misconduct in regard to any of their legal duties. For instance, misconduct may arise where commissioners fail to apply their minds responsibly and fairly to the issues placed before them as evidence in dispute resolution. This is a breach of the duty to determine the dispute fairly and quickly and in relation to the substantive merits of the dispute.\(^\text{126}\) Misconduct is also committed when adequate notes are not taken at the arbitration hearing and faulty awards are given as a result of this ineptitude. In the matter of *Consolidated Wire Industries (Pty) Ltd v CCMA & Others*,\(^\text{127}\) the court observed that the commissioner stated in his award that the fourth respondent had testified at the hearing, when it was in fact common cause that he had not testified. The court acknowledged that such circumstances amounted to misconduct.

\(^{122}\) Vide *Le Roux v CCMA & Others* supra at 1373B-H.
\(^{123}\) *Mthembu & Mahomed Attorneys v CCMA and Others* [1998] 2 BLLR 150 (LC).
\(^{124}\) *Purefresh Foods (Pty) Ltd v Dayal & Another* (1999) 20 ILJ 1590 (LC) at 960.
\(^{125}\) *Standard Bank of South Africa v CCMA & Others* supra at 915C-D.
\(^{126}\) S 138(1) of the LRA.
\(^{127}\) (1999) 20 ILJ 2602 (LC).
3.3.2.2 SECTION 145(2)(a)(II): GROSS IRREGULARITIES IN PROCEEDINGS

Certain legal formalities in CCMA arbitration proceedings are overlooked in pursuit of the speedy, but fair resolution of disputes.128 Section 138(1) of the LRA provides that a commissioner deal with the merits of the dispute with the minimum of legal formalities. However, certain basic principles of fair procedure must be upheld to ensure that CCMA arbitration proceedings are just. It follows that a CCMA arbitration award may be set aside if the commissioner commits a gross irregularity in the conduct of the proceedings.

The Labour Court relies on the principles developed in private arbitration case law in the interpretation of this review provision.129 The phrase “gross irregularity” is given the ordinary meaning used in South African law. It is concerned with an irregularity in the process or method utilised to conduct the arbitration proceedings, rather than in the outcome or result thereof.130

Gross irregularities occur, as in a refusal to hear evidence or in cases where the reasoning is so flawed that one must conclude that the hearing was not fair.131 Furthermore, the irregularity must be serious: it must result in the aggrieved party failing to have his or her case fully and fairly determined. An objective test is applied in order to determine whether the irregularity will amount to a miscarriage of justice. It can be said that an injustice has occurred when the aggrieved party was prejudiced in being prevented from having a fair and complete trial.132 The aggrieved party, however, must demonstrate that he or she was in fact prejudiced by the irregularity.133

The commissioner need not act with any moral turpitude in committing the irregularity. A *bona fide* error in procedure may result in the award being set aside

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128 Karos Leisure (Pty) Ltd t/a Movenpick v CCMA & Others (J239/99) [1999] ZALC 130 (20 August 1999).
129 Moloi v Euijen NO & Another (1997) 18 ILJ 1372.
130 Bester v Easigas (Pty) Ltd 1993 1 SA 30.
132 Benjamin v Sobac SA Building & Construction 1989 4 SA 940 C at 971 B-D.
133 Afrox Limited v Laka & Others (1999) 20 ILJ 1732 (LC) at 1745I-J.
on review.\textsuperscript{134} Where it can be shown that the commissioner acted with malice in committing the gross irregularity, it is probable that he or she will be guilty of misconduct as well as the commission of a gross irregularity, in terms of section 145(2)(a)(ii).

The principles of natural justice must at all times be observed in ensuring that a fair hearing is conducted. The right to be heard is one of the pillars of natural justice. A prime example of a gross irregularity is the failure by a commissioner to acknowledge and apply the \textit{audi alteram partem} rule.\textsuperscript{135} This rule is very important in our new constitutional dispensation, which is based on justiciable Bill of Rights.

Parties to the arbitration process must be permitted to lead relevant evidence on all the issues in dispute. In the matter of \textit{Legal Aid Board v John NO & Another},\textsuperscript{136} the court stated that the first consideration was whether the evidence that the commissioner had refused was relevant. Relevancy involves whether two facts are so related to each other that according to the common course of events one fact, either taken by itself or in connection with other facts, proves or renders probable the past, present or future existence or non-existence of the other.\textsuperscript{137} The court held that the applicant had been deprived of a full and fair hearing when the commissioner refused to hear relevant evidence as to a motor allowance scheme, particularly after the second respondent had had an opportunity to adduce such evidence.\textsuperscript{138}

Where the commissioner gives the parties an opportunity to make further representations on a particular point, and then makes a decision without considering these representations, a gross irregularity is committed.

\textbf{3.3.2.3 SECTION 145(2)(a)(III): ACTING ULTRA VIRES}

The LRA confers various powers on CCMA commissioners. Where commissioners act outside these and any other powers conferred by law, the resultant award may be

\textsuperscript{134} \textit{Goldfields Investment Ltd & Another v City Council of Johannesburg & Another} 1938 TPD 551.
\textsuperscript{135} \textit{Malan and Another v CCMA & Another} [1997] 9 BLLR 1173 (C).
\textsuperscript{136} (1998) 19 ILJ 851 (LC).
\textsuperscript{137} \textit{R v Katz} 1946 AD 71 at 78.
\textsuperscript{138} \textit{Legal Aid Board v John & Another} \textit{supra} at 854.
set aside on review. The commissioners are said to have exceeded their powers when they do not act within their jurisdiction where the award is not limited to the boundaries of their statutory powers or where they make awards that they do not have the power to make. The award must not be greater than that which is permitted in terms of the law, but merely outside the powers of the commissioner.

Classic examples of the application of this review ground are the cases of Colyer v Essack NO & Others; and Malan v CCMA & Another. In the said matter, the Commissioner found that the candidate’s attorney representing the party to the dispute had committed contempt of the CCMA. The court stated that due to the far-reaching nature of a conviction of contempt, as well as the principles of natural justice, a commissioner may make such a decision only where there is express statutory empowerment to that effect.

It held that, prior to amendment, section 42(9) of the LRA merely allowed a commissioner to refer an alleged incident of contempt to the Labour Court, and did not confer the power to make a finding of contempt or to prescribe punishment for contempt. The award was set aside, as the commissioner had exceeded her powers.

In Cycad Construction (Pty) Ltd v CCMA & Others, the question of a commissioner entertaining an issue not submitted to the CCMA for adjudication was discussed. The commissioner found that the version of events alleged by the employee did not render the dismissal procedurally unfair. The commissioner thereafter examined the other witness’s testimonies to determine whether there was another basis for the procedural unfairness of the dismissal. The court held that once procedural fairness was put in dispute, the commissioner could consider all aspects of procedure in terms of the evidence adduced to determine the fairness of the dismissal. Commissioners are thus not restricted to the aspects of procedural unfairness.

139 S 145(2)(a)(iii).
140 Le Roux v CCMA & Others supra 1370F.
141 [1997] 9 BLLR 1173 (C).
142 Colyer v Essack NO & Others; Malan v CCMA & Another supra at 1180 B-C.
alleged by the parties, but rather to the aspects manifest in the evidence led at the hearing. The award in this matter was not set aside.

Commissioners also exceed their powers where they make awards that are inappropriate under the circumstances. In Benicon Earthworks & Mining Services (Pty) Ltd v Dreyer NO & Another,144 the award was found to be inappropriate in that it was not capable of proper clarification and understanding.

Commissioners have the right to decide what evidence will be heard. Therefore, awards cannot be set aside solely on the basis that the commissioners exceeded their powers in disallowing certain evidence. It is suggested that in order to escape review, commissioners must adopt a purposeful and commonsense approach when exercising their powers. They must carefully weigh up and consider all issues and dispose certain issues in a fair and appropriate manner, as determined by the prevailing circumstances of the particular circumstances of a case.

Certain discretionary powers are conferred in the LRA, in terms of which commissioners may exercise their functions. In Smuts v Adair & Another,145 the commissioner’s award was set aside as she exercised a discretion that did not exist in awarding less compensation than required in terms of the provisions of section 149(1) of the LRA.

However, an award may not be set aside by a court where the commissioner is given discretion to choose between two remedies and he or she merely chooses one remedy over the other.

3.3.2.4 SECTION 145(2)(b): AWARD IMPROPERLY OBTAINED

The LRA provides that CCMA arbitration awards may be set aside if they were obtained by improper means.146 This prescribed ground of review must be read in the context of the entire review provision. This situation occurs where one party to

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144 (1999) 20 ILJ 118 (LC).
146 S 145(2)(b) of the LRA.
the arbitration process obtains an award in its favour, through fraud or improper means. Examples of such incidents occur where a party obtains the award through bribery and corruption of the commissioner and also instances where a party deliberately, wrongfully and falsely misleads the commissioner through false and fraudulent representations.\footnote{Moloi v Euijen NO & Another (1997) 18 ILJ 1372 (LC).}

One of the most common instances of improperly obtained awards is where the commissioner is accused of bias in favour of the successful party. The test to determine whether an award can be set aside on the grounds of bias is whether the commissioner’s conduct created a suspicion or perception of bias. This can easily be created in the mind of a lay person participating in the proceedings.

It is not necessary that that there is a “real likelihood” of bias, but merely a reasonable suspicion thereof. Every commissioner is under a duty to disclose a previous or present relationship with any of the parties to the dispute, be it a social or business relationship. Where a commissioner fails or neglects to disclose the relationship, a reasonable suspicion of bias may arise in the party to the arbitration, and the award may be set aside on review. This duty of disclosure applies to both compulsory and voluntary arbitration proceedings.

A perception of bias may also arise where the commissioner makes inappropriate comments that impinge negatively on the competence and capabilities of one of the litigants. An award will not be set aside on the grounds of perceived or suspected bias on the part of the commissioner where he or she adopted an inquisitorial approach in investigating the complexity of the dispute through the extensive cross-examination of witnesses. This will also be the case where the commissioner adopts an authoritative and firm control over the hearing.\footnote{Mutual and Federal Insurance Company Limited v CCMA & Others supra at 1620.}

After having disclosed any facts that may lead to the reasonable perception of bias, commissioners may on application by one of the parties be requested to recuse themselves from the hearing, but need not agree to the request. However, should the request not be made, the commissioners still have the prerogative to recuse
themselves if they believe they may not be impartial in the matter. By dealing with such important and sensitive issues right at the commencement of the proceedings, valuable time and the legal costs of subsequent review proceedings could be saved.

### 3.3.2.5 JUSTIFIABILITY TEST

The controversial justifiability test was laid down for the review of CCMA awards in the case of *Carephone (Pty) Limited v Marcus NO & Others,* subsequently confirmed by the Labour Appeal Court. The test formed the basis of review proceedings for a long time, until *Sidumo v Rustenburg Platinum Mines Ltd* was decided by the Constitutional Court. According to the *Carephone* case, the award must contain a rational, objective basis justifying the connection between the evidence properly before the commissioner and the conclusion eventually arrived at. This ground for review will be dealt with in Chapter Four.

### 3.4 CONCLUSION

CCMA arbitration awards are generally final and binding on all parties. However, the awards are subject to review on four limited grounds, namely misconduct by the commissioner; gross irregularity in proceedings; *ultra vires* acts; and improperly obtained awards. In general, these grounds relate to the procedural and jurisdictional aspects of the proceedings and the *mala fides* of the arbitrator. The awards may not be appealed. The courts will not enter into the merits of a matter in order to set aside the decision of an arbitrator. Nonetheless, the justifiability of the decision may be examined on review.

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150 [2007] 12 BLLR 1097 (CC).
CHAPTER FOUR
THE JUSTIFIABILITY TEST AND CCMA ARBITRATION AWARD
REVIEWS IN CAREPHONE (PTY) LTD v MARCUS NO & OTHERS

4.1 INTRODUCTION

The justifiability test, as propounded in Carephone (Pty) Ltd v Marcus NO & Others,\textsuperscript{151} has caused much debate among judges and academics alike. However, the Labour Appeal Court has confirmed the application of the justifiability test in the review of awards of the CCMA and the test has subsequently been applied in numerous cases.

This chapter will review the Carephone judgment and discuss the substance given to the justifiability test through subsequent cases. It will thereafter explore the merits of criticisms against and general observations on the rationality test under three general themes. Firstly, the justifiability test has been denounced as blurring the distinction between appeals and reviews - a distinction that has been carefully guarded by the judiciary. Secondly, the justifiability test has been attacked on constitutional grounds relating to administrative law and the exercise of public power. Thirdly, the different policy considerations in favour of the application of the justifiability test are discussed. Having considered the comments and observations, a discussion will follow as to whether the justifiability test should be included in current legal jurisprudence.

4.2 CAREPHONE (PTY) LTD v MARCUS NO & OTHERS

In Carephone, the Labour Appeal Court upheld the judgment of the Labour Court, dismissing an application for the review of a CCMA award. The Labour Appeal Court held that section 145 and not section 158(1)(g) of the LRA\textsuperscript{152} applies in review of CCMA awards. It then went on to formulate the justifiability test, based on the constitutional boundaries on Commissioners’ powers.

\textsuperscript{151} (1998) 19 ILJ 1425 (LAC) at 1435.

\textsuperscript{152} Act 66 of 1995.
4.2.1 FACTUAL BACKGROUND

The appellant dismissed the respondent towards the end of 1996. The referral of the matter to the CCMA for conciliation proved unsuccessful, after which the dispute was referred for arbitration. The appellant was made aware of the dates of the arbitration hearing fourteen days before the commencement of the hearing.

On the first day of the hearing, the appellant requested a postponement of the matter. The commissioner refused the postponement, but delayed the proceedings until the following day. The arbitration proceedings commenced the following day, and the appellant’s representative again requested a postponement. The commissioner again refused the request, but allowed the matter to stand over until the next day.

When the appellant applied for the postponement on the third day, the commissioner refused to grant it. Further, he warned the appellant that should he leave, the hearing would continue. Nonetheless, the appellant departed and the commissioner found in favour of the respondents, who were awarded compensation for wrongful dismissal. Subsequently, the appellant applied to the Labour Court to set aside the commissioner’s award, due to his refusal to grant a postponement and the fact that the resultant arbitration hearing occurred in the absence of the appellant.

4.2.2 REASONING OF LABOUR APPEAL COURT

The court found that the LRA contained three review provisions. Section 145 concerns the review of CCMA arbitration awards; section 158(1)(h) relates to the review of awards where the state is party to the award as an employer; and section 158(1)(g) provides for the review of all other administrative functions performed in terms of the LRA.

153 Carephone (Pty) Ltd v Marcus NO & Others supra at 1435G-1435A.
154 Carephone (Pty) Ltd v Marcus NO & Others supra at 1428F-1429D.
The Labour Appeal Court held that section 145 of the LRA, and not section 158(1)(g), is the applicable provision in review proceedings relating to CCMA awards.\textsuperscript{155} The court considered the competence of the CCMA with reference to the LRA and the Constitution. The court stated that the CCMA found its authority in the Constitution and was subject to its provisions, as it was a public institution created in terms of legislation under the auspices of the Constitution.\textsuperscript{156}

The court rejected the argument that the CCMA performs a judicial function in performing compulsory arbitrations. The court stated that while the commissioners may perform certain acts of a judicial nature, they were not vested with judicial authority in terms of the Constitution. The CCMA exercises public power when it resolves labour disputes in compulsory arbitration proceedings. Furthermore, it is an organ of state, as envisaged in section 239 of the Constitution. It is bound to the Bill of Rights and subscribes to the principles of public administration, namely impartiality, fairness and equity.\textsuperscript{157}

The court commented on the recognition of forums such as the CCMA under section 34 of the Constitution as well as the purpose of the right to fair administrative justice, which is to extend the values of accountability, openness and responsiveness to institutions like the CCMA.\textsuperscript{158}

The Labour Appeal Court held that a CCMA award may be reviewed in terms of section 145(2)(a)(iii), where the Commissioners exceed the constitutional duties incumbent upon them.\textsuperscript{159} The provisions of the LRA concerning compulsory CCMA arbitration were found to be consistent with these constitutional requirements. The imperatives required in terms of the Constitution and highlighted by the court were: process must be fair and equitable; the arbitrator must be impartial and unbiased; the proceedings must be lawful and procedurally fair; the reasons for the award must be stated publically and in writing; the award must be justifiable in terms of the reasons;

\textsuperscript{155} Carephone (Pty) Ltd v Marcus NO & Others supra 1433H.
\textsuperscript{156} Carephone (Pty) Ltd v Marcus NO & Others supra 1430A.
\textsuperscript{157} Carephone (Pty) Ltd v Marcus NO & Others supra 1430 D-G.
\textsuperscript{158} Carephone (Pty) Ltd v Marcus NO & Others supra 1431H.
\textsuperscript{159} Carephone (Pty) Ltd v Marcus NO & Others supra 1432H.
and the award must be consistent with the constitutionally entrenched right to fair labour practices.

The Labour Appeal Court then proceeded to formulate the justifiability test. It stated that administrative action must be justifiable in relation to the reasons given for it.\textsuperscript{160} It further stated that the requirement of justifiability gave expression to the constitutional values of accountability, responsiveness and openness.\textsuperscript{161} Justifiability in this sense involves substantive rationality in the outcome of the administrative decision. The test for rationality laid down in this case was as follows:\textsuperscript{162}

> “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?”

The court stated that justifiability related to whether the decision was defensible; whether it could be shown to be just, reasonable or correct; not whether the decision made was in fact correct or just. The application of this test requires the Labour Court to make value judgments. This will entail a consideration of the merits of the commissioner’s decision in some form.

However, the court cautioned that an investigation into justifiability of the decision did not eliminate the distinction between review and an appeal. The Labour Court does not possess appeal jurisdiction in respect of matters referred to the CCMA for conciliation and arbitration. On review, the judges of the Labour Court must be aware that they enter into the merits merely to determine whether the outcome was rationally justifiable and not in an effort to substitute their own opinions for that of the commissioners in question\textsuperscript{163}. If, however, the judges should on review substitute the decisions with their own, they will in effect be performing an administrative function, which is in conflict with the doctrine of the separation of powers.\textsuperscript{164}

\textsuperscript{160} \textit{Carephone (Pty) Ltd v Marcus NO & Others} 1434B.
\textsuperscript{161} \textit{Carephone (Pty) Ltd v Marcus NO & Others} 1435.
\textsuperscript{162} \textit{Carephone (Pty) Ltd v Marcus NO & Others} 1435 E-F.
\textsuperscript{163} \textit{Carephone (Pty) Ltd v Marcus NO & Others} 1434 E-F.
\textsuperscript{164} \textit{Carephone (Pty) Ltd v Marcus NO & Others} 1434I and 1435A.
4.2.3 RULING OF LABOUR APPEAL COURT

The court found that there had been sufficient material before the commissioner for him to decide the matter rationally and objectively and that his reasoning had been rationally connected to such material. The commissioner was found to have acted within the substantive limits to the exercise of his powers under the LRA, and the appeal was dismissed with costs.

4.3 PUBLIC POWER AND RATIONALITY

The court in Carephone supra held that the power exercised by the CCMA commissioners when making arbitration awards was administrative in nature. This formed the basis of the entire judgment, and the court consequently held that an element of rationality was required in such awards. This approach was wholly rejected in the case of Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others,165 where Zondo JP referred to Carephone and noted the finding that the ground for review contained in section 145(2)(a)(iii) incorporated the constitutional requirement that administrative action must be justifiable in relation to the reasons given for it.166 However, in view of the findings in the case of Pharmaceutical Manufacturers Association: In re Ex parte President of the Republic of South Africa,167 where the Constitutional Court held that public power must be exercised rationally, the court felt obliged to consider whether an award, insofar as it involved the exercise of public power, was reviewable on the basis of rationality. Zondo JP stated that the question that needed to be answered was whether “rationality” and “justifiability” had the same meaning. He argued that if it did, it would not be necessary to depart from the views expressed in the Carephone case supra, because the rationality ground of review, as was expressed by the Constitutional Court in Pharmaceuticals Manufacturers supra, would already be accommodated in Carephone supra.168 Zondo JP proceeded and stated the following:169

166 Vide para 8.
167 2000 2 SA 674 CC.
168 Vide para 21.
169 Vide para 25.
“There can be no doubt that in Carephone this Court viewed the concept of justifiability as related, at least to some extent, to the concept of rationality but emphasised, correctly in my view, in the context of the fact that it was dealing with section 33 read with 23 which expressly use the adjective “justifiable”, that it should stick to the term “justifiable”. In the light of this I am of the view that, although the term “justifiable” 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.”

However, despite the finding by the court that the concepts of “justifiability” and “rationality” are in essence similar concepts from which an inference can be drawn that there should be no departure from the Carephone case, the court also found that:

“Irrationality of such decisions is now a ground of review and, quite clearly, the issuing of an arbitration award by a CCMA Commissioner under the Act is an exercise of public power and must, therefore, meet the constitutional requirement of rationality. If an award fails to meet this constitutional requirement, it can be set aside on this ground.”

From reading the above, it would seem to appear that the court has introduced the concept of rationality as a ground for review, which can be distinguished from the grounds specifically mentioned in section 145. On the other hand, Zondo JP also held that Carephone stays:170

“This appeal can, therefore, be considered on the basis as was decided by this Court in Carephone CCMA awards can be reviewed and set aside if they are not justifiable in relation to the reasons given for them.”

It is unfortunate that the court did not deal with the question whether rationality, like justifiability, could also be deduced from section 145(2)(a)(iii), except to mention that:171

“In determining that the ground of review of justifiability fell within section 145(2)(a)(iii) of the Act, Carephone in effect held that the time limits set out in section 145 for the

170 Vide para 33.
171 Vide para 32.
bringing of review applications against CCMA awards would apply to that ground of review as well. In this regard, it may be thought that, if the ground of review relied upon is not under section 145, the period within which a review on such ground must be launched is a reasonable time from the day of the issuing of the award and not the six weeks as prescribed by section 145. If Carephone stands, the question of whether the six weeks period does or does not apply will not arise. Although the reasoning on which this conclusion was based in Carephone is unsatisfactory, there are, in my view, sound policy considerations which suggest that we leave Carephone as it is.”

However, the court based this conclusion on the premise that commissioners exercise public powers when performing their arbitral functions and are therefore bound by the constitutional requirement of justifiability.\(^\text{172}\)

The Labour Appeal Court has held that the issuing of an arbitration award by a CCMA commissioner is “clearly” an exercise of public power.\(^\text{173}\) However, no reasons for this conclusion have been provided.

Public power is a complex term that should not be too rigidly defined, as its scope and nature are constantly changing. In defining public power, the following concepts should be taken into account: the nature and extent of the power being exercised; and the vulnerability of the citizen and the availability of alternative means of controlling the exercise of power. The source of the power exercised and nature of the body exercising the power, while relevant, are not conclusive in the categorisation of the power as public or private; more important is the nature of the power being exercised.

Commissioners acting on behalf of the CCMA wield extensive power, as their decisions affect the rights and duties of all people in prescribed labour disputes. The only redress available to parties aggrieved by the award of a CCMA arbitrator is through the review provisions set out in the LRA.\(^\text{174}\) No appeal is permitted from such awards. No contractual relationship exists between the CCMA and the party aggrieved by the award in terms of which this party could utilise an alternative means

\(^{172}\) Shoprite Checkers (Pty) Ltd NO & Others (LAC) supra at 1616J-1617F.

\(^{173}\) Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others (LAC) supra at 614I; Glaxco Welcome SA (Pty) Ltd v Mashaba & Others [2000] 8 BLLR 923 (LC) at 927I.

\(^{174}\) s 145(2)(a) of the LRA.
of legal redress. The grounds of review are the only means of control of the vast power exercised by CCMA commissioners in the performance of their arbitral duties.

In *Pharmaceutical Manufacturers Association of SA*, the Constitutional Court stated that the rule of law required that decisions made in the exercise of public power be rationally related to the purpose for which the power was bestowed. This involved an objective investigation. Should an irrational decision be permitted to stand, it would be contrary to the constitutional principles required of such exercises of power.

The Constitutional Court stated that rationality was the minimum constitutional requirement of all instances where public power was being exercised by the executive and its functionaries. However, the Constitutional Court cautioned that this did not mean that this requirement called for judges to substitute their own opinions for the decision made. The element of rationality demands that the purpose of the exercise of a specific power be within the powers of the functionary and that the functionary’s decision is objectively rational. This applies regardless of whether or not the objectively irrational decision is made in good faith. Consequently, as holders of public power, CCMA arbitrators are required to comply with the requirement of rationality in making arbitration awards.

### 4.4 ADDING SUBSTANCE TO JUSTIFIABILITY TEST

In devising the justifiability test in *Carephone’s* case, Froneman DJP states that this requirement of substantive rationality could also be formulated as “reasonableness”, “rationality” or “proportionality”. He further states the following:

“Without denying that the application of these formulations in particular case may be instructive, I see no need to stray from the concept of justifiability itself. It seems to me that one will never be able to formulate a more specific test other than, in one way or another, asking the question: is there a rational objective basis justifying the connection made by the administrative decision maker between the material properly available to him and the conclusion he or she eventually arrive at?”

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175 *Pharmaceutical Manufacturers Association of South Africa* supra at 708D-G.
176 *Pharmaceutical Manufacturers Association of SA* supra at 708F.
177 *Carephone (Pty) Ltd v Marcus NO & Others* supra at 1435C-E.
Froneman adds that judicial precedent will give more specific content to the broad concept of justifiability in the review of CCMA arbitration awards in terms of the LRA. What follows below, is a brief analysis of the interpretation that the courts have since accorded to the justifiability test.

4.4.1 MEANING OF JUSTIFIABILITY

The term “justifiability” has a specialised meaning in regard to the review of CCMA commissioners awards.\textsuperscript{178} However, the justifiability test requires that commissioners apply their minds seriously and conscientiously to the evidential material before them and reach conclusions on rational rather than confused or illogical bases.\textsuperscript{179} It concerns the process of reasoning and the connection or absence of connection between the premises and the outcome.

A court will not interfere with a decision reached by a commissioner once it finds that the commissioner has applied his or her mind to the relevant issues and the facts. If there a rational connection between the findings of fact and the conclusion, it will not interfere with the award.\textsuperscript{180} This is so, even if the court or another commissioner would have come to a different conclusion.

Justifiability does not relate to whether the decision is correct; this is the subject matter of an appeal. Justifiability relates to the process of decision-making, in other words, whether there is a logical reasoning or an explanation for that decision. The result of this distinction is that an incorrect conclusion does not necessarily lack justifiability.\textsuperscript{181}

In \textit{Country Fair Foods v CCMA},\textsuperscript{182} Ngcobo AJP found that justifiability meant no more than that the commissioner’s decision must be supported by the facts and applicable law. Firstly, the decision must be supported by the facts \textit{found}, as reflected in the

\textsuperscript{178} \textit{Nel v Ndaba & Others} (1999) 20 ILJ 2666 (LC) at 2671D.
\textsuperscript{179} \textit{Adcock Ingram Critical Care v CCMA & Others} (2000) 21 ILJ 1752 (LC) at 1751.
\textsuperscript{180} \textit{SMCWU v Party Design CC} [2001] 6 BLLR 667 (LC).
\textsuperscript{181} \textit{Purefresh Foods (Pty) Ltd v Dayal & Another} (1999) 20 ILJ 1590 (LC).
\textsuperscript{182} (1999) 20 ILJ 1701 (LAC).
rational reasoning. This implies that a court may not interfere with a commissioner’s factual findings, where they are logically substantiated. Secondly, the law applied as shown by the commissioner’s reasoning, must support the decision. The application of incorrect legal principles may, however, be indicative of a failure by the commissioner to apply his or her mind and nonetheless render the award reviewable. Lastly, the final decision of the commissioner must follow logically from the factual and legal findings made in the reasoning process.

The existence of one or more flawed reasonings in a commissioner’s award will not render the entire decision unjustifiable; provided that the commissioner would have reached the same conclusion had such flawed reasons not been present.\footnote{\textit{Gray Security Services (Western Cape) (Pty) Ltd v Cloete NO \\& Another (2000) 21 ILJ 940 (LC) at 952C-954J.}}

\subsection*{4.4.2 JUSTIFIABILITY v REASONABLENESS, RATIONALITY AND PROPORTIONALITY}

The court in \textit{Carephone}’s case stated that “reasonableness,” rationality” and “proportionality” may be useful re-formulations of “justifiability” in certain disputes. It is therefore understandable that the Labour Appeal Court stated that it would generally be unnecessary to stray from the original formulation of the assessment, namely justifiability. The justifiability test requires an objective analysis, which would be in line with the common law principles of review. In making this determination, the court will consider the allegations of the parties, the decision and reasoning of the commissioner, the material or evidence before the commissioner and any other relevant factor.\footnote{\textit{Department of Justice v CCMA \\& Others (2001) 22 ILJ 2439 (LC) at 2447 I-J.}}

The court in \textit{Carephone} treated the Commissioner’s power as administrative action. Thus, the origin and the context of the concepts of reasonableness, rationality and proportionality were immediately clear. These are clear grounds for review under administrative law.\footnote{Vide s 33 of the Constitution and s 6 of PAJA.} Justifiability should remain the definite yardstick in CCMA
reviews for irrationality, as Carephone has been held to be incorrect in that CCMA arbitrators exercise public power rather than administrative power.\textsuperscript{186}

The courts have framed the justifiability test in terms of reasonableness in a number of cases. An example of such is the question whether a reasonable person sitting as a commissioner would have come to the same conclusion. In order to avoid review, the commissioner's decision must fall within the range of reasonably possible and appropriate outcomes. The error in this approach is that it focuses on the conclusion of the commissioner, rather than on the reasons for such conclusion. This is not the purpose of the justifiability test, as it may blur the distinction between appeals and reviews, in that the court may look into the correctness of the commissioner's decision.

In Country Fair Foods (Pty) Ltd v CCMA,\textsuperscript{187} Conradie JA made reference to reasonableness in testing the justifiability of the sanction awarded by a commissioner. He referred to the judicial alteration of sentence in a criminal appeal. An award would not be considered justifiable if it is “dramatically wrong”, “perverse” or “strikingly inappropriate”. He said it was also not justifiable if it was excessively out of kilter with what the review court would have awarded. This test was based on the reluctance by the appeal courts to interfere with the exercise of discretion on the grounds of unreasonableness. Conradie JA stated that the reluctance to interfere on the review ground of unreasonableness should be just as strong, if not stronger.\textsuperscript{188}

This approach should not be followed in investigating the justifiability of an award. It fails to take cognisance of the material elements of the justifiability test, namely the rationality of the commissioner’s decision, as reflected in the reasoning for such decision. It focuses on the outcome of the hearing, rather than on the reasoning process; thereby blurring the distinction between appeals and reviews. In fact, the learned judge applied an appellate test in the review proceedings.

\textsuperscript{186} Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others (LAC) \textit{supra} at 1616J-1617F.
\textsuperscript{187} (1999) 20 ILJ 1701 (LAC).
\textsuperscript{188} In Toyota South Africa (Pty) Ltd & Others v Radebe & Others (LAC) \textit{supra} at 355A-E.
In *Morningside Farm v Van Staden NO & Another*, a similar approach was adopted. Here, the court stated that a CCMA award may be set aside if there was a glaring inconsistency between the facts found and the final decision.

These judgments can be interpreted to relate to the rationality of the decision, in that the glaring inconsistency may show that that the commissioner's reasoning is inadequate and unjustifiable.

The courts have discussed the similarity between the meanings of rationality and justifiability. Indeed, the justifiability test formulated in *Carephone* requires a rational, objective basis.

In *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp & Others*, the Labour Appeal Court stated that rationality required that commissioners not act arbitrary. They must arrive at decisions through a reasoning process rather than through "conjecture, fantasy, guesswork or hallucination". It further stated that justifiability related to the decision being defensible on the important rational steps taken in the reasoning advanced by the commissioner.

Proportionality, this was not utilised as a means of applying the principles of *Carephone*.

In *Roman v Williams NO*, the High Court asserted that every administrative decision must be capable of objective substantiation. This requires that three factors be present, namely suitability, necessity, and proportionality. The two former factors, which may overlap, depend largely on the purpose for which the administrative power was bestowed. Proportionality relates to the relationship between the means and the end of the investigation, and will be determined on the particular facts of each case.

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191 1998 1 SA 270.
4.5 CRITIQUE OF JUSTIFIABILITY TEST

The justifiability test has been criticised as blurring the distinction between appeals and reviews, despite the judicial emphasis on the existence of this distinction. Appeals relate to whether the conclusion of the decision-maker is correct on the merits. Reviews concern the manner in which the decision-maker reached such conclusion. The LRA does not provide for appeals against CCMA arbitration awards. However, aggrieved parties have a limited right to the review of such awards where a statutory defined defect exists in the award.\(^{192}\)

In *Carephone*,\(^{193}\) Froneman DJP stated that the justifiability test did not abolish the distinction between appeals and reviews. The learned judge differentiated justifiability (able to be shown to be just, reasonable or correct) and correctness (“just”, “justified” or “correct”). The reference here to a decision being able to be shown to be “correct” was unfortunate, as justifiability does not relate to the correctness of a commissioner’s decision.\(^{194}\) The reference merely perpetuates the mistaken belief that justifiability blurs the appeal-review divide.

The argument that the justifiability test transforms the review CCMA awards into appeal proceedings is based on the alleged similarity between the justifiability test and appeals. By including justifiability under the review ground of commissioners having exceeded their powers, courts are said to advocate that commissioners exceed their powers unless they decide the case correctly.\(^{195}\)

Neither was section 145(2)(a)(iii) intended for this purpose, nor is this the effect of the justifiability test. Admittedly, the justifiability test comes close to transcending the line dividing appeals and reviews. This distinction must be recognised in interpreting the justifiability test.

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\(^{192}\) S 145(2)(a) of the LRA.

\(^{193}\) *Carephone (Pty) Ltd v Marcus NO & Others supra* at 1434 C-F.

\(^{194}\) *County Fair Foods (Pty) Ltd v CCMA & Others supra* at 1706 F-1707A.

\(^{195}\) *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others (LC) supra* at 1247, cited with approval in *Cox v CCMA & Others [2001] 2 BLLR 141 (LC)* at 145 D.
The Review Court is not required to determine whether the commissioner was correct in making the award\(^{196}\) as this would be tantamount to an appeal. The court must investigate the reasoning of the award and determine whether the commissioner applied his or her mind and gave a decision based on rational reasoning. Commissioners act beyond their powers where they give arbitrary, irrational awards that are not based on logical reason, regardless of whether or not the award is correct.

The test places an onerous burden on the court to enter into the rationality of the merits of the decision. However, the merits are not considered to comment on the correctness of the decision or to substitute the decision with a judicial evaluation.

Rather, the merits are considered only to determine the rationality of the process of decision-making through a consideration of the relationship between the reasons and the outcome.\(^{197}\) This represents the key difference between an appeal and a review on the grounds of justifiability.

A further argument is that it is unlikely that an incorrect award based on erroneous findings of fact and erroneous reasoning will be justifiable. The argument continues that as a result, no significant difference exists between review on the grounds of justifiability and appeal.\(^{198}\) Awards based on erroneous finding of fact are likely to be unjustifiable. Further, the final decision in such awards is likely to be incorrect. However, the correctness of the decision is irrelevant in applying the justifiability test.

On appeal, the decisions that are incorrect will always be set aside. Correct decisions based on incorrect reasoning will be upheld, provided that there is a different process of reasoning to uphold the decision.\(^{199}\) On review for justifiability, incorrect decisions will not necessarily be set aside. It is insufficient and irrelevant to show that the award is incorrect, as incorrect decisions may yet be justifiable. This will be the case where the commissioner applied his or her mind to the matter, and

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\(^{196}\) Vide Cadema (Pty) Ltd v CCMA (Western Cape Region) & Others (2000) 21 ILJ 2261 (LC).

\(^{197}\) County Fair Foods (Pty) Ltd v CCMA & Others supra at 1706E-F.

\(^{198}\) Shoprite Checkers (Pty) Ltd v Ramdaw & Others (LC) supra at 1247.

\(^{199}\) Karbochem Sasolburg (A division of Sentrachem Ltd) v Kriel & Others (1999) 20 ILJ 2889 (LC).
his or her reasons lead logically and rationally to the conclusion. Such awards would be upheld, despite the incorrect conclusion. The corollary is that a correct yet unjustifiable decision will be set aside on review, due to an absence of rationality. This demonstrates that the appeal-review divide can be maintained despite the use of the justifiability test.

The justifiability test requires that the court be aware of the correct application of the test and give effect to this subtle distinction. Aggrieved parties may attempt to appeal to a Commissioner's award under the guise of review for justifiability. This is insufficient reason to disallow the justifiability test in its entirety. Instead, the Labour Courts must be cautious in the application of the test, and should dismiss any applications that seek appeals under the guise of reviews.200

4.5.1 RIGHT TO JUST ADMINISTRATIVE ACTION

The application of the justifiability test in Carephone was premised on the notion that commissioners exercised administrative actions when making arbitral determinations. This has since been held to be incorrect, in that commissioners exercise public power rather than administrative power in doing so. The courts have given little motivation in support of this conclusion. The reason for this can be found in section 33 of the Constitution, which provides for administrative justice.

This provision can be relied upon only where the power exercised constitutes administrative action. The CCMA is in an organ of state that exercises public power. However, not every exercise of public power is administrative in nature. An aggrieved party would seek recourse from an invalid administrative action through the use of PAJA, which provides that an administrative action may be reviewed if the decision is not rationally connected to the information before the administrator and the reasons given for the decision by the administrator. The similarity between this review ground and the justifiability test is recognisable.

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200 Examples of matters dismissed as a result of applicants seeking appeals under the guise of reviews include Cox v CCMA & Others supra at 144D-E; Ster Kinekor (Pty) Ltd v Daka & Another 2001 10 (LC) 1.11.11 at para 11.
It appears to be unlikely that the PAJA will apply to the review of commissioner’s arbitral powers. The reason for this is that the LRA came into effect before the planning for the PAJA had even begun. There was intense judicial debate as to the applicability of section 158(1)(g) of the LRA, the general review powers of the Labour Court, to CCMA arbitration awards. It was held that a constitutional interpretation of the LRA required that section 145 be the only provision applicable to the review of CCMA awards.201

The common law approach resulted in a wide formulation of the types of powers that the judiciary was empowered to review. In President of the Republic of South Africa v South African Rugby Union,202 the Constitutional Court stated that when determining whether an exercise of power constituted administrative action, the relevant considerations included the source, nature and subject matter of power, whether a public duty was being exercised and the relation between the power and the non-administrative policy matters or the implementation of legislation. While the constitutional review test is much wider than its common law predecessor, the common law remains part of our law, as developed in the light of the Constitution.203

Hoexter suggests that an institutional approach, informed by a doctrine of separation of powers, be adopted in determining the constitutional meaning of administrative action.204 This approach excludes the exercise of power by the judiciary and the legislature from the definition, as these powers are judicial and legislative in nature. The public administration consists of all executive organs, excluding the Cabinet and, in certain circumstances, the President.

However, the notion that a CCMA commissioner is exercising an administrative action when performing arbitral functions has been firmly rejected by the Labour Courts.205 This conclusion is based on Constitutional Court cases decided after

201 Carephone (Pty) Ltd v Marcus NO & Other supra at 1433G.
202 1999 10 BCLR 1059 (CC).
203 Smithkline Beecham (Pty) Ltd v CCMA & Others (2000) 21 ILJ 988 (LC).
205 Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others supra at 1617C-D.
Carephone and on the fact that the court in Carephone failed to consider whether the making of the arbitration award was an administrative act before applying the right to administrative justice.

The nature of the commissioner’s power was entered into the labour judgment of Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others. Here the Labour Court ruled that arbitration had never been regarded as a form of administrative action. Commissioners do not exercise administrative powers due to the compulsory nature of the CCMA arbitration, as an extension of private arbitration and an alternative to court adjudication.

4.5.2 OTHER POLICY CONSIDERATIONS

The justifiability test has found support on the basis of other policy considerations. Justice is perhaps the most important factor to be considered in determining whether the justifiability test should apply.

The endorsements of awards that are not based on the findings made by a commissioner, or which are irrational, arbitrary or unjustifiable in any other sense, serve only to perpetrate injustice. It is in the interests of justice and sound labour relations that a CCMA arbitration award be justifiable in relation to the reasons given for it. Fairness is an overriding and fundamental objective of the LRA. The requirement of justifiability in awards also contributes to the pursuit of justice by reducing the effects of commissioners being ill trained, inexperienced and overworked.

The application of the justifiability test has been upheld on the basis of the Labour Court being a court of “law and equity”, rather than merely a “court of law”. This status is the result of the 1998 amendments to the LRA, which require that the

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206 Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council 1999 1 SA 374 (CC).
207 Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others (LAC) supra at 1617B.
208 Cox v CCMA & Others supra at 145F. However the court stated that this reasoning applies only where, but for the mistake the commissioner would have ruled in favour of the party (at 145H).
209 S 151(1) of the LRA.
Labour Court attributes equal weight to law and equity in interpreting the law.\textsuperscript{210} It is important that aspects of fairness must be considered when the Court makes decisions. Equity requires that substantive rationality be an essential characteristic of CCMA awards.

In general, labour dispute jurisdiction is divided between the Labour Court and the CCMA, depending on the nature of the dispute. Unlike private arbitration, CCMA arbitration is imposed on the relevant parties. The element of compulsion and the finality of the awards require that a review be permitted where the final decision is not justifiable on the reasons, despite the LRA aim for expedience in the resolution of labour disputes. This also reflects the necessity that justice be done. It has also been said that sound labour relations would be better served in general if arbitration awards complied with the requirements of section 33 of the Constitution.

4.6 DEVELOPING LAW

The current constitutional dispensation aims to foster a democratic society in which accountability, responsiveness and openness are central features.\textsuperscript{211}

The wrongs committed in our apartheid past are addressed in the Bill of Rights to ensure that justice will be done in the future. The application of the justifiability test upholds the culture of rationality upon which this order is based. Section 145(2) of the LRA must be interpreted to allow review on the grounds of justifiability.

Justifiability has been incorporated into section 145(2) of the LRA in various ways. In \textit{Carephone}, Froneman DJP stated that review in terms of the justifiability test applied on the basis that the commissioner had exceeded the constitutional constraints on his or her arbitral powers. This is a defect in terms of section 145(2)(a)(iii) of the LRA, and renders the award reviewable.\textsuperscript{212}


\textsuperscript{211} Preamble to s 1 of the Constitution.

\textsuperscript{212} \textit{Carephone (Pty) Ltd v Marcus NO & Others supra} 1439C.
However, case law indicates that the courts are divided as to how the justifiability test fits into the existing body of labour law. Some judges claim that the justifiability test is a separate constitutional ground for review. Others try to incorporate the test under section 145(2), either by applying it as the “standard of review” or by adopting the Carephone approach and including the test as an incidence of a defective award, as envisaged by section 145(2). In other cases, the judges fail to categorise the test, merely citing it along with section 145(2) and proceeding to focus on the application of the justifiability test, although a sound framework for such application still needs to be established.

It would appear that these methods of integrating the justifiability test into existing case law will be discussed later. It seems that the doctrine of separation of powers and our constitutional order in general requires that justifiability be included as an instance of review under section 145(2), on the same basis as any other form of reviewable irregularity or misconduct.213

4.6.1 A SEPARATE GROUND OF REVIEW?

In some cases, the judiciary has viewed the justifiability test as a review ground separate from section 145.

In the matter of Department of Justice v CCMA & Others,214 the court referred to section 145, and then stated:

“In addition to grounds set out above, there is a further ground based on the constitutionally entrenched right to fair administrative action. This ground is set out in the matter of Carephone v Marcus NO & Others.”

The reliance on the right to administrative justice in the reasoning of Carephone has been criticised and rejected by the Labour Appeal Court in the matter of Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others.215 However, the ratio decidendi of the case has been upheld on the basis of policy considerations. In the absence of any

213 Cadema (Pty)Ltd v CCMA (Western Cape Region) supra 2267H.
214 (2001) 22 ILJ 2439 (LC).
statement to the contrary, this implies that the incorporation of the test under section 145, rather than a separate ground of review, should stand as well.

It is important to recognise the doctrine of separation of powers in this enquiry. Section 145(2) provides the limited grounds of review as determined by the legislature. The judiciary is not permitted to interfere in this exercise of legislative power. Until such time as a law is declared unconstitutional, the courts may, at best, interpret the existing grounds consistent with the Constitution. Thus, the judiciary may not decide that a new ground of review exists on the basis of justifiability. It is therefore necessary that either section 145(2) be set aside as unconstitutional, or it be interpreted in the light of the Constitution. Having regard to the fact that section 145 has not come under constitutional attack, the courts have stated obiter that this provision is not unconstitutional. Consequently, the justifiability test must be interpreted under the existing review grounds.

Thus, justifiability must be incorporated into section 145. It is not a separate or constitutional ground of review. Parties should be prohibited from utilising Carephone’s test to circumvent the review grounds set out in section 145 of the LRA.

4.6.2 JUSTIFIABILITY TEST – STANDARD OF REVIEW UNDER SECTION 145

In discussing the requirement of justifiability in a CCMA award, the court in Carephone labelled the subsection of the judgment, “The standard of review”. The court stated that the constitutional right to administrative justice extended the scope of judicial review to include substantive rationality. The judgment then proceeds to discuss the manner in which one would go about determining whether administrative action is justifiable in relation to the reasons given for it and formulating the justifiability test.

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217 Toyota SA Motors (Pty) Ltd v Radebe & Others supra 351F; Cox v CCMA & Others supra 146A.
218 Carephone v Marcus NO & Others supra 1431-1434J.
This reasoning suggests that the justifiability test is the general standard to be applied to all reviews of CCMA awards.\textsuperscript{219} For example, in Ensign Brickford SA (Pty) Ltd v Shongwe NO & Others,\textsuperscript{220} the commissioner’s failure to exercise his discretion on the facts was held to be misconduct, on the basis that no rational objective basis justified the connection between the material before him and the conclusion he arrived at. Here, justifiability was used as a yardstick of misconduct. In most other cases, this so-called standard of review has been applied without any reference to the express grounds in section 145.\textsuperscript{221}

The Carephone concept of rationality is clearly not a general test for the review of CCMA awards. This approach ignores the existence of section 145 in its entirety, flouting both the doctrine of separation of powers and the many cases of legal precedent in CCMA reviews.

However, Carephone’s justifiability test does not purport to do this, either impliedly or expressly. Furthermore, the justifiability test as a general standard of review cannot be wholly reconciled with the grounds set out in section 145. For example, justifiability cannot be used as a yardstick for whether an award was improperly obtained.

4.6.3 JUSTIFIABILITY- AN INSTANCE OF REVIEW UNDER SECTION 145?

It appears from precedents that an overwhelming number of cases incorporate the lack of substantive rationality into section 145(2), as any other form of conduct or omission that is reviewable. This submission can be supported by another instance of review where commissioners commit a gross irregularity in terms of section 145(2)(a)(ii) of the LRA, by prohibiting a party from calling witnesses. Irrationality is viewed as an instance of justifying the setting aside of an award on the grounds of an arbitrator exceeding his or her powers by committing misconduct in relation to his or

\textsuperscript{219} Metro Cash & Carry Ltd v Le Roux NO & Others [1999] 4 BLLR 351 (LC) 353F-I.
\textsuperscript{220} (2001) 22 ILJ 146 W (LC).
\textsuperscript{221} National Union of Metalworkers of SA on behalf of Ngele v Delta Motor Corporation & Others (2002) 23 ILJ 1876 (LC).
her arbitral duties or committing a gross irregularity in the conduct of the arbitration proceedings.

In Carephone, the Labour Appeal Court incorporated substantive rationality under section 145(2)(a)(iii) as an instance of review, in that commissioners have a constitutional duty to make determinations that are justifiable and exceed this limit by making irrational awards.\textsuperscript{222} In terms of the general principles relating to section 145(2)(a)(iii), CCMA Commissioners must recognise and abide by the prescribed duties and powers imposed on them by the LRA. Where commissioners fail or neglect to adhere to such duties they exceed their powers and their awards may be set aside. Irrationality is a form of conduct where commissioners exceed their powers, in the same manner as review, where commissioners hear matters beyond their statutory jurisdiction. The justifiability test is merely applied as a guiding principle to determine whether the defect of irrationality exists in the award. Justifiability is treated as an instance of review, and not as the sole basis upon which parties may apply for review under section 145(2)(a)(iii).\textsuperscript{223} The starting point of the review enquiry always lies in section 145(2)(a).

The grounds for review are not watertight groupings of defective conduct, rendering CCMA awards open to review. It could happen that one form of defective conduct may fall into two or more of the grounds set out in Section 145(2) of the LRA, depending on the manner in which one approaches the issue.

This phenomenon was identified in the matter of County Foods (Pty) Ltd v CCMA & Others,\textsuperscript{224} where the court stated that an award lacking rationality might be reviewed in terms of the commissioner having exceeded his powers, having committed misconduct, or having committed a gross irregularity, whichever is the most appropriate. Many judges have chosen to locate justifiability under the review ground of a commissioner having committed a gross irregularity in the conduct of the arbitration proceedings.

\textsuperscript{222} Vide Carephone (Pty) Ltd v Marcus NO & Others supra 1439C.
\textsuperscript{223} De Beers Consolidated Mines Ltd v CCMA & Others (2000) 21 ILJ 1051 (LAC).
\textsuperscript{224} (1999) 20 ILJ 1701 (LAC).
However, in the matter of *Goldfields Investment Limited & Another v City Council of Johannesburg & Another*,\(^ {225}\) it was stated that gross irregularities fell into two classes, namely patent and latent irregularities. The former relates to those that occur openly in the conduct of the arbitration, while the latter concerns irregularities occurring in the minds of the decision-maker.

4.7 CONCLUSION

The foregoing discussion illustrated the difficulties the judiciary has faced in interpreting the review grounds and applying the justifiability test. The application of the justifiability test in CCMA arbitration review can only be beneficial. If the test is applied correctly, it does not transcend the dividing line between appeals and reviews. Justifiability serves a vital function in controlling the immense public power exercised by CCMA arbitrators, despite the fact that such power does not amount to administrative action in the sense that is protected by the Constitution. The rule of law and the doctrine of legality, which is inherent of our constitutional order, require that the decisions of the CCMA arbitrators be rationally based on our democratic values of accountability, responsiveness and openness.

Other policy factors also call for justifiability in CCMA arbitration awards. These include the pursuit of justice, the compulsory nature of CCMA arbitration proceedings, the finality of CCMA awards, the supervisory role played by the Labour Court in relation to the CCMA, and sound labour relations.

While the requirement of justifiability in CCMA arbitration awards appears to have found acceptance with the judiciary in principle, courts have anguished over how to legitimately include such rationality into labour law as it currently stands. Perhaps one of the greatest problems is that justifiability was accepted as a requirement of CCMA awards on incorrect legal foundations. Had the reasoning of Carephone been correct, the *ratio deciderendi* of the case would not have been questioned and the courts would have included the justifiability test under the review ground that a commissioner exceeded his or her powers. While justifiability is not a separate

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\(^ {225}\) 1938 TPD 551 at 556 cited in *Toyota SA Motors (Pty) Ltd v Radebe & Others (LAC)* supra 351F.
ground for review or a general standard of review, it is not necessary to limit justifiability to Section 145(2)(a)(iii) of the LRA.
CHAPTER FIVE
SIDUMO AND REVIEW OF CCMA ARBITRATION AWARDS

5.1 INTRODUCTION

The leading case of Carephone was decided on the basis of the wording contained in the administrative justice clause contained in the Interim Constitution of 1993. This provision provides that administrative justice should be justifiable in relation to the reasons given for it. However, the final 1996 Constitution no longer uses this wording. Section 33(1) now provides that “everyone has the right to administrative action that is lawful, reasonable and procedurally fair”.

The change in wording in the just administrative action raised the question whether the change in wording had any material influence on the interpretation of the reading of section 145 of the LRA. The argument that was advanced, was that the choice of words was meaningful and significant. However, in the Carephone case, it would appear that the court seemed to regard “justifiability” and “reasonableness” as being one and the same when it stated that:

“Many formulations have been suggested for this kind of substantive rationality required of administrative decision-makers, such as ‘reasonableness’, ‘rationality’, ‘proportionality’ and the like. Without denying that the application of these formulations in particular cases may be instructive, I see no need to stray from the concept of “justifiability itself”.

In Shoprite Checkers (Pty) Ltd v Ramdaw & Others, the Labour Appeal Court indicated a preparedness to interpret justifiability and rationality as similar concepts. With the advent of Sidumo, the Constitutional Court had the opportunity to provide clarity on this legal issue, but also went further and set the standard to be applied in the review of arbitration awards in respect of section 145 of the LRA. In this chapter,

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226 S 24(d).
227 Carephone (Pty) Ltd v Marcus NO (1998) 19 ILJ 1435C-E.
228 (2001) 22 ILJ 1603 (LAC).
we will examine the findings of the Constitutional Court and the standard that should be applied in section 145 arbitration award review proceedings.

5.2 **PAJA OR LRA**

It is important to emphasize that the PAJA is more than a place of legislation providing a statutory grounding for judicial review. It is not mainly concerned with giving judges and magistrates the power to tract down and correct maladministration in individual cases and after the fact.

It aims to set out system-wide procedures and methods that will encourage good decision-making by administrators in the first place, thereby reducing the need for judicial review. Before 19994, the general administrative law of South Africa was a common law system. The exemplary characteristic of this system is the following dictum of Innes CJ, in Johannesburg *Consolidated Investment Company Ltd v Johannesburg Town Council*,229 “Whenever a public body has a duty imposed on it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty, this Court may be asked to review the proceedings complained of and set aside or correct them. This is no special machinery created by the legislature; it is a right inherent in the Court.”

PAJA provides a set of legislative rules and principles with the general effect aimed at ensuring the lawful, reasonable and procedurally fair exercise of a particular administrative power. PAJA’s definition of administrative action requires the courts to enquire whether the nature of arbitration proceedings is such that it constitutes a decision taken by an organ of state as exercising a public power or performing a public function in terms of legislation.

In *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others*,230 the Supreme Court of Appeal considered the possible effect of the enactment of PAJA on section 145(2) of the LRA and found it unnecessary to decide whether PAJA applied. The Labour Appeal Court did so on the basis of the dictum referred to in *Carephone*, which

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229 1903 TS 111, 115.
230 2001 4 SA 1038 (LAC).
appears to be in line with the reasoning of the Constitutional Court in *Pharmaceutical Manufacturers Association of South Africa & Another: In re Ex parte President of the Republic of South Africa & Others.*

“It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.”

The Supreme Court of Appeal thereafter compared the grounds of review under section 145 of the LRA with section 6(2) of PAJA and came to the conclusion that PAJA extended the available remedies to parties to CCMA arbitrations and that PAJA superseded the specialised enactment of the LRA and consequently that arbitration awards would be rendered subject to review in terms of the PAJA. It means, too, that the comprehensive lists of grounds of judicial review in section 6 supplements the narrower lists of review grounds in other legislation.

In this regard, the Supreme Court of Appeal relied on the decision of the Constitutional Court in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others,* where it was stated that Section 6 of PAJA revealed a clear purpose to codify the grounds of judicial review of administrative actions. The Constitution requires PAJA to “cover the field”, and it did so. Nothing in section 33 of the Constitution precludes specialised legislation of administrative action, such as section 145 of the LRA, alongside general legislation, such as PAJA. However any legislation that gives effect to section 33 must comply with its precepts. In *Bato Star,* the following appears:

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231 2000 2 SA 647 (CC); 2000 3 BCLR 141 (CC).
232 Para 42.
233 *Rustenburg Platinum Mines v CCMA* 2006 SCA 115 (RSA) [23]-[25] (the grounds of review in the PAJA override the narrower list of grounds applicable to review of CCMA decisions in s 145 of the LRA).
234 2004 4 SA 490 (CC); 2004 7 BCLR 678 (CC).
235 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others* 2004 4 SA 490 (CC).
236 At para 25.
“The provision of section 6 divulges a clear purpose to codify the grounds of judicial review of administrative action as defined in PAJA. 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. *It is not necessary to consider here causes of action for judicial review of administrative action that do not fall within the scope of PAJA. As PAJA gives effect to section 33 of the Constitution, matter that relating to the interpretation and application of PAJA will of course be constitutional matters.*"

The Supreme Court of Appeal found that PAJA applied.

Furthermore, the CCMA, in adjudicating labour related disputes is generally recognised as a public institution, which is a creature of statute involved in the exercise of public power, whereas PAJA has adopted a similar definition as an “organ of state”. Hoexter warns against interpretations that attempt to introduce the classification of administrative functions as “judicial”, “quasi-judicial”, “legislative” and “purely administrative”.

“Given that the classification of functions has been discredited in our system, and given the Courts’ deliberate efforts to root it out of our common law, it would be perverse to read this conceptual approach into the Act on such flimsy evidence. There is even less justification for asserting that the effect of the phrase is to exclude ‘legislative’ (or for that matter, ‘judicial’) administrative conduct from the PAJA since the New Clicks case, where Chalkalson CJ regarded the phrase ‘of and administrative nature’ as bringing regulation making *within* the scope of the definition of ‘decision’.”

PAJA is general administrative law, applicable to all instances of administrative action, as defined. In other words, PAJA provides a set of legislative of particular administrative power rules with a general effect aimed at ensuring the lawful, reasonable and procedurally fair exercise of public power.

In *President of the Republic of South Africa & Others v South African Rugby Football Union & Others*, the following was stated:

“In section 33, the adjective ‘administrative’ not ‘executive’ is used to qualify ‘action’. This suggests that the test for determining whether conduct constitutes ‘administrative action’ is not the question whether the action concerned is performed by a member of..."
the executive arm of Government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not."

Navsa AJ concluded that a commissioner conducting CCMA arbitration was performing an administrative function.

5.3 **SIDUMO** AND CONSTITUTIONAL COURT

5.3.1 BACKGROUND

This case involved a dispute between Rustenburg Platinum Mines and the National Union of Mineworkers over the dismissal of a security guard, Mr Sidumo. The facts that set the proceedings in motion will now be discussed. Rustenburg Platinum was concerned about the low yield of a facility in which precious metals were separated from low grade concentrate. It decided that one reason might be theft of precious metals by employees. The mine introduced more stringent search procedures for people leaving the facility. Mr Sidumo was stationed there as a guard, with instructions to search each employee leaving the facility in a special cubicle with a metal detector. He was instructed to ensure that employees signed a register confirming they had been searched. When the low yields continued, the mine management became more convinced that theft was the main cause, and they installed surveillance cameras at various points, including in Sidumo’s station.

An analysis of the videotapes indicated that, over a three-day period, Sidumo had searched a number of employees perfunctorily, and had not searched eight of them at all. He had permitted some employees who had not been searched to sign the register. During the period in which the cameras were installed, one employee was apprehended with R44 000 worth of precious metals in his trousers by a guard who performed his duties properly. The mine charged Sidumo with negligence and failure to follow company procedures, and dismissed him. His appeal failed.

The matter was referred to the CCMA. In the arbitration hearing, Sidumo claimed that he had not been trained in the new search procedures. The Commissioner rejected that explanation, but found that, in view of Sidumo’s 14 years of service with

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the mine and his clean disciplinary record, dismissal was too harsh a sanction. The commissioner ordered Rustenburg Platinum Mines to reinstate Sidumo, subject to a final warning. On review, the Labour Court could find no reason to interfere with the award. On appeal, the Labour Appeal Court ruled that, since the attack on the commissioner’s finding that length of service was a relevant consideration had not been foreshadowed in the founding affidavit, the company could not raise the point in argument on appeal.

On further appeal to the Supreme Court of Appeal, the court took a different approach. It found that, because reviews of CCMA awards were subject to the Promotion of Administration of Justice Act 3 of 2000, commissioners’ decision must be rational. Applying that test, the court found that the commissioner’s conclusion that dismissal was too harsh a sanction was irrational, because the Commissioner had elevated two weak mitigating factors – namely length of service and a clean disciplinary record – above several more compelling aggravating factors and because the commissioner had ignored the proper approach to assessing the appropriateness of the sanction of dismissal for proven misconduct. The matter thereafter went to the Constitutional Court.

5.3.2 INTRODUCTION

In Sidumo, the Constitutional Court held that an arbitration award of the CCMA would be unreasonable and thus reviewable if it was a decision “that a reasonable decision maker could not reach” (the Sidumo test).

In applying that test, Navsa AJ found:

“In respect of the absence of dishonesty, the (Labour Appeal Court) found the Commissioner’s statement in this regard ‘baffling’. In my view, the Commissioner cannot be faulted for considering the absence of dishonesty a relevant factor in relation to the misconduct. However, the Commissioner was wrong to conclude that the relationship of trust may not have been breached. Mr Sidumo was employed to protect the mine’s valuable property, which he did not do. However, this is not the end of the enquiry. It is still necessary to weigh all the relevant factors together in the light of the seriousness of the breach.”
The court went on to find that, in order to succeed with a reasonableness review, the applicant must establish that the result of the award fell outside of a range of reasonableness:

“To my mind having regard to the reasoning of the Commissioner, based on the material before him, it cannot be said that his conclusion was one that a reasonable decision maker could not reach. This is one of those cases where the decision makers acting reasonably may reach different conclusions. The LRA has given that decision making power to a Commissioner.”

In this case, we will critically examine how the Sidumo test has been interpreted and applied.

5.3.3 CONSTITUTIONAL COURT JUDGMENT IN SIDUMO

In Sidumo, Navsa AJ rejected the operation of the reasonable employer test, finding that the approach adopted by the SCA tilted the constitutional balance in respect of the right to fair labour practices against employees, and held that “the Commissioner’s sense of fairness is what must prevail and not the employer’s view”.

Navsa AJ then went to explain how Commissioners should go about determining the fairness of the sanction of dismissal in these three key passages:

“In approaching the dismissal dispute impartially a commissioner will take into account the totality of the circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The Commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee’s challenge to the dismissal.

There are other factors that will require consideration. For example, the harm caused by the employee’s conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of the dismissal on the employee and his or her long service record. This is not an exhaustive list.

In terms of the LRA, a Commissioner has to determine whether a dismissal is fair or not. A Commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a Commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances.”

Para 119.

Para 115.
The Constitutional Court replaced the reasonable employer test with what we can call the “impartial commissioner test”. While the former may have been biased in favour of employers, the latter is by no means biased in favour of employees. This view is consistent with the constitutional principle of fair labour practices, which applies equally to both parties. The impartial commissioner test strives to ensure absolute neutrality on the part of the commissioners in the determination of a fair and reasonable sanction.

Navsa AJ further held that:244

“In respect of the absence of dishonesty, the Labour Court found the Commissioner’s statement in this regard “baffling”. In my view, the Commissioner cannot be faulted for considering the absence of dishonesty a relevant factor in relation to the misconduct. However, the Commissioner was wrong to conclude that the relationship of trust may have not been breached. Mr Sidumo was employed to protect the mine’s valuable property which he did not do. However, this is not the end of the enquiry. It is still necessary to weigh up all the relevant factors together in the light of the seriousness of the breach.”

Navsa AJ concluded by stating:245

“The absence of dishonesty is a significant factor in favour of the application of progressive discipline rather than dismissal. So too is the fact that no losses were suffered. That Mr Sidumo did not own up to his misconduct and his denial that he received training, are factors that count against him. His years of clean and lengthy service were certainly a significant factor. There is no indication that progressive discipline will not assist to adjust Mr Sidumo’s attitude and efficiency. In my view, the Commissioner carefully and thoroughly considered the different elements of the code and properly applied his mind to the question of the appropriateness of the sanction.”

In summary, the Constitutional Court ruling replaced the reasonable employer test with what may be called “the impartial commissioner test”. The former reasonable employer test may have been biased in favour of employers; the latter is by no stretch of imagination biased in favour of employees. In accordance with the constitutional principle of fair labour practices that will be applicable to both parties, the impartial commissioner test strives to ensure absolute neutrality in the determination of a sanction.

244 Para 116.
245 Para 117.
Along similar lines, Ngcobo J held as follows in *Sidumo*:

“What this means is that the Commissioner ... does not start with a blank page and determine afresh what the appropriate sanction is. The Commissioner’s staring point is the employer decision to dismiss. *The Commissioner’s task is not to ask what the appropriate sanction is but whether the employer’s decision to dismiss is fair.* In answering this question, *which will not always be easy*, the Commissioner must pass a *value judgment*. However objective the determination of the fairness of a dismissal might be, it is a determination based upon a value judgment. Indeed, the exercise of a value judgment is something about which reasonable people may readily differ.”

But it could not have been the intention of the law-maker to leave the determination of fairness to the *unconstrained value judgment* of the commissioner. Were that to have been the case, the outcome of a dispute could be determined by the background and perspective of the commissioner. The result may well be that a commissioner with an employer background could give a decision that is biased in favour of the employer, while a commissioner with a worker background could give a decision that is biased in favour of a worker. *Yet fairness requires that regard must be had to the interests of both the worker and those of the employer. And this is crucial in achieving a balanced and equitable assessment of the fairness of the sanction.*

These considerations imply *certain constraints* on commissioners. However, what must be emphasised is that having regard to these considerations does not amount to deference to the employer decision in imposing a particular sanction. What is required from a commissioner is to take *seriously the reasons for the employer establishing the rule and prescribing the penalty of dismissal* for breach of it.

An employer commissioner should *respect the fact that the employer is likely to have greater knowledge of the demands of the business than the commissioner*. However, such respect for the employer’s knowledge is not a reason for the commissioner to defer to the employer. The commissioner must *seek to understand the reasons for the particular rule being adopted and its importance in the running of the employer’s business and then weigh these factors in the overall determination of fairness.*
What is clear from the above passage is that the determination of the sanction involves a value judgment on the part of commissioners. There are, however, significant constraints placed on commissioners in this regard.

It is expected of commissioners to remain impartial in the process and to consider all relevant factors before exercising their value judgment. Put differently, insofar as commissioners have a discretion regarding penalty, it will always be a bound discretion. It can only be exercised after consideration of the prescribed factors. The enquiry is a sophisticated one, and, as Ngcobo J remarked, answering the question “will not always be easy”.

Because the Constitutional Court found that the commissioner’s award was not reviewable, it was not confronted with having to decide whether Sidumo’s dismissal was fair on the application of the approach advocated by it. The Constitutional Court judgment has gone a long way to prescribe a formula for commissioners, but nor really an illustration of its application.

Ngcobo J continued and stated as follows:

“However, the Commissioner was wrong to conclude that the relationship of trust may have not been breached. Mr Sidumo was employed to protect the mine’s valuable property which he did not do. However, this is not the end of the enquiry. It is still necessary to weigh all the relevant factors in the light of the seriousness of the breach. The absence of dishonesty is a significant factor in favour of the application of progressive discipline rather than dismissal. So too, is the fact that no losses were suffered. That Mr Sidumo did not own up to his misconduct and his denial that he received training, are factors that count against him.”

In conclusion, the Honourable Mr Justice Ngcobo found that the commissioner had carefully and thoroughly considered the different elements of the code and properly applied his mind to the question of the appropriateness of the sanction.

5.3.4 PAJA or LRA

The Supreme Court of Appeal considered section 145(1) and (2) as well as section 158(1)(g) of the LRA and referred with approval to Carephone supra where the application of these two sections were discussed. The Labour Appeal Court was not
prepared to hold that section 158(1)(g) created a separate and more expansive basis of review of CCMA awards. It held that the administrative provisions of the Interim Constitution of 1993, as it stood then, suffused the grounds of review under section 145 of the LRA, thereby extending the scope of review of CCMA awards.

The Labour Appeal Court had earlier in its ruling stated that section 33 of the Constitution of the Republic of South Africa, 1996, read with section 23(2)(b) of Schedule 6 to the Constitution, extended the scope of review and introduced a requirement of rationality in the outcome of the decision.246

The Labour Appeal Court stated that, when the Constitution requires administrative action to be justifiable in relation to reasons given for it, it seeks to give expression to the fundamental values of accountability, responsiveness and openness. The test formulated by the Labour Appeal Court was based on the wording of item 23(2) of Schedule 6 to the Constitution, which was part of the wording of section 33(1) and (2) of the Constitution, pending the promulgation of national legislation, which later turned out to be PAJA.247

The Supreme Court of Appeal, after comparing the grounds of review under section 145 of the LRA with section 6(2) of PAJA 3 of 2000, decided that PAJA by necessary implication extended the available remedies to parties to CCMA arbitration and that PAJA superseded the specialised enactment of the LRA. Parliament enacted PAJA, because it was under a constitutional obligation to give concrete meaning to just administrative action, as set out in the Constitution. However, that obligation did not exempt it from its statutory duty to review arbitration awards in terms of section 145 of the LRA.

The Supreme Court of Appeal relied on the Constitutional Court decision in Bato Star Fishing (Pty) Ltd v Minster of Environmental Affairs & Others,248 where it was stated that section 6 of PAJA expressed a clear purpose to codify the grounds of judicial

246 Para 38.
248 2004 4 SA 490 (CC).
review of administrative actions.\textsuperscript{249} The Constitution required PAJA to “cover the field” and it did so.\textsuperscript{250} The only difference in reconciling section 145 of the LRA with the provisions of PAJA, according to the Supreme Court of Appeal, was in relation to time limits to set aside an arbitration award. Section 145 of the LRA provides that a party may apply to set aside an arbitration award within six weeks of the date on which the award was served on him or her. However, PAJA on the other hand, requires that proceedings for judicial review be instituted without unreasonable delay not later than 180 days after the exhaustion of internal remedies or after the person concerned became aware of the action involved and the reasons for it.

In \textit{Sidumo supra}, the Constitutional Court had to decide whether the SCA had been correct in finding that CCMA arbitration in terms of the LRA constituted administrative action under PAJA, having the effect that its decisions were subject to the PAJA standard of review, including being reviewable if the reasons for the decision were not rationally connected to the information placed before the commissioner. The Constitutional Court further agreed with the SCA that a commissioner conducting CCMA arbitration was performing an administration function.\textsuperscript{251} The Court, however, reasoned that PAJA was not the exclusive legislative basis for review\textsuperscript{252} and that section 145 of the LRA constituted national legislation in respect of administrative action within the specialised field of labour law.\textsuperscript{253}

Furthermore, section 145 has to meet the requirements of section 33(1) of the Constitution, which implies that it has to provide administrative action that is lawful, reasonable and procedurally fair.

The content of section 33 requires that written reasons be given for administrative action that adversely affects the rights of individuals. Nothing in section 33 of the

\textsuperscript{249} \textit{Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others supra} at 506I-J.

\textsuperscript{250} \textit{Minister of Health & Another v New Clicks South Africa (Pty) Ltd & Others (Treatment Action Campaign) & Another 2006 2 311 (CC); 2006 1 BCLR 1 CC} at para 95.

\textsuperscript{251} Para 88.

\textsuperscript{252} Para 91-92.

\textsuperscript{253} Para 91-92.
Constitution precludes specialised legislative regulation of administrative action such as section 145 of the LRA, alongside general legislation such as PAJA.²⁵⁴

The court held the view that such a conclusion was supported by section 210 of the LRA, which confirms the relevance and applicability of the latter Act in the case where a conflict arises between its provisions and that of any other piece of legislation, and the principle that general legislation, unless specifically indicated, does not derogate from special legislation.²⁵⁵

5.3.5 JUSTIFIABILITY OR REASONABLENESS

The court proceeded to interpret and apply section 145 in a manner that was compatible with the values of reasonableness and fairness demanded by an open, democratic society. Sachs J commented as follows:

“In an open, democratic society based on human dignity, equality and freedom, it would be inappropriate to restrict review of the commissioner’s decision to the very narrow grounds of procedural misconduct that a first reading of section 145(2) would suggest; at the same time, the labour law-setting, requiring a speedy resolution of the dispute with the outcome basically limited to dismissal or reinstatement, makes it inappropriate to apply the full PAJA-type administrative review on substantive as well as procedural grounds; and to the extent that the right to just administrative action is involved, the values of fair dealing that underlie section 33 of the Constitution must be respected.”²⁵⁶

In its attempt to reconcile section 145 with the requirements of section 33(1) of the 1996 Constitution, the court referred to Carephone.²⁵⁷

“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. Section 33(1) of the Constitution presently states that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. The reasonableness standard should now suffuse section 145 of the LRA.”

²⁵⁴ Para 89-90.
²⁵⁵ Para 99-103.
²⁵⁶ Para 158.
²⁵⁷ Para 106.
The reasonableness standard was extensively dealt with in the matter of *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others.*\(^{258}\) In the context of section 6(2)(h) of PAJA 3 of 2000, O’Reagan J stated that a decision would be reviewable if, in Lord Cooke’s words, it was one which a reasonable decision maker could not reach.\(^{259}\)

In *Bato Star Fishing,*\(^{260}\) relied upon by the Constitutional Court in the *Sidumo* matter, the court previously considered the lawfulness of administrative action in the allocation of fishing quotas in the context of section 6(2)(h) of the PAJA. In that matter, the court found that a decision was open to review “if the decision was so unreasonable that no reasonable person could have exercised the power was to be construed”.

In the above case, the court also identified certain circumstances or factors that could assist in determining whether the decision was one that a reasonable decision-maker could not have reached, which included such factors as the nature of the decision, the reasons for the decision, the identity and expertise of the decision-maker, the different factors relevant to the decision, the reasons furnished by the decision-maker and whether the considerations taken into account were “capable of sustaining” his finding.\(^{261}\)

On the basis of *Bato Star Fishing*, the Constitutional Court in *Sidumo* concluded that the standard of reasonableness involved asking the question whether the decision reached by the commissioner was one that a reasonable decision-maker could not reach.

The Court also concluded in *Sidumo*, as was the case in *Carephone* with justifiability, that it could not find that reasonableness was an independent or separate ground of review. The Court in *Sidumo*, as in *Bato Star Fishing supra*, interpreted Section 145 of the LRA consistently with the provisions of Section 33(1) of the 1996 Constitution.

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\(^{258}\) 2004 4 SA 490 (CC).
\(^{259}\) Para 107.
\(^{260}\) Vide para 258 *supra*.
\(^{261}\) Para 45.
The Constitutional Court further and correctly held that section 145 of the LRA is now suffused by the constitutional standard of reasonableness.\textsuperscript{262} It is for this reason that the Constitutional Court, through Navsa AJ, referred to the “standard of review” as opposed to the “ground of review” in determining whether the standard of review set by section 145 was constitutionally compliant.\textsuperscript{263}

Ngcobo J rejected the submission that rationality was not an independent ground of review, but one flowing from the provisions embedded in section 145(2) of the LRA. He stated as follows:\textsuperscript{264}

“It is contended that the rationality test is not an independent ground for review ... But the effect of the test contended for by COSATU seems to me, to be the same. It imports a constitutional standard for review that is based on the test we announced in \textit{Pharmaceutical} in connection with constitutional in general constraints on the exercise of public power. The fundamental problem with this approach is its staring premise; it starts with the Constitution and not with the provisions of section 145(2)(a).”

Section 39(2) of the 1996 Constitution provides that courts are specifically required to promote the spirit, purport and objects of the Bill of Rights. This does not suggest that the LRA and section 145 are bypassed in order to rely directly on the 1996 Constitution. Ngcobo confirms this when he held that:\textsuperscript{265}

“It seems to me that where the legislation which is enacted to give effect to a constitutional right specifies the grounds upon which decisions of tribunals giving effect to that legislation may be reviewed, a court reviewing the decision of that tribunal should start with the interpretation of the statutory in question; and of course, the provision under consideration must be construed in conformity with the Constitution.”

It would appear that the Constitutional Court only deviated from \textit{Carephone} insofar as it held that the test for interference on review was now reasonableness rather than justifiability. The court confirmed that section 145 was suffused by reasonableness, but omitted to express a clear opinion whether or not reasonableness was capable of being deduced from the provisions of section 145(2)(a)(iii) of the LRA.

\textsuperscript{262} Para 106.  
\textsuperscript{263} Para 104.  
\textsuperscript{264} Para 251.  
\textsuperscript{265} Para 249.
The employer did not rely on any specific grounds of review as set out in section 145(2)(a). The employer instead relied on the broad ground of unjustifiability as a basis of attack on the award. In the alternative, the employer relied on rationality as being the basis for its attack. This, however, demonstrates the point made earlier, namely the ground of review, expressly provided for in section 145(2)(a), has somehow faded into the background as a result of the standard of review under section 145(2)(a), which is based on the Constitution. 266

5.3.6 APPLICATION OF STANDARD OF REVIEW

An important question which the Constitutional Court had to decide in Sidumo was whether an award made by a commissioner was reviewable because of a defective process of reasoning if the conclusions reached by the said commissioner were nevertheless found to be reasonable in relation to the evidence presented before, as indicated from reasons other than those relied on by him. The Supreme Court of Appeal considered this question and ruled in a positive manner, stating that the focus was on the way the commissioner eventually arrived at his or her conclusions: 267

“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 enquiry is whether the record contains material showing that the decision – notwithstanding any errors of reasoning – was correct. This is because an appeal, the only determination is whether the decision is right or wrong ... In a review, the question is not whether the decision is capable of being justified (or, as the Appeal Court thought, whether it is not so correct as to make intervention doubtful), but whether the decision-maker properly exercised the powers entrusted to him or her. The focus is on the process, and on the way in which the decision-maker came to the challenged conclusion.”

The Constitutional Court's judgment in Sidumo indicates that it did not reject the Supreme Court of Appeal’s approach in toto, despite the fact that it did not expressly approve of the approach of the latter.

266 Para 279.
267 Para 30 -31.
The Constitutional Court observed that the commissioner had in fact advanced three material reasons why the sanction of dismissal was unfair. Firstly, he stated that no losses had been sustained by the company. Secondly, he found that the misconduct was unintentional or a “mistake”; and, thirdly, there was no dishonesty. He also took the view that the offence committed by Mr Sidumo did not go to the heart of the relationship of trust between Mr Sidumo and the mine.²⁶⁸

The Constitutional Court accepted that there was no evidence presented at the hearing that the mine had suffered any loss as a consequence of Mr Sidumo’s neglect. However, losses could have been sustained by the mine by the employee’s misconduct, although no concrete evidence was proven to have flowed from it.²⁶⁹ The Constitutional Court consequently held that the commissioner was absolutely correct in his finding in this regard but erred in his remaining two reasons for finding the dismissal unfair. In this regard, Navsa AJ held that:²⁷⁰

“In respect of the Commissioner’s finding that the misconduct was unintentional or a mistake, it was correctly pointed out on behalf of Mr Sidumo that it was Mr Botes, in his evidence before the Commissioner, who characterised his misconduct as “mistakes”. It is true that Mr Sidumo did not conduct individual searches, which were his main task. Therefore, to describe his conduct as a “mistake” or “unintentional” is confusing and, in this regard, the Commissioner erred.”

Furthermore, Navsa AJ held that:²⁷¹

“In respect of the absence of dishonesty, the Labour Appeal Court had found the Commissioner’s statement in this regard “baffling”. In my view, the Commissioner cannot be faulted for considering the absence of dishonesty a relevant factor in relation to the misconduct. However, the Commissioner was wrong to conclude that the relationship of trust may not have been breached. Mr Sidumo was employed to protect the Mine’s valuable property which he did not do. However, this is not the end of the enquiry. It is still necessary to weigh up all the relevant factors together in the light of the seriousness of the breach.”

It would appear from the Constitutional Court’s judgment that when a commissioner is confronted with a situation where he or she must make a value judgment as to

²⁶⁸ Para 113.
²⁶⁹ Para 114.
²⁷⁰ Para 115.
²⁷¹ Para 116.
whether a dismissal was fair or too harsh a sanction in the prevailing circumstances, he must consider all the material relevant factors:\textsuperscript{272}

“The absence of dishonesty is a significant factor in favour of the application of progressive discipline rather than dismissal. So, too, is the fact that no losses were suffered. That Mr Sidumo did not own up to his misconduct and his denial that he received training, are factors that count against him. His years of clean and lengthy service were certainly a significant factor. There is no indication that the principle of progressive discipline will not assist to adjust Mr Sidumo’s attitude and efficiency. In my view, the commissioner carefully and thoroughly considered the different elements of the Code and properly applied his mind to the question of appropriateness of the sanction.”

It would appear from the aforesaid that by applying the reasonableness test to the facts of the case, the Constitutional Court was actually adopting the approach of the Supreme Court of Appeal.

Furthermore, it would appear that the incorrect reasons advanced by the Commissioner did not constitute a defect, as envisaged by section 145(2) of the LRA, to make the decision reviewable. The case of Sidumo can now be regarded as sound authority, for the view that a CCMA Commissioner’s award would not be reviewable merely because the Commissioner had advanced incorrect reasons for his or her decision.\textsuperscript{273}

However, a Commissioner’s failure to consider all the substantive factors in a case may result in his or her decision being set aside on review, not based on the ground that the decision itself was unreasonable, but because the decision did not indicate that the commissioner carefully weighed and considered all the material relevant factors placed before him or her in arriving at his or her decision.

The facts of Sidumo provide a clear indication of just how far the elastic of reasonableness can be stretched before it snaps and gives rise to a reasonableness review. Mr Sidumo, a security guard, tasked with guarding a high-risk security point, was guilty of repeatedly failing to search, either properly or at all, employees exiting the security point – misconduct that constituted nothing short of dereliction of duty.

\textsuperscript{272} Para 117.

\textsuperscript{273} See RSA Geological Services (A Division of De Beers Consolidated Mines Ltd) v Grogan & Others [2008] 2 BLLR 184 (LC) para 50.
However, the Constitutional Court concluded that the commissioner’s decision that the sanction of dismissal was too harsh, fell within range of reasonableness and was therefore not reviewable.\(^{274}\)

### 5.4 CONCLUSION

In this chapter, it was established that in the case of *Sidumo*, the Constitutional Court held that an arbitration award of the CCMA would be unreasonable and thus reviewable if it was a decision ‘that a reasonable decision-maker could not reach’.

The court went on to find that, in order to succeed with a reasonableness review, the applicant must establish that the *result* of the award falls outside the range of reasonableness.

The Constitutional Court in *Sidumo* confirmed that CCMA arbitration proceedings constituted administrative action, but that its awards were to be taken on review in terms of the LRA and not the PAJA, Act 3 of 2000 and that the question of review under the 1996 Constitution of the Republic of South Africa was that of reasonableness and not justifiability.

The court emphasised that the main “innovation” of *Sidumo* was that in order to succeed with a reasonableness review, both the reasons and the result must be assailed.

In *Sidumo*, the Constitutional Court rejected the application of the reasonable employer’s test and held that, in determining the fairness of the sanction of dismissal for misconduct, “the commissioner’s sense of fairness is what prevail and not the employer’s view”.

While *Sidumo* and the abolition of the reasonable employer’s test may not have had the dramatic consequences predicted by some, there is no escaping the fact that it has presented employers, in particular with serious challenges.

\(^{274}\) See para 119.
Sidumo has further confirmed and established that incorrect decisions do not render awards made by CCMA Commissioners reviewable. The Labour Courts will always scrutinise the manner in which the Commissioners came to their decisions and whether the incorrect reasons are substantively relevant. The question that an applicant that intends to pursue review proceedings will have to ask him- or herself is not whether or not the reasons furnished by the commissioner are satisfactory or correct, but whether they serve as evidence of a ground for review that will alone or together with other considerations be sufficiently compelling to warrant an inference that the decision was unreasonable.
CHAPTER SIX
SIDUMO AS INTERPRETED AND APPLIED IN SUBSEQUENT CASE LAW

6.1 INTRODUCTION

After the Constitutional Court’s judgment in Sidumo, various questions surfaced in respect of the interpretation and application of subsequent review matters. In this chapter, I propose to examine how the Sidumo test has been interpreted and applied by our Courts. Firstly, I will deal with the explication by the Labour Appeal Court of the Siduma test; secondly, review value judgments; thirdly, review findings of law and facts; reconciling conflicting judgments; fourthly, explore potential ways around the Sidumo test; and, finally, determine and review sanction after Sidumo.

6.2 LABOUR APPEAL COURT’S CLARIFICATION OF SIDUMO TEST

_Fidelity Cash Management Service_275 is the leading explication by the Labour Appeal Court of the Sidumo test. Zondo JP described the test in the following terms:

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

The court emphasised that the main “innovation” of Sidumo was that in order to succeed with a reasonableness review, both the reasons and the result must be assailed.

“It seems to me that even if there may have been a debate under Carephone and prior to Sidumo on whether a Commissioner’s decision for which he or she has given bad reasons could be said to be justifiable if there were other reasons based on the record

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before him or her which he or she did not articulate but which could sustain the decision which he or she made, there can be no doubt under *Sidumo* that the reasonableness or otherwise of a commissioner’s decision does not depend – or at least not solely – upon the reasons that the Commissioner gave for the decision.”

In many cases, the reasons which the commissioner gives for his or her decision finding or award will play an important role in the subsequent assessment of whether or not such a decision or finding is one that a reasonable decision-maker could or could not reach. However, other reasons on which the relevant commissioner did not rely to support his or her decision or finding, but which can render the decision reasonable or unreasonable, can also be taken into account.

The court summarised this in the following terms:

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

*Ellerine Holdings*²⁷⁶ contains another important explication of the *Sidumo* test by the Labour Appeal Court. Davis JA appears to have agreed with the company’s submissions, which were described thus:

“A court should eschew the red light test and adopt a more facilitative framework ... it would be wrong formalistically to pass through an award ... find [that] some irregularity had taken place [and] that irregularity would [then] set off the judicial trap wire, the red lights of review would flicker brightly and the result would be to sustain an application for review. A more substantive overall framework for review would examine the nature and role played by an official such as [the Commissioner], and then take into account the substance of that decided, both in terms of its conclusion and reasoning which underpin it.”

The court in *Sidumo*, was also concerned to ensure that a red light approach to review should no longer form part of our labour relations procedures with regard to review of the [CCMA].

The court said the following (Davids JA then quoted *Sidumo* para 116):

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²⁷⁶ *Ellerine Holdings Ltd v CCMA & Others* (2008) 29 ILJ 2899 (LAC) 2906.
“This passage ... finds support in the dictum of this court per Zondo JP in Shoprite Checkers v Ramdaw NO & Others (2001) 22 ILJ 1603 (LAC) at 1636H-I:

‘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 nevertheless must be allowed to stand because they are not so unsatisfactory so as to fall foul of the applicable grounds of review. Without such contemplation, the Act’s objective of the expeditious resolution of disputes would have no hope of being achieved. In my view, the [Commissioner’s] cannot be said to be unjustifiable when regard is had to all the circumstances in this case and the material that was before him.’ ”

In summary, in terms of these judgments, the test for reasonableness, as encapsulated in the Sidumo test, is a stringent results based test that will not be met often. In order to succeed with a review on the basis that an award was unreasonable, the applicant must establish that both the reasons for and the result of the award are unreasonable. If an award contains bad reasons, it will not be set aside on review for want of reasonableness if there exist good reasons (even if they were not considered by the commissioner) that can justify the result of the award.

6.3 REVIEWING VALUE JUDGMENTS
6.3.1 PENALTY REVIEWS

In applying the Sidumo test as a strict results based test, the Labour Appeal Court refused to interfere with the arbitration awards in the following matters:

Edcon Ltd v Pillemner NO and Others

In the above case, the employee, a quality controller, was dismissed for dishonesty, having failed to report that her company car had been involved in an accident while being driven by her son. This occurred against the background that, being of the mistaken belief that her son was prohibited from driving her car, the employee had requested her husband to fix the car at his panelbeating workshop, at his own cost, and had thereafter kept the accident a secret. The commissioner found the sanction of dismissal unfair on account of the circumstances of the matter, the employee’s length of service (17 years), her unblemished record and the fact that the employee

277 At para 101.
was only two years away from retirement. Reinstatement with the forfeiture of back-pay was ordered. A review application was dismissed. On appeal to the Labour Appeal Court, Sangoni AJA found that:

“The Commissioner’s conclusion ... as well as the facts of the case, are such that it cannot be found that be reasonable decision-maker in the position of the Commissioner could not have reached the conclusion which she did.”

On appeal, the court found that the award was not reviewable, because the commissioner’s decision that the company had not led evidence to demonstrate a breakdown in the trust relationship was beyond reproach. The company’s appeal was dismissed with costs.

**Tretyre**

In the above case, the employee, a wheel balancer/general worker, was dismissed for being under the influence of alcohol at work, on an isolated occasion. The commissioner found that the dismissal was unfair and ordered that the employee be reinstated on a final written warning with the forfeiture of back-pay. The company succeeded on review, with the decision of the commissioner being replaced with an order that the employee’s dismissal was substantively fair. On appeal to the Labour Appeal Court, Zondo JP reversed the judgment of the Labour Court and restored the award. Having found that the employee was under the influence of alcohol, but not to the extent that he could not perform his duties, Zondo JP concluded:

“In the light of the above can it be said that the Commissioner’s decision that the sanction of dismissal was too harsh and his order that the [employee] be reinstated are reasonable in the sense that they are decisions that a reasonable decision maker could not reach? In my view that can certainly not be said on these facts and circumstances. If I had sat as Commissioner, I would definitely have also found that dismissal as a sanction was too harsh in the circumstances of the case.”

In *Palaborwa Mining Company Ltd v Cheetham & Others,* the employee, the company secretary, was dismissed after failing a breathalyser test which revealed that his alcohol level was above the prescribed limit. The company’s policy provided

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279 *NUMSA & Another v Tretyre (Pty) Ltd & Others* (unreported LAC judgment case no JA46/05 dated 27/03/2009 per Zondo JP).

280 At para 15.

for the dismissal of a first offender who transgressed this rule. The employee’s defence, which appears to have been accepted, was that he had attended a party the previous evening. The commissioner found the employee’s dismissal to be fair. The employee succeeded in the Labour Court in an ensuing review, with the court substituting the commissioner’s decision with an order that the employee’s dismissal was substantively unfair. An award of eight months’ salary was given as compensation.

Revelas J held:

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

On appeal to the Labour Appeal Court, the court allowed the appeal and restored the commissioner’s award. In doing so, Willis J held as follows:

“Despite the fact that decision-makers, acting reasonably, may reach different conclusions, the LRA has given the decision-making power to the Commissioner and there it rests, unless it can be concluded that a reasonable decision maker could not have reach such a conclusion. Indeed, read together with *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others*,282 upon which the majority decision in *Sidumo* so strongly relies, the judgment has the clear effect that the Courts, and, in particular, the Labour Courts, must defer (but not in an absolute sense) to the decision of the Commissioner.”

“If one compares the facts *in casu* with the facts in the case with which the Constitutional Court was concerned, then the obvious, inevitable and necessary conclusion is that the learned judge in the court a quo was clearly wrong in interfering with the award of the Commissioner. The appeal must succeed.”283

Patel JA concurred with Willis JA, but wrote his own judgment, in which he differed with Willis JA’s reasoning and raised some points of his own. He referred to *Mondi* 2004 4 SA 490 (CC).

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282 2004 4 SA 490 (CC).
283 At para 8.
In *Paper Company v Dlamini*, in which the Labour Appeal Court adopted a conservative approach to dismissal for an isolated incident of alcohol abuse. Patel JA held:

“If this decision [ie Mondi Paper] is to be followed, the outcome for the employee would be different.” I myself have a fair amount of sympathy for the employee, but that is not the test since the *Sidumo* judgment. *Sidumo* enjoins the court to remind itself that the task to determine fairness or otherwise of a dismissal falls primarily within the domain of the Commissioner. This was the legislative intent and as much as decisions of different commissioners may lead to different results, it is unfortunately a situation which has to be endured with fortitude despite the uncertainty it may create. I have to remind myself that the test ultimately, is whether the decision reached by the [Commissioner] is one that a reasonable decision-maker could reach in the circumstances. On this test, I cannot gainsay the decision of the [Commissioner].” (Emphasis added)

A comparison between *Trentyre* and *Palaborwa Mining* provides a good illustration of the operation of the *Sidumo* test in this context. Zondo JP’s finding in *Trentyre* that dismissal for an isolated incident of alcohol abuse (particularly where there is no evidence of its impairing the employee’s ability to do his job properly) is typically unfair, accords with the substantive law on dismissal for drunkenness.

On an application of this jurisprudence, the dismissal of the employee in *Palaborwa Mining* probably ought to have been found unfair (a point recognised by Patel JA). Yet both cases were found to pass the *Sidumo* test – *Trentyre* because the sanction was right, and *Palaborwa Mining*, because, although harsh and probably wrong, the sanction did not fall outside the range of reasonableness.

In *Shoprite Checkers (Pty) Ltd v CCMA & Others*, in respect of which the judgment was delivered by Zondo JP on 21 December 2007, the employee, who occupied a supervisory position and had a clean record and 30 years service, was dismissed for “unauthorised consumption”. On two occasions, he had been captured on video putting a piece of food into his mouth and, on a third occasion, consuming a plate of food in the company’s delicatessen. The commissioner found the sanction of dismissal unfair and reinstated the employee on a ‘severe final warning’, with

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285 Para 4.
forfeiture of back-pay (for 2 years and 6 months). The company brought a review on the merits, and the union a cross review in relation to the forfeiture of back-pay. The Labour Court set aside the award on account of the absence of a record of the arbitration. In an ensuing appeal, the Labour Appeal Court found that there was no doubt that the result of the award met the test for reasonableness.

Zondo JP added that he:

“... would go so far as to say that there is no prospect that a reasonable decision-maker – including a CCMA Commissioner – could, on the facts of this case, find that dismissal was a fair sanction.”

6.4 REVIEWING FINDINGS OF LAW AND FACT
6.4.1 JURISDICTIONAL REVIEWS

Reviews that are directed at findings of jurisdiction by the CCMA are unaffected by the Sidumo test, it would appear from the dictum of the LAC (per Tlaletsi AJA) in SARPA.288

“The question on before the court a quo was whether, on the facts of a case a dismissal has taken place. The question was not whether the finding of the Commissioner that there had been a dismissal of the three players was justifiable, rational or reasonable. The issue was simply whether, objectively speaking, the facts which would give the CCMA jurisdiction to entertain the dispute existed. If such facts did not exist, the CCMA had no jurisdiction irrespective of its finding to the contrary. In short, in a review directed at a finding of jurisdiction, all that an applicant need establish to succeed on review is that the finding was wrong.”

In that case, the Labour Appeal Court considered whether the Labour Court had correctly declined to review an award, which found that the rugby players concerned had been constructively dismissed, following a failure to renew their contracts on the same terms and conditions, despite their reasonable expectation that their contracts would be renewed.289 The court found that no dismissal had been proved and

287 At para 19.
288 *South African Rugby Players Association (SARPA) & Others v SA Rugby (Pty) Ltd & others; SA Rugby (Pty) Ltd v SARPU & Another (SARPA) [2008] 9 BLLR 845 (LAC).
289 Para 3.
Tlaletsi AJA referred to the matter of Benicon Earthworks & Mining Services (Pty) Ltd v Jacobs NO & Others, comment as follows:

“The old Labour Appeal Court [has] considered the position in relation to the Industrial Court established in terms of the predecessor to the current Act. The Court held that the validity of the proceedings before the Industrial Court is not dependent upon any finding which the Industrial Court may make with regard to jurisdictional facts, but upon their objective existence.”

The court further held that any conclusion to which the Industrial Court arrived at on the issue had no legal significance. This means that, in the context of this case, the CCMA may not grant itself jurisdiction which it does not have. Nor may it deprive itself of jurisdiction by making a wrong finding that it lacks jurisdiction which it actually has jurisdiction.

The LAC thereafter concluded that:

“The question before the court a quo was whether, on the facts of the case, a dismissal had taken place. The question was not whether the finding of the Commissioner that there had been a dismissal of the three players was justifiable, rational or reasonable. The issue was simply whether, objectively speaking, the facts which would give the CCMA jurisdiction to entertain the dispute existed. If such facts did not exist, the CCMA had no jurisdiction irrespective of its finding to the contrary.”

“Commissioners are entrusted with the function of determining whether they have jurisdiction to hear a particular matter, more so where the issue of jurisdiction has been raised by one of the parties.”

“Where a Commissioner’s arbitration function is being challenged the focus should be on the Commissioner’s subjective reasons for his findings rather than the jurisdictional fact’s objective existence. The rationale for such an approach is evident from the matter of SARPA supra where the commission ruled that in his opinion the rugby players had had a reasonable expectation that their contracts would be renewed and that the failure to renew the said contracts constituted a constructive dismissal. These facts must be subjectively determined and not objectively.”

It would appear from the aforesaid judgments that the reasonableness standard is not applicable to jurisdictional reviews. The question that an applicant must ask is

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290 (1994) 15 ILJ 801 (LAC) 804C-D.
291 Para 40.
292 Para 41.
293 See Rule 22 of the Rules for the Conduct of proceedings before the CCMA.
whether the jurisdictional fact exists or not. Applicants who propose to apply for jurisdictional review must demonstrate that the commissioner’s finding was wrong.

### 6.4.2 GIVING CONTENT TO THE SIDUMO TEST

In the matter of *Fidelity Cash Management Service v CCMA & Others*, the court was confronted with having to apply the *Sidumo* test in relation to a commissioner’s factual findings on the merits. The facts will be briefly presented. Following an armed robbery from an aircraft at the Virginia Airport, the employee, then in charge of the company’s Durban control room, was dismissed for gross negligence. This negligence related to his failure to arrange back-up vehicles at the Airport, his refusal to take a polygraph test, and twice appearing late at his disciplinary hearing. The commissioner found the employee not guilty and reinstated him. The company was unsuccessful on review.

Zondo JP held that:

> “Nothing said in *Sidumo* means that that the CCMA’s arbitration award can no longer be reviewed on the grounds, for example, that the CCMA has no jurisdiction in a matter or any matter of the other grounds specified in Section 145 of the Act. If the CCMA has 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.”

On appeal to the Labour Appeal Court, Zondo JP concluded as follows in relation to the commissioner’s decision that the employee was not guilty:

> “In my view, the analysis of the evidence and the issues before the Commissioner, which has been undertaken above, reveals without any doubt that the decision that the Commissioner reached in this case that the [employee] was not guilty of the acts of misconduct for which he was dismissed and that his dismissal was substantively unfair was a decision that a reasonable maker could reach.”

The Labour Appeal Court essentially agreed with the commissioner’s findings in *Fidelity Cash Management Services*. However, the judgment gives very little insight

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294 [2008] 3 BLLR 197 (LAC).
295 Para 101.
296 Para 101.
into the point at which the court would find that a commissioner’s factual findings on the merits are unreasonable. The Labour Court has, however, dealt with the issue in a number of important judgments.

In *Fidelity Cash Management Services*, the Labour Appeal Court stated that *Sidumo* made it clear that flawed reasoning was not reviewable if the decision of the commissioner could be supported by the evidence placed before him.297

“... the reasonableness or otherwise of a Commissioner’s decision does not depend – at least not solely – upon the reasons that the Commissioner gives for the decision. In many cases, the reasons which the Commissioner gives for his decision, finding or award will play a role in the subsequent assessment of whether or not such a decision or finding is one that a reasonable decision-maker could or could not reach. However, other reasons upon which the Commissioner did not rely, to support his or her decision or finding but which can render a decision reasonable or unreasonable, can be taken into account. This would clearly be the case where a Commissioner gives reasons A, B and C for 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 or she did not rely but could have relied, which are enough to sustain the decision.”

Zondo JP then stated that:298

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

In *Transnet*,299 in setting aside the commissioner’s finding of procedural unfairness, Basson J held as follows:

“In the light of the aforesaid, I am of the view that the Commissioner arrived at a conclusion which is entirely disconnected with the evidence properly placed before the Commissioner, to such an extent that it cannot be said that his conclusion was one that a reasonable decision-maker could have reached.”

297 Para 101.
298 Para 102.
In *Brolaz Projects*, the employee, a client liaison manager, was dismissed for poor performance. The commissioner found that the dismissal was substantively fair, but procedurally unfair and awarded the employee 12 months’ salary as compensation. The basis of the commissioner’s finding of procedural unfairness was that the company had made a *mala fide* offer of alternative employment and then unreasonably withdrew it once the employee had accepted it, which ‘tainted’ the consultation process.

In setting aside the commissioner’s finding of procedural unfairness on review, Basson J held:

> “The evidence does not, in my view, support the conclusion that the [employee] was procedurally unfairly dismissed. [The employee's] dismissal was preceded by consultation which the Commissioner found to be fair. The fact that an alternative offer of employment was made and subsequently withdrawn does not in itself render the consultation process tainted. Furthermore in the light of the fact that the evidence does not support the conclusion that the offer was not *bona fide*, it is not in my view, reasonable to have come to the conclusion that the process was now tainted.”

(Emphasis added)

In summary, a commissioner’s finding on the facts will be unreasonable if it is:

(i) unsupported by any evidence;
(ii) based on speculation by the commissioner;
(iii) entirely disconnected from the evidence;
(iv) supported by evidence that is insufficient reasonably to justify the decision; or
(v) made in ignorance of evidence that was not contradicted.

In *Karan Beef*, the employee, a truck driver, was dismissed for being drunk on duty after having failed a breathalyzer test. The commissioner found that the employee’s dismissal was substantially unfair, because he was not guilty, as a second breathalyzer test was negative. The commissioner also found that the employee’s dismissal was procedurally unfair, because the chairperson of his disciplinary hearing

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300 *Brolaz Projects (Pty) Ltd v CCMA & Others* (2008) 29 ILJ 2959 (LC).
301 Para 26.
was biased, in that on the day of the incident he had refused to speak to the employee, informing him that he would be chairing his disciplinary inquiry.

In setting aside the commissioner’s decision on procedural unfairness, Molahlehi J held that the conclusion that the chairperson was biased was “unsupported by the evidence”, that the evidence was “insufficient to support the conclusion” and that the conclusion was based on “speculation” on the part of the commissioner.\(^{303}\)

In the process, Molahlehi J relied on the following important dictum of Van Niekerk AJ, in the case of *Sil Farming CC t/a Wigwam v CCMA*:\(^{304}\)

“A Commissioner arrives at a decision which no reasonable decision-maker could reach if the decision is unsupported by any evidence that is insufficient to reasonably justify a decision arrived at or where the decision-maker ignores uncontradicted evidence.”

### 6.4.3 OVERLAP BETWEEN UNREASONABLENESS AND IRREGULARITY

In *Brolaz Projects*, Basson J found the commissioner’s decision to award the employee compensation reviewable. In the process, the court listed a number of factors to which the commissioner had failed to apply his mind, including the limited extent to which the company had deviated from fair procedures and the extent of the employee’s poor performance. The court went on to find:

“The Commissioner further committed a *material error in law* in coming to the conclusion that ... an employee’s length of service was not a relevant factor in regard to the determination of compensation for procedural unfairness. It is clear from authorities that length of service is a *relevant consideration* in relation to the awarding of compensation for procedural unfairness. By ignoring these judgments, the Commissioner, in my view, committed a *gross irregularity*. The fact that the employee was only employed for a period of nine months and with an appalling performance record was *completely disregarded by the Commissioner in coming to the conclusion to award him 12 months’ compensation.*

In my view, the conclusion reached by the Commissioner in respect of compensation is not *one that a reasonable Commissioner would have reached having regard to all the relevant factors, his own factual finding and the applicable case law.*\(^{305}\)”

\(^{303}\) At para 20 and 24.

\(^{304}\) Unreported LC judgment case no JR 3347/2005 per Van Niekerk AJ.

\(^{305}\) At para 31.
In *NUM v CCMA*, the employee, an underground locomotive driver, was dismissed for sleeping on duty. The commissioner found that the employee’s dismissal was fair. On review, Molahlehi J set aside the award on the basis that it was unreasonable in that the commissioner had failed to apply his mind to a number of mitigating factors, including that the employee had shown remorse and had fallen asleep while waiting for his locomotive to be serviced. In the process, the court held as follows:

“In *Sidumo*, the Court held that in arriving at a decision whether or not dismissals are fair, commissioners exercise a value judgment. In exercising value judgment, Commissioners need to take into account all the circumstances of the case, including the importance the importance of the rule that was breached and the reasons why the employer imposed the sanction of dismissal. The employee’s input need also be taken into account.”

In *Senama v CCMA & Others*, the employee was dismissed for theft after a vehicle registered in his name was identified as having entered the company’s premises and collected stock from the warehouse. The commissioner rejected the employee’s version that he had been on leave at the time, and upheld the substantive fairness of his dismissal. In doing so, the commissioner drew an adverse inference against the employee on account of his failure to provide a plausible explanation as to why he only disclosed his ownership of the vehicle at arbitration. In dismissing a review brought by the employee, Mohlahleli J held:

“A reasonable decision is reached when a Commissioner in performing his function as an arbitrator applies the correct rules of evidence and if there is to be a deviation it must not be of such a nature that it denies any party a fair hearing.

It is also required of the Commissioner to weigh all the relevant factors and circumstances of the case before him or her to ensure that his decision is reasonable.”

In the present case, the commissioner’s finding that the dismissal of the employee was substantially fair was based on the proper evaluation of the circumstances and the evidence that was led during the arbitration hearing. The commissioner gave

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reasons why he accepted the version of the company and rejected that of the employee.

_Senama v CCMA & Others_\(^{308}\) also lends support for the view that erroneous reasons must be indicative of one or more grounds of review in order to guarantee the decision’s susceptibility to review proceedings.\(^{309}\)

“A reasonable decision is reached when a Commissioner, in performing his or her functions as an arbitrator, applies the correct rules of evidence, and if there is to be a deviation it must not be of such a nature that it materially denies any party a fair hearing. It is also required of a Commissioner to weigh all the relevant factors and circumstances of the case before him to ensure that his decision is reasonable.”

In _Sidumo_, Ngcobo held as follows:\(^{310}\)

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

Since the _Sidumo_ test has been delivered, there appears to be a tendency among applicants to frame their review applications based on gross irregularities, in an apparent attempt to avoid the _Sidumo_ test.

In _Maepe v CCMA & Another_,\(^ {311}\) the employee, a convening senior commissioner, was dismissed by the CCMA for sexual harassment. At the arbitration before the CCMA, he was found not guilty of sexual harassment and reinstated. The CCMA, in its capacity as an employer, then went on review. Despite upholding the finding that the employee’s dismissal was substantively unfair, the Labour Court granted the review on the basis that, in the light of the employee’s dishonest evidence, the commissioner had erred in reinstating him and ought not to have granted him any

\(^{308}\) _Supra_.

\(^{309}\) See para 18 _supra_.

\(^{310}\) See para 268.

\(^{311}\) (2008) 29 ILJ 2189 (LAC) at para 11.
relief at all. In an appeal brought by the employee, the Labour Appeal Court found that the arbitrating commissioner had committed a gross irregularity in not having regard to the employee’s dishonest evidence. In the result, the Labour Appeal Court upheld the judgment of the Labour Court reviewing the award, but awarded the employee 12 months’ salary as compensation — this on account of the fact that, despite his mendacity, the employee’s dismissal was, nevertheless, substantively unfair.

Zondo JP held:312

“In my view the Commissioner’s failure to take into account the [employee’s] conduct in giving false evidence under oath in the arbitration when he considered the issue of relief constituted a gross irregularity which justified the setting aside of the order of reinstatement which the Commissioner had made.”

In summary: In order for a commissioner’s failure to apply his mind to qualify as a gross irregularity, the issue that the commissioner failed to consider must have been of material importance and of such a nature that the failure to consider it materially deprived the party concerned of his or her right to a fair hearing.

6.4.4 VALUE JUDGMENTS AND DUTY TO CONSIDER MATERIAL FACTS AND CIRCUMSTANCES

In Sidumo, the Constitutional Court confirmed the importance of a commissioner determining the fairness of the sanction of dismissal in accordance with his or her own sense of fairness.313 Fairness is, however, a relative term and whenever a commissioner has to decide whether the sanction is fair or unreasonable, he or she will be making a value judgment. There is, however, significant constraints placed on commissioners in this regard. Amongst other things, they must remain impartial in the process and must consider all relevant factors before exercising their value judgment.

In the SCA judgment in Sidumo, the SCA did not use the term “reasonable employer’s test” to describe the approach that commissioners should adopt to

312 See para 11 supra.
313 Para 75-76.
sanction. It was not concerned with reasonableness but rather with fairness. Cameron JA held as follows in this regard:

“The criterion of fairness denotes a range of possible responses all of which could properly be described as fair. The use of ‘fairness’ in everyday language reflects this. We describe a decision as ‘very fair’ when we mean generous to the offender or more than fair when we mean it was lenient; or even severe. It is in this latter category, particularly, that CCMA Commissioners must exercise great caution in evaluating decisions to dismiss. The mere fact that a CCMA Commissioner may have imposed a different sanction does not justify concluding that the sanction was unfair.”

The Constitutional Court judgment of Sidumo rejected the operation of the reasonable employer’s test. Navsa AJ found that the approach adopted by the SCA tilted the constitutional balance in respect of the right to fair labour practices against employees, and held that “the Commissioner’s sense is what must prevail and not the employer’s view”.

Navsa AJ then went on to explain how commissioners should go about determining the fairness of the sanction of dismissal in these key passages:

“In approaching the dismissal dispute impartially a Commissioner will take into account the totality of circumstances. He or she will necessarily take into account the employer imposed the sanction of dismissal as he or she must take into account the basis of the employer challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employer conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of the dismissal on the employee and his or her long service record.”

In summary, we can accept that in terms of the LRA, a commissioner has to determine whether a dismissal is fair or not.

“A Commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a Commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all the relevant circumstances.”

It would appear that just like in Sidumo, the judgment in Fidelity Cash Management Services makes it clear that a value judgment must be made following the consideration of all the relevant facts and circumstances surrounding the particular case. Where however, a commissioner fails to consider all the material and
substantive factors in order to determine the fairness of the dismissal, in the light of his or her own sense of fairness, the award would be reviewable if it can be ascribed to one or more of the grounds of review stated in section 145 of the LRA.

The above principle was confirmed in the matter of *Hulett Aluminium (Pty) Ltd v Bargaining Council for the Metal Industry & Others*.\(^\text{314}\) The facts of this case are briefly as follows. The employee, an accounts clerk, was dismissed for dishonesty. The charge arose out of the unauthorised delivery to the employee’s daughter, who worked for one of the company’s clients, of a box containing material belonging to the company. The employee claimed that she had been under the impression that the box contained material she thought she was authorised to purchase for herself, and for which she had forgotten to pay until reminded.

She also contended that the sanction of dismissal was inconsistent and unfair, because an employee, (one Cassim) to whom she had handed the parcel was given a final written warning and suspended for a period. The commissioner found that the employee was guilty as charged, but that the sanction of dismissal was too harsh, because it was inconsistent with the penalty imposed on Cassim. Furthermore, the employee had a long service record and the company had not adhered strictly to its policy and procedures concerning the sale of scrap metal to employees. In the result, the commissioner reinstated the employee.

In setting aside the award on review, Molahlehi J held that the commissioner’s decision was not reasonable. He should have taken into account the seriousness and nature of the offence and that Mr Cassim was found guilty of an offence of a less serious nature than that of the employee. In addition, he had apologised for his wrongdoing, whereas the employee had denied any wrongdoing and showed no remorse.

Accordingly, the court held that the commissioner’s award was not reasonable and grossly irregular because of the misapplication of the principle of parity. And it was

\(^{314}\) [2008] 3 BLLR 241 (LC).
for this reason that the award stands to be reviewed. The court referred to *Sidumo*, noting that in determining the fairness of dismissals:

“Commissioners must take into account the reasonableness of the rule breached by the employee and the circumstances of the infringement. The Court [the CC in *Sidumo*] further held that in arriving at a decision whether or not the dismissals are fair, the Commissioners exercise a value judgment. In exercising the value judgment, the Commissioners need to take into account all the circumstances of the case, including the importance of the rule that was breached and the reasons why the employer imposed the sanction of dismissal. The employee inputs need also be taken into account.”

6.4.5 IN SUPPORT OF PROCESS-RELATED TEST FOR REASONABLENESS

This approach of the Labour Court is supported and consistent with a series of important judgments. In *New Clicks*, Ngcobo J held:

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

In *Bato Fishing Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*, O’Reagan J held:

“If we are satisfied that the Chief Director did take into account the factors, struck a reasonable equilibrium between them and selected reasonable means to pursue the identified legislative goal in the light of the facts before him, the applicant cannot succeed.”

More recently, Nugent J held as follows in the matter of *Point High School*:

“The law now is clear that in exercising his discretion, the HOD [who had appointed the principal and the Deputy Principal essentially on account of employment equity considerations alone] proceeded without proper understanding of the scope of the discretion which he was called upon to exercise. He disregarded the necessity of

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316 *Minister of Health & Another v New Clicks SA (Pty) Ltd & Others (Treatment Action Campaign & Another)* 2006 2 SA 311.
317 2004 SA 490 (CC).
318 *Point High School*.
actually weighing the equity consideration to which he sought to give effect, against the interests of the governing body and the school (including its pupils) to have the benefit of improved ability in the teaching staff. In doing so he omitted to reach a reasonable equilibrium between these interests, rendering his decision reviewable on the basis described on Bato Star Fishing.319

Most recently, O’Reagan J held as follows in Tao Ying Metal Industries:320

“The second constitutional issue is the question whether the Commissioner applied her mind to the period of operation of exemption. It is clear, as Ngcobo J holds [at para 76], that a Commissioner is obliged to apply his or her mind to the issue in a case. Commissioners who do not do so are not acting lawfully and/or reasonably and their decisions will constitute a breach of the right to administrative justice.”321

“The first obligation on an arbitration in determining a matter is to set out the reasons, even if only briefly, for any decision. However, beyond the dicta referred to above, there is no further discussion in the Commissioner’s award of the text of the exemption and its meaning … If the Commissioner had in fact applied her mind to the question of the meaning of the exemption; one would have expected at least some discussion of its text. This is nowhere evident in the award. In my view, it cannot be concluded that the Commissioner did apply her mind to the meaning of the exemption.”322

The underlined sentence in the quotation above is the most definitive statement after Sidumo, to the effect that an error in the process alone may result in a CCMA award being unreasonable. It reveals that, in addition to the results based unreasonableness, there also exists another form of unreasonableness, namely process-related unreasonableness.

In the light of the judgement in Tao Ying Metal Industries, if a commissioner fails to have regard to a materially relevant factor, then to use the language of the Sidumo test, the decision is not one that a “reasonable decision-maker could … reach” – this because a consideration of all materially relevant factors is essential to a reasonable administrative decision.

Process related reviews have proven to be a much more successful basis for the review of decisions by commissioners on sanction. An award will be reviewable for process related reasons where the commissioner, for example commits a material

319 At para 15.
321 At para 134.
322 At paras 140-141.
error of law or fails to apply his mind to materially relevant factors. In addition to constituting a gross irregularity, these errors also constitute “process related” acts of unreasonableness.

In *Southern Sun Interests (Pty) Ltd v CCMA & Others*, Van Niekerk J explained the concept of process related reviews as follows:

“It might be inferred from the *Sidumo* line of reasoning that an application for review brought in terms of section 145, process related conduct by a Commissioner is not relevant, and that the reviewing court should concern itself only with the record of the arbitration proceedings and its result. I do not understand the *Sidumo* judgment to have this consequence. Section 145 of the Act clearly invites a scrutiny of the process by which the result of the arbitration proceeding was achieved, and a right to intervene if the Commissioner’s process related conduct is found wanting. Of course, reasonableness is not irrelevant to both process and outcome.”

In *Boxer Super Stores (Pty) Ltd v Zuma & Others*, the employee was dismissed for having stolen the amount of R9 000 while loading an ATM machine. The commissioner considered the probabilities to be evenly matched and found against the company by way of operation of the onus of proof, but only awarded the employee three months’ salary as compensation. In a review brought by the employee, the Labour Court (per Pillay J) held that the award of compensation was wholly incongruent with the finding that the company had not discharged the onus, and ordered the employee’s retrospective reinstatement. In an appeal brought by the company, the LAC (per Davis JA) held:

“The [Commissioner’s] award was *manifestly irrational and, to that extent, the judgment of Pillay J is correct. It is irrational because the [Commissioner] gave no reasons for awarding compensation* after having found that the [company] had failed to discharge the onus in relation to substantive [fairness]. What the Commissioner should have done was to have said, in effect; I have examined the evidence. It appears to me that, give the grave nature of the charges levelled against the [employee] that is of dishonesty, it is clear that the relationship between the two parties is at the level where they could no longer work together. Reinstatement would therefore be inappropriate. And re-deployment would be inappropriate because of the conclusions reached by the company. Accordingly in terms of the powers that I have in terms of Section 193(2), I make a small award of compensation”.

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324 2009 ZALC 68 JR 243/05 24 July 2009 at paras 14 and 17.
The appeal succeeded and the judgment of Pillay J was set aside.

In *National Union of Mineworkers v Samancor Ltd*, the operation of the *Sidomo* test was addressed by the SCA. This case involved the dismissal of an employee after he had been incarcerated for ten days. In overruling the judgment of the Labour Appeal Court, the SCA (per Nugent JA) held as follows:

“It is apparent from the reasons given by the Labour Appeal Court that it did not appreciate the limited nature of the question that had been before the Labour Court – and hence the limited question that was before it on appeal. Nowhere in its reasons is there any express finding that the award was one that no reasonable decision-maker could make nor does it appear by implication. The most that can be said is that it found that the arbitrator erroneously categorised the dismissal to which I will return – but error is not by itself a proper basis for reconsidering an award. Having found that there was an error, the Labour Appeal Court said that “manifestly the question as to whether a dismissal in the circumstances of the present dispute, is substantively fair depends upon the facts of the case” and proceeded to consider the facts, reaching the following conclusion [to the effect the dismissal of the employee was manifestly substantially fair].”

“That approach to the matter would have been appropriate if the arbitrator award had been under appeal but not where it was being subjected to review.”

“The nature of the error that the commissioner had made in the categorisation of the dismissal appears from the SCA’s judgment. While the SCA and the LAC were in agreement that ‘incapacity’ was the correct categorisation of the reason for the employee’s dismissal and that the Commissioner had erred in his categorisation, the two courts approached the consequence of that error very differently. For its part, the LAC appears to have construed the Commissioner’s miscategorisation as warranting, in itself, interference with the award. Nugent J found, on the other hand, that ‘I do not see that the difference of opinion on the correct categorisation of the dismissal plays any material role in this case.’”

The fact that the LAC was found to have erred in *Samancor* in its application of the *Sidumo* test is a lesson for all concerned. The SCA judgment reiterates the fact that the *Sidumo* judgment was a conservative one, and that an award will only fail the test if it is truly capable of (reasonable) justification. This was well expressed recently by Davis JA in *Bestel* in *the context of commenting on the Sidumo test:*

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327 *Samancor Tubashe Ferrochrome v MEIBC & others* [2010] 8 BLLR 824 (LAC).
328 At para 8.
329 At para 10.
“It is important to emphasise ... that the ultimate principle upon which a review is based is justification for the decision as opposed to being considered to be correct by the reviewing court; that is whatever this Court might consider to be the better decision is irrelevant to review proceedings as opposed to an appeal. Thus great care must be taken to ensure that this distinction, however difficult it is to always maintain, is respected.”

6.5 CONCLUSION

In this chapter, it was established that reasonableness was a sound test for review and should not be seen as a ground for review. Furthermore, reasonableness has not broadened the scope of review, but in fact simplified it. When the concept of reasonableness is applied, the court is required to review and set aside the arbitration award, if the decision arrived at, falls within the grounds of section 145(2) of the LRA, which a reasonable decision-maker could not have made having regard to all the circumstances of the particular matter.

As the review of jurisprudence demonstrates, while Sidumo has in particular served to limit the review of value judgments, there is still lots of scope for the review of CCMA awards in the event of commissioners failing to apply their minds properly to the facts and the law.

It also appears that reasonableness may not be as stringent a test as originally considered. In fact, as the dictum of Chalkalson J in New Clicks makes clear, reasonableness calls for a more intensive scrutiny of CCMA arbitration awards than the Carephone test did.

“I am of the view that the best hedge against reviews is for Commissioners to continue to strive towards reasoning their awards properly along the lines discussed. By focusing on the issues and embarking on a systematic analysis thereof, the potential for a review should be significantly reduced. The focus of Commissioners should always be on the way in which they arrive at their conclusions, rather than on the outcome of the process.”

Without the protection of the reasonable employer’s test, employers are now forced to review their approach to discipline and dismissal in the workplace. The message from Sidumo is that employers cannot impose discipline as they used to do in the
past. Employers cannot approach the issue of sanction as if *Sidumo* does not exist. Commissioners are not agents of employers, but more like umpires who must decide the issue of fairness. *Sidumo* has given clear guidelines about the issue of sanction and discipline in the workplace.

At the minimum, employers would be well advised to ensure that workplace rules and standards are clearly established and communicated and reaffirmed, where necessary.

On the review front, although it is difficult to assail an award on sanction on the basis of the *Sidumo* results based test, such awards will be vulnerable to review on process-related grounds if the commissioner *inter alia* adopts an erroneous legal approach to sanction or fails to apply his or her mind to materially relevant factors in mitigation or aggravation.

At the same time, *Sidumo* certainly does not give commissioners a *carte blanche* when it comes to sanction. They are obliged to consider all relevant factors and balance them up in a completely impartial manner. They must at all cost avoid substituting their own opinion for the decision of the employer in answering this question they should ask themselves, namely whether the employer have fairly imposed the sanction of dismissal.
CHAPTER SEVEN
REASONABLENESS STANDARD AND REVIEW OF PRIVATE ARBITRATION AWARDS

7.1 INTRODUCTION

The finality of an arbitrator's award is central to the effectiveness of private arbitration proceedings. The arbitral parties enter into the process voluntarily, and the arbitrator is chosen by consent. Thus, the court will only enter into objections in relation to arbitration awards on limited grounds.

This chapter will discuss the recourse available to parties aggrieved by arbitrators; awards. This analysis will comprise a discussion of the rejection of appeals against arbitration awards, as well as the two key means of abolishing private arbitration awards. It will involve recourse to common law, whereby an award is declared null and void due to invalidity and the statutory grounds of review, whereby the award is set aside. The Arbitration Act (1965) came into existence long before the LRA and the CCMA, and its ability to have a dispute heard and determined by an impartial third party plays an important role in dispute resolution and has not deprived parties from entering into agreements that provide for the private arbitration of a dispute. This consensual arbitration process co-existed within a single labour law system. However, since the advent of the new democratic dispensation, the new Labour Relation Act has created the CCMA as the main statutory body that regulates the function of conciliating and arbitrating labour disputes. The interpretation and application of the narrow grounds of review will be dealt with in full in an effort to unravel the legal disarray that has at times led to the erroneous interpretation of the review provision. The courts' different approaches to establish whether or not private arbitration award reviews are also subject to the reasonableness standard will be discussed and considered.
7.2 NATURE OF PRIVATE ARBITRATION AWARDS

Bosch defines private arbitration as:\(^{331}\)

“A voluntary process whereby the parties to a dispute agree that an acceptable third party, the arbitrator, will fairly hear their respective cases by receiving and considering evidence and submissions from the parties and then make a final and binding decision.”

In *Total Support Management (Pty) Ltd & Another v Diversified Health Systems (SA) (Pty) Ltd & Another*,\(^{332}\) the Supreme Court of Appeal described the distinctive attributes of private arbitration as follows:\(^{333}\)

“First, arbitration proceeds from an agreement between parties who consent to a process by which a decision is taken by the arbitrator that is binding on the parties. Second, the arbitration agreement provides for a process by which the substantive rights of the parties to the arbitration are determined. Third, arbitrator is chosen, either by the parties, or by a method to which they have consented. Fourth, arbitration is a process by which the rights of the parties are determined in an impartial manner in respect of a dispute between parties which is formulated at the time that the arbitrator is appointed.”

A private arbitration award must be in writing and all members of the tribunal must sign it. The award must be delivered to the parties within the period prescribed in the arbitration agreement, or failing any specification as to time of award, within four months.\(^ {334}\) These time limits may be extended by written agreement between the parties or by a court, on good cause shown.\(^{335}\)

Contrary to the position in a number of foreign jurisdictions,\(^ {336}\) there is no authority in South African law that requires arbitrators to give reasons for their decisions. However, it is custom and good practice for an arbitrator to do so. Arbitrators are directed largely by the terms of reference set out in the arbitration agreement, and

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\(^{332}\) 2002 4 SA 661 (SCA).

\(^{333}\) Para 24.

\(^{334}\) S 23(a) of the Act. S 23(b) sets out a three month time limit where an umpire makes an award.

\(^{335}\) S 23 of the Act.

\(^{336}\) See Butler and Finsen *Arbitration in South Africa* 269 fn 89.
thus they must provide reasons for the decision if the arbitration agreement so directs.

Case law reveals that there exists a close similarity between private and CCMA arbitration award reviews. The court in reviewing private arbitration awards, adopts a narrower approach to the grounds upon which an award may be set aside that is very similar to the one adopted in relation to CCMA arbitration awards. This appears from the matter of *Academic & Professional Staff Association v Pretorius SC & Others.*

“The courts have, in dealing with reviews of private arbitration, adopted a narrow approach. This approach confines itself to mainly issues related to procedural aspects to the arbitration. This approach is mainly informed by the fact that private arbitrations flow from the consent of the parties, who, through an agreement, determines the powers of the arbitrator.”

In *NUM obo 35 employees v Grogan NO & Another,* the court had to adjudicate on an issue relating to grounds for misconduct: whether a *bona fide* mistake of law or fact or a gross mistake *per se* qualifies or constitutes grounds for misconduct. The court explained the rationale behind such an approach:

“Arbitration is intended to provide a specialised, informal, private and convenient process, at reduced cost aimed at quickly reaching finality. It is the essence of the process that awards should not be appealable, unless otherwise agreed, and that supervision by the Courts generally should be restricted to guarding the process from gross and fraudulent acts. In the private sphere it is a consensual process undertaken by agreement and in conscious awareness of the advantages attending the finality of awards and the limited rights of review.”

In *Seardel Group Trading (Pty) Ltd t/a The Bonwit Group v Andrews NO & Others,* the court indicated that section 33 of the Arbitration Act was not unconstitutional to the extent that it placed a limitation on the grounds for review.

“Further, the constitutionality of section 33 of the Arbitration Act has not been placed in dispute *in casu.* In my view, the clear purpose of section 33 of the Arbitration Act is to

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337 [2008] 1 BLLR 1 (LC) para 59.
338 [2007] 4 BLLR 289 (LC).
339 Para 43.
limit the grounds for review, both in regard to common law grounds and now also in regard to so-called ‘constitutional grounds’ of review.”

Private arbitration review matters are limited to the grounds of review as set out in section 33 of the Arbitration Act and, like section 145 of the LRA, have not been found to be unconstitutional.

Once an award is delivered to the parties, the dispute is *res judicata* and the parties may not embark on a fresh arbitration hearing on the same issues. Unless otherwise agreed, parties may not appeal the arbitral decision, and the only recourse available to the aggrieved parties is review on the limited grounds set out in the Arbitration Act.\(^{341}\) Thus, the effect of the award is to bring the dispute to an end and often to end or extinguish rights and obligations between the parties.

There are two courses of action open to a party that wishes to enforce an arbitration award. Firstly, the party may apply to court in terms of common law to compel the party in default to abide by the contractual obligations of the arbitration agreement. Secondly, where the award was made under the authority of the Arbitration Act, the successful party may apply to the High Court or Labour Court with jurisdiction to have the award made an order of court and thus enforceable through execution proceedings.\(^{342}\)

### 7.3 REASONABLENESS AND PRIVATE ARBITRATION AWARDS

Section 33 of the Constitution of the Republic of South Africa provides as follows:

> “(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.”

It would appear from the above wording of the Constitution, that reasonableness relates to administrative action only. Consequently, we may conclude, that on review, a private arbitration award would only be subject to the reasonableness standard as explained in *Sidumo* if private arbitrations like CCMA arbitrations can be

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\(^{341}\) S 28 and s 33 of the Act.

\(^{342}\) S 31(3) of the Arbitration Act and Rule 45 of the Uniform Rules of Court.
categorised as administrative actions. This will be apparent from the matter of NUM obo 35 employees supra.\textsuperscript{343}

“Should arbitration be considered to be administrative action then it would follow that arbitration awards issued under the Arbitration Act would have to be reasonable and, in the light of the provisions of Section 6 of the Promotion of Administrative Justice Act 3 of 2000 9 (PAJA), as such would entitle a review on all ordinary review grounds, including a lack of rational connection between the evidence and the decision as reflected in the reasons given for it.”

The courts, however, have not given much credence to this basic criterion. The courts focus their attention more on the similarities between the grounds for review of CCMA awards and private arbitration awards than on the nature of arbitrations itself. A case that illustrate this clearly is the matter of Ntshangane v Speciality Metals CC,\textsuperscript{344} where Mlambo J commented on the similarity between the provisions of section 33(1)(b) of the Arbitration Act and section 145 of the LRA. He made the following observation:\textsuperscript{345}

“It is correct that the arbitrations conducted under the Arbitration Act are voluntary. On the other hand arbitrations conducted under the CCMA are obligatory but are specifically provided for review in terms of section 145. In other words, the labour Court is given power to use the same standard regarding arbitrations conducted under the Arbitration Act as well those conducted under the CCMA. In other words, the Court, in reviewing arbitration awards, will have to apply uniform standards and indeed I cannot imagine that the legislature would have intended that one set of arbitration proceedings or awards be subjected to a less stringent review scrutiny than the others.”

Furthermore, in the matter of Transnet Ltd v Hospersa & Another,\textsuperscript{346} Mlambo J held that:

“In my view the standard test of review of awards of the CCMA was set out in the Labour Appeal Court applies equally to awards issued in terms of the Arbitration Act. One reason is the similarity between section 145 and section 33 of the Arbitration Act. The other reason is that inconsistencies and confusion could prevail if this Court were to apply different standards of review.”

Also, in the matter of Seardel Group Trading,\textsuperscript{347} Basson J referred to section 40 of the Arbitration Act and confirmed that arbitrations conducted in terms of a collective

\begin{flushleft}
\textsuperscript{343} Para 43.
\textsuperscript{344} [1998] 3 BLLR 305 (LC).
\textsuperscript{345} Para 34.
\textsuperscript{346} [1999] 7 BLLR 732 (LC).
\end{flushleft}
agreement were consensual in nature and that the arbitration award in the above matter could be reviewed in terms of the limited grounds contained in section 33 of the Arbitration Act.\textsuperscript{348}

"The basis remains that of consensual collective agreement pursuant to which arbitration under the auspices of a bargaining council are conducted. In stark contrast hereto, arbitration conducted under the auspices of the CCMA are compulsory in nature. As stated above [at paragraph 17], in terms of section 146 of the LRA, such arbitrations are expressly excluded from the ambit of the Arbitration Act which underlines the consensual nature of arbitrations to which it applies (see once again, the provisions of section 40 of the Arbitration Act at paragraph [16] above. There is thus a marked and important difference between arbitrations conducted under the auspices of the CCMA and arbitrations conducted under the auspices of a bargaining council."

This discourse was finally resolved by the Supreme Court of Appeal in the matter of \textit{Total Support Management (Pty) Ltd GW Slabbert v Diversified Health Systems SA (Pty) Ltd PEB Reynolds}. The court addressed the effect that section 33(1) of the 1996 Constitution had on private arbitration award reviews. The court noted that that it was only administrative action that was subject to the right to administrative action, as provided for in section 33(1).

Smalberger ADP referred to the two different definitions of administrative action in respect of the general definition and the PAJA definition of administrative action and found that private arbitration did not fall under the scope thereof. The court assigned distinctive qualities or characteristics to private arbitration as it arose from private powers. The parties to private arbitration arise from a contract concluded between the parties, from which flow certain substantive rights and obligations of a binding nature. The decision taken by the arbitrator is of a binding nature. The method of choosing the arbitrator was agreed to by the parties and determined in an impartial manner.\textsuperscript{349}

Smalberger ADP concluded as follows:

\begin{quote}
"The hallmark of arbitration is that it is adjudication, flowing from the consent of the parties to the arbitration agreement, which define the powers of adjudication, and are
\end{quote}

\textsuperscript{347} Paras 25-26.
\textsuperscript{348} Para 33.
\textsuperscript{349} Para 264.
equally free to modify or withdraw that power at any time by way of further agreement. This is reflected in section 3(1) of the Act. As arbitration is a form of private adjudication the function is of an arbitrator is not administrative but judicial in nature. This accord with the conclusion reached by Mpati J in *Patcor Quarries CC v Issroff and Others* 1998 4 1069 (SECLD) at 1082G. Decisions made by in the exercise of judicial functions do not amount to administrative action (cf *Neil v Le Roux NO and Others* 1996 3 SA 562 (CC) 567 C [para 24]), and compare also the exclusionary provisions to be found in (b) (ee) of the definition of “administrative action”. Contained in Section 1 of the Promotion of Administrative Justice Act No 3 of 2000. It follows in my view that consensual arbitration is not a species of administrative action and section 33(1) of the 1996 Constitution has no application to the to a matter such as the present.”

It can be accepted that arbitrators do not engage in administrative action when issuing private arbitration awards and that such awards are accordingly not subject to the scrutiny of the reasonableness standard of review.

**7.4 APPLICATION OF THE JUSTIFIABILITY AS A STANDARD BY AGREEMENT**

It would appear that our courts have divergent views in relation to the above matter.

In *Seardel Group Trading supra*, Basson J, in interpreting a collective agreement, accepted that although private arbitration awards were generally only reviewable in terms of section 33(1) of the Arbitration Act,\(^\text{350}\) parties could by agreement render the justifiability standard applicable to private arbitration award reviews:\(^\text{351}\)

> “It would therefore appear that the parties intended to extend the scope of review beyond the narrow grounds contained in section 33 of the Arbitration Act for arbitration conducted in terms of the collective agreement to include the wide grounds of ‘constitutional review’ to be read into section 145 of the LRA in terms of the Carephone judgment.”

The court then proceeded to apply to apply the justifiability test and ruled that:\(^\text{352}\)

> “The arbitrator failed to take into account an important aspect of material available to her that she failed to take into account the common cause fact of the final written warning. Based upon this misdirection by the arbitrator (the first respondent), the arbitration award falls to be set aside on review on the wider test of justifiability as the arbitrator clearly did not apply her mind to a crucial part of the material before her in coming to a conclusion that the dismissal was unfair.”

\(^{350}\) Para 59.

\(^{351}\) Para 55.

\(^{352}\) Para 58.
In *NUM obo 35 employees supra* the court noted that the arbitrator's award was challenged on the ground that the justifiability standard was applicable. In determining whether such an assumption was correct, the court referred to *Total Support Management supra and* noted that in that particular matter, the Supreme Court of Appeal found that private arbitration did not fall within the range of administrative action, because it involved the exercise of private power, as opposed to public power, which had the effect of rendering rationality review inapplicable. The court accordingly held that:

> "The powers of the Labour Court are established and circumscribed by statute and no party in litigation can confer additional powers on the Court or add, vary or amend the powers given to the court by legislation. The parties are free to establish a private appeal or a private review body, in their arbitration agreement and clothe that body with the powers they may wish to confer. However, that is not the same as seeking to add to the jurisdiction of the Labour Court."

The parties to private arbitration agreement are at liberty to include in the arbitration agreement a condition suggesting that the arbitration award would be subject to review on CCMA grounds, including the test of rationality or justifiability, without considering the question whether it did not by implication imposed via the backdoor jurisdiction on the court which it did not have.

> "The parties conferred on the arbitrator the power, firstly, to issue a final and binding award, subject to review on the same grounds on which the Labour Court reviews awards of the CCMA. In doing so, the mandated the arbitrator to issue an award that met the standards set for CCMA awards. Counsel for the parties confirmed that the standard of review in this case was the usual grounds for reviewing CCMA awards and include testing the award for rationality and justifiability."

353 Para 41.
354 Para 44.
355 *RSA Geological Services (A Division of De Beers Consolidated Mines Limited) v Grogan & Others* [2008] 2 BLLR 184 (LC).
356 Para 10.
7.5 CONCLUSION

Section 33(1) of the Arbitration Act restricts the grounds for reviewing private arbitration awards. This is not unconstitutional. Furthermore, private arbitration awards are not a kind of administrative action. In view of the consensual nature of private arbitration, it is insulated against outside interference and is the main reason why the reasonable standard is not applicable to the review of its awards. Consequently, review proceedings may only be considered in terms of the defined grounds stated in section 33(1) of the Arbitration Act.

Another important feature of private arbitration awards is that the parties to the agreement may not in their terms of reference agree on the applicability of the reasonable standard of review, as it would have the effect of the parties colluding with each other in imposing jurisdiction on the Labour Court, that it is precluded statutorily from having. The disputing parties are free to appoint their own review or appeal panel.
CHAPTER EIGHT
CONCLUSION

The South African labour law system is founded on the principle that labour law disputes should be resolved quickly, cheaply, effectively and, finally, with the minimum of legal formalities. The new LRA has introduced profound changes to the familiar terrain of labour law and industrial relations practice in South Africa. The establishment of the CCMA by legislature replaced the rudimentary dispute settlement mechanism of the old Act. The CCMA is entrusted by the legislature to give expression to the function of resolving disputes at arbitration level, without conferring a right of appeal against its findings to the newly established Labour Court.

The legislature has placed such confidence and trust in the establishment of the CCMA and its capability to finalise arbitration awards that it provided for a few narrowly defined grounds of review of arbitration awards, as provided for in Section 145 of the LRA. This statutory review mechanism is far more restrictive in scope that the appeal process, where a dissatisfied appellant can attack the merits and/or correctness of the arbitrator’s decision. The reviewability of a decision in arbitration review proceedings depends on whether the arbitration proceedings or the commissioner’s reasoning process appears to be defective in one or more ways, as contemplated by the provisions of section 145(2) of the LRA.

The legal framework for the review of arbitration awards in the labour context consists of three basic provisions in two statutes, namely section 33 of the Arbitration Act and section 145 and section 158(1)(g). Section 33 applies for private arbitration review, while section 145 applies to the review of CCMA arbitration awards.

It has been determined that the making of an arbitration award constitutes an administrative action that is subject to the constitutional provisions of the right to just administrative action that is lawful, reasonable and procedurally fair, as provided for in section 33(1) of the 1996 Constitution. However, this does not imply that an applicant may directly rely on the constitutional provisions of the Constitution or on
the provisions of section 6(2) of PAJA to review CCMA arbitration awards on the
ground of unreasonableness or unfairness or the incorrectness of the arbitrator’s
decision.

It has been established that the restrictive ambit of section 145 of the LRA does not
fall foul of the constitutional imperatives imposed by section 33(1), but it has the
effect that reasonableness has suffused the statutory defined grounds of review.
Based on this interpretation, reasonableness should be seen as a standard against
which the reviewability of a decision is to be tested. This requires the Labour Court
to enquire whether the decision made by the commissioner is the result of the
happening of an event, as provided for in section 145 for review, is one that a
reasonable decision-maker could not reach having regard to all the circumstances of
the case.

The CCMA is an organ of state and CCMA commissioners exercise public power in
making arbitration awards. As a result, their decisions must be justifiable in relation
to the reasons they provide. Justifiability entails that commissioners apply their minds
to the matters before them and reach conclusions on a rational basis, rather than
illogically or arbitrarily. Review of justifiability involves an objective analysis of the
arbitrator’s process of reasoning – whether there is a connection between the
findings made and the final decision reached. Justifiability does not concern the
merits of the dispute or the correctness of the award.

The application of the justifiability test in CCMA arbitration reviews can only be
beneficial. If applied correctly, the test does not transcend the dividing line between
appeal and reviews. Rather, it serves a vital function in controlling the immense
public power exercised by CCMA arbitrators, despite the fact that such power does
not amount to administrative action in the sense protected by the Constitution. In
fact, the rule of law and the doctrine of legality inherent in our constitutional order
require that the decisions of the CCMA arbitrators be rational, as do the founding
constitutional values of a democratic society based on accountability, responsiveness
and openness.
Various other policy factors also call for justifiability in CCMA arbitration awards. These are the pursuit of justice, the compulsory nature of most CCMA arbitration proceedings, the finality of CCMA awards, the supervisory role played by the Labour Court in relation to the CCMA, and sound labour relations.

While the requirement of justifiability in CCMA awards seems to sit well with the judiciary in principle, courts have anguished over how to legitimately include such rationality into labour law as it stands. Perhaps one of the greatest problems has been that justifiability was accepted as a requirement of CCMA awards, without the correct legal foundation. Had the reasoning in Carephone been correct, the ratio decidendi of the case would not have been questioned and the courts would have included the justifiability test under the review ground that a commissioner has exceeded his or her powers. While justifiability is not a separate ground for review, it is not necessary to limit justifiability to section 145(2)(a)(iii) of the LRA.

Private arbitration awards are similar to CCMA awards in that arbitrators reach final and binding conclusions that are subject only to limited grounds of review. The formulation of the review grounds in the Arbitration Act is strikingly similar to those applicable to CCMA arbitration awards in terms of the LRA. Section 33 (1) of the Arbitration Act sets out the limited grounds on which the awards may be set aside on review.

The Labour Appeal Court has rejected the application of the Carephone justifiability test to private arbitration reviews. The formulation of the Sidumo test may be summarised as follows:

Is the decision reached by the Commissioner one that a reasonable decision-maker could not reach?357 This test originates from the Constitution, with its aim being to “give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair”.358

357 At para 110.
358 Ibid.
In order to enable reviews for reasonableness to be brought in terms of section 145 of the LRA 66 of 1995, when the language of the section does not make specific reference thereto, the Constitutional Court held that section 145 must be read in such a way as to ensure that administrative action by the CCMA is lawful, reasonable and procedurally fair\(^{359}\) and that “the reasonableness standard should now suffuse section 145”.\(^ {360}\)

**WHAT DOES THE **\textit{SIDUMO TEST}** DEMONSTRATE?**

The \textit{Sidumo} test demonstrates that it is results based, which tests the reasonableness of the result/outcome of the award. In order to assail an award on the basis of the \textit{Sidumo} test, the applicant must assail not only the commissioner’s reasons, but also the result of the award. The reasonableness of the result of the award stands to be determined on all the material that was before the commissioner (with the result that the award can be sustained for reasons not considered by the commissioner).

The focus will be on whether the result of the award falls within the range of reasonable outcomes, as opposed to whether it was correct. Having regard to the context mentioned above, the fact that a commissioner [as was the case in \textit{Samancor}] commits an error in the process of his or her reasoning will not result in the \textit{Sidumo} test being met, unless the result of the award is incapable of justification on all the material before the commissioner.

The \textit{Sidumo} test is a conservative test, as the SCA’s judgment has indicated in the \textit{Samancor} judgment, and will only fail the test if it is truly incapable of reasonable justification. Thus, great care must be taken to ensure that this distinction between appeal and review is always maintained and respected, however difficult it is to always maintain.

\(^{359}\) At para 105.
\(^{360}\) At para 110.
THE *SIDUMO* TEST IS NOT AN ALL-ENCOMPASSING TEST

The key question that has arisen after *Sidumo* is whether the result of reasonableness suffusing section 145 of the LRA is that the grounds of review set out therein have been rendered obsolete.

I am of the view that the grounds for review, as set out in section 145, remain operational and, in addition to these grounds, awards may be attacked on the basis of the *Sidumo* test. This submission has the effect and result that where an applicant on review establishes that the commissioner committed misconduct or a gross irregularity or exceeded his or her powers, the award will fall to be set aside on review without the *Sidumo* test coming into play.

The factual findings in an award will fail the *Sidumo* test if there is insufficient evidence to reasonably justify them or if the commissioner ignores material evidence to reasonably justify them or if the commissioner ignores material evidence in making them.

Furthermore, an erroneous legal approach to the determination of a charge of misconduct will render an award susceptible to review for want of reasonableness. However, where a commissioner goes wrong in his or her appreciation of the severity of the misconduct or makes findings in mitigation that are not sustainable or does not have proper regard to the relevant facts in the determination of penalty, a decision thereon will be susceptible to review, even on the *Sidumo* test.
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