

REVIEW OF CCMA ARBITRATION AWARDS

by

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DECLARATION

I declare that the mini-dissertation hereby submitted to the University of Limpopo for the degree of Masters of Labour Law (LLMLABOUR) has not previously been submitted by me for a degree at this or any other university, that it is my own work in design and execution, and that all materials contained therein has been duly acknowledged.

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DEDICATION

I dedicate this dissertation to my late grandmother Annah Mohlaba who has always seen the good in me. It is also dedicated to my sources of inspiration my mother Edith, my father Johannes, my little sisters Sharon ‘Shazz’, Elaine ‘Ezo’ and Mitchell ‘Shinono’ and my brother Prince.

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ACRONYMS

AAA - AMERICAN ARBITRATION ASSOCIATION

AD - APPELLATE DIVISION

CC - CONSTITUTIONAL COURT

**CCMA- COMMISSION FOR CONCILIATION MEDIATION AND
ARBITRATION**

FMCS - FEDERAL MEDIATION AND CONCILIATION SERVICE

LAC - LABOUR APPEAL COURT

LC - LABOUR COURT

LRA - LABOUR RELATIONS ACT 66 OF 1995

NLRA - NATIONAL LABOUR RELATIONS ACT OF 1935

PAJA - PROMOTION OF ADMINISTRATIVE JUSTICE ACT 3 OF 2000

SCA - SUPREME COURT OF APPEAL

ABSTRACT

This research discusses and differentiates between appeals and reviews. It illustrates the aim of the legislature in abolishing appeals in so far as arbitration awards are concerned. Furthermore, it illustrates the procedure for reviews and its legal effect. The concept of arbitration award is also discussed in short and its enforcement. Different grounds of review are discussed and their legal impact. Our Courts have in recent years formulated test or standards to be used in determining whether an arbitration award is sought to be reviewed. Such tests are discussed. A comparative study between South African legal system and United States' legal system is illustrated. It is recommended that the test of "reasonableness" as formulated in *Sidumo* be applied in all reviews of arbitration awards.

CHAPTER ONE

1. INTRODUCTION

1.1 BACKGROUND

In terms of the Constitution of the Republic of South Africa,¹ everyone has a right to a fair labour practice.² In 1956 the Labour Relation Act (LRA) was enacted which aimed at achieving a fair labour practice. One of the primary objects of the Labour Relations Act of 1995 is the effective resolution of labour disputes.³ Under the 1956 LRA, employers and employees were free to engage in industrial action in regard to any matter not covered by the agreement, provided that it concerned the employment relationship. Its underlying philosophy is that where a legal right or entitlement is at issue, the preferred solution is arbitration.

The Act offers two institutions for the performance of dispute resolution functions of which one of them is the Commission for Conciliation, Mediation and Arbitration (CCMA). The CCMA replaces the old conciliation boards of the 1956 LRA and assumes many arbitral function of the Industrial Court. If a dispute referred to it remains unresolved after conciliation, the CCMA must arbitrate the dispute. The decision of the Commissioner or an arbitration award is final and binding. An award that has been certified by the CCMA director may be enforced as if it were an order

¹ Act 108 of 1996

² Section 23(1)

³ Section 1(d)(iv)

of the Labour Court (LC).⁴ An award may also be made an order of the LC and executed as a court judgment. In *Deutsch v Pinto*⁵ it was stated that the power to make an award an order of court is a discretionary one which must, of course, be judicially exercised. The LRA affords any party to a dispute who alleges a defect in any arbitration proceedings a right to review and set aside the arbitration award.⁶

1.2 PROBLEM STATEMENTS

The right to review arbitration awards has always been guaranteed by the LRA on one or more grounds that will be discussed later in Chapter 3. However our courts have developed tests to be used in determining whether or not a decision of a CCMA Commissioner is reviewable. As a result the tests for review have always been controversial.

1.3 HYPOTHESIS

The hypothesis, as suggested in the title is that the test for review of CCMA arbitration awards should be developed in a manner that will be applicable in all circumstances without being controversial.

⁴ Section 142(1) and (3); See also Adolph Landman and Chantal Constable ‘Enforcing CCMA awards’ (2003) 19 (6) Employment Law.

⁵ 1997) 18 ILJ 1008 (LC) at 1016E.

⁶ Section 145

1.4 OBJECTIVES

1. To outline the test for reviewing arbitration awards in so far as it relates to the right to review as embodied in the LRA.
2. To set out the difference between Appeal and Review as remedies provided by the LRA.
3. To outline and differentiate between the test for review as developed by our courts and the grounds for review as set out in the LRA.
4. To set a guide on how our courts can develop a test for review which can be applied in all circumstances

1.5 RATIONALE

This study sets out the test for reviewing arbitration awards as developed by our courts. In addition, it illustrates how these tests need to be developed in a more uncontroversial way. Our courts therefore have a reciprocal duty to ensure that there is compliance with the “reasonability” test as formulated in the case of Sidumo. This study also illustrates the need to amend the LRA in order to enact a test for review that will be binding to all courts. This study also gives a clear difference between appeal and review.

1.6 RESEARCH METHODOLOGY

The main method to be used in this study is library research. Primary and Secondary sources of law such as legislation, case law, text books, journal articles and the internet were used for analyses on the research topic.

1.7 ORGANISATION OF CHAPTERS

- Chapter one gives a general overview of the study.
- Chapter two explains the difference between appeal and review.
- Chapter three deals with the grounds for review as set out in the LRA and how it has been applied in South Africa.
- Chapter four deals with the case study and test for review as developed by our courts.
- Chapter five deals with the position in Australian law with regard to reviews.
- Chapter six deals with recommendations and concluding remarks and summarises the preceding chapters.

CHAPTER TWO

2 BASIC DISTINCTIONS BETWEEN APPEAL AND REVIEW

In this chapter the distinction between appeals and reviews are discussed. A brief distinction about appeals and reviews in general is set out. However, the core discussion in this chapter is to differentiate appeals and reviews in a Labour law sense.

2.1 DIFFERENCE BETWEEN APPEALS AND REVIEWS IN GENERAL

In civil matters, a decision handed down by a magistrate may be erroneous either because the presiding officer, has misconstrued the facts of the matter before him or because he has misinterpreted the law or applied it correctly. Alternatively the decision may be impeachable because of some procedural irregularity that occurred during the conduct of the case. In general, if one complains of the reasoning employed by the court in coming to a decision, one will proceed by way of appeal. But if one complains about the process which led to the decision of the magistrate, one will proceed by way of review. Thus, an appeal is in reality a re-evaluation of the record of proceedings in the magistrate's court. The ground of review are laid down in section 24 of the Supreme Court Act⁷

In *Johannesburg Consolidated Investment Co v Johannesburg Town Council*⁸ Innes CJ describes review as:

⁷ 59 of 1959

⁸ 1903 TS 111 at 114

*“...the process by which the proceedings of inferior courts of Justice, both civil
And criminal are brought before this court in respect of grave irregularities or
Illegalities occurring during the course of such proceedings”*

Because an appeal is a reassessment of the evidence and proceedings of the lower court, the ambit of the appeal is the record of such extensive evidence which is not apparent from the record. The difference is apparent from the treatment of the record. An appeal is heard and decided on the record of the lower court. In *R v Bates & Reidy*⁹ Innes CJ said:

“The difference between an appeal and review is that an appeal is based upon the matters contained in the record, while in review the appellant may travel beyond the record in order to rely on certain grounds, such as gross irregularity and the admission of incompetent evidence. If the appellant desires to appeal, but is not satisfied with the record as it stands, he may proceed to apply for leave to amend it”

Appeals and reviews also differ in relation to the period of time within which each must be brought. Appeals must be noted and prosecuted within statutorily prescribed time limits. Appeal must be noted within 20 days after the date of the judgment appealed against or within 20 days after the clerk of the court has supplied a copy of the written judgment to a party who has applied for it. Reviews need be applied for only within a reasonable time.

⁹ 1902 TS 199 at 200

A party to any civil suit or proceeding in a magistrate's court may appeal against the decision of the magistrate to a provincial division of the HC or to a local division of the HC that possesses appeal jurisdiction.¹⁰ To this general power of appeal there exist two exceptions. First, the parties may, before commencement of the hearing, lodge with the court a written agreement that the decision of the court shall be final and that they undertake not to appeal against the court's decision. Secondly, a party may by notice in writing abandon the whole or part of a judgement in his favour.¹¹ A party does not forfeit his right to appeal against a judgement by satisfying or offering to satisfy it in whole or in part, or by accepting any benefit under the judgement or order. At common law, however, a party may well forfeit his right to appeal by satisfying the judgement of the court a quo provided that the inference may be drawn from his conduct in doing so that he does not wish to appeal. Section 83, which confers upon parties the power to appeal, alludes an appeal in any civil suit or proceeding. From this one may clearly infer that an appeal may be noted against both a decision arrived at in a trial action and a decision on application. Appeals may be brought against the following decisions:

- a) any judgement described in section 48¹²

¹⁰ Section 83 of the Magistrates Courts Act 32 of 1944. Section 19(1)(a)(i) read with section 19(2)(a) and (b) of the SCA 59 of 1959 provides that the only local division which has such appellate jurisdiction is the Witwatersrand local division.

¹¹ Section 86(1)

¹² Judgement describes in section 48

- a) an order granting judgement for the plaintiff
- b) an order granting judgement for the defendant
- c) an order of absolution from the instance
- d) an order as to costs (including costs as between attorney and client)
- e) an order, subject to such conditions as the court thinks fit, against the party in whose favour judgement has been given suspending wholly or in part the taking of further proceedings upon the judgement for a specified period pending arrangements by the other party for the satisfaction of the judgement
- f) an order against a party for payment of an amount of money for which judgement has been granted in specified installment or otherwise, including an order contemplated by section 65(J) or 73

- b) any rule or order having the effect of final judgement, including an order relating to execution in terms of chapter IX of the Act and an order as to costs
- c) in certain circumstances, any decision overruling an exception.

Although section 48 refers to orders granted in a judgement on the trial of an action, appeal may be brought in addition against an order granted in motion proceedings. Consequently, it follows that the parties to the dispute envisaged in section 48 may appeal after the court has decided the matter on the basis of evidence on the merits of the case. Where merits and quantum have been separated, a finding on the merits is not itself appealable. Section 83 (b) provides expressly that appeals may be brought against orders relating to process in execution or relating to the collection of judgement debts. All orders made by a magistrate in the course of these two procedures are thus subject to appeal. Section 83 also renders appealable any order as to costs. It is important to note, however, that an appeal against an order as to costs that accompanies a rule or order which is not itself subject to appeal may be treated on a different basis from that rule or order, in other words, even though the remainder of the rule or order is not appealable, an appeal may be lodged against the order as to costs. In *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd*¹³ Watermeyer CJ stated “... *the merits of the dispute in the court below must be investigated in order to decide whether the order as to costs in that dispute was properly made or not*”.

Section 24(1) of the Supreme Court of Act provides for the following grounds of appeal:

- a) absence of jurisdiction on the part of the court

¹³ 1948 (1) 839 (A)

- b) interest in the cause, bias, malice or corruption on the part of the presiding judicial officer
- c) gross irregularity in the proceedings and
- d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.

A necessary precondition for review is that the litigant seeking review must have been prejudiced by the gross irregularity. If no prejudice was suffered, the court of review will not interfere with the finding of the lower court. The following may be regarded as instances of gross irregularity:

- a) irregularities pertaining to evidence
- b) disregard of the audi et alteram partem rule
- c) exceeding authority

The review of the proceedings of a lower court takes place on application in accordance with the provisions of the High Court rule 53. The notice of motion must set out the decision or proceedings sought to be reviewed and must be supported by an affidavit setting out the grounds and the facts and circumstances upon which the applicant relies to have the decision or proceedings set aside or corrected.

However in criminal cases parties dissatisfied with the outcome of a criminal trial in a lower court may bring the matter before the Provincial or local Division of the Supreme Court either by way of review or by way of appeal. However, appeal and review are no alternatives to each other. They serve different purposes. Where the accused complains

about his conviction or sentence he should approach the Supreme Court by way of appeal. But where his complaint is about the methods of a trial, about an irregularity involved in arriving at the conviction, the best procedure is to bring his complaint by way of review. Where a magistrate has allegedly made a mistake of law the accused should follow the appeal procedure. The review procedure differs from the appeal procedure in other respects too. In an appeal the appellant is confined to the four corners of the record, but in review proceedings the aggrieved party may traverse matters not appearing in the record.

The grounds for review in criminal matters are found in the Criminal Procedure Act (CPA)¹⁴ and Supreme Court Act.¹⁵ The grounds upon which the proceedings of any inferior court may be brought under review before a provincial division, or before a local division having review jurisdiction are as follows:

- a) absence of jurisdiction on the part of the court
- b) interest in the cause, bias, malice or corruption on the part of the presiding judicial officer
- c) gross irregularity in the proceedings and
- d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.

¹⁴ Act 51 of 1977

¹⁵ Act 59 of 1959

In *S v Naidoo*¹⁶ it was held that in question of fact or of law which are in issue and about which there is doubt may be set down by the court for argument by a representative of the Attorney-General and by an advocate appointed by the court to act on behalf of the accused. In such an event the record of the proceedings in the magistrate's court and all additional information which have been obtained by the judge who dealt with the review in the first instance, are laid before the court. A convicted person desiring to appeal shall within 15 days after the date of conviction, sentence or order in question, lodge with the clerk of the court a notice of appeal in writing in which he shall set out clearly and specifically the grounds, whether of fact or law or both fact and law, on which the appeal is based. Provided that if such appeal is noted by an attorney on behalf of a convicted person he shall simultaneously with the lodging of the notice of appeal lodge a power of attorney authorizing him to note an appeal and to act on behalf of the convicted person.

2.2 APPEALS AND REVIEWS IN TERMS OF THE LABOUR RELATIONS ACT.

The question often arises whether a party wishing to have the judgment of the lower court set aside is obliged to proceed by way of appeal or by way of review. Appeals and reviews are procedures that may be adopted in order to challenge decisions of the lower courts and if necessary, have them corrected. Although aimed at similar results, appeals and reviews are different procedures and each is appropriate only in certain circumstances. In determining which procedure is appropriate, one should begin by enquiring what one's ground of complaint is.

¹⁶ 1958 (1) SA 36 (N)

An award given by a commissioner is not subject to an appeal. Appeal against arbitration is an exception rather than a rule. The current LRA abolished the right to appeal against decisions of the industrial court that existed under the 1956 LRA and replaced that with the right to take decisions of the CCMA on review to the LC. However the party who is unhappy with an award may not have the matter re-heard by the higher court, nor may a higher court make a decision based on the record of the evidence led at arbitration, just on a re-assessment of the merits. However, the LC has the power in terms of the 1995 LRA, to review an award given by a commissioner.¹⁷ The distinction between an appeal and review is thus more difficult than it appears at first glance. De Villiers CJ in *Klipriver Licensing Board v Ebrahim*¹⁸ held that the words appeal and review are in some Acts “employed as interchangeable terms. However, the distinction is aptly formulated in *Coetzee v Lebea NO and Others*¹⁹ :

“The fact that a reviewing court may have come to a different result if the matter had been brought on appeal can never be, on its own, a basis for attacking the process of reasoning. If it did then the distinction between appeal and review would be obliterated. And whatever effect constitutional entrenchment of the right to administrative justice may have on our common law, it does not mandate a destruction of the distinction between these two remedies”.

¹⁷ Section 145 and 158

¹⁸ 1911 AD 458

¹⁹ (1999) 20 ILJ 129 (LC)

It is important to differentiate between an appeal and a review as the LRA does not permit an appeal from an arbitrator's award as its aim was to provide for a simple, inexpensive resolution of unfair dismissals. The explanatory memorandum²⁰ states that the absence of an appeal from the arbitrator's award speeds up the process and frees it from the legalism that accompanies appeal proceedings. Ngcobo AJP in *Country Fair Foods*²¹ also stated that the distinction between a review and an appeal must still be maintained notwithstanding the constitutional imperatives. There are, however, basic differences between Appeal and Review although such distinctions occasionally become blurred in our law.

2.2.1. REVIEW

2.2.1.1 PROCEDURE FOR BRINGING A REVIEW APPLICATION

A party to a dispute may make an application in terms of section 145 of the 1995 LRA for an order setting aside the award.²² An application for review must be made within six weeks of the date that the party received the award; however, it is possible for the LC to condone a late review on good cause shown by way of a condonation application. . If a party claims that a commissioner was corrupt, an application to set aside the arbitration award must be made to the LC within six weeks of the date on which the party discovered the corruption.

²⁰ Prior to the promulgation of the LRA< the Ministerial Legal Task Team was appointed in August 1994 to overhaul the laws regulating Labour relations in South Africa. The Task Team produced a draft Bill accompanied by a detailed explanatory memorandum for discussion and negotiation by the social partners to reach consensus on a new labour relation dispensation for South Africa.

²¹ (1999)20 ILJ 1701 (LAC)

²² Rule 7A of the Labour Court Rules: A party desiring to review a decision or proceedings of a body or persons performing a reviewable function justiciable by the court must deliver a notice of motion to the person or body and to all other affected parties

2.2.1.2 THE NATURE OF REVIEW PROCEEDINGS

Review is regulated by Rules of the LC.²³ In the case of review the manner in which the decision was reached is the focus of the proceedings. It involves a limited re-hearing (in terms of certain defined grounds of review) and the question is rather whether the procedure adopted was formally correct. A review is an enquiry into the procedural correctness of the arbitration and the arbitrator's decision. Review can only be made on the following specified grounds to be discussed in chapter 3:

- a) commissioner committed a misconduct in relation to his or her duties;
- b) commissioner committed a gross irregularity in the conduct of the arbitration proceedings; or
- c) commissioner has exceeded his or her powers
- d) or the award has been improperly obtained.²⁴

The Superior Court can usually not question the findings of fact and that of law of the court a quo, unless the findings are not justifiable in terms of the reasons given for the decision.²⁵ Reviews are not only about the ultimate outcome of the decision, but also about the reasoning that led to the outcome.²⁶ On review, the procedure followed by the court a quo' can be questioned and the award will be interfered with if gross irregularities in the procedures are found. The court dealing with the review cannot impose its own

²³ Rule 7A

²⁴ Section 145(2)

²⁵ See PAK le Roux "Challenging and enforcing CCMA arbitration awards; The new LRA procedures to ensure compliance" (2003) October 13 (3) contemporary Labour Law 284; Adolph Landman and Chantal Constable Enforcing CCMA awards (2003) 19 (6) Employment Law.

²⁶ Christopher Garbers: Reviewing CCMA awards in the aftermath of Sidumo: How the Labour Court has been reacting to landmark judgment. Contemporary Labour Law Vol 17 no 9 April 2008.

decisions on what the fact and the relevant provisions of the law are. In *Lekota v First National Bank of SA Ltd*,²⁷ the court held that in review proceedings the function of the court is to decide, not whether the commissioner acted correctly, but whether he or she committed misconduct or a gross irregularity or exceeded his powers.

2.2.1.3 LEGAL EFFECT OF A REVIEW

The enforcement of the award may be stayed until a decision regarding the review application has been made. The result of a successful review application may be either that the award is set aside and the matter submitted back to the CCMA for fresh finding, or that the LC substitutes its own determination for that of the arbitrator.²⁸ If the award is set aside, the LC may determine the dispute in a manner it deems appropriate and it may make any order that it considers appropriate in relation to the procedure to be followed in determining that dispute.²⁹

2.2.2 APPEAL

2.2.2.1 PROCEDURE FOR LODGING AN APPEAL

Any party to any proceedings before the LC may apply to the LC for leave to appeal to the LAC against any final judgment or final order of the LC.³⁰ Leave to appeal may be granted subject to any conditions that the court concerned may determine.

²⁷ 1998 10 BLLR 1021 (LC).

²⁸ Section 145(1)(a)

²⁹ CCMA Rule 19

³⁰ Section 166(1).

2.2.2.2 THE NATURE AND EFFECT OF AN APPEAL

Appeal is concerned with the correctness of a result and an appeal court has unlimited powers to interfere with the decision appealed against. In the case of an appeal, the merits of the case are heard again, and the deciding body takes a new decision on the merits and the facts of the case. In addition a Superior Court can question the decision of the court a quo, its findings of law and of fact and it can replace the lower court's decision with its own decision on the facts and the relevant provisions of law. As stated above that an award by the CCMA is not subject to appeal such a rule is subject to exceptions. Any person bound by an arbitration award about the interpretation or application of a closed shop agreement or an agency shop agreement may appeal against that award to the LC.³¹ However, a right to appeal from all decisions of the LC has been retained. Such appeals lie only to the LAC, subject to the right to appeal directly against decisions of the LC to the CC on constitutional matters.³² The LAC has no jurisdiction to review such decisions of the LC. A party may only appeal against judgment of the LC which lies to the LAC. There is no appeal against decisions of the LAC to the SCA.

³¹ Section 24(7)

³² That right exists in terms of rule 18 of the rules of the Constitutional Court, which permits appeals from decision of the High Court directly to the Constitutional Court provided that the High Court confirms that the point under appeal is a constitutional matter; John Grogan ‘Bucking the LAC: Appeals to the Constitutional Court (2002) 18 (3) EL 17, John Grogan ‘The highest law: Overruling the LAC (2003) 19 (1) EL

In dealing with section 21A³³ of the 1956 LRA, Nicholas AJA in his judgment in *National Union of Textile Workers v Textile Workers Industrial Union*³⁴ held that the meaning of the word “appeal” must be determined in the light of the context in which it appears in the 1956 LRA and that the legislature could not have intended the word “appeal” to mean appeal in the ordinary strict sense. It was then held that legislature could not have intended the word “appeal” to mean review because if “appeal” means review, every review of a deemed decision will be successful in that it would by definition not be a decision properly considered and that the legislature could not have intended such results.

³³ Section 21A of the LRA 1956 conferred upon a registered trade union which felt aggrieved by the refusal of its application for admission as a party to an industrial council a right to appeal to the lower court.

³⁴ 1988 (10) SA 925

CHAPTER THREE

3 GROUNDS FOR REVIEW AS RECOGNISED IN OUR LAW

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

Section 145 of the LRA governs the review of award by the CCMA and by bargaining councils.³⁵ Review in terms of section 145 is limited both insofar as time and grounds of review.³⁶ The LC took the view that the words “despite section 145” in section 158(1) limit the review of CCMA arbitration awards to section 145 only. In *Edgars Stores (Pty) Ltd v Director, CCMA*,³⁷ Revelas J took a different approach to the meaning of these words and interpreted section 158 (1)(g) to exclude its application in terms of arbitration proceedings although the court accepted that section 158 (1)(g) had the effect of extending the LC’s power of review. In *Pep Stores (Pty) Ltd v Laka NO and Others*³⁸ Mlambo J considered two applications, namely one to make an award an order of court, the other to review and set aside the same award. Mlambo J was of the opinion that section 158 (1)(g) does not apply to reviews of these awards stating that the provision for a time frame in section 145 is an important confirmation of the legislative objectives of finality in dispute resolution and since section 158 (1)(g) has no time frame, it can “therefore have no role to review of awards as section 145 provides for this”. Mlambo J

³⁵ Before the 2002 amendments to the LRA took effect 1 August 2002 the Arbitration Act was applicable to council arbitration and a review of an award had to be brought under that Act. However in terms of section 12 the amendments are applicable to bargaining council arbitrations, unless a collective agreement provides otherwise.

³⁶ It is submitted that in terms of section 145 the Labour Court has the power to, inter alia, refer the matter back to the CCMA or to make another award, should it deem it appropriate.

³⁷ (1998) ILJ 350 (LC)

³⁸ (1998) 19 ILJ 1534 (LC)

also held that in addition to procedural defects, section 145 also gives the LC the power to enquire whether the award is appropriate within the meaning of section 138(9).³⁹

In *Ntshangane v Speciality Metals CC*⁴⁰ Mlambo J considered the question whether the LC could review CCMA arbitration awards in terms of section 158 (1)(g) and expressed the view that the appropriate interpretation of section 158 (1)(g) should be that “in addition to the courts review power of CCMA arbitration awards it is also empowered to review anything else performed in terms of the Act”. The LC could thus not review CCMA arbitration awards in terms of section 158 (1)(g) but in terms of section 145.

An award may be set aside if there is a defect in the arbitration proceedings in that the commissioner:

- a) committed misconduct in relation to his or her duties
- b) committed a gross irregularity in the conduct of the arbitration proceedings, or
- c) exceeded his or her powers.⁴¹

3.1.1 MISCONDUCT IN RELATION TO THE DUTIES OF AN ARBITRATOR

An arbitrator is required to give due consideration to the issues, to apply his or her mind thereto and to come to a reasoned conclusion. Failure to do so may constitute misconduct. In *Abdul v Cloete NO*⁴² the applicants seek to review the award of a part-

³⁹ Section 13 (9) provides that the commissioner may make any appropriate arbitration award in terms of the LRA, including but not limited to, an award that gives effect to any collective agreement or to the provisions and primary objects of the LRA and an award that includes, or is in the form of a declaratory order.

⁴⁰ (1998) 19 ILJ 584 (LC)

⁴¹ Section 145(2).

⁴² (1998) 3 BLLR 264 (LC)

time commissioner of the CCMA. The question to be considered was whether the arbitrator's failure to apply his mind to the issues before him as occurred constitutes misconduct in relation to the duties of the commissioner as an arbitrator or a gross irregularity in the conduct of the arbitration proceedings as contemplated in section 145(2) of the Act. Where an arbitrator does not give reasons which are capable of being understood and which are on the face of it mutually contradictory in material respect, it is not for the parties or a court on review to attempt to rescue reasons from findings where no such reason is apparent in the first place.

The court held in *Abdul v Cloete* that an incomprehensible and self contradictory award amounted to gross misconduct, justifying the setting aside of the award. Although the award can be brief, it must be reasoned and capable of being understood. The concept of misconduct denotes some moral wrongdoing. In *Country Fair Foods (Pty) Ltd v Theron NO*⁴³ it was submitted that the award was vitiated by defects in the sense of misconduct in relation to the duties of the arbitrator, as well as gross irregularities in the conduct of the arbitration proceedings. The applicant's case of misconduct was based on the submission that the arbitrator conducted the proceedings in such a way that his conduct gave rise to a reasonable apprehension of bias.

For there to be misconduct, it has been held that there must be some "wrongful or improper conduct" on the part of the arbitrator. The commissioner must conduct the proceedings before him in a fair, consistent and even-handed manner. This means that he must not assist, or be seen to assist, one party to the detriment of the other. Therefore, even though a commissioner has the power to conduct arbitration proceedings in a

⁴³ (2001) 2 BLLR 134 (LC)

manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly under the provision of section 138(1), this does not give him the power to depart from the principles of natural justice. Although it clearly lies within the commissioner's powers to decide whether to adopt an inquisitorial or adversarial mode of fact finding, once this decision has been made it ought to be consistently applied to both parties.

Stelzner AJ was satisfied that the conduct of the arbitrator overstepped the boundaries of a fair procedure in the conduct of arbitration proceedings. However, Stelzner AJ held that although the arbitrator's conduct was wrong and improper, he could not find any basis on which to conclude that there was "personal turpitude" on his part. It was stated that adopting a procedure that everybody will not agree with is therefore not a misconduct within the meaning of section 145. Gross negligence may indicate misconduct, as might a gross mistake of law or fact. Misconduct includes bias. In *BTR Industries SA (Pty) Ltd v Mawu*⁴⁴ the court held that the test for bias is whether the conduct complained of would lead a reasonable litigant to doubt the impartiality of the presiding officer.⁴⁵ In *Buckas v eThekwini Municipality*⁴⁶ the court ruled that the arbitrator's failure to disclose his business connections with the employer constituted a gross misconduct.

⁴⁴ (1992) 13 ILJ 803 (A)

⁴⁵ The code of Conduct for CCMA commissioners provides that commissioners must disclose any interest or relationship likely to affect their impartiality or which might create a perception of partiality.

⁴⁶ (2003) 9 BLLR (LC)

As far as misconduct is concerned, an arbitrator will make himself guilty of misconduct in relation to his duties as an arbitrator if he fails to apply his mind responsibly and fairly to the issues before him. An arbitrator that acts in this fashion is not conducting himself in accordance with the requirements of the LRA which enjoins the arbitrator to give due consideration to the issues before him, to apply his mind thereto and to come to a reasoned conclusion. For example, section 138 of the LRA directs a commissioner to determine the dispute fairly and quickly and to deal with the substantial merits of the dispute albeit with the minimum legal formalities. This section also requires the commissioner to issue an arbitration award with brief reasons for his award. In *Dickenson and Brown v Fisher's Executors*⁴⁷ Solomon JA states:

"It may be also that an arbitrator has been guilty of the grossest carelessness and that in consequence he had to come to a wrong conclusion on a question of fact or of law, and in such a case I am not prepared to stay that a court might not properly find that there had been misconduct on his part."

The arbitrator in Abdul appears to have conducted himself in a manner in which Schreiner J would have described as latent gross irregularity. An examination of his reasons indicates that he has failed to appreciate what the LRA requires of him when arbitrating a dispute referred to the CCMA.

⁴⁷ 1915 AD 166 (at 176)

There have, however been relatively few cases in which commissioners have been found to have committed misconduct and the courts have tended to restrict themselves to findings of other reviewable faults.⁴⁸

3.1.2 GROSS IRREGULARITY IN THE CONDUCT OF THE ARBITRATION PROCEEDINGS

Irregularity refers not to the result, but to the method followed in the proceedings. If the irregularity was so gross that the aggrieved party was prevented from having his or her case fully and fairly determined, the award is open to challenge. A serious mistake of law can also lead to a gross irregularity. A commissioner may misconceive the nature of the process that should be followed or misunderstand the legal principles applicable to the case. As far as the notion “gross irregularity” is concerned, in *Bester v Easigas (Pty) Ltd & Another*⁴⁹ Brand AJ reviewed the authorities in relation to the meaning of the provisions of section 33(1)(b) of the Arbitration Act, which provides for the setting aside of an award where an arbitration tribunal “has committed any gross irregularity in the conduct of arbitration proceedings”. In order for an irregularity to constitute review, the irregularity must have been of such a serious nature that it resulted in the aggrieved party not having his case fully and fairly determined. In *Malelane Toyota v CCMA*⁵⁰ Mlambo J held that the arbitrator committed a reviewable irregularity by ignoring evidence placed before him regarding the commission of the offence. He further stated that the arbitrator had failed to apply his mind to the matter and ignored material evidence before him.

⁴⁸ See Coetzee v Lebea (1999) 20 ILJ 169 (LC)

⁴⁹ 1993 (1) SA 30 (C) at 42 J ff

⁵⁰ (1999) 6 BLLR (LC)

Mlambo J further held that the arbitrator's award cannot be justified in relation to the reasons given for it.

In *Toyota South Africa Manufactures (Pty) limited v Radebe and Others*, it was argued by the applicant that the commissioner's award warranted intervention by the court. It was argued that if the court adopted the wider test of review in terms of section 158(1)(g) of the Act, the court was bound to set aside the award in question. Tip AJ in *Standard Bank of South Africa v CCMA* stated:

"where a commissioner sitting as arbitrator had misconstrued or misapplied relevant legal principles to an extent that it is inappropriate or unreasonable, then such a commissioner has failed in the task assigned under the Act. It cannot be said that the legislator contemplated that an aggrieved party in such circumstances would find itself without relief. The relief lies in a review application. That is precisely what section 158(1)(g) contemplates and is precisely what section 158(1)(g) contemplates and is intended to achieve".

Revelas J in *Radebe* held that the fact that the arbitrator took into account the first respondent's supervisor's evidence does not mean that he ignored the evidence presented by the applicant's other witness. The court did not find that the arbitrator's findings were so unreasonable finding that the arbitrator did not apply his mind or that he ignored the facts before him.

3.1.2.1 DIFFERENCE BETWEEN PATENT AND LATENT IRREGULARITIES

Gross irregularity falls broadly into two classes, those that take place openly as part of the conduct of the trial, they might be called patent irregularities and those that take place inside the mind of the judicial officer, which are only ascertainable from the reasons given by him and which might be called latent. Even patent irregularities are only material in as much as they prevent, or are deemed to prevent the magistrate's mind from being properly prepared for the giving of a correct decision. Neither in the case of latent nor in the case of patent irregularities need there be any intentional arbitrariness of conduct or any conscious denial of justice.

Many patent irregularities have the effect of preventing a fair trial of the issues. And if from the magistrate's reasons it appears that his mind was not in a state to enable him to try the case fairly this will amount to a latent gross irregularity. If on the other hand, he merely comes to a wrong decision owing to him having made a mistake on a point of law in relation to the merits, this does not amount to gross irregularity. In matters relating to the merits, the magistrate may err by taking a wrong one of several possible views, or he may err by mistaking or misunderstanding the point in issue. In the latter case it may be said that he is in essence failing to address his mind to the true point to be decided and therefore failing to afford the parties a fair trial.

In *Leboho v Commission for Conciliation, Mediation and Arbitration & Others*⁵¹ there were two aspects to be considered. Firstly, that the arbitrator based his decision on hearsay evidence. Secondly that the arbitrator committed gross irregularity when the

⁵¹ 2005 (4) CCMA

hearing having been concluded with closing arguments, he re-opened it and mero motu called further witnesses. It is contended that this also showed bias on the part of the arbitrator. Musi J stated with regard to the first aspect that the arbitration proceedings are generally conducted in line with the rules of civil procedure and the standard of proof is the same. The presiding officer has no power to mero motu to call witnesses. He can only do so with the consent of the litigants. Musi J continued to state that whereas the Act gives an arbitrator a wide discretion on how to conduct proceedings, the bottom line is the procedure followed must be fair and should not result in prejudice to any of the parties involved. Musi J held that the arbitrator committed a patent gross irregularity in re-opening the hearing and calling and re-calling witnesses without the consent of the parities.

In *University of the North v Mthombeni NO*,⁵² the major complaint raised by the university in the proceedings is that the commissioner committed a gross irregularity or committed misconduct in his conduct of the arbitration proceedings. The commissioner refused the university the opportunity to testify and to call witnesses in support of its case. In *Montagu Liquor Licencing Board v Idelson*⁵³ the AD stated that a commissioner commits reviewable misconduct where he does not allow a party to lead evidence, cross examine witnesses or even make concluding arguments. Mlambo J in *University of the North* held that the commissioner's conduct has led to injustice and therefore constituting a gross irregularity.

⁵² J630 / 97

⁵³ 1957 (1) SA 262 (A)

The following are a number of examples of misconduct that the Labour Court has regarded as gross irregular.

- Conciliating a dispute at arbitrating stage without the consent of both parties;
- Misconstruing jurisdiction;
- Failing to determine the dispute;
- Undermining a party's right to lead evidence on the substantive issues in dispute;⁵⁴
- Granting legal representation inappropriately;⁵⁵
- Refusing to grant a postponement where postponement was appropriate;⁵⁶
- Refusing the right to cross-examine;
- Hearing evidence from a witness in the absence of both parties without their consent;
- Failing to advise a lay representative of the consequences of not challenging the other party's evidence;
- Basing an award on documents not admitted as evidence;⁵⁷
- Making findings not justified on the evidence;
- Gravely misunderstanding evidence;
- An incomprehensible and self-contradictory award and
- Ignoring evidence or failure to consider evidence that has been presented during the arbitration.

⁵⁴ University of the North v Mthombeni NO J630 / 97, Legal Aid Board v John (1998) 19 ILJ 851 (LC)

⁵⁵ See Real Estate Services (Pty) Ltd v Smith (1999) 20 ILJ 196 (LC) where the court held that, as the commissioner has a wide discretion, it would be inappropriate to set aside the decision.

⁵⁶ In Commuter Handling Services (Pty) Ltd v Mokoena (2002) 9 BLLR 843 (LC): It may also be grossly irregular to fail to raise the need for a postponement where a party who has been prejudiced by a new issue does not ask for one.

⁵⁷ For example, the record of a disciplinary hearing; relying on what happened during internal hearings and not considering evidence submitted during the arbitration proceedings: Malelane Toyota v CCMA (1999) 6 BLLR 555 (LC)

Not all irregularity is gross. The test for establishing gross irregularity is whether the irregularity was material and precluded a proper and fair hearing.⁵⁸ A gross irregularity may be patent or latent and may arise in relation to the establishment of the commissioner's jurisdiction as well as the arbitration process.⁵⁹ Gross irregularity is not necessarily accompanied by bad faith. If bad faith is present, it would also constitute misconduct.⁶⁰ In *Leboho v CCMA and others*⁶¹ Musi J held that the arbitrator committed a gross irregularity in re-opening the hearing and calling and re-calling witnesses without the consent of the parties.

It is not clear if the applicant must show that the irregularity had a material effect on the award or whether there was no prejudice as to the outcome, the award should stand because the irregularity was not gross. It is submitted, where a procedural irregularity does not affect the outcome, the court may issue a declaration to that effect rather than set aside the award.

3.1.3 EXCESS OF POWER

A commissioner exceeds his or her powers, or acts ultra vires, by making an award which he or she did not have the power to make. This may include failure to exercise a power or a discretion that ought to have been exercised. Thus, a commissioner exceeds his or her powers by, *inter alia*,

⁵⁸ See *Country Fair Foods (Pty) Ltd v CCMA* (1999) 20 ILJ 2609 (LC)

⁵⁹ A bribe or the corrupt dealing, however, may be less obvious

⁶⁰ It was held in *Mthembu and Mahomed Attorneys v CCMA* (1998) 12 BLLR 1314 (LC).

⁶¹ 2005 (4) CCMA

- committing a material error of law which may relate to improper characterization of the dispute, or ignoring or misconstruing the appropriate statute or legal principles. In *Mokels Stores (Pty) Ltd v Woolfrey*⁶² it was stated that material error includes failure to demonstrate an understanding of any discretion conferred by statute;
- purporting to determine a dispute in the absence of jurisdiction to do so;⁶³
- purporting to arbitrate an unfair dismissal dispute that had been referred to conciliation as an unfair labour practice dispute;
- failing to apply the proper test to interpret relevant statutory or case law, including the law of evidence;
- making findings that are not justified by the evidence;
- determining issues which are not in dispute;
- failing to consider appropriate material.⁶⁴

In *Transnet Limited v CCMA & Others*⁶⁵ the applicants seek to review the arbitrator's award on the basis that the CCMA had no jurisdiction to arbitrate the dispute. The grounds of review which the Applicant submitted were that the arbitrator "committed a gross irregularity and or alternatively, committed misconduct and or alternatively exceeded his powers" It was contended that the arbitrator in ordering that the training be provided moreover, with paid leave to the respondents for that purpose, the arbitrator exceeded his powers. Jammy AJ held with regard to the issues of jurisdiction that the dispute could not be the subject of arbitration under the Act. In purporting to determine a

⁶² (1997) 6 BLLR 572 (LC)

⁶³ *Transnet Ltd v CCMA* (2001) 6 BLLR 684 (LC)

⁶⁴ *Standard Bank of South Africa Ltd v CCMA* (1998) BLLR 622 (LC)

⁶⁵ (2001) 6 BLLR 684 (LC)

dispute in the absence of statutory jurisdiction to have done so, a commissioner will manifestly have exceeded his powers. Jammy AJ strongly held that the arbitrator exceeded his powers.

3.1.4 THE AWARD WAS IMPROPERLY OBTAINED

This category refers to a situation of bribery or corruption. As in the Arbitration Act,⁶⁶ it refers to impropriety by a party, whereas misconduct is limited to the conduct of the arbitrator. In practice, section 145(2)(b) is therefore concerned primarily with the conduct of the successful party.⁶⁷ The weight of authority suggests that the court should make a finding that an award is set aside. Not doing so, it is submitted, creates a situation that is practically indistinguishable from conducting a review in terms of section 158 (1) (g) which the Labour Appeal Court, in the many cases, categorically ruled against.

3.2 DIFFERENCE BETWEEN REVIEWS IN TERMS OF SECTION 145 AND 158(1)(g)

3.2.1. PRE-CAREPHONE DECISIONS IN FAVOUR OF SECTION 145

Both section 145 and 158(1)(g) make provisions for review applications. However, a review in terms of section 145 is limited in so far as time and grounds of review are concerned. Section 158(1)(g) on the other hand is more relaxed with no time limit and provides for review on any grounds permissible in law. In *Edgars Stores (Pty) Ltd v*

⁶⁶ Section 33(1)(c)

⁶⁷ See *Shoprite Checkers (Pty) Ltd v Ramdaw NO (2000) 7 BLLR 835 (LC)*

*Director CCMA*⁶⁸, Revelas J took a different approach to the meaning of these words and interpreted section 158(1)(g) to exclude its application in terms of arbitration proceedings although the court accepted that section 158(1)(g) had the effect of extending the LC's power of reviews. It was further held that the phrase 'despite section 145' found in section 158(1)(g) should be construed to mean nothing more than despite the review of arbitrators' awards on very narrow grounds in terms of section 145.

In *Pep Stores*, Mlambo J considered two applications namely, one to make an award an order of court in terms of section 158(1)(c), the other, to review and set aside the award. Mlambo J was of the opinion that section 158(1)(g) does not apply to reviews of these awards stating that the provisions for a time frame in section 145 is an important confirmation of the legislative objective of finality in dispute resolution and since section 158(1)(g) has no time frame, it can therefore have no role in the review of awards. In addition to procedural defects, section 145 also gives the CC the power to enquire whether the award is appropriate within the meaning of section 138(9).

Mlambo J in *Ntshangane* also considered for example whether the LC could review CCMA arbitration awards in terms of section 158(1)(g) and expressed the view that the appropriate interpretation of section 158(1)(g) should be that in addition to the courts review power of CCMA arbitration awards, the court is also empowered to review anything else performed in terms of the Act. The LC could thus not review CCMA arbitration awards in terms of section 158(1)(g), but in terms of section 145. In arriving at this conclusion, Mlambo J referred to the statement of Landman J in *Deutsch v Pinto*

⁶⁸ (1998) ILJ 350

that the LC has a supervisory role towards CCMA arbitrations, but expressed the view that such supervisory does not lay arbitration awards open to any conceivable line of attack under the guise of review in terms of section 158(1)(g) as this would result in encouraging even the most spurious to frustrate a successful party at arbitrations. Mlambo J then states that if both sections are applicable to review of CCMA arbitration proceedings and awards, section 145 will completely be ignored and parties will seek to review every conceivable award in terms of section 158(1)(g) thereby rendering section 145 ineffectual in that it will never be used.

3.2.2 PRE-CAREPHONE DECISIONS IN FAVOUR OF SECTION 158(1)(g)

Although it was unnecessary to decide whether a CCMA arbitration award can be reviewed on the wider grounds set out in section 158(1)(g), Landman AJ, in *Deutsch v Pinto* held that it seems that having regard to the right in section 33 of the Constitution to lawful and fair administrative action that the wider grounds may be relied upon. The LC took the view that the words “despite section 145” in section 158(1)(g) do not limit the review of CCMA arbitration awards to section 145 thus allowing reviews in terms of section 158(1)(g).

In *Standard Bank v CCMA*, Tip AJ reviewed and set aside the commissioner’s award in terms of section 158(1)(g). Tip AJ found that where a commissioner misconstrues oral or documentary evidence or has ignored or misapplied relevant legal principles in an arbitration to an extent that it had failed in the task assigned under the LRA and that an

aggrieved party alleging an unjustifiable award would not be without a remedy, notwithstanding the more narrow ambit of the grounds contained in section 145. This remedy, the court held, was a review and that the ambit of the review must necessarily be correspondingly broad and the court considered that this was precisely what section 158(1)(g) contemplated. The court accordingly held that the broad approach had to be adopted by the court reviewing awards of the CCMA. This approach was also adopted in *Shoprite v CCMA*, where Pretorius AJ held that review of a CCMA arbitration award may be founded on the provisions of section 158(1)(g) and that the word despite section 145 means “notwithstanding the provisions of section 145”. Gon AJ in *Rustenburg Platinum Mines Ltd v CCMA & Others*⁶⁹ also applied the provisions of section 158(1)(g) in considering a review of CCMA arbitration awards.

In the LC decision of *Radebe*, Revelas J heard an application for review in terms of section 158(1)(g). The standard of review applied by Revelas J was that the award must be justifiable in relation to the reasons given for it & the LC held that before a CCMA arbitration award can be set aside, it must be shown to be so grossly unreasonable, that it does not satisfy the requirements of section 33 of the Constitution. Revelas J indicated when applying the review test as set out in section 158(1)(g), that the section should serve as a reminder that review proceedings under section 158(1)(g) should not be regarded as appeal proceedings.

In *Carephone (Pty) Ltd v Marcus No & Others*, the LAC attempted to clarify the position relating to the contradictory LC judgements concerning the applicability of either section

⁶⁹ (1998) 19 ILJ 327 (LC)

145 or section 158(1)(g) to reviews of CCMA arbitration awards in the watershed case of *Carephone* in which it ruled that:

- a) section 158(1)(g) is not applicable in the context of the review of CCMA arbitration awards and
- b) in order to ensure that section 145 complies with the constitution, the wording “despite section 145” must be read as “subject to” the provisions of section 145 as this is a lesser evil than ignoring the whole of section 145, including its time limits.

The LAC then held that section 158(1)(g) is not applicable in the context of arbitration awards. Section 158 (1)(g) should therefore be interpreted as simply providing for the court’s residual powers of review in cases not covered by section 145 or section 158(1)(h).

3.2.3 CAREPHONE DECISION

Carephone’s legal representative had on two occasions requested a postponement of the arbitration hearing due to their unavailability. On the third request for postponement, the commissioner refused it, whereupon Carephone’s representative left the arbitration hearing despite a warning that the matter would continue. The arbitration hearing then proceeded in their absence and an award was made whereby Carephone was ordered to pay compensation for unfair dismissal. The applicant then approached the LC to review the decision of the commissioner refusing the postponement. While the review had been sought under section 145, it was argued that the court should consider applying the

‘wider’ grounds contained in section 158(1)(g). Mlambo J refused and favoured the view that section 158(1)(g) was not applicable to arbitration awards and section 145 alone governs reviews of CCMA arbitration awards.

The LAC in Carephone considered the relationship between section 145 and 158(1)(g) and held that section 158(1)(g) is not applicable in the context of arbitration awards. Froneman DJP stated that the effect of allowing the review of CMA arbitration awards in terms of section 158(1)(g) would be to render section 145 superfluous.⁷⁰ In reaching this conclusion, the court had to answer two questions. Firstly whether section 33 of the Constitution⁷¹ was applicable to arbitration awards conducted under the auspices of the CCMA and secondly, whether grounds of review in section 145 were in conflict with section 33.

The court rejected the argument that section 33 was not applicable to CCMA arbitration awards because such compulsory arbitrations are judicial in nature, and thus fall outside the ambit of administrative action. The LAC held that the issuing of an arbitration award by a commissioner of the CCMA constituted an administrative action as contemplated in section 33 of the Constitution read together with item 23(2) of Schedule 6. Froneman DJP held that, although the CCMA performs many functions, some of which are judicial

⁷⁰ Revelas J shared the same opinion in Edgars Stores holding that there would have been no need for section 145, if the wider grounds review were allowed as these would automatically also include the narrower grounds of section 145.

⁷¹ Section 33 of the Constitution deals with administrative action and provides that:

- 1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair
- 2) Everyone whose right has been adversely affected by administrative action has the right to be given written reasons.

in nature, the CCMA did not function as a court and therefore had no judicial authority under the Constitution holding that administrative action may take many forms, even if judicial in nature, but the action remains administrative. Froneman DJP found that should a commissioner exceed his or her powers, for example by making an award which is not justifiable in relation to the reasons given for it, it can be reviewed under section 145. It is therefore not necessary to resort to section 158(1)(g).

The court also held that section 145 was not in conflict with section 33 of the Constitution. Froneman DJP came to this conclusion on the basis that there is nothing in the LRA that permits a commissioner in arbitration proceedings to exceed the bounds of constitutional constraints in the constitution and that the words of the LRA must be read in a manner consistent with the Constitution and not in a way that would render section 145 superfluous.

In addition to the grounds as set out in section 145 the LAC also formulated a test for the standard to be used in determining whether or not there is a ground for reviewing a decision of a CCMA commissioner namely the “justifiability or rationality” test, “is there a rational objective basis justifying the connection made by the commissioner between the material properly available and the conclusion eventually arrived at.” This results in a wide test for review. The LAC thus held that the ground of review contained in section 145(2)(a)(iii), namely that a commissioner exceeded his or her powers incorporated the constitutional requirement that an administrative action must be justifiable in relation to the reasons given for it.

3.3 GROUNDS FOR REVIEW IN TERMS OF PROMOTION OF ADMINISTRATIVE JUSTICE ACT 3 OF 2000.

In terms of section 6 of Promotion of Administrative Justice Act (PAJA) any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action on one or more grounds contemplated in subsection 2 which includes the following:

- a) that the administrator who took it was not authorized to do so by the empowering provisions, acted under a delegation of power which was not authorized by the empowering provision or was biased or reasonably suspected of bias.
- b) that the action was procedurally unfair
- c) the action was materially influenced by an error of law
- d) the action was taken for a reason not authorized by the empowering provision, for an ulterior purpose or motive, because irrelevant considerations were taken into account or relevant considerations were not considered, or in bad faith.
- e) the action itself contravenes a law or is not authorized by the empowering provision or is not rationally connected to the purpose for which it was taken.

In *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others*, the SCA found that PAJA applies to review of arbitration awards by CCMA commissioners. It took the view that because PAJA was the national legislation passed to give effect to the constitutional right to just administrative action, was required to cover the field and purported to do so,

it applied to awards by commissioners. In this regard it applied to awards by commissioners. The court relied on decisions of the court in Bato Star. In *President of the Republic of SA & others v SA Rugby Football Union & others*⁷² the following appears:

"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. The question is whether the task itself is administrative or not.

The Old Industrial Court established in terms of the LRA,⁷³ although performing functions similar to that of a court of law, was regarded as administrative in nature. In this regard the Appellate Division (AD) in *SA Technical Officials Association v President of the Industrial Court & Others*⁷⁴ said the following:

"An administrative body, although operating as such, may nevertheless in the discharge of its duties functions as if it were a court of law performing what may be described as judicial functions, without negating its identity as an administrative body & becoming a court of law.

Currie & De Waal State:

"The CCMA is not a branch of the judiciary and does not exercise judicial power. Rather, the exercise of the compulsory arbitration power is an exercise of public power of an administrative nature. The arbitration power is designed to fulfill the primary goal of the Act which is to promote labour peace by effective settlement

⁷² 2000 (1) SA 1 (CC)

⁷³ Act 28 of 1956

⁷⁴ 1985 (1) 59 (A)

*of disputes. It does so with an element of compulsion, corresponding to the traditional government/governed relationship*⁷⁵

In *Bato Star* the following appears:

"The provisions of section 6 divulge 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.⁷⁶

PAJA is a codification of the common-law grounds of review. It is apparent, though, that it is not regarded as the exclusive legislative basis of review. If PAJA were to apply, section 6 thereof would not allow for such exclusivity and would enable the HC to review CCMA arbitrations. The powers of the LC set out in section 158 of the LRA differ significantly from the powers of a court set out in section 8 of PAJA. The powers of the LC are directly at remedying finality speedily. In the context of section 6(2)(h) of PAJA, O Regan J said the following "An administrative decision will be reviewable if, in the Lord Cooke's words, "it is one that a reasonable decision maker could not reach"

If arbitration is an unfair dismissal matter by a commissioner amounted to judicial conduct, the powers of review would be limited to the relatively narrow confines

⁷⁵ Currie & De Waal The Bill of Rights Handbook (sed Juta & Co Ltd Wetton 2005) at 651

⁷⁶ Bato Star at Para 25

established by the LRA. Ngcobo J in *Sidumo* finds that PAJA does not apply to reviews under section 145(2) of the LRA. He holds therefore that the ambit of the grounds of review under section 145(2) of the LRA must be informed by section 33 of the constitution. He concludes that section 145 (2) is now suffused by the constitutional standard of reasonableness which is implicit in the requirement of reasonable administrative action in section 33. In determining the ambit of the grounds of review in section 145(2)(a), the SCA focused the enquiry on whether arbitral awards are products of administrative action. Having found that they are, it held that the provisions of PAJA apply to their review. It reasoned that the grounds of review in section 145(2)(a) have been subsumed under the grounds of review contained in PAJA. It held that, by necessary implication, PAJA extended the grounds of review available to parties to CCMA arbitration. Therefore, PAJA does not apply to reviews of CCMA arbitration awards by commissioners.

3.4 REVIEW OF ARBITRATION AWARDS ON JURISDICTIONAL GROUNDS⁷⁷

Judicial review of an award may arise in an action on the contract as interpreted by the award or in a procedure to enforce the award. In either case, the court may of necessity review the action of the arbitrator as an incident of the enforcement procedure. This indirect review usually comes as part of the decision as to whether a collateral attack on the award will be allowed.

⁷⁷ Review of labour Arbitration awards on jurisdictional grounds: The university of Chicago Law Review, vol 17 No 4

The New York court of Appeals has stated in the matter of Wilkins⁷⁸ that the award of an arbitrator cannot be set aside for mere errors of judgment, either as to the law or as to the facts. If he keeps within his jurisdiction and is not guilty of fraud, corruption or other misconduct affecting his award, it is unassailable, operates as a final and conclusive judgment and, however disappointing it may be the parties must abide by it.

In the absence of misconduct on the part of the arbitrator, this would seem to limit the court to a review on jurisdictional grounds.

3.4.1 THE RATIONALE OF REVIEW ON JURISDICTIONAL GROUNDS

Arbitration is based upon the voluntary consent of the parties to be bound by the decision of the impartial arbiter. The enforceability of an award rests entirely upon this consent as it is expressed in the collective agreement, and in so far as it is effective, moral suasion.

If the arbitrator by his award goes beyond the matter submitted to the arbitration process in the agreement, his award is unenforceable because the necessary element of consent is lacking.

3.4.2 JURISDICTIONAL REVIEW OF THE MERITS

The court has the right if not the duty to review the scope of submission or jurisdiction of the arbitrator. When the arbitrator proceeds beyond the issue of the submission, the parties are not only improperly bound without their consent, but the arbitrator has no

⁷⁸ 169 N.Y. 494, 62 N.E. 575 (1902)

reasonable basis upon which to make a just award. The interests of the parties and of justice therefore require that the court act in such cases. However the courts are in danger of intruding themselves into the merits under the guise of determining whether the arbitrator or has jurisdiction. In such situations, the reviewing court occasionally appears to go beyond the actual problems of submission by means of a purported review of the arbitrator's jurisdiction.

The danger that the courts will review the merits on jurisdictional grounds constantly recurs because jurisdictional grounds are advanced in nearly every case as a basis for review of an award which is unsatisfactory to one of the parties. In many cases it is difficult to draw the line between the scope of submission review that is a necessary protection for the parties and the less desirable practice of using it as a means of reviewing the merits of the controversy. It is submitted, however, that the courts can aid all parties to labour disputes by giving full effect to the submission agreement contemplated by the parties and by avoiding a review of the merits of the award.

Judicial review of labour arbitration awards on jurisdictional grounds is necessary and proper. However, it seems necessary strictly to limit this review to the determination of the scope of the submission agreement.

CHAPTER FOUR

4 THE TESTS FOR REVIEW AS FORMULATED AND DEVELOPED BY OUR COURTS

Initially there was some controversy as to whether an award could be reviewed in terms of section 145 only or whether section 158(1)(g) also permitted the review of an award. While section 145 contains narrow grounds for review, section 158(1)(g) is much broader and allows for a review on any ground permissible by law, including common law and constitutional grounds.

The question was decided by the LAC in *Carephone (Pty) Ltd v Marcus NO.*⁷⁹ It was held that section 145 applied to review of awards, but that in circumstances of compulsory arbitration by the CCMA, the award must be justifiable in terms of the reasons given for it and it must comply with constitutional imperatives pertaining to fair administrative action.⁸⁰ The legislature brought finality to the question by providing in the amended section 158(1)(g).⁸¹

Underlying the debate on the appropriate provision in terms of which reviews should be brought, was the more important issue of the test for reviewing arbitration awards. Those

⁷⁹ (1998) 11 BLLR 1093 (LAC)

⁸⁰ *Ibid* Shoprite Checkers (Pty) Ltd v Ramdaw NO (2000) 7 BLLR 835 (LC) in which the LC held that a review of an arbitration award is limited to the narrow grounds specified in section 145 only.

⁸¹ Amended by section 40 of the Amendment Act 2000. Before the amendment took effect, section 158(1)(g) provided for a review by the LC despite section 145. The amended section 158(1)(g) states that ‘subject to section 145’ the LC can review the performance of any function provided for in the Act.

who supported a narrow test relied on section 145, which allows for review on the basis of a defect as contemplated in section 145(2)

4.1 THE CAREPHONE TEST

The LAC attempted to clarify the position relating to the contradictory LC judgments concerning the applicability of either section 145 or section 158(1)(g) to reviews of CCMA arbitration awards in the watershed of Carephone. In the LC decision whereby the applicant approached the LC to review the decision of the commissioner refusing the postponement. While the review had been sought under section 145, it was argued that the court should consider applying the wide grounds contained in section 158(1)(g). Mlambo J refused and favoured the view that section 158(1)(g) was not applicable to arbitration awards and section 145 alone governs the review of CCMA arbitration awards.

It is fortunate that the debate relating to the appropriate test for reviewing CCMA arbitration awards was addressed in the unanimous decision of the LAC in Carephone. In addition to the more traditional and limited grounds for review as set out in section 145, the LAC also formulated a test for the standard to be used in determining whether or not there is a ground for reviewing a decision of a CCMA commissioner, namely the justifiability or rationality test. The test entails that there must be a rational objective basis justifying the connection made by the commissioner between the material property available and the conclusion eventually arrived at”? This results in a wide test for review

in section 145(2)(a)(ii), namely that a commissioner exceeds his or her powers, incorporated the constitutional requirement that an administrative action must be justifiable in relation to the reasons given for it.

The court accordingly found that the only basis for review are that the facts amount to misconduct or gross irregularity or that his actions are not justifiable in terms of the reasons given for them and that he has accordingly exceeded his constitutionally constrained powers under section 145(2)(a)(iii) of the LRA. However the LAC went to some extent to insist that the distinction between an appeal and review remained valid. The court realized that by extending the grounds for review to include “justifiability” there was a danger of “obliterating” the distinction. Garbers states that there is little doubt that the subsequent application in practice of this wider test for review (justifiability) “confirms the existence of what we may call a higher percentage right of appeal against CCMA awards”.⁸² The justifiability test was held by the LC to have become a basis of review in terms of section 145.

In *Country Fair Foods* the LAC revived the so-called “reasonable employer test”, the practical implication of which is that where the employer can show that the sanction it imposed fell within a range of reasonable sanctions, and the commissioner finds that sanction to be unfair, the award of the commissioner becomes reviewable. Rather it was said by Ngcobo AJP in *Country Fair Foods* that the mere fact that the commissioner may have imposed a somewhat different sanction than the employer would have, is no justification for interference by the commissioner. According to Garbers, *Country Fair*

⁸² Garbers C “The demise of the ‘reasonable employer’ test” 2000 CLL 81 at 82

Foods set the stage for the LAC judgment in *Toyota South Africa Motors (Pty) Ltd v Radebe*,⁸³ because not only was the reasonable employer test revived, but the seeds of confusion about the meaning and importance of the judgment in Carephone were sown.

One of the issues considered by the LAC in *Radebe* was the implication and applicability of the Carephone justifiability test for review. Nicholson JA expressed misgivings about the correctness of the Carephone decision. The learned judge rejected the “reasonable employer test” revived in *Country Fair Food* and set aside the commissioner’s award, but expressed grave doubts about the existence of the broad justifiability test for review enunciated in Carephone. Nicholson JA stated that he had certain misgivings about whether the justifiability of the award constitutes an independent ground upon which an award can be attacked.⁸⁴

Unfortunately, the LAC did not overturn the *Carephone* decision as Nicholson JA indicated that it was not necessary for the purposes of that judgment to decide the issue, but expressed doubts as to whether justifiability could be an independent ground of review as it would, essentially constitute an appeal. He noted that an appeal on fact was similar to review on the basis that an award is not “justifiable with regard to the reasons given” Nicholson JA held that a gross irregularity would be committed by a commissioner if there is a difference between the sanction which the court would have

⁸³ (2000) 3 BLLR 243 (LAC)

⁸⁴ However, Nicholson JA, notwithstanding his misgivings in *Radebe*, now seems to accept “justifiability as a review. In *Crowns Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp and others* (2002) 23 ILJ 863 (LAC) where he states that “ Arbitration awards issued by the CCMA may be reviewed on any of the grounds set out in section 145, more specifically where the commissioner had committed a gross irregularity in the conduct of the arbitration proceedings. The decision of the arbitrator can also be set aside if it is not rationally related to the purpose for which the power was given from an objective view or if it is not justifiable as to the reasons give (referring to *Shoprite v Ramdaw* (LAC)).

imported and that which the commissioner imposed. The court in Carephone never imported an independent ground for review in to section 145 as the LAC in Radebe would have it. According to Garbers, the court in Carephone simply recognised that the CCMA, in terms of exercising its powers, can only do what the law tells it to do, that the law includes the constitution and that the powers of the CCMA are also delimited by constitutional reality.

According to Sharpe⁸⁵ a substantial majority of awards are upheld as justifiable under Carephone. The misgivings of Nicholson JA in *Radebe* may have been well founded in view of the LC decision in *Shoprite v Ramdaw*. Wallis AJ found it necessary to review the law regarding reviews and to examine whether Carephone was still good law and binding on it, especially in the light of the doubt cast by the misgivings of Nicholson JA in *Radebe* and judgments by the CC in *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan*⁸⁶ and *Pharmaceutical Manufacturers Association*⁸⁷. Wallis AJ found that there was no justification for the commissioner's conclusion as opposed to "very serious misconduct" in the LC's opinion. Willis AJ dealt with the Carephone standard of review (justifiability test). Nicholson JA's reservation expressed on the standard of review and the CC judgments mentioned above. In essence the court found that , as a result of the Carephone judgment, the grounds of review expressly provided for in section 145 were sidelined and a constitutional basis for a review, not provided for in the LRA was introduced.

⁸⁵ Sharpe CW "Reviewing CCMA Arbitration Awards: Towards Clarity in the Labour Courts" 2000 ILJ 2160 at 2165

⁸⁶ (1999) (1) SA 374 (CC)

⁸⁷ 2000 (2) SA 674 CC

Accordingly, the LC held that the decision in Carephone on this point is no longer authoritative and that Carephone was therefore no longer good law and consequently no longer binding on it, and that the LC was not obliged to follow it. Thus, in terms of *Shoprite v Ramdaw*, the mere fact that the commissioner's decisions not justifiable on all the facts placed before him, does not constitute a ground for review. It must be shown that the commissioner's award is so unreasonable as to be "indefensible on any legitimate ground" i.e. that no reasonable commissioner could in the proper exercise of his functions have arrived at that awards.

The LC was of the opinion that, had the justifiability of an award been the test for review, it would have concluded that the award was reviewable on that ground. The LC held that the commissioner's decision was indeed not justifiable on all the material places before him, but that was not the test in review proceedings. Etienne Mureinik⁸⁸ maintains that: rationality review calls for scrutiny far more specific than the mere identification of gross error. It requires the reviewing body to ask whether:

- a) The decision-maker has considered all the serious objections to the decision taken, and has answers which plausibly meet them.
- b) The decision-maker has considered all the serious alternatives to the decision taken, and has discarded them for plausible reasons and
- c) There is a rational connection between premises and conclusion: between the information before the decision-maker and the decision that it reached.

⁸⁸ Estienne Mureinik "Reconsidering Review Participation and Accountability" ALR 41

4.2 THE “RATIONALITY” AND “JUSTIFIABILITY” TEST AS FORMULATED IN SHOPRITE CHECKERS (PTY) LTD V RAMDAW NO AND OTHERS

It was argued that a CCMA commissioner does not perform an administrative function when acting as an arbitrator and consequently that the provisions of the constitution relating to fair administrative justice do not apply to arbitration proceedings. As a result, the test for review was much less restrictive than that adopted in the Carephone judgment, resembling the test applied by the courts in terms of section 33 of the Arbitration Act. The issue of review of CCMA arbitration awards came before the LAC in *Shoprite v Ramdaw (LAC)* when it had to consider, inter alia, whether the LC was correct in holding that the Carephone case had been overruled by the decisions of the CC. The appeal raised the question whether Carephone is still good law. The LAC considered that, although Carephone was in certain respects unsatisfactory, there were sound reasons to leave Carephone as it is. The court held that review of CCMA awards should be brought in terms of section 145.

Zondo JP remarked that the CC in Fedsure dealt with the same administrative section as the court in Carephone and that the CC had to consider whether the passing of resolutions relating to rates by a local council constituted an administrative action as contemplated in section 24. Zondo JP held that the provisions of section 33 read with those of item 23 of Schedule 6 to the Constitution of the Republic of South Africa are materially similar to those of section 24 of the interim Constitution. However the CC did not give a definition

of an administrative action although it did make the observation that, whilst it might not have served any useful purpose under the previous legal order to ask whether or not an action of a public authority was administrative, under the new constitutional order that question had to be asked in order to give effect to the provisions of section 24 of the interim constitution and the provisions of section 33 read with item 23 of Schedule 6 of the final Constitution.⁸⁹

Zondo JP agreed with this approach of the CC and held that Froneman DJP in Carephone does not seem to have appreciated that the administrative justice section could only apply if the action in question was an administrative action and that, because of this, a court would have no choice but to have to satisfy itself that such action was an administrative action before it could apply the provisions of the administrative justice section to it.⁹⁰ Zondo JP then dealt with the judgment of the CC in *Pharmaceutical Manufacturers Association*. After discussing the CC judgment, Zondo JP stated that it was clear from the judgment that as long as a particular decision is the result of an exercise of public power, such a decision can be set aside by a court if it is irrational and that the rationality of a decision made in the exercise of public power must be determined objectively.

Having set out the CC decision with regard to the reviewability of decisions made in the exercise of public power on grounds of irrationality, the learned judge then discussed Carephone's decision regarding the reviewability. He then held that it is clear that the ground of review dealt in the CC case is that of irrationality whereas the ground of review

⁸⁹ Fedsure Life, Shoprite v Ramdaw (LAC) at 1610 E-G

⁹⁰ Shoprite v Ramdaw (LAC) at 1610 H

that was dealt with in Carephone is that of justifiability. The LAC in Ramdaw NO essentially confirmed the Carephone decision, finding that an award may be set aside if it is irrational, but that the court could not interfere with the decision simply because it disagreed with it. The court went on to hold that although the terms “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. As a result the learned judge was satisfied that a decision that is justifiable cannot be said to be irrational and a decision that is irrational cannot be said to be justified. Garbers also stated that although there were regular reminders issued in judgments that the court should be careful not to blur the distinction between appeal and review, the rationality or justifiability test enabled the LC to take a fairly interventionist approach to CCMA awards if it felt that this was necessary.⁹¹

4.3 SIDUMO’S TEST OF “REASONABLENESS”

The LAC in *Shoprite Checkers (Pty) Ltd v Ramdaw NO and others* found that the test for a review was not “justifiability” but rather “rationality”. It also found that the two concepts of justifiability and rationality are closely related that the approach adopted in Carephone decision still applied. The rationality or justifiability test enabled the LC to take a fairly interventionist approach to CCMA awards if it felt that this was necessary.⁹²

⁹¹ Christoph Garbers “Reviewing CCMA awards in the aftermath of Sidumo” CLL vol 17 No 9

⁹² Ibid

Thus the position remained until the decision of the CC in *Sidumo and Others v Rustenburg Platinum Mines Ltd and Others*

In terms of Sidumo, the grounds for reviewing awards set out in section 145 of the LRA are suffused by reasonableness. This was found in the light of the change in the wording of the final Constitution. In terms of this approach a CCMA award is reviewable if the reasoning of the commissioner, based on the material before him or her, results in a conclusion that a reasonable decision maker could not reach.

It was considered whether the standard of review set by section 145 of the LRA is constitutionally compliant. The Carephone test held that section 145 was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. Section 33 of the Constitution 1996 now states that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. The reasonableness standard should now suffice section 145 of the LRA. Consequently, the standard to be applied when a decision of a commissioner in a dismissal dispute is sought to be reviewed is whether the decision reached by the commissioner is one that a reasonable decision maker could reach.

In *Sidumo*, the employee had been employed as a security officer at Rustenburg Platinum Mines. His job entailed the conducting of searches of persons leaving a high security to prevent theft of the mine's extremely valuable metals. The employee was dismissed for failing to apply the established metals. The commissioner concluded that dismissal was

too harsh a sanction and that there had been no losses suffered by the mine and ordered that Sidumo be reinstated with three months compensation and be given a written warning effective for three months.

The mine applied to the LC with the contention that the commissioner had erred in concluding that no losses had been suffered and that the violation of the rule had been unintentional. The LC considered that employees who perform poorly but who had not been dishonest should not automatically face dismissal. The court took into account Sidumo's service record. The LC considered the test for review of a commissioner's award as enunciated by the LAC in *Carephone (Pty) Ltd v Marcus*. It seems 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 property available to him and the conclusion he or she eventually arrived at? The LC concluded with reference to the grounds of review as set out in section 145 of the LRA and the test in Carephone, that there was no basis upon which it could interfere with the commissioner's award.

On appeal to the LAC, the LAC concluded that Mr Sidumo's clean lengthy service record was capable of sustaining the finding that the sanction of dismissal was too harsh and dismissed the appeal. However on a further appeal to the SCA the court held that the commissioner failed to appreciate the ambit of his duties under the LRA and therefore incorrectly approached the task entrusted to him in determining whether the employer's

decision was fair.⁹³ The SCA then referred with approval to Carephone, where the application of section 145 and 158(1)(g) was discussed and stated that the LAC in Carephone 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 justice provisions of the constitution suffused the grounds of review under section 145 of the LRA, thereby extending the scope of review of CCMA awards. The LAC stated that section 33 of the constitution⁹⁴ read with item 23(2)(b) of Schedule 6 of the Constitution extended the scope of review and introduced a requirement of rationality in the outcome of decisions. The SCA considered the decision in *Shoprite Checkers (Pty) Ltd v Ramdaw NO and Others*, where the LAC considered the possible effect of the enactment of PAJA⁹⁵ on section 145(2) of the LRA and found it unnecessary to decide whether PAJA applied. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*,⁹⁶ it was stated that section 6 of PAJA revealed a clear purpose to codify the grounds of judicial review of administrative actions.

However the CC in Sidumo then examined 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

⁹³ Rustenburg Platinum (SCA) at par 36

⁹⁴ Section 33 of the constitution provides:

- 1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- 2) Everyone whose rights have been adversely affected by administrative action has the right to be given reasons.
- 3) National legislation must be enacted to give effect to these rights, and must-
 - a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal.
 - b) Promote an efficient administration.

⁹⁵ Promotion of Administrative Justice Act 3 of 2000

⁹⁶ 2004 (4) SA 490 (CC)

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 reasonable standard should now suffuse section 145 of the LRA. The reasonableness standard was dealt with in Bato Star. In the context of section 6(2)(h) of PAJA, O'Regan J said that an administrative decision will be reviewable if it is one that a reasonable decision-maker could not reach. The CC recognised that scrutiny of a decision based on reasonableness introduced a substantive ingredient into review proceedings. Applying section 145 will give effect not only to the constitutional right to fair labour practice, but also to the right to administrative action which is lawful, reasonable and procedurally fair.

Ngcobo J then found that PAJA does not apply to reviews under section 145(2) of the LRA. He held that the ambit of the grounds of review under section 145(2) of the LRA must be informed by section 33 of the Constitution. He concluded that section 145(2) is now suffused by the constitutional standard of reasonableness which is implicit in the requirement of reasonableness action in section 33. Applying this standard, he concluded that the arbitral award of the commissioner should not be disturbed. However the CC in Sidumo held that the test for determining whether arbitration awards are reasonable or unreasonable is whether the commissioner's decision or finding is one that a reasonable decision-maker could not reach. The question is not whether the award or decision is one that a reasonable decision-maker would not reach. A court deciding the reasonableness or otherwise of a decision must ensure that the decision falls within the bounds of

reasonableness as required by the Constitution. In assessing the reasonableness or otherwise of an arbitration award, or other decision of a CCMA commissioner, it could happen that the court feels that it would have arrived at a different decision or finding to that reached by the commissioner. The task of determining the fairness or otherwise of a dismissal is primarily that of commissioners. This does not mean that the decisions or arbitration awards cannot be legitimately scrutinized by the LC on review.

The test on review is not whether the dismissal is fair or not, but whether the commissioner's decision is one that a reasonable decision-maker could not have reached in all of the circumstances. Awards will be final and binding unless such decision or award is one that a reasonable decision-maker could not have made in all circumstances. The grounds in section 145 of the LRA are not obliterated but are suffused by reasonableness. There are differences in the approaches in Carephone and Sidumo regarding the grounds of review set out in section 145 of the LRA. Carephone sought to construe the section with a constitutional imperative at the time that an administrative action had to be justifiable in relation to the reasons given for it. However Sidumo construes the section to meet the current constitutional requirement that an administrative action must be lawful, reasonable and procedurally fair. The reasonableness of a commissioner's decision does not depend, at least not solely, upon the reason given for the decision. Such reasons will play a role in the subsequent assessment, but other reasons, not relied upon by the commissioner to support a decision or finding, but which can render the decision reasonable or unreasonable, can be taken into account.

In *Pharmaceutical Manufactures of SA in Re Ex Parte President of RSA*⁹⁷ the CC dealing with rationality as a minimum threshold requirement applicable to the exercise of public power, held that the question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. It then said that otherwise a decision that, viewed objectively, is in fact irrational might pass simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place from above substance and undermine an important constitutional principle. Same can be said to determination of the reasonableness or otherwise of a decision or finding or arbitration award made by a CCMA commissioner under the compulsory arbitration provisions of the Act. Whether CCMA award, or decisions are reasonable must be determined objectively with due regard to all the evidence and issues that were before the commissioner. In *Hulett Aluminium (Pty) Ltd v Bs Metal Industry*,⁹⁸ Sidumo test was applied and the award was set aside and it was held that the award was one that no reasonable decision-maker could not have made.

In *Fidelity Cash Management Service*, it was held that Sidumo test is a stringent test that will ensure that arbitration awards are not lightly interfered with. It will ensure more than before, and in line with the objectives of the Act and particularly the primary objective of the effective resolution of disputes, that 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

⁹⁷ 2000 (20) SA 674 (CC)

⁹⁸ (2008) 3 BLLR 241 (LC).

made. The Sidumo test certainly limits reviews, particularly in relation to value judgments.

CHAPTER FIVE

5 A COMPERATIVE STUDY OF UNITED STATES AND SOUTH AFRICAN LEGAL SYSTEM

There are no material differences between the two legal systems. However in both South Africa and the United States arbitrations are conducted by independent bodies. Arbitration and mediation have become important features of the American Labour relations system. By the 1920s the distinction between arbitration over disputes of rights and those over interest was already finding its way into legislation governing labour relations. The National Labour Relations Act (NLRA) of 1935 stimulated unionism and collective bargaining both of which are particularly conducive and the expansion of grievance arbitration. The major American agency mediating in labour disputes is the Federal Mediation and Conciliation Service (FMCS)

In South Africa the LRA offers two institutions for the performance of dispute resolution functions of which one of them is the CCMA. The CCMA hears disputes which have been referred to it for arbitration and such disputes are heard by an arbitrator who later gives an award. The CCMA is an independent statutory body with juristic personality. The CCMA's main function is dispute resolution through conciliation and arbitration. The CCMA may, upon request, advise a party about the procedures to follow, assist a party to obtain legal advice or representation and provide advice and training with regard to establishing collective bargaining institutions, resolving disputes, disciplinary and

dismissal procedures, employment equity and more. The CCMA's powers are not limited to addressing disputes referred to it, and provision of other services that are requested. It may, in the public interest, offer to conciliate disputes that have not been referred to it.

5.1 ARBITRATION AWARDS AND ITS ENFORCEMENT

In South Africa, once a dispute has been arbitrated the arbitrator is obliged to issue an arbitration award. The award is the arbitrator's decision or judgement in the matter. The commissioner must also give reasons for his decision. The decision of the Commissioner or an arbitration award is final and binding. If a party fails to comply with an arbitration award that orders the performance of an act other than payment of money, any other party to the award may enforce it by way of contempt proceedings in the LC. An award that has been certified by the CCMA director may be enforced as if it were an order of the LC. An award may also be made an order of the LC and executed as a court judgment. However, in the United States arbitration has been molded by custom and private contract, the courts and legislatures have dealt mainly with the "before" and "after" of arbitration – the enforceability of agreements providing for arbitration and the review and enforcement of awards that have been made rather than with the arbitration process itself. An arbitration process is thus an incidental decision about a collective bargaining contract or an interpretation of the contract. In the United States the overwhelming majority of parties of an arbitration award have dutifully carried out its provisions. Federal Judicial Support of Arbitration began in 1957 when SC held that an agreement could be enforced

under section 301 of the Taft-Hartley Amendments to the NLRA.⁹⁹ Three years later it held that doubts about arbitration should be resolved in favour of arbitration, that arbitration have the authority to fashion remedies, and that judges should enforce an arbitration award even if they would have arrived at different conclusions. Under the American system therefore, courts of law will normally uphold arbitration awards, they will refuse to enforce them only if it can be proved that the arbitrator exceeded his authority or was mentally or morally unfit to perform his duties.

5.2 REVIEW

Reviews in South Africa are governed by section 145 and 158(1)(g) of the LRA. Section 158(1)(g) is more relaxed with no time limit and provides for review on any grounds permissible in law. However section 145 provides for the following grounds of review as discussed in chapter 3:

- a) committed misconduct in relation to his or her duties
- b) committed a gross irregularity in the conduct of the arbitration proceedings, or
- c) exceeded his or her powers.¹⁰⁰

Accordingly, the role of domestic judicial system is limited in America. There is no review of an arbitrator's substantive conclusions in rendering an award. To subject an award to review on the merits of the dispute would destroy the finality for which the parties contracted and render the exhaustive arbitration process merely a prelude to

⁹⁹ T.J. St Antoine "Arbitration & the law" in A Zack (ed): Arbitration in practice pp. 9-22

¹⁰⁰ Section 145 (2).

judicial litigation which the parties sought to avoid. However the Court of Appeals for the Second Circuit has held that, notwithstanding the parties' intent to provide for a final decision, an arbitral award is subject to statutory defenses regarding enforcement. Currently, United States courts review arbitral decisions under both the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Federal Arbitration Act.¹⁰¹ The rules of the convention permit refusal of an award under limited circumstances. A number of grounds for setting aside an arbitral award are based on deficiencies in the arbitral process. Article V of the New York Convention provides that:

- a) An award may be refused, at the request of the parties against which it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought.
- b) Recognition of an arbitral award may also be refused if the authority of the state where recognition and enforcement is sought finds that the enforcement of the award would be contrary to the public policy of that country.¹⁰²

In *W.R. Grace v Local 759*¹⁰³ the dispute involved an arbitration award issued pursuant to a collective bargaining agreement. Although the New York Convention was not applicable, the court applied a general policy standard to the award, holding that in the context of labour arbitration, an award must be contrary to an explicit overriding policy in order to justify a refusal to enforce an award. Grounds in terms of subsection 1(c) are more similar to the grounds in terms of section 145 of the LRA. Grounds for refusing to

¹⁰¹ The Federal Arbitration Act governs all arbitration proceedings occurring within the United States or otherwise submitted under the Act.

¹⁰² USC 201 (1995) New York Convention

¹⁰³ 461 U.S 757 (1983)

enforce an award under subsection 1(c) and 2(b) offer little direction to the courts interpreting them¹⁰⁴ and are as follows:

a) Excess of Authority

If an arbitrator fails to confine his or her decision to the provision of the agreement, the arbitrator has exceeded the scope of authority rendering the award unenforceable. However it is often difficult to distinguish between a mere error of law and an action which wholly exceeds arbitral authority. Review of an award based on alleged abuse of authority is quite limited. The excess of powers provision of the Federal Arbitration Act 10(d) is afforded an extremely narrow interpretation. An arbitrator's authority derives solely from the contract between the parties to the arbitration. Accordingly, an arbitrator must act within the boundaries of his or her power under an arbitration agreement. If an arbitral decision includes rulings on issues not presented to the tribunal or otherwise authorized, the arbitrator has exceeded her authority and the award may be vacated. Courts have consistently held that awards supported by any "colorable" justification must be enforced. Thus where arbitrators explain the basis of their conclusions even where the award is barely justifiable, enforcement cannot be refused.

In South African legal system a commissioner exceeds his or her powers, or acts ultra vires, by making an award which he or she did not have the power to make. This may include failure to exercise a power or a discretion that ought to have been exercised. In *Transnet Limited v CCMA & Others*, the applicants seek to review the arbitrator's award on the basis that the CCMA had no jurisdiction to arbitrate the dispute. The

¹⁰⁴ Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Dec 29 1970

court therefore held that the commissioner has exceeded his powers as the dispute was not subject to arbitration.

In *187 Concourse Associates v Fishman & Service Employees International Union, Local*¹⁰⁵ the grievant participated in a physical altercation with a supervisor. The arbitrator reinstated him based on his good employment record. The company challenged the award, arguing that the arbitrator exceeded his authority in reinstating the grievant because he was guilty of the alleged misconduct. The court agreed and set aside the award essence from the collective bargaining agreement. The court based its conclusion that the arbitrator exceeded his authority on the fact that the award acknowledged that the grievant had committed the alleged infraction, and that the employer had no option but to terminate him. The court accordingly ruled that the arbitrator's reinstatement of the employee contravened his authority under the agreement.

b) Public Policy

A reviewing court may also vacate award that it finds contrary to domestic public policy. Article V (2)(b), which permits review under this standard is to be construed narrowly due to the strong policy in favour of international arbitration.

The Supreme Court decided the Steelworkers trilogy in *United Steelworkers v Enterprise Wheel and Car Corp*¹⁰⁶ and *United Steelworks v American MFG Co*¹⁰⁷ three landmark decisions which have been viewed as having dispelled the specter of

¹⁰⁵ 32B-J 187

¹⁰⁶ 363 U.S 593 (1960)

¹⁰⁷ 363 U.S 564 (1960)

judicial intrusion into the arbitration process created by the courts earlier decision in Lincoln Mills passing on the merits of the bargaining agreement dispute, specifically, the arbitrator's construction of the agreement is not reviewable for errors of either fact or law.¹⁰⁸

After the trilogy, the courts were still left with residuum of power to review. Courts exercising this power have seldom precisely articulated the grounds upon which their review is justified. Nevertheless, for the sake of analysis, the grounds permitted by the trilogy for reviewing an arbitration proceeding may be grouped into three categories. The first two categories derive from the court's statement that "the judicial inquiry under section 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made. It is evident that the courts have authority to determine whether the grievance is arbitrable, within the arbitrator's subject matter jurisdiction under the contract and whether, even if the controversy is arbitrable, the arbitrator exceeded specific contractual limits on his authority in making his decision.

Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement. He may of course look for guidance from any source yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

¹⁰⁸ The principle that courts may not review the award of an arbitrator for error of either fact or law is one to which the courts have been paying lip service for many years. *Burchell v March*, 58 US 344 (1854)

Under this last category of judicial authority, a court may review and set aside an award when the arbitrator, by basing his award on some source wholly extraneous to the agreement between the parties has violated his obligation to interpret and apply the contract.

In *Local 791, Int'l Union of Elec. Workers v Magnavox Co*,¹⁰⁹ the union claimed that a company initiated assembly line speed-up constituted a violation of the collective bargaining contract. After dismissing the grievance on the grounds that the union had failed to carry its burden of showing that the speed-up constituted an unfair change under the contract, the arbitrator went on to order the parties to negotiate concerning the implementation of appropriate engineering studies regarding assembly line speed. Where the grievance itself has been dismissed, it is a close question whether such an order is an instance of an arbitrator dispensing his own brand of industrial justice or a legitimate incident of his function in settling the contract dispute. It is therefore of interest to note that in vacating this award the court relied on language in the contract which expressly limited the arbitrator's powers. These three specific exceptions to the general rule of judicial non-interference, then, must constitute the basis for a court's proper refusal to enforce an arbitrator's award, including of course, a refusal to enforce an award based on the past practices of the parties.

Category (1) is only concerned with the arbitrator's subject-matter jurisdiction to entertain the dispute, not the factors he may or may not rely upon in reaching his decision, and therefore, it may not properly be used by courts as a basis for deciding

¹⁰⁹ 286 f.2d 465 (6th Cir 1961)

that an arbitrator's award should be set aside because it was based on past practices.¹¹⁰ Category (2) gives courts the power to deny enforcement of an award as improperly based upon past practices if, only if, the contract contains a provision which prohibits the arbitrator from looking beyond the express terms of the contract.

In *Torrington Co v Metal Prods Workers*,¹¹¹ the company during the term of the old contract, announced, over the objection of the union, its intention to discontinue a long-standing practice of giving its employees paid time-off to vote on election days. The company reiterated its position during the negotiations for a new contract, but failed to deal with this issue when it submitted a formal proposal to extend the old contract with specified amendments. The new contract which emerged from the negotiations contained no paid voting time provisions. When the company later refused to grant paid voting time, the union filed a grievance which ultimately went to arbitration. The arbitrator ruled in favour of the union.

In opposing enforcement of this award in court, the company argued that the statement in the contract providing that the arbitrator "shall have no power to add to the provisions of this agreement" was an express limitation on the arbitrator's powers which he violated in making his award. There is no doubt, therefore that the Torrington Court engaged in a review of the merits of the arbitrator's award. Thus, the court's conclusion seems to be that when an arbitrator has erroneously found that

¹¹⁰ Clearly category (1) is inappropriate in past practice cases, and no court has chosen to reply on such a basis for its jurisdiction. The courts have also held that arbitration is not be denied on the ground that there is no provision in the contract on which an award for the grievance could be based.

¹¹¹ 362 F. 2d 677 (2d Cir.1966)

a particular obligation is part of an agreement, he has both added to and failed to base his award upon the agreement.

However the position of the court in Torrington does not find support in the case of *H.K Porter Co v United Saw Workers*,¹¹² in which the court of Appeals for the Third Circuit also apparently assumed the meaning of category (3) if it is based upon an implied or modified term which the arbitrator has erroneously deduced from the parties practices. Both Potter and Torrington indicate that an award which could not “reasonably” have been based upon the agreement will inevitably be one which differs too greatly from that which the court would itself have rendered had it been in the arbitrator’s shoes.

It may therefore be said that the United States’ legal system does not differ materially from the South African legal system.

¹¹² 333 F 2d 596 (3d Cir 1964)

CHAPTER SIX

6. CONCLUSIONS AND RECOMMENDATIONS

6.1 CONCLUSION

As discussed in chapter one the aim of this research was to achieve four objectives namely:

- a) To outline the test for reviewing arbitration awards in so far as it relates to the right to review as embodied in the LRA.
- b) To set out the difference between Appeal and Review as remedies provided by the LRA.
- c) To outline and differentiate between the test for review as developed by our courts and the grounds for review as set out in the LRA.
- d) To set a guide on how our courts can develop a test for review which can be applied in all circumstances.

In Chapter two distinctions between appeals and reviews was discussed. It has been shown that appeals and reviews are procedures that may be adopted in order to challenge decisions of the lower courts and if necessary, have them corrected. Although aimed at similar results, appeals and reviews are different procedures and each is appropriate only in certain circumstances. The LRA of 1995 abolished the right to appeal and replaced it with the right to take decisions of the lower courts to review. In *Coetzee v Lebea NO and Others* the importance of distinguishing between appeals and reviews was outlined. The

explanatory memorandum states that the absence of an appeal from the arbitrator's award speeds up the process and frees it from the legalism that accompanies appeal proceedings.

Country Fair Foods also stated that the distinction between a review and an appeal must still be maintained notwithstanding the constitutional imperatives.

However in Civil cases a party may appeal the decision of the lower court if he reasonably believe that the presiding officer made an error of law or fact. Alternatively the decision may be impeachable because of some procedural irregularity that occurred during the conduct of the case and in such circumstances the aggrieved party may have the decision reviewed. In *Johannesburg Consolidated Investment Co v Johannesburg Town Council* the court described review as the process by which the proceedings of inferior courts of Justice, both civil and criminal are brought before this court in respect of grave irregularities occurring during the course of such proceedings" Appeal is the rehearing of the merits of the case. In review the decision of the lower court may be set aside whereas in appeals the presiding officer may arrive at a different decision all together.

In Chapter three different grounds for reviews were outlined, grounds in terms of section 145 and 158(1)(g). However there has always been a question of whether section 158(1)(g) is applicable to reviews of arbitration awards. Review in terms of section 145 is limited both insofar as time and grounds of review. Section 158(1)(g) provides for review on wider grounds or on grounds permissible by law. *Pep Stores*, Mlambo J was stated that section 158 (1) (g) does not apply to reviews of these awards stating that the

provision for a time frame in section 145 is an important confirmation of the legislative objectives of finality in dispute resolution and since section 158 (1) (g) has no time frame, it can “therefore have no role the review of awards as section 145 provides for this. However section 145 provides for the following grounds of review:

- d) committed misconduct in relation to his or her duties
- e) committed a gross irregularity in the conduct of the arbitration proceedings, or
- f) exceeded his or her powers.
- g) award was improperly obtained

An arbitrator is required to give due consideration to the issues, to apply his or her mind thereto and to come to a reasoned conclusion. Failure to do so may constitute misconduct. An incomprehensible and self contradictory award also amounts to gross misconduct, justifying the setting aside of the award. Irregularity is so gross that the aggrieved party is prevented from having his or her case fully and fairly determined, the award is open to challenge. A serious mistake of law can also lead to a gross irregularity.

However an irregularity may be patent or latent. An irregularity that takes place openly, as part of the conduct of the trial, they might be called patent irregularities and those that take place inside the mind of the judicial officer, which are only ascertainable from the reasons given by him and which might be called latent. Many patent irregularities have the effect of preventing a fair trial of the issues. And if from the magistrate’s reasons it appears that his mind was not in a state to enable him to try the case fairly this will amount to a latent gross irregularity. Gross irregularity is not necessarily accompanied by bad faith. If bad faith is present, it would also constitute misconduct.

A commissioner that makes an award which he or she did not have the power to make exceeds his powers. This also includes failure to make a discretion which he ought to have exercised. The court in Torrington as discussed in Chapter 5 concluded that when an arbitrator has erroneously found that a particular obligation is part of an agreement, he has both added to and failed to base his award upon the agreement and in such he or she has exceeded his or her powers.

Whereby the award was obtained by way of bribery or corruption, is one of the grounds justifying review. In such a case, the award was improperly obtained and may be set aside by the Superior Court.

Our Courts came to a decision that arbitration awards may not be reviewed in terms of section 158 (1)(g) which provides for any ground permissible by law. The LAC in Carephone considered the relationship between section 145 and 158(1)(g) and held that section 158(1)(g) is not applicable in the context of arbitration awards. Froneman DJP stated that the effect of allowing the review of CMA arbitration awards in terms of section 158(1)(g) would be to render section 145 superfluous.

PAJA is a codification of the common-law grounds of review. In Sidumo it was held that PAJA does not apply to reviews under section 145(2) of the LRA as the Commissioner does not perform a judicial function. Judicial review of an award may arise in an action on the contract as interpreted by the award or in a procedure to enforce the award. In

either case, the court may of necessity review the action of the arbitrator as an incident of the enforcement procedure. Judicial review of labour arbitration awards on jurisdictional grounds is necessary and proper. However, it seems necessary strictly to limit this review to the determination of the scope of the submission agreement as also shown in Chapter five.

In Chapter four the different tests developed by our courts were discussed. There had been controversy as to whether an award could be reviewed in terms of section 145 only or whether section 158(1)(g) also permitted the review of an award. Our Courts formulated tests for the standard to be used in determining whether or not there is a ground for reviewing a decision of a CCMA commissioner. The first test of “justifiability or rationality” was formulated in Carephone. According to the justifiability or rationality test there must be a rational objective basis justifying the connection made by the commissioner between the material property available and the conclusion eventually arrived at. The Carephone test held that section 145 was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it.

The test of “irrationality” was developed in *Shoprite v Ramdaw*. The LAC in Ramdaw NO essentially confirmed the Carephone decision, finding that an award may be set aside if it is irrational, but that the court could not interfere with the decision simply because it disagreed with it

However the court in *Sidumo* came with a different test for review of arbitration awards. According to *Sidumo* the standard to be applied when a decision of a commissioner in a dismissal dispute is sought to be reviewed is whether the decision reached by the commissioner is one that a reasonable decision maker could reach. The SCA in *Sidumo* referred with approval to Carephone, where the application of section 145 and 158(1)(g) was discussed and stated that the LAC in Carephone 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 justice provisions of the constitution suffused the grounds of review under section 145 of the LRA, thereby extending the scope of review of CCMA awards.

However the CC in *Sidumo* then examined 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. The reasonable standard should now suffice section 145 of the LRA. The reasonableness standard was dealt with in *Bato Star*. In the context of section 6(2)(h) of PAJA, O'Regan J said that an administrative decision will be reviewable if it is one that a reasonable decision-maker could not reach. The test on review is not whether the dismissal is fair or not, but whether the commissioner's decision is one that a reasonable decision-maker could not have reached in all of the circumstances. Awards will be final and binding unless such decision or

award is one that a reasonable decision-maker could not have made in all circumstances. In *Fidelity Cash Management Service*, it was held that Sidumo test is a stringent test that will ensure that arbitration awards are not lightly interfered with. In conclusion, Sidumo test certainly limits reviews, particularly in relation to value judgments. In Chapter five it has been shown that the South African legal system does not differ materially with the United States' legal system as far as review of arbitration awards are concerned.

6.2 RECOMMENDATIONS

It is therefore recommended that the test of “reasonableness” as formulated in Sidumo must therefore be applied in all reviews of arbitration awards. It will ensure that arbitration awards are not lightly interfered with. It limits the power of Labour Courts in reviewing arbitration awards. It is also recommended that arbitrators should make a decision that a reasonable decision maker could have arrived at given the facts. The Sidumo test meets the current constitutional requirement that an administrative action must be lawful, reasonable and procedurally fair. The test of reasonableness suffuses the constitutional standard in terms of section 3.

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