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FROM SIDUMO TO DUNSMUIR: THE TEST FOR REVIEW OF CCMA ARBITRATION AWARDS

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Thesis presented for the degree of DOCTOR OF PHILOSOPHY
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February 2013

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PLAGIARISM DECLARATION

I hereby declare that this thesis, presented for examination for the degree of Doctor of Philosophy at the University of Cape Town, has not been previously submitted for a degree at this or any other university, that it is my own unaided work both in concept and execution and that all the materials contained herein have been duly acknowledged.

........................................  ........................................
Emma Fergus                      Date
ABSTRACT

FROM SIDUMO TO DUNSMUIR – THE TEST FOR REVIEW OF CCMA ARBITRATION AWARDS

This thesis seeks to identify the test for judicial review of arbitration awards issued by the Commission for Conciliation, Mediation and Arbitration ('CCMA'). Currently, that test is set out in section 145 of the Labour Relations Act 66 of 1995 ('LRA'), read with the Constitutional Court’s decision in Sidumo & another v Rustenburg Platinum Mines Ltd & others [2007] 12 BLLR 1097 (CC). In terms of Sidumo, section 145 of the LRA has been suffused by the standard of reasonableness, consistently with the right to just administrative action found in section 33 of the Constitution of the Republic of South Africa, 1996 ('the Constitution'). In search of a clear formulation of the test, an extensive examination of South African case law on the subject is undertaken. Thereafter, relevant principles of judicial review in South Africa in the administrative sphere generally are considered. Finally, an assessment of Canadian case law and commentary in this field is conducted. The conclusion to this thesis proposes a revised test for review of CCMA awards.

The principal research findings begin by recognising the significance of efficiency, accessibility, flexibility and informality to ensuring fair and efficacious labour dispute resolution. The implication of this is that the test for review of CCMA awards should not be too exacting. Still, section 33 of the Constitution cannot be ignored and a broader ambit of review may therefore be necessary in certain instances. In fact, to maintain legal certainty, intrusive review may sometimes be crucial. These factors must be balanced when formulating a reliable and practical approach to review of CCMA awards. A key finding of this thesis is that – ostensibly due to the complexity of doing so – the Labour Courts have struggled to apply the current test for review consistently, fairly or predictably.

While South African principles of administrative law offer some guidance in identifying the test more clearly, it is argued that greater clarity remains necessary. Thus, Canadian law is consulted. Canada’s legal system is found to elucidate the standard in seven specific ways. From there, it is recommended that section 145 of the LRA be reformulated consistently with the standard of reasonableness, in a manner informed by the Canadian model. It is then proposed that the revised test encompass discrete standards of review applicable to different
categories of defect. The standards advanced range from flexible forms of reasonableness to correctness. By recasting the test in this manner, greater structure is simultaneously lent to it. In conclusion, it is submitted that, were the test proposed to replace the Courts’ current attitude to review, a suitable balance between the rights to fair labour practices and just administrative action may be struck.
ACKNOWLEDGMENTS

First and foremost, thank you to my supervisor, Professor Alan Rycroft, who consistently encouraged and advised me throughout the process of completing this thesis, and without whom I would not have undertaken this PhD at all.

Adding to his support, Professor Rochelle Le Roux and Associate Professor Debbie Collier, have unhesitatingly responded to research queries, attended PhD seminars and affirmed me despite my enduring self-doubt. Thank you to both of you.

To the University of Toronto’s faculty of law, thank you for hosting me during my stay in Canada. I am particularly grateful for Professor Brian Langille’s guidance on the basic principles of Canadian dismissal law, and for Professor David Dyzenhaus’s erudite and thought-provoking conversations about Canadian administrative law, not to mention the delicious lunches over which these conversations took place! Thank you too to both Professor David Mullan, for his engaging instruction on judicial review and for his willingness to meet up with me, and to Judge Katherine Swinton, for taking the time to discuss the realities of review in practice with me.

Then to Chris Albertyn and his family, who welcomed me into their lives without hesitation, I am eternally grateful for your companionship. Chris, your considered advice and debate on numerous aspects of labour law and arbitration in Canada, was infinitely useful to me. Thank you for that.

For the funding I received from the University of Cape Town, which enabled me to spend invaluable time researching in Canada, I am hugely appreciative.

I am further indebted to various South African Judges, academics and colleagues, including Judge Anton Steenkamp, Judge Andre van Niekerk, Professor Hugh Corder, Professor Paul Benjamin, Associate Professor Graham Bradfield, Associate Professor Helen Scott, Tracy Gutuza and Michael Wagener, many of whom may not even be aware of the significant academic and personal contributions which they have made to my work on this thesis.
For the regular, efficient and affable assistance of the staff of the Brand van Zyl Law Library, I am immensely grateful.

Finally, the support of my family and friends has been tremendous. My husband, Shaun Fergus – the proverbial pillar of strength throughout my research – has endured many a weekend and social occasion with an absent wife. My parents, Dave and Sue Whitelaw, have been equally supportive and understanding, as have many of my friends, including, in particular, Jacqueline Lurie, Saskia Kemp, Emma Hendrie, Alison Orr and Katirini Paizee (who patiently and amiably helped me with the formatting).

Thank you to all of you.
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INTRODUCTION

1. THE ORIGIN OF THE PROBLEM

Picture the drafters of the Labour Relations Act (‘LRA’ or ‘the Act’). They are embroiled in a discussion over how arbitration awards issued by commissioners of the new dispute resolution body – the Commission for Conciliation, Mediation and Arbitration (‘CCMA’) – should be assessed by the courts. Their vision for the institution was a ‘one stop shop’, which would provide quick, accessible, informal and cheap labour dispute resolution services to the public. These features they deemed crucial to the unique exigencies of employment relationships. Thus, when an appropriate measure of judicial scrutiny was ultimately agreed upon, the possibility of appeal from CCMA awards was excluded from the LRA. In its place, limited grounds of review akin to those in the Arbitration Act were prescribed. By doing so, the drafters of the Act sought to promote the efficiency and authority of the CCMA. Simultaneously, by minimising judicial intervention with CCMA proceedings, the informality necessary for effective labour dispute resolution was to be maintained.

In another room, the drafters of the final Constitution were similarly engaged in debate. For them the issue was revising the interim Constitution’s formulation of the right to just administrative action. Still incensed by the injustices committed by South Africa’s erstwhile government, they sought to define judicial powers of review to ensure that all

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1 The Labour Relations Act 66 of 1995 (‘LRA’ or ‘the Act’).
3 For the unique nature of employment relationships and dispute resolution in this arena generally, see John Brand et al Labour Dispute Resolution 2 ed (2008) at 15-18.
4 Section 143(1) of the LRA. This was consistent with the idea that arbitration awards should be final and binding.
7 And around the same time.
8 Section 24 of the Constitution of the Republic of South Africa Act 200 of 1993 (‘the Interim Constitution’); Carephone para 15. Section 33 read with item 23(2) of Schedule 6 of the Constitution of the Republic of South Africa, 1996 (‘the Constitution’) provided the drafters with an interim measure to the problem. For the final version, see section 33 of the Constitution.
future governments would properly be held accountable for their actions. To achieve this, the drafters surmised, public institutions would need to act with accountability, transparency and openness. Furthermore, any actions taken by the administration would be required to meet constitutional standards of reasonableness, lawfulness and procedural fairness. In their view, it was only in this way that administrative justice could be assured.

Regrettably, the two teams did not meet to align their conclusions. The result has been contention over how to construe the provisions of section 145 of the LRA – the grounds for review of CCMA arbitration awards – alongside the requisites of section 33 of the Constitution – the right to just administrative action. This dissertation attempts to resolve the controversy by devising a test for review of CCMA awards complementary to both. Before outlining the route it follows, a brief synopsis of the topic is provided below.

2. SUMMARY OF THE TOPIC

In October of 2007, the Constitutional Court gave judgment in Sidumo & another v Rustenburg Platinum Mines Ltd & others. Amongst the key findings of the Court was that the grounds for review of CCMA arbitration awards provided for in section 145 of the LRA, were suffused by the constitutional standard of reasonableness. In accordance with

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11 Section 33 of the Constitution.

12 Corder (2006) at 2; Du Plessis & Corder (1994) at 165-170; Currie & De Waal at 643; Mureinik (1994).

13 For a full discussion of the contention (since Carephone at least) see chapters 3 to 5 of this thesis; for examples, see Shoprite Checkers (Pty) Ltd v Ramdaw NO & others 2001 (3) SA 68 (LC); Shoprite Checkers (Pty) Ltd v Ramdaw NO & others [2001] 9 BLLR 1011 (LAC); Southern Sun Hotel Interests (Pty) Ltd v CCMA & others [2009] 11 BLLR 1128 (LC) para 13 and Edcon Ltd v Pillemer NO & others [2010] 1 BLLR 1 (SCA) para 12.


15 Note that, throughout this thesis, references to ‘section 145’ are references to section 145 of the LRA, unless otherwise stated.

16 Stipulated in section 33 of the Constitution.
this standard, reviewing courts are obliged to assess the reasonableness of a CCMA commissioner’s award by asking whether ‘…the decision reached by the commissioner [is] one that a reasonable decision maker could not reach?’

Unfortunately, very little guidance was offered by the Court in Sidumo as to how this standard should be applied in practice. Confusion has consequently arisen, resulting in a variety of judicial attitudes to review. These range from complete disregard for the reasonableness test to intricate and involved assessments thereof. Specifically, some courts depict the reasonableness standard as a resolutive one, sufficient to excuse other irregularities in arbitration awards. Others pay only nominal attention to it in favour of the applicant’s allegations of section 145 defects, while still others dismiss these grounds entirely preferring to apply reasonableness alone. In addition, whether the introduction of the reasonableness standard has narrowed the grounds for review or expanded upon them remains uncertain. Equally debatable are the questions whether reasonableness comprises both procedural and substantive elements and if so, what these are. Finally, the differences between the Carephone and Sidumo tests are unclear – again this is evident from reviewing

17 Sidumo para 110.
20 See Edcon, where the SCA ostensibly held that despite procedural irregularities in the commissioner’s award, as the outcome was reasonable, the award should not be set aside.
22 In Ray-Howett’s opinion, this occurred in Fidelity; Grant Ray-Howett ‘Is it reasonable for CCMA commissioners to act irrationally?’ (2008) 29 ILJ 1619 at 1621; More blatantly, see Kievits Kroon (LC) para 28.
23 Certain critics have argued that following Sidumo, the courts’ powers of review have been reduced; Shoprite Checkers (Pty) Ltd v CCMA & others [2008] 12 BLLR 1211 (LAC) (‘Shoprite Checkers 1’) para 19; Palaborwa Mining Co Ltd v Cheetham & Others (2008) 29 ILJ 306 (LAC) para 6; John Grogan ‘In the shadow of Sidumo: Applying the ‘reasonable commissioner’ test’ (2008) 24(6) Employment Law 3; Garbers (2008) at 85; John Grogan ‘Two-edged sword: The CC’s ruling in Rustplats’ (2007) 23(6) Employment Law 3 at 22.
24 In Southern Sun Hotel Interests para 14, the Labour Court held that reasonableness comprised both procedural and substantive elements. See also Sasol Mining; Anton Myburgh ‘Sidumo v Rustplats: How have the courts dealt with it?’ (2009) 30 ILJ 1 at 19; Landman, in AA Landman ‘A study in deference: Labour Court deference to CCMA arbitration awards’ (2008) 29 ILJ 1613 at 1618, disagrees with this approach.
25 In Carephone, the LAC held that the section 145 grounds of review were suffused by the interim Constitution’s requirement of rational justifiability for all administrative action; Carephone para 37.
courts’ divergent attitudes to each.\textsuperscript{26} Compounding the confusion, and despite the import of the distinction between appeal and review,\textsuperscript{27} frequent references to the ‘correct’, ‘wrong’ or ‘incorrect’ findings of commissioners appear in Labour and Labour Appeal Court judgments.\textsuperscript{28} Altogether, the result has been inconsistency and unpredictability in review proceedings\textsuperscript{29} – an intolerable outcome, given the LRA’s principal objective of promoting effective dispute resolution.\textsuperscript{30}

This objective, stipulated in section 1(d)(iv) of the Act, was considered vital to the unique context of labour disputes.\textsuperscript{31} Thus, it was with efficiency in mind that the CCMA was established.\textsuperscript{32} As alluded to above, the need to ensure fairness to both parties, together with the exigencies of employment relationships,\textsuperscript{33} further necessitated that the institution be accessible, informal, cost-effective and flexible in its operations.\textsuperscript{34} Primarily for these reasons, the original grounds for review provided for in section 145 were cast in narrow

\textsuperscript{26} Compare, for example, \textit{Ellerine Holdings} at 10-11 & 16 with \textit{Cheetham, Fidelity and Bestel v Astral Operations Ltd & others} [2011] 2 BLLR 129 (LAC) paras 16-17.

\textsuperscript{27} While the courts have repeatedly confirmed the importance of the distinction, the candidate questioned the legitimacy of this in Emma Fergus ‘The distinction between appeals and reviews – Defining the limits of the Labour Court’s powers of review’ (2010) 31 \textit{ILJ} 1556. Consult this work for the differences between appeal and review generally and the rationale behind the distinction.

\textsuperscript{28} \textit{Amazwi Power Products (Pty) Ltd v Turnbull} [2008] 9 BLLR 817 (LAC) para 21; \textit{Khanyile v Billiton Aluminium SA Ltd t/a Hillside Aluminium} (LAC) unreported case no DA24/06 of 24 February 2009 para 34; \textit{Motsamai v Everite Building Products (Pty) Ltd} [2011] 2 BLLR 144 (LAC). For confirmation that this is not the proper enquiry on review, see \textit{National Union of Mineworkers & Another v Samancor Ltd (Tubatse Ferrochrome) & Others} (2011) 32 \textit{ILJ} 1618 (SCA) paras 5, 7 & 15 and \textit{Bestel}.


\textsuperscript{30} Section 1(d)(iv) of the LRA.

\textsuperscript{31} \textit{NEHAWU v University of Cape Town and Others} 2003 (2) BCLR 154 (CC) para 31; The Explanatory Memorandum at 279 & at 318-319; Benjamin and Cooper (1995).

\textsuperscript{32} Section 1(d)(iv) of the LRA; The Explanatory Memorandum at 279 & 318-319; \textit{Food & Allied Workers Union on behalf of Mbatha & others v Pioneer Foods (Pty) Ltd t/a Sasko Milling & Baking & others} (2011) 32 \textit{ILJ} 2916 (SCA) (‘\textit{FAWU}’) paras 21-22. Consider, however, \textit{Herholds v Nedbank Ltd} (2012) 33 \textit{ILJ} 1789 (LAC) paras 52-56.

\textsuperscript{33} For the unique nature of labour dispute resolution generally, see Brand et al (2008). Consider too the Namibian judgment of \textit{Africa Personnel Services (Pty) Ltd v Government of The Republic of Namibia and Others} 2009 (2) NR 596 (SC) para 70, in which the Namibian Supreme Court discussed the importance of employment to a person’s sense of self-worth; \textit{Dyokhwe v De Kock NO & others} (2012) 33 \textit{ILJ} 2401 (LC) para 28. In \textit{Reference Re Public Service Employee Relations Act (Alha)} [1987] 1 SCR 313 at 368, the importance of having a job was described as follows: ‘Work is one of the most fundamental aspects in a person’s life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person’s employment is an essential component of his or her sense of identity, self-worth and emotional well-being. Accordingly, the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person’s dignity and self-respect ...’, as cited in \textit{HOSPERSA obo Venter v SA Nursing Council} [2006] 6 BLLR 558 (LC) para 27 and again in \textit{Standard Bank of South Africa v CCMA & others} [2008] 4 BLLR 356 (LC) para 65.

\textsuperscript{34} The Explanatory Memorandum at 318-319.
terms and the Act contains no right to appeal against CCMA awards.\(^{35}\) Review was directed at promoting the credibility of CCMA proceedings,\(^{36}\) in turn encouraging buy-in from all stakeholders.\(^{37}\) The idea was that awards would be final and binding, and subject to scrutiny in limited circumstances only.\(^{38}\) Review was therefore not to be confused with appeal. Since Sidumo,\(^{39}\) retaining the distinction between the two has proved difficult.\(^{40}\) Yet, its importance is frequently confirmed by reviewing courts in light of legislative intent.\(^{41}\)

Still, the CCMA remains an administrative institution tasked with administrative functions.\(^{42}\) Thus, it is subject to the constraints imposed on administrative bodies by the Constitution, including the requirements of accountability, transparency and openness.\(^{43}\) In addition, it must exercise its powers and perform its functions consistently with the right to administrative action which is lawful, reasonable and procedurally fair under section 33 of the Constitution.\(^{44}\)

Regrettably, the inconsistency and unpredictability with which reviews are being conducted is undermining both the LRA’s and the Constitution’s objectives.\(^{45}\) The doctrine of legal

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\(^{36}\) Benjamin (2007) at 3-6; The Explanatory Memorandum.

\(^{37}\) The Explanatory Memorandum at 279 & 318-319; Benjamin & Cooper (1995).

\(^{38}\) Section 143(1) of the LRA.

\(^{39}\) Read with Carephone para 37.

\(^{40}\) Primarily on account of the fact that reasonableness constitutes a substantive measure of review; Carephone para 37; Sidumo paras 106-110; Herholdt para 52; Fidelity; Discovery Health Limited v CCMA and others [2008] 7 BLLR 633 (LC) and Cheetham.

\(^{41}\) FAWU paras 21-23; ‘The Explanatory Memorandum at 279 & 318-319; Sidumo para 108-109; The South African Municipal Workers Union v The South African Local Government Bargaining Council & others (LAC) unreported case no DA06/09 of 29 November 2011 (‘SAMWU’) paras 9 & 18; Bestel paras 16-17; Transnet Freight Rail paras 74-75; For the distinction between appeals and reviews generally, consult Fergus (2010); Johannesburg Consolidated Investment Co v Johannesburg Town Council 1903 (1) SA 111 (A) and Chevron Engineering (Pty) Ltd v Nkambule & Others (2001) 22 ILJ 627 (LAC).

\(^{42}\) Sidumo para 88.

\(^{43}\) Section 33 of the Constitution; see too section 195(1) of the Constitution prescribing the standards for the public administration generally. Part of the rationale for allowing judicial review is to ensure that administrative decision-makers are held accountable for their conduct; Garbers (2008) at 86; Ray-Howett at 1628; Sidumo paras, 88, 138 & 140; Carephone paras 9, 19 & 34-35.


\(^{45}\) The lack of predictability in the outcome of review proceedings further threatens the legitimacy of the labour dispute resolution process.
certainty and the rule of law are simultaneously threatened.\textsuperscript{46} The need for clarification is accordingly considerable. The path taken in this thesis, in attempting to achieve such clarity, is depicted in the overview of each chapter below.

3. OVERVIEW OF THE CHAPTERS

3.1 Chapter 1

In order to set the appropriate backdrop for review, the first chapter describes the nature and characteristics of the CCMA. It begins with an analysis of the purposes behind its establishment and a discussion of the CCMA’s features. A synopsis of the statistics arising from its operations follows. By illustrating both the institution’s intended nature and the reality of its everyday functions, the chapter reveals the extreme pressures under which the CCMA and its commissioners function.\textsuperscript{47} Together with pertinent principles of administrative law (which are relevant in light of the CCMA’s status as an administrative body),\textsuperscript{48} this is the framework in which CCMA awards ought to be evaluated. Having addressed the context for review of CCMA decisions,\textsuperscript{49} the dissertation turns to the Labour Appeal Court’s judgment in \textit{Carephone (Pty) Ltd v Marcus NO \& others}\textsuperscript{50} and the implications thereof for the statutory grounds of review.

3.2 Chapter 2

In chapter 2, Froneman DJP’s decision in \textit{Carephone} that the grounds for review in section 145 of the LRA were infused by the Constitutional requirement that awards ‘be justifiable in

\textsuperscript{46} For a useful discussion of the need for consistency, see \textit{Dunsmuir v New Brunswick} [2008] 1 SCR 190 para 133.


\textsuperscript{48} \textit{Sidumo} para 88. These factors include accountability, transparency and openness as well as reasonableness, procedural fairness and lawfulness; sections 1, 33 and 195 of the Constitution; \textit{Carephone} paras 9, 19 & 34-37; \textit{Sidumo} paras 138 & 140.

\textsuperscript{49} The importance of context is clear as the nature and scope of the reasonableness standard is contextually dependent; \textit{Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others} 2004 (4) SA 490 (CC) para 45; Hoexter (2007) at 315. De Ville (2005) at 212-214; Clive Plasket \textit{The Fundamental Right to Just Administrative Action: Judicial Review of Administrative Action in the Democratic South Africa} (PhD Thesis) 2002 at 339-363.

\textsuperscript{50} \textit{Carephone (Pty) Ltd v Marcus NO \& Others} [1998] 11 BLLR 1093 (LAC).
relation to the reasons given for them’, is examined. At the time, the interim Constitution was in effect. The right to just administrative action provided for therein prescribed rational justifiability, along with lawfulness and procedural fairness, as the requisites for just administrative action. Naturally the phrase ‘rational justifiability’ is distinct from that of ‘reasonableness’ applicable under the final Constitution. The rationale for aligning the statutory grounds with the right to just administrative action was nevertheless alike in both cases – commissioners perform administrative functions; they are consequently bound to comply with the standards set by the Constitution. As such, in so far as Froneman DJP explained the reasons for, and appropriate application of, the rational justifiability standard in Carephone, to understand Sidumo it is crucial to understand Carephone. The chapter thus evaluates this decision with reference to pertinent case law arising from it.

3.3 Chapter 3

Following the review of Carephone, the focus necessarily turns to the Constitutional Court’s decision in Sidumo & another v Rustenburg Platinum Mines Ltd & others. There, the Court held that:

‘…section 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in Bato Star: Is the decision reached by the Commissioner one that a reasonable decision-maker could not reach?’

As mentioned above, however, the infusion of section 145 with reasonableness was not the straightforward affair it was intended to be. On the contrary, it led to an abundance of contradictory decisions by the Labour and Labour Appeal Courts and Supreme Court of Appeal. It is these judgments which this chapter studies. Given the sheer number of

51 This standard essentially came to be known as the ‘rationality’ or ‘rational justifiability’ test; Shoprite Checkers (2001) (LAC) para 26; Crown Chickens (Pty) Ltd v Rocklands Poultry v Kapp & Others (2002) 23 ILJ 863 (LAC) para 19; Du Toit (2010) at 1-2.
52 This test asked: ‘…is there a rational, objective basis justifying the connection made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at?’; Carephone para 37.
53 Section 33 read with item 23(2) of Schedule 6 to the Constitution; Carephone para 15.
54 And held to infuse section 145 of the LRA in Sidumo.
55 Read with the remaining constraints imposed on the public administration by the Constitution; sections 1(d), 33 & 195(1) of the Constitution.
57 Sidumo para 110. See also Le Roux & Young at 30, where the authors argue that this test constitutes an overarching standard of review and does not exist as an independent ground for review; Du Toit (2010) at 2; Manana expresses a similar view.
decisions which have been handed down since *Sidumo*, it is impossible to evaluate every one. As a result, while the majority of Labour Appeal Court and Supreme Court of Appeal judgments are covered in this chapter, only significant decisions of the Labour Courts are addressed. For the most part too, the discussion of these cases ends with those decided on or before 31 December 2011.

By appraising these cases, chapter 3 charts the progress of the courts on controversial questions. Included amongst these are the relationship between reasonableness and section 145; the meaning of reasonableness; whether reasonableness truly encompasses both procedural and substantive components; the continued relevance (if any) of the *Carephone* standard; the capacity of reasonableness to override procedural defects in awards and whether *Sidumo* has limited or expanded the courts’ powers of review. The assessment of the judiciary’s varying attitudes to review is directed at extracting the controversial questions from those which are no longer in doubt. As without knowledge of these controversies they cannot be resolved, the evaluation is critical to revising the current test for review. It further forms the backdrop for the next chapter which endeavours to establish the appropriate context for reformulating section 145 and the *Sidumo* standard.

3.4 Chapter 4

Here, the groundwork for formulating a test for review that is both fitting and reliable in practice is laid. First, those aspects of the reasonableness standard which are clearly ascertainable are confirmed and the outstanding questions reiterated. Recognising the contextual variability of reasonableness, it is then argued that to clarify the uncertainties, a thorough examination of contextual considerations relevant to reasonableness review in section 145 proceedings is necessary. After evaluating these factors the chapter resolves that while important, there are simply too many of them to constitute an accessible tool from

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58 This question was initially contentious. *Shoprite Checkers* 1 para 19; *Cheetham* para 6; Grogan (2008) at 3; Garbers (2008) at 85; Grogan (2007) at 22. Compare these views, however, with *Value Logistics Ltd v Basson & Others* (2011) 32 ILJ 2552 (LC) paras 40-43 and *Ellerine Holdings* at 10-11; *Sidumo* para 140; Consider too *Sidumo* para 106, where the majority held that the test was more extensive than the rationality test on account of its substantive nature. Finally, consult *Carephone* para 31.

59 See *Southern Sun Hotel Interests* where the Court noted expressly that the reasonableness standard’s definition remained uncertain in various respects; *Southern Sun Hotel Interests* para 13; Garbers (2008) at 84; Le Roux & Young at 30. Compare too *Foschini* (2010) (LAC) with *State Information Technology Agency*.

60 The contextual nature of reasonableness has repeatedly been affirmed; *Bato Star* para 45; Hoexter (2007) at 315; De Ville (2005) at 212-214; Plasket at 339-363.
which to delineate the scope of review. Something more concrete is needed. Greater clarity is therefore sought in the meanings ascribed to reasonableness in South African administrative law. It is found, however, that while useful to a degree, purporting to define reasonableness in a finite sense is of limited utility. Reasonableness by its very nature is context dependent. Defining its boundaries with meticulous precision should accordingly be approached with caution. Nevertheless, the rule of law and the doctrine of legal certainty do require a measure of rigidity. As such, when formulating a suitable test for reasonableness in section 145 proceedings, a balance between the two must be struck. While South African law, it is submitted, must inform both the context and foundations of review, it fails to provide sufficient guidance as to the manner in which this balance may be achieved. Structure is consequently sought in related principles of Canadian labour and administrative law. These are examined in chapter 6. Before doing so, the comparative compatibility of various jurisdictions’ tests for review is explored.

3.5 Chapter 5

Chapter 5 considers the relative suitability of the British, Australian, New Zealand and Canadian legal systems as comparative tools for South African labour law. Outlines of these countries’ approaches to review of labour related, administrative (and, where relevant, judicial) determinations are provided. The compatibility of each with the test for review of CCMA awards is then assessed in turn. It is concluded that the Canadian system of judicial review constitutes the most apposite and instructive comparator for the purposes of this thesis.

3.6 Chapter 6

Chapter 6 is the predecessor to the conclusion of this dissertation. Similarly to chapter 4, its emphasis is on narrowing the gap between what is certain and what is uncertain. It attempts to achieve this by appraising the Canadian approach to judicial review of labour arbitrators’ and boards’ decisions. The chapter opens with a brief description of the former test for

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61 Including those associated with rationality, justifiability and proportionality specifically.
63 Shoprite Checkers 3 para 31.
64 For Canadian administrative and labour law generally, consult Gus van Harten, Gerald Heckman & David Mullan Administrative Law: Cases, Text, and Materials 6 ed (2010) and Donald D Carter et al Labour Law in
review in Canada. Thereafter, it addresses key decisions of the Supreme Court of Canada in which the standard of reasonableness (and judicial review generally) were themselves reviewed. Of these, the most pivotal is *Dunsmuir v New Brunswick*. Following the discussion of relevant case law, the critique to which *Dunsmuir* (and, to a lesser extent, subsequent cases) gave rise is considered. In doing so, specific questions surrounding *Sidumo* are resolved. These include the questions concerning the relationship between the *Carephone* and *Sidumo* standards, as well as that between reasonableness and the section 145 grounds, the confines of the procedural and substantive components of reasonableness and the circumstances in which the standard may be resolutely applied. Finally, a vision for delineating reasonableness with a measure of precision, while retaining its flexible nature, is established. Structure is given to this vision in the conclusion to the thesis.

4. CONCLUSION

Here, a succinct and practical test for reasonableness review and review instituted on one or more of the statutory grounds is formulated. The test is expressly devised to suit the unique context of South African labour dispute resolution (albeit with reference to Canadian law). It is accordingly proposed that due consideration be given to replacing the current legislative grounds of review with this test. In turn, legal certainty will be better assured and efficiency promoted. Simultaneously, parties’ Constitutional rights to both fair labour practices and just administrative action will be better protected.

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*Canada* 5 ed (2002). The candidate’s reasons for choosing Canada as the principal comparative jurisdiction are explained in chapter 5.

65 Again, the discussion of relevant case law ends with case law handed down on or before 31 December 2011. *Dunsmuir v New Brunswick* [2008] 1 SCR 190. Two other critical cases addressed are *Canada (Minister of Citizenship and Immigration) v Khosa* 2009 SCC 12 and *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817.


67 With reference to a finite but still apt set of contextual considerations drawn primarily from the Canadian approach.

68 Sections 23 & 33 of the Constitution.
CHAPTER 1

THE NATURE OF THE CCMA AND ITS ARBITRAL FUNCTIONS

1. INTRODUCTION

In Sidumo & another v Rustenburg Platinum Mines Ltd & others, the Constitutional Court held that arbitrations of the Commission for Conciliation, Mediation and Arbitration (‘CCMA’) constitute administrative action for the purposes of section 33 of the Constitution. The implication of this finding is that CCMA arbitration awards are amenable to review, not only on the basis of section 145 of the Labour Relations Act 66 of 1995 (‘the LRA’), but also in accordance with the Constitutional right to just administrative action. As the grounds for review provided for in section 145 of the LRA were intentionally cast in narrow terms in light of the exigencies of labour dispute resolution, extending reviewing courts’ powers consistently with this right should not be frivolously undertaken. A principal assertion of this thesis is that while CCMA arbitrations comprise administrative action, factors unique to the labour relations arena require that a contextually appropriate measure of

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71 The Commission for Conciliation, Meditation and Arbitration (‘the CCMA’) was established in terms of section 112 of the Labour Relations Act 66 of 1995 (‘the LRA’ or ‘the Act’).
72 Section 33 of the Constitution of the Republic of South Africa, 1996 (‘the Constitution’), provides for the right to just administrative action which is lawful, reasonable and procedurally fair.
73 See chapter 2 of this paper, read with section 36 of the Constitution.
74 See chapter 2 of this paper, read with section 36 of the Constitution. Indeed, it is not unusual for administrative law principles to differ from one contextual arena to the next. In Germany, for example, there are different codes for discrete areas of administrative law; Rainer Pfaff & Holger Schneider ‘The Promotion of Administrative Justice Act from a German perspective’ (2001) 17 SAJHR 59.
review be applied to CCMA arbitration awards.\textsuperscript{77} When devising that measure, the features and objects of the CCMA, read with those of the LRA, are important consideration. Equally significant is the impact of these features and objects on the institution’s operations, commissioners and parties to disputes.

The CCMA was primarily established to resolve labour disputes expeditiously, thereby reducing the incidence of industrial action.\textsuperscript{78} In turn, social justice was to be achieved.\textsuperscript{79} To realise this goal, the LRA assigned specific characteristics both to the CCMA and to proceedings conducted under its auspices. To understand the influence of these traits on judicial review, it is necessary to evaluate them comprehensively. That evaluation is undertaken below.\textsuperscript{80} Adding to this, the impact of the CCMA’s features on the institution’s commissioners and daily operations is assessed, with reference to reported statistics. By doing so, the context in which reviews of CCMA awards should be conducted is revealed.

\textsuperscript{77} Arguably, any limitation of the right to just administrative action is justifiable in this context; consider Tembeka Ngcukaitobi & Jason Brickhill in ‘A difficult boundary: Public sector employment and administrative law’ (2007) 28 \textit{ILJ} 769 at 775, where the authors mention this possibility in the context of excluding the application of PAJA from all labour disputes; consult too Paul Benjamin ‘Conciliation, arbitration and enforcement: The CCMA’s achievements and challenges’ (2009) 30 \textit{ILJ} 26 at 26 & 42-43.

\textsuperscript{78} It was further devised to address the problems associated with the Industrial Courts; The Explanatory Memorandum.


2. **SIDUMO & ANOTHER V RUSTENBURG PLATINUM MINES LTD & OTHERS**\(^{81}\)

In *Sidumo & another v Rustenburg Platinum Mines Ltd & others*,\(^{82}\) writing for the majority of the Court, Navsa AJ addressed the question of whether CCMA arbitrations constituted administrative action. He began by observing that while CCMA arbitrations and court proceedings shared a number of similarities, they remained distinct in important respects.\(^{83}\) The responsibilities of administrative tribunals ranged from implementing legislation to determining disputes in a manner akin to that of the courts.\(^{84}\) Yet, the CCMA’s lack of judicial authority withdrew its operations from the judicial sphere. As such, and despite the fact that the CCMA exercised public power, it was not a branch of the judiciary. Instead, it was an administrative body tasked with quintessentially administrative functions; it was accordingly subject to section 33 of the Constitution.\(^{85}\)

Supporting Navsa AJ’s conclusion but wishing to amplify his reasoning, O’Regan J recognised that the question of whether CCMA arbitrations constituted administrative action was difficult. The issue required due consideration of the role of the CCMA in South Africa’s Constitutional order and the purposes of the right to just administrative action.\(^{86}\) While it is unnecessary to explain the manner in which O’Regan J resolved the debate here, her description of the CCMA and its purposeful establishment as an accessible, cost-effective and efficient institution for the resolution of labour disputes is key.\(^{87}\) Distinctively to Navsa AJ, the Judge held that CCMA arbitrations were primarily adjudicative in nature.\(^{88}\) However, the CCMA was still an administrative body, lacking judicial power.\(^{89}\) Arbitrations performed by

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\(^{81}\) *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC).

\(^{82}\) Ibid. While the Supreme Court of Appeal (‘SCA’) heard the matter before it progressed to the CC (and so was equally tasked with the question of whether CCMA arbitrations constituted administrative action), the SCA was somewhat dismissive of the issue. Cameron JA (writing for the majority of the SCA in *Sidumo; Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA & Others* [2006] 11 BLLR 1021 (SCA)), surmised simply that: ‘There can be no doubt that a CCMA commissioner’s arbitral decision constitutes administrative action.’ *Rustenburg Platinum Mines* (SCA) para 25. As such, and whereas it is arguable that Cameron JA’s efficient resolution of the question is laudable (see, in this regard, Hoexter (2000) *SALJ* at 517), Cameron JA’s rather perfunctory statement of the position offers minimal analytical assistance.

\(^{83}\) *Sidumo* paras 81-85.

\(^{84}\) Ibid para 82.

\(^{85}\) Ibid para 88.

\(^{86}\) Ibid para 123.

\(^{87}\) Ibid para 125.

\(^{88}\) At least to the extent to which it involved the application of legal principles to the facts of a dispute.

\(^{89}\) *Sidumo* paras 124-132.
it therefore fell within the scope of section 34 of the Constitution. This did not inevitably imply that they were excluded from the reach of section 33.\(^{90}\) Whether they fell within its ambit had to be determined with reference to the objects of section 33 and the context in which arbitrations take place.\(^{91}\) Following careful analysis of this issue, O’Regan J concluded that it was Constitutionally appropriate to hold the CCMA (as an administrative tribunal) to the standards of scrutiny provided for in section 33.\(^{92}\)

Despite the courts’ finding that CCMA arbitrations comprised administrative action, both Judges agreed that the provisions of the Promotion of Administrative Justice Act 3 of 2000 (‘PAJA’), listing the grounds of review\(^93\) applicable to administrative action generally, were not suited to CCMA awards.\(^{94}\) Thus, to secure parties’ rights to just administrative action during section 145 proceedings, it was necessary to construe section 145 as suffused by the constitutional standard of reasonableness.\(^95\) The meaning and scope of this standard, together with its impact on the section, are thoroughly canvassed in later chapters. What follows here is a description of the CCMA’s characteristics in so far as they influence the permissible reach of review.

\(^{90}\) Ibid para 126.

\(^{91}\) Ibid para 132.

\(^{92}\) Ibid para 139 -140; note that Ngcobo J (writing for the minority) disagreed, holding that commissioners’ awards were not reviewable under section 33 of the Constitution. Ngcobo J nevertheless recognised that CCMA arbitrations were subject to certain legislative and Constitutional constraints. These constraints were ascertainable with reference to the primary objects of the LRA, as well as the foundational principles of the Constitution. The most pertinent requisites therefore were that arbitration proceedings be fair and that the doctrine of legality be complied with; \textit{Sidumo} paras 163, 164 & 200-240. For detailed discussions of the doctrine of legality, consult \textit{Fedsure} para 56 and \textit{AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another} 2006 (11) BCLR 1255 para 39. Consider too \textit{Albutt v Centre for the Study of Violence and Reconciliation and Others} 2010 (5) BCLR 391 (CC) para 49; \textit{Affordable Medicines Trust and Others v Minister of Health and Others} 2006 (3) SA 247 (CC); \textit{Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex parte President of the Republic of South Africa and Others} 2000 (3) BCLR 241 (CC) para 20 and \textit{SARFU} para 38.

\(^{93}\) Section 6 of PAJA.

\(^{94}\) \textit{Sidumo} para 104.

\(^{95}\) Ibid para 110.
3. THE NATURE OF THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION

The CCMA was established in terms of section 112 of the LRA. The Act does not expressly state the purposes of the body.\(^{96}\) It nevertheless appears from the structure of the CCMA’s statutory functions read with the objects of the LRA, that it was created to promote effective dispute resolution within the labour sphere.\(^{97}\) This was to be achieved in a forum accessible to the public at large.\(^{98}\) The purposes of the CCMA are depicted in its Annual Report of 2009 to 2010 in the following terms:

‘The purpose of the CCMA is to promote social justice\(^{99}\) and fairness in the workplace. This will be done through the delivery of ethical, quality, innovative and cost-effective dispute management and dispute resolution services that are in accordance with the law.’\(^{100}\)

In order to advance these objectives, particularly in the realm of unfair dismissal disputes,\(^{101}\) the Task Team responsible for drafting the Act substituted court proceedings with CCMA arbitrations. Their rationale for this is recorded in the LRA’s Explanatory Memorandum,\(^{102}\) which highlights the benefits of ‘final and binding’ arbitration over adjudication. Those benefits include informality, cost-effectiveness, accessibility and efficiency. In addition, the

\(^{96}\) See, however, O’Regan J’s analysis of the CCMA in *Sidumo*, where she held that the purpose of the CCMA was to create a body for the ‘affordable, accessible and quick resolution of workplace disputes’; *Sidumo* para 125.

\(^{97}\) Theron & Godfrey suggest that the protection of workers’ rights should be the keystone of effective dispute resolution; Jan Theron & Shane Godfrey ‘The CCMA and small business – The results of a pilot study’ (2000) 21 *ILJ* 53 at 54.

\(^{98}\) This is equally apparent from the rationale behind the establishment of the CCMA; the Explanatory Memorandum at 318-9. In contrast to the expense associated with court proceedings, the CCMA’s services are free, which clearly promotes accessibility; Darcy Du Toit et al *Labour relations law: A comprehensive guide* 4 ed (2003) at 5; Benjamin (2007) at 3-4; Paul Benjamin & Carola Gruen *The regulatory efficiency of the CCMA: A statistical analysis of the CCMA’s CMS database Development & Policy Research Unit Working Paper* 06/110 (June 2006) at 1; John Brand et al *Labour Dispute Resolution* 2 ed (2008) at 1.

\(^{99}\) Another important purpose behind enabling expeditious dispute resolution and the subsequent establishment of the CCMA was the reduction in the incidence of strike action and the consequent promotion of labour peace; Jan Theron & Shane Godfrey ‘The labour dispute resolution system and the quest for social justice: A case study on the CCMA, unfair dismissals and small business’ (2002) *SAJLR* 21 at 31; Benjamin & Gruen at 1; Benjamin (2007) at 26; the Explanatory Memorandum at 284-285 & 318. O’Regan in Catherine O’Regan ‘The development of private labour arbitration in South Africa: A review of the arbitration awards’ (1989) 10 *ILJ* 557 at 570, records the preventative role which arbitration may play in the context of collective bargaining.


\(^{101}\) As well as unfair labour practice disputes, which are similarly subject to arbitration in terms of section 186 read with section 191 of the LRA.

\(^{102}\) The Explanatory Memorandum at 317-318.
drafters hoped that by precluding judicial involvement, arbitrations would remain non-legalistic and so better suited to the unique character of employment relationships than judicial processes. Finally, crafting the CCMA in this way was intended to ensure a ‘credible, legitimate alternative process’, which would reduce industrial action arising from dismissals. In turn, the problems associated with the former conciliation boards and the Industrial Court were to be avoided.

For the purposes of this thesis, the CCMA’s most significant function is the resolution of employment disputes by means of arbitration. In order to provide a complete picture, it is nonetheless useful to mention the additional legislative duties of the institution. Sections 115(1) and (4) of the LRA stipulate these; they encompass resolving disputes (both by conciliation and arbitration), providing assistance with establishing workplace forums, compiling and publicising information about the body’s operations and performing any further duties which the CCMA is obliged to perform under the LRA or related legislation.

103 Ibid.
104 Ibid. The benefits of arbitration are recognized in many commonwealth countries. As Lewis and Clark have observed in the United Kingdom, for example: ‘Arbitration is cheaper, speedier, more informal and more accessible, it avoids the legalism and publicity associated with the tribunals, and offers the possibility of a more flexible range of remedies, including greater likelihood of reinstatement or re-engagement.’; R Lewis & J Clark Employment Rights, Industrial Tribunals and Arbitration: The Case for Alternative Dispute Resolution (1993) at 33. See also J Clark ‘Arbitration in dismissal disputes in South Africa and the UK’ (1997) 18 ILJ 609. For the detrimental impact of broad judicial review on the essence of arbitration, see Calvin William Sharpe ‘Reviewing CCMA arbitration awards: Towards clarity in the Labour Courts’ (2000) 21 ILJ 2160 at 2164 ftnt 13 and Steelworkers v Warrior & Gulf Navigation Co 363 US 564 (1960); for a more general appraisal, see Calvin William Sharpe ‘Judicial review of labor arbitration awards: A view from the bench’ (1999) 52 Natl Acad Arbs Ann Proc 126.
105 The Explanatory Memorandum at 325-332; O’Regan notes that amongst these problems were: ‘Extended delays in obtaining relief, excessive formalism in the preparation of cases, overreliance on the use of lawyers and consequent expense…’ O’Regan (1989) at 559. Parties to disputes further complained about the competence of the members of the Industrial Courts.
106 Or at least its compulsory functions.
107 Sections 115(1) & (4) of the LRA. For the purposes of this paper, the most pertinent disputes required to be referred to conciliation and then to arbitration are those stipulated in section 191 of the LRA. For a list of the CCMA’s discretionary functions, see the residual provisions of section 115 of the LRA. Consult too Du Toit et al (2003) at 32-33 and the CCMA’s Annual Report 2009-2010 where it describes its functions as follows:

‘The CCMA’s compulsory statutory functions are to –

• conciliate workplace disputes;
• arbitrate certain categories of disputes that remain unresolved after conciliation;
• establish picketing rules;
• facilitate the establishment of workplace forums and statutory councils;
• compile and publish information and statistics about our activities;
• accredit and consider applications for subsidy by bargaining councils and private agencies; and
• provide support for the Essential Services Committee.

The CCMA’s discretionary statutory functions are to –

• supervise ballots for unions and employer organisations;
• provide training and information relating to the primary objective of the LRA;
• advise a party to a dispute about the procedures to follow;
• offer to resolve a dispute that has not been referred to the CCMA; and
As alluded to above, the effective functioning of the CCMA when fulfilling these obligations is supported by its distinctive features. Together with its independent status, these contribute to realising the LRA’s goals generally. Before considering the appropriate scope of review, it is necessary to address the CCMA’s characteristics in detail. They are accordingly analysed below. First, however, the CCMA’s status as an independent tribunal is briefly discussed.

3.1 The CCMA as an independent body

To secure the objects of legitimacy and credibility, the CCMA was established as an independent institution.\(^{108}\) It is managed by its governing body\(^{109}\) which consists of a chairperson, the director of the CCMA\(^{110}\) and nine other members. The members are nominated by the National Economic Development and Labour Council (‘NEDLAC’)\(^{111}\) and hold office for periods of three years.\(^{112}\) When nominating the members of the CCMA’s governing body, NEDLAC is obliged to ensure equal representation from organized labour, organized business and government.\(^{113}\)

As such, all major stakeholders are involved, consistently with the tenor of the LRA.\(^{114}\) This ‘tripartite’ approach to developing and implementing labour policy and legislation is widely recognised as necessary for the credibility and legitimacy of relevant policies and laws. The CCMA as a statutory (albeit independent) institution is no exception and thus its credentials

\(^{108}\) Section 113 of the LRA.

\(^{109}\) The governing body, in terms of section 3 read with Schedule 3 of the Public Finance Management Act 1 of 1999, is also the official accounting authority of the CCMA.

\(^{110}\) While part of the governing body, the Director is not empowered to vote on decisions it takes; section 116(2) of the LRA.

\(^{111}\) NEDLAC was established in terms of section 2 of the National Economic, Development and Labour Council Act 35 of 1994 (‘the NEDLAC Act’). NEDLAC’s Executive Council is comprised of representatives from organized business, organized labour, organizations of community and development interests and the state; section 3 of the NEDLAC Act. For the objects, powers and functions of NEDLAC, see section 5 of the NEDLAC Act.

\(^{112}\) Sections 116(1) & (2) of the LRA.

\(^{113}\) Together with one independent person for the position of chairperson; section 116(3) of the LRA.

\(^{114}\) See the purposes of NEDLAC as well as the composition of its Executive Council as referred to above; see also sections 3 & 5 of the NEDLAC Act. As Cheadle notes, specifically in relation to drafting the Codes of Good Practice (provided for in section 203 of the LRA), allowing all ‘social partners’ to participate in the process promotes legitimacy; Halton Cheadle ‘Regulated flexibility: Revisiting the LRA and the BCEA’ (2006) 27 ILJ 663 at 685 para 77. For an historical account of the political circumstances which gave rise to the involvement of trade unions in governmental policy and legislative drafting, consult Du Toit et al (2003) at 16-17; Department of Labour The Innes Labour Brief: A strategic approach for the Minister of Labour (1994) 6(1) at 58-62, as cited in Du Toit et al (2003) at 17 and Catherine O’Regan ‘1979-1997: Reflecting on 18 years of labour law in South Africa’ (1997) 18 ILJ 889 at 898-899.
are boosted by the tripartite nature of its governing body.\footnote{The appropriateness of a tripartite approach to the composition of the CCMA’s governing body reflects that of the International Labour Organisation (‘the ILO’). The ILO’s governing body consists of 56 titular members (including 28 representatives from governments, 14 employee representatives and 14 employer representatives) and 66 deputy members (including 28 representatives from governments, 19 employee representatives and 19 employer representatives), available at \url{http://www.ilo.org/gb/AboutGB/lang--en/index.htm}, accessed on 19 October 2010.} Cooperation from all parties to CCMA disputes is concurrently encouraged.\footnote{Du Toit et al (2003) at 5; Benjamin (2009) at 26. See also John Brand ‘CCMA: Achievements and challenges – Lessons from the first three years’ (2000) 21 ILJ 77 at 80 for a discussion of the legitimacy which this approach has lent to the CCMA. Brand emphasizes the significance of involving all stakeholders in achieving that legitimacy. Consider too the CCMA’s Annual Report of 2009-2010 at 5.} In addition to managing the CCMA and its affairs, the governing body oversees the appointment of commissioners. It is required in this regard to prepare a Code of Conduct for commissioners and to ensure their compliance therewith.\footnote{Section 117 of the LRA; Department of Justice The Code of Conduct – Commissioners Consolidated Labour Court Directive 2010, available at \url{http://www.worklaw.co.za/SearchDirectory/Codes_Of_Good_Practice/COMMISSIONERS.asp}, accessed on 18 July 2012.}

Notwithstanding its independence in name and management, the CCMA is primarily financed by the Department of Labour. To this extent therefore, it is dependent on government. Fortunately, there is no evidence to suggest that this has affected its ability to operate impartially and objectively.\footnote{Details of its financing obligations and allowances are set out in section 122 of the LRA.} Still, given its administrative standing,\footnote{See the discussion above and SARFU para 138.} the CCMA remains accountable to the Executive. Each year, it is obliged to submit an annual report of its activities and financial position to the Minister of Labour.\footnote{Section 122(3) of the LRA. This report must be tabled in parliament by the Minister within 14 days of its submission.} A statement of the CCMA’s estimated income, expenditure and future financing needs must similarly be provided.\footnote{Section 115(d) of the LRA.} The institution’s accountability, coupled with its duty to compile and publish information and statistics on its activities,\footnote{Section 122(3) of the LRA.} preserve the CCMA’s integrity. All told, it enjoys measurable respect from the public and its stakeholders as a result.\footnote{Benjamin (2013) at 53.} The features of CCMA proceedings complement this and a discussion of those features follows.
In giving effect to both the purposes of the LRA and the institution’s establishment, CCMA proceedings are characterised by certain key traits, including accessibility, flexibility and informality and expeditiousness. It is instructive to address these in turn.

### 3.2.1 Accessibility

First, CCMA proceedings are designed to be accessible to the general public. There are at least three ways in which this objective is achieved. To begin with, the CCMA’s services are essentially free. There are no costs for referring unfair dismissal and unfair labour practice disputes to the institution at all. All employees, no matter how poor, may therefore do so. Supplementing this is Rule 25 of the Rules for the Conduct of Proceedings before the CCMA (‘the CCMA Rules’). In terms of this Rule, legal representation is prohibited in all unfair dismissal proceedings arising from the alleged misconduct or incapacity of the dismissed employee. Should either or both of the parties to the dispute be desirous of lawyers, they are required to make express application therefore to the presiding commissioner. While

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124 The Explanatory Memorandum at 317-318.  
125 Theron and Godfrey emphasize that, particularly in the South African context where poverty is rife, social justice is necessarily bound to socio-economic factors. Achieving social justice in the workplace therefore requires access to socio-economic resources and the elimination of discrepancies between different racial and other groups; Theron & Godfrey (2002) at 25-26. In the absence of accessibility, the LRA’s objective of achieving social justice might never be achieved.  
126 Only under exceptional circumstances are parties required to pay fees to the CCMA; consult, in this regard, sections 123, 140, 147, 188A & 189A of the LRA and www.ccma.org.za, where an outline of those circumstances is provided.  
127 Legal representation is currently prohibited during all conciliation proceedings, regardless of the nature of the dispute. Still, parties may be represented by a director or employee of the party in question, or by any member, office bearer or official of the party’s registered trade union or registered employers’ organization; rule 25 of the CCMA Rules. Note, however, that in Law Society of the Northern Provinces v Minister of Labour and Others (NGHC) unreported case no 61197/11 of 15 October 2012, the High Court ruled that the prohibition of legal representation during CCMA arbitration proceedings was unconstitutional. It thus ordered the CCMA to revise rule 25 within 3 years of its judgment. For the duration of that 3 year period, the Court’s decision will be suspended and so legal representation will remain precluded from CCMA proceedings until October 2015 (or the CCMA amends the CCMA Rules). For the CC’s earlier (and effectively contrary) pronouncement on the matter, see Netherburn Engineering CC t/a Netherburn Ceramics v Mudau NO & others [2009] 6 BLLR 517 (CC).  
128 In the absence of both the commissioner’s and the other party’s consent, the applicant is required to satisfy the commissioner (in terms of Rule 25(1)(c)) that it would be unreasonable to expect the applicant to deal with the dispute without legal representation, taking account of the following factors:  
   (a) the nature of the questions of law raised by the dispute;  
   (b) the complexity of the dispute;  
   (c) the public interest; and
there are various reasons for the exclusion, its principal impact on accessibility is that it minimizes the costs of arbitration proceedings. Concomitantly, the preclusion promotes access to the institution. As discussed in later paragraphs, it supports timeous dispute resolution too. Yet, its implications for CCMA commissioners can be severe. These are considered under ‘expeditiousness’ below. Unfortunately, the frequency of review proceedings curtails the value of Rule 25 and the CCMA’s free services; this effect must consequently be accounted for when revising the test for review.

Finally, the CCMA’s accessibility is endorsed by its extensive geographical presence. The institution boasts 19 offices across the country, making its services readily available to the majority of South African residents.

3.2.2 Flexibility and informality

The second critical feature of CCMA proceedings is that of flexibility. Combined with informality, flexibility is important to ensuring that disputes are resolved in a manner apposite both to employment relationships generally and to individual cases. Section 138 of the LRA is the principal statutory mechanism for enabling flexibility.

(d) the comparative ability of the opposing parties or their representatives to deal with the dispute.’

Until 1 January 2012, the statistics on the number of parties represented during arbitration proceedings were unreliable. Fortunately, as of that date, the CCMA’s CMS database has been revised to include mandatory recording of statistics on legal representation. More recent statistics on the matter are accordingly now both available and arguably more legitimate; Benjamin & Gruen at 59 and Benjamin (2013) at 11-12.

Which make up the majority of disputes referred to the institution; for the percentage of disputes concerning misconduct and incapacity dismissals, consult the CCMA’s Annual Report 2009-2010.

Rule 25 of the CCMA Rules currently ensures this. Note, however, Law Society of the Northern Provinces. The prohibition contrasts starkly with court proceedings, the costs of which are often prohibitive; Currie & De Waal at 138-139 & 718.

For one, commissioners are denied the benefits enjoyed by the courts of assistance from the parties’ legal representatives; Benjamin (2007) at 9.

Consult, however, Herholdt v Nedbank Ltd (2012) 33 ILJ 1789 (LAC) paras 53-56, where the Judge contested this view.

In the financial year of 2009 to 2010, the CCMA opened 3 new offices, thereby further improving access to its services in response to the global economic crisis; the CCMA’s Annual Report 2009-2010 at 3, 88 & 89.

A comprehensive discussion of the unique nature of employment relationships falls outside the scope of this thesis. Suffice to say here that the employment relationship is characterised by an imbalance of power; Sidumo para 74. For detailed discussions thereof, consult Brand et al (2008) at 15-18.

This section simultaneously promotes informality; Brand et al (2008) at 17. The statute promotes flexibility not only by granting this broad administrative discretion to CCMA commissioners but also by providing for Codes of Good Practice under section 203 of the Act. These codes are detailed in later paragraphs and constitute a form of ‘soft law’; Cheadle at 668.
a) The nature of commissioners’ discretionary powers

Section 138 addresses the manner in which arbitration proceedings are to be conducted. Its relevant provisions read as follows:

‘138. (1) The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities.
(2) Subject to the discretion of the commissioner as to the appropriate form of the proceedings, a party to the dispute may give evidence, call witnesses, question the witnesses of any other party, and address concluding arguments to the commissioner…
(6) The commissioner must take into account any code of good practice that has been issued by NEDLAC or guidelines published by the Commission in accordance with the provisions of this Act that is relevant to a matter being considered in the arbitration proceedings.
(7) Within 14 days of the conclusion of the arbitration proceedings—
(a) the commissioner must issue an arbitration award with brief reasons, signed by that commissioner;…
(b) …
(c) …. 
(9) The commissioner may make any appropriate arbitration award in terms of this Act, including, but not limited to….
(10) The commissioner may make an order for the payment of costs according to the requirements of law and fairness in accordance with rules made by the Commission in terms of section 115 (2A)( j) and having regard to—
(a) any relevant Code of Good Practice issued by NEDLAC in terms of section 203;
(b) any relevant guideline issued by the Commission.’

It is significant that commissioners are afforded substantial discretion by this section to determine the form which arbitration proceedings take. In addition to reducing the

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137 Section 136 of the LRA provides for commissioners to be appointed to arbitrate disputes.
138 Clark’s opinion on this subsection and its relationship with subsection 138(1) is detailed below; Clark (1997) at 616-617.
139 Section 138(10) provides a good example of a discretion required to be exercised with reference to certain considerations. Thus, the discretion is not completely unfettered and is subject to stipulated constraints; Consult generally, in this regard, Cheadle at 668 para 20.
140 Benjamin (2007) at 8; Brand (2000) at 87. Note that Le Roux has argued that the CCMA Rules began the process of formalizing CCMA proceedings. In turn, he submits, the breath of commissioners’ discretionary powers under section 138 was reduced; PAK Le Roux ‘New regulations governing conciliation and arbitration proceedings at the CCMA’ (2000) 9(11) Contemporary Labour Law 105 at 110. Yet, as the CCMA Rules regulate only the time periods and formal procedures to be followed, prior to and during conciliation and arbitration proceedings, they do not regulate the manner in which proceedings are actually conducted. As such, it is doubtful whether the CCMA Rules have had a substantial impact on the discretion which commissioners enjoy.
technicalities and delays prevalent in court processes, the legislature’s intention when granting this discretion was to promote flexibility and informality in CCMA arbitrations. In the context of employment relationships, there are sound reasons for this. For one, where parties are likely to continue with their relationship following the dispute resolution process, traditional litigation resulting in a ‘winner’ and a ‘loser’ is undesirable. If anything, it may serve to aggravate existing hostility between the parties. Thus, while commissioners’ exercises of discretion under section 138 may be reviewed in terms of section 145 of the LRA, when doing so, courts should recount both the extent of commissioners’ discretionary powers and the rationale underlying them.

The statutory discretion of commissioners consists of several components. Two of these are clearly stipulated in section 138 itself. First, commissioners are obliged to exercise their discretions in such a way that disputes are fairly and quickly resolved. Secondly, when resolving disputes, they must address the principal merits of each, without undue legal or technical formality.

under section 138 of the LRA. Arguably nonetheless, the CCMA guidelines on misconduct arbitrations do limit the breadth of commissioners’ discretionary powers; CCMA Guidelines: Misconduct arbitrations in GenN 602 GG 34573 of 2 September 2011 (‘the Guidelines’). For commissioners’ similarly wide discretionary powers to determine appropriate awards, consider sections 193 & 194 of the LRA, read with subsequent chapters of this thesis.

141 The Explanatory Memorandum at 315-322; Benjamin (2009) at 26.

142 Consult section 138 itself.

143 Brand et al (2008) at 15. Mischke & Brand comment further that it is for this reason that less formal procedures are better suited to labour dispute resolution. They observe that ‘[i]t is possible for disputes to be processed in a manner that satisfies the needs, and considers the interests, of both parties to such an extent that they emerge from the process mutually satisfied and recommitted to their extended relationship…’; Carl Mischke (adapted by John Brand) ‘Overview of the dispute system’ in Brand et al (2008) at 15.

144 Section 145 was intentionally cast in narrow terms. It mimics section 33 of the Arbitration Act 42 of 1965, which provides for narrow grounds of review in respect of private arbitration awards. As Benjamin records, this suggests that the legislature’s intention when drafting the section was that Labour Courts would be obliged to conduct review proceedings comparably to the manner in which the civil courts do when reviewing private arbitration proceedings; Benjamin (2007) at 33. See also the Explanatory Memorandum at 315-322 and Shoprite Checkers (2000) (LC). The scope of section 145 has since been extended by the suffusion of section 145 with the reasonableness standard however; Sidumo para 109, read with Bato Star.

145 For the appropriate approach to reviewing CCMA arbitration awards generally, consult chapters 3 and 4 of this thesis and the conclusion hereto; see also, Foschini Group v Maidi & others [2010] 7 BLLR 689 (LAC) paras 32-35; Pep Stores Pty Ltd v Laka NO & others (1998) 19 ILJ 1534 (LC); Naraindath v CCMA & others (2000) 21 ILJ 1151 (LC) and Le Monde Luggage t/a Pakwells Petje v Commissioner Dunn & others [2007] 10 BLLR 909 (LAC). In Le Monde Luggage, the LAC confirmed the approach endorsed by the Court in Naraindath that proceedings akin to those of the small claims court were generally apposite to CCMA arbitrations.

In *Naraindath v CCMA & others*, Wallis AJ examined the nature of commissioners’ discretionary powers in detail. He began by observing that these powers were measurably broad and that they afforded commissioners significant leeway as to the form of arbitration proceedings. Explaining the emphasis in section 138 on conducting arbitrations ‘with the minimum of legal formalities’, the Judge noted that commissioners were not required to mimic the formal procedures of the courts. This would counter the Act’s intentions when establishing the CCMA. Nonetheless, held Wallis JA, commissioners’ discretionary powers were subject to the qualification that arbitrations were not to deprive either of the parties of their right to a fair hearing. Arbitration awards evincing such deprivation would be susceptible to review. According to him, specific guidelines for arbitration proceedings could accordingly not be formulated. While at times the ‘traditional adversarial approach’ to proceedings might be warranted, the Judge expected those occasions to be scarce. In conclusion, Wallis JA offered an outline of the process CCMA commissioners were to follow during arbitration proceedings; he stated:

‘In general a commissioner will start with the brief statements required by the rules setting out the stances of the respective parties. The task of commissioner[s] may be eased by having available a record of what the relevant witnesses said at a disciplinary enquiry. There may well be documents which are relevant and the consideration of which will dispose of peripheral matters. Ordinarily there will be no legal representation. In those circumstances it is wholly appropriate for the commissioner to conduct the proceedings in the same manner in which commissioners of the Small Claims Court have for many years conducted proceedings with conspicuous success. The proceedings before that tribunal are informal in nature and conducted in a manner

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147 *Naraindath v CCMA & others* [2000] 6 BLLR 716 (LC).

148 For comprehensive explanations of the confines of commissioners’ powers and obligations, consult Benjamin (2007) at 8-19 and chapters 3 and 4 of this dissertation.

149 *Naraindath* para 26. See also *Foschini* (2010) (LAC). In Benjamin’s view, reviewing courts should accordingly consider, for example, the extent to which a procedural or substantive rule applicable to judicial proceedings should apply to CCMA arbitrations; Benjamin (2007) at 17.

150 Benjamin (2007) at 9. In the event of a conflict between expediting the process and upholding the parties’ rights to a fair hearing, parties’ rights are to be preferred; *Northern Training Trust v Maake & others* [2006] 5 BLLR 496 (LC) para 29; *Foschini Group (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2002) 23 ILJ 1048 (LC) and *Halcyon Hotel (Pty) Ltd t/a Baraza v CCMA & others* [2001] 8 BLLR 911 (LC).

151 *Naraindath* para 27.

152 See, however, *Char Technology (Pty) Ltd v Mnisi & others* [2000] 7 BLLR 778 (LC) para 1 and *Eastern Cape Agricultural Cooperative v Du Plessis & others* (2000) 21 ILJ 1335 (LC) para 31. In both cases, the Courts described the key duties of commissioners at the commencement of arbitration proceedings, with express reference to assisting lay applicants and lay employers. Since *Naraindath*, specific guidelines have nonetheless been published in relation to misconduct arbitrations; The Guidelines.

determined by the commissioner subject to the overriding need to comply with the principles of natural justice.\textsuperscript{154}

Subsequently, in \textit{CUSA v Tao Ying Metal Industries & others},\textsuperscript{155} the CC explained the discretion as requiring commissioners to: ‘cut through all the claims and counter-claims and reach for the real dispute between the parties.’\textsuperscript{156} Notably, it added that ‘to perform th[at] task effectively, commissioners must be allowed a significant measure of latitude in the performance of their functions.’\textsuperscript{157} However, held the majority, three constraints attached to commissioners’ exercises of discretion too. These included that, when resolving disputes, commissioners were to determine the ‘real dispute between the parties’, ensure fairness to both parties and finalise the matter efficiently.\textsuperscript{158}

On this basis, the test for review might be reduced to asking whether commissioners had identified the relevant parties’ dispute accurately and resolved it fairly and quickly. The proposal is helpfully concise. Yet, O’Regan J’s dissenting judgment in \textit{Tao Ying},\textsuperscript{159} suggests that greater depth of analysis may be needed. While accepting the tenor of the majority’s sentiments, she recorded:

‘I proffer two points of caution. First, it is, at the end of the day, essential for the decision-maker in a fair adjudicative process to understand what the issues for decision are. Moreover, when that process is adversarial, it is necessary that the parties understand the issues as well, so that those issues may be properly engaged. We must be careful that, in attempting to acknowledge the informality of the processes before the CCMA, we do not lose sight of the essentialia of an adjudicative process.’\textsuperscript{160}

Thus, commissioners remain bound to apply the basic tenets of adjudication when doing so is necessary to secure fairness.\textsuperscript{161} Since \textit{Tao Ying}, the LC in \textit{Transnet Freight Rail v Transnet Naraindath} para 32; consult also sections 26-33 of the Small Claims Court Act 61 of 1984. Wallis AJ’s views have been endorsed by subsequent courts; \textit{Foschini} (2010) (LAC) paras 32-35; \textit{Le Monde Luggage} para 17. In the latter, the Court held in this regard that: ‘The arbitration process before a member of the second respondent [the CCMA] should not be reduced to the evidentiary formalism which applies in a formal court of law.’

\textsuperscript{154} \textit{Naraindath} para 32; consult also sections 26-33 of the Small Claims Court Act 61 of 1984. Wallis AJ’s views have been endorsed by subsequent courts; \textit{Foschini} (2010) (LAC) paras 32-35; \textit{Le Monde Luggage} para 17. In the latter, the Court held in this regard that: ‘The arbitration process before a member of the second respondent [the CCMA] should not be reduced to the evidentiary formalism which applies in a formal court of law.’

\textsuperscript{155} \textit{CUSA v Tao Ying Metal Industries & others} [2009] 1 BLLR 1 (CC)

\textsuperscript{156} Ibid para 65.

\textsuperscript{157} Ibid.

\textsuperscript{158} Ibid.

\textsuperscript{159} \textit{CUSA v Tao Ying Metal Industries & others} [2009] 1 BLLR 1 (CC).

\textsuperscript{159} Ibid para 152.

\textsuperscript{160} Ibid; \textit{Carephone} para 20; \textit{Sidumo} para 208. When doing so, commissioners should have regard to the competing interests of the parties to the dispute, with reference to relevant principles of labour law and considerations of equity; \textit{Sidumo} paras 76-77 & 168-184.
Bargaining Council & others\(^{162}\) has lent instructive substance to the CC’s comments. There, the Court defined commissioners’ decision-making duties as incorporating: applying the laws of evidence;\(^{163}\) applying the substantive law of dismissal; applying their minds to materially relevant facts; disregarding materially irrelevant factors; and weighing up materially relevant facts and issues.\(^{164}\) Clearly then, despite their mandate to finalise disputes quickly and informally, commissioners are obliged to meet a minimum standard of due process.\(^{165}\)

Even so, the central implication of commissioners’ prerogative to conduct proceedings as they see fit, is that arbitrations need not be adversarial in nature. Unless it is crucial to preserving the parties’ rights, arbitrations should not imitate formal court processes.\(^{166}\) A more inquisitorial approach is often better suited to resolving employment disputes.\(^{167}\) This does not mean that commissioners must favour one approach to the complete exclusion of another, however. As Benjamin points out, rather than selecting a cleanly adversarial or strictly inquisitorial stance, arbitrators should focus on addressing the substantial merits of the dispute before them and may run arbitrations in any manner required to achieve this.\(^{168}\)

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\(^{163}\) Note, however, the SCA’s directive in *Edcon* that the applicant’s contention that the commissioner had admitted uncorroborated hearsay evidence did not require investigation on account of the award’s substantive reasonableness; *Edcon Ltd v Pillemer NO & others* (2009) 30 ILJ 2642 (SCA).

\(^{164}\) *Transnet Freight Rail* para 16. See also in this regard *Sasol Mining (Pty) Ltd v Commissioner Nggeleni & others* [2011] 4 BLLR 404 (LC) para 10, citing *Sidumo* para 268.

\(^{165}\) Commissioners’ obligations during misconduct dismissal arbitration proceedings have been expressly regulated by the Guidelines. These Guidelines comprise numerous pages of instructions to commissioners as to how misconduct dismissals should be conducted. While the instructions are undoubtedly helpful for commissioners, if faultless compliance therewith is required to meet the reasonableness test on review, the guidelines may have severe consequences for the efficiency of both arbitration and review proceedings. For one, the incidence of review proceedings may increase. In addition, the likelihood of finding awards reasonable may become negligible. Given the bulk and intricacy of the Guidelines, commissioners cannot, in any event, fairly be expected to display perfect compliance with each and every guideline in their awards. As such, while the Guidelines are informative in so far as they add content to the nature of commissioners’ obligations, they should not become the basis for assessing the reasonableness of CCMA arbitration awards. For further directions on the manner in which CCMA proceedings are to be conducted, consult the Commission for Conciliation, Mediation and Arbitration *CCMA Practice and Procedure Manual* 5 ed (November 2010), available at [http://www.ccma.org.za/UploadedMedia/2010%20Practice%20and%20Procedure%20Manual.pdf](http://www.ccma.org.za/UploadedMedia/2010%20Practice%20and%20Procedure%20Manual.pdf), accessed on 11 June 2012 (‘the Manual’).

\(^{166}\) As Benjamin points out, the courts have not always endorsed this idea, with some judges ‘issu[ing] severe warnings to arbitrators as to the consequences of departing from the conventional adversarial hearing…’; Benjamin (2007) at 17-19. This encourages commissioners to adopt adversarial methods of conducting arbitrations rather than more inquisitorial methods. In turn, flexibility in CCMA proceedings is hampered.

\(^{167}\) Unfortunately, despite this, there is an alarming trend towards holding commissioners to the standards required of the judiciary during review proceedings; Benjamin (2007) at 10.

\(^{168}\) Provided that the parties’ rights to a fair hearing are not violated by assuming a more inquisitorial approach and that the process is expeditiously and fairly conducted; Benjamin (2007) at 17-19. According to Benjamin, reviewing courts have often failed to acknowledge this. Again, the flexibility advocated by the LRA is hindered.
To understand the options available to commissioners, it is useful to consider the traditional formulations of these two discrete types of dispute resolution process. Looking to the adversarial approach first, Brand describes it as envisaging the parties as embroiled in a contest against one another, with the presiding officer performing the role of ‘umpire’. At the extreme end of this model, the decision-maker is completely detached from the parties’ dispute and entirely neutral. To attain an impartial image, he or she refrains from asking questions of the parties or interfering in the dispute as far as possible. The system ensures that witnesses are subjected to cross-examination, but it essentially submits control of the proceedings to the parties. In contrast, during less adversarial proceedings, the decision-maker would assume greater control of the hearing, inquiring about facts and evidence from the parties and calling and questioning witnesses when necessary.

Brand observes that the principal difficulty with the latter model - the so-called ‘inquisitorial approach’ - is that it strains the decision-maker’s ability to appear neutral and impartial, which is vital to achieving natural justice. Moreover, it obliges decision-makers to ‘dominate’ the proceedings, demanding greater skill and competency on their part than is needed for adversarial processes. Adding to these difficulties are those associated with

169 Which is traditionally used by the courts.
171 Whether by requiring further evidence (by requesting specific witness testimonies for example) to determine the dispute or otherwise; Brand (1993) at 105-106.
172 Which Clark records is considered crucial to ensuring that the principles of natural justice are upheld; Clark (1997) at 615.
173 Clark (1997) at 615; Albertyn observes that the question of control is central to the nature of dispute resolution processes in general; Christopher Albertyn ‘Specialised arbitration and mediation’ in Paul Pretorius (ed) Dispute Resolution (1993) at 113; see also Clark (1997) at 611; Guideline 33 of the Guidelines.
174 Consult too Dimbaza Foundaries Ltd v CCMA & others [1999] 8 BLLR 779 (LC); Benjamin (2013) at 24.
175 According to Brand et al (2008), arbitrators should be ‘fair, unbiased and independent’. For the nature of labour dispute resolution generally, see Brand et al (2008) at 19. A possible means of avoiding the problem of parties perceiving impartiality as a result of commissioners’ adopting an inquisitorial approach was usefully proposed in Eastern Cape Agricultural Cooperative paras 31-32. Consider too Benjamin (2013) at 25-26.
176 Brand (1993) at 105-106. Clark submits further that the two primary features of adversarial proceedings include the parties’ essential ‘control over the pre-hearing process…[and]…control over the hearing process’. This contrasts with inquisitorial or investigative proceedings where the arbitrator maintains substantial control over the manner in which proceedings are conducted and the issues in dispute determined; Clark (1997) at 611. Lord Justice Staughton in ‘Common law and civil law procedures: Which is the more inquisitorial?’ in Current Problems in Arbitration and Litigation Lecture series published by the Chartered Institute of Arbitrators (1988) 117 at 118 describes the nature of adversarial proceedings as follows: ‘[T]he essence of adversarial procedure is that the judge listens to the evidence and arguments of the parties, and decides between them; he does not make his own enquiries as to the facts, or adopt conclusions of fact not proposed by either party; nor does he propose or adopt arguments or conclusions of law differing from those which the parties put forward. By contrast, where the procedure is inquisitorial the judge can and does exercise all of those functions.’ See also Butler (1994).
excessive degrees of informality, which are exacerbated where the motive for informality is expeditiousness.\textsuperscript{177} As Brand submits, ‘justice and fairness’ may require time to achieve and efficiency should not be prized at their expense.\textsuperscript{178} Thus, some structure and order is necessary, in the absence of which, parties’ rights to fairness may be undermined.\textsuperscript{179} Chaotic attitudes to arbitrations accordingly cannot be tolerated.\textsuperscript{180}

Despite the potential pitfalls of the inquisitorial approach, in the context of CCMA arbitrations, where the parties are frequently unrepresented and lack the requisite skills to ensure that fundamental issues are addressed (or crucial witnesses called),\textsuperscript{181} handing control of the proceedings to the parties may endanger their rights. Were commissioners precluded from calling witness or questioning parties of their own accord, identifying the true issues in dispute may become fortuitous. As the inquisitorial approach allows commissioners to deal with all of the issues which, in their opinions, are relevant to determining a dispute fairly, the model offers a solution to these problems in CCMA proceedings.\textsuperscript{182} In turn, the parties are assured of a more material form of justice. Supplementing the suitability of this model in the employment context is that inquisitorial proceedings facilitate the narrowing of issues in dispute. As Brand records, it is due to this attribute that inquisitorial tactics have generally proved more effective for resolving labour disputes than formal legal pleadings and processes.\textsuperscript{183} As such, it is unsurprising that the Act endorses the inquisitorial method, rather than adversarial processes.\textsuperscript{184} All told therefore, not only does the informality of the inquisitorial approach accord with legislative intent but it promotes the features of flexibility and accessibility inherent in the CCMA.\textsuperscript{185} Unfortunately nonetheless, commissioners

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\textsuperscript{178} Ibid.
\textsuperscript{179} Ibid. Consult too Maake para 29 and Benjamin (2013) at 24, together with the references cited therein.
\textsuperscript{180} Brand et al (2008) at 17.
\textsuperscript{181} Clark (1997) at 615; Brand et al (2008) at 146.
\textsuperscript{182} Clark (1997) at 611; Guideline 33 of the Guidelines.
\textsuperscript{183} Brand (2000) at 79. Narrowing the issues in dispute requires commissioners to identify the true nature of the dispute between the parties. According to Brand, the process often leads to a ‘more accurate discovery of the real dispute between the parties than the adversarial exchange of pleadings.’; Brand (2000) at 79.
\textsuperscript{184} Clark (1997) at 615, citing Brand (1993) at 106.
\textsuperscript{185} Consider, in this regard, Clark’s reference to Wood’s remark that:

‘...The [investigative] arbitration process is more flexible than that of a tribunal ... the freedom from rigid precedent has been shown to be particularly valuable, enabling legal rules to be applied with greater attention given to the context and needs of the particular parties concerned. Perhaps above all, an arbitrator is freer to resist the pervasive pressure of legal processes which tend to divert attention from the central issues.’

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regularly do not conduct arbitrations in a typically inquisitorial fashion, preferring the ‘safer’ route promised by adversarial or court-like processes.\(^\text{186}\)

Having said that, in the context of compulsory, statutory arbitrations where Constitutional rights are at stake (including those conducted by the CCMA), care is required to secure parties’ rights.\(^\text{187}\) Thus, following inquisitorial models specifically designed for private and voluntary arbitration should be approached with caution during these proceedings. The submission is best illustrated by way of an example.

The model developed by the Independent Mediation Services of South Africa (‘IMSSA’) is instructive.\(^\text{188}\) That model was devised to ensure a ‘quick, fair, user friendly and non-judicial’ approach to private dispute resolution. To realise these goals, IMSSA dispensed with many of the court like documents and processes which it had previously used.\(^\text{189}\) In their place, a traditionally inquisitorial approach was implemented. As a result of the new system, the challenges of narrowing the issues in dispute were alleviated. In turn, IMSSA was able to limit the average time taken to conclude dismissal disputes to a single day.\(^\text{190}\)

\(^\text{186}\) Benjamin suggests various reasons for this, including: ‘...the absence of training and direction from the CCMA as to how to conduct an arbitration in this manner; the complexity of many unfair dismissal cases; the informality of pre-arbitration procedures; as well as the perception of parties and their representatives for whom adversarial proceedings are the norm. This perception is also reflected in the jurisprudence of the [Labour Courts] which tends to view informal adversarial proceedings as the preferred norm.’ Benjamin (2007) at 19. It was conceivably in response to these concerns that the Guidelines were published.

\(^\text{187}\) There are important differences between private and compulsory arbitration. First, during private arbitrations, the parties determine the terms of reference themselves and so retain a measure of control over the proceedings and the criteria used for resolving the dispute; Barney Jordaan, Peter Kantor & Craig Bosch Labour Arbitration with a commentary on the CCMA Rules 2 ed (2011) at 5-6; Brand et al (2008) at 41. Secondly, with private arbitrations, the parties choose their arbitrator – in contrast to the CCMA’s mandate to allocate arbitrators to disputes conducted under its auspices; Brand et al (2008) at 144 & 149. In addition, during compulsory arbitrations, control over the manner which proceedings take essentially vests in the relevant commissioner rather than the parties; Brand et al (2008) at 144. For further information on the distinctions between these proceedings, consult Sidumo paras 86-88; Martin Brassey Employment and Labour Law: Commentary on the Labour Relations Act vol 3 (2006) at A7–1–A7–2; Currie & De Waal at 651 fnnt 34; Telcordia Technologies Inc v Telkom SA Ltd 2007 (5) BCLR 503 (SCA) para 45; Total Support Management (Pty) Ltd & another v Diversified Health Systems (SA) Pty Ltd 2002 (4) SA 661 (SCA) para 24 and Steyn v Middelburg Ferrochrome (a division of Samancor Ltd) & others (2009) 30 ILJ 1637 (LC).

\(^\text{188}\) IMSSA was established in 1984, resulting in a significant increase in the number of labour disputes resolved through private arbitration; O’Regan (1989) at 557.

\(^\text{189}\) Including ‘pleadings, pre-trial meetings, discovery and legal representation’ and official records; Brand (2000) at 86-87.

\(^\text{190}\) Brand (2000) at 86-87.
At first glance, the IMSSA method seems entirely compatible with CCMA arbitration proceedings. However, in the context of the CCMA, the Constitutional rights of the parties to fair labour practices and a fair hearing are paramount, and the form of the proceedings must ultimately give effect to those rights. In contrast, during private arbitration proceedings, the parties’ foremost rights arise from the law of contract rather than the Constitution. Thus, to the extent to which the efficiency and informality of IMSSA-like processes jeopardise parties’ Constitutional rights, conducting CCMA arbitrations along identical lines would be inappropriate. Bearing both the advantages and disadvantages of inquisitorial processes in mind, the legitimacy of the proposal that commissioners should simply focus on resolving the substantial merits of the case quickly and fairly, is apparent. As such, neither a strictly inquisitorial model nor a stereotypically adversarial process should be favoured to the complete exclusion of the other.

An additional consideration when determining the appropriateness of the degree to which the inquisitorial approach is fitting, is the presence or absence of legal representation during the proceedings. According to Clark, one of the key determinants of whether proceedings should be conducted inquisitorially or adversarially is the nature of the parties’ representation, if any, during the arbitration concerned. Where the parties are not represented, inquisitorial processes are generally preferable. That principle, submits Clark, should nonetheless be subject to the proviso that where a complex legal issue is in dispute, or interests broader than those of the immediate parties to the dispute are at stake, adversarial

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191 As Clark observes, the South African system does not envisage the adoption of a purely investigative or inquisitorial approach to arbitration proceedings however; instead it recognises the utility of both hybrid models and adversarial ones; Clark (1997) at 612.
192 Sections 23 and 33 of the Constitution.
193 In Brand’s view, the efficient nature of CCMA proceedings adversely affects parties’ perceptions of fairness in the conciliation and arbitration processes. In support of this contention, he refers to the International Labour Organisation’s (ILO’s) finding that: ‘the pressure of attempting to complete all ‘simple’ dismissal cases within the time can also induce a sense in the parties of being subjected to undue pressure in the conduct of their case and of being denied a fair hearing.’; Greg Smith, Rob LaGrange & Andre van Niekerk Report by team of experts (1998) International Labour Organisation, as cited by Brand (2000) at 87. Unfortunately, given the pressures under which commissioners operate, parties’ perceptions in this regard are arguably legitimate. Sasol Mining para 7. he concern has partly been addressed by the CCMA through enhanced training and mentoring programmes; Benjamin (2013); For parties’ rights to a fair hearing, see Goldfields Investment Ltd & another v City Council of Johannesburg & another 1938 TPD 551 at 556; Sidumo para 263; Tao Ying Metal Industry (Pty) Ltd v Poob NO & Others (2007) 28 ILJ 1949 (SCA) para 126; Branford v Metrorail Services (Durban) & others (2003) 24 ILJ 2269 (LAC) and Telcordia Technologies paras 71-73 & 78.
197 Or ‘investigative’ approach as Clark labels it; Clark (1997) at 609-610.
198 Clark (1997) at 612.
proceedings may be better.\textsuperscript{199} Rule 25 of the CCMA Rules, while largely supportive of inquisitorial methods of conducting CCMA arbitrations,\textsuperscript{200} concurrently recognises the need for legal representation where complex legal questions arise.\textsuperscript{201}

Clearly then, there are numerous factors commissioners must account for when exercising their discretionary powers under section 138. Coupled with the technical and legalistic attitude to CCMA awards often evinced by the courts,\textsuperscript{202} determining the appropriate manner of proceedings can be onerous.\textsuperscript{203} As Godfrey and Theron observe, not infrequently, the Labour Courts demand ‘judicial standards’ from commissioners. For the reasons discussed above, requiring strict compliance with court-like standards is contrary to legislative intent and may threaten (rather than support) parties’ rights.\textsuperscript{204}

A further challenge faced by commissioners when conducting arbitrations, is again highlighted by Clark. It arises from sections 138(1) and 138(2) of the LRA which, in his view, are contradictory.\textsuperscript{205} While section 138(1) promotes an essentially inquisitorial approach, section 138(2) provides for the right of the parties to call and cross-examine witnesses – established features of the adversarial model.\textsuperscript{206} According to Clark, section 138(2) leaves the grant of that right in the hands of the relevant commissioner. Yet, the

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\textsuperscript{199} Ibid; Clark submits that granting commissioners the discretion to allow legal representation in suitable cases, as section 140 of the LRA did prior to the 2002 amendments, and rule 25 of the CCMA Rules currently does, facilitates an appropriate relationship between representation and the adoption of either an adversarial or an inquisitorial approach to the proceedings. For a contrary view, see \textit{Law Society of the Northern Provinces}.\textsuperscript{200} The CCMA Rules. In terms of this rule, legal representation is precluded from unfair dismissal proceedings, where the reason for the dismissal relates to the conduct or capacity of the relevant employee, unless both parties consent, or the commissioner allows it.\textsuperscript{201} Rule 25(1)(c) of the CCMA Rules.\textsuperscript{202} Benjamin (2007) at 17-19. In Benjamin’s opinion: ‘It is suggested that the tendency to articulate rules of general application is not an appropriate exercise of the LC’s supervisory jurisdiction. The role of the court should be to direct arbitrators as to how they should exercise the various statutory discretions conferred on them. Neither parliament nor the CCMA has sought to lay down a body of rules to deal with the conduct of arbitrations and it is not appropriate for the labour courts to step in and lay down rules of general application. The LC’s role should be to develop guidelines that assist arbitrators to exercise their wide-ranging statutory discretion in a manner consistent with the purposes of the Act and that does not violate the parties' rights.’; Benjamin (2007) at 17-19. Consult too Benjamin (2013) at 24.\textsuperscript{203} Benjamin (2007) at 8; for the approach which commissioners are obliged to adopt when conducting arbitration proceedings involving lay persons, see \textit{Char Technology} para 1 and \textit{Eastern Cape Agricultural Cooperative} paras 31-32.\textsuperscript{204} Coupled with the requirement that they provide only brief reasons for their awards; Section 138(7)(a) of the LRA; Theron & Godfrey (2002) at 59-60. Consider too, in this regard, \textit{Chemical Workers Industrial Union \& Others Sopelog CC} (1994) 15 \textit{ILJ} 90 (LAC) at 94-98. There, the LAC explained the significance of limiting the permissible scope of appeal during appeals against determinations of the Industrial Court.\textsuperscript{205} Clark (1997) at 616-617.\textsuperscript{206} Ibid.
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CCMA’s publicity leaflets, policy documents and general practice do not portray these rights in this manner. Instead, they depict the parties’ rights as absolute.\(^{207}\)

The contradiction (for the purposes of misconduct dismissal disputes at least) has ostensibly been clarified by the publication of the CCMA Guidelines: Misconduct Arbitrations (‘the Guidelines’).\(^{208}\) These Guidelines may be positive in so far as they resolve the tension between sections 138(1) and 138(2). Still, they curb the reach of commissioners’ statutory discretions extensively.\(^{209}\) In light of Clark’s observations above, whether the limits placed on commissioners’ powers are congruent with legislative intent is doubtful.

Under Guideline 14 for example, commissioners are advised of parties’ rights to call, examine and cross-examine witnesses (and present closing arguments) subject to their discretion in terms of section 138.\(^{210}\) This seems consistent with the Act. The Guidelines later state, however, that the parties are entitled to exercise these rights regardless of the manner of the proceedings. Read together with the remaining provisions of the Guidelines – which are protracted, rigid and mandatory in nature – these directives significantly restrict commissioners’ abilities to regulate the form of proceedings. The flexibility and informality needed for effective labour dispute resolution may consequently be endangered thereby. Whereas the purpose of the Guidelines is to promote consistency in the outcome of arbitration awards,\(^{211}\) whether this justifies the threats they pose to legislative intent and the efficacy of proceedings is questionable.\(^{212}\) A final concern is that the Guidelines may encourage review proceedings based on technical irregularities by commissioners who fail to comply strictly with each and every item. The Guidelines should accordingly be cautiously approached by reviewing courts, bearing in mind the constraints they impose on commissioners’ discretionary powers.

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\(^{207}\) Ibid.

\(^{208}\) CCMA Guidelines: Misconduct Arbitrations GenN 602 GG 34573 of 2 September 2011 (‘the Guidelines’).

\(^{209}\) Ibid.

\(^{210}\) Guideline 14 of the Guidelines.

\(^{211}\) Guideline 3 of the Guidelines.

\(^{212}\) Section 1(d)(iv) of the LRA.
b) The Codes of Good Practice

Returning to the Act’s espousal of flexibility, the Codes of Good Practice (enacted under section 203 of the LRA) (‘the Codes’) are noteworthy. Section 138(10) of the LRA obliges commissioners to have regard to these Codes when undertaking arbitration proceedings. Various Codes have been promulgated. By far the most pertinent of these for this dissertation is the Code of Good Practice for Misconduct and Incapacity Dismissals (‘Code for Dismissals’), which plays a critical role in most arbitrations. Item 1 of that code specifically affirms the need for flexibility. It reads: ‘[The Code] is intentionally general. Each case is unique, and departures from the norms established by this Code may be justified in proper circumstances’.

The coupling of Codes with firm legislative provisions was intended to facilitate certainty, while retaining the flexible nature of the process and law. In addition, it was hoped that the Codes would educate employers and employees about the proper procedures for resolving disciplinary issues in the workplace. Consequently, the incidence of dispute referrals to the CCMA was to be reduced. Unfortunately, this has not been the case. The formulation and purpose of the Codes are neatly described by Cheadle as follows:

‘The codes were to provide a legitimate, coherent, accessible and flexible jurisprudence to guide employer policy and practice, collective agreements and dispute resolution.’

Legitimacy and coherence were arguably achieved through the Codes’ implementation. Regrettably, the same cannot be said of their envisaged flexibility. According to Cheadle, while the codification of labour law by the Codes lent cogency to the law, the codification

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213 Flexibility in determining fairness in labour disputes has long been recognised as crucial to the dispute resolution process. As O’Regan recorded: ‘No hard and fast rules concerning substantive fairness can be set...’; O’Regan (1989) at 573. Debatably, the same is true of procedural fairness.
214 The Code of Good Practice Dismissals, Schedule 8 to the Labour Relations Act 66 of 1995 (‘Code for Dismissals’).
215 Note that the majority of arbitrations concern allegations of unfair dismissal based on misconduct or incapacity; Benjamin (2013) at 1; CCMA Annual Report 2009-2010 & CCMA Annual Report 2010-2011. See also Venter & Levy.
216 Benjamin (2009) at 27.
217 Benjamin & Gruen at 1. Regrettably, this has not been the case; Benjamin (2009) and Benjamin (2013).
218 Ibid.
219 Cheadle at 685 para 76; Benjamin & Gruen at 1.
220 Paul Benjamin & Carole Cooper ‘Innovation and continuity: Responding to the Labour Relations Bill (1995)’ 16 ILJ 258 (A) at 273.
process was intended to be on-going. The Codes were to be regularly updated, with reference to Labour Court judgments and CCMA awards. Yet, they have not been regularly revised and are now outdated, requiring extensive supplementation from legal precedent. Given their purported function as an educational tool for employers, employees and commissioners, the stagnancy of the Codes is concerning. The implications for flexibility are equally worrying. Exacerbating this, neither commissioners nor courts have succeeded in applying the Codes in the variable manner intended. On the contrary, they have largely enforced their provisions in a formal and technical fashion. Amongst other undesirable results, pre-dismissal hearings have frequently become ‘over-proceduralised’.

As Theron and Godfrey observe, the vital role flexibility plays in labour dispute resolution is demonstrated by the position of small businesses. When deciding disputes, the distinctive needs of these entities must therefore be accounted for by commissioners. The commentators cite the differences between the depth of employment relationships in small enterprises and larger ones as a prime illustration of their exigencies. In small businesses, the parties inevitably work closely together and often have meaningful personal relationships. In contrast, employees employed by large enterprises may rarely, if ever, interact with their true employers; managers and supervisors are their closest contacts and distant connections.

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221 Cheadle at 685 para 78.
222 See also Benjamin & Gruen at 61, where the authors assert that the Labour Court’s judgments on review constitute binding precedent. Thus, they argue, it is vital that the Codes of Good Practice are regularly updated to reflect the changing jurisprudence of the courts. Whereas the Codes of Good Practice indeed require revision from time to time, the submission that decisions on review are binding should be treated with caution. Decisions of this nature ought to bind later courts only to the extent to which similar facts are in dispute. In the absence of specificity in the facts, judgments handed down on review should not, however, necessarily give rise to precedent; consider, in this regard, K Van Dijkhorst ‘Courts: Stare decisis’ The Law of South Africa vol 5(2) 2 ed (2003) para 164 and Bourke’s Estate v Commissioner for Inland Revenue [1991] 4 All SA 94 (AD) at 101. In addition, as enquiries into reasonableness inevitably involve value judgments (in respect of which reasonable people may differ), where awards are overturned for unreasonableness, whether the relevant court’s reasoning would be binding is questionable; Fidelity Cash Management Service v Commission for Conciliation, Mediation & Arbitration & others (2008) 29 ILJ 964 (LAC) paras 98-102; Sidumo para 109; consult too chapter 4 of this dissertation.
223 Cheadle at 685 para 79.
224 Cheadle at 670 para 23; Benjamin (2009) at 47. Note, however, Benjamin’s earlier (seemingly contrary views); Benjamin (2007) at 22. See also PAK Le Roux ‘Dismissals for misconduct: Some reflections’ (2004) 25 ILJ 868 at 875 and Avril Elizabeth Home for the Mentally Handicapped v CCMA & others [2006] 9 BLLR 833 (LC) paras 838-841, where the LC cautioned commissioners against assuming overly technical attitudes to procedural fairness when resolving arbitrations. As detailed in subsequent chapters, the tendency towards rigid applications of the Codes of Good Practice should be borne in mind by reviewing courts.
characterise the parties’ working relationships. Resultantly, argue Theron and Godfrey, reinstatement is likely to be less suited to disputes involving small businesses than to cases involving larger ones. In addition, as small enterprises invariably have fewer resources available to them than their bigger counterparts, holding them to the same standards of procedural fairness may not be appropriate.

Theron and Godfrey’s sentiments are reflected in the Code for Dismissals, which directs commissioners to consider the differences between large and small entities when determining fairness in dismissal disputes. Again, in this way, the Code for Dismissals confirms the need for flexibility and variation in relation to both the manner of proceedings and the meaning of fairness.

Despite this directive, Theron and Godfrey’s study on CCMA proceedings involving small businesses reveals that commissioners only rarely consider the needs of small entities during the decision-making process. The authors propose that the primary reason for this is the perception held by commissioners that they are bound to resolve matters with reference to strict legal principles rather than equity and fairness. The perception is aggravated by the Labour Courts’ formal attitudes to CCMA awards. The impact of formal, technical approaches on small businesses is thus another contextual factor pertinent to review. Ultimately, in the absence of legislative amendment, fairness in disputes (particularly those concerning small enterprises) may only be achieved through the flexible application of the Codes. Regrettably, the courts’ and CCMA’s current approaches thereto, coupled with the

228 Ibid.
229 For further difficulties imposed by the LRA on small entities, see Theron & Godfrey (2000) at 71 and Theron & Godfrey (2002) at 61-62.
230 Item 1(1) of the Code for Dismissals. According to O’Regan, before the LRA’s promulgation in 1995, arbitrators generally accounted for the different exigencies of large and small employers; O’Regan (1989) at 572-3.
231 Or the express reference thereto in the Code for Dismissals itself.
233 As the court in Super Group Autoparts t/a Autozone v Hlongwane NO & others [2010] 4 BLLR 458 (LC) held, the LC is ultimately a court of equity; Super Group para 11. The role of equity should therefore be recalled during review proceedings. Consider further, in this regard, Brand (2000) at 89.
234 For commissioners’ obligation to apply the law as directed by the courts, consult Le Roux v Commission for Conciliation, Mediation and Arbitration & Others (2000) 21 ILJ 1366 (LC). In Le Roux, the Court referred with disdain to Hammond & Others v L Suzman Distributors (Pty) Ltd (1999) 20 ILJ 3010 (CCMA), where the presiding Commissioner had refused to follow a binding judgment of the LC as it did not lead to an equitable outcome. While the Court’s approach in Le Roux has been followed, given the need for flexibility, accessibility and social justice, the legitimacy of rigid adherence thereto is questionable; Theron & Godfrey (2002) at 37.

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stale status of the Codes and the technicality and length of the Guidelines, are inhibiting the realisation of these goals.

3.2.3 Expeditiousness and efficiency

The LRA intends to promote the ‘effective’ resolution of disputes.\textsuperscript{235} It is therefore unsurprising that one of the features of the CCMA is efficiency in dispute resolution.\textsuperscript{236} In the labour relations realm, efficiency was deemed crucial to maintaining industrial peace and enduring employment relationships. The interests of both parties to the dispute are usually aligned in this regard.\textsuperscript{237} The LRA promotes expeditiousness in CCMA proceedings in several ways,\textsuperscript{238} not least of all by requiring employees to refer unfair dismissal disputes for conciliation within 30 days of the dismissal in question.\textsuperscript{239} Where the dispute concerns an allegedly unfair labour practice, the employee must refer it for conciliation within 90 days of the unfair practice itself.\textsuperscript{240} Once a referral has been received, the CCMA is obliged to conciliate the matter within 30 days.\textsuperscript{241} Where conciliation fails, parties have 90 days in which to refer the unresolved dispute to arbitration.\textsuperscript{242} Compared to the time periods involved in court proceedings (where prescription is often the only constraint placed on permissible

\textsuperscript{235} Section I(d)(iv) of the LRA.
\textsuperscript{236} Sidumo paras 124-125; Food & Allied Workers Union on behalf of Mbatcha & others v Pioneer Foods (Pty) Ltd t/a Sasko Milling & Baking & others (2011) 32 ILJ 2916 (SCA) (‘FAWU’) paras 21-22; section I(d)(iv) of the LRA; Benjamin (2007) at 3-6; the Explanatory Memorandum at 279 & 318-319; Benjamin (2009); Benjamin & Cooper.
\textsuperscript{237} Employees’ interests lie primarily with finding alternative employment should they not be reinstated and in securing financial relief in the period between their dismissals and reinstatement or new employment. Employers, on the other hand, require speedy resolution of disputes to ensure both financial certainty and workforce continuity. Consider, for example, the implications of section 193 of the LRA (providing for ‘retrospective reinstatement to the date of the dismissal’) for small employers; Theron & Godfrey (2002) at 54.
\textsuperscript{238} Benjamin summarises several key aspects of the Act which promote informal and expeditious dispute resolution, including: ‘short time periods for referring disputes, simplified dispute referral forms, compulsory conciliation of all disputes, an approach to arbitration that seeks to focus on the merits of cases rather than technicalities, restrictions on legal representation in dismissal arbitration, no right of appeal against arbitrators’ decisions and restrictions on the grounds for judicial review of arbitration awards…’; Benjamin (2009) at 26. See also Benjamin (2007) at 3.
\textsuperscript{239} Or of the date on which the employer took the final decision to uphold the dismissal; section 191(1)(b)(i) of the LRA. For the meaning of conciliation, consult Albertyn (1993) at 114.
\textsuperscript{240} Or of the date on which the employee became aware of the unfair labour practice in question; section 191(1)(b)(ii) of the LRA.
\textsuperscript{241} Section 135(2) of the LRA.
\textsuperscript{242} Section 136(1)(b) of the LRA. The CCMA has jurisdiction to arbitrate only certain kinds of disputes. Generally speaking, where the CCMA does not have jurisdiction to hear the matter, the dispute may be referred to the Labour Court for adjudication. For categories of dispute falling within the CCMA’s arbitral jurisdiction, see section 191(5), read with section 191(12), of the LRA. Note that, between 2009 and 2010, the average time period for finalizing arbitration proceedings was 39 days from the date of referral; CCMA Annual Report 2009-2010 at 14.
time lapses between disputes arising and proceedings being instituted)\textsuperscript{243} the CCMA’s time periods are remarkable and plainly encourage speedy dispute resolution.

Adding to this is the LRA’s provision for the compressed dispute resolution procedure known as ‘con-arb’.\textsuperscript{244} In con-arb proceedings, the matter is set down for conciliation and arbitration on the same day, and both processes are performed by the same commissioner.\textsuperscript{245} If conciliation is unsuccessful, the commissioner proceeds directly to arbitration, without the need for subsequent referral to arbitration.\textsuperscript{246} As Benjamin notes, con-arb has had a measurable impact on the time spent finalising disputes. Again, this process advances efficiency.\textsuperscript{247}

Of further import is the statutory duty of commissioners to issue awards within 14 days of the conclusion of arbitration proceedings.\textsuperscript{248} CCMA awards are final and binding,\textsuperscript{249} and no appeal lies against them.\textsuperscript{250} In terms of the LRA, parties aggrieved by commissioners’ decisions are limited to instituting review proceedings, based on one or more of the grounds set out in section 145. These grounds were intentionally cast in narrow terms and mimic those applicable to private arbitration awards under section 33 of the Arbitration Act 42 of 1965.\textsuperscript{251} The aim of confining their reach was to discourage review of CCMA awards, thereby

\begin{footnotes}
\item[244] Section 191(5A) of the LRA. Con-arb must be used where the dismissal or unfair labour practice relates to probation, or where neither of the parties has objected to the resolution of the dispute through con-arb. The con-arb process was implemented in 2002 by section 46(g) of the Judicial Matters Amendment Act 12 of 2002 and accordingly did not form part of the original Act. For a comprehensive discussion of both the advantages and disadvantages of the con-arb process in the context of CCMA proceedings, consult Alan Rycroft ‘Rethinking the con-arb procedure’ (2003) 24 \textit{ILJ} 699; see also Albertyn (1993) at 120-121.
\item[245] For the implications of this process both on the parties to disputes and the proceedings themselves, see Rycroft (2003) at 703-709.
\item[246] Section 191(5A) of the LRA. Benjamin records that the con-arb process has increasingly been used by the CCMA; Benjamin (2009) at 32; Benjamin (2013).
\item[247] Benjamin (2009) at 32; see also Benjamin & Gruen at 29. Con-arb is the default position. Parties may, however, object to the con-arb process when referring disputes to the CCMA. For the precise figures, consult the \textit{CCMA Annual Report 2010-2011}. For the successes and failures of con-arb, see Venter & Levy at 31-33.
\item[248] Section 138(7) of the LRA.
\item[249] Unless it is an advisory award; section 143 of the LRA. Arbitration awards may be enforced as though they were orders of court, provided only that the Director of the CCMA certifies that the award in question does not constitute an advisory award.
\item[250] Sections 143 & 145 of the LRA.
\item[251] Benjamin (2007) at 33; \textit{Shoprite Checkers} (2000) (LC). For an informative discussion of these grounds and their narrow nature, see \textit{Amalgamated Clothing & Textile Workers Union of SA v Veldspan (Pty) Ltd} (1993) 14 \textit{ILJ} 1431 (A).
\end{footnotes}
avoiding the delays associated with court processes. The need for efficiency in labour dispute resolution and the stark consequences of delay, submits Benjamin, justified doing so. Since their enactment nevertheless, the grounds provided for in section 145 have been extended by the CC to incorporate the constitutional standard of reasonableness.

The Explanatory Memorandum to the LRA explains the rationale for prohibiting appeals against CCMA awards. It records the bar as pivotal to ensuring the credibility and legitimacy of the new framework. Effectiveness, accessibility, efficiency and informality, and arbitration rather than adjudication were, in the Task Team’s view, key to realising these objectives. By dispensing with the option of appeals, unnecessary ‘legalism’ was to be avoided and speedy dispute resolution attained. According to the drafter’s of the Act:

‘…appeals lead to records, lengthy proceedings, lawyers, legalism, inordinate delays and high costs. Appeals have a negative impact on reinstatement as a remedy, they undermine the basic purpose of the legislation and they make the system too expensive for individuals and small business.’

The courts have repeatedly affirmed the import of the LRA’s dispute resolution structure, as well as its preclusion of appeals. Ironically, this is undercut by the cumbersome structure

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252 Limiting the parties’ rights of review (by providing for only narrow grounds in section 145) was intended to promote the expeditious resolution of labour disputes. It was further hoped that by confining review and prohibiting appeals, the difficulties associated with appeals against the Industrial Court’s decisions (which operated under the Labour Relations Act 28 of 1956) could be avoided; the Explanatory Memorandum at 318-319; O’Regan (1989) at 559; Brand (2000) at 77; Benjamin (2007) at 31-32. Brand recalls nonetheless that while limiting review and precluding appeals may promote efficiency and cost-effectiveness, parties have only one opportunity to have the merits of their disputes tested. In turn, their rights to fairness are endangered; Brand (1993) at 95.


254 In accordance with the Constitutional right to just administrative action; section 33 of the Constitution; Sidumo para 109.

255 The Explanatory Memorandum at 318-9.

256 Ibid.

257 Ibid. According to the Explanatory Memorandum at 319:

‘Prior to the establishment of the present LAC, it was argued that an appeal structure would provide the consistency required to develop coherent guidelines on what constitutes acceptable industrial relations practice. This has not been the case. The LAC’s judgments lack consistency and have had little impact in ensuring consistency in judgments of the Industrial Court. The draft Bill now regulates unfair dismissal in express and detailed terms and provides a Code of Good Practice to be taken into account by adjudicators. This will go a long way towards generating a consistent jurisprudence concerning unfair dismissal despite the absence of appeals.’

Consider too Brand (2000) at 77 and Benjamin (2007) at 32.

258 See, for example, Shoprite Checkers (2000) (LC) para 61; FAWU paras 21-22. For the distinction between appeal and review generally, consult Emma Fergus ‘The distinction between appeals and reviews – Defining the limits of the Labour Court’s powers of review’ (2010) 31 ILJ 1556; Coetsee v Lebea NO & another (1999) 20 ILJ 129 (LC); County Fair Foods (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others (1999) 20 ILJ 1701 (LAC); Shoprite Checkers (2001) (LAC) and Mthembu & Mahomed Attorneys v Commission
of appellate courts in South Africa, which exposes the decisions of the Labour Court on review to three tiers of appeal.\(^\text{259}\) Parties having the resources to institute appeal proceedings may appeal against the Labour Court’s order to the Labour Appeal Court, against the Labour Appeal Court’s order to the Supreme Court of Appeal and finally, against the Supreme Court of Appeal’s order to the Constitutional Court.\(^\text{260}\) Contributing to this is the unfortunate reality that well-resourced employers may institute review proceedings purely for the purposes of delay, with no genuine intention of pursuing the matter.\(^\text{261}\) The absence of legislative provision requiring review proceedings to be set down for hearing within a specific period of the serving and filing of the respondent’s replying affidavit, enables this tactic.\(^\text{262}\) Applications for review may accordingly be instituted\(^\text{263}\) but never heard.\(^\text{264}\)

Another threat to efficiency was posed by the LAC’s decision in *Carephone (Pty) Ltd v Marcus NO & Others*.\(^\text{265}\) There, the Court extended the grounds of review listed in section 145 of the LRA to include rational justifiability.\(^\text{266}\) The extension saw an influx in review proceedings.\(^\text{267}\) The Constitutional Court’s (‘CC’) subsequent decision in *Sidumo*, updating

\[^{259}\text{Consider, in this regard, Anton Steenkamp and Craig Bosch ‘Labour dispute resolution under the 1995 LRA: Problems, pitfalls and potential’ 2012 Acta Juridica 120.}\]

\[^{260}\text{Chevron Engineering (Pty) Ltd v Nkambule & others [2003] 7 BLLR 631 (SCA); NUMSA & others v Fry’s Metals (Pty) Ltd [2005] 5 BLLR 430 (SCA); Benjamin (2007) at 6-7. For the legislature’s response to remedying the delays and difficulties associated with the cumbersome structure of the courts, consider the draft Superior Courts Bill GG 33216 of 21 May 2010; at the time of writing the Bill was open for public comment. Should this Bill be passed, the Labour Courts will be dispensed with and all labour matters will proceed directly to the High Courts, thereby eliminating one tier of appeal. Consult too the Constitution Seventeenth Amendment Bill GG 32311 of 17 June 2009.}\]

\[^{261}\text{Benjamin (2009) at 41; Benjamin (2007) at 34; Benjamin & Gruen at 35-36.}\]

\[^{262}\text{Benjamin (2009) at 42; John Grogan ‘Stalled reviews: Lessons by the DOL’ (2005) 21(5) Employment Law 16.}\]

\[^{263}\text{Coupled with a convenient application for a stay of the CCMA arbitration award until such time as the review proceedings are heard. Note, however, the current Labour Relations Amendment Bill, which aims to remedy this problem, available at: https://www.labour.gov.za/downloads/legislation/bills/proposed-amendment-bills/lraamendmentbill.pdf, accessed on 27 November 2012.}\]

\[^{264}\text{Benjamin (2009) at 41-42; Steenkamp & Bosch at 131. See, however, K Young ‘Labour Court review applications: Diligence and the onus to pursue without undue delay’ (2007) 16(8) Contemporary Labour law 87; Autopax Passenger Services (Pty) Ltd v Transnet Bargaining Council & others [2007] 1 BLLR 39 (LC) and Bezuidenhout v Johnston NO & others [2006] 12 BLLR 1131 (LC).}\]

\[^{265}\text{In Carephone, the LAC found that when holding CCMA commissioners to the standards required by section 33 of the Constitution, reviewing courts were to enquire whether there was: ‘…a rational objective basis justifying the connection made by the […commissioner…] between the material properly available to him and the conclusion he or she eventually arrived at?'; Carephone para 37. This standard was generally referred to as the rational justifiability standard but has since been replaced by the standard of reasonableness; Sidumo para 109.}\]

\[^{266}\text{Ibid.}\]

\[^{267}\text{Benjamin (2009) at 43. According to Benjamin, as a result of the LAC’s decision in Carephone, the estimated incidence of review proceedings increased from approximately 10% to 20%; Benjamin (2007) at 34 & 39.}\]
the test for review, was expected to reduce the frequency of reviews.\textsuperscript{268} Whether it did so, however, remains unclear.\textsuperscript{269} Arguably instead, \textit{Sidumo} has augmented the difficulties with review. As indicated above, in \textit{Sidumo}, the Court held that section 145 had been suffused by the constitutional standard of reasonableness.\textsuperscript{270} Reasonableness is generally acknowledged to permit more intrusive review than rational justifiability.\textsuperscript{271} Thus, it seems improbable that by replacing the \textit{Carephone} standard\textsuperscript{272} with reasonableness, the incidence of review proceedings will be suppressed. Still, whatever the impact of \textit{Sidumo} is, the benefits for efficiency of discouraging review proceedings persist; they are therefore relevant on review.\textsuperscript{273}

Whereas the prohibition against appeals supports efficiency and accessibility, it is by no means beyond criticism.\textsuperscript{274} As Brand remarks, the difficulty with the ban is its effect on consistency in the outcomes of proceedings. As CCMA awards do not constitute legal precedent, commissioners are not bound by each other’s findings. There is further little scope for reviewing courts to confirm the true state of the law.\textsuperscript{275} In Brand’s view, while limiting challenges to private arbitrators’ decisions is apt, the same cannot be said of statutorily compelled arbitral awards.\textsuperscript{276} As such, extending the ambit of review (in \textit{Carephone} and subsequently in \textit{Sidumo}) was debatably a necessary evil.\textsuperscript{277}

Returning to the Act’s promotion of expeditiousness, the exclusion of legal representatives from specified disputes discourages the protraction of proceedings oft occasioned by lawyers.\textsuperscript{278} Again, while advantageous to a degree, the prohibition presents problems. In particular, it places a considerable burden on commissioners, who are denied the benefits of

\textsuperscript{268} Benjamin (2009) at 43.
\textsuperscript{269} Consider Alan Rycroft ‘An evaluation of the Labour Court’ at 64-68 in Andrew Levy & Tanya Venter (eds) \textit{The Dispute Resolution Digest 2012} (2012) 61, read with the CCMA Annual Report 2010-2011.
\textsuperscript{270} \textit{Sidumo} para 109.
\textsuperscript{271} For the relationship between rationality and reasonableness, consult chapters 3, 4 and 6 of this thesis.
\textsuperscript{272} \textit{Carephone} para 37.
\textsuperscript{273} Benjamin (2009) at 47-48. Note, however, Tuchten J’s contrary sentiments in \textit{Herholdt} paras 53-56. See also O’Regan J’s argument in \textit{Sidumo} that extending section 145 to incorporate reasonableness would not hamper efficiency.
\textsuperscript{274} Consider \textit{Herholdt} paras 53-56; Benjamin & Cooper at 275, citing Clive Thompson ‘The 1995 Labour Relations Bill’ \textit{IMSSA Bulletin} (1995) at 23.
\textsuperscript{275} In addition, argues Brand, the lack of appeals detracts from the capacity of the courts to remedy the potentially severe implications of unfair or incorrect findings. This is particularly concerning in South Africa, where unemployment and poverty are rife; Brand (2000) at 90.
\textsuperscript{276} Brand (2000) at 90; see also Sharpe (2000) at 2173.
\textsuperscript{277} Brand (2000) at 90.
\textsuperscript{278} Rule 25 of the CCMA Rules; Benjamin (2009) at 35. As discussed above, the prohibition similarly promotes accessibility and flexibility.
legal argument and written pleadings enjoyed by the courts. Instead, commissioners receive but brief statements of the parties’ cases which rarely include legal references or argument. Once more, this is a feature of the CCMA process to which reviewing courts should be alive when assessing awards.

Accessibility, flexibility and informality and efficiency are concepts entrenched in the reasons for the CCMA’s development and the provisions of the LRA itself. The concepts are paramount to effective labour dispute resolution. Nonetheless, various challenges face these features of CCMA proceedings and the institution has only partially attained them as a result. In themselves, they require commissioners to function under tremendous pressure both time and resource-wise. The extent of the strain imposed on commissioners is revealed by the figures depicted in the CCMA’s Annual Reports. In particular, the figures cited in its report of 2009/2010 are exemplary, that report is discussed below.

4. THE CCMA’S ANNUAL REPORT

When introducing the CCMA’s Annual Report of 2009/2010, the Chairperson of its Governing Body described the year as one which had confronted the CCMA with considerable challenges. Specifically, the ‘global economic crisis’, together with the enhanced accessibility of the institution and its budgetary constraints, placed it under severe pressure. As a result of these challenges, the South African government was obliged to

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279 In judicial proceedings, the presiding officers almost always have the benefit of legal argument from qualified attorneys or advocates. In addition, parties to court proceedings are required to submit detailed written pleadings of their cases, a benefit not enjoyed by arbitrating commissioners who are instead limited to brief accounts of parties’ contentions (if these are provided at all). These accounts are generally handwritten and incorporated into the LRA referral forms 7.11 and 7.13. Reviewing courts should be alive to these issues when assessing commissioners’ awards; Benjamin (2007) at 10-13; note, however, Brand (2000) at 79, as discussed above.


282 And arguably that of social justice too; Theron & Godfrey (2002) at 63.

283 Benjamin (2007) at 3.

284 Brand observes that these pressures have been shown to be deleterious to commissioners’ independence and health, as well as to the quality of their awards; Brand (2000) at 84; consider too Benjamin (2009) at 38 & 40 and Benjamin (2013). For comparative figures associated with the Industrial Courts, see O’Regan (1989) at 559.

285 CCMA Annual Report 2009-2010; for more recent, but less specific figures, see the CCMA Annual Report 2010-2011 at 18-21. For a general analysis and additional details, consider Venter & Levy.

286 As noted above, the CCMA’s governing body is obliged by section 122(3) of the LRA to submit an annual report of its finances and operations to the Minister of Labour. For the institution’s statistics, consult the CCMA’s Annual Reports, available at http://www.ccma.org.za; Benjamin (2009) at 27-40 and Benjamin (2007) at 3.

287 Due principally to the increased caseload; the CCMA Annual Report 2009-2010 at 3.
advance additional funding to the CCMA to secure its continued operation. The pressures it faced are significant for several reasons. First, they constitute a stark reminder of the need for flexibility in CCMA proceedings. In order to adapt and respond to changing economic, societal and financial circumstances, commissioners must be permitted to conduct proceedings in flexible ways. Second, they divulge the role of context in delineating the scope of review – CCMA awards cannot, under such pressurised circumstances, be expected to be perfect and reviewing courts must recall this when evaluating commissioners’ findings. Finally, the challenges posed to the CCMA portray the institution’s reliance on government, notwithstanding its statutorily established independence. In turn, the pertinence of administrative law must be acknowledged. Together with the ambit of review, the implications of this are detailed in subsequent chapters.

The figures cited in the Annual Report further attest to the obstacles the body faced. During the 2009/2010 financial year, 153 657 disputes were referred to the CCMA, equating to 617 new referrals every working day. This marked an increase of 9% in the institution’s caseload. Of these disputes, the vast majority concerned unfair dismissals. In the same year, 116 022 conciliations were conducted, amounting to 466 conciliations each working day. Conciliations comprised 61% of the total matters heard by the CCMA, reflecting an increase of 14% over the previous year. Impressively, 99.8% of these were heard within the statutory time frame of 30 days. On average, finalising a dispute by conciliation was completed within 27 days of the receipt of the referral.

288 The CCMA Annual Report 2009-2010 at 23, records that the CCMA made representations to the Department of Labour during the financial year of 2009 to 2010 for an increase of R65 million in its Government Grant allocation. Inadequate resources has been an ongoing problem for the CCMA; Brand (2000) at 81-83.
289 Section 113 of the LRA.
290 CCMA Annual Report 2009-2010 at 18. For the effect of the economic downturn on the number of disputes arising from operational requirements dismissals, which were referred to the CCMA during this period, see the CCMA Annual Report 2009-2010 at 22.
291 As Benjamin and Gruen observe, for various reasons, these statistics are not, however, altogether reliable; Benjamin & Gruen at 28. According to Benjamin, the incidence of unfair dismissal disputes has been notably consistent over the years; Benjamin (2009) at 29. For more recent figures, see Venter & Levy and the CCMA Annual Reports, available at http://www.ccma.org.za.
292 CCMA Annual Report 2009-2010 at 18. According to Godfrey and Theron, compared to their predecessors (the conciliation boards which operated under the 1956 Labour Relations Act), the CCMA has achieved significant success in resolving disputes by conciliation; Theron & Godfrey (2002) at 29.
293 Recall, however, that these figures are deceptive; Benjamin & Gruen at 13 & 24. For further comments on the CMS database, see Benjamin (2009) at 38 and Benjamin (2013). In the latter, Benjamin notes that some of these difficulties have since been rectified. Consider too Haroon Bhorat, Kalie Pauw & Liberty Mncube Understanding the efficiency of the dispute resolution system in South Africa: an analysis of CCMA data Development Policy Research Unit Working Paper 09/137 (May 2009).
In addition to conciliations, 48 138 arbitrations were held, corresponding to 25% of the disputes dealt with by the CCMA during the period under review. This constituted an increase of 20% over the preceding year. 99% of the arbitration awards issued were rendered within the 30 day statutory time period therefore and the average time from referral to finalisation was 39 days. Finally, 24 778 additional ‘processes’ were heard during 2009/2010, reflecting a 10% increase from 2008/2009, and 10 506 applications for certification of arbitration awards were received.

Both the immensity of these figures and the speed with which conciliations and arbitrations are handled depict the stressors placed on commissioners’ operations. Positively however, they confirm the CCMA’s achievement of efficient dispute resolution - a commendable attribute given its legislative mandate. Adding to the body’s accolades, the Annual Report recorded a substantial reduction in the number of awards referred to the Labour Court for review, compared to that of 2007/2008. The implication is that the quality and legitimacy of awards improved during 2009/2010. According to the report, the primary reason for this was the implementation of an award perusal system, which had been formalized over preceding years. When considering the impact of Sidumo (if any) on the frequency of reviews, the introduction of this system (which coincided with the CC’s judgment), must be noted.

Given the relationship between the characteristics of CCMA proceedings and the daily challenges with which it is confronted, when determining the extent of reviewing courts’

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294 CCMA Annual Report 2009-2010 at 19.
295 Initially, there were lengthy delays between arbitration proceedings and the issuing of awards; Theron & Godfrey (2000) at 59.
297 These include rescissions and in limine proceedings, for example.
298 This reflects an increase of 7% from the financial year of 2008 to 2009. Whether this suggests that the impact of the economic crisis was so severe that employers simply could not afford to abide by arbitration awards, or whether there is an alternative explanation for the increase, is unclear.
299 Consider too the Director’s Report, where the CCMA’s internal targets are discussed; CCMA Annual Report 2009-2010 at 10-12. These targets constitute overt indicators of the pressures placed on commissioners to resolve disputes quickly, despite the absence of resources.
300 According to the report, the number of review proceedings declined between 2007 and 2008. In the financial year of 2009 to 2010, there was a further 5.4% reduction in the incidence of review proceedings against CCMA arbitration awards; CCMA Annual Report 2009-2010 at 13.
301 CCMA Annual Report 2009-2010 at 13. Thus, the reduction in review proceedings should not be assumed to have arisen as a result of the CC’s decision in Sidumo. For additional mechanisms implemented to improve the quality of awards (including extensive training for commissioners and mentoring programmes), see Benjamin (2013) at 14.
302 As noted earlier, rather than remedying the confusion, the decision has only led to further confusion and inconsistency. See, in this regard, Herholdt paras 53-56 and the ensuing chapters of this thesis.
powers, it is necessary to recall not only its features, but also their impact on the institution itself.  

5. CONCLUSION

The Constitutional Court has confirmed the status of CCMA arbitration proceedings as administrative action. Still, the characteristics of the institution distinguish it from archetypal administrative bodies. These features are crucial to achieving the CCMA’s objects and concurrently those of the LRA. As such, they must be attended to during section 145 proceedings. In turn, when reformulating the test for review, deviating from generic approaches may be justified.

Included amongst the relevant traits of the CCMA are its independence, accessibility, efficiency, and flexibility. The institution’s independence from government is assured by the LRA. Even so, as a creature of statute exercising public power and dependent on government for funding, the CCMA remains accountable for its actions. Looking to the second of its features, the institution’s geographical reach and provision of largely free services, ensures its accessibility. Efficiency is maintained through certain legislative mechanisms provided for in the LRA. Of these, the short time periods for referrals and for hearing disputes, as well as the obligation of commissioners to render awards within 14 days of concluding arbitration proceedings, are most striking. Finally, flexibility and informality are supported by the LRA’s directive that disputes be resolved by conciliation and arbitration rather than traditional court adjudication. In this way, coupled both with the Codes

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303 In addition to resolving individual disputes, the CCMA performs certain services, including the mediation of large scale disputes, general dispute management and prevention, education, training and development, institution building and the determination of matters relating to essential services; CCMA Annual Report 2009-2010 at 21 – 39.
304 Sidumo para 88.
306 Most pertinently that of ensuring the effective resolution of labour disputes; section 1(d)(iv) of the LRA; consider too section 23 of the Constitution.
307 Consider the CC’s rejection of PAJA’s application to section 145 proceedings; Sidumo para 104. The influence of policy considerations on the nature of disputes arising in the labour relations arena is of additional relevance. As Cheadle observes: ‘...the policy issues that should inform the granting of a remedy in employment law become lost in a general right to test administrative action...’; Cheadle at 678 para 51. See also Chirwa paras 143-149 and Gcaba para 69. Arguably, this overlaps with O’Regan J’s approach in Sidumo, of determining the administrative status of the CCMA with reference to the Constitutional appropriateness of doing so; Sidumo paras 132-137.
308 The Explanatory Memorandum at 318-319.
309 Consistently with sections 1(d), 33 and 195(1) of the Constitution; see too Sidumo para 88.
310 Sections 138(7) and 191 of the LRA.
promulgated under the Act\textsuperscript{311} and commissioners’ broad discretions to conduct arbitrations in any appropriate manner but ‘with the minimum of legal formalities’,\textsuperscript{312} informality and flexibility in CCMA proceedings are legislatively secured. The intention behind these features was to design a dispute resolution system responsive to the sensitive nature of employment disputes. Regrettably, judicial interference and the failure to update the Codes regularly have scuppered this objective somewhat. While the Code’s stagnation requires regulatory amendment to rectify, tempering the impact of undue judicial intervention, by revising the test for review, is the task of this thesis.

Each of the CCMA’s characteristics plays an important role in promoting its goals and effective functioning. As these features affect both commissioners and parties to disputes in various ways, they are equally germane to review. Commissioners are required to hear and resolve a substantial number of cases annually, with minimal financial or legal assistance.\textsuperscript{313} In addition, their statutory mandate to finalise disputes quickly places them under considerable pressure.\textsuperscript{314} Frequently, changing economic, social, and political forces aggravate these stressors.\textsuperscript{315} In spite of this, the CCMA’s recorded performance and efficiency are impressive.\textsuperscript{316} Its contribution to alleviating tensions arising in the employment arena is well recognised\textsuperscript{317} and it enjoys wide esteem within the communities it serves.\textsuperscript{318}

To ensure the CCMA’s continued functionality, efficacy and credibility, when reviewing arbitration awards, respect for its role in protecting employees’ rights to fair labour practices is due.\textsuperscript{319} To ensure this, the essence and key features of the institution, as well as their impact on commissioners and parties, must be recalled. The requisites of the right to

\textsuperscript{311} Section 213 of the LRA.
\textsuperscript{312} Section 138(1) of the LRA.
\textsuperscript{313} Rule 25 of the CCMA Rules, read with the discussion thereon above.
\textsuperscript{314} Section 138(7) of the LRA.
\textsuperscript{315} \textit{CCMA Annual Report 2009-2010} at 2-3.
\textsuperscript{316} Compare its success, for example, with that of the former Industrial Courts. Prior to the creation of the CCMA, conciliation boards and the Industrial Court were responsible for conciliating labour disputes; Du Toit et al (2003) at 22. The success rate of the Industrial Courts in conciliating disputes was less than 30\% and that of conciliation boards, 20\%. By comparison, in the financial year of 2009 to 2010, the CCMA successfully resolved 59\% of all disputes referred to it by conciliation. This figure has been reasonably consistent over the past three years; \textit{CCMA Annual Report 2009-2010} at 13.
\textsuperscript{317} Consult, for example, Benjamin (2013) at 52-53.
\textsuperscript{319} Section 23 of the Constitution.
administrative justice and the traditional manner in which it has been effected during review proceedings threaten these features. When delineating the powers of reviewing courts, a suitable balance between them and the right to just administrative action must accordingly be struck. As discussed in the chapters which follow, achieving that balance may be difficult. The discussion opens with the predecessor to reasonableness – rational justifiability – and the judgment of the LAC in Carephone.
CHAPTER 2

THE TEST FOR REVIEW PRIOR TO SIDUMO V RUSTENBURG PLATINUM MINES – CAREPHONE (PTY) LTD V MARCUS NO & OTHERS

1. INTRODUCTION

Prior to the Constitutional Court’s (‘CC’) decision in Sidumo & another v Rustenburg Platinum Mines Ltd & others, the scope of the test for review of CCMA arbitration awards had been comprehensively considered in Carephone (Pty) Ltd v Marcus NO & others. The principle distinction between the two judgments lies in the Constitution in terms of which each was decided. While Carephone was effectively determined under the interim Constitution, Sidumo followed the final Constitution. The two are therefore intimately connected and a thorough appraisal of Carephone is crucial to understanding Sidumo. The debate and confusion to which Carephone gave rise further illustrate many of the difficulties associated with formulating the standard of review. What follows is a brief synopsis of Carephone, together with a discussion of the reasons for the Court’s decision and the uncertainty resulting from it.

2. CAREPHONE (PTY) LTD V MARCUS NO & OTHERS

In Carephone (Pty) Ltd v Marcus NO & others, the Labour Appeal Court (‘LAC’) was called to establish the nature and extent of the courts’ powers of review over CCMA arbitration awards. Before doing so, it was necessary to determine whether review proceedings against arbitration awards could be instituted under both sections 145 and 158(1)(g) of the LRA, or whether applicants were confined to bringing proceedings under

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322 Compare section 24 of the Constitution of the Republic of South Africa Act 200 of 1993 (‘the Interim Constitution’) with section 33, read with item 23(2) of Schedule 6, of the Constitution of the Republic of South Africa, 1996 (‘the Constitution’). While they read identically, Carephone was formally determined under the latter; Carephone para 15.
323 Section 33 of the Constitution.
324 Ibid; Sidumo paras 106 & 110.
325 Carephone.
326 Carephone para 2.
327 The Labour Relations Act 66 of 1995 (‘LRA’ or ‘the Act’); section 158(1)(g) (as it then was) read as follows: ‘The Labour Court may –
section 145. The principal basis of the argument for the former was that section 145, in so far as it offered only limited grounds of review, failed to give adequate effect to the parties’ rights to just administrative action. To circumvent this difficulty, section 158(1)(g) had sometimes been construed as a permissable avenue for reviewing arbitration awards. In Carephone, Froneman DJP rejected this approach.

Before doing so, however, the question of whether CCMA arbitrations constituted administrative action required attention. The Judge began with an overview of the Constitutional context in which the CCMA operates. Importantly, while the CCMA was not judicial in nature, it remained bound by the Constitutional provisions governing organs of state and the public administration; it was similarly bound by the Bill of Rights. Thus, in Froneman DJP’s view, the CCMA was clearly an administrative body for the purposes of the

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328 Of the LRA.
329 Carephone para 7. As Grant notes, section 145 offers litigants only narrow, procedurally based grounds of review consistently with the purpose of the LRA to promote efficient dispute resolution; Grant at 252; section 1(d) of the LRA; The Explanatory Memorandum to the Labour Relations Act 1995 16 ILJ 278 (‘the Explanatory Memorandum’) at 318-319.
330 In terms of section 33 read with item 23(2) of Schedule 6 to the Constitution. See also Nicci Whitear-Nel ‘Carephone (Pty) Ltd v Marcus NO & others’ (1999) 19 ILJ 1425 (LC)’ (1999) 20 ILJ 1483 at 1484.
331 Note that section 158(1)(g) constitutes a broader and more general basis for review than section 145; Calvin William Sharpe ‘Reviewing CCMA arbitration awards: Towards clarity in the Labour Courts’ (2000) 21 ILJ 2160 at 2161-2163.
332 Note that Froneman DJP wrote the decision on behalf of an unanimous Court; Carephone paras 25-27. In doing so, the Judge interpreted the words ‘despite section 145’ as ‘subject to section 145’; Carephone paras 26-28; See also Standard Bank (1998) (LC) at 625A-B. For criticism of the interpretive approach adopted by Froneman DJP, see Pretorius at 1512-1513. Note that while the Judge discussed both subsections 158(1)(g) and 158(1)(h) as bases from which to review CCMA arbitration awards, it is unnecessary to distinguish between the subsections for the purposes of this thesis. They will instead be referred to generally as section ‘158(1)’, unless otherwise specified.
333 Carephone para 15.
334 See, in particular, sections 195(1) & 2, 8, 33, 165-166 and 239 of the Constitution; Carephone paras 11-16.
Constitution.\textsuperscript{336} Amongst other obligations,\textsuperscript{337} the institution’s administrative status obliged commissioners not only to respect parties’ fundamental rights, but also to ensure fairness, impartiality, equitability and an unbiased approach during all arbitration proceedings.\textsuperscript{338} Apposite adherence to the rule of law was of further import.\textsuperscript{339}

This outcome was endorsed by the substantive component of the right to just administrative action.\textsuperscript{340} Accountability, responsiveness and openness in all public institutions, noted Froneman DJP, were the core values upon which the right was based.\textsuperscript{341} The suggestion that the CCMA, while a public body, was exempt from upholding those values\textsuperscript{342} was contrary to the essence of the right.\textsuperscript{343} There could be no doubt therefore, held the Judge, that when conducting arbitrations, the CCMA engaged in administrative action.\textsuperscript{344} This, in turn, imposed Constitutional constraints upon the exercise of commissioners’ arbitral powers; these constraints were described in \textit{Carephone} as follows:

‘The constitutional imperatives for compulsory arbitration under the LRA are thus that the process must be fair and equitable, that the arbitrator must be impartial and unbiased, that the proceedings must be lawful and procedurally fair, that the reasons for the award must be given publicly and in writing, that the award must be justifiable in terms of those reasons and that it must be consistent with the fundamental right to labour practices.’\textsuperscript{345}

Having identified these limits, Froneman DJP examined the relevant provisions of the LRA\textsuperscript{346} and resolved that the Act complied with them.\textsuperscript{347} To the extent to which commissioners failed to adhere to these constraints, review proceedings were available. Section 145(2)(a)(iii)\textsuperscript{348} was more than sufficient for protecting parties’ rights in this regard.

\begin{footnotes}
\item[336] Carephone paras 17-18.
\item[337] Most importantly perhaps, the obligations to remain accountable, open and transparent as stipulated in sections 1(d) and 195(1)(f)-(g) of the Constitution.
\item[338] Section 195(1)(d) of the Constitution; Carephone paras 11-16.
\item[339] Carephone para 9; section 1(c) of the Constitution. This section provides that South Africa is a democracy which is founded, among other things, on the rule of law. In \textit{Strategic Liquor Services v Mvumbi NO and Others} 2010 (2) SA 92 (CC), the Court explained the relationship between the aforementioned values and the rule of law as follows: ‘[T]he rule of law requires that [judges] should not act arbitrarily and that [judges] should be accountable’; Strategic Liquor Services para 17.
\item[340] Section 33 of the Constitution; Carephone para 19.
\item[341] Ibid; Carephone para 35..
\item[342] On the basis that arbitration proceedings did not constitute administrative action.
\item[343] Carephone para 19.
\item[344] Ibid paras 11-19.
\item[345] Ibid para 20.
\item[346] Specifically, he examined sections 136-138 of the LRA.
\item[347] Carephone paras 21-22; sections 136-138 of the LRA.
\item[348] The subsection permits review on the basis that a commissioner exceeded his or her powers.
\end{footnotes}
and there was accordingly no need to permit review under section 158(1)(g).\footnote{349 Carephone paras 24-29.} In fact, warned the Judge, permitting such review would only impede the expeditiousness and informality with which CCMA proceedings were intended to be resolved.\footnote{350 Ibid para 28, read with the implications of the Judge’s earlier remarks; Carephone para 21. Those included that section 158(1) of the LRA required commissioners to conduct arbitration proceedings quickly and with the minimum of legal formalities.}

Froneman DJP then addressed the nature of review appropriate to administrative action. He noted first that the entrenchment of the right to administrative justice had extended the scope of review.\footnote{351 Following Carephone there was little doubt that the introduction of the rational justifiability test had extended the available grounds of review; Whitear-Nel at 1486; Sharpe (2000) at 2174; Grant at 255-256; Gill Loveday ‘Justifiability is the key: Review judgments reviewed’ (1998) 14(5) Employment Law 4. Whether the same can be said in the wake of Sidumo is controversial. The reasons for the uncertainty are detailed in later chapters of this dissertation.} This was apparent from the Constitutional stipulation that administrative action be justifiable in relation to the reasons for it.\footnote{352 Section 33 read with item 23 of Schedule 6 to the Constitution; Carephone para 31. See also the SCA’s decision in Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA & others [2006] 11 BLLR 1021 (SCA) which confirms this.} This requirement introduced a need for rationality in the merits or outcome of administrative decisions.\footnote{353 Carephone paras 30-31. Prior to Carephone, unreasonableness had been held to constitute a reviewable irregularity only where the unreasonableness arose from the relevant commissioner’s failure to apply his or her mind to the matter before him or her; Venture Motor Holdings Ltd v/ Williams Hunt Delta v Biyana & Others (1998) 19 ILJ 1266 (LC) paras 5 & 26; Hira and Another v Booysen and Another 1992 (4) SA 69 (A); Johannesburg Stock Exchange v Wits Nigel Ltd 1988 (3) SA 132 (A).} In other words, irrationality as a ground of review was no longer confined to review for procedural irregularities or constitutive merely as evidence thereof.\footnote{354 Carephone paras 30-31.}

Nonetheless, cautioned Froneman DJP, the distinction between appeals and reviews remained important. Reviewing courts were not excused by the rationality test from maintaining this distinction during section 145 proceedings. The term ‘justifiable’ meant: ‘able to be shown to be just, reasonable, or correct, or defensible.’\footnote{355 Ibid para 32.} Yet, it did not require that administrative action in fact be ‘just, justified or correct.’\footnote{356 Ibid.} According to Froneman DJP, this fine discrepancy was crucial to sustaining the discrete characteristics of appeal and review.\footnote{357 Ibid.}

Informing the distinction was respect for the proper separation of powers between the legislature, the executive and the judiciary.\footnote{358 The need to respect the separation of powers (‘SOP’) ostensibly led to decisions such as Davis JA’s in BMD Knitting Mills (Pty) Ltd v SACTWU [2001] 7 BLLR 705 (LAC). There, the Judge held that the rational
simply replacing commissioners’ findings with their own preferences as to outcome. Courts were not permitted to assume the administrative function themselves, despite the need for value judgments to be made during the course of rationality review.\textsuperscript{359}

Expanding on the meaning of rational justifiability, Froneman DJP recounted the substantive nature of the test, recording that it had often been referred to as reasonableness, proportionality or rationality.\textsuperscript{360} In his view, however, it was unhelpful to redefine it. Instead, the appropriate test for review could be formulated plainly as follows:

\begin{quote}
‘…is there a rational objective basis justifying the connection made by the administrative decision maker between the material properly available to him and the conclusion he or she eventually arrived at?’\textsuperscript{361}
\end{quote}

Applying the new standard to the matter before the Court,\textsuperscript{362} Froneman DJP found the Commissioner’s award rationally justifiable.\textsuperscript{363} According to the Judge, the Commissioner’s reasoning was rationally connected to the material before him and he had therefore not exceeded his ‘constitutionally constrained’ powers under section 145(2)(a)(iii).\textsuperscript{364} Notably, the test devised in Carephone made no reference to the capacity of alternative reasons to justify otherwise deficient awards. On a direct reading thereof then, reasons other than those

\textsuperscript{359} Carephone paras 33-35. In reaching this conclusion, Froneman DJP referred to Hira at 91E-1; in Hira, the Appellate Division had remarked that ‘it was quite proper to give an independent and impartial administrative tribunal the exclusive competence to decide not only matters of fact, but also of law, with no right of appeal to a court.’ Thus, in Froneman DJP’s view, the LRA’s conference of decision-making power on the CCMA did not offend section 34 of the Constitution; Carephone para 33. For affirmation of this approach, consult Cora Hoexter ‘Standards of review of administrative action – review for reasonableness’ in Jonathan Klaaren (ed) A delicate balance: The place of the judiciary in Constitutional democracy – Proceedings of a symposium to mark the retirement of Arthur Chaskalson, former Chief Justice of the Republic of South Africa (2006) at 68–9.

\textsuperscript{360} For alternative meanings associated with the concept (and the relationship between ‘reasonableness’ and ‘appropriateness’), see Whitear-Nel at 1487-1489; Standard Bank (1998) (LC) paras 21–27. Note that in Standard Bank, Tip AJ contended that reasonableness review was available to aggrieved litigants as a result of commissioners’ statutory obligation to render ‘appropriate awards’ under section 138(9) of the LRA. In effect, he held, reasonableness and appropriateness were equivalent. Consider too Pep Stores and C Garbers ‘The demise of the “reasonable employer” test’ (2000) 9(9) Contemporary Labour Law 81 at 87.

\textsuperscript{361} Carephone para 37; the test has been labeled the ‘rational justifiability test’, the ‘rational justifiability standard,’ the ‘Carephone standard’ and the ‘Carephone test’ and these terms will be used interchangeably to refer to the standard throughout the text of this thesis. See, in this regard, Loveday (1998) at 4 and Mark Wesley ‘Review of CCMA arbitration awards: Shoprite Checkers (Pty) Ltd v Ramdaw & others’ (2001) 22 ILJ 1515 at 1515. Wesley refers to the standard simply as the ‘justifiability’ test.

\textsuperscript{362} Before doing so, Froneman DJP confirmed that there was no basis on which to set the award aside under sections 145(2)(a)(i), 145(2)(a)(ii) or 145(2)(b) of the LRA. These sections include the grounds of improperly obtaining an award, gross irregularity and misconduct.

\textsuperscript{363} Carephone para 53.

\textsuperscript{364} Ibid. For a discussion of the standard’s application to private arbitration awards, see Roelof McLahlan ‘Lack of justifiability or rationality as a ground for review of private arbitration awards’ (2002) 5 De Rebus 49.
given by commissioners ought to have been irrelevant to the enquiry. Still, following Carephone, reviewing courts regularly resorted to assessing alternative reasons for awards when applying the standard of rational justifiability.365

3. CRITICISING CAREPHONE

Froneman DJP’s decision is generally concise and well constructed. His location of the rational justifiability enquiry within section 145(2)(a)(iii), while understandable in the circumstances, was nevertheless unfortunate.366 The substantive nature of rationality inevitably requires scrutiny of the merits of disputes. However, the authority of decision-makers to issue final determinations cannot, by definition, depend upon the validity of those determinations.367

In an earlier decision of the Labour Court – Reunert Industries (Pty) Limited t/a Reutech Defence Industries v Naicker & others368 – Landman J addressed the meaning of ‘excess of powers’ thoroughly. Amongst other pertinent observations, the Judge remarked that:

‘...(3) The powers of … [CCMA commissioners] are,…, the powers conferred by the LRA and include the exercise of such discretionary powers as the law allows.

(4) A commissioner will exceed the commissioner’s powers when the commissioner strays from the ambit of the commissioner’s jurisdiction or where the commissioner makes a ruling or awards a remedy which is beyond the powers of the commissioner.

365 See, for example, Conradie JA’s judgment in De Beers Consolidated Mines Ltd v CCMA & others [2000] 9 BLLR 995 (LAC). Consider too the Court’s decision in Rustenburg Platinum Mines Ltd v CCMA & others [2004] JOL 12787 (LAC). As Benjamin records, following Carephone reviewing courts regularly conducted review in a manner more consistent with appeal; Benjamin (2007) at 34.
(5) Where the commissioner is given a choice of remedies the commissioner will not exceed the commissioner’s jurisdiction or powers merely by choosing one above another...\cite{ibid_at_1636-1637}

On the strength of Landman J’s words, ‘excess of powers’ occurs when commissioners act in a manner inconsistent with the powers conferred upon them by the LRA.\cite{ibid_at_1636-1637} Placing the rational justifiability test within this irregularity suggests that, due to the Constitutional requisite that administrative action be lawful, reasonable and procedurally fair, when commissioners fail to reach rationally justifiable findings they exceed their powers.\cite{ibid_at_1636-1637} However, this view misconstrues the intended function of section 33 of the Constitution and the reach of reviewing courts’ powers under section 145. There are several reasons for this.

First, the principal purpose of section 33 is to establish the right to just administrative action.\cite{ibid_at_1636-1637} Yet, the creation of that right does not necessarily give rise to a corresponding power.\cite{ibid_at_1636-1637} If it did, the result would be an exceptionally generous construction of ‘excess of powers’ which would enable undue judicial interference with commissioners’ awards.\cite{ibid_at_1636-1637} A better understanding is that rather than imposing a power on commissioners to act reasonably, section 33 establishes a check on the exercise of commissioners’ powers. In turn, parties’ rights to just administrative action are protected.\cite{ibid_at_1636-1637} As Cheadle has explained:

‘…bills of rights limit the exercise of power of the legislature and the executive by defining their limits and the nature of their engagement with the legal system. In a sense, a bill of rights is no more than a set of rules governing the limits (and sometimes the content) of other rules.’\cite{ibid_at_1636-1637}

Analogously, in Reunert Industries, Landman J described the impact of the Constitution on commissioners’ obligations; he stated:

\begin{itemize}
  \item Ibid at 1636-1637.
  \item \textit{Carephone} paras 22-24.
  \item Iain Currie & Johan de Waal \textit{The Bill of Rights Handbook} 5 ed (2005) at 642-644.
  \item Hugh Corder ‘Reviewing review: much achieved, much more to do’ in Hugh Corder & Linda van der Vijver (eds) \textit{Realising Administrative Justice} (2002) 1; Corder suggests that section 24 of the interim Constitution did not impose a positive duty on administrative bodies (or at least not all administrative bodies) to act fairly and reasonably.
  \item \textit{Reunert Industries} at 1636-1637.
  \item \textit{Sidumo} para 172. Note too, however, Ngeobo J’s judgment in \textit{Sidumo}; \textit{Sidumo} paras 273-277.
  \item MH Cheadle, DM Davis & NRL Haysom \textit{South African Constitutional Law: The Bill of Rights} (2010; updated loose-leaf) at 1-1.
\end{itemize}
‘Arbitrators...[are under a] duty to seek, but not necessarily to achieve, a lawful, just, fair and proper decision...’

In other words, commissioners must attempt to reach reasonable conclusions. Yet, to the extent to which they do not reach them, they cannot be said to have exceeded their powers.

Secondly, interpreting section 33 of the Constitution in this way threatens the separation of powers between the legislature and the judiciary. The legislature has conferred the power to resolve specified labour disputes on CCMA commissioners. Should their jurisdiction to exercise that power be subject to the requirement that they resolve disputes reasonably in every instance, failures by commissioners to reach reasonable conclusions would deprive them of the right to have exercised that power in the first place. The implication is that the power to determine whether commissioners may decide disputes at all, lies with the judiciary rather than the legislature. This blatantly disregards the proper delegation of governmental power and must for that reason be rejected.

Thus, Froneman DJP’s location of rational justifiability within section 145(2)(a)(iii) of the LRA was regrettable. Whereas subsequent courts often ignored that location, labelling the rational justifiability test as an incident of ‘excess of powers’ evidently contributed to the confusion arising from Carephone. Specifically, the relationship between the section 145 grounds of review and rational justifiability, as well as the degree (if any) to which they were interdependent, was unclear. Given the dual components of review, reading section 145

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377 Reunert Industries at 1634.
378 Ibid.
379 See Langa CJ’s decision in Chirwa v Transnet Ltd and others [2008] 2 BLLR 97 (CC) para 155, where the erstwhile Chief Justice observed that: ‘It seems to me axiomatic that the substantive merits of a claim cannot determine whether a court has jurisdiction to hear it.’ See also David Mullan Administrative Law (2001) at 54, citing P Craig in Administrative Law at 299-302 et seq; Telcordia Technologies para 52.
380 County Fair Foods (Pty) Ltd v CCMA & others [1999] 11 BLLR 1117 (LAC) para 8. In Shoprite Checkers (Pty) Ltd v Ramdaw NO & others [2001] 9 BLLR 1011 (LAC) however, the Court described rational justifiability as falling within the ground of excess of powers; Shoprite Checkers (2001) (LC) para 21.
381 Compare, for example, the varying approaches to this question adopted by the Judges in both County Fair Foods and De Beers as discussed in later paragraphs.
382 Being comprised of both substantive and procedural elements.
generally— as impliedly incorporating substantive rationality independently of the grounds provided for therein – would accordingly have been preferable.

Still, the Carephone decision was commendable in numerous respects. First, by detailing the Constitutional context in which section 145 review proceedings were to be conducted, and distinguishing between appeals and reviews as Froneman DJP did, critical aspects of the purposes and nature of review were canvassed. The Judge’s emphasis on rational justifiability as requiring only the ability to appear justified (rather than to be justified) is of further utility in defining the limits of review. Finally, it was apparent from Froneman DJP’s decision that the original section 145 grounds of review remained applicable. Notwithstanding the clarity of his decision, however, later courts failed to apply the test consistently. In the process, the essence of the standard was unravelled, leaving a poor foundation for the CC’s decision in Sidumo.

Four areas of concern were primarily responsible for the muddle. The first questioned whether CCMA arbitrations constituted administrative action. The second countered

383 And without reference to the individual grounds stipulated therein.
384 It might well have appeased Nicholson JA’s concerns about locating the Carephone test under the ground of gross irregularity too; consult, in this regard, Toyota SA Motors (Pty) Ltd v Radebe & Others (2000) 21 ILJ 340 (LC) para 39.
386 Carephone para 32.
387 This is evident from his description of the two components of review: procedural review as it was previously known and substantive review in the form of rational justifiability; Carephone paras 19-37. Consult too Crown Chickens (Pty) Ltd v Rocklands Poultry v Kapp & others [2002] 6 BLLR 493 (LC) para 58.
388 For a more detailed discussion of the manner in which the courts applied the test, see Edcon v Pillemer NO & others [2010] 1 BLLR 1 (SCA) para 12. There, Mlambo JA set out the two distinct (but opposing) interpretations of the Carephone standard which reviewing courts applied before Sidumo; the Judge suggested that only one of these interpretations was correct. See also Sharpe (2000) at 2164-2170; Benjamin (2007) at 34.
389 In Toyota SA Motors, Nicholson JA raised additional concerns (albeit only in obiter dicta). First, he questioned the capacity of the rational justifiability standard to be distinguished from the test on appeal. In support of his contention he cited the principles articulated in R v Dhlumayo 1948 (2) SA 677 (A); Toyota SA Motors paras 33-39. Furthermore, the Judge contested the LAC’s Constitutional basis for suffusing the section 145 grounds of review with rationality, arguing that it had been unnecessary to do so in the absence of a Constitutional challenge (under section 36 of the Constitution) to the section. As such, he had ‘grave doubts’ as to whether the Carephone standard constituted an independent basis for review; Toyota SA Motors para 40. See too, in this regard, Shoprite Checkers (2000) (LC) paras 64-77 and De Beers paras 7-9. Finally, Nicholson JA recorded his disagreement with casting rational justifiability as a form of gross irregularity; Toyota SA Motors para 39. For a comprehensive critique of the case, see Pretorius at 1513 & 1523; Garbers (2000) at 84-87. Shoprite Checkers (2000) (LC) paras 88-90; Volkswagen SA (Pty) Ltd v Brand NO & others (2001) 22 ILJ 993 (LC) paras 53-55; Netherburn Engineering CC v Netherburn Ceramics v Mudau & others [2003] 10 BLLR 1034 (LC) at 1043 & 1047; Wesley; Pretorius at 1514-1523. Contrarily, Garbers suggested that, following Carephone, there was no dispute about the status of CCMA arbitration proceedings as administrative action; Garbers (2000) at 85. Consider, however, the Sidumo decisions, which evince the enduring uncertainty around the issue.
Carephone’s prescriptions as to the reach of section 158(1)(g) and the prohibition against reviewing awards in terms thereof. Thirdly, the LAC was criticised for inappropriately investigating section 145’s compatibility with section 33, in the absence of a direct Constitutional challenge to the section. Finally, controversy arose around the confines and meaning of the rational justifiability standard. In particular, its aptitude for fudging the distinction between appeal and review was contested. The first and third of these critiques are beyond the scope of this paper and they will not be detailed here. Instead, it will merely be assumed that CCMA arbitrations constitute administrative action. The LAC’s entitlement to question section 145’s Constitutional compliance will similarly be accepted. As to the second challenge, it may readily be dispensed with. In fact, the legislature has since intervened. As a result, there is no longer any doubt that review proceedings against CCMA arbitration awards may only be brought in terms of section 145

391 See, for example, Pretorius at 1524; Sharpe (2000) at 2171-2172; Loveday (1998); Shoprite Checkers (2000) (LC); Garbers (2000) at 82.
392 Of the Constitution.
393 Shoprite Checkers (2000) (LC); Toyota SA Motors.
394 Loveday (1998); Whitear-Nel at 1487-1489, citing Tip AJ’s formulation of reasonableness in Standard Bank as akin to ‘appropriateness’; Standard Bank (1998) (LC) paras 21-27. An alternative approach to rational justifiability suggests that the proper enquiry entails asking whether the outcome of the award was related to the purposes for which the power to resolve disputes was afforded to commissioners: Crown Chickens para 58; County Fair Foods para 10. Note that while Kroon JA in County Fair Foods criticized the Carephone judgment on the basis that Froneman DJP had failed to interpret the meaning of the term ‘justifiability’ correctly, the Judge nonetheless relied upon, and agreed with, Froneman DJP’s depiction of the rational justifiability standard; County Fair Foods paras 10-20.
395 Shoprite Checkers (2000) (LC); Toyota SA Motors. Note that the candidate has elsewhere expressed the view that the distinction is unhelpfully superficial; Emma Fergus ‘The distinction between appeals and reviews – Defining the limits of the Labour Court’s powers of review’ (2010) 31 ILJ 1556; see also JR De Ville Judicial Review of Administrative Action in South Africa revised 1 ed (2005) at 30. In Garbers’s view, the Carephone standard imported a ‘90% right of appeal’ against CCMA awards; Garbers (2000) at 82. Consider, however, Pretorius’s distinctive view, which emphasizes that the rational justifiability test is concerned with the manner in which proceedings are conducted, rather than the correctness of awards; it therefore does not conflate appeal with review; Pretorius at 1522. Arguably, the LAC’s findings in Carephone were in any event correct; Whitear-Nel at 1485. For further reading on the subject, consult Currie & De Waal at 650; De Ville (2005) at 35-87; Hoexter (2007) at 164-222; Cora Hoexter ‘Administrative action in the courts’ 2006 Acta Juridica 303 and President of the Republic of South Africa v South African Rugby and Football Union & Others 2000 (1) SA 1 (CC) (‘SARFU’).
396 In the absence of a Constitutional challenge thereto.
397 Doing so was arguably apt nonetheless. As the LAC in Carephone was obliged to determine whether section 158(1) of the LRA was available to parties as an avenue for review of arbitration awards, it was necessary for the Court to assess the Constitutional validity of section 145 to a degree; Carephone paras 2-28; Whitear-Nel at 1484. The contention is endorsed by section 39(2) of the Constitution which engenders courts when interpreting legislation to: ‘…promote the spirit, purport and objects of the Bill of Rights…’. Thus, the Constitution itself obliged the LAC to interpret the LRA with reference to and in compliance with the Bill of Rights; Pretorius at 1523; Garbers (2000) at 86. All that was required was that the LAC’s interpretation of section 158 was one which the section was reasonably capable of bearing; Dadoo Ltd & others v Krugersdorp Municipal Council 1920 AD 530 para 554-555. Whether its interpretation was reasonable is debatable; Whitear-Nel at 1486; Kynoch Feeds (1998) (LC) at 395-396 and Solomon v Commission for Conciliation, Mediation and Arbitration & others (1999) 20 ILJ 2960 (LC) paras 19 & 21. Section 158(1)(g) now reads ‘subject to section 145…’ rather than ‘despite section 145…’; section 36(b) of the Judicial Matters Amendment Act 12 of 2002.
of the LRA.\(^{400}\) The final difficulties listed above are, nonetheless, of significant import to this thesis. Together with judicial decisions following *Carephone* in which the scope of the rational justifiability standard was thoroughly examined, these critiques are analysed below.\(^{401}\) Unfortunately, much of the confusion evident in the courts’ decisions persists today.

4. **THE JUDICIAL RESPONSE TO CAREPHONE**

4.1 County Fair Foods (Pty) Ltd v CCMA & others

In *County Fair Foods (Pty) Ltd v CCMA & others*,\(^{402}\) the LAC had the opportunity to interpret and apply its decision in *Carephone* for the first time.\(^{403}\) Kroon JA, Ngcobo AJP and Conradie JA each wrote a separate judgment, illustrating discrete ways in which the rational justifiability test could be construed. The discrepancies between the judgments reveal the indefinite relationship between section 145’s grounds of review and the *Carephone* test well. Key aspects of each decision are addressed in turn below.

Kroon JA began by noting that, notwithstanding *Carephone*, there was no reason to limit rational justifiability to proceedings instituted under section 145(2)(iii) of the LRA. In his view, the standard might just as easily have been situated in the context of gross irregularities or misconduct.\(^{404}\) Given that Froneman DJP’s placement of rational justifiability within excess of powers was somewhat problematic, Kroon JA’s approach, while not ideal, was at least progressive. Still, section 145 was cast in purposively narrow, procedural terms.\(^{405}\) Comparatively, rational justifiability allowed for substantive review.\(^{406}\) Thus, describing the latter as a cleanly independent basis for review would seemingly have been more logical.\(^{407}\)

\(^{400}\) Read with reference to the *Carephone* test; Andre van Niekerk et al *Law@work* 2 ed (2012) at 448.

\(^{401}\) For the manner in which reviewing courts applied the test, see Sharpe (2000).

\(^{402}\) *County Fair Foods (Pty) Ltd v CCMA & others* [1999] 11 BLLR 1117 (LAC).


\(^{404}\) *Carephone* para 8. While his approach was preferable to Froneman DJP’s, it was (and is) still not ideal; the relationship between rationality (or reasonableness) and section 145 is appraised in detail in later chapters.

\(^{405}\) *National Education, Health and Allied Workers Union v University of Cape Town and others* 2003 (2) BCLR 154 (CC) (‘NEHAWU’) para 31; Benjamin (2007) at 33-36; the Explanatory Memorandum at 318-319; Section 1(d) of the LRA.

\(^{406}\) *Carephone* paras 36-37.

\(^{407}\) In addition, as Sharpe observes, given the importance of the statutory rights protected by the LRA, enabling both substantive and procedural review was fitting; Sharpe (2000) at 2174. See also Grant at 255-256.
In the absence of doing so explicitly, the uncertain relationship between the legislative and Constitutional grounds of review endured.  

While aligning himself with certain of the Court’s findings in Carephone,\(^\text{408}\) Kroon JA criticised the distinction drawn by the LAC between ‘justifiable’ and ‘just, justified or correct’.\(^\text{409}\) Of particular concern to him was Froneman DJP’s use of the word ‘correct’. In this regard, he observed:

‘The meanings of the word “justifiable” adverted to by the learned judge were “able to be legally or morally justified, able to be shown to be just, reasonable or correct; defensible.” If the word “correct” were excised from those meanings and the remainder were contrasted simply with the word “correct” there could be no quarrel with the distinction drawn. I am not convinced, however, of the correctness, in the present context, of including within the meanings of “justifiable” that of “able to be shown to be correct” and of contrasting “justifiable” with “just” or “justified.”\(^\text{410}\)

Given the emphasis on review proceedings precluding judicial analyses of the correctness of a tribunal’s findings,\(^\text{411}\) Kroon JA’s concern is unsurprising. Yet, it reveals a misunderstanding of the meanings attributed to ‘justifiability’ by Froneman DJP. Rather than suggesting that decisions need be correct, just or justified, ‘justifiable’ implied that decisions be capable of objective substantiation on the strength of the reasons given for them.\(^\text{412}\) In other words, whether a decision was correct was immaterial – justifiable awards required only that corroborative explanations accompany them.\(^\text{413}\)

A preferable definition of the term ‘justifiable’ is absent from Kroon JA’s judgment and cannot clearly be garnered from it. In holding the Commissioner’s decision defective, the Judge recorded three specific irregularities in the award.\(^\text{414}\) First, the Commissioner’s factual findings indicated that he had not applied his mind to relevant evidence.\(^\text{415}\) Secondly, there was no rational connection between the Commissioner’s findings and the evidence before

\(^{408}\) County Fair Foods para 9; specifically, he agreed with Froneman DJP’s emphasis on the significance of the distinction between appeals and reviews and his definition of the extended test for review.

\(^{409}\) County Fair Foods para 10; the Judge referred to the former as applicable to review proceedings and the latter as applicable to appeals.

\(^{410}\) County Fair Foods para 10. For a more thorough discussion of the various meanings attributed to these terms, consult chapter 4.

\(^{411}\) Coetzee v Lebea NO & Another (1999) 20 ILJ 129 (LC) para 10; Carephone para 32. See too Fergus (2010) and the references cited therein; De Ville (2005) at 30.

\(^{412}\) This was Froneman DJP’s view; Carephone para 32.

\(^{413}\) Carephone para 32.

\(^{414}\) Regarding both the manner in which the Commissioner had reached his decision and the decision itself.

\(^{415}\) County Fair Foods paras 14, 17 & 19.
him.\textsuperscript{416} Finally, the Commissioner’s failure to afford proper recognition to pertinent features of the third respondent’s conduct, had led him to lose sight of other important considerations, in turn rendering the award irrational.\textsuperscript{417} Ultimately, in Kroon JA’s opinion, in the absence of a rational connection between evidence and award, the Commissioner’s determination evinced a gross irregularity warranting review.\textsuperscript{418}

Want of rationality (or reasonableness) in administrative determinations has long been recognized\textsuperscript{419} as a potentially adequate basis from which to infer failures to apply the mind.\textsuperscript{420} In this form, it constitutes a procedural irregularity capable of review.\textsuperscript{421} Unfortunately, it is unclear from Kroon JA’s decision whether he deemed the award defective on this basis, or whether the Commissioner’s failure to apply his mind had simply resulted in an irrational outcome. To the extent to which the former led to the review, Kroon JA did not apply the \textit{Carephone} standard at all. Were it the latter approach which informed his conclusion however, substantive irrationality ostensibly did come into play. In any event, and regardless of the precise rationale behind it, the varying interpretations of Kroon JA’s decision exemplify the indefinite nature of the relationship between the rational justifiability standard and section 145 of the LRA.

Ngcobo AJP’s judgment clarified the essence of Kroon JA’s somewhat, but simultaneously blurred the distinction between appeal and review. According to Ngcobo AJP, the Commissioner’s failure to refrain from interfering with the employer’s sanction\textsuperscript{422} constituted an impermissible error of judgment. This error justified the conclusion that the Commissioner had failed to apply his mind and had consequently committed a gross irregularity.\textsuperscript{423} At a glance, Ngcobo AJP’s findings seem consonant with the distinction between appeal and

\textsuperscript{416} Ibid para 17.
\textsuperscript{417} Including the interests of the parties involved; ibid para 18.
\textsuperscript{418} \textit{County Fair Foods} para 20.
\textsuperscript{419} Both prior to and since \textit{Carephone}. See, for example, \textit{Venture Motor Holdings} paras 5 & 26; \textit{Hira, Johannesburg Stock Exchange} and \textit{Kynoch Feeds} (1998) (LC) paras 33-36.
\textsuperscript{420} See Darcy Du Toit et al \textit{Labour Relations Law: A Comprehensive Guide} 4 ed (2003) at 153-155. The precise phrase ‘failure to apply the mind’ was not necessarily adopted by the courts in all instances but its essence is evident in a number of the reviewable defects listed by Du Toit et al as examples of gross irregularities and excesses of power.
\textsuperscript{422} Ngcobo AJP found that the employer’s sanction was ‘reasonable’.
\textsuperscript{423} \textit{County Fair Foods} paras 36-37.
review. Yet, the path which led him to this conclusion suggests otherwise. In holding the award defective, the Judge ambiguously remarked:

‘The reviewing court is concerned with the manner in which the commissioner comes to a conclusion. It does not concern itself with the result. … The reviewing court must ask itself whether the award can be sustained by the facts and the applicable law. If the award can be sustained by the facts and the law, interference with the award is not warranted. If it cannot, interference is warranted.’

And further that:

‘…the question is not whether another reasonable commissioner would have made the same ‘error of judgment’. The question is whether the commissioner interfered with the sanction fairly imposed by the employer in circumstances where the commissioner should not have interfered.’

Just how an enquiry into the sustainability of an award, with reference to the facts and the applicable law, was distinct from an appeal went undefined. Asking directly whether a commissioner had interfered where he should not have done so depicts confusion equivalent to that apparent in Kroon JA’s decision. Regrettably, however, Ngcobo AJP shed no light on these issues, leaving the disconcerting impression that provided judicial dissatisfaction persisted awards would be amenable to review. As such, despite his reference to a gross irregularity, the Judge seemingly engaged in substantive review.

Conradie JA took an opposing view, finding that it was only where a commissioner’s award was so clearly and dramatically incorrect that it made one ‘whistle’, that interference would be warranted. Applying this approach after analysing both the evidence and the award, the

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424 The Judge looked only to alleged procedural irregularities in the award, rather than to the substance of the Commissioner’s findings.
425 County Fair Foods paras 26-27. For a similar depiction of review, consult Coetzee para 10. Note, however, that in Rustenburg Platinum Mines, the SCA disapproved of this approach as impermissibly blurring the distinction between appeal and review; Rustenburg Platinum Mines (SCA) para 30.
426 County Fair Foods para 35.
427 Consider Froneman DJP’s attempt at tackling this issue; Carephone para 37. For critique of rational justifiability and its conflation of appeal with review, consult Toyota SA Motors paras 33-39; Rustenburg Platinum Mines (SCA) paras 29-31; Fergus (2010).
428 Ibid; Kroon JA arguably misunderstood Froneman DJP’s divergent descriptions of ‘justifiability’ and ‘justified’.
429 County Fair Foods para 43; his approach is reflected in the sentiments of van Dijkhorst JA in Adcock Ingram Critical Care v CCMA & Others [2001] 9 BLLR 979 (LAC). There, the Judge held: ‘The test to be applied is that set out by this Court in Carephone… The mere fact that the reviewing Court differs in its conclusion of law or fact from that of the tribunal of first instance may not be reason for interference as that would blur the distinction between appeal and review. But when the difference is so great that it impinges upon the basic norm
Judge resolved that while the Commissioner had made an ‘error of judgment’, the error was not so egregious as to be unreasonable. Consequently, the award ought to have stood.

Conradie JA’s judgment reflects a standard of review akin to ‘gross unreasonableness’ or the Wednesbury test. This test essentially renders the question of whether interference is justified, a matter of degree. The Wednesbury standard may be suitably deferential to commissioners’ findings but it also poses difficulties. First, the standard fails to provide an objective basis from which judges may assess rational justifiability. In addition, it neglects the significance of commissioners’ reasons in rationality review, favouring a focus on the extent of the ‘chasm’ between commissioners’ findings and those of reviewing courts. This necessarily requires that a comparison be made between the court’s preferences as to outcome and those of the presiding commissioner. However, in review proceedings, courts are not generally possessed of all evidentiary material available to commissioners during arbitrations. They are accordingly in an inferior position relative to the CCMA in so far as factual and evidentiary determinations are concerned. The appropriateness of a test comprising little more than comparison is therefore questionable.

viz the necessity of a fair trial, interference is warranted. Whether that point has been reached has to be decided on the facts of each individual case. In this case the divide is in my view so great that it warrants interference…’; Adcock Ingram para 22.

County Fair Foods para 48.

Ibid para 47.

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223; so-called ‘Wednesbury unreasonableness’ generally requires absurdity or gross unreasonableness; Sir William Wade & Christopher Forsyth Administrative Law 9 ed (2004) at 364 & 371-372; Cora Hoexter with Rosemary Lyster The New Constitutional and Administrative Law vol 2 (2002) at 186; PP Craig Administrative Law 4 ed (1999) at 537; De Ville (2005) at 209. Wednesbury unreasonableness and gross unreasonableness have not always, however, been construed as equivalent; LA Rose Innes Judicial Review of Administrative Tribunals in South Africa (1963) at 215; the Introduction to this dissertation. Note Pretorius’s opposition to casting the test for review as one which sets the threshold for review at ‘egregious’ findings or conduct on the part of commissioners; Pretorius at 1523-1525.

Consistently with the doctrine of the SOP and the implications of the right to just administrative action.

See Shoprite Checkers, where Wallis AJ commented on the role of review in establishing objective justifications for awards; Shoprite Checkers (2000) (LC) paras 29-30. Consult too Hoexter (2007) at 311 and Hoexter with Lyster (2002) at 518. In these texts the difficulties with the ground of unreasonableness provided for in section 6(1)(h) of the Promotion of Administrative Justice Act 3 of 2000 (‘PAJA’) are recorded.


Cases in which the complete record was not available include Bestel v Astral Operations Ltd & others [2011] 2 BLLR 129 (LAC); Shoprite Checkers (Pty) Ltd v CCMA & others [2008] 12 BLLR 1211 (LAC) (‘Shoprite Checkers 1’); SA Rugby Players’ Association (SARPA) & others v SA Rugby (Pty) Ltd & others; SA Rugby (Pty) Ltd v SARPU & another [2008] 9 BLLR 845 (LAC) para 31.

Furthermore, reviewing courts do not benefit from the oral testimonies of the parties or the witnesses called during the relevant arbitration proceedings. Courts therefore cannot make credibility findings as effectively as commissioners can; Mark Aronson, Bruce Dyer & Matthew Groves Judicial Review of Administrative Action 3 ed (2004) at 180; Housen v Nikolaisen 2002 SCC 33 para 22; Alberta Union of Provincial Employees v Alberta, 2010 ABCA 216 para 47.
Usefully, the CC has since rejected the *Wednesbury* standard.\(^{438}\) Thus, it is unnecessary for the purposes of this thesis to appraise Conradie JA’s judgment in greater detail.\(^{439}\) His application of the gross unreasonableness standard, when compared to the attitudes of his brethren, nevertheless helpfully illustrates another construction of rational justifiability adopted post *Carephone*.\(^{440}\) When read together, the LAC’s diverse findings lucidly illustrate the persistent confusion around the relationship between section 145 and the *Carephone* test.

### 4.2 *De Beers Consolidated Mines Ltd v CCMA & others*\(^{441}\)

In *De Beers Consolidated Mines Ltd v CCMA & others*,\(^ {442}\) the LAC was again divided as to the rational justifiability of the award in question. Whereas Conradie JA and Willis JA concurred in upholding the appeal, their reasons for doing so were disparate.\(^ {443}\) Zondo AJP was alone in finding that the Commissioner’s decision should be exempt from review and his approach to review contrasts starkly with those of the other two Judges. Once more, comparably to *County Fair Foods*, the discrete attitudes of the three Judges evince varying interpretations of the rational justifiability enquiry and its indefinite association with section 145.

In holding as he did, Zondo AJP examined (near exclusively) the Commissioner’s three principle reasons for ordering reinstatement.\(^ {444}\) The first of these reasons, he deemed irrational. Similarly, the second was illogical.\(^ {445}\) Yet, the third of the Commissioner’s reasons was neither irrational nor unjustifiable; it further did not depict a gross irregularity.\(^ {446}\) As such, the Judge concluded that the award should have been upheld.\(^ {447}\) Before doing so, he

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\(^{438}\) *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) paras 42-44; consider too *Roman v Williams NO* 1997 (9) BCLR 1267 (C) at 284-285; Garbers (2000) at 86-87 submits that *Carephone* did not impose the requirement that, to succeed on review, allegations of commissioners’ excesses of power had to be gross.

\(^{439}\) At least for the purposes of defining the ambit of reasonableness or rational justifiability.

\(^{440}\) Consider too *County Fair Foods* para 43.

\(^{441}\) *De Beers Consolidated Mines Ltd v CCMA & others* [2000] 9 BLLR 995 (LAC).

\(^{442}\) Ibid.

\(^{443}\) Ibid.

\(^{444}\) Ibid.

\(^{445}\) The employees had been dismissed for fraud.

\(^{446}\) *De Beers* para 8.

\(^{447}\) Ibid paras 8-9.

\(^{447}\) Ibid para 13; just why Zondo AJP considered it necessary to conclude that the reason given did not constitute a gross irregularity is unclear.
emphasized the nature of review proceedings as distinct from appeal, precluding judicial interference in case of disagreement alone.\textsuperscript{448}

Zondo AJP’s stance was both apposite and questionable. In so far as he considered the rationality of the award in light of the Commissioner’s reasons, his decision is valuable. His approach in this respect plainly accorded with Carephone’s stipulation that assessing commissioners’ reasons formed the basis for rationality review.\textsuperscript{449} In addition, he did not succumb to the temptation of substituting his own opinion of the matter for that of the Commissioner.\textsuperscript{450} However, the legitimacy of upholding the award on the strength of the Commissioner’s third reason alone, after describing her remaining reasons as irrational and illogical, is doubtful. Allowing awards premised upon irrational and unjustifiable reasons to stand simply due to one reasonable contention, fails to preserve the Constitutional imperatives of accountability, transparency and openness.\textsuperscript{451} It also appears illogical. While it is conceivable that an award may be justifiable with reference to only certain of the reasons given for it, where the majority of a commissioner’s reasons are wholly unjustifiable it is counterintuitive to endorse the award.\textsuperscript{452}

Conradie JA approached the enquiry somewhat differently.\textsuperscript{453} Rather than confining his analysis to the Commissioner’s reasons, he analysed the evidence in detail, with reference to both her findings and ultimate award.\textsuperscript{454} Having decried the validity of certain of these findings,\textsuperscript{455} Conradie JA evaluated the Commissioner’s reasons. He described these reasons in turn as incorrect,\textsuperscript{456} ‘bizarre’\textsuperscript{457} and based on a misunderstanding of applicable legal principles.\textsuperscript{458} According to him, supplementary to the factors considered by the

\begin{flushleft}
\textsuperscript{448} De Beers para 13.  
\textsuperscript{449} Carephone paras 20 & 31-38.  
\textsuperscript{450} This aptly accords with the principles devised in Carephone; Carephone para 36.  
\textsuperscript{451} Section 1(d) of the Constitution; Carephone para 19.  
\textsuperscript{452} Recall the functions of judicial review generally in ensuring accountability and enhancing improved decision-making in future decisions; Jeffrey Jowell ‘The democratic necessity of administrative justice’ 2006 Acta Juridica 13 at 17; Solomon paras 19 & 21; Cape Bar Council v Judicial Service Commission & another (Centre for Constitutional Rights & another as amici curiae) [2011] JOL 27947 (WCC) paras 28–29; Standard Bank (1998) (LC) para 19. De Ville argues that judicial review has an additional role to play in promoting cooperation and conversation between the judiciary and the public administration; De Ville (2005) at 30.  
\textsuperscript{453} Not only is his approach distinct from Zondo JP’s but it is vastly different to that which he adopted in County Fair Foods.  
\textsuperscript{454} De Beers paras 17-19.  
\textsuperscript{455} Ibid para 17.  
\textsuperscript{456} Ibid para 20.  
\textsuperscript{457} Ibid para 21.  
\textsuperscript{458} Ibid para 22.
\end{flushleft}
Commissioner was an additional concern – the dismissed employees had shown no remorse. Whereas their lack of remorse ought to have been taken into account, the Commissioner had not done so.\textsuperscript{459}

Conradie JA’s approach demonstrates an interpretation of rational justifiability commonly adopted by the courts following \textit{Carephone}. The interpretation permitted reviewing courts to reflect on alternative reasons for awards when assessing the rationality thereof. There are two related difficulties with this construction. First, Froneman DJP made no provision in his definition of rational justifiability for alternative reasons to be considered during review proceedings.\textsuperscript{460} As such, Conradie JA’s stance does not strictly comply with the \textit{Carephone} standard. Secondly, and consequent thereon, is the impact of the Judge’s interpretation. By allowing alternative reasons to inform review, the potential for judges to replace commissioners’ findings with those of their own preference may arguably be increased. Given that this practice was explicitly denounced by the LAC in \textit{Carephone}, the validity of permitting it on review was (at the time of \textit{De Beers}) debatable.\textsuperscript{461}

Conradie JA then resolved that, as the Commissioner had ‘ignored or misapplied legal principles to an extent that [was] inappropriate or unreasonable’, she had ‘failed to make a rational connection between the material available to her and the conclusion which she reached.’\textsuperscript{462} As a result, her award was irrational and liable to be set aside.\textsuperscript{463} Ostensibly therefore, in the Judge’s view, irrationality incorporated errors of law.\textsuperscript{464} While review for material error of law had repeatedly been declared legitimate,\textsuperscript{465} whether minor errors

\textsuperscript{459} Ibid para 25.
\textsuperscript{460} Carephone para 37.
\textsuperscript{461} Note that this issue was ostensibly resolved by the CC in \textit{Sidumo}.
\textsuperscript{462} De Beers para 27.
\textsuperscript{463} The error rendering the award reviewable concerned the commissioner’s misunderstanding of the significance of the employees’ ‘long service’ as a mitigating factor; De Beers paras 26-27. Yet, the materiality of this misunderstanding is debatable and the relevance of mitigating circumstances is far from clear; compare Consani Engineering (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & others (2004) 25 ILJ 1707 with MEC for Health (Gauteng) v Mathamini & others (2008) 29 ILJ 366 (LC). For a summary of the current approach to mitigating circumstances, see National Union of Mineworkers & another v CCMA & others (LC) unreported case no C507/06 of 22 October 2010. See also Nicola Smit ‘How do you determine a fair sanction? Dismissal as an appropriate sanction in cases of dismissal for (mis)conduct’ (2011) 1\textit{ De Jure} 49 at 69-70 and item 3(5) of the Code of Good Practice Dismissals, Schedule 8 to the Labour Relations Act 66 of 1995.
\textsuperscript{464} Consider too Metcash Trading (Pty) Ltd v\textit{a} Trador Cash & Carry Wholesalers v Sithole & others (1998) JOL 3591 (LC) where the Court emphasized that in order to be rationally justifiable, the law applied by commissioners must be the correct law. Sharpe disagrees; Sharpe (2000) at 2168.
\textsuperscript{465} Maneche & others v Commission for Conciliation, Mediation and Arbitration & others (2007) 28 ILJ 2594 (LC) paras 13 -14; Hira at 93; Mlaba v Masonite (Africa) Ltd & others [1998] 3 BLLR 291 (LC) at 301C-302E; OK Bazaars (A Division of Shoprite Checkers) v Commission for Conciliation, Mediation & Arbitration &
warranted interference remained uncertain.\textsuperscript{466} Equally unclear was whether mistakes of law were required to result in irrational outcomes for reviewable defects to arise. Conradie JA’s failure to address both the materiality of the Commissioner’s error and the relationship between the relevant grounds of review was accordingly regrettable. Nevertheless, once more, the discrepancies between his and Zondo AJP’s approaches divulge the contested nature of review subsequent to \textit{Carephone}.

Willis JA agreed with Conradie JA that the Commissioner’s award ought to be overturned. Yet, his reasons for doing so differed significantly from Conradie JA’s. This time, the Judge began with an assessment of the Commissioner’s reasons, findings and award,\textsuperscript{467} observing that:

‘The overall impression, upon reading the award, is of a humane, compassionate, intelligent person, honestly trying to apply her mind to the issues. Ordinarily one cannot reasonably expect much more from an arbitrator.’\textsuperscript{468}

As such, when regard was had to all the material properly before the Commissioner, together with the connections she had made between that material and her award, the Commissioner’s decision was justifiable.\textsuperscript{469} Willis JA’s emphasis on the relationship between the Commissioner’s evidence, reasons and award\textsuperscript{470} was perhaps more appropriate than either Zondo AJP’s minimalist attitude or Conradie JA’s appellate like stance. The Judge did not, however, stop there. There was another ground on which he deemed the award reviewable - the Commissioner had misconstrued the nature of her powers. In essence, Willis JA held, rather than applying the reasonable employer test, the Commissioner had decided the matter

\begin{footnotesize}
\textsuperscript{466} Ibid; National Commissioner of the SA Police Service v Potterill NO & others (2003) 24 ILJ 1984 (LC) paras 23-25; \textit{Hira} at 93. In \textit{Hira}, the Appellate Division held that only material errors of law were reviewable; \textit{Hira} at 91. See also Willis JA’s views on review for error of law; \textit{De Beers} paras 55-56.
\textsuperscript{467} \textit{De Beers} paras 28-39.
\textsuperscript{468} Ibid para 40. This approach compares to that of Sharpe who proposes that an appropriate test for review should ask ‘whether the commissioner made a good faith effort to reach a reasoned conclusion based on a consideration of relevant legal and evidentiary materials’; Sharpe (2000) at 2173.
\textsuperscript{469} \textit{De Beers} para 42.
\textsuperscript{470} This is discussed in more detail below.
\end{footnotesize}
simply on her own assessment of fairness.\textsuperscript{471} In doing so, she had exceeded her powers,\textsuperscript{472} and the award consequently fell to be set aside.\textsuperscript{473}

Two aspects of Willis JA’s judgment are noteworthy. First, while arguably aptly deferential, Willis JA’s appraisal of the award’s rationality appears premised on little more than an imprecise intuition.\textsuperscript{474} In turn, it offers minimal insight into the meaning of the Carephone standard. His concurrence with Zondo AJP on the question of rationality despite the ultimate reviewability of the award,\textsuperscript{475} nonetheless demonstrates the difficulties with defining the standard appropriately.\textsuperscript{476} Positively, from the Judge’s finding that the award was reviewable on the basis of excess of powers, the continued independence of the section 145 grounds of review may be inferred.\textsuperscript{477} Notwithstanding the substantive rationality of the Commissioner’s award, Willis AJ deemed the legality of her approach to resolving the dispute, faulty.\textsuperscript{478} For the purposes of understanding Sidumo, this indication of section 145’s independence is paramount. Following the CC’s decision, there was a degree of uncertainty around the continued validity of the section 145 grounds.\textsuperscript{479} Remembering that Carephone was a prelude to Sidumo, Willis JA’s decision usefully endorses their enduring relevance.\textsuperscript{480}


\textsuperscript{472} In support of this determination, he cited Amalgamated Clothing and Textile Workers Union v Veldspan (Pty) Ltd 1994 (1) SA 162 (A); there, the Court held that an arbitrator would exceed his or powers to the extent to which he or she had made ‘...a determination outside of the terms of the submission (or referral in the case of arbitrations being conducted in terms of the LRA)...’; Veldspan at 169C.

\textsuperscript{473} De Beers paras 50-62; In Zondo AJP’s opinion, it was inappropriate for Willis AJ to have addressed this ground of review at all, as it had not been proposed by the applicants in their review application; De Beers at paras 14-15. Compare this view to the varying approaches of the Judges in CUSA v Tao Ying Metal Industries & others [2009] 1 BLLR 1 (CC) paras 68 & 130-134.

\textsuperscript{474} De Beers para 40.

\textsuperscript{475} Particularly when compared to the conclusive remarks of Conradie JA to the contrary.

\textsuperscript{476} And simultaneously retaining the distinction between appeal and review; consider Shoprite Checkers (2000) (LC) para 73; Toyota SA Motors paras 33-39; Rustenburg Platinum Mines (SCA) paras 29-31.

\textsuperscript{477} For additional confirmation of the continued validity of the section 145 grounds of review, see Shoprite Checkers (2000) (LC) paras 58-91.

\textsuperscript{478} De Beers paras 50-62.

\textsuperscript{479} Consider, for example, Kievits Kroon Country Estate (Pty) Ltd v CCMA & others [2010] JOL 26444 (LC) and Edcom.

\textsuperscript{480} See too Crown Chickens para 58.
4.3 Shoprite Checkers (Pty) Ltd v Ramdaw NO & others

While Shoprite Checkers (Pty) Ltd v Ramdaw NO & others (‘Shoprite Checkers (LC)’) will not be discussed in detail here, to understand the appeal against it, it is necessary to mention it briefly. In Shoprite Checkers (LC), Wallis AJ re-examined Carephone, stridently holding that it had been erroneously decided. As such, and despite the binding nature of LAC determinations, he was not obliged to follow it. His primary concerns with Froneman DJP’s findings included that:

a) the rational justifiability standard fused the distinction between appeal and review contrary to the intentionally narrow grounds provided for in the LRA;
b) the LAC had construed section 145 inappropriately, and in the absence of a Constitutional challenge to the section there had been no basis for doing so; and
c) CCMA arbitrations did not constitute administrative action.

Predictably, controversy ensued.

4.4 Shoprite Checkers (Pty) Ltd v Ramdaw NO & others

Following the confusion created by Shoprite Checkers (LC), appeal proceedings were instituted. The legitimacy of Carephone thus confronted the LAC in Shoprite Checkers (Pty) Ltd v Ramdaw NO & others (‘Shoprite Checkers (LAC)’). While the rational justifiability test faced scrutiny, the primary question before the Court in Shoprite Checkers (LAC) was
whether CCMA arbitrations constituted administrative action.\textsuperscript{489} Notwithstanding the consequence of this question, however, Zondo JP neglected to answer it. Instead, he held simply that the Constitutional requirement that all exercises of public power must be rational was undisputed.\textsuperscript{490} As commissioners were clearly exercising public power during arbitration proceedings, to the extent to which the meanings of ‘rationality’ and ‘justifiability’\textsuperscript{491} were adequately aligned, the administrative nature of CCMA arbitrations would be immaterial.\textsuperscript{492} The Judge then concluded that the terms were suitably similar in meaning to counteract the contention. In his view:

‘[A]lthough 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. In this regard, I am satisfied that a decision that is justifiable cannot be said to be irrational and a decision that is irrational cannot be said to be justifiable.’\textsuperscript{493}

In effect, for the purposes of review at least, rationality and justifiability were interchangeable.\textsuperscript{494} According to Zondo JP, the appropriate test for review based on rationality therefore obliged reviewing courts to:

a) consider the material properly available to the commissioner, the final decision taken, and the reasons for it;

b) recall that a finding of irrationality would be infrequent;\textsuperscript{495}

c) carefully maintain the distinction between appeal and review; and

d) ensure that the need for efficiency in labour dispute resolution was not forgotten.\textsuperscript{496}

Applying these factors to the matter before him, Zondo JP held that the Commissioner’s award, while open to criticism, was neither irrational nor unjustifiable;\textsuperscript{497} it was accordingly

\textsuperscript{489} Shoprite Checkers (2001) (LAC) para 3.

\textsuperscript{490} This was apparent from the CC’s decisions in Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC) paras 85-90 and Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1999 (1) SA 374 (CC) paras 56-59; Shoprite Checkers (2001) (LAC) para 19.


\textsuperscript{492} Ibid para 19.

\textsuperscript{493} Ibid para 25.

\textsuperscript{494} For the courts frequent equations of these terms, consult chapters 3 and 4 of this dissertation.

\textsuperscript{495} On the authority of Pharmaceuticals Manufacturers. For his earlier analogous assertion, see Rustenburg Platinum Mines (2004) (LAC) para 15, where he remarked that, in case of doubt, courts should not interfere.

\textsuperscript{496} Shoprite Checkers (2001) (LAC) para 82.
immune from review. In doing so, he aptly refrained from substituting his own preferences as to outcome, for those of the Commissioner. To this extent, his judgment was creditworthy. Both his clarification of the nature of review and his emphasis on the expeditiousness vital to labour dispute resolution were further fittingly congruent with the objects of the LRA. Yet, the Judge’s failures to affirm the Constitutional status of CCMA arbitrations and to acknowledge the distinction between justifiability and rationality were regrettable. In neglecting the former, the Constitutional foundations of review went unconfirmed. Simultaneously, the essential role of the right to administrative justice in review proceedings was undermined. The Judge’s oblique references to trivial discrepancies between ‘justifiability’ and ‘rationality’ did not assist in refining the meaning of the Carephone standard either. Compounding these problems was the absence from Zondo JP’s decision of emphasis on the import of the connections made by commissioners between evidence, award and reasons when conducting rationality review. To the extent to which outcome rather than reasoning process forms the basis for such review, the distinction between appeal and review is obscured.

4.5 Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp & others

Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp & others illustrates these difficulties well. There, the LAC again both clarified the nature of review and muddied the waters. In evaluating the relevant Commissioner’s award, Nicholson JA described ‘rational justifiability’ as implying that awards should:

‘…not be arbitrary and must have been arrived at by a reasoning process as opposed to conjecture, fantasy, guesswork or hallucination. Put differently, the arbitrator must have applied his mind seriously to the issues at hand and reasoned his way to the

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497 Ibid paras 84 & 101; in concluding as he did, the Judge again recounted the role of efficiency in resolving labour disputes; consider too, in this regard, NEHAWU para 31 and Food & Allied Workers Union on behalf of Mbatha & others v Pioneer Foods (Pty) Ltd t/a Saska Milling & Baking & others (2011) 32 ILJ 2916 (SCA) (‘FAWU’) para 19.
499 The Explanatory Memorandum at 318-319; section 1(d) of the LRA; Benjamin (2007) at 32-33.
500 That a distinction does exist was clearly implied by his findings. For the differences between rationality, justifiability and reasonableness, refer to chapters 3 and 4 of this thesis.
501 His use of the word ‘correct’ to describe aspects of the commissioner’s findings was similarly not ideal; Shoprite Checkers (2001) (LAC) para 83.
502 Rustenburg Platinum Mines (SCA) paras 29-30; Pretorius.
504 Ibid.
505 Writing for an (effectively) unanimous Court.
conclusion. Such conclusion must be justifiable as to the reasons given in the sense that it is defensible, not necessarily in every respect, but as regards the important logical steps on the road to his order.\textsuperscript{506}

The passage is lucid and ostensibly apposite. However, the Court’s findings were disappointingly inconsistent with it.\textsuperscript{507} Rather than limiting his appraisal to the Commissioner’s stated reasons, Nicholson JA declared the award incapable of justification whether based on the reasons given for it or on any alternative reasons discernible from the evidence.\textsuperscript{508} Thus, despite his emphasis on rationality review as entailing assessments of the reasoning process and logicality of commissioners’ decisions (with reference to the reasons given for decisions), Nicholson JA ultimately concerned himself with alternative reasons capable of sustaining the award.\textsuperscript{509} Doing so enabled intrusive review. Once more, the distinction between appeal and review was blurred and the Carephone standard misconstrued.

4.6 Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA & others\textsuperscript{510}

In Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA & others,\textsuperscript{511} the SCA remedied at least some of the debate. In the process, it addressed the relationship between section 6 of the PAJA\textsuperscript{512} and section 145 of the LRA.\textsuperscript{513} In particular, whether the PAJA’s grounds could legitimately form the basis for reviewing CCMA arbitration awards was determined. With extensive reference to the Constitutional foundations of the PAJA, the Court held in this regard that the grounds listed therein had indeed superseded those of the LRA.\textsuperscript{514} It was nonetheless immaterial to the matter at hand whether the Carephone standard or section 6(2)(f) of the Promotion of Administrative Justice Act (‘PAJA’)\textsuperscript{515} was applied - both tests produced the same result.\textsuperscript{516} Unfortunately, the LAC in Rustenburg Platinum Mines Ltd v CCMA & others had failed to properly apply either of these tests. The Carephone standard required reviewing courts to enquire whether there had been ‘a rational objective

\begin{itemize}
  \item \textsuperscript{506} Crown Chickens para 58.
  \item \textsuperscript{507} Ibid para 64.
  \item \textsuperscript{508} Ibid paras 64 & 65-67.
  \item \textsuperscript{509} Ibid.
  \item \textsuperscript{510} Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA & others [2006] 11 BLLR 1021 (SCA).
  \item \textsuperscript{511} Ibid.
  \item \textsuperscript{512} Section 6 of the PAJA lists the grounds of review on which review proceedings may be instituted against administrative action generally.
  \item \textsuperscript{513} Rustenburg Platinum Mines (SCA) paras 18-27.
  \item \textsuperscript{514} Ibid paras 24-27.
  \item \textsuperscript{515} The Promotion of Administrative Justice Act 3 of 2000 (‘PAJA’).
  \item \textsuperscript{516} Rustenburg Platinum Mines (SCA) para 26.
\end{itemize}
basis justifying the connection the commissioner made between the material before him and
the conclusion he reached.\textsuperscript{517} Critically, it did not allow for alternative reasons justifying an
award to be appraised on review. Yet, the LAC had done so, failing to confine its evaluation
to the rationality of the Commissioner’s reasoning process and instead conducting an
appeal.\textsuperscript{518} While the SCA conceded that review for irrationality inevitably entailed a measure
of substantive scrutiny, the fundamental distinction between review and appeal persisted. The
LAC’s findings were therefore inappropriate and the appeal was upheld.\textsuperscript{519}

The significance of the SCA’s interpretation of the \textit{Carephone} standard lies in its reversion to
the original delineation of the standard.\textsuperscript{520} The Court suitably refrained from examining the
simple rationality of the Commissioner’s final award, as many courts had formerly done.\textsuperscript{521}
As Cameron JA observed, the effect of this approach had been to collapse the standard into
little more than a deferential appeal.\textsuperscript{522} Comparatively, the SCA’s emphasis on the rationality
of the Commissioner’s reasoning process\textsuperscript{523} enabled it to maintain the distinction between
review and appeal recognised in \textit{Carephone}.\textsuperscript{524} Rather than examining the outcome of an
award (and whether it was supported by the facts and the law), rational justifiability, in the
Court’s view, focused on the connections made by commissioners between their stated
reasons for awards, the evidence properly before them and their final determinations.\textsuperscript{525} The
SCA’s decision is usefully coherent with that of the LAC’s in \textit{Carephone}. Given that
reviewing courts struggled to apply the rational justifiability standard as it stood, however,
the absence of supplementary guidelines in the Court’s judgment left them little better
equipped than before.

\textsuperscript{517} Ibid para 29.
\textsuperscript{518} Ibid paras 29-30.
\textsuperscript{519} Ibid paras 30-35 & para 53.
\textsuperscript{520} Compare the SCA’s decision in \textit{Rustenburg Platinum Mines} (SCA) para 29 to \textit{Carephone} para 37.
\textsuperscript{521} See the Labour Courts’ decisions in \textit{County Fair Foods} and \textit{De Beers} paras 17-27, for example; Benjamin
(2007) at 34; Sharpe (2000) at 2164-2170. Fortunately, some courts seemingly construed the test for review quite
appositely; \textit{Metro Cash & Carry Ltd v Le Roux NO & others} [1999] 4 BLLR 351 (LC) paras 12-19.
\textsuperscript{522} \textit{Rustenburg Platinum Mines} (SCA) paras 29-30.
\textsuperscript{523} Ibid para 29.
\textsuperscript{524} \textit{Carephone} para 32. The Judge noted further that the rational justifiability test focuses on the justifiability of
awards, rather than on the question of whether awards are truly justified or correct.
\textsuperscript{525} \textit{Rustenburg Platinum Mines} (SCA) para 29.
5. CONCLUSION

Carephone extended the grounds of review available to parties aggrieved by CCMA awards. Key to this extension was the infusion of rational justifiability into section 145 of the LRA. While the scope of rationality review was, for the most part, clearly expressed by Froneman DJP, the judgment led to both controversy and confusion. As a result, varying interpretations of rational justifiability pervaded subsequent judicial determinations. Furthermore, distinctive approaches to the relationship between section 145 and the Carephone test developed. The SCA’s pronouncement in Rustenburg Platinum Mines admirably attempted to elucidate the test, and to some extent it succeeded. Further guidance would nevertheless have been useful.

Despite the inconsistencies to which Carephone gave rise, both Carephone and Rustenburg Platinum Mines hold apparent value. Pertinently, read together, the decisions explicate the essential principles of review and the Constitutional bases therefore. By revisiting these matters, some of the contention discussed above may be remedied. Given that the Constitutional premises of substantive review remain largely intact since Carephone, before examining Sidumo it is instructive to recount the principles and values addressed in these two fundamental judgments.

The first evident principle was that review was comprised of both procedural and substantive elements. Whereas the former were regulated by the grounds provided for in section 145 of the LRA, the latter was found in the right to just administrative action. At the time of

527 Compare, for example, the decisions of the 3 Judges in County Fair Foods and De Beers as discussed above; consider too Adcock Ingram para 22 and Coetzee para 10.
528 Whether it stated the principles applicable to review any more clearly than the LAC had in Carephone, however, is questionable.
529 Notwithstanding a change in the Constitution applicable – the interim Constitution has since been replaced by the Constitution. Note also Edcon, where the SCA held that the only difference between the Carephone and Sidumo standards was ‘in the semantics’; Edcon para 16.
530 Being Carephone and Rustenburg Platinum Mines (SCA).
531 Carephone paras 15-37; Sharpe (2000) at 2174. Prior to Carephone, irrationality had succeeded as a ground of review only in so far as the alleged irrationality exposed the relevant commissioner’s procedural irregularity; Venture Motor Holdings paras 5 & 26; Hira, Johannesburg Stock Exchange and Kynoch Feeds (1998) (LC) paras 33-36. Following Carephone, in County Fair Foods, Ngcobo J ostensibly adopted this approach too; County Fair Foods paras 26-27.
532 At the time of Carephone, this right appeared in section 33 read with item 23(2) of Schedule 6 to the Constitution. Currently, the right resides in section 33 of the (final) Constitution.
Carephone, this right permitted substantive review based on rational justifiability.\textsuperscript{533} Notwithstanding the introduction of rationality review, the section 145 grounds of review still maintained their currency.\textsuperscript{534} The scope of review had simply been extended.\textsuperscript{535} While the substantive constituent of review permitted a measure of scrutiny into the merits of arbitration proceedings, it did not allow for covert appeals.\textsuperscript{536} The correctness of commissioners’ findings was accordingly irrelevant to the enquiry; so too was the plain sustainability of awards on the facts and the law.\textsuperscript{537} Rather than emphasizing rationality in outcome, substantive review focused on the rationality of the connections made by presiding commissioners between evidence, awards and reasons. It was only by retaining this emphasis that the proper distinction between appeals and reviews could objectively be maintained.\textsuperscript{538} Appraising alternative reasons for awards intruded upon this distinction, facilitating appellate like attitudes to review.\textsuperscript{539} Thus, alternative reasons justifying or invalidating awards (according to Rustenburg Platinum Mines at least) were of minimal relevance to section 145 reviews.

As detailed in later chapters of this thesis, it is here that a significant discrepancy between the Carephone standard and the Sidumo test arises – specifically, in review proceedings based on the latter, no proscription on assessing alternative reasons for awards exists.\textsuperscript{540} At this point therefore, the Carephone test loses its comparative value. The principle that reviews should not be transmuted into appeals nonetheless remains important. As such, the Courts’ directives as to how appellate style review may be avoided, maintain a degree of legitimacy following Sidumo.

Supporting these principles were the Constitutional values associated with review. Paramount in this regard was the right to just administrative action which grounded judicial review and particularly substantive review.\textsuperscript{541} Underpinning this right were the values of accountability,

\textsuperscript{533} Carephone paras 15 & 31; section 33 read with item 23(2) of Schedule 6 to the Constitution. 
\textsuperscript{534} De Beers paras 56–62; Solomon paras 19 & 21. In Solomon, the Court emphasized the function of judicial review in ensuring due process. 
\textsuperscript{535} Carephone paras 30–31; Whitear-Nel at 1486; Sharpe (2000) at 2174; Grant at 255–256 and Loveday (1998). 
\textsuperscript{536} Rustenburg Platinum Mines (SCA) paras 29–30; Sharpe (2000) at 2168. 
\textsuperscript{537} Ibid; Sharpe (2000) at 2168. For alternative (and debatably contrary) interpretations of the test, see Coetzee para 10 and County Fair Foods para 27. 
\textsuperscript{539} Rustenburg Platinum Mines (SCA) paras 29–30. 
\textsuperscript{540} Fidelity Cash Management Service v CCMA & others [2008] 3 BLLR 197 (LAC) para 102. 
\textsuperscript{541} County Fair Foods para 5.
transparency and openness, with which all administrative bodies were Constitutionally obliged to comply.\textsuperscript{542} CCMA arbitrations comprised administrative action. Hence, the intrusion of rational justifiability into section 145 (and its concomitant extension) was justifiable despite the section’s intentionally narrow grounds.\textsuperscript{543} While the right to fair labour practices supported the rational justifiability standard, given the inherent presence of fairness throughout the LRA it was of relatively incidental import in determining the limits of review.\textsuperscript{544} The expeditiousness with which labour disputes were to be resolved, however, remained a significant consideration in review proceedings.\textsuperscript{545} Similarly, the separation of powers between the executive (encompassing the public administration), the legislature and the judiciary was germane to review.\textsuperscript{546} Consequently, exercising a degree of deference towards commissioners’ determinations was fitting.\textsuperscript{547}

Following \textit{Carephone}, it was these principles and values which informed\textsuperscript{548} the ambit of review available under section 145. By analogy, and to the extent to which these principles and values do not impinge upon the final Constitution’s right to just administrative action,\textsuperscript{549} they bear corresponding relevance to the scope of review following \textit{Sidumo}. Barring the principles associated with alternative reasons for awards, they may thus be resorted to when interpreting the confines of reasonableness review. Through analyses of the CC’s decision in \textit{Sidumo} and key judgments flowing from it, this measure of review is discussed in depth in the chapters which follow.

\textsuperscript{542} Sections 1(d) & 195 of the Constitution; \textit{Carephone} paras 9-13.

\textsuperscript{543} \textit{Carephone} paras 8-9 & 30-31; Whitear-Nel at 1486; \textit{Kynoch Feeds} (1998) (LC) para 47; Garbers (2000) at 85; Wesley at 1520. Compare these commentators’ views with those of Grogan (2000) at 8. Consider too the CC’s policy arguments in \textit{Chirwa} and \textit{Gcaba v Minister for Safety & Security & others} 2010 (1) SA 238 (CC).

\textsuperscript{544} Section 23 of the Constitution; consider, in this regard, \textit{Carephone} para 20, read with the LRA generally. For the provisions of the Act of greatest relevance to ensuring fairness in CCMA proceedings, see chapter 1.

\textsuperscript{545} \textit{Shoprite Checkers} (2001) (LAC) para 82; \textit{Rustenburg Platinum Mines} (2004) (LAC) para 15; the Explanatory Memorandum at 318-319; section 1(d) of the LRA.

\textsuperscript{546} \textit{Carephone} para 34. For the doctrine of SOP, see \textit{Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996} 1996 (4) SA 744 (CC) paras 109, 111 & 113 and Hoexter (2007) at 139-142.

\textsuperscript{547} This may be inferred from Zondo JP’s comments in \textit{Rustenburg Platinum Mines} (2004) (LAC) para 15; Smit (2008) at 1636; \textit{BMD Knitting Mills} para 18.

\textsuperscript{548} Or at the very least ought to have informed.

\textsuperscript{549} Section 33 of the Constitution.
CHAPTER 3

THE INTRODUCTION AND APPLICATION OF THE REASONABLENESS STANDARD

1. INTRODUCTION

Nine years after Carephone (Pty) Ltd v Marcus NO & Others, in the seminal decision of Sidumo & another v Rustenburg Platinum Mines Ltd & others, the Constitutional Court (‘CC’) held that:

‘…section 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in Bato Star: Is the decision reached by the Commissioner one that a reasonable decision-maker could not reach?’

Both the meaning of this standard and its proper application remain unclear and courts have frequently offered inconsistent interpretations thereof. The principal areas of controversy are first the relationship between reasonableness and the section 145 grounds of review. Secondly, both the test’s precise definition and its capacity to negate the import of procedural irregularities are confusing. Further uncertain is whether the principles of review associated with Carephone continue to apply and if so, the extent to which they do. Related to this question is whether the standard has expanded upon or limited judicial powers of review. As reasonableness requires reviewing courts to assume a deferential stance to commissioners’ awards, the contention around these issues threatens the distinction between appeal and review; in turn, the doctrine of separation of powers (‘SOP’) is endangered. Parties’ rights

552 Sidumo para 110. See also PAK Le Roux & K Young ‘The role of reasonableness in dismissal: the Constitutional Court looks at who has the final say’ (2007) 17(3) Contemporary Labour Law 21, who submit that reasonableness is an over-arching standard of review, rather than an independent ground for review; Le Roux & Young at 30.
553 Section 145 of the Labour Relations Act 66 of 1995 (‘the LRA’ or ‘the Act’). For grounds of review accepted by the courts since Sidumo, refer to Anton Myburgh ‘Sidumo v Rustplats: How have the courts dealt with it?’ (2009) 30 ILJ 1; Anton Myburgh ‘Determining and reviewing sanction after Sidumo’ (2010) 31 ILJ 1; Anton Myburgh ‘Reviewing the review test: Recent judgments and developments’ (2011) 32 ILJ 1497 and the judgments cited in each.
to fair labour practices and the necessarily efficient nature of labour dispute resolution are similarly hampered. Thus, it is crucial that the ambiguities surrounding the Sidumo test be addressed and clarity obtained. Before illustrating the courts’ frustrations with reasonableness, it is necessary to consider Sidumo in some detail. What follows is a discussion of this decision and then an analysis of pertinent Labour Court (‘LC’), Labour Appeal Court (‘LAC’) and Supreme Court of Appeal (‘SCA’) cases in which the courts have responded to it.

2. SIDUMO & ANOTHER V RUSTENBURG PLATINUM MINES LTD & OTHERS

Following Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA & others, Sidumo appealed to the Constitutional Court, giving the CC an opportunity to examine the scope of review under section 145. Before doing so, various questions arose. First was whether the reasonable employer test remained part of South African law. Secondly, it was necessary to resolve the debate about the status of CCMA arbitrations as administrative action. Finally, to the extent to which CCMA arbitrations did constitute administrative action, whether PAJA’s grounds of review applied to section 145 proceedings required attention.

The first of these questions saw the Court reject the SCA’s findings in Rustenburg Platinum Mines Ltd; in its view, the reasonable employer test did not comply with contemporary constitutional principles of South African labour law. The CC nonetheless confirmed the legitimacy of the SCA’s decision in respect of the second enquiry, holding that CCMA arbitration proceedings qualified as administrative action. Its third finding was again contrary to the SCA’s conclusions, however. According to the majority, CCMA awards

\[\text{CCMA & others [2007] 8 BLLR 707 (LAC), the LAC held that in terms of the doctrine of separation of powers (‘SOP’), the legislature’s entitlement to make policy choices must be respected by the courts provided they are not contrary to the Constitution of the Republic of South Africa, 1996 (‘the Constitution’); Engen Petroleum para 72. See also Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Tourism 2004 (7) BCLR 687 (CC) para 46; Carephone paras 34-35. In Sidumo, however, O’Regan J suggested that the doctrine of SOP is irrelevant to section 145 proceedings; Sidumo paras 136-137. Consult too Palaborwa Mining Co Ltd v Cheetham & Others (2008) 29 ILJ 306 (LAC) para 6. O’Regan J’s sentiments are discussed in more detail below.}\]

\[\text{Sidumo & another v Rustenburg Platinum Mines Ltd & others [2007] 12 BLLR 1097 (CC).}\]

\[\text{Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA & others [2006] 11 BLLR 1021 (SCA).}\]

\[\text{Section 6 of the Promotion of Administrative Justice Act 3 of 2000 (‘PAJA’).}\]

\[\text{Sidumo paras 62-79. The question is addressed in more detail later.}\]

\[\text{Sidumo para 88. The legitimacy of this finding is beyond the scope of this paper and will therefore not be examined here. For further commentary, consult the references cited in chapter 1.}\]

\[\text{Led by Navsa AJ.}\]
were not reviewable under PAJA. In reaching these conclusions, the Court affirmed the Constitutional foundations of review, recounting key principles in the process.\textsuperscript{561} The most important of its findings are discussed below.

First, the Court assessed the administrative status of CCMA proceedings. In doing so, it acknowledged the evident similarities between the CCMA and courts of law, while recording relevant distinctions between them.\textsuperscript{562} Foremost of these was the obligation imposed on commissioners by the LRA to determine disputes speedily, fairly and without undue legal formality. This obligation rendered arbitrations discrete from adjudicative processes.\textsuperscript{563} Adding to this, lawyers were expressly excluded from attending most arbitrations and resultant awards bore no precedential value.\textsuperscript{564} The resolution of disputes by the CCMA was compelled by statute which differentiated its proceedings from private and voluntary arbitrations.\textsuperscript{565} What this revealed, nonetheless, was that when conducting arbitrations, commissioners exercised public power. Finally, case law concerning the nature of administrative action under the Constitution, endorsed the status of CCMA arbitrations as administrative. Altogether, these factors confirmed that CCMA arbitrations comprised administrative action.\textsuperscript{566} The implication of this finding (to which the Court returned later) was that section 145 of the LRA had to be read consistently with section 33(1) of the Constitution – the right to just administrative action.\textsuperscript{567}

Turning then to PAJA’s application, the majority emphasized the features of dispute resolution under the LRA. Of specific import in this regard were the specialized fora provided for in the Act, which were purposefully designed to protect parties’ rights to fair

\textsuperscript{561} Sidumo paras 80-105. Consider too O’Regan J’s judgment emphasizing the relevance of commissioners’ Constitutional obligations to determining the status of the CCMA; Sidumo paras 123, 132, 138 & 140.
\textsuperscript{562} Sidumo paras 81-87.
\textsuperscript{563} Ibid para 85; see also section 138 of the LRA.
\textsuperscript{564} Ibid; consult too Brassey’s and Currie and De Waal’s comments on the status of the CCMA, cited in Sidumo paras 86-87; Martin Brassey Employment and Labour Law: Commentary on the Labour Relations Act vol 3 (2006) at A7-1 – A7-2; Iain Currie & Johan De Waal The Bill of Rights Handbook 5 ed (2005) at 651 fnnt 34. Note, however, Law Society of the Northern Provinces v Minister of Labour and Others (NGHC) unreported case no 61197/11 of 15 October 2012. In Law Society of the Northern Provinces, the Court declared the prohibition on legal representation in certain CCMA proceedings unconstitutional.
\textsuperscript{565} Sections 133-139 of the LRA. For the differences between private and compulsory arbitration, consult Barney Jordaan, Peter Kantor & Craig Bosch Labour Arbitration with a commentary on the CCMA Rules 2 ed (2011) at 5-6; John Brand et al Labour Dispute Resolution 2 ed (2008) at 41, 144 & 149; Sidumo paras 86-88; Brassey at A7–1–A7–2; Currie & De Waal at 651 fnnt 34; Telcordia Technologies Inc v Telkom SA Ltd 2007 (5) BCLR 503 (SCA) para 45 and Reunert Industries (Pty) Limited v Reutech Defence Industries v Naicker & others [1997] 12 BLLR 1632 (LC) paras 3-4 & 6.
\textsuperscript{566} Sidumo para 98-100. See also chapter 1, Sidumo paras 81-84 and the case law referred to therein.
\textsuperscript{567} Ibid para 89.
labour practices. To achieve this, the LRA sought to: ‘…provide simple procedures for the resolution of disputes through statutory conciliation, mediation and arbitration and the licensing of independent alternative dispute resolution services…’ The Act further strived to ensure that ‘disputes of right’ were resolved: ‘…in a way that would be accessible, speedy and inexpensive, with only one tier of appeal.’

It was therefore plain that labour disputes required expeditious determination. These features of dispute resolution were reflected not only in particular provisions of the Act but also in its spirit and objects. Pertinent to the case at hand, held the Court, was that efficiency permeated section 145 which offered only limited grounds of review to parties aggrieved by commissioners’ awards.

The SCA had deemed the only conflict between the LRA and PAJA to reside in the time periods for review mandated by each. The CC, however, disagreed. It argued that there was a general ‘lack of cohesion’ between the statutes’ principal provisions. Primarily, this stemmed from the expertise and efficiency with which labour disputes were to be finalised. The scope of the courts’ powers under PAJA and the LRA were resultanty disparate.

Further suggesting the uniqueness of dispute resolution in the labour sphere was section 210

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568 Ibid para 94.
569 Ibid; the Explanatory Memorandum to the Labour Relations Act (1995) 16 ILJ 278 (‘the Explanatory Memorandum’) at 279.
570 Sidumo para 98.
571 Ibid para 94; section 1(d) of the LRA; for the LRA’s general endorsement of efficiency, see Carli Botma & Adriaan van der Walt ‘The role of reasonableness in the review of labour arbitration awards (Part 1)’ 2009 Obiter 328 at 329.
572 Sidumo para 95.
573 Ibid paras 96-97.
574 Compare section 8(1)(c)(ii) of PAJA, which provides as follows:
‘8(1) The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that its just and equitable, including orders—
...(c) setting the administrative action aside and—
...(ii) in exceptional cases—
(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or
(bb) directing the administrator or any other party to the proceedings to pay compensation…’;
with section 145(4) of the LRA, which states:
‘Section 145…
...(4) If the award is set aside, the Labour Court may—
a) determine the dispute in the manner it considers appropriate; or’
b) make any order it considers appropriate about the procedures to be followed to determine the dispute.’
Consider too section 1(d)(iv) of the LRA and the Explanatory Memorandum to the LRA at 279 & 318-319.
of the LRA, which attested to section 145’s incompatibility with PAJA. \(^{575}\) Finally, several canons of statutory interpretation implied that the LRA took precedence over PAJA. \(^{576}\) On these bases, the CC declared that PAJA did not apply to reviews of CCMA arbitration awards. \(^{577}\)

Having resolved these issues, the majority turned to section 145’s Constitutional compliance. \(^{578}\) The starting point for the enquiry was the Constitution. Both section 3 of the LRA \(^{579}\) and the Constitution itself espoused this approach. Section 145 was accordingly to be interpreted consistently with the right to just administrative action in section 33. \(^{580}\)

\textit{Carephone} had been decided under the interim Constitution’s formulation of the right. \(^{581}\) Yet, that formulation had been modified by the final Constitution. \(^{582}\) Rather than rational justifiability, the Constitutional requisites for administrative action (including CCMA arbitrations) were now lawfulness, reasonableness and procedural fairness. \(^{583}\) Arbitration proceedings and associated awards which fell short of these standards were consequently reviewable. \(^{584}\)

To ensure these standards were met, held the CC, it was necessary that: ‘The reasonableness standard […] suffused […] section 145 of the LRA.’ \(^{585}\) According to the Court, applying this test would:

‘…give effect not only to the constitutional right to fair labour practices but also to the right to administrative action which [was] lawful, reasonable and procedurally fair.’ \(^{586}\)

\(^{575}\) \textit{Sidumo} paras 98-100; section 210 of the LRA reads as follows: ‘Application of Act when in conflict with other laws: –If any conflict, relating to the matters dealt with in this Act, arises between this Act and the provisions of any other law save the Constitution or any Act expressly amending this Act, the provisions of this Act will prevail.’

\(^{576}\) Including that general legislation should not prevail over specific legislation; \textit{Sidumo} para 101.

\(^{577}\) \textit{Sidumo} paras 101-104.

\(^{578}\) Ibid para 104.

\(^{579}\) Section 3 stipulates that when interpreting the LRA, courts are obliged to do so consistently with the Constitution.

\(^{580}\) \textit{Sidumo} para 105.

\(^{581}\) Section 24 of the Constitution of the Republic of South Africa Act 200 of 1993 (‘the interim Constitution’); \textit{Carephone} was formally decided in accordance with section 33, read with item 23(2) of Schedule 6, of the Constitution; \textit{Carephone} para 15.

\(^{582}\) For the meaning of the interim Constitution’s right to just administrative action, see Hoexter (2007) at 303-307 and Etienne Mureinik ‘Reconsidering review: Participation and accountability’ 1993 \textit{Acta Juridica} 35.

\(^{583}\) See section 33 of the Constitution.

\(^{584}\) \textit{Sidumo} para 89.

\(^{585}\) Ibid para 106. As Grogan observes, apart from reflecting on the fact that commissioners are obliged to act rationally and remain impartial, the Judge provided later courts with no further explanation of the meaning of ‘reasonableness’; John Grogan ‘Two-edged sword: The CC’s ruling in \textit{Rustplats}’ (2007) 23(6) Employment Law 3 at 7.

\(^{586}\) \textit{Sidumo} para 110.
The majority’s intentions behind this statement are debatable. One interpretation is that the Court sought merely to confirm the interdependence of Constitutional rights and their inherently supportive nature. Thus, requiring commissioners’ decisions to be reasonable would enhance the likelihood of decisions being fair. Through proper protection of the right to just administrative action, the right to fair labour practices would be secured. More controversial constructions have, nonetheless, also surfaced.

One of these is that the efficient nature of labour dispute resolution necessitates a higher threshold for review than that previously applicable. In other words, following Sidumo, the courts’ powers of review were constricted. Various challenges may be levelled against this view and they are fully discussed in later paragraphs. Suffice to say here that, in her concurring judgment in Sidumo, O’Regan J held the reasonableness standard to have extended the scope of review. Her statement alone points to the illegitimacy of the construction. Adding to this, the proposition is contrary to the purpose of judicial review – of promoting parties’ rights to just administrative action. As such, it is illogical to aver that by reading section 145 consistently with section 33, the CC constrained the Labour Courts’ powers of review.

587 Constitutional rights are inherently interlinked and should therefore be interpreted harmoniously with another if at all possible; S v Rens 1996 (1) SA 1218 (CC) at 1222-1223; De Ville (2005) at 80; S v Mhilungu and Others 1995 (3) SA 867 (CC). By subsequently holding that there was no reason why sections 23, 33 and 34 of the Constitution should not overlap, Nsavs AJ ostensibly endorsed this principle too; Sidumo para 112. For the proper approach to Constitutional interpretation generally, consult LM Du Plessis Reinterpretation of Statutes (2002) at 133-144.

588 Consider Ngcobo J’s decision in Sidumo for a discussion of fairness; see also John Grogan ‘Death of the reasonable employer: the seismology of review’ (2000) 16(2) Employment Law 4 at 10.


590 See the discussion of Cheetham below.

591 In her concurring decision in Sidumo.

592 Sidumo para 140. Consider too Sidumo para 106; there, Navsa AJ observed that the Carephone standard was substantive in nature and permitted more intrusive scrutiny than the rationality test formulated in Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC); Carephone para 31. The extension of the courts’ powers of review has been confirmed in decisions such as Value Logistics para 40 and Ellerine Holdings at 10-11.

593 For further affirmation of O’Regan J’s statement, consult Hoxeter (2007) at 306, where she refers to Minister of Health and Another v New Clicks SA (Pty) Ltd and Others (Treatment Action Campaign and Innovative Medicines SA as Amici Curiae) 2006 (1) BCLR 1 (CC) para 108. Arguably, this has been clear for some time; Roman v Williams NO 1998 (1) SA 270 (C) at 284-285.

594 Recall the applicant’s argument in Carephone that section 145 of the LRA did not offer adequate protection for parties’ rights and thus it was necessary to permit review of CCMA awards under section 158(1)(g) of the Act; Carephone paras 5-8 & paras 30-31.
An alternative approach argues that reasonableness has diminished the role of section 145. Proponents of this view submit that the standard offers sufficient protection to the right to fair labour practices in itself and thus section 145 is superfluous. Whereas some courts have adopted this attitude, Constitutional considerations cast doubt on its viability. For one, were section 145 to have been obliterated by the Sidumo test, the Constitutional values of accountability, transparency and openness in administrative decision-making would be defeated. Secondly, given the critical functions of section 145 of ensuring that awards are lawful and procedurally fair, were the section declared redundant, achieving these imperatives would be left to chance.

The breadth of the PAJA’s grounds for review equally illustrates the irony of dispensing with section 145 in favour of reasonableness exclusively. From these it is plain that, in the context of general administrative action, the legislature deemed grounds other than reasonableness to be necessary for protecting parties’ rights. As PAJA was enacted to give effect to the right to just administrative action, it follows that Parliament saw all the grounds provided for therein as important. The legislature’s recognition of both procedural and substantive bases for review accordingly affirms the continued pertinence of grounds other than reasonableness. By analogy, section 145 must remain applicable. Finally, the doctrine of SOP deserves a mention. In Sidumo, O’Regan J contested the alleged significance of the SOP to section 145 proceedings, observing that:

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595 Consider the SCA’s dismissal of the remaining grounds for review alleged by the applicant on the basis that the relevant award was substantively reasonable; Edcon Ltd v Pillemer NO & others (2009) 30 ILJ 2642 (SCA). See also Grogan (2008) at 3.  
598 A reasonable award which was reached by means of an unreasonable reasoning process would be allowed to stand; Garbers (2008) at 87; Ray-Howett at 1628-1634.  
599 Which include but are not limited to unreasonableness; section 6 of PAJA. Consider too A Pillay ‘Reviewing reasonableness: an appropriate standard for evaluating state action and inaction?’ (2005) 122 SALJ 419 at 424.  
600 Under section 33 of the Constitution.  
601 Consistently with the right to just administrative action.  
602 Hoexter (2007) at 67-76: Engen Petroleum para 72. Bato Star paras 45-46. Note, however, O’Regan J’s submission that the doctrine does not apply to section 145 review proceedings as discussed below; Sidumo paras 136-137.
'The doctrine of the separation of powers...has no application in the present case. There is no reason why, from a separation of powers perspective, the conduct of the CCMA should be immune from scrutiny under section 33.'

While at first glance her comments decry the doctrine’s relevance to the issue, a closer look reveals a different picture. Notably, the Judge expressed these sentiments following her discussion of the cases in which public institutions had been exempt from reasonableness review altogether. Given the principle that reviewing courts may not supplant the choices of the legislature with their own and should approach administrative decisions with respect, O’Regan J arguably sought merely to assert that subjecting CCMA awards to scrutiny on the basis of reasonableness was apt. Awards were not to be excused from review therefore. The role of the SOP in section 145 proceedings – of promoting balance between judicial appraisal and due restraint – consequently remains significant.

Approaching the question from another perspective confirms this. Abandoning legislative intent in favour of an ‘all encompassing’ standard of reasonableness disregards the role of the legislature in delineating the scope of the law. This undermines the doctrine, again rendering the aforementioned construction problematic. Finally, the approach negates the proper role of the judiciary in review proceedings. That role precludes the courts from performing administrative functions themselves. It is resultantly fortunate that this interpretation has now been refuted by the LAC.

Returning to the majority judgment in Sidumo, Navsa AJ next considered Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others, in which the

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603 Sidumo para 137.
604 Read with both Bato Star and Engen Petroleum. In Bato Star, O’Regan J propounded the import of the doctrine of SOP, with reference to deference and the need for courts to refrain from usurping the functions of administrative agencies. Comparably, in Engen Petroleum, the LAC emphasized the legislature’s entitlement to make policy choices; Bato Star paras 45-46; Engen Petroleum para 72; Consider too Carephone paras 34-35.
605 These cases included Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1999 (1) SA 374 (CC); President of the Republic of South Africa v South African Rugby and Football Union & Others 2000 (1) SA 1 (CC) (‘SARFU’) and De Lange v Smuts NO 1998 (3) SA 785 (CC); Sidumo para 136.
606 Bato Star paras 45-46; Engen Petroleum para 72; Carephone paras 34-35.
607 Consult too Fidelity paras 98-99.
608 Relative to that of the judiciary at least.
609 Carephone para 35; Bato Star para 45.
610 Fidelity para 101.
611 Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others 2004 (7) BCLR 687 (CC).
Constitutional formulation of reasonableness had first been devised.612 Significantly, in Bato Star, the CC had rejected the notion of gross unreasonableness as the requisite standard under the Constitution.613 In other words, egregious unreasonableness was not required to justify review. Instead, held the majority, the question was simply whether the decision made by the relevant commissioner was ‘one that a reasonable decision-maker could not reach.’614

Addressing the nature of reasonableness more fully, the CC in Sidumo confirmed its substantive character, acknowledging that when applying the test, courts would invariably need to assess the merits of disputes.615 Value judgments would accordingly be necessary. In making such judgments, conceded the Court, it was unavoidable that the distinction between appeal and review would be threatened. To minimize the threat, reviewing courts were to recount Hoexter’s advice that: ‘…the danger [lay], not in careful scrutiny, but in “judicial overzealousness in setting aside the administrative decisions that [did] not coincide with the judge’s own opinions.”’616

In other words, while intensive scrutiny was acceptable, where awards fell within the range of permissible outcomes prescribed by reasonableness, interference would not be warranted.617 The proposition arises from the concept of deference – a well established tenet of judicial review.618 In essence, deference ensures that administrative decisions are not lightly interfered with and that the separation of power between the legislature, executive and judiciary is maintained.619 As Landman states, the notion of deference implies that: ‘…the

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612 Ibid para 44.
613 Ibid paras 44-45. For an earlier comparable decision, see Roman at 284-285. For gross unreasonableness generally, see Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1947] 2 All ER 680.
614 Sidumo para 107.
615 Ibid para 108.
616 Ibid para 109. For discussions of deference, see Hoexter (2007) at 138-147 and De Ville (2005) at 67-68; Cora Hoexter Administrative Law in South Africa 2 ed (2012) at 148-156. Note that Hoexter’s description of deference concerns non-specific administrative action. As such, it must be tailored to the unique nature of labour dispute resolution when applying it to section 145 reviews. Of particular significance in this regard is the need for efficiency in this context; Sidumo para 137. Consider further, Geo Quinot ‘Towards effective judicial review of state commercial activity’ (2009) 3 TSAR 436.
617 Ibid.
619 Consistently with the Constitution’s directives therefore; sections 33 & 195(1) of the Constitution; Hoexter (2007) at 130-139 & 316; Bato Star paras 46-48; Carephone para 34; De Ville (2005) at 30
court not only exercises restraint when a decision is under review but also [it]...allows for a broad margin and prevents a court from straying within the domain of the decision-maker.620

By adopting a deferential attitude, held the majority in Sidumo, it would be possible to apply reasonableness without engaging in an appeal.621 Unfortunately, the CC offered no practical guidance as to how this was to be done,622 leaving reviewing courts with principles more readily declared than applied.623 Similarly absent from the Court’s findings was a definition of reasonableness capable of clear and consistent application.

Despite these omissions, the CC applied the cited principles to the facts, noting first that the Commissioner had both paid due consideration to the Code of Good Practice Dismissals624 and applied his mind to the question before him.625 Pertinently here, Navsa AJ remarked:

‘Given the pressures under which commissioners operate and the relatively informal manner in which proceedings are conducted, and the further fact that employees are usually not legally represented, it is to be expected that awards will not be impeccable.’626

When evaluating the reasonableness of awards therefore, they should not be critiqued against judicial standards of precision. In light of the legislative framework for arbitration and the stressors under which commissioners function, doing so would be inappropriate. The connotation is that the context in which the CCMA operates affects the ambit of review. This

621 Sidumo para 108-109. Ray-Howett suggests that a better way to secure the distinction between appeals and reviews is to adopt the so-called ‘austere’ approach to review. In terms of this approach, when evaluating the reasonableness of commissioners’ decisions, only the reasoning processes adopted by commissioners should be appraised; Ray-Howett at 1631. Regardless of the potential clarity which his proposal might bring, it is doubtful that the CC in Sidumo intended reasonableness to be construed in this limited fashion.
622 Sidumo para 109.
623 In turn, courts have regularly engaged with the merits of disputes in a manner more like appeal than review. See, for example, Samancor Manganese (Pty) Ltd v CCMA & others (LAC) unreported case no JA17/2009 of 24 February 2009 para 64; Clarence v The National Commissioner of the SA Police Service (2011) 32 ILJ 2927 (LAC); Zono v Grass NO & others [2011] 9 BLLR 873 (LAC) paras 14, 15 & 36; Mutual Construction Company Tvl (Pty) Ltd v Ntombela NO & others [2010] 5 BLLR 513 (LAC) and Dunwell Property Services CC v Sibande & others [2012] 2 BLLR 131 (LAC); Misambo v Commission for Conciliation, Mediation and Arbitration & others (2010) 31 ILJ 2031 (LAC) paras 12 & 21; Amazwi Power Products (Pty) Ltd v Turnbull [2008] 9 BLLR 817 (LAC) and Khanyile v Billiton Aluminium SA Ltd t/a Hillside Aluminium (LAC) unreported case no DA24/06 of 24 February 2009.
624 The Code of Good Practice Dismissals, Schedule 8 to the Labour Relations Act 66 of 1995 (‘Code for Dismissals’).
625 Sidumo para 117.
626 Ibid para 118. Note, however, Mape v CCMA & another [2008] 8 BLLR 723 (LAC) para 8; O’Regan J’s judgment in CUSA v Tao Ying Metal Industries & others [2009] 1 BLLR 1 (CC) para 140 and Ellerine Holdings at 11.
notion is hardly novel; in fact, in *Bato Star* it was specifically highlighted.⁶²⁷ There, in clarifying the nature of reasonableness under the Constitution, the CC had resolved that the reasonableness of decisions was to be determined with reference to:

‘[T]he nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well being of those affected.’⁶²⁸

In turn, as De Ville remarks:

‘…the circumstances of the case at hand, the specific statutory provisions, the legal and administrative scheme provided for in the statute concerned, as well as the broader context…will all play a role in determining what reasonableness requires in the specific case at hand.’⁶²⁹

Consequently, when delineating the scope of review, the nature and context of CCMA arbitrations, together with the specifics of the dispute in question, require attention.⁶³⁰ Having recognized this in *Sidumo*, the CC confirmed the reasonableness of the Commissioner’s award. In its view, both his reasoning and the material before him established this.⁶³¹ The Court’s concluding comments are instructive:

‘This is one of those cases where the decision-makers acting reasonably may reach different conclusions. The LRA has given that decision-making power to a commissioner.’⁶³²

Given its earlier sentiments, the outcome of *Sidumo* was clearly informed by legislative intent, read with contextual factors specific to CCMA proceedings. Significantly too, the CC asserted the rule that reasonable decisions may differ from one decision-maker to the next.⁶³³ To this extent, the Court illustrated the crucial interplay between the right to fair labour

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⁶²⁷ *Bato Star* paras 41 & 54; De Ville (2005) at 212. Compare these sentiments to JR De Ville ‘Deference as respect and deference as sacrifice: A reading of *Bato Star Fishing v Minister of Environmental Affairs*’ (2004) 20 SAJHR 577, where he criticizes the contextual approach to applying reasonableness.

⁶²⁸ *Bato Star* para 45.

⁶²⁹ De Ville (2005) at 212.

⁶³⁰ For a more in-depth discussion of relevant contextual considerations, consult chapter 4. Consider too *Ellerine Holdings* at 13 and *Sidumo* para 118.

⁶³¹ *Sidumo* para 119.

⁶³² Ibid.

⁶³³ The principle that a reasonable decision is one which falls within the range of acceptable outcomes indicates that what is reasonable in the eyes of one court or tribunal may well be different to what is reasonable in the eyes of others; *Bato Star* para 45.
practices, the doctrine of SOP and the reasonableness standard well. Regrettably, its findings remained ambiguous in other respects.

In addition to its failure to define deference or reasonableness in practical terms, the Court neglected to clarify the relationship between section 145 and the reasonableness test. In particular, Navsa AJ confirmed the award’s reasonableness without reference to the remaining grounds of review advanced by the applicant. These included that the Commissioner’s reasons and findings were irrational; that there was no link between the evidence and his factual findings; that the Commissioner had been so grossly careless that his conduct amounted to misconduct; that the Commissioner had failed to apply his mind to the facts and had accordingly denied the employer a fair hearing; and finally that the Commissioner had acted in excess of his powers. Disappointingly, the majority offered no explanation for disregarding these grounds. While it might be inferred that section 145 had lost its relevance following Sidumo, the inference is an unlikely one. More probable is that the remaining grounds simply did not justify review. Alternatively, from the Court’s failure to discuss grounds aside from reasonableness it may be deduced that the CC deemed the applicant’s grounds to depict a single but composite defect – the alleged ‘irrationality’ (or unreasonableness) of the Commissioner’s award.

Concurring with Navsa AJ’s principal findings, O’Regan J elaborated on his reasoning. In doing so, she provided additional insight into the scope of reasonableness review. First, she emphasized the import of section 33 of the Constitution in upholding the Constitutional values of accountability, responsiveness and openness.

And had committed a gross irregularity by doing so.

Sidumo para 23 & 185.

For this view, consider Kievits Kroon (LC).

Particularly given that neither Navsa AJ nor the other Judges expressly stated that the section 145 grounds had been displaced by the standard of reasonableness. See too Fidelity; The South African Municipal Workers Union v The South African Local Government Bargaining Council & others (LAC) unreported case no DA06/09 of 29 November 2011 (‘SAMWU’) paras 9, 10, 18 & 27. Note, however, Edcon para 23 and Kievits Kroon (LC) para 28.


Botma & van der Walt (Part 1) argue that Navsa AJ’s findings were hardly ground breaking, having mostly been determined in either Carephone or the LAC’s decisions since then.

See section 1 of the Constitution.
conducted with due accountability, openness and transparency.\textsuperscript{641} It followed that reasonableness was not to be interpreted as reducing commissioners’ Constitutional obligations. On the contrary, O’Regan J observed, section 145’s suffusion with the standard had expanded the reach of review; the grounds stipulated therein had not been limited by it.\textsuperscript{642} Nonetheless aware of the dangers associated with extending review,\textsuperscript{643} the Judge commented:

‘It is clear that the CCMA has been established to expedite the resolution of labour disputes in an efficient and cost-effective manner. Special procedures have been created to avoid the delays and costs associated with dispute resolution in the ordinary courts…

… [However, as] the Labour Relations Act already provides for the scrutiny on review of decisions of the CCMA by the Labour Court, no further delay will be caused by that scrutiny being on the basis of the constitutional standards established in section 33. So the need for speedy and cheap resolution of disputes does not mean that the CCMA should not be held accountable for its decisions, nor that it should not be monitored by the Labour Court to ensure that it acts lawfully, reasonably and procedurally fairly. Indeed, as Sachs J has reasoned,\textsuperscript{644} it is entirely consistent with our Constitutional order that the procedures and decisions of the CCMA should be lawful, reasonable and procedurally fair and that this should be ensured by appropriate scrutiny by the Labour Courts.\textsuperscript{645}

In other words, according to O’Regan J, expanding the permissible grounds for review would not endanger the efficiency with which labour disputes were to be resolved. In any event, the constitutional principles of accountability, transparency and openness in administrative decision-making rendered commissioners’ compliance with these values crucial.\textsuperscript{646}

Two aspects of O’Regan J’s decision are particularly germane. First is her commendable acknowledgment of the role of accountability, transparency and openness in judicial review. Inevitably associated with these values are the purposes of review. As discussed in her judgment, judicial review ensures that both the parties’ rights to just administrative action and

\textsuperscript{642} Sidumo para 140.
\textsuperscript{643} Primarily that of excessive judicial review, leading to the protraction of labour disputes contrary to the objects of the LRA; section 1(d)(iv) of the LRA.
\textsuperscript{644} Sachs J wrote a concurring judgment too but for different reasons. Pertinently therein, he addressed the contextual factors relevant to review; Sidumo para 158. For further discussion of these factors, see De Ville (2005) at 211-216.
\textsuperscript{645} Sidumo para 140.
\textsuperscript{646} Ibid.
key Constitutional values are upheld. In practical terms, this translates into adequate scrutiny and supervision of administrative determinations, thereby facilitating improved future decision-making. By means of review, commissioners may be directed towards more legitimate approaches to resolving labour disputes. This important function of review is an underlying theme in numerous cases, and it is addressed more fully under Fidelity below.

Secondly, O’Regan J’s statement that extending the ambit of review would not hamper efficiency is significant. Usefully, it avows that reasonableness has indeed expanded the reach of review. Still, the Judge’s sentiments in this regard should be treated cautiously. It may be that if suitably applied, reasonableness need not jeopardize the speed with which disputes are finalised. Yet, broadening reviewing courts’ powers may conceivably encourage the institution of review proceedings generally. In addition, should the test be inadequately, inconsistently or ambiguously applied, the probability of frivolous review proceedings may be increased.

In a dissenting minority decision, Ngcobo DJP held that CCMA arbitrations did not constitute administrative action. Whereas the Judge’s findings were obiter dicta, his description of the standards to which commissioners may be held and his definition of gross irregularities, have been repeatedly cited by reviewing courts. As such, Ngcobo J’s judgment is informative when identifying the confines of review.

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647 Ibid para 138; sections 1(d), 33 & 195 of the Constitution.
648 And while not expressly stated in Sidumo.
650 This ought, nonetheless, to be construed with reference to the majority’s finding that the reasonable employer test no longer forms part of South African law; Sidumo para 79. This is discussed in more detail below.
651 As the likelihood of success is inevitably greater where a wider variety of grounds are available.
652 As has arguably been the case; consider the Shoprite Checkers trilogy discussed below and Emma Fergus & Alan Rycroft ‘Refining review’ 2012 Acta Juridica 170 at 187-192.
653 Desperate applicants may simply rely upon serendipity rather than legitimate bases for review. See Paul Benjamin ‘Friend or foe? The impact of judicial decisions on the operation of the CCMA’ (2007) 28 ILJ 1 at 32-36.
654 Sidumo para 163.
656 See for example SAMWU paras 9, 10, 18 & 27; Afrox Healthcare para 21; Ellerine Holdings para 12; Transnet Freight Rail v Transnet Bargaining Council & others [2011] 6 BLLR 594 (LC) para 11.
657 In case of section 145 proceedings; Sidumo paras 267-268.
The Judge began with the reasons for the LAC’s decision in Carephone, reiterating section 145’s purposefully narrow construction. To ensure the section’s compliance with section 33, the Court in Carephone had introduced the rational justifiability test, thereby extending permissible review beyond mere procedural impropriety. In so doing, substantive defects (such as irrationality) were proclaimed reviewable. Logically, corresponding principles must apply to the reasonableness enquiry, again revealing its expansive nature. Consistently with the majority, Ngcobo J highlighted the need for efficiency, finality and cost-effective labour dispute resolution under the LRA. In his view, while Constitutional values informed the interpretation of section 145, these features of dispute resolution and the Act’s primary objects were of equivalent worth.

The relevance of his observations is apparent. However, it has not been these dicta which have drawn the courts’ attention. Instead, their focus has fallen on Ngcobo DJP’s descriptions of commissioners’ obligations during arbitration proceedings. Most frequently cited in this regard is the following passage:

‘Thus construed, the commissioners are required to act fairly in the determination of unfair dismissal disputes. If a commissioner fails to do so he or she commits a gross irregularity in the conduct of the arbitration proceedings and the ensuing arbitral award falls to be reviewed and set aside. Similarly, if a commissioner makes an award which is inconsistent with his or her obligations under the LRA, he or she acts in excess of the powers conferred by the LRA and the award falls to be reviewed and set aside.’

In other words, on account of their duty to determine matters procedurally fairly, commissioners’ failures to do so are ‘grossly irregular’. In addition, where commissioners depart from their statutory powers and duties, their resultant findings may be set aside.

658 The limited nature of the section 145 grounds for review is well established; Edgars Stores (Pty) Ltd v Director, Commission for Conciliation, Mediation and Arbitration & others (1998) 19 ILJ 350 (LC) at 356 & 359; the Explanatory Memorandum at 327-330; Paul Benjamin & Carole Cooper ‘Innovation and continuity: Responding to the Labour Relations Bill’ (1995) 16 ILJ 258 at 274-275; Benjamin (2007) at 3-6; Carephone para 25; Sidumo para 245. See also chapter 1 of this thesis.
659 And therefore ‘substantive impropriety’ too. Recall that the reasonableness test is a substantive enquiry which invariably requires reviewing courts to make value judgments; Carephone paras 25 & 36; Sidumo para 179.
660 In particular, section 1(d)(iv) of the LRA was relevant.
661 Sidumo para 253.
662 Ibid para 165.
663 In accordance with section 145(2)(ii) of the LRA. Thus, when determining whether such an irregularity has occurred, the essential question is whether the commissioner’s conduct deprived the parties of their rights to a fair hearing. For judicial endorsement of this approach, see Fipaza v Eskom Holdings Ltd (2010) 31 ILJ 2903 (LC) para 58; Relyant Retail Ltd t/a Bears Furnishers v CCMA & others [2009] JOL 24327 (LC); Woolworths (Pty) Ltd v CCMA & others [2010] 5 BLLR 577 (LC) paras 19-23 and Transnet Freight Rail paras 10, 11, 14 & 17.
Debatably, while Ngcobo J’s remarks offered a neat summary of awards’ vulnerability under section 145, they did little to expound the principles of review beyond those applicable under Carephone. Still, in so far as they acknowledge commissioners’ duties as key to defining the ambit of reasonableness, they set the context for review; in that way they are valuable.

3. COURT DECISIONS FOLLOWING SIDUMO

Since Sidumo, definite patterns of confusion and controversy have surfaced in the case law. Some courts make but passing or no reference to the Sidumo test, applying a process more like appeal than review. Others apply the test in association with one or more statutory ground(s) of review, while others treat it as an entirely independent basis for review. In some instances, the section 145 grounds are completely disregarded when in others they are not. Furthermore, inconsistent opinions as to the relationship (if any) between the Carephone and Sidumo standards frequently appear between judgments. Finally, contention around the question of whether reasonableness extends or restricts the legitimate sphere of review abounds. What follows is an analysis of court decisions in which the aforementioned controversies are most apparent. Throughout the analysis, the legitimacy

664 See the discussion of case law in chapter 2; for the section 145 grounds of review generally, consult Reunert Industries at 1634-1637.
665 See, for example, Miyambo paras 12 & 21.
666 Sidumo paras 110 onwards; Cheetham paras 5-6; Edcon para 23; Kievis Kroon (LC); Dunwell para 17. Compare these cases, however, to the courts’ remarks in Fidelity and Sasol Mining (Pty) Ltd v Commissioner Ngeleni & others [2011] 4 BLLR 404 (LC). For varying opinions on the independence of the section 145 grounds, consult Sidumo paras 247-255; Toyota SA Motors (Pty) Ltd v Radebe & Others (2000) 21 ILJ 340 (LAC) paras 33 & 40; Samancor Tubatse Ferrochrome v Metal & Engineering Industries Bargaining Council & others (2010) 31 ILJ 1838 (LAC); Foschini Group v Madi & others [2010] 7 BLLR 689 (LAC); Le Roux & Young at 30; Darcy Du Toit Reviewing CCMA arbitration awards: Has section 145 become academic? Paper presented at the 13th Annual SASLAW Conference, Vineyard Hotel, Cape Town (22 October 2010) at 7-9 and Garbers (2008).
667 Kievits Kroon (LC) para 28.
668 Compare, for example, Ellerine Holdings at 10-11 with Edcon para 16; Cheetham: Fidelity and Bestel paras 16-17.
669 Consider, amongst others, the views of Garbers (2008); Du Toit (2010) and Carli Botma & Adriaan van der Walt ‘The role of reasonableness in the review of labour arbitration awards (Part 2)’ 2009 Obiter 530 at 543; Cheetham para 6; Ellerine Holdings paras 10-11; Carephone para 37 and Foschini Group (2010) (LAC) para 28. For the notion that reasonableness permits greater scrutiny than the traditional model of review does (albeit in the general administrative law context), see Hoexter (2007) at 301-318; De Ville (2005) at 209-210; Roman at 281; Steyn v Middleburg Ferrochrome (A division of Samancor) and others (2009) 30 ILJ 1637 (LC) paras 37-38.
670 Due to the wealth of Labour Court (‘LC’) decisions following Sidumo, it is not possible to evaluate each and every one. Thus, the analysis of case law in this thesis focuses on the Labour Appeal Court’s (‘LAC’) and the Supreme Court of Appeal’s (‘SCA’) decisions. Labour Court (‘LC’) judgments are addressed in limited cases only. With the exception of a few exceptional decisions, the analysis is further confined to judgments handed down before 1 January 2012. Given the Court’s comments in Dell v Seton South Africa (Pty) Ltd & others [2011] 9 BLLR 846 (LAC) para 33, relying predominantly on the LAC’s decisions is arguably appropriate. Note,
of these varying interpretations of Sidumo will be appraised and those best suited to the South African legal framework identified.

### 3.1 The impact of reasonableness on the ambit of review: Palaborwa Mining Co Ltd v Cheetham & Others

The first of the LAC’s decisions following Sidumo was Palaborwa Mining Co Ltd v Cheetham & Others. The principal theme in Cheetham is well captured by Willis JA’s depiction of the reasonableness test. In his opinion, Sidumo had:

‘…reduced the potential for the Labour Courts and the Supreme Court of Appeal to exercise scrutiny over the decisions of commissioners who are appointed to arbitrate in terms of the LRA.’

Thus, according to the Judge, the LRA’s conferral of power on commissioners (rather than courts) implied that interference would be warranted in only very limited circumstances. This, coupled with the CC’s findings in Bato Star and the administrative status of CCMA arbitrations, necessitated that Labour Courts: ‘defer (but not in an absolute sense) to the decision of the commissioner.’ Notwithstanding his recognition of deference, Willis JA emphasized the quasi-judicial nature of CCMA arbitration proceedings. To this end, he decried the reverence associated with the Sidumo test, noting that:

‘Commissioners of the CCMA have the advantages both of administrative decision-makers (their decisions are not disturbed merely because a court considers them to have been wrong) and judicial officers (independence) but are not subject to most of the checks and balances that are applicable to an administrative decision-maker or a judicial officer or even a decision-maker in the private sector. The implications are considerable.’

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672 Ibid para 5; Garbers submits that deference implies that reviewing courts may not substitute their own reasons for those of commissioners in order to justify their findings; Garbers (2008) at 85.
674 At least in so far as determining fairness was concerned.
675 Cheetham para 5; Garbers (2008) at 85.
676 Ibid para 6. Both Ray-Howett and Garbers seemingly agree that too much deference is undesirable; Ray-Howett at 1628; Garbers (2008) at 86.
In other words, the deferential nature of reasonableness presented problems. There is much to be said for the Judge’s concerns in this regard. Despite the need for courts to balance the rights to fair labour practices and administrative justice, deference should be approached with caution. If inappropriately or overzealously applied, it has the potential to reduce the perceived legitimacy of CCMA awards; it may further affect the levels of accountability to which commissioners are held, in turn detracting from the rights it seeks to protect. Supplementing these difficulties, critics have argued that a less deferential approach would better promote efficiency and expeditiousness in labour dispute resolution. Should awards be thoroughly scrutinized for both substantive and procedural adequacy, the credibility afforded to CCMA decisions would be enhanced. In turn, the incidence of review proceedings may be reduced.

Of course, there is just as strong an argument to be made to the contrary. Subjecting administrative decisions too readily to judicial review may obstruct administrative efficiency and effectiveness. Not only does inadequate deference impair cost effectiveness but it aggravates the omnipresent problem of administrative ineptitude. To the extent to which courts are too dictatorial in their attitudes to review, administrators may misunderstand what is expected of them. They may consequently adopt unnecessarily protracted procedures when fulfilling their functions, in desperate attempts at covering every possible contingency.

678 Ray-Howett at 1628; Garbers (2008) at 86.
679 Ibid. See too Ngcobo J’s decision in Sidumo, emphasizing the import of the right to fair labour practices and the statutory context in which review takes place, to review proceedings generally: Sidumo para 253.
682 Albeit in the context of commercial administrative activity.
683 Ibid.
684 Ibid.
685 On account of the discrepancy between their apparent legislative obligations and the dictates of reviewing courts.
686 Quinot at 442. To the extent to which courts are too dictatorial in their attitudes to review, decision-makers may be unable to identify what is required of them. In turn, they may adopt inappropriate or protracted procedures in order to cover every possible contingency. Consider Benjamin (2007) at 17-19; Halton Cheadle ‘Regulated flexibility: Revisiting the LRA and the BCEA’ (2006) 27 ILJ 663 at 670; Paul Benjamin
Nevertheless, failing to hold commissioners accountable for their awards could have disastrous effects not only for the professed credibility of awards, but also for awards themselves. Ultimately, too much deference may harm parties’ rights to fair labour practices rather than support them. As such, where interference with awards is warranted, they should be quashed. Determining the appropriate balance between too much and too little deference is the challenge which reviewing courts invariably face.

Despite Willis JA’s concerns with the reasonableness standard’s reverent nature, he duly applied it to the facts before him. As the Commissioner’s decision in Cheetham was in his view reasonable, he subsequently upheld the appeal. When doing so, the Judge did not refer to the applicant’s alleged grounds of review, thus failing to explain the relationship between section 145 and reasonableness. Equally absent from his decision was an objective or substantive explanation for the conclusion that the award was reasonable, thereby providing no guidance as to the standard’s practical application. Debatably, despite the absence of overt direction in these areas, it may be inferred from Willis JA’s decision that he considered reasonableness to be an independent test for review.

Pateli JA and Molahleli JA concurred in Willis JA’s judgment, agreeing that reasonableness afforded commissioners greater latitude than previously granted. Pateli JA similarly confirmed that mere judicial disagreement with commissioners’ conclusions did not render them unreasonable. Furthermore, as the task of determining fairness was primarily entrusted to commissioners, their findings were not open to ready interference. Consistently with Willis JA’s remarks, the Judge added:

‘Conciliation, arbitration and enforcement: The CCMA’s achievements and challenges’ (2009) 30 ILJ 26 at 47; chapter 1. For a case in which the Court was arguably too intrusive, see Clarence.

687 The right to which the LRA seeks to give effect; section 23 of the Constitution. Note too Shoprite Checkers 3 paras 26-28.

688 Cheetham para 6.

689 In which he found the award reasonable without reference to the remaining grounds of review.

690 For a similar approach, see Danwell para 17.

691 Albeit with certain reservations regarding Willis JA’s comments in paragraph 6 of the judgment. The Judges did not, however, stipulate precisely which comments they disagreed with.

692 Cheetham para 12.

693 And reviewing courts were to remind themselves of these constraining features of reasonableness during review proceedings; Cheetham para 12.
’…This was the legislative intent and as much as decisions of different commissioners
can lead to different results, it is unfortunately a situation which has to be endured
with fortitude despite the uncertainty it may create.’

Plainly therefore, Pateli JA shared Willis JA’s anguish about the potentially detrimental
impact of deference on the quality of commissioners’ awards. The Judges’ disquiet illustrates
two points. First, it portrays a particular construction of the Sidumo test, as demanding the
need for considerable respect to be shown to administrative actions. Secondly, and more
positively, the LAC’s distress attests to the function of judicial review of bettering future
decisions-making.

As for the first of these, the Judges in Cheetham seemingly understood Sidumo to have
curtailed the scope of review. This was necessary to preserve legislative intent, which
precluded officious interference with commissioners’ awards. While Willis and Pateli
JJA’s respect for the doctrine of SOP is laudable, their construction of the standard as a
restrictive one contradicts its Constitutional foundations. Ostensibly, their argument was
based on the need for efficiency in labour dispute resolution, congruently with section
1(d)(iv) of the LRA. However, as O’Regan J reflected in Sidumo, extending review to
encompass reasonableness need not defeat the speed with which labour disputes are
resolved. As section 33 protects individuals from unjust administrative action, it endorses,
rather than diminishes, the permissible ambit of review – in the absence of adequate scrutiny
the section’s protective role would be hampered. Were the contrary true, commissioners may
be less inclined to comply with the values of accountability, transparency and openness than
before. For these reasons, infusing section 145 with the constitutional standard of
reasonableness necessarily augmented the Labour Courts’ powers of judicial review.

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694 Cheetham para 13.
695 For the meaning of administrative justice, see Jowell (2006) at 16-17; Hoexter in Corder & van der Vijver
696 For examples of successful grounds for review, consult the cases referred to in Myburgh (2009); Myburgh
697 Cheetham para 13.
698 See, in this regard, sections 23, 33 & 1(d)(iv) & 195(1) of the Constitution.
699 For efficiency generally, consult Benjamin (2007) at 3-6; the Explanatory Memorandum at 279 & 318-319;
Benjamin & Cooper; Benjamin (2009); Sidumo paras 124-125; Food & Allied Workers Union on behalf of
Mbatha & others v Pioneer Foods (Pty) Ltd t/a Sasko Milling & Baking & others (2011) 32 ILJ 2916 (SCA)
(‘FAWU’) paras 21-22 and chapter 1.
700 Sidumo para 140; for similar sentiments, see Foschini Group (2010) (LAC) para 28.
701 Ibid.
702 Section 195 of the Constitution; Garbers (2008) at 86; Ray-Howett at 1628.
703 Sidumo para 140; Carephone para 31. Consider too Foschini Group (2010) (LAC) para 28; there, the Court
held that the test was more stringent than that applicable under Carephone. The history of the final Constitution
Supporting this argument is the distinction between rationality and reasonableness. As the CC held in *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others*, rationality comprises only one facet of reasonableness. All exercises of public power (whether executive, legislative or administrative in nature) are required by the rule of law to at least be rational. Yet, distinctively to executive and legislative conduct, administrative action may be challenged on the basis of reasonableness; litigants are confined to questioning the former on the ground of irrationality alone. As administrative action may therefore be exposed to more vigorous examination by the courts than executive or legislative conduct, it follows that reasonableness constitutes a more intrusive test than rationality. On that basis, it is nonsensical to suggest that reasonableness sets a lower threshold for review than that applicable under rational justifiability.

These observations point strongly to the expansive effect of *Sidumo*. However, its effect must be understood with reference to the Court’s finding that the reasonable employer test was defunct. That test had obliged commissioners to determine the fairness of dismissals from the employer’s perspective. In essence, commissioners were to defer to employers’ decisions.

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703 For a recent discussion of the distinction, consult *Value Logistics* paras 38-44.
705 In other words, to the extent to which it is adopted, the proposal would undermine the rule of law; *Pharmaceutical Manufacturers* para 85; *Cape Bar Council v Judicial Service Commission & another (Centre for Constitutional Rights & another as amici curiae) [2011] JOL 27947 (WCC) paras 25-30. Note too *Rustenburg Platinum Mines* (SCA) para 26, referred to in para 43 of *Sidumo*. There, the SCA observed that section 33 of the final Constitution could not have intended to prescribe a lower standard of review than that which was applicable under section 24 of the interim Constitution.
706 *Pillay* at 425-429.
707 Ibid; *Value Logistics* paras 38-44 and *Sidumo* para 140. Consider too, in this regard, *New Clicks* para 108; *Myburgh* (2009) at 24 and *Bel Porto School Governing Body and Others v Premier of the Province, Western Cape and Another* 2002 (3) SA 265 (CC).
708 De Ville agrees that reasonableness is a more extensive test than rational justifiability; *De Ville* (2005) at 212-213; *Myburgh* (2009) at 24. For varying arguments on the subject, refer to *Garbers* (2008) at 85; *Ellerine Holdings* at 11 and Zondo JP’s judgment in *Shoprite Checkers (Pty) Ltd v Ramdaw NO & others* [2001] 9 BLLR 1011 (LAC), as discussed in chapter 2.
709 *Sidumo* paras 72-79; see too Nicola Smit ‘How do you determine a fair sanction? Dismissal as appropriate sanction in cases of dismissal for (mis)conduct’ (2011) 1 *De Jure* 49 at 54.
According to the CC, the Constitutional endorsement of fairness in labour disputes rendered the reasonable employer test archaic. Commissioners’ findings on sanction were to be informed with reference to both parties’ needs rather than simply the employers’. Resultantly, following *Sidumo*, commissioners were not required to accede to employers’ sanctions. In turn, they were granted a broader discretion to determine fairness than that which they had previously enjoyed.

Seemingly, it was this finding which led to constructions of reasonableness as demanding greater degrees of judicial deference. Naturally, to the degree to which commissioners’ powers were widened by *Sidumo*, the scope for judicial intervention was reduced. Yet, their powers were extended in relation to decisions on sanction alone. In so far as *Sidumo* may be said to have constrained review therefore, the constraint did not arise from the reasonableness standard itself. Instead, it was a consequence of expanding the authority of commissioners to assess employers’ decisions. It further has no application to commissioners’ findings which do not address sanction. Proposing simply that reasonableness limits courts’ powers of review is accordingly misleading and incomplete.

It is also a proposition which cannot be understood in isolation, or without reference to the Court’s abandonment of the ‘reasonable employer test’. To summarise: the notion that reasonableness restricts judicial scrutiny may only logically apply to commissioners’ discretionary findings on the fairness of dismissals; it is by no means a general rule. Generally speaking in fact, given the courts’ mandate to scrutinize the merits of proceedings when testing awards for reasonableness, the standard has broadened the ambit of review.

An alternative reason for this particular construction of reasonableness may have been Navsa AJ’s reference to Hoexter’s depiction of reasonableness as a deferential enquiry. The

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710 For a comprehensive discussion of the reasonable employer test and case law relevant to it, see *Rustenburg Platinum Mines* (SCA) paras 40-47.
711 *Sidumo* paras 72-79.
712 Refer to the discussion above.
714 Thus, matters involving jurisdictional questions or where commissioners have minimal discretion, more intensive scrutiny would arguably remain appropriate; Garbers (2008) at 87-88; *Tao Ying* para 131.
715 Including, for example, disputes concerning the interpretation of collective agreements or unfair labour practices.
716 Le Roux & Young at 30; Ray-Howett at 1632; given the adjudicative (rather than policy-oriented) nature of CCMA proceedings, a more intensive level of scrutiny may in any event be appropriate; Garbers (2008) at 86. For the limited reach of reasonableness in pre-Constitutional South Africa, see Hoexter (2007) at 301.
717 *Sidumo* para 79. There remains, however, an inevitable link between the reasonable employer test and the grounds for review; Garbers (2008) at 81 & 84-85. See too Grogan (2007).
718 Le Roux & Young at 30; Ray-Howett at 1632; Garbers (2008) at 86.
implication is that while significant scrutiny may be acceptable, deference must be shown when determining whether to set administrative decisions aside.\textsuperscript{719} The principle pertains to judicial review generally, however, and enables the process of review to be distinguished from that applicable on appeal. In other words, Hoexter’s observations do not indicate that reasonableness is less intrusive in nature than rationality or rational justifiability.\textsuperscript{720} They simply provide reviewing courts with a way to envisage review comparative to appeal.\textsuperscript{721} As such, Navsa AJ’s reference to deference should not be seen to imply that reasonableness confined judicial powers beyond the extent already applicable.

Returning to the second implication of \textit{Cheetham}, the Judges’ concerns spoke to the function of judicial review in facilitating improved future decision-making.\textsuperscript{722} This function is well established in administrative circles. It further espouses an interpretation of reasonableness consistent with constitutional principles and values.\textsuperscript{723} Overturning substandard awards not only upholds parties’ rights but it enables the judiciary to direct commissioners towards more appropriate ways of resolving disputes.\textsuperscript{724} In turn, it is a pertinent consideration during all section 145 proceedings.

\textbf{3.2 An overview of reasonableness: Questions raised by Fidelity Cash Management Service v CCMA & others,\textsuperscript{725} Kievits Kroon Country Estate (Pty) Ltd v CCMA & others\textsuperscript{726} and Sasol Mining (Pty) Ltd v Commissioner Nggeleni & others\textsuperscript{727}}

Following \textit{Cheetham}, whether the \textit{Sidumo} test had reduced reviewing courts’ powers was unclear. While confirming certain aspects of review, the LAC’s decision in \textit{Fidelity Cash Management Service v CCMA & others}\textsuperscript{728} failed to clarify the confusion. In \textit{Fidelity}, the

\footnotesize{\textsuperscript{719} Consider \textit{Shoprite Checkers} (2001) (LAC) (as discussed in chapter 2) and \textit{Ellerine Holdings} at 11. Recall that too much deference is equally undesirable; Ray-Howett at 1628; Garbers (2008) at 86.

\textsuperscript{720} The implications of her sentiments are discussed more fully under \textit{Ellerine Holdings} below.

\textsuperscript{721} For the traditional distinctions between review and appeal, consult Fergus (2010).


\textsuperscript{723} For accepted grounds for review, see Myburgh (2009); Myburgh (2010); Myburgh (2011) and Du Toit (2010).

\textsuperscript{724} Consider Cheryl Saunders ‘Apples, oranges and comparative administrative law’ 2006 \textit{Acta Juridica} 423 at 429.

\textsuperscript{725} The supervisory role of review is canvassed more fully under \textit{Fidelity} (as discussed below). For contrary views on the value of judicial intervention, compare Ray-Howett at 1628 with Quinot at 440.

\textsuperscript{726} \textit{Fidelity Cash Management Service v CCMA & others} [2008] 3 BLLR 197 (LAC).

\textsuperscript{727} \textit{Kievits Kroon Country Estate (Pty) Ltd v CCMA & others} [2010] JOL 26444 (LC).

\textsuperscript{728} \textit{Sasol Mining (Pty) Ltd v Commissioner Nggeleni & others} [2011] 4 BLLR 404 (LC).

\textsuperscript{729} \textit{Fidelity Cash Management Service v CCMA & others} [2008] 3 BLLR 197 (LAC).}
Court purportedly expounded the principles articulated in *Sidumo*. First was that the test of rational justifiability, as the threshold requirement for substantive review, had been dispensed with in favour of reasonableness. That standard had suffused section 145 of the LRA, requiring CCMA arbitrations (and associated awards) not only to be lawful and procedurally fair but also to be reasonable. Awards departing from these requisites were vulnerable to review. The enquiry in each case was whether the commissioner’s decision was one which a reasonable decision-maker could not reach. Reasonable awards were, nonetheless, to be left well alone. To this point, the LAC did little more than replicate Navsa JA’s comments. Yet, it later extrapolated thereon, usefully indicating additional features of reasonableness.

To begin with, the Court asserted that the enquiry on review was whether the relevant award was one which a commissioner, acting reasonably, *could* not have reached. It was not whether the award was one which a reasonable commissioner *would* not have reached. Ostensibly, the LAC saw a material distinction between ‘would’ and ‘could’. Precisely what the significance of that distinction was is still to be revealed. Grammatically, the former conception suggests a lack of capacity on the part of reasonable commissioners to render reviewable awards, whereas the latter indicates wilfulness. The first seems logical. By comparison, in so far as the second implies an association between reasonableness and misconduct, its rejection by the LAC was apt. Unreasonableness need not be linked to misconduct. In the absence of further explanation as to the rationale for the Court’s emphasis on ‘would’ rather than ‘could’, it is fortunate that the issue has not been pursued by subsequent courts.

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729 *Sidumo* para 110.
730 *Fidelity* para 92.
731 Ibid para 97. The LAC’s comments in this regard might be construed as suggesting that awards which are reasonable in outcome, but deficient in other respects, should be upheld. The Court’s subsequent pronouncement that the section 145 grounds of review retain their validity, however, refutes this interpretation; *Fidelity* para 101. Thus, reasonableness in outcome will not necessarily remedy other reviewable irregularities; *SAMWU* paras 9 & 18. Note, however, *Edcon* and *Clarence*.
732 *Fidelity* para 97.
733 The difficulty with this conception of the test is that it might be interpreted as suggesting that the requirement for review is that the commissioner could not possibly have reached the decision in question. In turn, the need for the outcome to be grossly unreasonable might be implied. Yet, the courts have repeatedly rejected gross unreasonableness as the threshold for review under section 33 and the interpretation would therefore be inappropriate; *Bato Star* paras 44-45; *Roman* at 284-285; *Fidelity* para 99. See too *Myers v National Commissioner of the SAPS & others* (SCA) unreported case no 425/2012 of 29 November 2012. There, while arguably misapplying the test for review, the SCA nonetheless confirmed that gross unreasonableness was not the standard propounded in *Sidumo*; *Myers* para 28.
Returning to the substance of *Fidelity*, the LAC recounted its words in *Cheetham* that determining fairness was a task principally entrusted to commissioners rather than courts. As such, simple disagreement between judges and commissioners would not inevitably warrant review. Here, the import of efficiency in dispute resolution was relevant. To the extent to which reviewing courts interfered too readily with CCMA awards, the efficacy of these specialist bodies would be lost.\textsuperscript{734} As a result, remarked the LAC:

‘…Sidumo attempts to strike a balance between two extremes, namely, on the one hand, interfering too much or too easily with decisions or arbitration awards of the CCMA and, on the other, refraining too much from interfering with CCMA’s awards or decisions.’\textsuperscript{735}

Disappointingly, the Court did not explain how this fine balance was to be struck. Instead, it compounded the obscurity of its comments by expanding on them as follows:

‘[The reasonableness standard] is a stringent test that will ensure that […] awards are not lightly interfered with. It will ensure that, more than before, and in line with the objectives of the Act and particularly the primary objective of the effective resolution of disputes, awards of the CCMA will be final and binding as long as it cannot be said that such a decision or award is one that a reasonable decision-maker could not have made in the circumstances of the case. It will not be often that an arbitration award is found to be one which a reasonable decision-maker could not have made but I also do not think that it will be rare that an arbitration award of the CCMA is found to be one that a reasonable decision-maker could not, in all the circumstances, have reached.’\textsuperscript{736}

The Court’s observations are equivocal. Describing the test as both ‘stringent’ and preclusive of too much intrusion indicates a more restrictive measure of review than that previously applicable. For the reasons discussed under *Cheetham*, however, to the degree to which reasonableness narrowed the scope of review it did so in a limited sense only. Constitutional pointers demonstrate that reasonableness is more expansive in nature than rational justifiability.\textsuperscript{737} The uncertainty arising from *Cheetham* ought therefore to have been easily clarified in *Fidelity*. Still, the LAC failed to acknowledge the Constitutional factors demarcating the standard as having broadened reviewing courts’ powers. Its ambiguous

\textsuperscript{734} Contrary to legislative intent; *Fidelity* para 98.
\textsuperscript{735} *Fidelity* para 99.
\textsuperscript{736} Ibid para 100.
\textsuperscript{737} As defined by Carephone; Hoexter (2007) at 306-309; Pillay at 425-429; Pharmaceutical Manufacturers para 85; Rustenburg Platinum Mines (SCA) para 26; Value Logistics.
pronouncement that it would be neither common nor rare to encounter unreasonable awards took the matter no further.

Fortunately, the Court’s later directives in Fidelity provide useful guidance in other respects. First, it emphasized that the Sidumo test did not detract from the significance of the statutory grounds of review. Consequently, in the event of a commissioner’s alleged excess of powers, for example, unreasonableness need not be established (or raised) to found review. The same was true of other allegations of reviewable irregularities provided for in section 145. Notably, the LAC did not locate the standard within section 145(2)(a)(iii) of the LRA, as Froneman DJP had in Carephone. Conceivably, the Court perceived no necessary nexus between reasonableness and excesses of power. Once again, it may be inferred that reasonableness comprises an autonomous basis for review which need not be associated with section 145 or related procedural irregularities.

Despite the LAC’s overt declaration of section 145’s continued role, courts have sometimes submitted that, following Sidumo, the sole ground of review is unreasonableness. A stark example of this appeared in Kievits Kroon Country Estate (Pty) Ltd v CCMA & others. There, the applicant instituted review proceedings on numerous bases, including gross irregularity, misconduct and the lack of a rationally justifiable connection between the commissioner’s findings and the evidence presented. The LC ignored these grounds averring confidently instead that:

\[\text{Fidelity para 100.}\]
\[\text{In terms of section 145 of the LRA; Fidelity para 101; see too Southern Sun Hotel Interests (Pty) Ltd v CCMA & others [2009] 11 BLLR 1128 (LC) paras 14 & 17 and Maepe para 22.}\]
\[\text{Fidelity para 101. Consider, however, SA Rugby Players’ Association (SARPA) & others v SA Rugby (Pty) Ltd & others; SA Rugby (Pty) Ltd v SARPU & another [2008] 9 BLLR 845 (LAC); Chabeli v CCMA & others [2010] 4 BLLR 389 (LC); Asara Wine Estate & Hotel (Pty) Ltd v van Rooyen & others (2012) 33 ILJ 363 (LC); Gabriel Tsietsi Banda v Emfuleni Local Municipality & others (LC) unreported case no J1214/08 and Gubevu Security Group (Pty) Ltd v Ruggiero NO & others [2012] 4 BLLR 354 (LC), in which unreasonableness and excess of powers appear to have been conflated. Emma Fergus ‘Circumventing review – When is a question jurisdictional?’ (2012) 129 SALJ 504; Du Toit (2010) at 3.}\]
\[\text{In relation to rational justifiability; Carephone para 24.}\]
\[\text{And consistently with Cheetham.}\]
\[\text{This remains a contested proposal; compare Du Toit (2010) at 3; Ellerine Holdings (as discussed below) and Fidelity para 101.}\]
\[\text{Kievits Kroon Country Estate (Pty) Ltd v CCMA & others [2010] JOL 26444 (LC).}\]
\[\text{Ibid para 21.}\]
‘The test in review applications is whether the decision arrived at by the commissioner is one that no other reasonable decision-maker would [sic] have arrived at. The applicant has relied on grounds of review that are no longer part of our law.’

In light of *Fidelity*,

the basis for the Court’s statement in *Kievits* is uncertain.

Both the Constitutional foundations of judicial review and the functions thereof endorse this stance. First, section 33 of the Constitution expressly calls for procedural fairness and lawfulness, distinctively from reasonableness. By implication, each component of section 33 is material, and merging the three under the broad header of reasonableness is inappropriate. In addition, there are sound reasons for requiring all three facets of review and, by analogy, for permitting review of statutory defects independently of reasonableness. Foremost of these is the role of review in facilitating improved future decision-making. This ensures that legal certainty and the rule of law are maintained while simultaneously protecting parties’ rights to procedurally fair and lawful administrative action. Supplemented by this are the Constitutional values of accountability, transparency and openness. To ensure the effective maintenance of these values, procedural defects in commissioners’ awards must be amenable to review. Finally, were reasonableness in itself sufficient to sustain these rights and values, the remaining requisites provided for in section 33 would be rendered superfluous, which could not have been the intention of the Constitution’s drafters. All told, regardless of the Court’s sentiments in *Kievits*, the LAC’s affirmation of section 145 in *Fidelity* must be preferred.

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746 Ibid para 28.
747 And by implication procedurally based review; *Fidelity* para 101.
748 Consider Myburgh’s observation that gross irregularities have increasingly led reviewing courts to set awards aside on the basis of unreasonableness; Myburgh (2009) at 16-17.
749 Section 33 of the Constitution, read with section 195(1)(f)’s mandate for accountability, transparency and openness in the public administration; see too *Sidumo* para 138.
750 Consistently with section 195(1) of the Constitution in particular; Jowell (2006); De Ville (2005) at 30; *Solomon* paras 19 & 21. In *Solomon*, the LC set an award aside which, while ostensibly correct in outcome, was flawed in process. When doing so, it emphasized that the purpose of review went beyond assessing the correctness of commissioners’ decisions. Instead, judicial review sought to ensure due process in arbitration proceedings and simultaneously to secure the ‘constitutional values of accountability, responsiveness and openness’ in the public administration.
752 Sections 1(d) and 195(1) of the Constitution.
753 Subsequent case law confirms this approach; *Fidelity* para 101; *Southern Sun Hotel Interests* paras 14 & 17; *Maepe* para 22; *Transnet Freight Rail*. See too *Kievits Kroon* (LAC) para 21, in which the LAC upheld the LC’s decision but concurrently noted that the statutory grounds of review remain valid.
Looking once more to *Fidelity*, there is no clear statement in the judgment of the applicant’s precise grounds for review. It nevertheless appears from the decision that review was sought on account of the Commissioner’s failure to take relevant factors into account and the irrationality of his findings. In thoroughly assessing each ground, the LAC’s theoretical approach to review (and endorsement of section 145) was verified in practice. Notwithstanding this, the Court has been criticised for construing the *Sidumo* test as tolerating substantively reasonable awards despite inadequacies in commissioners’ reasoning processes. The legitimacy of this critique is doubtful for several reasons. The first arises from the established ground of review of inadequate reasons. As any enquiry into this ground inescapably engages commissioners’ reasoning processes, it is illogical to assert that deficient processes are no longer susceptible to review if reasonableness in outcome is found.

The significance of adequate reasons has been repeatedly attested to by courts and commentators alike. The rationale for adequate reasons is plain. As Garbers comments, reasons:

\[
\text{‘...[e]nsure a higher quality of decision-making and foster the legitimacy of the institution in question. Any approach on review which in effect reduces reasoning to irrelevance, undermines such legitimacy.’}\]

Similarly in *Strategic Liquor Services v Mvumbi NO and Others,* when recounting its observations in *Mpthahlenle vs First National Bank of South Africa Ltd*, the CC held that reasons:

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754 And unjustifiability.

755 *Fidelity* paras 39-81.

756 For subsequent affirmation of this approach, see *Maepe* paras 11 22, 24, 40 & 46-51; Myburgh (2009) at 22 and Ray-Howett at 1629. Inevitably, nonetheless, there remains an overlap between gross irregularities and unreasonableness; *New Clicks* para 511; *Reunert Industries*; Clive Plasket *The Fundamental Right to Just Administrative Action: Judicial Review of Administrative Action in the Democratic South Africa* (PhD Thesis, Rhodes University, 2002) at 363; *Anglo Platinum Ltd v CCMA & others* [2010] JOL 25372 (LC) as discussed in Anton Myburgh *Clarifying the review test* Paper presented at the 2011 CCMA Commissioners Indaba; Lagoon Beach Hotel, Cape Town (December 2011); Myburgh’s paper has since been published as Myburgh (2011). Consider too *Afrox Healthcare* para 21. For procedural grounds of review closely linked to reasonableness, consult *Value Logistics* para 46; *Kaefer Insulation (Pty) Ltd v President of the Industrial Court & others* (1998) 19 ILJ 567 (LAC) para 21; *Standard Bank of Bophuthutuatswana Ltd v Reynolds NO & others* (1995) 16 ILJ 1380 (BG) at 1397; *Pam Golding Properties (Pty) Ltd v Erasmus & others* [2010] JOL 24963 (LC) paras 5-6; *Sidumo* para 268; *Gaga v Anglo Platinum Ltd & Others* (2012) 33 ILJ 329 (LAC) para 44; *Ellerine Holdings* at 13 and *Southern Sun Hotel Interests*.

757 Ray-Howett at 1621-22; Botma & van der Walt (Part 2) at 538-539.

758 Garbers (2008) at 86. See too *Maepe* paras 7, 8 & 22; *Tao Ying* para 140; De Ville (2005) at 30; Jowell (2006) at 16-17; *Strategic Liquor Services v Mvumbi NO and Others* 2010 (2) SA 92 (CC) para 17; *Mpthahlenle vs First National Bank of South Africa Ltd* 1999 (2) SA 667 (CC) para 12 and *Cape Bar Council* para 30.
‘...explain[...] to the parties, and to the public at large which has an interest in courts being open and transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial decisions.’

In other words, prescribing adequate reasons both guarantees better decision-making and promotes the Constitutional values of accountability, transparency and openness, underpinning section 33. Poor reasons ought therefore to be met with review.

The need not only for reasons to be adequate, but also for reasoning processes to be satisfactory has been acknowledged by the courts in recent cases too. In *Bestel v Astral Operations Ltd and Others*, for example, the LAC upheld the commissioner’s award, recording that:

‘[The commissioner had] ‘engaged in a careful analysis of the testimony presented to him.’

The implication is that the commissioner’s reasons demonstrated an adequate reasoning process and that this was germane to determining the reasonableness of his award. Consequently, both adequate reasons and satisfactory reasoning processes are pertinent to the enquiry on review. Whether these requisites fall under reasonableness generally or must be

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759 *Strategic Liquor Services v Mvumbi NO and Others* 2010 (2) SA 92 (CC) para 17.
760 Ibid, citing *Mphalele v First National Bank of South Africa Ltd* 1999 (2) SA 667 (CC) para 12. The Court added:

‘Then, too, [the provision of reasons] is essential for the appeal process, enabling the losing party to take an informed decision as to whether or not to appeal or, where necessary, seek leave to appeal. It assists the appeal Court to decide whether or not the order of the lower court is correct. And finally, it provides guidance to the public in respect of similar matters...’; *Strategic Liquor Services* para 12.

While the case was decided in the context of an appeal against the LC’s failure to give reasons for its decision, equivalent principles surely apply to CCMA arbitration awards.

761 Sections 1(d) & 195(1) of the Constitution. Based on their ordinary meaning, transparency and openness require commissioners to ensure clarity and honesty in their reasoning processes. Accountability, in turn, obliges them to provide explanations for their decisions; *Strategic Liquor Services* para 17. Consult further in this regard Fergus (2010); *Solomon* paras 19 & 21; Corder in Corder & van der Wijver (eds) (2002); Hoexter in Corder & van der Wijver (eds) (2002); Mureinik (1993); Jowell (2006) and Cape Bar Council paras 25-30.

762 For the requisites of adequate reasoning and the need therefore, see section 138(7)(a) of the LRA and *County Fair Foods (Pty) Ltd v CCMA & others* (1999) 20 ILJ 1701 (LAC) at 1717C-E. Note, however, Zondo JP’s qualifying remarks in *Maepe* para 8.

763 In *Southern Sun Hotel Interests* para 14, the LC held that reasonableness consisted of both procedural and substantive elements implying the need for adequate reasons as well as a reasonable outcome. For comparable sentiments, consult *Sasol Mining; Pam Golding* para 8 and *Myburgh* (2009) at 19.


765 Ibid para 31

766 Ibid para 9.
alleged in relation to a specific statutory ground of review is uncertain. Equally indeterminate is the extent of commissioners’ obligations to engage in comprehensive reasoning processes. Potential solutions to these problems are proposed in later chapters.

Understanding the relationship between reasonableness in outcome and reasonableness in procedure is comparably tricky. Compounding the difficulty of disassociating processes from substance is the courts’ acknowledgment of reasonableness as comprising both procedural and substantive components. Ostensibly therefore, where a commissioner has followed an unreasonable procedure, the award may be set aside for procedural unreasonableness, sometimes regardless of defects alleged under section 145 and sometimes not. Sasol Mining (Pty) Ltd v Commissioner Nggeleni & others illustrates the position well. There, the applicant contended that the commissioner’s gross irregularity had resulted in an unreasonable outcome. In addressing this contention, the Court began with Myburgh’s submission that:

‘…if the act of process-related unreasonableness equates to a latent gross irregularity, then, in order to succeed on review, the applicant would have to establish no more than that the result of the award may (and not would) have been different if the commissioner had properly acquitted him or herself’.

Applying this principle to the facts, the LC concluded that the result would indeed have been different had it not been for the irregularity concerned; the award was consequently reviewable. When doing so, the Court made no further reference to the award’s

767 In section 145 of the Act.
768 See, in particular, chapters 4 and 6 of this thesis.
769 Southern Sun Hotel Interests para 14; Sasol Mining para 11; Pam Golding para 8; Parmalat SA (Pty) Ltd v CCMA & others (LC) unreported case no C486/10 of 2 December 2011 paras 14-16; Myburgh (2009) at 19; Calvin William Sharpe ‘Reviewing CCMA arbitration awards: Towards clarity in the Labour Courts’ (2000) 21 ILJ 2160 at 2174; B Grant ‘The review of arbitration awards in terms of the Labour Relations Act’ (1999) 2 Stell LR 251 at 255-256; For the distinction between procedural and substantive irregularities in the context of the Carephone test, see Solomon paras 19 & 21.
770 Myburgh (2009) at 19. Consider too, the implications of Le Roux and Young’s comments; Le Roux & Young at 30.
771 Sasol Mining (Pty) Ltd v Commissioner Nggeleni & others [2011] 4 BLLR 404 (LC).
772 Ibid para 1.
773 Ibid para 11, citing Myburgh (2010) at 16. In addition to the question of whether a commissioner’s error had deprived the parties of a fair hearing; Fipaza para 58. This test has repeatedly been accepted by the courts as determinative of whether a gross irregularity has occurred; Sidumo paras 267-268; Woolworths paras 19-23; Transnet Freight Rail para 14. For earlier comparable judgments, see Ellis v Morgan 1909 TS 576; Goldfields Investments Limited & another v City Council of Johannesburg & another 1938 TPD 551 and Telcordia Technologies.
774 Sasol Mining para 13; note too Myburgh’s reference to ‘SA4’, where the Court asserted that whether errors were reviewable depended on the materiality of those errors; Myburgh (Paper presented at the 2011 CCMA Commissioners Indaba).
reasonableness, holding merely that the gross irregularity justified review.\textsuperscript{775} As such, no clear guidelines on the association between section 145 and procedural unreasonableness were provided. Certain inferences may nonetheless be drawn. What appears is that the procedural component of unreasonableness limits review of procedural errors to those potentially affecting the outcome of the proceedings. Yet, as discussed below, whether this limitation actually explicates the \textit{Sidumo} standard or simply confirms the principles applicable prior to \textit{Sidumo} is questionable.\textsuperscript{776}

Still, \textit{Sasol Mining} is useful in so far as it exemplifies the complex distinction between procedural and substantive review; in addition, it endorses the argument that section 145 of the LRA exists independently of reasonableness. Had the matter been determined on the basis of substantive unreasonableness, the Court would have been obliged to enter and analyse the merits. However, it appears to have been determined with reference to procedure and reasoning process alone. Specifically, the Commissioner had failed to resolve the factual dispute between the parties consistently with his duties. It was accordingly the Commissioner’s erroneous approach rather than an ‘unreasonable’ error or factual finding which was responsible for the award’s inadequacy. Thus, it may be inferred that while gross irregularities and unreasonableness are oft related, the section 145 grounds for review may apply autonomously too.\textsuperscript{777}

Returning to the contribution which the dual features of reasonableness make, while there can be no qualms with assessing procedural errors on review, whether there is a need to include reasonableness in the equation is arguable. As the courts have repeatedly held, an inescapable overlap exists between reasonableness and the statutory ground of gross irregularity.\textsuperscript{778} The problem arises from the notion that, in principle at least, the section 145 grounds are procedural in nature. By comparison, the reasonableness test is substantive and consists of an

\textsuperscript{775} Ibid.
\textsuperscript{777} For discussion of the substantive and procedural aspects of reasonableness, see Ray-Howett at 1628-1634; Myburgh (2009) at 16-17; Garbers (2008) at 87-88 and \textit{Southern Sun Hotel Interests} paras 13-17.
\textsuperscript{778} Whether in the form of failures to apply the mind, failures to take relevant factors into account or otherwise. For the overlap between unreasonableness and gross irregularities, see \textit{New Clicks} para 511; \textit{Reunert Industries}. Plasket discusses the grounds of review (listed in \textit{PAJA}) which relate to the constitutional standard of reasonableness; Plasket at 363. Consider too \textit{Anglo Platinum} (2010) (LC) as referred to in Myburgh (Paper presented at the 2011 CCMA Commissioners Indaba); \textit{Afrox Healthcare} para 21; \textit{Value Logistics} para 46; \textit{Kaefer Insulation} para 21 and \textit{Standard Bank} (1995) (BG) at 1397.
‘outcomes based enquiry’. The courts have combined substantive and procedural review, they have done so primarily while acknowledging the overlap between gross irregularities and unreasonableness. Whether they needed to assess reasonableness at all in these instances is nevertheless questionable. If a gross irregularity is established, there should be no need to scrutinise the outcome – doing so only threatens the distinction between review and appeal.

Having said that, the intersection between gross irregularities and reasonableness prevails. Given the nature of the remaining defects listed in section 145 of the LRA, the courts’ confinement of this overlap to gross irregularities, to the exclusion of the remaining grounds, is sensible. Arguably too, in so far as procedural unreasonableness (and the reasonableness standard generally) are linked to section 145, the link ends at gross irregularities. Even then, the association between this defect and the Sidumo test is constrained. On the strength of Sasol Mining, the notion of procedural unreasonableness merely describes defects in reasoning process which may have influenced the outcome of the particular award. However, as this has long been an accepted basis for review, its recognition under the header of procedural unreasonableness does nothing to extend the scope of review. To the extent to which it has affected the ambit of permissible scrutiny, additional clarification is required. The answers to these questions may lie in defining the boundary between reasonableness and gross irregularities more clearly. Currently, precisely where this boundary falls is an open debate.

779 Ellerine Holdings at 14; Carephone para 37; Sidumo paras 106-110; Herholdt para 52; Fidelity; Discovery Health Limited v CCMA and others [2008] 7 BLLR 633 (LC); Cheetham.

780 New Clicks para 511; Reunert Industries; Plasket at 363; Afrox Healthcare para 21; Value Logistics para 46; Kaefer Insulation para 21; Standard Bank (1995) (BG) at 1397. Compare too the LAC’s descriptions of gross irregularities and unreasonableness in Ellerine Holdings at 13 and Bestel para 14 respectively.

781 And their uncomfortable fit with substantive review depicted in chapter 2. For general principles and examples of these grounds, refer to Reunert Industries at 1634-1637; United National Breweries (SA) Ltd v Khanyeza & others [2006] 4 BLLR 321 (LAC); Sampson Associates (Pty) Ltd t/a Interbrand Sampson v Cities Shepherd & others [2010] 7 BLLR 746 (LC); Jafsa v Commission for Conciliation, Mediation & Arbitration & Others (2006) 27 ILJ 2368 (LC) and Moloi v Euijen & others [1997] 8 BLLR 1022 (LC). In Moloi, the Court noted that the ground of ‘misconduct’ (as distinct from improperly obtaining an award) implied an element of impropriety. Consider too Emma Fergus The Evolving Role of the Labour Court in Review Proceedings Paper presented at the 24th Annual Labour Law Conference, Sandton Convention Centre, Johannesburg (June - July 2011).


783 See Transnet Freight Rail para 17 and the discussion thereof below. Consult too Sidumo para 268; Gaga para 44; Information Trust Corporation paras 9-10; Miladys para 30; Toyota SA Motors para 41; chapter 4 and the conclusion to this thesis.
The LAC’s final contribution in *Fidelity* was its attention to the distinctions between the *Carephone* and *Sidumo* standards. First, the Court confirmed the different Constitutional bases for each: whereas *Carephone* was decided under the interim Constitution, the final Constitution’s formulation of the right to just administrative action informed *Sidumo*. Secondly, but less overtly, *Sidumo* clarified the power of reviewing courts to evaluate the reasonableness of commissioners’ findings with reference to all evidentiary material properly before them during arbitration proceedings. Thus, courts were not confined to appraising only those reasons and facts covered by commissioners in their awards. Instead, held the LAC, the enquiry was an objective one. Recalling the SCA’s definition of rational justifiability in *Rustenburg Platinum Mines*, the discrete attributes of reasonableness and rational justifiability should have been evident after *Fidelity*. Nonetheless, the tests have been frequently conflated by reviewing courts, which regularly use the terms interchangeably.

While the cited discrepancies between the standards may seem nominal, this is by no means the case. Determining whether awards are supported by the general body of evidence, rather than simply with reference to commissioners’ findings, exposes awards to a disparate measure of scrutiny. In so far as *Carephone* might have demanded more from commissioners, it did so primarily in respect of their written findings. *Sidumo*, on the other hand, permits more intrusive evaluations into the merits, rendering the likelihood of confusing appeal with review greater. In this way (particularly given the Constitutional

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784 *Fidelity* para 102.
785 Section 33 read with item 23(2) of Schedule 6 of the Constitution; *Carephone* para 15.
786 *Fidelity* para 102.
787 For subsequent confirmation of this stance, consult *Foschini Group* (2010) (LAC) para 29; *Fidelity* para 102 and *Transnet Freight Rail* para 10. The Court in *Fidelity* observed that, following *Carephone*, the bounds of courts’ powers of review were unclear; see too Benjamin (2009) at 42-43. Recall, however, *Rustenburg Platinum Mines* (SCA) paras 29-31.
788 For suggested qualifications to this approach, consult chapter 6 and the conclusion to this thesis. *Fidelity* para 102. Both Landman at 1618 and Garbers (2008) question nonetheless whether *Sidumo* really endorsed the power of reviewing courts to entertain alternative reasons for awards.
789 *Rustenburg Platinum Mines* (SCA) para 29-31. The argument is enhanced by the CC’s separation of reasonableness from rationality as a viable ground for review; *Pharmaceutical Manufacturers* para 85; *New Clicks* para 108; *Sidumo* para 140; *Bel Porto*; *Value Logistics* paras 38-44; Pillay at 425-429; Myburgh (2009) at 24; Hoexter (2007) at 306-309; De Ville (2005) at 212-213 and chapter 4 of this thesis.
790 Consider, for example, *Afrox Healthcare* para 21; *Parmalat* paras 14-16; *Tao Ying*; Du Toit observes that this occurred prior to *Sidumo* too; *Du Toit* (2010) at 2.
791 Consider, however, Myburgh (2009) at 15-20. There, Myburgh submits that the likelihood of an award being overturned on review is determinable with reference to whether the disputed finding (in the relevant award) relates to the employer’s choice of sanction or to the procedures followed by the commissioner. In his view, the permissible scope of review of sanction determinations is narrower than that applicable to procedural irregularities.
factors outlined above), reasonableness has expanded the ambit of review comparative to Carephone.\textsuperscript{793} However, that does not mean that applying reasonableness rather than rational justifiability will invariably increase the probability of finding reviewable defects. In certain matters, looking only to the presiding commissioner’s reasons (consistently with Carephone)\textsuperscript{794} could well reveal an irregularity, when applying the Sidumo test does not. In others, the opposite may be true. Unqualified assertions as to Sidumo’s expansion or confinement of judicial powers of review, relative to Carephone, must accordingly be interpreted with these factors in mind.

### 3.3 The relationships between Carephone and Sidumo and reasonableness and the statutory grounds of review: Ellerine Holdings Ltd v CCMA & others,\textsuperscript{795} Afrox Healthcare Limited v the CCMA & others\textsuperscript{796} and Boxer Superstores (Pty) Ltd v Zuma & others\textsuperscript{797}

The LAC’s decision in Ellerine Holdings Ltd v CCMA & others\textsuperscript{798} demonstrates the courts’ hesitance about the relationship between Sidumo and Carephone well. The LAC opened its discussion with the following remark:

‘…Sidumo decided, inter alia, that when a court deals with the question of an arbitrator exceeding her powers, it is obliged to adopt a Carephone type test.’\textsuperscript{799}

Presumably, this was subject to rational justifiability’s substitution with reasonableness.\textsuperscript{800} The Court’s use of the phrase ‘Carephone type test’, rather than ‘Carephone test’, suggests that it recognized a measure of difference between the standards. Yet, despite that recognition, it used the terms reasonableness and justifiability interchangeably throughout its judgment.\textsuperscript{801} By failing to explicate their distinguishing features, the LAC left the existence

\textsuperscript{793} Consult, for example, Rustenburg Platinum Mines (SCA) paras 29–31 and Foschini Group (2010) (LAC) para 28, read with Currie & De Waal at 675–676.
\textsuperscript{794} Rustenburg Platinum Mines (SCA) para 26.
\textsuperscript{795} Ellerine Holdings Ltd v CCMA & others [2008] JOL 22087 (LAC).
\textsuperscript{796} Afrox Healthcare Ltd v Commission for Conciliation, Mediation & Arbitration & Others (2012) 33 ILJ 1381 (LAC).
\textsuperscript{797} Boxer Superstores (Pty) Ltd v Zuma & others [2008] 9 BLLR 823 (LAC).
\textsuperscript{798} Ellerine Holdings Ltd v CCMA & others [2008] JOL 22087 (LAC).
\textsuperscript{799} Ibid at 10.
\textsuperscript{800} Ibid.
of a distinction between the tests in doubt. Simultaneously, the validity of its pronouncements on the issue in *Fidelity* went unconfirmed.

Exacerbating the uncertainty evident in *Ellerine Holdings* was the Court’s initial location of reasonableness under the ground of excess of powers, comparatively to its later conclusions. In so far as *Carephone* drew the rational justifiability test from section 145(2)(a)(iii), the LAC’s reference to it in *Ellerine Holdings* is understandable. Still, in its subsequent application of reasonableness, it correlated the standard with gross irregularities, thus departing from its original placement of reasonableness under section 145(2)(a)(iii). Apparently, its reference to excess of powers was remiss.

*Afrox Healthcare Limited v the CCMA & others* divulges equivalent uncertainty as to the relationship between *Carephone* and *Sidumo*. In *Afrox*, the LAC held the Commissioner’s award unreasonable on account of his failure to consider all relevant evidence. It reached this finding despite the applicant’s alleged basis for review, ‘that there was no rational connection between the evidence placed before the commissioner and his conclusion.’ The allegation mimics the test delineated in *Carephone*. However, the Court preferred to apply reasonableness. When doing so, it repeated the substantive nature of this standard and its warrant for scrutinizing the merits of arbitration proceedings. According to the LAC, these features were particularly pertinent when determining:

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802 For the distinction between them, consult Hoexter (2007) at 306-309; Bato Star para 43; Grogan (2008) 3 at 7-8; Currie & De Waal at 675-676; *Fidelity* para 102 and *Rustenburg Platinum Mines* (SCA) paras 29-31. Hoexter contends that to be rational: ‘a decision must be supported by the evidence and information before the administrator as well as the reasons given for it….’; Hoexter (2007) at 307. See also De Ville (2005) at 212-21 and Myburgh (2009) at 24.

803 *Fidelity* para 102.

804 *Ellerine Holdings* at 14.

805 For critique of this decision and the relationship between reasonableness and the statutory grounds, see Garbers (2008) at 88; Le Roux & Young at 30 and Myburgh (2009) at 16-17. Consider too *Tao Ying* para 150, where O’Regan J held that failures to apply the mind (an accepted form of gross irregularity) may deprive an award of rationality.


807 Ibid para 19.

808 Ibid para 4. According to the appellant, the Commissioner had ignored critical evidence; *Afrox Healthcare* para 9.

809 *Afrox Healthcare* para 5; consider too *Parmalat* paras 14-16 and *Tao Ying* para 150.

‘…whether the commissioner brought his mind to bear on the material before him before making his award. This is what this court said in Carephone…’

Conceding that the Carephone enquiry had been replaced by the Sidumo test, it then resolved that:

‘[T]he reasonable decision-maker yardstick…is none other than that in the absence of a rational objective basis between the decision arrived at and the material properly placed before the decision-maker, the relevant decision is clearly not one which a reasonable decision-maker could have arrived at.’

The connotation is that reasonableness and rationality are equivalent. Yet, as discussed above, according to Rustenburg Platinum Mines, rather than emphasizing the outcomes of commissioners’ decisions, the Carephone standard examined the rationality of the connections made by commissioners between their reasons, the evidence and their findings. In other words, courts were precluded from evaluating awards with reference to all of the evidence presented during arbitration proceedings under Carephone. To this extent, the enquiries are discrete. As asserted above, Constitutional factors endorse their distinctiveness. In so far as it blurred the defining features of these standards, the LAC’s interchangeable use of the terms in Afrox Healthcare was accordingly regrettable.

Comparable hesitance is apparent in subsequent decisions of the LAC. Just a day after Ellerine Holdings in fact, the Court gave judgment in Boxer Superstores (Pty) Ltd v Zuma & others. Referring neither to Sidumo nor to Carephone, it declared the relevant award ‘irrational’. The irrationality arose from the Commissioner’s failure to provide reasons for granting only limited compensation to the employee. Unfortunately, in reaching this decision, the LAC did not expound the relationship between irrationality and inadequate reasoning; the question was again left hanging. Similarly, the Court offered no explanation for favouring the rationality enquiry over reasonableness, in contrast to its approach in Afrox

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811 Afrox Healthcare para 20.
812 Ibid.
813 Ibid para 21; see too Bestel paras 16-17.
814 This is implicit in many decisions; consider Parmalat paras 14-16; Tao Ying para 150.
815 Rustenburg Platinum Mines (SCA) paras 20 & 29.
816 Ibid. See also Fidelity para 102.
817 In addition, the latter has been held to allow assessment of both alternative reasons for awards and the reasonableness of outcomes reached; Fidelity para 102. The distinctions between these concepts are canvassed fully in chapter 4; consult too Hoexter (2007) at 306-309; Pillay and Pharmaceutical Manufacturers para 85.
819 Ibid para 11. Once again the need for adequate reasons is clear.
Healthcare. Once more, the implication is that the standards are indistinguishable notwithstanding Fidelity’s assertions to the contrary.\textsuperscript{820}

Returning to Ellerine Holdings, the LAC next expanded on its preliminary statements, commenting that the impact of Sidumo had been to dispense with the ‘red light approach’ to review.\textsuperscript{821} Consequently, the cautious attitude to review formerly adopted by the courts no longer applied. In turn, the reasonableness enquiry’s suffusion of section 145 had broadened judicial powers of scrutiny over commissioners’ awards.\textsuperscript{822} Precisely how it had done so was not explained. The LAC nevertheless warned future courts that awards which were inadequate in some respects would not invariably be unreasonable.\textsuperscript{823} Referring to Shoprite Checkers (Pty) Ltd v Ramdaw NO & others,\textsuperscript{824} it noted that setting merely ‘unsatisfactory’ determinations aside could hamper the essence – and particularly the efficiency – of the dispute resolution framework designed by the Act.\textsuperscript{825} To avoid this, deference was due to commissioners’ awards.\textsuperscript{826}

At a glance, the Court’s judgment in Ellerine Holdings appears contradictory: according to it, Sidumo had extended the reach of review, while concurrently prescribing deference. However, rather than combining these features of reasonableness inappropriately, Ellerine Holdings depicts the dilemma inescapably faced by courts on review.\textsuperscript{827} Applying a standard sufficiently intrusive to preserve parties’ Constitutional rights, while still respecting

\begin{footnotesize}
\textsuperscript{820} Fidelity para 102. Myburgh adds that Boxer is authority for the proposition that reasonableness exists independently of section 145; Myburgh (2009) at 22-23; compare this to Le Roux & Young at 30.
\textsuperscript{821} Ellerine Holdings at 10-11.
\textsuperscript{822} Consistently with the purposes of substantive review and the majority of judicial sentiment; Sidumo paras 106-110 & para 140; Carephone para 37; Herholdt para 52; Foschini Group (2010) (LAC) para 28; Super Group Autoparts t/a Autozone v Hlongwane NO & others [2010] 4 BLLR 458 (LC) para 17; Value Logistics para 40. In Value Logistics, the Court held that reasonableness allowed for greater scrutiny than that permissible under the interim Constitution; according to the LC, Sidumo had set a ‘lower threshold for review and a higher standard for administrative action’; Value Logistics para 40.
\textsuperscript{824} Shoprite Checkers (Pty) Ltd v Ramdaw NO & others [2001] 9 BLLR 1011 (LAC) at 1636H-I.
\textsuperscript{825} Ibid, as cited in Ellerine Holdings at 11; see too section 1(d)(iv) of the LRA.
\textsuperscript{826} For the original conception of ‘deference as respect’, consult Dyzenhaus (2004); more recently, see Hoexter (2007) at 138-47.
\textsuperscript{827} Bryden eloquently describes the quandary which faces reviewing courts. He records that what is required is a resolution to the dissension: ‘...between the desire of judges to develop a jurisprudence that is both principled and sufficiently flexible to address a broad range of administrative decision-making and the desire of administrative law practitioners (whether they be parties to administrative proceedings, lawyers or administrative decision-makers) to operate in a legal environment that enables them to achieve practical solutions to their problems.’; P Bryden ‘Standards of review and sufficiency of reasons: Some practical considerations’ (2006) 19 Can J Admin Law 191 at 192, cited in G van Harten, G Heckman & D Mullan Administrative Law Cases, Texts and Materials 6 ed (2010) at 850.
\end{footnotesize}
legislative intent and the doctrine of SOP, is no easy task. It is surely this tension which is responsible for much of the confusion.

Perhaps the most fitting theoretical construction of Ellerine arises from Hoexter’s proposal as to how the conflicting characteristics of reasonableness may be united. Hoexter submits that in so far as the constitutional standard of reasonableness restricts (rather than extends) judicial powers of review, the restriction is confined to determining applicable remedies. In other words, whereas intensive examination of administrative decisions is acceptable, overturning awards on account of trivial defects alone, or where doing so would not influence the outcome, is unwarranted. The proposal is useful in theory but applying this conception of reasonableness in practice remains. Specifically, defining the point at which an error becomes sufficiently serious as to necessitate review is tricky.

To understand how the Court’s decision in Ellerine Holdings is aligned with Hoexter’s approach, it is necessary to consider the judgment in more depth. The LAC in Ellerine Holdings assessed the Commissioner’s findings with reference to the applicant’s contended grounds of review. When doing so, it did not confine itself to evaluating only the award and reasons provided for therein. Instead, it found the general body of evidence supportive of the award, engaging in measurable scrutiny of the merits in the process. While it identified various errors in the Commissioner’s decision, it refused to overturn the award. According to the majority, the errors did not amount to gross irregularities. Davis JA’s observations in this regard are important:

‘The reasons why these questions must be answered in the negative, is in the first place, that a court must be careful to parse an award by second respondent in the same fashion as one would an elegant judgment of the Supreme Court of Appeal or the Constitutional Court. These awards must be read for what they are, awards made by arbitrators who are not judges. When all of the evidence is taken into account, when there is no irregularity of a material kind in that evidence was ignored, or improperly

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828 Ibid; Sidumo paras 137 & 243-244; Herholdt para 52 & 54.
829 Hoexter (2007) at 318, read with the CC’s endorsement thereof; Sidumo para 109.
830 Consistently with the expansive nature of the reasonableness enquiry.
831 This seems aligned with the Court’s approach to review of gross irregularities in Sasol Mining.
832 Ellerine Holdings at 13-14.
833 Some assistance is provided by the approach adopted in Sasol Mining as discussed above.
834 Implying a distinction between Carephone and Sidumo at least to this extent.
835 Ellerine Holdings at 14.
836 Ibid at 12-13.
rejected, or where there was not a full opportunity for an examination of all aspects of the case, then there is no gross irregularity as urged upon us…”

In passing these remarks, the LAC again recognised the significance of context in defining the ambit of review. When measuring the reasonableness of awards, the context in which commissioners operate is accordingly germane. In so far as Hoexter’s submissions are concerned, it is plain from Ellerine Holdings that the Court did not refrain from investigating the facts thoroughly. It exercised deference only when it came to determining whether the award in question was unreasonable, demonstrating its adoption of Hoexter’s model of deference.

Somewhat more questionably, the LAC then stated that as the award did not evince a gross irregularity, appraising its substantive reasonableness would not assist the respondents. The statement is noteworthy but puzzling. In its expression, the Court acknowledged the substantive nature of reasonableness, defining it as an ‘outcomes based enquiry’. Still, in the same breath, it suggested that the procedural adequacy of the Commissioner’s findings rendered the reasonableness of the outcome irrelevant. As averted to above, there is inevitably an overlap between gross irregularities and unreasonableness. However, given the conceptions of the former as procedural and the latter as substantive, the grounds are theoretically distinct. Conflating them disregards their discrete origins; simultaneously, the Constitutional essence of reasonableness is obscured. In addition, attributing reasonableness to awards purely on the basis that they lack procedural irregularities renders the standard redundant – a result anomalous with Constitutional intent. To remedy this, a test capable of

837 Ibid at 13.
839 Ellerine Holdings at 13.
840 Nor was it unreasonable; instead, held the Court, it was ‘justifiable’; Ellerine Holdings at 14-15.
841 Specifically, the LAC held that doing so would not ‘be helpful to the respondents’; Ellerine Holdings at 14.
842 Ellerine Holdings at 14-15.
843 Ngcobo J’s remarks in New Clicks describe the overlap well:

‘There is obviously an overlap between the ground of review based on failure to take into consideration a relevant factor and one based on the unreasonableness of the decision. A consideration of the factors that a decision-maker is bound to take into account is essential to a reasonable decision. If a decision-maker fails to take into account a factor that he or she is bound to take into consideration, the resulting decision can hardly be said to be that of a reasonable decision-maker…’; New Clicks para 511.


844 Consider the purposes of judicial review generally and the contents of the right to just administrative action; Jowell (2006) at 16-17; Hoexter in Corder & van der Vijver (eds) (2002) at 27; Corder in Corder & van der
differentiating between gross irregularities and unreasonableness is needed. Currently, no such test exists. Subsequent decisions reveal comparable sentiments and the issue is detailed more fully in later paragraphs of this chapter.  

### 3.4 Maintaining the distinction between appeal and review

Another theme apparent from many cases is the familiar challenge of maintaining the distinction between appeal and review. Aggravating the difficulties associated with it, have been the LAC’s frequent references to the ‘correctness’ (or ‘incorrectness’) of commissioner’s findings. Matters such as Amazwi Power Products (Pty) Ltd v Turnbull, Khanyile v Billiton Aluminium SA Ltd t/a Hillside Aluminium and Motsamai v Everite Building Products (Pty) Ltd, exemplify the problem. In Amazwi, while making no reference whatsoever to the Sidumo standard, the LAC upheld the Commissioner’s findings of unfairness as ‘correct’. Comparably, albeit with a contrary outcome, in Motsamai the Court held that by awarding re-employment the Commissioner had: ‘…clearly got it wrong.’ In Khanyile, the LAC again deemed the Commissioner’s order ‘correct’. It concurrently asserted that there could ‘be no doubt’, in fact, of the award’s correctness. Ironically too in Khanyile, the Court criticized the LC for having engaged in an appellate like procedure, rather than conducting a review. It nonetheless committed an analogous error.

Whereas a court which upholds a commissioner’s award as correct is perhaps unlikely to find it unreasonable, the correctness of awards is not the enquiry on review. That enquiry is

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845 See, for example, Tao Ying and the discussion thereof below. Consider too Parmulat paras 14-16.


848 Khanyile v Billiton Aluminium SA Ltd t/a Hillside Aluminium (LAC) unreported case no DA24/06 of 24 February 2009.


850 Amazwi Power Products para 21. For the absence of references to reasonableness, see paras 7-21.

851 Motsamai para 23.

852 Khanyile para 34.

853 Ibid.

854 Ibid.

855 Samancor Ltd (Tubatse Ferrochrome) (2011) (SCA) paras 5, 7 & 15 and Bestel paras 16-17. Admittedly, there are exceptions to this rule. Whether a commissioner has acted *ultra vires*, for example, ostensibly calls for an enquiry into the correctness of the commissioner’s decision; Myburgh (2011) at 1518; *Southern Sun Hotel Interests*. For traditional conceptions of review and the distinctions between review and appeal, see Botma & van
confined to appeal proceedings.\textsuperscript{856} Regardless of the veracity of the LAC’s substantive findings in these matters,\textsuperscript{857} labelling awards as correct or incorrect should therefore be avoided. In the absence of doing so, the challenge of retaining the apposite boundaries between appeal proceedings and reasonableness review is just exacerbated.\textsuperscript{858} 

In \textit{Samancor Manganese (Pty) Ltd v CCMA and others}\textsuperscript{859} overtly illustrates the quandary.\textsuperscript{860}

In \textit{Samancor Manganese}, the review application was premised on the allegedly ‘erroneous’ findings of the relevant Commissioner.\textsuperscript{861} Given the nature of review as preclusive of enquiries into correctness,\textsuperscript{862} the legitimacy of the application was disputable. Disappointingly, however, neither the LC nor the LAC dismissed it on this basis.\textsuperscript{863} Instead, the application was dismissed on account of the accuracy of the Commissioner’s award.\textsuperscript{864} Whereas the Court made brief mention of the reasonableness test, it ultimately relied on the award’s correctness in reaching its decision. Its reference to reasonableness accordingly comprised no more than formalistic compliance with the tenets of review; in truth an appeal was conducted.\textsuperscript{865}
An even more severe example of conflating appeal with review appears from Dunwell Property Services CC v Sibande & others.866 There, the LAC held that, to succeed on review, the appellant employer was required to prove both the substantive and procedural fairness of its erstwhile employee’s dismissal.867 Yet, it is trite that the fairness of dismissals is the precise question before commissioners during arbitration proceedings.868 In framing the issue as such, the Court in Dunwell clearly confused correctness review with the Sidumo standard.869

A related concern emerges from matters such as Rainbow Farms (Pty) Ltd v CCMA & others.870 In Rainbow Farms, the LAC pointed to the ‘inescapable conclusion’ which the Commissioner had not reached.871 The implication of the remark is that only one acceptable outcome was available to the Commissioner. Not only does this suggest that CCMA awards are required to be correct, but it offends a fundamental principle articulated in Sidumo – more than one reasonable outcome may exist in any given case.872 Thus, commissioners cannot be confined to single ‘reasonable’ conclusions.873 There are good reasons for limiting judicial power in this way. The notion of an ‘inescapable’ or ‘inevitable’ conclusion seemingly arises from the assumption that courts are better equipped to decide disputes than commissioners.874 It further presumes that there is only one correct conclusion. However, neither of these assumptions is true of all cases.875

866 Dunwell Property Services CC v Sibande & others [2012] 2 BLLR 131 (LAC).
867 Ibid para 18; the Court made this remark despite its formal affirmation of the reasonableness test; Dunwell para 17. For a further example of disguising appeal as review see Jordaan v CCMA & others [2010] 12 BLLR 1235 (LAC). Consider too the SCA’s comments in Samancor Ltd (Tabatese Ferrochrome) (2011) (SCA) paras 5, 7 & 17, regarding the LAC’s approach in Samancor Tabatese Ferrochrome (2010) (LAC).
868 Sections 185, 188, 191 & 193 of the LRA; Van Niekerk et al at 231 & 437-439; Clarence paras 13-14.
869 Recall that reasonableness does not require correctness or perfection; Sidumo para 118; Garbers (2008) at 84.
871 Ibid para 38. The connotation is that there was only one possible outcome available to the Commissioner, contrary to the principle that there may be a range of reasonable decisions available in any given case; Foschini Group (2010) (LAC) para 48. Similarly nonetheless, in South African Post Office Ltd v CCMA & others (‘SAPO’)(LAC) unreported case no JA56/06 of 3 August 2011, the LAC held that only one reasonable possible conclusion was available to the Commissioner; SAPO para 33.
873 Ibid.
874 For the inappropriateness of this assumption, consult chapter 6.
875 Consider that the LRA is based on the principles of natural justice and that the Labour Court was established as a court of law and equity; sections 1(d), 138 & 151 of the LRA; Chirwa v Transnet Ltd and others [2008] 2 BLLR 97 (CC) para 42; the Explanatory Memorandum to the LRA at 318-319; chapter 1. Thus, strict legal principles are not necessarily appropriate, or inevitably suited, to resolving labour disputes; note too Mark Aronson, Bruce Dyer & Matthew Groves Judicial Review of Administrative Action 3ed (2004) at 180.
Looking to the first, commissioners hear disputes *de novo* and on a daily basis. They are well versed in applying the Codes of Good Practice particularly when it comes to misconduct and incapacity dismissals. Conversely, judges of the Labour Courts do not have the benefit of such experience, nor that of hearing the parties’ testimonies first-hand. In addition, reviewing courts are frequently presented with incomplete records of proceedings, deterring from their ability to determine disputes fairly, relative to commissioners. As such, the perception that the judiciary is inevitably superior in its dispute resolution faculties should be treated with caution.

As for the second assumption, the terms of reference in labour disputes are pivotal. These include not only strict legal principles but also the flexible concepts of fairness and equity. Neither fairness nor equity lends itself to scientific or succinctly quantifiable results. Instead, when assessing the two (just as with reasonableness) subjective value judgments are necessary. These judgments, by their nature, may vary from one court (and dispute) to the next; the assumption that in each case there is an ideal answer is therefore illogical.

Of course, the supervisory function of review remains important. While balancing these factors may be tricky, refraining from overzealous averments as to the ‘obvious’, ‘inevitable’ or ‘inescapable’ conclusions commissioners ought to have reached, would be a valuable starting point. Given the terms’ resemblance to correctness, their frequent use merely threatens the tenuous distinction between appeal and review further.

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876 Dismissals constitute the majority of their work; Venter & Levy at 40; *CCMA Annual Report 2010-2011*; Paul Benjamin ‘Assessing South Africa’s Commission for Conciliation, Mediation and Arbitration (CCMA)’ Publication pending (2013); Consider too, the LAC’s cautionary remarks in *CWIU & Others v Sopelog CC* (1994) 15 ILJ 90 (LAC) concerning appeals conducted under the 1956 LRA; *Sopelog* at 97B-E.

877 See, for example, *Bestel* para 24 and *Shoprite Checkers 1* read with *Shoprite Checkers 3* (as discussed below).

878 *Chirwa* para 42; sections 138 & 151 of the LRA; the Explanatory Memorandum to the LRA at 318-319; chapter 1.

880 For an informative illustration of two courts assessing very similar facts but reaching altogether different conclusions, consult the *Shoprite Checkers* trilogy discussed below.

881 For the distinction between appeals and reviews, refer to Fergus (2010).
3.5 The impact of judicial indecision on the outcome of review proceedings: the ‘Shoprite Checkers’ trilogy

Prior to Khanyile, the Shoprite Checkers trilogy had begun.\textsuperscript{882} Not only do these cases exemplify the themes of uncertainty depicted above, but they offer a useful illustration of how different attitudes to review may affect the outcome of any given matter.\textsuperscript{883} In the first of these matters, Shoprite Checkers (Pty) Ltd v CCMA & others (‘Shoprite Checkers 1’),\textsuperscript{884} the respondent employee had been dismissed for eating food belonging to his employer in prohibited areas of the workplace. Following two arbitrations and two review applications in which the courts had remitted the matter to the CCMA for arbitration afresh, the employer appealed to the LAC.\textsuperscript{885} The employee simultaneously instituted a cross-appeal.

Shoprite contended that the Commissioner’s finding of unfair dismissal was unjustified.\textsuperscript{886} The LAC disagreed, holding that:

‘The decision of the commissioner that dismissal was too harsh as a sanction is, broadly speaking, reasonably reasoned. Even if one were to test it on the basis of whether it is justifiable in relation to the reasons given for it, it would, without the slightest doubt, survive the test. If one tests it against the test of unreasonableness in accordance with the decision of the Constitution Court in Sidumo…, there is no doubt, that it is reasonable because it cannot be said that a reasonable decision-maker could not reach the same conclusion. In fact, I would go so far as to say that there is no prospect that a reasonable decision-maker, including a CCMA commissioner, could on the facts of this case find that dismissal was a fair sanction. Any attempt by the appellant to seek a forum that will make such a finding is, in my view, an exercise in futility.’\textsuperscript{887}

Several aspects of this statement are striking. First, the Court’s sentiment that there was ‘no prospect’ that a reasonable decision-maker could have reached a contrary conclusion on fairness again suggests an approach more like appeal than review. It is a fundamental trait of reasonableness review that more than one reasonable outcome may exist. As such, resolving

\begin{footnotesize}
\textsuperscript{882} Fergus & Rycroft.
\textsuperscript{883} Compare Shoprite Checkers 1 with Shoprite Checkers v CCMA & others [2008] 9 BLLR 838 (LAC) (‘Shoprite Checkers 2’) and Shoprite Checkers 3.
\textsuperscript{884} Shoprite Checkers (Pty) Ltd v CCMA & others [2008] 12 BLLR 1211 (LAC) (‘Shoprite Checkers 1’).
\textsuperscript{885} Ibid paras 1-9.
\textsuperscript{886} Specifically in light of the nature of the employee’s misconduct; Shoprite Checkers 1 para 19.
\textsuperscript{887} Shoprite Checkers 1 para 19.
\end{footnotesize}
that there is no alternative, acceptable finding offends the standard’s inherent nature and fits more comfortably within the paradigm of appeal.888

Secondly, the LAC’s analysis of the reasonableness of the Commissioner’s findings on fairness was exceptionally brief relative to its evaluation of the cross-appeal. In fact, its discussion thereof was limited to the paragraph cited above. By comparison, it scrutinized the cross-appeal in detail.889 Finally, the Court’s comment, that ‘even if’ the decision were appraised with reference to the Carephone standard it would survive review,890 reveals a novel approach to the relationship between reasonableness and rational justifiability. Ostensibly, the LAC deemed the latter to impose greater constraints on commissioners than those compelled by the former. Given the discrete measures of review applicable under each,891 the Court’s statements should not be taken at face value. Instead, they should be understood with reference to the different emphases placed by each test on various elements of awards.892

The Court in Shoprite Checkers 1 next examined the ‘justifiability’, ‘rationality’ and ‘reasonableness’ of the Commissioner’s order of reinstatement without backpay,893 essentially equating these terms in the process.894 Following an intricate assessment of the facts, Zondo JP895 concluded that the Commissioner’s failure to award retrospective reinstatement896 was neither justified nor reasonable.897 He therefore allowed the cross-appeal and ordered that the employee be retrospectively reinstated. In doing so, the Judge observed that consistently with the new standard of review, the LAC was entitled to consider all

888 It further repeats the assumption of judicial superiority recorded above; see chapter 6 and Fergus (2010).
889 Shoprite Checkers 1 para 19 & paras 20-32.
890 Particularly when compared with its later affirmation of the award’s reasonableness.
891 As outlined above; the Carephone standard emphasized commissioners’ connections between awards, reasons and evidence while the Sidumo test is concerned with whether decisions are justifiable in relation to the evidence generally.
892 Together with the CC’s abandonment in Sidumo of the reasonable employer test; Sidumo paras 62-79.
893 Which the employee had challenged in its cross appeal. The cross appeal was instituted, in part, against the Commissioner’s decision to impose a final written warning. In the respondent’s opinion, that finding was irrational and unjustifiable. Zondo JP found no basis for this and dismissed the cross appeal in this respect. He nevertheless upheld it on other counts; Shoprite Checkers 1 para 21.
894 Shoprite Checkers 1 paras 22-23.
895 Writing for a unanimous court.
896 Or at the very least a measure of backpay.
897 Shoprite Checkers 1 para 26.
evidentiary material before it, hinting at the distinction between Carephone and Sidumo.\textsuperscript{898} This was true notwithstanding that the full record of proceedings was not before the Court.\textsuperscript{899}

Still aggrieved, Shoprite turned to the SCA in an appeal confined to the appropriateness of the LAC’s order of retrospective reinstatement. The matter is reported as \textit{Shoprite Checkers (Pty) Ltd v CCMA & others (‘Shoprite Checkers 3’)}.\textsuperscript{900} At the outset, the SCA confirmed the Constitutional foundations of review. It then recited the danger associated with reasonableness of blurring the boundaries between appeal and review. The difficulty lay in the reasonableness test’s endorsement of substantive or merits based review. Review proceedings, held the Court, were accordingly to be approached with caution and with due respect for the LRA’s intentional exclusion of appeals from CCMA awards.\textsuperscript{901}

Applying these remarks to the facts of \textit{Shoprite Checkers 3}, the SCA emphasized the broad discretion afforded to commissioners by the Act to determine the appropriateness of retrospective reinstatement.\textsuperscript{902} This discretion, held the Court, restricted the permissible scope of judicial interference.\textsuperscript{903} Of relevance too in the matter before it was the absence of a complete record of proceedings.\textsuperscript{904} The record’s deficiencies had placed the LAC in an even more inferior position to investigate the merits than would ordinarily have been the case. In the SCA’s opinion, this had constrained its authorized sphere of intrusion further. On the strength of the record before it, the Court then examined the LAC’s findings and reached a contrary conclusion. According to it, there was no evidence indicating that the Commissioner had acted upon an incorrect principle or capriciously.\textsuperscript{905} His award was instead reasonable\textsuperscript{906} and the employee’s cross-appeal ought to have been dismissed.\textsuperscript{907} The SCA thus upheld the appeal.

While the Court’s pronouncements in \textit{Shoprite Checkers 3} were largely trite, they are a critical reminder of the breadth of commissioners’ discretionary powers, particularly

\textsuperscript{898} Ibid para 30. See also Transnet Freight Rail para 10; Fidelity para 102.

\textsuperscript{899} Shoprite Checkers 1 para 30.

\textsuperscript{900} Shoprite Checkers (Pty) Ltd v CCMA & others [2009] JOL 23356 (SCA). (‘Shoprite Checkers 3’)


\textsuperscript{902} Section 193(a) of the LRA.

\textsuperscript{903} Shoprite Checkers 3 para 32. See also Myburgh (2010) at 15-16.

\textsuperscript{904} Shoprite Checkers 3 para 30.

\textsuperscript{905} Ibid.

\textsuperscript{906} Ibid para 30. The appeal was accordingly upheld; Shoprite Checkers 3 para 35.

\textsuperscript{907} Ibid para 32.
regarding sanction. Arguably, the SCA’s refusal to interfere without palpable evidence of arbitrary or capricious decision-making is an attitude apposite to discretionary determinations in general.\textsuperscript{908} In addition, it conforms to the contextual nature of the reasonableness enquiry well. The matter is addressed more fully in subsequent paragraphs.

In the interim between \textit{Shoprite Checkers 1} and \textit{Shoprite Checkers 3}, \textit{Shoprite Checkers (Pty) Ltd v CCMA \& others (‘Shoprite Checkers 2’)}\textsuperscript{909} was decided. There, the LAC granted an appeal against the reviewing court’s decision to uphold the Commissioner’s award.\textsuperscript{910} The facts of \textit{Shoprite Checkers 2} imitate those of \textit{Shoprite Checkers 1}: The respondent employee had been dismissed for consuming food belonging to Shoprite in unauthorized areas of the workplace. Following arbitration at the CCMA, the employee was reinstated – guilt had purportedly not been proven.\textsuperscript{911}

Nonetheless, on appeal, the employee conceded culpability. The review was consequently confined to the appropriateness of his dismissal.\textsuperscript{912} Following an examination of the Commissioner’s conclusions in this regard, the Court found them inadequate. Not only had the employee’s testimony in defence been uncritically accepted by the Commissioner (despite it being ‘unsatisfactory in the extreme’)\textsuperscript{913} but he had failed to account for all relevant factors before reaching his decision.\textsuperscript{914}

Typically, the matter would have been remitted to the CCMA for rehearing on the basis of the employee’s guilt. The LAC, however, preferred to determine it of its own accord.\textsuperscript{915} The Court began by reviewing the abundance of authority espousing the fairness of dismissals for theft. It then acknowledged the LAC’s earlier decision in \textit{Shoprite Checkers 1},\textsuperscript{916} in which it

\textsuperscript{908} For a comprehensive discussion of the proper approach to review of discretionary determinations, refer to chapter 6.
\textsuperscript{909} \textit{Shoprite Checkers v CCMA \& others [2008] 9 BLLR 838 (LAC) (‘Shoprite Checkers 2’)}.
\textsuperscript{910} Ibid paras 4 \& 26. On review, the Commissioner’s order of reinstatement had been confirmed subject to a final written warning.
\textsuperscript{911} \textit{Shoprite Checkers 2} para 3.
\textsuperscript{912} Ibid paras 5 \& 14.
\textsuperscript{913} Ibid para 11.
\textsuperscript{914} Ibid.
\textsuperscript{915} Whether this was appropriate given that the discretion has been expressly afforded to commissioners by the LRA is questionable. A full discussion of whether the LAC is empowered to do so is beyond the scope of this paper however. For the extent of the LAC’s powers in this regard, consult \textit{Samancor Ltd (Tubatse Ferrochrome) (2011) (SCA)} para 7.
\textsuperscript{916} \textit{Shoprite Checkers 1} para 30.
had departed somewhat from these authorities.\textsuperscript{917} In Davis JA’s opinion,\textsuperscript{918} the matters were distinguishable. Thus, it was fair to confirm the employee’s dismissal despite the trivial nature of the theft involved.\textsuperscript{919}

The Court’s conclusion in \textit{Shoprite Checkers 2} did not address the reasonableness of the Commissioner’s findings on sanction. Still, when read with its precursor, the cases divulge definite problems with the contentious nature of review. First, they illustrate the likelihood of reviewing courts reaching different outcomes during merits based review, despite comparable facts. In this way, they reveal the potential impact of inconsistent attitudes to review on substantive findings. Moreover, they demonstrate the futility of assuming that only one reasonable decision is available in every case.\textsuperscript{920}

Secondly, the Courts’ judgments display disparate levels of engagement with the law. In \textit{Shoprite Checkers 1}, the LAC considered the fairness of sanction\textsuperscript{921} with minimal reference to case authorities.\textsuperscript{922} Comparatively, in \textit{Shoprite Checkers 2}, the Court engaged extensively with the law, assuming a discrete approach to determining fairness. The distinctiveness of their attitudes raises questions about how commissioners are to determine the fairness of dismissals for misconduct.\textsuperscript{923} Specifically, the weight attributable to the Code for Dismissals relative to case law is indefinite.\textsuperscript{924} Should reviewing courts’ opinions in this area vacillate from one matter to the next, a key function of judicial review, as a supervisory and performance enhancing tool, may be lost.\textsuperscript{925} Rather than guiding commissioners, inconsistent judicial attitudes to the law only serve to confuse. To this end, in so far as the ambit of review

\begin{itemize}
\item \textsuperscript{917} Notably, no reference was made to these cases at all in \textit{Shoprite Checkers 1}.
\item \textsuperscript{918} Writing for an unanimous court in \textit{Shoprite Checkers 2}.
\item \textsuperscript{919} \textit{Shoprite Checkers 2} paras 15-25.
\item \textsuperscript{920} Consistently with the nature of the reasonableness enquiry which recognizes that more than one reasonable outcome may exist in any given case.
\item \textsuperscript{921} Albeit in the context of a purported enquiry into reasonableness.
\item \textsuperscript{922} \textit{Sidumo} aside, the Court made only brief reference to case authority; specifically, it referred to \textit{Republican Press (Pty) Ltd v CEPPWAWU & Gumede & others} [2007] 11 BLLR 1001 (SCA); \textit{Shoprite Checkers 1} para 29.
\item \textsuperscript{923} The limited nature of the LAC’s appraisal of the case law is disparate from the Court’s extensive review thereof in \textit{Shoprite Checkers 2}; \textit{Shoprite Checkers 2} paras 16-21.
\item \textsuperscript{924} For purportedly procedural clarity on this question, see the CCMA Guidelines: Misconduct arbitrations in GenN 602 GG 34573 of 2 September 2011 (‘the Guidelines’). Consider too the various Codes of Good Practice, promulgated under section 203 of the LRA which commissioners are obliged to consult when resolving disputes; \textit{Transnet Freight Rail} paras 11-13. For proposed reconciliations of \textit{Shoprite Checkers 1} and \textit{Shoprite Checkers 2}, consult DJ Meyer ‘Comparing apples with pears: \textit{Shoprite Checkers (Pty) Ltd v CCMA and Others and Shoprite Checkers (Pty) Ltd v CCMA}’ (2010) 43(2) De Jure 344 and Smit (2011) at 72-73.
\item \textsuperscript{925} This complicates the task before commissioners and exacerbates the difficulties they face when seeking to comply with their statutory and Constitutional obligations as depicted in \textit{Carephone} and by Ngcobo J in \textit{Sidumo}.
\end{itemize}
affected the Courts’ findings in the Shoprite Checkers trilogy, it is crucial that the confines of review be clarified.

3.6 Limiting review of discretionary findings: Transnet Freight Rail v Transnet Bargaining Council & others926 and National Union of Mineworkers obo Employees and Others v Commission for Conciliation Mediation and Arbitration and Others (‘NUM obo 112 Employees’)927

Of related import, both to limiting judicial powers of review generally and assessing discretionary determinations, is the matter of Transnet Freight Rail v Transnet Bargaining Council & others.928 In Transnet, the LC expressly stated that reasonableness did not permit judicial interference with commissioners’ allocations of weight to relevant considerations.929 In other words, while commissioners were to account for all relevant factors when resolving disputes, reviewing courts were barred from reallocating the weight attributed by them to such factors. Considering the SCA’s observations in Shoprite Checkers 3, the notion seems valid.930 However, in light of the LAC’s decision in National Union of Mineworkers obo Employees and Others v Commission for Conciliation Mediation and Arbitration and Others (‘NUM obo 112 Employees’),931 its application to section 145 proceedings is questionable.

In NUM obo 112 Employees, the Court was required to determine whether the Commissioner had attended to all relevant statutory considerations when making his award. Specifically, he had been obliged to consider item 6(1) of the Code for Dismissals, which lists the factors relevant to determining the fairness of dismissal for participating in wild cat strikes.932 Yet, rather than assessing simply whether the Commissioner had done so and had allocated weight to each, the LAC engaged in an extensive balancing act. In the process, it re-evaluated the weight assigned to the prescribed factors by the Commissioner, contrary to Transnet Freight Rail.933 Having done so, the Court concluded that a reasonable decision-maker would have
found the dismissals to have been manifestly unfair; as a result, the award was unreasonable.  

Given the LAC’s attitude, whether Transnet Freight Rail’s prohibition of judicial weight allocations stands, is unclear. Either way, the Court’s approach in NUM obo 112 Employees is concerning. First, it is beyond doubt that the power to determine fairness in dismissal disputes has been entrusted to commissioners and not to the courts. As such, commissioners enjoy a wide discretion to make these determinations; that discretion necessarily includes the allocation of weight to relevant factors when determining fairness. Provided therefore, that commissioners properly apply their minds to all pertinent considerations, with apt attention to both the applicable law and material facts, deference is due to their findings. Purely because a reviewing court might have allocated the weight differently to a particular commissioner does not entitle it to substitute his or her award with its own view of the matter. To the extent to which this occurred in NUM obo 112 Employees, the legitimacy of the LAC’s decision is questionable.

3.7 The relationship between gross irregularities and unreasonableness: CUSA v Tao Ying Metal Industries & others, Anglo Platinum Ltd v CCMA & others and Transnet Freight Rail v Transnet Bargaining Council & others

In the midst of the Shoprite Checkers cases, the CC gave judgment in CUSA v Tao Ying Metal Industries & others. Tao Ying concerned the interpretation of a collective agreement which the presiding Commissioner had construed in favour of the employees. The LC and

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935 Section 143(1) of the LRA.
936 See, in this regard, section 138 of the LRA and chapter 1 of this thesis.
937 Sidumo paras 110 & 119; Cheetham para 4.
938 Chan’s discussion of proportionality in European law could assist with explaining the approach adopted by the Court in NUM obo 112 Employees. Chan argues that where the legislature has stipulated specific factors for consideration and decision-makers fail to recognize the weight of one or more particularly important factors, their decisions will be unreasonable; Johannes Chan ‘A sliding scale of reasonableness in judicial review’ 2006 Acta Juridica 233 at 255-256. The difficulty with this stance is that, as in NUM obo 112 Employees, there may be no statutory indication of the factors to which greater weight should be allocated.
939 CUSA v Tao Ying Metal Industries & others [2009] 1 BLLR 1 (CC).
940 Anglo Platinum Ltd v CCMA & others [2010] JOL 25372 (LC).
942 CUSA v Tao Ying Metal Industries & others [2009] 1 BLLR 1 (CC).
943 Ibid para 1.
LAC had dismissed both the review application and subsequent appeal respectively. Based on the absence of jurisdiction, the employer’s appeal to the SCA had nonetheless succeeded.944

The majority of the CC (led by Ngcobo J) disagreed with the SCA’s finding, thereby reinstating the Commissioner’s award.945 Due to the complexity of the decision, the discussion below addresses only the significant aspects of it. First, the Court recounted the LRA’s intentional preclusion of appeals against CCMA awards, denoting that interference with awards was justified in limited circumstances alone.946 As such, it was fitting to confine appeals to the issues raised by applicants in their initial papers. In effect, supplementary grounds for review were excluded from appraisal on appeal. In the majority’s opinion, adopting a contrary view would undermine efficient dispute resolution and the objects of the LRA.947

The original review application in Tao Ying was founded on the Commissioner’s alleged failure to apply her mind to the parties’ dispute. As a legitimate ground of review, if proven, it would have warranted setting her award aside.948 According to the CC, however,949 this was not the case in Tao Ying. Relying on Ngcobo J’s decision in Sidumo,950 the Court resolved instead that the Commissioner’s findings had not deprived the parties of a fair hearing and that her findings were in any event ‘right’. She had suitably applied her mind to the matter and her award was therefore exempt from review.951 For the reasons detailed earlier, the CC’s reference to the correctness of the Commissioner’s decision is regrettable.952 Still, its recognition of the continued relevance of traditionally ‘procedural’ grounds of review953 and its refusal to entertain new grounds of review on appeal, are instructive.954

944 Ibid para 41.
945 Ibid para 107.
946 Ibid para 64.
947 Ibid para 67. The Court’s comments were subject to the proviso that where the parties had proceeded on the basis of a common misconception of the law, the court concerned would be obliged to raise that point of law mero motu.
948 Tao Ying para 76. For ‘failure to apply the mind’ as a ground of review, see Kaefer Insulation para 21; Standard Bank (1995) (BG) at 1397; Information Trust Corporation (LAC) para 10; Miladys; Toyota SA Motors para 41 and Maepe. For general principles in this regard, consult Johannesburg Stock Exchange v Witwatersrand Nigel Ltd 1988 (3) SA 132 (A) and Hira.
949 At least the majority of the CC.
950 In terms of which the Judge had held that a failure to apply the mind deprived the parties of their right to a fair hearing; Sidumo para 267; Fipaza (LC) para 58.
951 Tao Ying paras 76-82.
952 Reasonableness recognizes that there may be a range of permissible outcomes available to commissioners and so does not prescribe perfection for CCMA awards; Sidumo para 118; Garbers (2008) at 84.
953 Specifically, failures to apply the mind; Tao Ying para 150; consider too SAMWU paras 9, 10, 18 & 27 and Pam Golding.
In a dissenting judgment, O’Regan J preferred the SCA’s conclusion that the Commissioner’s award evinced a clear failure to apply her mind, thereby divesting the award of rationality. Before doing so, she recorded her opposition to the majority’s finding that grounds of review omitted from the original papers should be excluded from consideration on appeal. In O’Regan J’s view, where such grounds concerned Constitutional rights (including the right to just administrative action), attending to them was crucial. The need to protect parties’ rights is indisputable. Nevertheless, the practical utility of the Judge’s sentiments is unclear. Judicial review is intrinsically designed to protect parties’ rights. At the very least, the right to administrative justice will be at stake in all review proceedings. So too will the right to fair labour practices be present. Thus, attempting to distinguish between grounds (or cases) associated with Constitutional rights, and those which are not, may be futile. The alternative possibility is equally problematic. Should no distinction be drawn at all, O’Regan J’s approach would expose all grounds of review which are raised for the first time on appeal to scrutiny. It is consequently unfortunate that the Judge failed to explicate her remarks. In the absence of explanation, the majority’s approach must be preferred.

Returning to the defect alleged in Tao Ying, O’Regan J accepted that ‘failure to apply the mind’ was a legitimate basis for review. She then identified a related concern. According to her, commissioners who did not apply their minds appropriately acted unreasonably or unlawfully, in turn breaching the parties’ rights to just administrative action. In this instance, both the Commissioner’s findings and her reasoning process were unconvincing. As such, concluded the Judge, she had not applied herself adequately to the matter; this rendered her award irrational.

954 For the CC’s earlier pronouncements on this debate, see Bato Star.
955 Tao Ying para 150.
956 Ibid paras 130-132.
958 Section 33 of the Constitution.
959 Section 23 of the Constitution.
960 Tao Ying para 134. In Myburgh’s view, O’Regan J’s remarks indicate that erroneous reasoning processes may still justify review in and of themselves; Myburgh (2010) at 16.
961 Tao Ying paras 139-141.
962 Ibid para 150.
The material aspects of O’Regan J’s decision are twofold. First, the Judge’s finding that the
award was ‘irrational’,\textsuperscript{963} rather than ‘unreasonable’ again echoes the Carephone test. Given
the uncertainty surrounding the relationship between Carephone and Sidumo, her failure to
distinguish between these standards\textsuperscript{964} was disappointing; if anything, it added to the
prevailing confusion. Secondly, O’Regan J’s observations imply that procedural irregularities
are prerequisites for unreasonableness.\textsuperscript{965} As previously discussed, in light of the substantive
nature of reasonableness and the traditionally procedural character of gross irregularities, the
viability of the contention is doubtful.\textsuperscript{966} It further suggests a return to the doctrine of
symptomatic unreasonableness despite its abandonment in South Africa’s Constitutional
dispensation.\textsuperscript{967} Arguably therefore, O’Regan J’s decision should not be interpreted as
indicating that procedural defects must be present to establish unreasonableness;\textsuperscript{968} a better
construction is that her decision merely affirms the overlap between gross irregularities\textsuperscript{969} and
substantive unreasonableness.\textsuperscript{970}

In Anglo Platinum Ltd v CCMA & others\textsuperscript{971} the LC addressed this convergence once more,
albeit without reference to Tao Ying. In Anglo Platinum,\textsuperscript{972} the Commissioner was found not
to have applied his mind to the parties’ dispute. Furthermore, he had impermissibly narrowed
the issues for determination. Where commissioners did so, held the Court, disputes would not
be ‘fully and fairly determined’ and:

‘The ensuing decision inevitably [would] be tainted by dialectical unreasonableness
(process-related unreasonableness), characteristically resulting in a lack of rational
connection between the decision and the evidence and most likely an unreasonable

\textsuperscript{963} Consistently with the SCA’s findings; ibid.
\textsuperscript{964} Together with her reasons for departing from the term ‘reasonable’.
\textsuperscript{965} For comparable sentiments, see Transnet Freight Rail para 57; Value Logistics paras 46 & 53-54; Ellerine
Holdings at 14 and the applicant’s allegations in Sasol Mining para 1.
\textsuperscript{966} Carephone paras 30-31 & 37; Sidumo paras 105-110. For the dual features of reasonableness, consult Ray-
Howett; Myburgh (2009) at 16-17 and Roman at 281-282.
\textsuperscript{967} Hoexter with Lyster (2002) at 170-187; Standard Bank (1995) (BG); Yvonne Burns (original text by Marinus
\textsuperscript{968} Analogous decisions should similarly not be understood to suggest this; for an example thereof, consider
Parmalat paras 14-16.
\textsuperscript{969} At least in the form of failures to apply the mind; Fidelity para 101; W Hutchinson ‘Grounds for review:
Sections 145 and section 158(1)(g) of the Labour Relations Act’ (2009) 18(8) Contemporary Labour Law 79 at
80.
\textsuperscript{970} New Clicks para 511; Plasket at 363; Anglo Platinum (2010) (LC) as discussed in Myburgh (Paper presented
at the 2011 CCMA Commissioners Indaba); Afrox Healthcare para 21; For procedural grounds of review similar
to reasonableness, compare Value Logistics para 46; Kaefer Insulation para 21; Standard Bank (1995) (BG) at
1397 and Pam Golding para 5.
\textsuperscript{971} Anglo Platinum Ltd v CCMA & others [2010] JOL 25372 (LC).
\textsuperscript{972} Ibid.
outcome (substantive unreasonableness). There will often be an overlap between the ground of review based on a failure to take into consideration a relevant factor and one based on the reasonableness of a decision. If a commissioner does not take into account a factor that he is bound to take into account, his or her decision invariably will be unreasonable.  

By implication, at least some procedural grounds of review (including failures to take relevant considerations into account) necessarily lead to substantively unreasonable conclusions. Again the approach may be criticized. Where commissioners fail to consider certain factors in their awards, their resultant findings will not always be substantively unreasonable. Mitigating circumstances in misconduct dismissals provide a good example. Consider a commissioner who disregards an employee’s prolonged service history when determining the fairness of dismissal. As length of service has frequently been recognized as a pertinent mitigating factor in misconduct dismissals, to the extent to which the commissioner neglected it, he would have failed to take account of a relevant consideration and so committed a procedural irregularity. Yet, the remaining aggravating circumstances of the case might have far outweighed the employee’s lengthy period of employment. Whether the commissioner had considered this factor would then be immaterial to the outcome, leaving the award’s substantive reasonableness intact. The commissioner’s procedural irregularity could similarly not be held responsible for the award’s substantive reasonableness (or unreasonableness). Of course, had the Court’s comments in Anglo Platinum been based on the procedural component of reasonableness, an argument for the relationship between inadequate procedure and ensuing unreasonableness could be made. However, there is no evidence in its decision suggesting that was the case.

The relationship between procedural defects (in the form of gross irregularities) and the reasonableness standard surfaced in Transnet Freight Rail v Transnet Bargaining Council &

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973 Ibid; see too Myburgh (Paper presented at the 2011 CCMA Commissioners Indaba).
974 Ibid.
976 Of failing to take ‘relevant’ considerations into account.
977 Note too that commissioners are statutorily obliged to provide only brief reasons for their awards; Mapepe paras 8 & 22; section 138(7)(a) of the LRA. For the limits of permissible brevity, refer to Tao Ying para 140. Requiring commissioners to cite all relevant legal factors (regardless of the factors’ impact on the outcome) thus burdens commissioners beyond the Act’s intentions. Yet, on the strength of Anglo Platinum (2010) (LC), it would seem that, to the extent to which commissioners fail to do so, their awards may be procedurally defunct; consider further SAMWU paras 9, 10, 18 & 27 and Value Logistics para 44.
In so far as it had done so materially, a gross irregularity would arise.

To this point, the judgment accords with the principles enunciated in *Sidumo* and *Fidelity*, as well as those cited by the Court in *Transnet Freight Rail* itself. After concluding that the Commissioner had committed a material irregularity, the LC nonetheless proceeded ambiguously as follows:

‘For the same reasons, second respondent’s arbitration award amounts to a decision that a reasonable decision-maker could not make.’

The connotation is that the tests for gross irregularities and unreasonableness are principally identical. Yet, the Court acknowledged that the procedural quality of the former dictated that the processes which commissioners follow during arbitration proceedings be evaluated on review. Read with *Sidumo’s* declaration that reasonableness review allows for substantive investigation into the merits of disputes, the incoherence of equating these enquiries is apparent. Clearly a means of differentiating between these grounds is needed.

### 3.8 Reasonableness as a resolutive ground of review: Edcon Ltd v Pillemer NO and Clarence v The National Commissioner of the South African Police Service

Perhaps it was a similar rationale which informed the SCA’s findings in *Edcon Ltd v Pillemer NO*. In *Edcon*, the employee had been dismissed for dishonesty. Following arbitration
proceedings, the Commissioner deemed the dismissal unfair and ordered reinstatement.\(^{990}\) Both the LC and the LAC upheld the Commissioner’s findings and an appeal was subsequently instituted to the SCA.\(^{991}\) Edcon’s grounds for review are revealing; they included that:

a) The Commissioner had misunderstood the severity of the employee’s dishonesty in light of Edcon’s policies;

b) The Commissioner had admitted hearsay evidence without regard for applicable laws of evidence; and

c) The Commissioner’s finding that no evidence had been led pointing to a breakdown in the parties’ trust relationship, was erroneous.\(^{992}\)

Commencing with the principles of review,\(^{993}\) the Court defined the question before it as whether the award was one which ‘a reasonable decision-maker could arrive at considering the material placed before him.’\(^{994}\) Once more, it confirmed that this enquiry directed reviewing courts to examine not only commissioners’ findings, but also all evidentiary material presented during the arbitration proceedings at hand.\(^{995}\) Despite the discrepancies between this depiction of reasonableness and the SCA’s former definition of rational justifiability,\(^{996}\) the Court in Edcon continued as follows:

‘It is remarkable that the constitutional standard of ‘reasonableness’ propounded by the Constitutional Court in Sidumo is conceptually no different to what the LAC said in Carephone. The only difference is in the semantics – the LAC has preferred ‘justifiability’ whilst the Constitutional Court has preferred the term ‘reasonableness’.\(^{997}\)

As discussed above, the validity of the proposition is questionable. Were the standards identical in all but name, the CC’s replacement of rational justifiability with reasonableness would have been superfluous.\(^{998}\) Moreover, the drafters of the final Constitution would not

\(^{989}\) Ibid paras 3-6.

\(^{990}\) Ibid para 9; albeit without backpay; Edcon paras 1-2.

\(^{991}\) Edcon para 2.

\(^{992}\) Ibid para 10.

\(^{993}\) Ibid paras 11-16.

\(^{994}\) Ibid para 15.

\(^{995}\) Ibid para 16. See too Fidelity para 103.

\(^{996}\) Rustenburg Platinum Mines (SCA) para 26.


\(^{998}\) Sidumo para 110; Rustenburg Platinum Mines (SCA) paras 26-28.
have bothered to reformulate the right to just administrative action as they did. The SCA’s preceding comments that the Sidumo test allowed for all evidentiary material to be examined on review, when the Court itself had expressly prohibited this under Carephone, only further undercuts the legitimacy of its remarks in this regard.

Applying these equivocal sentiments to the facts nonetheless, the SCA held the Commissioner’s decision reasonable. It accordingly dismissed the appeal, upholding the award in the process. In doing so, the Court declared its conclusion dispositive of the matter; there was thus no need to consider the Commissioner’s allegedly inappropriate admission of hearsay evidence. Notably therefore, the matter was decided purely on the strength of reasonableness, notwithstanding the standard’s absence from the employer’s initial application papers. The implication is that reasonableness comprises an overarching basis for review, incorporating at least some of the traditionally procedural grounds therefore. Of associated import is the judgment’s implicit directive that reasonableness may remedy procedural deficiencies in awards.

To this end, the validity of the SCA’s stance is again arguable on several fronts. First, both the LAC and the CC have confirmed the continued status of section 145. While in certain cases, the nature of the contended grounds for review may fall within the scope of reasonableness this will not be true of all matters. Inappropriate admissions of hearsay evidence, for one, will not necessarily relate to the reasonableness of an award’s outcome. Still, they may affect parties’ rights to procedural fairness. As such, where the grounds alleged by the applicant on review do not fit comfortably under the broad header of unreasonableness, the suitability of the Court’s approach in Edcon is doubtful.

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999 Compare section 24 of the interim Constitution with section 33 of the Constitution.
1000 Rustenburg Platinum Mines (SCA) para 30.
1002 Ibid para 23. Similarly, in Clarence, the LAC upheld the Commissioner’s decision despite the Commissioner’s failure to resolve the matter in a rational manner; Clarence paras 26 & 41. Note that commissioners are obliged to apply the laws of evidence when resolving disputes; Transnet Freight Rail para 16; NUM & others v CCMA & others [2010] 6 BLR 681 (LC) para 23 (‘NUM’). For an overview of the principles of hearsay evidence in this context, consult Foschini Group (2010) (LAC) paras 35-37.
1003 For challenges to this view, see Le Roux and Young at 30 and Du Toit (2010) at 4-6 & 8.
1004 The LAC’s decision in Clarence has comparable implications; Clarence paras 26 - 41.
1005 Fidelity para 101; Sidumo paras 164-165, read with Du Toit’s comments thereon; Du Toit (2010) at 5-6. Compare too Tao Ying paras 62-76; SAMWU paras 9, 10, 18 & 27 and Pam Golding.
1006 Examples include failing to take relevant considerations into account or considering irrelevant factors.
Secondly, the approach defeats the functions of judicial review. Review is concerned not only with reasonableness but also with promoting accountability and competency in administrative decision-making.\textsuperscript{1009} By means of review, the quality of future decisions may be enhanced. Concurrently, lawfulness and procedural fairness are preserved.\textsuperscript{1010} Thus, paying nominal regard to commissioners’ procedural obligations during arbitration proceedings abrogates an essential tenet of review. As alluded to above, should procedurally defective awards be upheld on account of their substantive reasonableness, parties’ rights to procedural fairness may be thwarted.\textsuperscript{1011} Favouring substance over procedure as the Court in \textit{Edcon} did, may similarly flout the right to fair labour practices. Reasonableness should therefore not be seen as a resolutive test, capable of absolving awards of procedural irregularities.\textsuperscript{1012} On the contrary, the status of procedural defects as legitimate bases for review must be maintained.\textsuperscript{1013}

Linked to the difficulties posed by \textit{Edcon} are the problems revealed by \textit{Clarence v The National Commissioner of the South African Police Service}.\textsuperscript{1014} When conducting the review in \textit{Clarence}, the LAC criticised the Commissioner’s award extensively, primarily on the basis of his inadequate appraisal of relevant criminal law principles before finding the dismissal unfair. Specifically, the Court recorded that the Commissioner had failed to:

\begin{quote}
‘[C]onsider the crucial issue of private defence with the particularity which was required. The arbitrator seems to have arrived at his conclusion by accepting the version of the appellant who emphasized his subjective appreciation of the situation. This is not a rational way of deciding the issue. It was in the circumstances unreasonable for the arbitrator to have reached the decision which he did.’\textsuperscript{1015}
\end{quote}

Whether the LAC deemed the Commissioner’s irrational approach or his neglect of specified principles the primary reason for interfering with his findings is unclear. Its vague references to ‘rationality’ are equally confusing. Notwithstanding the narrow scope of reviewing courts’

\textsuperscript{1009} Ray-Howett at 1628-1634; \textit{Cheetham}; Garbers (2008) at 86 & 87; \textit{Sidumo} para 138; section 33, read with section 195(1), of the Constitution.
\textsuperscript{1010} Consider, in this regard, Du Toit (2010) at 9.
\textsuperscript{1011} Ray-Howett 1630-1632; \textit{Tao Ying} para 131; section 33 of the Constitution.
\textsuperscript{1012} For confirmation of the need to retain both procedural and substantive review, see \textit{SAMWU} para 11 and \textit{Southern Sun Hotel Interests} para 17. In Landman’s words: ‘…the issue of deference will not arise where imperative procedural issues have not been observed. This includes the rules of natural justice to the extent that they are applicable. The CCMA commissioner must be impartial and independent…’; Landman at 1618.
\textsuperscript{1013} For implicit affirmation of this approach, note \textit{Maepe} para 22 and \textit{Tao Ying} paras 76 & 150. See too Myburgh (2009) at 18.
\textsuperscript{1014} \textit{Clarence v The National Commissioner of the SA Police Service} (2011) 32 \textit{ILJ} 2927 (LAC).
\textsuperscript{1015} Ibid para 26.
authority, the Court determined the matter afresh. It began with the charges levelled against
the employee, addressing complex principles of criminal law – in a highly technical and
legalistic manner – in the process. It concluded that the employee’s guilt had not been
proven on a balance of probabilities. In turn, despite the Commissioner’s failure to resolve
the dispute in a ‘rational way’, or to refer to purportedly relevant law, his award was
upheld.

Ambiguous references to rationality aside, the Court’s attitude in Clarence is both
theoretically and practically questionable. First, the LAC neglected the significance of
context in review proceedings; in so doing, it disregarded the very nature of labour dispute
resolution. CCMA commissioners are expressly obliged to resolve disputes on the basis of
fairness, in an informal and accessible way. Consequently, the role of technical legal
considerations in CCMA arbitrations is limited and generally confined to the field of labour
law. It is for this reason that commissioners are not required to have legal training beyond
this specialist sphere. Moreover, parties to proceedings are often unrepresented and
commissioners usually receive little legal assistance as a result. In most cases, reference to
the Codes of Good Practice, as informed by common law principles, is sufficient to determine
disputes fairly. Demanding thorough knowledge and consideration of law outside of this
realm would render the requirement to issue awards within 14 days near impossible for
commissioners. Commissioners may further become obsessed with legal precision in their
findings, impairing the intended efficiency and informality of the labour dispute resolution
system. Finally, demanding legal perfection would result in comparable difficulties for
employers, who cannot fairly be expected to unravel complex legal issues before dismissing

1017 Ibid paras 27-41.
1019 Ibid para 41.
1020 In Chirwa, the CC confirmed the significance of fairness and equity to resolving labour disputes; Chirwa para 42.
1021 Section 138(10) of the LRA. Of assistance to commissioners when doing so are the various Codes of Good
Practice (as discussed in chapter 1 of this thesis) and the Guidelines.
1022 Rule 25 of the Rules for the conduct of proceedings before the CCMA GNR 1448 GG 25515 of 10 October
2003 (‘the CCMA Rules’), read with Venter & Levy at 36; the authors note there that in 66% of arbitrations
conducted by the CCMA between 2008 and 2010, neither party had any form of representation. Recall, however,
that the Rule has recently been declared unconstitutional; Law Society of the Northern Provinces.
1023 Sections 1(d)(iv) and 138 of the LRA; the Explanatory Memorandum at 318-319. Consider too Quinot at
442.
employees. The impact on the LRA’s labour dispute resolution processes may therefore be severe.

Practical problems exist too. Labour Court judges, while possessed of greater legal expertise generally, lack many of the advantages of CCMA commissioners when determining disputes. First, they do not benefit from hearing parties’ testimonies first-hand during review proceedings. Frequently too, reviewing courts do not have complete records of the arbitrations proceedings in question. The courts’ ability to draw accurate inferences about witness credibility and the extent of the damage to the parties’ relationship is accordingly constrained. Secondly, they do not engage with employers and employees on a daily basis as commissioners do. Such grassroots experience enhances commissioners’ proficiency to decide disputes consistently with the norms of labour law, fairness and equity.

These norms attest to the limited role of technical legal principles in arbitration proceedings. Any advantage attributable to the courts in this regard is consequently narrow. As a result, commissioners are often better equipped to resolve disputes fairly than reviewing courts. Thus, interference to the extent engaged in by the LAC in Clarence is unfortunate. Ironically too, such extensive intrusion has the potential to jeopardise rather than protect parties’ rights to fair labour practices. It similarly contravenes legislative intent. As such, courts should refrain from usurping commissioners’ functions in this way.

Of course, despite the difficulties both Clarence and Edcon raise, devising reasonableness as a resolutive test may promote the efficiency of labour dispute resolution. Were courts permitted to ignore procedural defects on account of reasonableness in outcome alone, disputes could be finalized more quickly. The loss to parties’ rights to fair procedures cannot, however, be so easily condoned. Given the inferior position of reviewing courts to

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1025 Without legal advice at least.
1026 Amongst other things.
1027 See Sopelog at 9TB-E and Fergus & Rycroft.
1028 Remembering that commissioners are principally responsible for determining disputes for good reason; Sidumo para 119.
1029 And sometimes lawfulness too.
1030 To justify the violation, a full ‘section 36 analysis’ would be required; section 36 of the Constitution; Du Toit (2010) at 9.
that of commissioners, prizing their assessments of reasonableness is even less appropriate.

Nonetheless, in certain instances, the applicant’s purportedly procedural grounds of review may fall within the broad ambit of reasonableness. Declaring an award reasonable without examining all of the contended grounds for review, may then be apt. Yet, in order to apply this approach effectively and consistently, clarity on the boundary between procedural defects unrelated to reasonableness and those within the standard’s scope must be obtained.

4. CONCLUSION

In Sidumo, the CC reformulated the substantive component of review previously described in Carephone. Rather than questioning the rational justifiability of the connections made by commissioners, the revised test assesses whether awards are ones which reasonable decision-makers could reach. The test is substantive in nature and entails value judgments as to whether the relevant commissioner has reached a reasonable conclusion. Importantly, the requisite standard for review is unreasonableness; gross unreasonableness need not be established. While the Sidumo test permits intensive scrutiny of the merits of disputes, the standard simultaneously emphasizes that deference is due to commissioners’ findings. Deference is crucial to upholding the proper SOP between the executive, legislature and judiciary and espouses the distinction between appeals and reviews. In turn, reviewing courts must recall that more than one reasonable outcome may exist in any given case. Related to this principle is that reasonableness does not equate to correctness. Augmenting these aspects of reasonableness is the context in which CCMA arbitrations are conducted. That context is depicted in the Constitutional right to fair labour practices, read with the

1031 As detailed above.
1032 Consider SAMWU para 11; Southern Sun Hotel Interests para 17 and Landman at 1618.
1033 Refer, in this regard, to De Ville’s depictions of reasonableness and grounds related thereto; De Ville (2005) at 213-214; see also Plasket at 363; Myburgh (2009); Myburgh (2010) and Myburgh (2011).
1035 Garbers (2008) at 85; Ray-Howett at 1632-1633.
1036 As Hoexter suggests: ‘…the ordinary dictionary meaning of reasonable – in accordance with reason or within the limits of reason – suggests an area of legitimate diversity, a space within which various reasonable choices may be made. It does not suggest that a decision is reasonable only when it is correct or perfect in the court’s eyes…To require less than reasonableness so defined would be to allow capricious decision-making. To require more – to require correctness or perfection – would be to allow the courts to substitute their own views for those of the administrator…’; Hoexter (2007) at 313.
1037 Sidumo para 118.
framework for labour dispute resolution provided for in the LRA. Together they portray an informal, flexible, efficient, accessible, and cost effective system for resolving disputes which warrants judicial interference with the finality of awards in only limited circumstances. Generally speaking, the dispute resolution mechanisms devised by the Act are better suited to protecting the right to fair labour practices than traditional court processes. They are therefore deserving of respect on review.

These features of reasonableness have been repeatedly confirmed by the courts and are largely uncontroversial. The Constitutional foundations of reasonableness and the values underpinning it are comparably so. Foremost of these is the right to just administrative action, which requires administrative conduct to be reasonable, lawful and procedurally fair. Supporting this right are the Constitutional norms of accountability, transparency and openness in the public administration. Coupled with the right to just administrative action, these values ensure that the rule of law is maintained. In addition, they foster improvement in future administrative decision-making, divulging a key function of judicial review. Suitably balancing these considerations with the need for deference is the challenge reviewing courts face. Ultimately, it is the interplay between these factors which designates the scope of the reasonableness test.

The CC has frequently stated that Constitutional rights must be interpreted harmoniously with another wherever possible. As such, the rights to fair labour practices and just administrative action should not be seen as contradictory. Instead, they ought to be construed as mutually supportive. Arguably, the most fitting construction of their relationship is that the right to just administrative action protects the right to fair labour practices. If read in this way, no conflict need arise between these rights.

1038 Section 1(d) of the LRA and section 23 of the Constitution.
1039 In this way, the right to just administrative action is balanced with the right to fair labour practices; Sidumo para 110. This is consistent with the contextual approach to applying the reasonableness standard; De Ville (2005) at 212; FAWU.
1040 Section 33 of the Constitution; Sidumo para 88.
1041 Sections 1 and 195 of the Constitution.
1042 Cape Bar Council paras 25-26; Carephone para 9; Fedsure para 58; Pharmaceutical Manufacturers para 33.
1043 Rens at 1222-1223; De Ville (2005) at 80 and Mhlungu. Consider too Sidumo para 112. For Constitutional interpretation generally, see Du Plessis (2002) at 133-144.
1044 Recall Navsa AJ’s comments in Sidumo as discussed above; Sidumo para 110.
Whereas the Court in *Sidumo* articulated these principles, values and rights, it failed to provide a pragmatic sense as to when decisions would be unreasonable. Nor did it indicate how deference should be shown in practice. As a result, reviewing courts have found themselves with only theoretical guidelines as to the standard’s daily application. Confusion and inconsistency in judicial attitudes to the standard consequently persist. Additional difficulties have similarly surfaced.

The controversy centres around three principal issues. First, the relationship between section 145 and reasonableness, and specifically whether they exist independently of one another, is unclear. Linked to this, whether the grounds provided for in section 145 of the LRA endure as legitimate bases for review has been questioned. The overlap between gross irregularities and reasonableness partly resolves these issues but the boundary between these grounds remains obscure. Further related to these problems, is uncertainty about the courts’ formulation of reasonableness as comprising both procedural and substantive elements. Seemingly, while adequate reasons are necessary to sustain awards, a satisfactory reasoning process may not always be. Secondly, the distinction between the *Carephone* and *Sidumo* tests, as well as the continued role (if any) of the former during review proceedings requires clarification. The meaning of the term ‘reasonable’ and its association (or equivalence) with rationality and justifiability is equally indeterminate. Finally, whether reasonableness has extended or limited the scope of review is in doubt. Without clarity on these issues and particularly the confines of reasonableness review, the distinction between appeal and review may be lost, legislative intent scuppered, and ultimately parties’ Constitutional rights threatened.

Fortunately, with reference to judicial authority and the Constitution, some of these questions may be answered. First, despite occasional judgments to the contrary, the continued viability of section 145 is plain. Not only has this principle been verified by the Labour Courts, but it is palpable in the Constitution’s definition of the right to just administrative

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1046 In some instances, courts have disregarded the section 145 grounds altogether while in others they have relied exclusively on statutory grounds. Compare, for example, *Kievits Kroon* (LC) and *Edcon* with *Maepe*. For further discussion of the issue, see Du Toit (2010).
1047 Consider *Edcon*, *Clarence* and *Joseph*.
1048 See *Kievits Kroon* (LC), for example.
action. That definition envisages the right as protective not only of reasonableness,\(^\text{1049}\) but also of procedural fairness and lawfulness in administrative decision-making. Evidently, the drafters of the Constitution saw a role for lawfulness and procedural fairness distinct from that which reasonableness plays. As the section 145 grounds were cast in a procedural light with lawfulness in mind, their enduring relevance lies in protecting the aspects of the right to administrative justice aside from reasonableness.\(^\text{1050}\) The Constitutional values of accountability, transparency and openness endorse the significance of section 145 and its potential to guide commissioners in subsequent disputes too.\(^\text{1051}\)

Secondly, subject to the provisos discussed more fully in the text,\(^\text{1052}\) section 145’s suffusion with reasonableness has extended rather than restricted the permissible ambit of review. Once more, the proposition is supported by the Constitutional values associated with administrative action and the history of the distinctions between the interim and final Constitutions’ formulations of section 33.\(^\text{1053}\) The submission that reasonableness has expanded judicial power is nonetheless subject to an important rider - the CC’s abandonment in *Sidumo* of the reasonable employer test.\(^\text{1054}\) The effect of the test’s rejection was to broaden the scope of commissioners’ discretionary powers to determine the fairness of employers’ sanctions. In so doing, the probability of finding a commissioner’s determination on sanction defective was reduced. As this did not result from the reasonableness standard itself but was due to the Court’s disavowal of the reasonable employer test, it is misleading to style the reasonableness standard as a restrictive one.\(^\text{1055}\)

Returning to the difficulties cited above, the first concerns the proper exchange between reasonableness and section 145 and whether the defects provided for in the latter apply autonomously of the former. Courts regularly establish unreasonableness with reference to specific defects in section 145.\(^\text{1056}\) There are several problems with this approach. For one, requiring evidence of a statutory defect to found unreasonableness fudges the procedural

\(^{1049}\) Section 33 of the Constitution.

\(^{1050}\) It may logically be inferred from *Carephone* and *Sidumo* that both Courts deemed section 145 of the LRA adequately protective of parties’ rights to procedural fairness and lawfulness already.

\(^{1051}\) Note *Cheetham* para 6 and the functions of judicial review described above.

\(^{1052}\) For contrary views, consult *Shoprite Checkers* 1 para 19; *Cheetham* para 6; Grogan (2008) at 3; Garbers (2008) at 85; Grogan (2007) at 22.

\(^{1053}\) Corder in van Wyk et al (1994) at 398.

\(^{1054}\) *Sidumo* para 79.


\(^{1056}\) Examples include *Ellerine Holdings, Transnet Freight Rail* and *Tao Ying.*
essence of section 145 with the substantive character of the *Sidumo* enquiry.\textsuperscript{1057} While, in some instances, the result of merging the two may be no different to applying them separately, this is by no means true of all cases.\textsuperscript{1058} Given section 145’s import in upholding the facets of the right to administrative justice distinct from reasonableness, acknowledging section 145 as an independent basis for review could remedy the issue.\textsuperscript{1059} On account of the inevitable interplay between gross irregularities and reasonableness,\textsuperscript{1060} however, doing so may not always be appropriate. Certainty on the boundaries between these grounds and reasonableness is accordingly needed.

Contributing to this, whether awards which are substantively reasonable but which disclose procedural defects in reasoning process, are susceptible to review, is uncertain.\textsuperscript{1061} In light of the need for efficiency, it might be contended that awards within this category should not be set aside on review. Yet, section 33’s assurances of procedural fairness and lawfulness (and its supporting values of accountability, transparency and openness) point to the contrary. The supervisory function of judicial review in rectifying deficient administrative action equally connotes this.\textsuperscript{1062} Aggravating the debate are judicial depictions of reasonableness as encompassing both procedural and substantive elements. These depictions are not entirely inappropriate\textsuperscript{1063} but they contradict the notion of reasonableness as an outcomes based enquiry. To solve these controversies, the impact of procedural irregularities on the substantive reasonableness of awards requires explanation. Once more, identifying the grounds of review which fall within the standard’s reach and those which do not would assist.

\textsuperscript{1057} *Sidumo* para 106 and *Carephone* para 25.

\textsuperscript{1058} Consider *Edcon* and the discussion on the admission of hearsay evidence above.

\textsuperscript{1059} Myburgh argues that reasonableness may also be an independent ground for review; Myburgh (2010) at 22-23. Compare this, however, to Myburgh (2011), in which Myburgh ostensibly expressed a contrary view. See also Du Toit (2010) at 7-9; Le Roux & Young at 30; Botma & van der Walt (Part 2) at 535 & 541 and *Toyota SA Motors*. The difficulties with asserting that reasonableness is an entirely autonomous enquiry are twofold. First, the CC introduced the standard during the process of interpreting section 145 of the LRA. When doing so, it did not order that an amendment to the Act be made. Nor did it suggest that it was ‘reading in’ the ground of review of substantive unreasonableness. Thus, whether the standard can be cast independently of section 145 is questionable. Secondly, the overlaps between certain grounds of review and reasonableness make it difficult to explain the standard’s purported autonomy; *New Clicks* para 511. Nevertheless, in practice, courts sometimes apply the standard independently of the Act and sometimes not.

\textsuperscript{1060} There is a comparable overlap between excess of powers and reasonableness. Consider, in particular, *Tao Ying; Carephone; Ellerine Holdings*.

\textsuperscript{1061} See *Edcon* and *Clarence* and the discussion thereof above.

\textsuperscript{1062} Jowell (2006); De Ville (2005) at 30; *Solomon* paras 19 & 21.

\textsuperscript{1063} *New Clicks* para 511; Plasket at 363; *Anglo Platinum* (2010) (LC) as discussed in Myburgh (Paper presented at the 2011 CCMA Commissioners Indaba); *Afrox Healthcare* para 21; *Value Logistics* para 46; *Pam Golding* para 5.
The relationship (if any) between adequate reasons and adequate reasoning processes and the continued validity of each, would benefit from explication too.

The contention around the meaning of reasonableness, its relationship with rationality and justifiability (or both) and its stated dual components, poses additional difficulties. While rationality has been recognized in the administrative sphere as comprising only one facet of reasonableness, the Labour Courts have not consistently followed this approach. In its stead, courts sometimes use the terms interchangeably and sometimes distinctively, with no indication of their reasons therefore. Nor have the courts agreed upon the continued functionality (if at all) of the Carephone standard. Answers are needed in these areas.

Finally, maintaining the distinction between appeal and review when applying the reasonableness standard has proven tricky. Whereas the significance of the distinction in itself is debatable, demarcating the confines of permissible judicial interference with administrative action in the labour sphere is vital. In so far as the distinction describes the need to do so, the label is valid; thus, taking cognisance of it is worthwhile. Regrettably, precisely how reviewing courts should give effect to the distinction remains elusive. At the very least, references to the ‘correctness’ or ‘incorrectness’ of commissioners’ findings or awards should be avoided on review.

In an attempt at resolving these issues and delineating the breadth of reviewing courts’ powers more clearly, chapter 4 examines contextual considerations associated with reasonableness in the labour arena. Thereafter, the meanings attributed to the standard in South African administrative law are appraised. In the process, the backdrop for devising a contextually appropriate, but nevertheless pragmatic test for review is set.

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1064 The CC has further repeatedly acknowledged that the concepts are distinct; Pharmaceutical Manufacturers para 85; see too Hoexter (2007) at 306-309; Pillay at 425-429.
1065 In Edcon, the SCA suggested that the only change introduced by the reasonableness test was the precise wording used in Sidumo; Edcon para 16. By implication, rational justifiability is conceptually equivalent to reasonableness.
1066 Compare, for example, Carephone para 37; Shoprite Checkers 1 para 23; Bato Star para 43 and Tao Ying paras 149-150.
1067 Compare Bestel, Fidelity, Tao Ying, Edcon and Ellerine Holdings and the critique thereof above.
1068 Fergus (2010).
1069 Or, for that matter, legislative and executive conduct.
1070 Whether a viable test for reasonableness may be derived from the appraisal of South African authorities, however, remains in doubt.
CHAPTER 4

THE REASONABLENESS STANDARD CLARIFIED?

1. INTRODUCTION

While many courts seem unconcerned about the inconsistency with which the reasonableness standard has been applied in practice,\(^{1071}\) the precise confines of it remain elusive.\(^{1072}\) Given the implications of construing reviewing courts’ powers too generously and the need for legal certainty,\(^{1073}\) it is crucial that clarity and coherence be established. In seeking to delineate the nature and extent of permissible review in the aftermath of *Sidumo & another v Rustenburg Platinum Mines Ltd & others*,\(^{1074}\) this chapter will first confirm the principles of reasonableness which are certain. Thereafter, contextual considerations relevant to formulating a succinct, reliable and pragmatic test will be addressed.

It is anticipated, nonetheless, that while useful as a backdrop, these factors complicate the issue beyond accessible reach. In order to promote a consistent approach to reasonableness, a more tangible definition is necessary. The meaning ascribed to ‘reasonableness’ in South African administrative law will therefore be discussed, with specific reference to rationality, justifiability and proportionality. So too will the Labour and Labour Appeal Courts’ (‘LC’ and ‘LAC’ respectively) attempts at delineating review be appraised.

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\(^{1072}\) C Garbers ‘Reviewing CCMA awards in the aftermath of *Sidumo*’ (2008) 17(9) *Contemporary Labour Law* 84 at 84; PK Le Roux & K Young ‘The role of reasonableness in dismissal: the Constitutional Court looks at who has the final say’ (2007) 17(3) *Contemporary Labour Law* 21 at 30. This is apparent from the diverse and often contradictory approaches of the courts to applying the reasonableness test. Compare, for example, *Foschini Group v Maidi & others* [2010] 7 BLLR 689 (LAC) with *State Information Technology Agency (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & others* (2008) 29 ILJ 2234 (LAC) (‘SITA’).

\(^{1073}\) *Shoprite Checkers (Pty) Ltd v CCMA & others* [2009] JOL 23356 (SCA) (‘Shoprite Checkers 3’) para 31; the Explanatory Memorandum to the LRA (1995) 16 *ILJ* 278 (‘the Explanatory Memorandum’). In the absence of certainty, neither workers nor employers may reliably identify their rights and obligations within the employment relationship. Equality and fairness in outcome and procedure are simultaneously threatened; consider J-M Servais ‘Labour conflicts, courts and social policy’ in R Blanpain (ed) *Labour law, human rights and social policy* (2001) 75 at 77.

\(^{1074}\) *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC).
Having done so, it is resolved that despite the value of academic and judicial descriptions of the concept, concrete definitions should be treated cautiously. Reasonableness is contextually dependent\textsuperscript{1075} and a measure of flexibility must inevitably be tolerated, regardless of the challenges it poses to certainty and coherence.\textsuperscript{1076} As a result, a balance between contextual variability and legal certainty must be struck.

Finally, in concluding this chapter, it is argued that an approach to reasonableness less cumbersome than that mandated by \textit{Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others},\textsuperscript{1077} is vital to realising that balance consistently. Currently, no such approach exists in South African law. Fortunately, however, Canadian law offers a suitable alternative.\textsuperscript{1078} A discussion of the Canadian model is reserved for the final chapter of this thesis.

2. DISCERNIBLE FEATURES OF REASONABLENESS

In the preceding chapter, it was concluded that certain principles of reasonableness are theoretically clear. In addition, submissions were made in relation to particular areas of concern. What follows is a brief overview of these principles and contentions, setting the groundwork for the subsequent assessment of contextual considerations relevant to reasonableness.

\textbf{2.1 The foundations of the reasonableness enquiry}

First, the underlying basis for introducing reasonableness is evident. By suffusing section \textsuperscript{1079}145 with the standard, the Constitutional Court (‘CC’) in \textit{Sidumo} sought to give effect to section 33 of the Constitution.\textsuperscript{1080} CCMA arbitrations constitute administrative action and commissioners are accordingly subject to the imperatives imposed on administrators by section 33 of the Constitution. In turn, arbitrations are to be conducted lawfully, reasonably

\textsuperscript{1075} \textit{Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others} 2004 (7) BCLR 687 (CC) paras 41 & 54; \textit{Sidumo} para 118; Cora Hoexter \textit{Administrative Law in South Africa} (2007) at 321; JR De Ville \textit{Judicial Review of Administrative Action in South Africa} revised 1 ed (2005) at 211.
\textsuperscript{1076} Palaborwa Mining Co Ltd v Cheetham & Others (2008) 29 ILJ 306 (LAC) para 6.
\textsuperscript{1077} \textit{Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others} 2004 (7) BCLR 687 (CC).
\textsuperscript{1078} Consult the discussion of Canadian law in chapter 6; \textit{Dunsmuir v New Brunswick} [2008] 1 SCR 190 para 64.
\textsuperscript{1079} Section 145 of the Labour Relations Act 66 of 1995 (‘LRA’ or ‘the Act’).
and procedurally fairly. Where commissioners fail to comply with these constraints, parties’ rights to just administrative action are threatened and resultant awards may be overturned.

As mentioned in chapter 3, the Court in Sidumo held that review for unreasonableness would give effect to the right to fair labour practices. The implications of this remark are ambiguous. Rather than inferring that reasonableness alone offered adequate protection to parties’ rights, a more logical construction of the CC’s comment in this regard is that it merely confirms the supportive role which the right to administrative justice plays in protecting parties’ rights to fair labour practices.

### 2.2 The test applicable

The second clear aspect of the reasonableness enquiry is its formulation. The applicable test is that articulated by the CC in Bato Star. Given its pertinence to this paper, the test is worth repeating:

‘Is the decision reached by the Commissioner one that a reasonable decision-maker could not reach?’

To be subject to review on the basis of this test, decisions need not be grossly or egregiously unreasonable – they need simply be unreasonable.

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1081 Sidumo para 89; CUSA v Tao Ying Metal Industries & others [2009] 1 BLLR 1 (CC) para 121.
1082 Carephone (Pty) Ltd v Marcus NO & others [1998] 11 BLLR 1093 (LAC) paras 24-32; Sidumo para 105.
1083 Sidumo para 110.
1084 The CC’s comments in this regard were analysed in the previous chapter and are therefore not recounted here.
1085 Sidumo para 110; Bato Star para 44; see too section 6(2)(h) of the Promotion of Administrative Justice Act 3 of 2000 (‘PAJA’) from which this standard was drawn.
1086 Sidumo para 110; Fidelity Cash Management Service v CCMA & others [2008] 3 BLLR 197 (LAC) paras 92-97. Note Super Group Autoparts t/a Autozone v Hlongwane NO & others (2010) 31 ILJ 1248 (LC), where the Judge explained the test as follows:

‘It seems to me the proper approach is to ask not whether the commissioner’s decision is one that a reasonable court (or reasonable decision-maker) could not reach but rather whether in light of the evidence advanced and having due regard to considerations of equity (after all, the Labour Court is primarily an equity court), the commissioner’s decision is one that can properly be said to be reasonable. Thus phrased, the standard avoids a review enquiry that leads inexorably to entanglements in appeal territory…’; Super Group para 10.

1087 This may be inferred from Bato Star; Hoexter (2007) at 314-315. See too Fidelity para 99. Compare this to Conradie JA’s judgment in County Fair Foods (Pty Ltd v CCMA & others [1999] 11 BLLR 1117 (LAC), where the Judge argued that review for irrationality (or unjustifiability) required that the challenged award induces a sense of shock or makes the court ‘whistle’. Consider too Cora Hoexter ‘The future of judicial review in South African administrative law’ (2000) 117(3) SALJ 484.
2.3 Reasonableness as a substantive enquiry

Thirdly, the standard has added a substantive dimension to section 145 proceedings. To this extent, the scope of reviewing courts’ powers has been extended to permit investigations into the reasonableness of commissioners’ findings. Determining reasonableness in outcome entails a value judgment. However, while reviewing courts may scrutinise the merits of impugned decisions, they are limited to doing so for the purposes of ascertaining reasonableness. Courts must refrain from substituting their preferred findings for those of commissioners.

The standard has at times been asserted as comprising both procedural and substantive elements. In so far as unreasonableness overlaps with gross irregularities, the dual components of reasonableness must be acknowledged. Still, as contended earlier, devising the test in this way poses several difficulties. It further contributes little to the principles of review applicable in the pre-Sidumo era. As such, its value is doubtful. Understanding

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1088 Sidumo paras 108-110; Carephone para 38.
1089 Compare the current test to the Carephone standard, read with the procedural grounds listed in section 145 of the LRA; Carephone para 38; Sidumo paras 108-110; Grant Ray-Howett ‘Is it reasonable for CCMA commissioners to act irrationally?’ (2008) 29 ILJ 1619. For an alternative view, see Carli Botma & Adriaan van der Walt ‘The role of reasonableness in the review of labour arbitration awards (Part 2)’ 2009 Obiter 530 at 561-562; note too Mutual Construction Co Tvl (Pty) Ltd v Ntombela NO & others (2010) 31 ILJ 901 (LAC) where the Court criticised the LC’s approach to reasonableness review as too narrow.
1090 Fidelity paras 92-101; Ellerine Holdings Ltd v CCMA & others [2008] JOL 22087 (LAC) at 10-11.
1091 Carephone paras 32-37; Sidumo paras 105-110; Fidelity paras 92-101.
1092 Carephone paras 32-37; Sidumo para 41; Fidelity paras 92-101.
1094 For the overlap between gross irregularities and unreasonableness, see Minister of Health & another v New Clicks South Africa (Pty) Ltd & others (Treatment Action Campaign & another as amici curiae) 2006 (2) SA 311 (CC) para 511; Clive Plasket The Fundamental Right to Just Administrative Action: Judicial Review of Administrative Action in the Democratic South Africa (PhD Thesis, Rhodes University, 2002) at 363; Anglo Platinum Ltd v CCMA & others [2010] JOL 25372 (LC); Afrox Healthcare Ltd v Commission for Conciliation, Mediation & Arbitration & Others (2012) 33 ILJ 1381 (LC) para 21. For the procedural grounds of review which are similar to reasonableness, refer to Value Logistics Ltd v Basson & Others (2011) 32 ILJ 2552 (LC) para 46; Kaefer Insulation (Pty) Ltd v President of the Industrial Court & others (1998) 19 ILJ 567 (LC) para 21 and Standard Bank of Bophuthatswana Ltd v Reynolds NO & others (1995) 16 ILJ 1380 (BG) at 1397.
1095 Or even the pre-Carephone era.
reasonableness as only substantive in nature offers one means of resolving this difficulty. Yet, as this construction neglects the inescapable interplay between certain procedural grounds and unreasonableness, it is not ideal. A more legitimate explanation of the dual features of reasonableness and the procedural grounds associated with it would be preferable.

2.4 The relationship between reasonableness and correctness

The fourth uncontroversial feature of reasonableness is that it does not equate to ‘correctness’. On the contrary, reasonableness presupposes that a range of acceptable outcomes exists in respect of any given dispute. Purely because an award is unsatisfactory in certain respects does not necessarily imply that it is unreasonable. The legislature has given the decision-making power to commissioners rather than the courts and the doctrine of the separation of powers (‘SOP’) demands that its intentions be respected. Consequently, while careful scrutiny is fitting, courts should not be overzealous in setting CCMA awards aside. A measure of deference is due to their findings.

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1096 And thus focused on outcomes rather than procedures. The formulation suggests that the standard operates independently of the statutory grounds. For varying opinions on the subject, consult Le Roux & Young at 30; Darcy Du Toit Reviewing CCMA arbitration awards: Has section 145 become academic? Paper presented at the 13th Annual SASLAW Conference, Vineyard Hotel, Cape Town (22 October 2010) at 7-9; Toyota SA Motors (Pty) Ltd v Radebe & Others (2000) 21 ILJ 340 (LAC) paras 33 & 40 and Garbers (2008).

1097 For illustrations of this interplay, consider Ellerine Holdings at 14; Sasol Mining paras 11-13; Tao Ying para 134 and Myburgh (2010) at 16.

1098 An alternative approach is proposed in the conclusion to this thesis, read with chapter 6.

1099 Carephone paras 32-37; Ellerine Holdings at 10-11; Khanyile v Billiton Aluminium SA Ltd t/a Hillside Aluminium (LAC) unreported case no DA24/06 of 24 February 2009 para 34; Bestel v Astral Operations Ltd & others [2011] 2 BLLR 129 (LAC) paras 16-17; Bernard Schwartz Lions over the Throne: The Judicial Revolution in English Administrative Law (1987) at 133 as cited in Bestel paras 16-17; Woolworths (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others (2011) 32 ILJ 2455 (LAC). Certain courts nonetheless continue to use the terms ‘correct’ and ‘incorrect’ in their assessments of reasonableness; Amazwi Power Products (Pty) Ltd v Turnbull [2008] 9 BLLR 817 (LAC) paras 7-21; Samancor Manganese (Pty) Ltd v CCMA & others (LAC) unreported case no JA17/2009 of 24 February 2009 paras 39-63. Note too the majority decision in Tao Ying; Shoprite Checkers v CCMA & others [2008] 9 BLLR 838 (LAC) (‘Shoprite Checkers 2’) and SITA.


1102 Sidumo paras 105-110 & 178-9; Cheetham para 12; Garbers (2008) 85; Ray-Howett at 1632-33; Fidelity paras 98-99.
Intrinsically linked to the relationship between reasonableness and correctness is the tenuous, but purportedly strict, distinction between appeals and reviews. This distinction has traditionally been understood as obliging reviewing courts to defer to administrative determinations. As argued elsewhere, it is debatable whether the distinction (in itself) contributes meaningfully to the apposite application of the reasonableness standard. Nonetheless, in so far as it reminds reviewing courts to assess reasonableness and not correctness and that respect is payable to commissioners’ findings, the distinction is useful.

2.5 The power of reviewing courts to evaluate all evidentiary material before commissioners

Fifth, when appraising awards for reasonableness, all evidentiary material presented during arbitration proceedings may be evaluated. Reviewing courts are therefore not confined to assessing only the reasons offered by commissioners for their decisions when determining reasonableness. Where reasons other than the commissioner’s justify the outcome in question, those reasons may also be considered. To this extent, the reasonableness enquiry is an objective one.

2.6 Section 145’s enduring pertinence

Despite the tendency of many courts to disregard alleged grounds for review in favour of general assessments of reasonableness, the continued relevance of section 145 has been

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1103 Carephone para 32-37; Sidumo paras 105-110; Fidelity paras 92-101. Note that the candidate has argued elsewhere that the distinction between appeals and reviews is somewhat superficial; Fergus (2010).
1104 Ibid. Nonetheless, the distinction serves as an important reminder to reviewing courts to refrain from overzealous interference with commissioners’ awards.
1105 Attributing terms such as ‘inescapable’, ‘obvious’ and ‘evident’ to the conclusions which commissioners ‘ought to have reached’ should equally be avoided. Consult, in this regard, chapter 3, read with CEPPAWU v NBCCI & others [2011] 2 BLLR 137 (LAC) paras 22-23; National Union of Mineworkers & Another v Samancor Ltd (Tabatse Ferrochrome) & Others (2011) 32 ILJ 1618 (SCA) para 7; Amazwi Power Products para 21; Khanyile (2009) (LAC) para 34 and Rainbow Farms (Pty) Ltd v CCMA & others [2011] 5 BLLR 451 (LAC) para 38.
1106 Chapter 3; Bato Star para 48; Cheetham para 6; DM Davis ‘To defer and when? Administrative law and Constitutional democracy’ 2006 Acta Juridica 23.
1107 Fidelity para 102; Edcon para 16.
1109 Fidelity para 102.
repeatedly affirmed in theory. In most instances, where courts have neglected contentions of statutory defects in applicants’ founding papers, the convergence between specific statutory grounds and reasonableness explains their attitudes. Thus, judicial failures to address specific allegations of section 145 defects should not be understood to imply that the grounds provided for in the section are no longer valid. On the contrary, while the section’s relationship with reasonableness awaits definition, it is clear that the defects listed in section 145 of the LRA remain viable grounds for review.

3. REASONABLENESS IN THE CONTEXT OF LABOUR DISPUTE RESOLUTION

As the CC held in *Bato Star*, the scope of reasonableness is determinable only with reference to contextual considerations relevant to the decision at hand. By implication, the standard is flexible in nature and its appropriate application contextually dependent. Reasonableness will consequently vary from one case to the next. Generally too, the nature of reasonableness in section 145 proceedings will differ from that applicable in other administrative contexts. Various factors affect the traits of the standard. These were described by the Court in *Bato Star*. In addition to them, factors specific to labour dispute resolution

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1111 Ibid para 101; *Southern Sun Hotel Interests* paras 14 & 17; *Maepe v CCMA & another* [2008] 8 BLLR 723 (LAC) para 22; Du Toit (2010) at 3.
1113 *Fidelity* para 101; *Southern Sun Hotel Interests* paras 14 & 17; *Maepe* para 22; *Transnet Freight Rail v Transnet Bargaining Council & others* [2011] 6 BLLR 594 (LC).
1115 *Sidumo* para 118; Hoexter (2007) at 321; De Ville (2005) at 211. For an example of the manner in which reasonable decisions based on similar facts may vary, compare *Shoprite Checkers (Pty) Ltd v CCMA & others* [2008] 12 BLLR 1211 (LAC) (*Shoprite Checkers 1*), *Shoprite Checkers 2* and *Shoprite Checkers 3* (‘the Shoprite Checkers trilogy’) as discussed in chapter 3 of this thesis. For further commentary on these cases, see DJ Meyer ‘Comparing apples with pears: *Shoprite Checkers (Pty) Ltd v CCMA and Others* and *Shoprite Checkers (Pty) Ltd v CCMA’* (2010) 43(2) De Jure 344.
1116 It is argued below that the contextual approach to reasonableness requires two levels of enquiry. The first entails an assessment of the *Bato Star* factors, while the second examines considerations germane to the labour and administrative spheres generally. For the pertinence of context and factors relevant thereto, see *Sidumo* para 253; *Ellerine Holdings* at 11; *Bato Star* para 44; De Ville (2005) at 211-212 and Hoexter (2007) at 318-321.
1117 Recall that *Bato Star* concerned a decision taken outside the labour relations arena and that the review proceedings were instituted in terms of PAJA. When delineating reasonableness under section 145 therefore, factors unique to CCMA proceedings must equally be appraised; Garbers (2008) at 86.
affect the ambit of reasonableness under section 145. The contextual considerations highlighted in *Bato Star* encompass:

‘The nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well being of those affected.’

These criteria are largely unique to individual decision-makers in particular cases. They may conveniently be referred to as the first tier of the contextual enquiry into reasonableness. More universal considerations (arising primarily from the SOP and broad principles of administrative and labour law) constitute the second. In spite of their seemingly separate foci, the two tiers are inherently related and in many respects overlap. What follows is a substantive discussion of both tiers – commencing with the *Bato Star* factors and ending with those pertinent to South African labour dispute resolution generally. By doing so, the framework for a practical and reliable test for review is cast. Whether reviewing courts can realistically be expected to address each of these factors in every case, however, will be questioned.

### 3.1 The Bato Star Factors

#### 3.1.1. The nature of the decision

The first of the *Bato Star* factors is the nature of the decision. CCMA awards are essentially adjudicative in nature. They involve identifying relevant facts and law and applying the applicable law to the dispute concerned. In this way, they strongly resemble judicial decisions. Given the need for deference to be paid to commissioners’ findings and the variable nature of disputes entrusted to them, the scope of reasonableness in individual cases

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1118 *Bato Star* para 45.
1119 *Sidumo* paras 105-110; *Tao Ying* paras 64-67; *Bato Star* paras 45-46; *Carephone* para 35; *Engen Petroleum* para 72; *Sidumo* paras 136-137.
1120 Given the complexity and number of relevant contextual factors involved, requiring reviewing courts to assess each and every one of these factors during section 145 proceedings may be unduly burdensome and may ultimately hamper the efficiency of the process.
1121 *Shoprite Checkers (Pty) Ltd v Ramdaw NO & others* [2000] 7 BLLR 835 (LC) paras 88-90; *Toyota SA Motors; Sidumo* para 208.
1122 *Cheetham* para 6; Garbers (2008) at 86; *Sidumo* para 208.
1123 Which ensures that reviewing courts do not inappropriately interfere with policy-laden or legislative decisions or usurp the functions of the administration; for further discussion of deference, consult chapter 3 and the references cited therein.
will differ on this basis alone. In practice, this factor may indicate, for example, that where complex legal issues arise, the test should be more stringent than where purely factual findings are challenged.\textsuperscript{1124} Discretionary determinations might analogously see reasonableness assume an altogether different form, somewhere between intrusive and reverential review.\textsuperscript{1125} Comparably, where subjective value judgments are involved (rather than strict applications of law), the level of intrusion may be lowered.\textsuperscript{1126}

The critical role of fairness and equity in resolving labour disputes must nevertheless be recognised in all cases.\textsuperscript{1127} These norms direct that strict principles of law are not inevitably suited to resolving labour disputes. Commissioners at grassroots level are oft better equipped to decide labour disputes than reviewing courts in any event.\textsuperscript{1128} This is primarily due to their daily exposure to parties to employment relationships and the evidentiary advantages which they enjoy over reviewing courts.\textsuperscript{1129} Accordingly, where these principles have appropriately informed commissioners’ findings, scrutiny thereof should be minimised.

Of related import is the content of awards and their impact on parties’ rights.\textsuperscript{1130} In certain jurisdictions, for example, the nature of reasonableness assumes greater breadth where decisions affect fundamental human rights.\textsuperscript{1131} Whereas this approach accords with the South African Constitution, applying it to section 145 proceedings may be redundant. The right to fair labour practices surfaces in all CCMA proceedings.\textsuperscript{1132} Similarly, the right to just

\textsuperscript{1124} For commissioners’ errors of law to be set aside on review, proof that the error was material ought nonetheless to be required; \textit{Hira & another v Booyzen} 1992 (4) SA 69 (A) at 90D-E; Hoexter with Lyster (2002) at 152-156; Hoexter (2007) at 258-260. For traditional administrative law approaches to reviewing policy-laden decisions (as opposed to adjudicative determinations), see De Ville (2005) at 214-216 and Plasket at 339 onwards.

\textsuperscript{1125} Consider \textit{Roman v Williams NO} 1998 (1) SA 270 (C) at 283; \textit{Lucky Horseshoe (Pty) Ltd v Minister of Mineral and Energy Affairs} 1992 (3) SA 838 (T) at 848I-J; \textit{Shoprite Checkers 3} para 32 and Myburgh (2010) at 15-16. Section 193 & 194 of the LRA grant commissioners a wide discretion to determine appropriate or ‘just and equitable’ relief; both are examples of discretionary determinations. Other provisions in the Act may, however, call for discrete levels of scrutiny; Myburgh (2009) at 4; Hoexter with Lyster (2002) at 154-155; \textit{Equity Aviation Services (Pty) Ltd v CCMA & others} [2008] 12 BLLR 1129 (CC) para 36.

\textsuperscript{1126} For review of value judgments, see \textit{Sidumo} paras 178-179.

\textsuperscript{1127} Consider sections 1(d), 138 & 151 of the LRA; the Explanatory Memorandum at 318-319; \textit{Chirwa v Transnet Limited & others} [2008] 2 BLLR 97 para 42; \textit{CWIU & Others v Sopelog CC} (1994) 15 ILJ 90 (LAC) at 97B-E and Emma Fergus & Alan Rycroft ‘Refining review’ 2012 \textit{Acta Juridica} 170.

\textsuperscript{1128} For review of value judgments, see \textit{Sidumo} paras 178-179.

\textsuperscript{1129} As tribunals of first instance.

\textsuperscript{1130} Naturally, this may overlap with the assessment of the impact of the decision on the lives of those affected by it.

\textsuperscript{1131} Johannes Chan ‘A sliding scale of reasonableness in judicial review’ 2006 \textit{Acta Juridica} 233 at 236; see too \textit{UES Local 298 v Bibeault} [1988] 2 SCR 1048, where the Supreme Court of Canada applied a ‘correctness’ standard of review to a matter involving the Constitutional right to associate.

\textsuperscript{1132} Section 23 of the Constitution.
administrative action is germane to all section 145 proceedings. Differentiating between matters in which Constitutional rights are at stake, and those in which they are not, is therefore futile. Whether it would be fitting to permit more intensive review where rights other than these two arise, is questionable.

Intrinsically linked to the aforementioned rights is the impact of the decision on the parties themselves. This factor suggests that decisions having dire consequences for one or more of the parties ought to be examined more closely than those less far-reaching. Again, the proposition is best illustrated by an example. Consider an award refusing reinstatement, where the relevant employee had committed misconduct but had a family of 6 to feed. On the strength of this factor, the award might face greater scrutiny than one refusing reinstatement of an employee guilty of misconduct and with a breadwinning wife and no children. The notion is humane. Yet, distinguishing between parties on this basis implies that personal circumstances may dictate the degree to which people enjoy legal protection. The detriment to fairness is ironic. As such, it is doubtful whether this interpretation of the criterion is justified.

3.1.2 The identity and expertise of the decision-maker

When determining whether a commissioner’s decision is reasonable with reference to the identity and expertise of the decision-maker, legislative intent is paramount. Of significance here is the statutory depiction of arbitration proceedings as informal processes, the form of which is at the discretion of presiding commissioners. Court-like procedures are generally inappropriate. Furthermore, consistently with the purposes of the LRA, disputes are to be resolved expeditiously. Legislative intent in this regard is apparent from section 138(1)

1133 Section 33 of the Constitution; section 145 of the LRA.
1134 For further explanation of this submission, refer to chapter 3 and the discussion of Tao Ying therein.
1135 And vice versa.
1136 Being the impact of the decision on the parties to the dispute.
1137 Analogously, where the dispute arises from an unfair labour practice, rather than a dismissal, the impact of the commissioner’s award will be less far-reaching. As such, based on this criterion, the standard of review might be less intrusive.
1138 Section 138 of the LRA; the Explanatory Memorandum at 313-314; see too John Brand et al Labour Dispute Resolution 2 ed (2008) at 17 and chapter 1 of this dissertation.
1139 Foschini Group (2010) (LAC) paras 32-35; Naraindath v CCMA and others (2000) 21 ILJ 1151 (LC); Pep Stores Ltd v Laka NO and others (1998) 19 ILJ 1534 (LC); section 138 of the LRA; OK Bazaars (A Division of Shoprite Checkers) and Others (2000) 21 ILJ 1188 (LC).
1140 Paul Benjamin ‘Conciliation, arbitration and enforcement: The CCMA’s achievements and challenges’ (2009) 30 ILJ 26 at 26; Tao Ying para 65.
of the Act, which obliges commissioners to conduct arbitration proceedings ‘…in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but [the commissioner] must deal with the substantive merits of the dispute with the minimum of legal formalities.’ The extent of commissioners’ discretionary powers under section 138 was detailed in chapter 1 and the discussion is not repeated here. What was concluded, however, was that while commissioners’ acts of discretion enjoyed measurable leeway, commissioners remained bound to adopt certain features of adjudication during arbitration proceedings, to the extent necessary for fairness and efficiency. As such, a degree of due process is required. When defining reasonableness with reference to the identity of the decision-maker therefore, these counterbalances to informality, efficiency and accessibility are pertinent. Precisely how they translate into a test for reasonableness remains regrettably elusive.

Returning to legislative intent and without detracting from commissioners’ obligations, it should not be forgotten that CCMA commissioners are not necessarily lawyers. Whereas most have experience in industrial relations, many commissioners have no formal legal training whatsoever. In addition, they operate under severe pressure and rarely benefit from the assistance of legal representatives as the courts do. Thus, they cannot be expected to

1141 Foschini Group (2010) (LAC) para 32. Other relevant sections include section 138, section 1(d)(iv) and section 191 of the LRA.
1142 Section 138 of the LRA. Since then, the CCMA Guidelines: Misconduct arbitrations in GenN 602 GG 34573 of 2 September 2011 (‘the Guidelines’) have been published; these provide comprehensive directions to commissioners tasked with resolving misconduct dismissal disputes. Note too Transnet Freight Rail para 16.
1144 Tao Ying paras 65 & 152; Carephone para 20; Sidumo para 208; Transnet Freight Rail. When resolving disputes, commissioners must consider the competing interests of the parties to the dispute, with reference to relevant labour law and principles of equity; Sidumo paras 76-77 & paras 168-184.
1145 Consider the Guidelines which, while helpful for commissioners, are somewhat cumbersome. If faultless compliance therewith is to set the tone for review, the Guidelines may have significant consequences. Not only may review proceedings be encouraged thereby but the likelihood of finding awards reasonable may be rendered negligible. In addition, reviews may become increasingly protracted, as reviewing courts trawl through trivial allegations of noncompliance by commissioners with the Guidelines. As such, while the Guidelines are instructive in many respects they should not constitute a principal contextual determinant of reasonableness. Of related relevance is the Commission for Conciliation, Mediation and Arbitration CCMA Practice and Procedure Manual 5 ed (November 2010), available at http://www.ccma.org.za/UploadedMedia/2010%20Practice%20and%20Procedure%20Manual.pdf, accessed on 11 June 2012 (‘the Manual’).
1146 The extensive training to which they are subject prior to their final appointment as commissioners ensures that they are equipped with the necessary skills to do the job; Paul Benjamin ‘Assessing South Africa’s Commission for Conciliation, Mediation and Arbitration (CCMA)’ Publication pending (2013) at 14.
1147 And with limited resources. For an in-depth discussion of the CCMA’s daily operations, see Paul Benjamin ‘Friend or foe? The impact of judicial decisions on the operation of the CCMA’ (2007) 28 ILJ 1 and Benjamin (2009).
have an intricate knowledge of all areas of the law or to have addressed every possible legal issue. The reasonableness enquiry must account for these realities, failing which legislative intent will be thwarted.

Furthermore, it must be recalled that awards were not envisaged to be impeccable. As a result, reviewing courts should not approach them as they would judgments of the ordinary courts. In *Ellerine Holdings*, Davis JA explained this principle as follows:

‘…a [reviewing] court must be careful not to parse an award by [a commissioner] in the same fashion as one would an elegant judgment of the Supreme Court of Appeal or the Constitutional Court. These awards must be read for what they are, awards made by arbitrators who are not judges.’

In order to ensure fairness, tempering this respectful attitude may still be necessary in some cases. Amongst other factors, the substantial constraints under which commissioners work dictate, that while paying deference to awards, reviewing courts must intervene when warranted. A measure of deference is crucial but too little is not. Not only does undue deference endanger parties’ rights, but it undermines the role and functions of judicial review.

On another note, it might be contended that given the significance of the decision-maker’s identity on the scope of review, the nature of reasonableness should differ according to the skills, qualifications and seniority of respective commissioners. This is arguable in theory but

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1148 *Sidumo* para 118; *Ellerine Holdings* at 10-13.
1149 *Sidumo* para 118; note too Grogan’s submission (albeit in light of *Carephone*) that commissioners are not magistrates and that their role is to consider the fairness of sanctions imposed by employers rather than to select sanctions of their own accord; John Grogan ‘Death of the reasonable employer: the seismology of review’ (2000) 16(2) *Employment Law* 4 at 10.
1150 For an example of a case in which the court arguably did so nonetheless, see *Clarence v The National Commissioner of the South African Police Service* (2011) 32 ILJ 2927 (LAC).
1152 Remember that commissioners sit alone and the parties are not usually assisted by lawyers; Rule 25 of the Rules for the conduct of proceedings before the CCMA GNR 1448 *GG* 25515 of 10 October 2003 (‘the CCMA Rules’), read with Tanya Venter & Andrew Levy ‘Disputes at the CCMA, bargaining councils and Tokiso’ in Andrew Levy & Tanya Venter (eds) *The Dispute Resolution Digest 2012* (2012) 23 at 36. Note, however, *Law Society of the Northern Provinces v Minister of Labour and Others* (NGHC) unreported case no 61197/11 of 15 October 2012.
1155 Sections 23 and 33 of the Constitution; *Cheetham* para 6 (and the discussion thereof in chapter 3); Ray-Howett at 1628; Garbers (2008) at 86.
the logic of doing so in practice is dubious. Reviewing courts cannot realistically be expected to analyse commissioners’ *curricula vitae*, for example, during each and every enquiry into reasonableness. The influence of this criterion on reasonableness should consequently be limited to the skills, identity and expertise of CCMA commissioners generally. It should not affect the standard of review in individual cases.

3.1.3 The range of factors relevant to the decision

The factors relevant to the decision will vary from one dispute to the next. Reviewing courts will accordingly need to assess the reasonableness of awards with reference to these factors on a case by case basis. Certain factors will apply to the majority of disputes. As these factors illustrate the manner in which this criterion affects the ambit of reasonableness well, they are discussed below.

Of pertinence to most CCMA arbitrations are the codes of good practice provided for in section 138(6) of the LRA. Commissioners are obliged by the Act to address these codes when resolving disputes and they play a key role in most CCMA proceedings. While it is beyond the scope of this paper to consider each and every one of these codes, it is instructive to mention the principal one. That code is the Code of Good Practice for Dismissals, which guides commissioners in both misconduct and incapacity dismissal disputes. Item 7 thereof, dealing with misconduct dismissals, directs them as follows:

7. Guidelines in cases of dismissal for misconduct.—Any person who is determining whether a dismissal for misconduct is unfair should consider—
   (a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the work-place; and
   (b) if a rule or standard was contravened, whether or not—

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1156 The majority of disputes referred to the CCMA concern allegedly unfair dismissals for misconduct, thus bringing the Code for Dismissals into play. For relevant statistics, refer to Venter & Levy at 42; the CCMA Annual Report 2009-2010 Department of Labour RP: 84/2010 and the CCMA Annual Report 2010-2011 Department of Labour RP: 58/2011. According to Rycroft, 46% of CCMA awards were taken on review to the Labour Court in 2010, confirming the significant role of the Code for Dismissals in review proceedings too; Alan Rycroft ‘An evaluation of the Labour Court’ in Andrew Levy and Tanya Venter (eds) *Dispute Resolution Digest 2012* (2012) 61 at 65.

1157 Section 138(6) of the LRA.

1158 Undoubtedly the most commonly encountered Code in CCMA arbitration proceedings is the Code for Dismissals. Other codes of good practice include, for example, the Code of good practice: Who is an employee? GenN 1774 of 1 December 2006 and the Code of good practice on dismissal based on operational requirements GenN 1517 GG 20254 of 16 July 1999. The Guidelines are of equal pertinence.

1159 The Code for Dismissals; note too *Sidumo* para 173.

1160 The Code for Dismissals.
(i) the rule was a valid or reasonable rule or standard;
(ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
(iii) the rule or standard has been consistently applied by the employer; and
(iv) dismissal was an appropriate sanction for the contravention of the rule or standard.\textsuperscript{1161}

Along analogous lines, item 9 of the Code outlines considerations germane to poor work performance dismissals, stipulating that:

\textsuperscript{9} Guidelines in cases of dismissal for poor work performance.—Any person determining whether a dismissal for poor work performance is unfair should consider—

(a) whether or not the employee failed to meet a performance standard; and
(b) if the employee did not meet a required performance standard whether or not—

(i) the employee was aware, or could reasonably be expected to have been aware, of the required performance standard;
(ii) the employee was given a fair opportunity to meet the required performance standard; and
(iii) dismissal was an appropriate sanction for not meeting the required performance standard.\textsuperscript{1162}

Thus, legal precedent aside,\textsuperscript{1163} commissioners are (at a minimum) bound to consider these factors when determining the fairness of misconduct and incapacity dismissals.\textsuperscript{1164} Reviewing courts ought similarly to address these considerations. Where additional legal principles arise, they too require attention.\textsuperscript{1165} Finally, the objects and underlying values of the LRA are relevant.\textsuperscript{1166} Given the critical relationship between these objects and the right to fair labour practices,\textsuperscript{1167} where commissioners disregard them, the reasonableness enquiry may potentially assume a more intrusive form. Once more, however, the precise extent of permissible judicial intrusion in these circumstances requires clarification.

\textsuperscript{1161} Item 7 of the Code for Dismissals.
\textsuperscript{1162} Item 9 of the Code for Dismissals.
\textsuperscript{1163} Which some courts apply more strictly than others. For an example of a strict approach, see Clarence.
\textsuperscript{1164} The application of these factors by commissioners is not, however, without constraint; Sidumo paras 181-182; Transnet Freight Rail paras 11-13; section 138 of the LRA.
\textsuperscript{1165} Ibid.
\textsuperscript{1166} For these, see section 1(d)(iv) of the LRA; the Explanatory Memorandum at 278-287 and the tenor of the Act as a whole.
\textsuperscript{1167} Section 23 of the Constitution.
Unfortunately, the complexities of applying this contextual criterion do not end there. As the cases of National Union of Mineworkers obo Employees and Others v Commission for Conciliation Mediation and Arbitration and Others (‘NUM obo 112 Employees’) and Transnet Freight Rail demonstrate,\footnote{Note the discussion of these cases in chapter 3; National Union of Mineworkers obo Employees and Others v Commission for Conciliation Mediation and Arbitration and Others [2012] 1 BLLR 22 (LAC) (‘NUM obo 112 Employees’); Transnet Freight Rail; Relyant Retail Limited t/a Bears Furnishers v Commission for Conciliation, Mediation & Arbitration & others [2009] JOL 24327 (LC).} defining reasonableness with reference to commissioners’ assessments of relevant factors is not straightforward. In particular, while it is clear that commissioners who fail to account for relevant factors commit irregularities,\footnote{Sidumo para 268; Gaga v Anglo Platinum Ltd & Others (2012) 33 ILJ 329 (LAC) para 44; Ellerine Holdings at 13; Maepe para 11; Southern Sun Hotel Interests paras 14-15; Pam Golding paras 5-6.} whether courts may reweigh commissioners’ allocations of weight to relevant factors, notwithstanding due attention thereto, remains controversial. Canadian principles of review assist in this regard.\footnote{These are addressed in chapter 6.}

\subsection{3.1.4 The reasons for the decision}

The reasons offered by commissioners for their awards will differ from one dispute to the next. Yet, their obligation to provide adequate reasons is common to all. It is one which arises from the Act itself. As such, this factor has influenced review proceedings under section 145 all along.

Section 138(7) of the LRA requires commissioners to provide only ‘brief reasons’ for their awards.\footnote{Section 138(7) of the LRA.} While affording commissioners some latitude therefore, the requisite of brief reasons does not exempt them from being thorough. Nor are they immunised from properly applying their minds to the issues at hand.\footnote{Maepe v CCMA & another para 8.} In Maepe v CCMA & another, the LAC emphasised that commissioners’ reasons ought at least to include:\footnote{Maepe v CCMA & another [2008] 8 BLLR 723 (LAC) para 8.}

‘...those matters or factors which he or she took into account which are of great significance to or which are critical to one or other of the issues he or she is called upon to decide.’\footnote{Ibid; see also Tao Ying para 140; Strategic Liquor Services v Mvumbi NO and Others 2010 (2) SA 92 (CC) para 17, citing Mpahlehle v First National Bank of South Africa Ltd 1999 (2) SA 667 (CC) para 12 and Garbers (2008) at 86. Together, they highlight the need for adequate reasoning in CCMA awards.}
In other words, commissioners’ reasons must indicate the primary factors affecting their awards. Where they fail to do so, the inference may be drawn that they did not consider that factor at all. The rationale behind this approach is sound. It was neatly expressed by the CC when reciting its observations in *Mpahlehle v First National Bank of South Africa Ltd* in *Strategic Liquor Services v Mvumbi NO and Others*, as follows:

‘[Reasons] explain[...] to the parties, and to the public at large which has an interest in courts being open and transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial decisions.’

To summarise: reviewing courts should not expect commissioners to furnish extensive or elaborate reasons for their findings and the reasonableness standard should not be too severe in this respect. Nevertheless, reasons are central to maintaining accountability, transparency and openness in arbitration proceedings. In turn, commissioners’ reasons must (at a minimum) disclose the principal grounds for their awards and evince well founded reasoning processes.

Naturally, this mandate discourages capricious decision-making consistently with Constitutional values. Adequate reasons undoubtedly remain obligatory therefore, but the boundary between them and a satisfactory reasoning process requires elucidation. The degree to which commissioners’ reasoning processes may justify review where the outcome of their findings is substantively reasonable is equally unclear. Again, Canadian principles of review offer guidance in these respects.

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1175 *Maepe* para 8.
1176 *Strategic Liquor Services v Mvumbi NO and Others* 2010 (2) SA 92 (CC) para 17.
1177 Ibid, citing *Mpahlehle v First National Bank of South Africa Ltd* 1999 (2) SA 667 (CC) para 12. The Court augmented this statement, with reference to the purposes of reasons, as follows:

‘Then, too, [the provision of reasons] is essential for the appeal process, enabling the losing party to take an informed decision as to whether or not to appeal or, where necessary, seek leave to appeal. It assists the appeal Court to decide whether or not the order of the lower court is correct. And finally, it provides guidance to the public in respect of similar matters...’ *Strategic Liquor Services* para 12.

While *Strategic Liquor Services* was decided in the context of an appeal against the LC’s failure to give reasons for its decision, equivalent principles apply to the CCMA. For the role of reasons on review generally, consult *Cape Bar Council v Judicial Service Commission & another (Centre for Constitutional Rights & another as amici curiae)* [2011] JOL 27947 (WCC) para 30.

1178 Consistently with sections 1(d) and 195(1) of the Constitution; *Cape Bar Council* paras 25-30.
1179 Consider *Bestel* para 9; Alternative reasons may nonetheless be found to justify the substantive findings of commissioners’ awards; *Fidelity* para 102; Benjamin (2009) at 43.
1180 Related to this is the indeterminate relationship between substantive and procedural unreasonableness as discussed in chapter 3.
1181 Consult further in this regard the discussion of *Edcon* and *Clarence* in chapter 3.
3.1.5 The nature of competing interests involved

In almost all employment relationships, there exists an imbalance of power in favour of the employer.\textsuperscript{1182} The CCMA was designed to mitigate this.\textsuperscript{1183} As a result, the institution is readily accessible to the less empowered members of society; its services are free and legal representation is prohibited in the majority of dismissal disputes.\textsuperscript{1184} In this way, at least some of the problems associated with the imbalance are countered.

The extent of the power disparity may differ markedly from one arbitration to the next. On the strength of Bato Star, the ambit of reasonableness should vary accordingly. Where the employer is a large organisation with extensive financial resources, for example, and the employee a non-unionised blue collar worker, the inequality is extreme. In such instances, more intensive scrutiny of awards may be justified. In comparison, where the parties are better matched,\textsuperscript{1185} a less rigorous approach to the reasonableness enquiry may apply.\textsuperscript{1186}

Still, given the structure of the CCMA and the need to find a reasonable equilibrium between both parties’ interests,\textsuperscript{1187} reviews must remain impartial and objective.\textsuperscript{1188} Whether preference should be afforded to either party on account of a perceived power imbalance is accordingly doubtful. This does not imply that the competing interests of the parties have no role to play at all. On the contrary, commissioners are obliged to address both parties’ interests when resolving disputes,\textsuperscript{1189} and where they fail to do so satisfactorily their awards may be unreasonable. Unfortunately, no tangible means of determining how this criterion


\textsuperscript{1183} Sidumo paras 72-74.

\textsuperscript{1184} Including misconduct and incapacity dismissal disputes; Rule 25 of the CCMA Rules; section 140 of the LRA. The Rule has recently been declared unconstitutional by the High Court but the declaration has been suspended for 3 years from the date of judgment; Law Society of the Northern Provinces. Compare, however, Law Society of the Northern Provinces with Netherburn Engineering CC t/a Netherburn Ceramics v Mudau NO others [2009] 4 BLLR 299 (LAC).

\textsuperscript{1185} As might be the case, for example, where the employee is a senior manager and the employer is a comparatively small enterprise.

\textsuperscript{1186} For an example of circumstances in which the size of the employer may be relevant to the reasonableness of the Commissioner’s award, see Samancor Tubatse Ferrochrome v Metal & Engineering Industries Bargaining Council & others (2010) 31 ILJ 1838 (LAC) paras 12-13.

\textsuperscript{1187} Bato Star paras 48-50.

\textsuperscript{1188} Neither party’s interests should outweigh the others.

\textsuperscript{1189} In a manner which does not unduly favour one party’s interests over the other’s; Sidumo paras 72-77 & paras 171-172. They are further required to do so fairly; Sidumo paras 77-79; Sidumo paras 181-182; Transnet Freight Rail paras 11-13; section 23 of the Constitution.
affects the scope of review exists. Together with many of the other contextual criteria, if anything, it only aggravates the complexity of defining reasonableness during review proceedings.

3.1.6 The impact of the decision on the lives and well-being of those affected

In dismissal disputes at least, commissioners’ decisions will invariably have a significant impact on the continuation of the parties’ employment relationship. For most South Africans, the consequences of losing their jobs are dire.\textsuperscript{1190} When delineating the reasonableness standard, the damaging effects of dismissal for an employee should resultantly be evaluated against the costs of reinstatement for his or her employer.\textsuperscript{1191} By implication, where the harm of dismissal vastly outweighs its costs, the reasonableness of an award upholding the dismissal may be more closely examined than otherwise. While factors germane to the award’s impact will vary from one dispute to the next they may include, for example, the age of the employee, the impact of the dismissal on the employee’s family,\textsuperscript{1192} and the need for large retailing employers to reduce stock losses.\textsuperscript{1193}

The impact of the decision is fundamental to disputes in which reinstatement is awarded or dismissal confirmed. Where only compensation is at stake, it must nonetheless be cautiously approached. Should the quantum of awarded compensation be too readily interfered with, commissioners may limit awards to moderate amounts in order to escape review.\textsuperscript{1194} As the LRA provides for compensation to be awarded up to a maximum of 12 month’s remuneration,\textsuperscript{1195} awards designed to avoid review obstruct the Act’s full application; ultimately legislative intent is scuppered. As such, whether the extent of the reasonableness


\textsuperscript{1191} On the basis of \textit{Bato Star} at least.

\textsuperscript{1192} Particularly where the dispute involves an allegedly unfair dismissal.

\textsuperscript{1193} In turn, they may dismiss employees for petty theft; consider the \textit{Shoprite Checkers} trilogy. Pillay argues that by assessing both the competing interests of the parties and the impact of the decision on those affected by it, an element of proportionality is imported into the reasonableness enquiry, thus extending it beyond rationality; A Pillay ‘Reviewing reasonableness: An appropriate standard for evaluating state action and inaction?’ (2005) 122 \textit{SALJ} 419.

\textsuperscript{1194} Benjamin (2007) at 18. There is evidence to suggest that commissioners may already be doing so. For one, awards of compensation are often favoured over orders of reinstatement despite the Act’s prioritisation of the latter; Venter & Levy at 51, read with section 193(2) of the LRA. In addition, the average compensation award is 4 months’ remuneration – a relatively limited amount; Benjamin (2009) at 40.

\textsuperscript{1195} Section 193 of the Act.
enquiry should succumb to manipulation on account of the impact of awards alone is questionable.1196

3.1.7 The feasibility of the Bato Star factors

As previously averred to, while these factors may be pertinent to the breadth of reasonableness in any given case, requiring reviewing courts to assess all 6 of them during section 145 proceedings is unduly burdensome. Imposing such a duty would likely increase, rather than reduce, the inconsistency already prevalent in reviews. It is consequently necessary to constrain the intricacies associated with the Bato Star criteria. A starting point may be to identify those considerations of greatest significance to the reasonableness standard. Fortunately once more, Canadian law provides direction.1197

Turning to the second tier of contextual considerations relevant to reasonableness, both administrative and labour law items emerge. As many of these have been addressed in earlier chapters, the discussion which follows is abbreviated.

3.2 Broader Contextual Considerations

The first important factor is section 33 of the Constitution.1198 As discussed in earlier chapters, that section requires administrative action to be lawful, reasonable and procedurally fair. In so doing, it ensures that the public administration is held accountable for its decisions1199 and that transparency and openness are promoted.1200 As confirmed by the

1196 Consider, however, Shoprite Checkers 1, where the impact of the decision on the employee was ostensibly prized over that of the employer. Compare this to the decision in Shoprite Checkers 2 and the discussion thereof in chapter 3.
1197 The utility of Canadian law is expounded in chapter 6.
1198 Sidumo para 89; Shoprite Checkers 3 paras 26-28.
1199 Sidumo para 138; Carephone para 35; Hugh Corder ‘Reviewing review: much achieved, much more to do’ in H Corder & L van der Vijver (eds) Realising Administrative Justice (2002) 1 at 1-2; see also Etienne Mureinik ‘Reconsidering review: Participation and accountability’ 1993 Acta Juridica 35 at 43, where the author explains the significance of administrative accountability for democracy.
Intrinsically related to section 33 is the Promotion of Administrative Justice Act 3 of 2000 (‘PAJA‘): the legislation promulgated to give effect to the right to just administrative action. CCMA arbitrations constitute administrative action. It has therefore been proposed that the grounds for review provided for in section 6 of PAJA may be used to define the ambit of reasonableness during section 145 proceedings. The difficulty with this is that the CC has explicitly rejected PAJA’s application to CCMA awards. In any event, the test for reasonableness delineated in Sidumo is no different to that stipulated in PAJA. The statute’s provisions accordingly contribute little to the enquiry. To the extent to which PAJA includes grounds other than reasonableness (and grounds related thereto), it nonetheless affirms the enduring import of parties’ rights to procedural fairness and lawfulness. In turn, the continued role of section 145 is verified.

Associated with PAJA is the doctrine of SOP. This plays a crucial part in all proceedings for judicial review and it is plainly relevant to reasonableness. In its most rudimentary form, the doctrine demands that reviewing courts show respect for administrative decisions. Excessive judicial interference is consequently inappropriate. That does not imply, however, that judicial deference should be extreme; on the contrary, excessive levels of deference may

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1201 Carephone paras 10, 19 & 34-35; Garbers (2008) at 86.
1202 Section 33 of the Constitution.
1203 Sidumo para 88.
1205 Sidumo para 98-104. Disregarding the CC’s pronouncement and delineating reasonableness with direct reference to section 6 of PAJA would plainly be inappropriate.
1206 Section 6(2)(h) of PAJA, read with Sidumo paras 105-110 and Bato Star para 44. For PAJA grounds of review linked to reasonableness, see De Ville (2005) at 213-214 and Plasket at 363 onwards.
1207 Ibid; compare section 145 of the LRA with section 6(2)(h) of PAJA.
1208 Section 6 of PAJA. For the relationship between these grounds and reasonableness, consult Plasket at 363. For illustrative cases in the labour context, see Value Logistics para 46; Kaefer Insulation para 21; Standard Bank (1995) (BG) at 1397; Pam Golding paras 5-6; Sidumo para 268; Gaga para 44; Ellerine Holdings at 13 and Southern Sun Hotel Interests paras 14-15.
1209 For affirmation of this principle, note Fidelity para 101; Southern Sun Hotel Interests paras 14 & 17 and Maepe para 22.
1210 Whether in the labour field or otherwise; recall, however, Sidumo paras 136-137 and the discussion thereof in chapter 3.
undermine the supervisory and guiding functions of review. Thus, where decisions are truly unreasonable\textsuperscript{1212} they ought to be set aside.\textsuperscript{1213}

Adding to these generic administrative law factors, are considerations specific to labour dispute resolution. Foremost of these is the right to fair labour practices\textsuperscript{1214} which reviewing courts are obliged to interpret harmoniously with the right to just administrative action.\textsuperscript{1215} Secondly, just as PAJA was enacted to give effect to the right to just administrative action, the LRA was intended to realise the right to fair labour practices. Logically therefore, the Act evinces legislative intent as to the manner in which labour disputes are to be resolved.\textsuperscript{1216} Such intent is best understood with reference to the prevailing themes of dispute resolution therein. The first of these appears in section 1(d)(iv) of the LRA, which provides that a key purpose of the Act is ‘to promote…the effective resolution of labour disputes.’\textsuperscript{1217}

Section 138 of the LRA and the Explanatory Memorandum to the Act reveal the residual themes of informality, cost-effectiveness and accessibility.\textsuperscript{1218} Through the simple procedures of conciliation and arbitration, disputes of right are decided in an accessible, speedy and inexpensive forum without the option of appeal.\textsuperscript{1219} These features of labour dispute resolution set the tone for section 145 review proceedings and must be accounted for when formulating a suitable test for reasonableness.\textsuperscript{1220}

\textsuperscript{1212} Or otherwise amenable to review.

\textsuperscript{1213} \textit{Bato Star} para 48. O'Regan J’s explication of this principle in \textit{Bato Star} is instructive; she held:

‘A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a court should pay due respect to the route selected by the decision-maker. This does not mean, however, that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a court may not review that decision. A court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker…’

\textsuperscript{1214} The right to fair labour practices; section 23 of the Constitution.

\textsuperscript{1215} \textit{Sidumo} para 148; section 39(2) of the Constitution; \textit{v Mhlungu and others} 1995 (3) SA 867 (CC) para 108.

\textsuperscript{1216} For the proper approach to interpreting the LRA, see \textit{NUMSA & others v Bader Bop (Pty) Ltd & another [2003] 2 BLLR 103 (CC)} paras 13 & 26-46 and \textit{Aviation Union of SA & another v SA Airways (Pty) Ltd & others [2012] 3 BLLR 211 (CC)}.

\textsuperscript{1217} Section 1(d)(iv) of the LRA. For the impact of efficiency on review, consult \textit{Food & Allied Workers Union on behalf of Mbatha & others v Pioneer Foods (Pty) Ltd t/a Sasko Milling & Baking & others} (2011) 32 ILJ 2916 (SCA) (‘FAWU’) paras 19-21. For a contentiously distinctive stance, see \textit{Herholdt} paras 52-56.

\textsuperscript{1218} The Explanatory Memorandum at 318; section 191 of the LRA; \textit{Sidumo} para 85; chapter 1 of this thesis.

\textsuperscript{1219} \textit{Sidumo} para 94; the Explanatory Memorandum at 317-320.

\textsuperscript{1220} \textit{Fidelity} para 100; \textit{Ellerine Holdings} at 13.
Attending to both tiers of contextual considerations when determining the bounds of this enquiry, acknowledges the variable nature of the reasonableness standard. Ideally, in doing so, each of the aforementioned factors should be weighed and an appropriate balance struck between them, on a case by case basis. Yet, as noted above, the bulk, variability and complexity of these factors render the task of delineating reasonableness in this way, unduly onerous. To remedy this, a more structured approach to reasonableness which nevertheless allows for flexibility in application, is needed. Whether such a test already exists in South African law requires consideration. Beginning with the terms assigned to the term ‘reasonable’ by South African courts and commentators, the issue is addressed below.

3.3 The meaning of ‘reasonableness’

Looking to the meanings attributed to the concept of ‘reasonableness’ in South Africa, it appears that defining the standard is no simple endeavour. As a result, its meaning is currently uncertain. To understand the intricacies of reasonableness, it is necessary to assess the various definitions which have been proposed for it, both by reviewing courts and commentators. The discussion which follows opens with the relationship between rationality and reasonableness. Thereafter, judicial and academic attempts at lending structure to reasonableness are described.

As previously observed, since Sidumo, the courts have frequently used the terms ‘rationality’ or ‘justifiability’ and ‘reasonableness’ interchangeably. There are several problems with doing so. First, equating these terms disregards the discrete characteristics of review under Carephone and Sidumo. While the SCA in Edcon held that their differences were semantic, earlier in Rustenburg Platinum Mines, the same Court had limited the enquiry

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1223 Refer in this regard to chapter 3, in which the courts’ ostensible confusion about the relationship between the Carephone and Sidumo tests is canvassed.
1224 Afrox Healthcare para 21; Parmalat paras 14-16; Ellerine Holdings at 15; Bestel paras 16-17; Du Toit suggests that this occurred prior to Sidumo; Du Toit (2010) at 2. Note further Etienne Mureinik ‘A bridge to where? Introducing the Interim Bill of Rights’ (1994) 10 SAJHR 31 at 40-43; Mureinik seemingly conflates the terms rationality, reasonableness and justifiability too.
1225 Compare Rustenburg Platinum Mines (SCA) para 26 with Sidumo and Fidelity para 102.
1226 Edcon para 16; Rustenburg Platinum Mines (SCA) para 26.
under *Carephone* to preclude reviewing courts from evaluating reasons other than those offered by commissioners as justification for their awards.\(^{1227}\) Moreover, the intentions of the drafters of the final Constitution cannot be ignored. Those intentions are clear from the discernibly distinct definitions of the right to just administrative action contained in the interim and final Constitutions respectively.\(^{1228}\) It is consequently illogical to equate the two standards; their distinctiveness must be recognised at some level.\(^{1229}\) A useful point of departure here is Froneman DJP’s description of ‘justifiable’ in *Carephone*; the Judge defined the concept as: ‘…able to be legally or morally justified, able to be shown to be just, reasonable or correct; defensible.’\(^{1230}\)

Froneman DJP therefore conceived a distinction between reasonableness and justifiability. Justifiability required only that a decision be capable of being shown to be reasonable; it did not demand that the decision actually be reasonable (as the standard of ‘reasonableness’ does).\(^{1231}\) Despite his delineation’s apparent potential to achieve lucidity, Froneman DJP’s definition of justifiability was criticised\(^{1232}\) and ultimately disregarded by the LAC. In *Shoprite Checkers (Pty) Ltd v Ramdaw NO & others*\(^{1233}\) that Court held:

‘…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*. In this regard I am satisfied that a decision that is justifiable

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1228 See also Mureinik (1994) at 40 fn 34. Mureinik addresses the reasons for the facile use of ‘justifiable’ rather than ‘reasonable’ in section 24 of the Constitution of the Republic of South Africa Act 200 of 1993 (‘the interim Constitution’). He submits that the terms are interchangeable and that the phrase ‘justifiable in relation to the reasons given for it’ was favoured over the term ‘reasonable’ in the interim Constitution to alleviate the fears of certain stakeholders. See also Corder in Corder & van der Vijver (eds) (2002) at 11 and Plasket at 354-355.
1229 Recall the principles of statutory interpretation including that ‘language is not used unnecessarily’, and that ‘statute law is (presumed) not to be) invalid or purposeless’; LM du Plessis ‘Statute law and interpretation’ *The Law of South Africa* vol 25(1) 2 ed (2011) paras 353, 342 & 347. Consider also *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) para 85; Hoexter (2007) at 306-309 and Pillay at 425-429.
1230 *Carephone* para 32; for criticism of Froneman DJP’s formulation (primarily on account of the Judge’s use of the word ‘correct’), consult *County Fair Foods* para 10. Compare these sentiments to the Court’s views in *Qozeleni v Minister of Law and Order and Another* 1994 (1) BCLR 75 (E) at 90. Debatably, it might be inferred from *Qozeleni* that proportionality formed part of the test for rational justifiability. Grogan (2000) at 5-6.
1231 Nor did it require justifiable decisions to be just or correct; *Carephone* para 32. This seemingly coheres with the Courts’ formulations of reasonableness in matters such as *Transnet Freight Rail* para 10; *Relyant Retail* paras 19-23 and *Bestel* paras 15-17.
1232 *County Fair Foods* para 10.
1233 *Shoprite Checkers (Pty) Ltd v Ramdaw NO & others* [2001] 9 BLLR 1011 (LAC).
cannot be said to be irrational and a decision that is irrational cannot be said to be justifiable.\textsuperscript{1234}

No further explanation of the terms’ meanings was offered however, leaving the validity of Froneman DJP’s sentiments in doubt. Instead, for practical purposes, rationality and justifiability were deemed identical. Again, there are difficulties with this view. The first is the established principle that justifiability and reasonableness bear corresponding meanings.\textsuperscript{1235} If rationality and justifiability are equally comparable, the scope for distinguishing between rationality and reasonableness disappears. In turn, the differences between the \textit{Sidumo} and \textit{Carephone}\textsuperscript{1236} standards are ignored.\textsuperscript{1237}

Notwithstanding these problems, courts continue to conflate the terms. In \textit{Shoprite Checkers I}, for example, Zondo JP held the Commissioner’s decision to be neither ‘justifiable, rational [n]or reasonable’.\textsuperscript{1238} As recorded above, the SCA in \textit{Edcon} depicted reasonableness as conceptually no different to rational justifiability under \textit{Carephone}.\textsuperscript{1239} Later, in \textit{Tao Ying}, O’Regan J found that the Commissioner had failed to apply her mind to the dispute before her and that her award was irrational on that count.\textsuperscript{1240} When read with the Judge’s decision as a whole, it might be inferred that rationality is indistinguishable from reasonableness.\textsuperscript{1241} Yet, in light of \textit{Bato Star},\textsuperscript{1242} and the judgments canvassed below, the inference would be misguided.\textsuperscript{1243}

\begin{itemize}
\item \textsuperscript{1234} Ibid para 25; see also R McLachlan ‘Lack of justifiability or rationality as a ground for review of private arbitration awards’ (2002) 5 \textit{De Rebus} 49.
\item \textsuperscript{1235} When defining the term ‘reasonable’, certain courts and commentators have aligned it with ‘rational’ or ‘justifiable’ but others maintain that its scope extends beyond these concepts; consider Pillay at 420-426; Hoexter (2007) at 301-321; Mureinik (1994) at 41; \textit{Carephone} paras 32 & 37; McLachlan (who describes rationality and justifiability as conceptually equivalent); Grogan (2000) at 5-6 & 10 (who hesitantly equates reasonableness with fairness); Plasket; Lourens du Plessis & Hugh Corder \textit{Understanding South Africa’s transitional Bill of Rights} (1994) at 169; Hugh Corder ‘Without deference, with respect: A response to Justice O’Regan’ (2004) 121 SALJ 438 at 442; Corder in Corder & van der Vijver (eds) (2002) at 8; \textit{Bel Porto School Governing Body and Others v Premier of the Province, Western Cape and Another} 2002 (3) \textit{SA} 265 (CC) at 427; \textit{Bestel} para 18 and \textit{Kievits Kroon Country Estate v MMoledi & others} (LAC) unreported case no JA78/10 of 24 July 2012 para 20.
\item \textsuperscript{1236} \textit{Rustenburg Platinum Mines} (SCA) para 26; \textit{Sidumo} paras 105-110; \textit{Carephone} para 37.
\item \textsuperscript{1237} Consider too the intentions of the drafters of the interim and final Constitutions; Mureinik (1994) at 40 fnnt 34; Corder in Corder & van der Vijver (eds) (2002) at 11; Plasket at 354-355; see also Pillay at 424.
\item \textsuperscript{1238} \textit{Shoprite Checkers I} paras 23 & 26; for a comparable approach, see \textit{Shoprite Checkers} (2001) (LAC).
\item \textsuperscript{1239} \textit{Edcon} para 16; Pillay would likely disagree; Pillay at 429.
\item \textsuperscript{1240} \textit{Tao Ying} para 150.
\item \textsuperscript{1241} Ibid paras 108-153.
\item \textsuperscript{1242} In which O’Regan wrote the majority judgment. Note that beyond the courtroom, O’Regan J has argued that rationality (as defined in \textit{Pharmaceutical Manufacturers} for one) constitutes but one measure of reasonableness. Thus, more invasive forms of scrutiny may be appropriate in other contexts; O’Regan (2004) at 435-437.
\item \textsuperscript{1243} Consider, for example, the CC’s description of rationality (as it applies to executive conduct) in \textit{Pharmaceutical Manufacturers}; the Court held:
\end{itemize}
By comparison, in Bestel v Astral Operations Ltd and Others,\textsuperscript{1244} the LAC emphasised that the crucial enquiry on review was whether awards were justified,\textsuperscript{1245} suggesting a return to the Carephone position.\textsuperscript{1246} This did not permit reviewing courts to replace commissioners’ findings with those of their own preference.\textsuperscript{1247} In Davis JA’s view, decisions were merely required to be rationally connected to the evidence presented.\textsuperscript{1248} The implications of this pronouncement are uncertain – specifically, whether the Court saw justifiability as equivalent to reasonableness, or as comprising but one facet thereof, is unclear. Arguably, rather than implying that the Carephone and Sidumo tests were identical, the LAC relied on Carephone purely for the principles espoused therein. Given that many of these principles remain valid,\textsuperscript{1249} the Court’s endorsement of Carephone in Bestel is instructive.

In Value Logistics Ltd v Basson & Others\textsuperscript{1250} the LC attempted to unscramble the indefinite link between rationality and reasonableness further. First, with reference to New Clicks, it confirmed that reasonableness allowed for a more intrusive measure of analysis than that permitted by the interim Constitution.\textsuperscript{1251} In other words, Carephone’s test of rational justifiability had been expanded on following its substitution with reasonableness – to adopt the Court’s expression, the latter set ‘a lower threshold for review and a higher standard for administrative action’ than that previously applicable.\textsuperscript{1252}

The LC then progressed to cases and commentary expounding the tests’ differences. Foremost of these was Bato Star. While the concepts of rationality and reasonableness had

\text quoted from Pharmaceutical Manufacturers paras 85.

The CC added that rationality was not an intrusive enquiry and merely obliged reviewing courts to determine whether the decision taken was ‘rationally related to the purpose for which it was given.’ Consult and compare further in this regard Bato Star para 43; Value Logistics paras 38-44; Boxer Superstores (Pty) Ltd v Zuma & others [2008] 9 BLLR 823 (LAC) para 11; Plasket at 338 onwards and Cora Hoexter Administrative law in South Africa 2 ed (2012) at 340.

\textsuperscript{1244} Bestel v Astral Operations Ltd & others [2011] 2 BLLR 129 (LAC).
\textsuperscript{1245} Note too Kievits Kroon (2012) (LAC) para 20.
\textsuperscript{1246} Bestel para 18.
\textsuperscript{1247} Ibid.
\textsuperscript{1248} Ibid paras 16-17.
\textsuperscript{1249} With the exception of the rule that reviewing courts may not refer to reasons other than those provided by commissioners in order to justify their awards; Fidelity para 102 read with Rustenburg Platinum Mines (SCA).
\textsuperscript{1250} Value Logistics Ltd v Basson & Others (2011) 32 ILJ 2552 (LC).
\textsuperscript{1251} Ibid para 40.
\textsuperscript{1252} Ibid. For an ostensibly alternative approach, refer to Foschini Group (2010) (LAC) para 30.
seemingly been equated therein, the CC had acknowledged reasonableness to be ‘no less than … rationality…’ 1253 In contrast, observed the LC in *Value Logistics*, Hoexter’s definitions of the terms indicated that rationality comprised only one element of reasonableness. 1254 Of additional import were the SCA’s findings in *Foodcorp (Pty) Ltd v Deputy Director-General, Department of Environmental Affairs & Tourism: Branch Marine & Coastal Management & others*. 1255 There, the Court had declared the impugned conduct ‘irrational and inexplicable and consequently unreasonable’. 1256 On the basis of these descriptions, the LC resolved that (at a minimum) reasonableness incorporated rationality 1257 but was not necessarily confined to it. 1258

Hoexter’s proposals are edifying in explicating the LC’s findings. Specifically, she submits that while reasonableness encompasses rationality, it also includes proportionality. 1259 In Hoexter’s view, the requisite of rationality dictates that decisions be:

‘…supported by the evidence and information before the administrator[s] as well as the reasons given for [them].’ 1260

Proportionality in turn seeks to:

‘…avoid an imbalance between the adverse and beneficial effects…of an action and to encourage the administrator to consider both the need for the action and the possible use of less drastic or oppressive means to accomplish the desired end. Two of its essential elements, then, are balance and necessity, while a third is suitability – usually referring to the use of lawful and appropriate means to accomplish the administrator’s objective.’ 1261

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1253 *Value Logistics* para 41, citing *Bato Star* para 43.
1254 *Value Logistics* para 41; Hoexter (2007) at 306-307. The remaining elements are proportionality and necessity.
1255 *Foodcorp* para 41; *Value Logistics* para 41; *Hoexter (2007)* at 306-307. The remaining elements are proportionality and necessity.
1256 *Value Logistics* para 43, citing *Foodcorp* para 12. Once again, this implies either that the standards are equivalent in meaning or that irrational conduct is a necessary precursor to unreasonableness.
1257 As formulated in *Carephone*.
1258 *Value Logistics* para 44.
1259 Both of which are to be applied with due regard for the principle of deference; *Hoexter (2007)* at 301-321 & 224-292; Fergus (2010).
1261 *Hoexter (2007)* at 309-310; see too *Hoexter (2012)* at 343-346; *De Ville* (2005) at 203; *Roman* at 282; Wayne Hutchison ‘Is the Labour Appeal Court succeeding in its endeavours to create certainty in our jurisprudence?’ (2001) 22 ILJ 2223 at 2225 and *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 at 547.
Pillay analogously advances a conception of reasonableness inclusive of these elements. She adds that rationality and reasonableness are necessarily distinct. Her argument proceeds along the following lines: All executive action is amenable to review on the basis of irrationality. Judicial review of administrative action, by definition, calls for a more rigorous degree of scrutiny than that appropriate to proceedings challenging executive conduct. Logically as such, reasonableness must entail something more than rationality. In support of her view, Pillay recounts the provisions of PAJA. Those provisions sanction review on the bases of both unreasonableness and irrationality, demonstrating the legislature’s recognition of the standard’s differences. In turn, she argues, establishing a rational connection between a decision and the manner in which it was reached constitutes but one aspect of reasonableness. Proportionality makes up the other. Pillay concludes that:

‘Reasonableness…begins at rationality, as the minimum threshold, moves on to proportionality, and ends with a value judgment on what the best approach in a particular case would be.’

What appears is that while reasonableness in the broadest sense may incorporate rationality and proportionality, the notion takes various forms – in some instances it may be more constrained than in others. By implication, reasonableness and rationality inescapably intersect. Suggesting that rationality is no longer a ground of review, when reasonableness is, is therefore nonsensical. Rather than eliminating Carephone style review, the reasonableness standard has enveloped it. This solution is useful to a degree but it does not explain the principle endorsed in Sidumo that substantive review is no longer confined to evaluating commissioners’ reasons. How this declared change in the law impacts on section 145 proceedings requires explanation. Fortunately, Canadian law assists with unravelling the issue.

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1262 Pillay at 424.
1263 Pharmaceutical Manufacturers para 85.
1264 Pillay at 420-421, 424 & 427.
1265 Ibid at 427.
1266 Ibid at 420-421.
1267 Ibid.
1268 Ibid at 439. Corder apparently agrees, asserting that proportionality is notably missing from PAJA; Corder (2004) SALJ at 441. Consult also Chan.
1269 Fidelity para 102; Foschini Group (2010) (LAC) para 29; Transnet Freight Rail para 10.
1270 Canadian law is detailed in chapter 6.
Of additional concern is how to determine whether the requisites of reasonableness have been met. While Hoexter’s definitions offer some direction, both raise discernible problems. The principal difficulty with her description of rationality is its failure to indicate how rationality differs from correctness, in practical terms. Merely alluding to the need for deference, while legitimate in theory, contributes little to the search for a pragmatic measure of reasonableness.

Turning to proportionality,1271 in the general administrative law context this may well inform reasonableness. Its functionality in section 145 proceedings is nevertheless restricted. The restriction arises from the concept’s constitutive elements. First of these is necessity, which obliges courts to enquire whether the decision-maker’s findings were necessary. Commissioners are statutorily compelled to reach decisions favouring one party over another in all arbitration proceedings.1272 Thus, the need for a decision in every case is unavoidable and this feature of proportionality is superfluous in section 145 proceedings. The second component of proportionality is balance. This directs decision-makers to strike an appropriate balance between the competing interests of parties to disputes. Again, commissioners are legislatively obliged to seek a fair balance between the parties’ interests before issuing their awards.1273 Hence, neither necessity nor balance adds much to the existing framework of reasonableness in the labour sphere.

In contrast, the suitability component of proportionality offers some bearing. Whereas commissioners have a wide discretion to determine relief,1274 the appropriateness of awarded relief is relevant to the enquiry on review. At a practical level, this feature of proportionality bars commissioners from ‘using a sledgehammer to crack a nut.’ Instead, their awards should be commensurate with disputes before them. Not only does imposing this duty improve the prospects of awards being fair, but it is aligned with Bato Star’s emphasis on the impact of decisions as contextually pertinent to the scope of reasonableness.1275 To this end at least, proportionality is valuable.

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1271 At least as defined by Hoexter (2007). For alternative depictions thereof (some of which are comparable to Hoexter’s), consult R (Daly) at 547; Chan at 248 & 254; De Ville (2005) at 203 and Plasket at 363-367.
1272 Section 115 of the LRA.
1273 See the discussion of commissioners’ roles in earlier paragraphs and chapters 1 and 3 of this thesis.
1274 Section 193 of the LRA. Given the breadth of commissioners’ discretionary powers, reviewing courts should be cautious in their attitudes to reallocating weight to relevant factors appraised by commissioners during arbitration proceedings; Transnet Freight Rail para 10, read with chapter 3.
Two supplementary hurdles concerning the proposed elements of reasonableness present themselves. The first is the proposal’s failure to acknowledge that notwithstanding theoretical distinctions between rationality and reasonableness, reviewing courts continue to equate them in practice. Provided courts disagree on whether these terms are interchangeable, it is unhelpful to formulate reasonableness as submitted, regardless of the potential validity thereof. Arguably, a test devoid of labels such as ‘rationality’, ‘justifiability’, ‘reasonableness’ and ‘proportionality’ would be preferable.

Second, assuming too firmly that proportionality is the second aspect of reasonableness and rationality the first negates the standard’s nature as a flexible enquiry, the scope of which is contextually dependent. Rigidity and formalism in defining its boundaries should thus be avoided. Given the variability of reasonableness, its components need to be pliable. Neither rationality nor proportionality is capable of clinical or static definition and different measures of reasonableness must accordingly remain available in discrete settings.

De Ville offers an informative depiction of the variability of reasonableness, in his analysis of the grounds of review listed in PAJA. He submits that:

‘…the provisions in PAJA providing for arbitrariness, capriciousness, irrationality, unreasonableness (and disproportionality) should be read in the above light. PAJA should be read as inviting different degrees of scrutiny on the basis of unreasonableness (understood in a broad sense), depending upon the factors mentioned above. These should not be read as watertight categories as they inevitably flow into each other.’

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1276 As described by Hoexter (2007) and Pillay and detailed above.
1277 Consider Value Logistics para 43, citing Foodcorp para 12; Bestel para 18 and Kievis Kroon (2012) (LAC) para 20. Baxter similarly observes that the concepts of rationality and reasonableness are readily identified with one another; Baxter at 484-5.
1278 Consider the difficulties with circular reasoning, as discussed with reference to Bestel below; Southern Sun Hotel Interests para 13.
1280 Note this is Hoexter’s own submission; Hoexter (2007) at 502; Cora Hoexter ‘Administrative action in the courts’ 2006 Acta Juridica 303 at 303-304 & 318-319.
1281 Compare, for one, the various formulations of rationality in matters such as Pharmaceutical Manufacturers; Carephone and Rustenburg Platinum Mines (SCA).
1282 Section 6 of PAJA.
1283 De Ville (2005) at 213-214. For related sentiments, consider Plasket at 363. While De Ville’s discussion of these grounds arose prior to Bato Star, it remains pertinent to the debate at hand.
In other words, reasonableness (regardless of its precise formulation) will demand differing levels of scrutiny in distinct contextual environments. Understanding the term as reflecting any number of associated concepts gives sensible effect to its contextual character. In light of the courts’ inconsistent attitudes to reasonableness, however, lending some structure to the standard remains necessary.

De Ville’s words address reasonableness under PAJA and so apply to administrative action generally – a vast category. Debatably therefore, his remarks need not be construed as countering the suitability of more concrete tests for reasonableness in specific arenas – including that of labour dispute resolution. The need for enhanced clarity in this area is clear. It is particularly important for legal certainty. Resultantly, when refining the test for review, while some room for manoeuvre is necessary, the dispute resolution framework established by the LRA must be accounted for.

To this end, the contextual indicators detailed above are an instructive point of departure. Coupled with germane principles of Canadian law, from these it is hoped that an objective and pragmatic test, capable of consistent application by reviewing courts, may be formulated. Certain courts have begun this process and their decisions are revealing. Their judgments are appraised in the ensuing paragraphs.

### 3.4 Practical guidance from the courts

The first significant decision in this regard was the CC’s in *Bato Star*. There, O’Regan J found that decisions would be reasonable where the reviewing court was:

‘…satisfied that the […]decision-maker[…] did take into account all the factors, struck a reasonable equilibrium between them and selected reasonable means to pursue the identified legislative goal in the light of the facts before him.’

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1284 Whether as rationality, justifiability, proportionality or a combination thereof.
1285 *Bato Star* para 45.
1286 Certain courts have attempted to do so with partial success; examples include the LC in *Sasol Mining* and the LAC in *Bestel*.
1287 Consistently with the contextual nature of reasonableness.
1288 Which is distinguishable from appeal.
1289 *Bato Star* para 50.
Le Roux and Young have summarised O’Regan J’s conception of reasonableness, with reference to her judgment as a whole. They suggest that, in *Bato Star*, the CC held that decisions would be unreasonable if they:

a) Cannot reasonably achieve the objectives in relation to which the decision was first undertaken;

b) Are not reasonably supported by the evidence and factual material which was before the decision-maker, when the decision was taken; and

c) Are not reasonable, when regard is had to the reasons proffered by the decision-maker for the decision.¹²⁹⁰

This depiction of reasonableness is accessibly concise. Yet, the repetitive use of the phrase ‘reasonable’ renders it somewhat circular.¹²⁹¹ Defining a term with reference to itself leaves the definition empty.¹²⁹² What can be drawn from it nonetheless are the aspects of awards requiring evaluation; these include the purpose of the decision, the role of evidentiary material and the import of reasons. In brief, purpose, evidence and reasons should all be accounted for in any professed test for reasonableness.

Building on these parameters in *Bestel v Astral Operations Ltd and Others*,¹²⁹³ the LAC examined review based on *Sidumo* comprehensively. It opened with reference to an article by Myburgh,¹²⁹⁴ in which the author contended that commissioners’ factual determinations would be unreasonable where they were:

‘i. Unsupported by any evidence;

ii. Based on speculation by the commissioner;

iii. Entirely disconnected from the evidence;

iv. Supported by evidence that is insufficiently reasonable to justify the decision; or

v. Made in ignorance of evidence that was not contradicted.’¹²⁹⁵

¹²⁹⁰ Le Roux & Young at 29; *Bato Star* paras 44-50.
¹²⁹² Ibid; Fergus & Rycroft at 191-192.
¹²⁹³ *Bestel v Astral Operations Ltd & others* [2011] 2 BLLR 129 (LAC). Note, however, that the Court did not expressly refer to *Bato Star* in its decision.
¹²⁹⁵ *Bestel* para 14; Myburgh (2009) at 13. In support of these criteria, Myburgh cited *Sil Farming CC t/a Wigwam v CCMA* (LC) unreported case no JR3347/05 of 2005; *Bestel* para 15. Note further that these criteria were purported to apply to commissioners’ factual findings specifically.
In so far as these indicators offer a more advanced and practical outline of unreasonableness, their utility is apparent. Difficulties still remain. First, items (i) and (iv) appear contradictory. The former implies that any degree of evidence supporting a commissioner’s findings may redeem otherwise faulty awards. Yet, the latter sets a higher standard - that of adequate (‘sufficiently reasonable’) evidence; in turn, item (i) is declared redundant. The specification of ‘sufficiently reasonable’ raises the concern identified in relation to the *Bato Star* criteria cited above. Here again, ‘reasonable’ is defined with reference to itself, leaving the formulation circular. What remains is an indicator no better or more objective than that available before: awards will be unreasonable if they cannot be justified in light of the material before the commissioner concerned. Comparably, item (ii) seems equivalent to the longstanding ground of review of arbitrary or capricious decision-making. Finally, items (i) and (iii) are difficult to distinguish, challenging their existence as distinctive bases for review. As such, while commendable as an outline, these indicators are unfortunately of lesser value than might otherwise appear.

Still, analogously to *Bato Star*, the LAC’s focus in *Bestel* on the evidence before commissioners as crucial to determining reasonableness is affirming. Pertinently, it asserts the substantive nature of the standard comparative to that of section 145. As the Court’s delineation of reasonableness focused on commissioners’ factual findings, its emphasis on the evidence presented is unsurprising. From it, it may be inferred that discrete forms of

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1296 Ibid.
1297 Le Roux & Young at 29; *Bato Star* paras 44-50. The Court in *Bestel* nevertheless applied this indicator and confirmed the reasonableness of the award. It concluded: ‘[The employer’s] speculation is insufficient to justify a conclusion that third respondent’s findings, on facts supported by the evidence was insufficiently reasonable to justify his decision or made in ignorance of uncontradicted evidence.’; *Bestel* para 30.
1298 Consider the Court’s reference to ‘capricious decision-making’ in *Shoprite Checkers* 3 para 32. Earlier in *Shoprite Checkers* (2001) (LAC) paras 18-19, the LAC had emphasized that rationality required that decisions were not arbitrary and that commissioners’ statutory powers were exercised in an objectively rational manner. Note also *Pharmaceutical Manufacturers* para 85.
1299 Fergus & Rycroft at 191-192. Furthermore, the list is near identical to the test for gross irregularities set out in *Ellerine Holdings* as follows: ‘When all of the evidence is taken into account, when there is no irregularity of a material kind in that evidence was ignored, or improperly rejected, or where there was not a full opportunity for an examination of all aspects of the case, then there is no gross irregularity as urged upon us…’; *Ellerine Holdings* at 13.
1300 Section 145 of the LRA. Reviewing courts have nonetheless repeatedly held that reasonableness consists of both procedural and substantive elements; *Southern Sun Hotel Interests* paras 14-17; *SAMWU v South African Local Government Bargaining Council & others* (2012) 4 BLLR 334 (LAC) (‘SAMWU’) para 10.
1301 In light of the connections made by commissioners between the evidence and their awards at least; *Bestel* paras 16-17.
reasonableness may apply to different findings and issues.\textsuperscript{1302} Identifying which findings and which issues call for which forms of reasonableness, is a separate endeavour. Once more, Canadian jurisprudence provides assistance with tackling this task.

\section*{4. CONCLUSION}

Notwithstanding the Court’s attempts in \textit{Sidumo} at clarifying review, the decision has caused further disquiet. Fortunately, specific features of the standard are clear. These include the foundations of reasonableness, the precise formulation of the test, the substantive nature of reasonableness, and the enduring relevance of section 145.\textsuperscript{1303} In addition, it is evident that reasonableness does not equate to correctness and that reviewing courts are now permitted to evaluate all evidentiary material before commissioners when assessing reasonableness – awards may therefore be justified on the basis of reasons other than those of the presiding commissioner.\textsuperscript{1304} Yet, on account of the difficulties of applying these principles in practice, coupled with inconsistent judicial attitudes thereto, confusion prevails. There is accordingly an urgent need for clarity.

Seeking clarity must begin by acknowledging the contextual variability of reasonableness.\textsuperscript{1305} This entails accounting for contextual considerations relevant to both labour and administrative law, when delineating the scope of reasonableness during section 145 proceedings. To these must be added the criteria identified in \textit{Bato Star} as pertinent to defining reasonableness.\textsuperscript{1306} Together, these contextual factors set the backdrop for review at a theoretical level. However, obliging reviewing courts to assess all 6 of the \textit{Bato Star} criteria, as well as broader, generic considerations in every case, is unduly burdensome. Imposing such a duty on the courts may exacerbate, rather than remedy, the controversies surrounding review. Canadian law offers guidance in reducing the list of contextual considerations applicable to review. That law is detailed in subsequent chapters.

\textsuperscript{1302} In other words, as the nature of the question in dispute varies from one case to the next, the ambit of reasonableness may change accordingly. Contriving reasonableness in this way is consistent with the contextual character of the standard confirmed in \textit{Bato Star} paras 41 & 54.

\textsuperscript{1303} \textit{Sidumo} paras 106-107; \textit{Carephone} para 25.\textsuperscript{1304} As was the case under \textit{Carephone}; \textit{Rustenburg Platinum Mines} (SCA) para 26. \textit{Fidelity} para 102; \textit{Edcon} para 16. For the principle that reasonableness does not equate to correctness, see \textit{Bestel} paras 16-17, citing Schwartz at 133; \textit{Carephone} paras 32-37; \textit{Ellerine Holdings} at 10-11; \textit{Khanyile} (2009)(LAC) para 34 and \textit{Woolworths}.

\textsuperscript{1305} \textit{Bato Star} paras 41 & 54; De Ville (2005) at 212; Hoexter (2007) at 315; Plasket at 339 onwards. Note, however, De Ville’s contrary remarks; De Ville (2004) at 579-580.

\textsuperscript{1306} \textit{Bato Star} para 45.
Before examining Canadian principles, it is instructive to consider the definitions ascribed to reasonableness in South African law by courts and commentators. For the most part, these indicate that rationality constitutes one element of reasonableness. Proportionality, according to Hoexter and Pillay at least, comprises the second. While helpful to a degree, problems with this description appear. For one, the contextual dependency of reasonableness dictates that rigid delineations of the standard be avoided. On the contrary, reasonableness must be capable of assuming discrete forms in discrete circumstances. Whereas limits may be necessary for consistency, the standard’s contextual flexibility requires respect. When formulating a test for review, some allowance for variation between cases must therefore be retained. Given the unique characteristics of labour dispute resolution comparative to administrative action generally, when reviewing CCMA proceedings this principle is paramount.

In addition to the difficulty of defining reasonableness in a suitably contextual fashion, confusion persists in other spheres. First, the relationship between reasonableness and the grounds of review stipulated in section 145 is controversial. Similarly, the distinctions (if any) between rational justifiability under Carephone and reasonableness under Sidumo are unclear. In so far as rationality constitutes an element of reasonableness, Carephone must still apply in part. The precise degree to which it does so nonetheless awaits definition. Thirdly, the sensibility and practicality of construing reasonableness as comprising both procedural and substantive aspects is doubtful. While the need for adequate reasons might

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1307 Consult and compare Pillay at 420-426; Hoexter (2007) at 301-321; Mureinik (1994) at 41; Carephone paras 32 & 37; McLachlan; Grogan (2000) at 5-6 & 10; Plasket at 354-358; Du Plessis & Corder at 169; Corder (2004) SALJ at 442 and the minority decision in Bel Porto.


1309 Particularly in understanding the relationship between Carephone and Sidumo.

1310 Ibid.

1311 For relevant considerations and the unique nature of labour dispute resolution generally, refer to Chirwa; Gcaba v Minister of Safety and Security & others [2009] 12 BLLR 1145 (CC) and Brand et al (2008).

1312 For further discussion of the controversy, see chapter 3 and the cases considered therein, including Kievits Kroom Country Estate (Pty) Ltd v CCMA & others [2010] JOL 26444 (LC); Edcon and Mapepe. Consult also Du Toit (2010).

1313 And proportionality the other; Hoexter (2007) at 301-321 & 224-292; Pillay at 439.

1314 Particularly in light of the uncomfortable relationship between procedural reasonableness and the entitlement of reviewing courts to entertain alternative reasons for commissioners’ awards.

1315 For one, it is difficult to extricate procedural unreasonableness from the statutory grounds prescribed by section 145 relating to defective procedures. Inconsistent applications of the standard consequently prevail. If the standard is cast in this way, however, confusing overlaps between these grounds and reasonableness are inevitable. For the overlap between gross irregularities and reasonableness generally, see Sasol Mining paras 11-
be seen as comprising the procedural aspect of reasonableness, the LAC’s declared distinction between Carephone and Sidumo pertaining to reasoning process presents problems.\textsuperscript{1317} What is needed therefore is a clear indication of the boundaries between procedural and substantive unreasonableness. Not only would this elucidate the association between gross irregularities and unreasonableness,\textsuperscript{1318} but it may simultaneously explain the circumstances in which reasonableness may be resolutoively applied.\textsuperscript{1319}

As alluded to above, the Canadian approach to review assists with resolving these issues. The meanings attributed to reasonableness in Canada inform the development of a more structured, reliable and practical test for review too. On account of their apparent utility, relevant principles of Canadian law are canvassed in chapters 5 and 6. Before doing so, whether British, Australian and New Zealand principles of administrative law and labour dispute resolution are of equivalent, comparative value is considered.

\textsuperscript{13} Pam Golding para 5; Southern Sun Hotel Interests para 17; New Clicks para 51; Afrox Healthcare para 21; Value Logistics para 46.
\textsuperscript{1317} Fidelity para 102.
\textsuperscript{1318} And arguably between excesses of power and unreasonableess.
\textsuperscript{1319} For examples of cases in which reasonableness was applied in a resolutive manner, see Edcon and Clarence.
CHAPTER 5

THE COMPARATIVE COMPATIBILITY OF THE UNITED KINGDOM'S,
AUSTRALIA'S, NEW ZEALAND'S AND CANADA'S LEGAL SYSTEMS

1. INTRODUCTION

It has been proposed that Canadian law be used as a reference from which to construe and revise the Sidumo test for review. However, given the dangers of indiscriminate legal comparisons, guidance should not be sought from Canadian law before the country’s comparative compatibility has been confirmed. Thus, whether Canada’s legal system is indeed compatible with South Africa’s requires attention. Before focusing exclusively on Canadian principles of review, it is prudent to consider the potential utility of alternative commonwealth countries too. Particularly pertinent in this regard are the United Kingdom’s, Australia’s and New Zealand’s systems of review. What follows is an assessment of these four jurisdictions’ comparative values in turn.

2. THE UNITED KINGDOM

The United Kingdom (‘the UK’) currently has a dual system of dealing with employment disputes. Unfair dismissals may first be referred to the Advisory, Conciliation and Arbitration Service (‘ACAS’) for conciliation. Should conciliation fail, parties have an election to refer these matters to adjudication by the Employment Tribunal (‘ET’) or to arbitration by an arbitrator appointed by ACAS. Where the latter route is adopted, the process follows a

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1320 As set out by the Constitutional Court (‘CC’) in Sidumo & another v Rustenburg Platinum Mines Ltd & others [2007] 12 BLLR 1097 (CC) para 109.
1322 Specifically with reference to Canadian principles of administrative and labour law.
1323 Which share certain founding principles of administrative law; Saunders at 448.
1324 For the purposes of this chapter, the abbreviation ‘the UK’ is used to describe only England and Wales.
1325 The Advisory, Conciliation and Arbitration Service (‘ACAS’) was established by the Employment Protection Act 1975 (‘EPA’).
1326 Although they must first be instituted in the ET; Simon Deakin & Gillian S Morris Labour Law 5 ed (2009) at 69; Section 2 of the Employment Tribunals Act 1996 (‘ETA’).
1327 See sections 2-9 in particular of the ETA; Norman Selwyn Selwyn’s Law of Employment 16 ed (2011) at 9.
1328 Section 7 of the Employment Rights (Dispute Resolution) Act 1998 (‘ERDRA’).
path markedly similar to that of CCMA\textsuperscript{1329} proceedings.\textsuperscript{1330} Appeals from ACAS arbitrations are not allowed and the scope of judicial review of ACAS determinations is narrow.\textsuperscript{1331} The UK system would therefore seem an ideal comparator. However, there are a number of factors detracting from its suitability. First, the availability of arbitration by ACAS is a relatively new feature of UK employment law.\textsuperscript{1332} As a result, the principles of review applicable to its decisions are poorly developed. Second, adjudication by the ET remains the preferred method of dispute resolution in most employment disputes.\textsuperscript{1333} Thus, while the potential for effective comparison exists, there is little in the way of case law available for critique. When determining the comparative worth of the UK’s system, consulting the ET’s decisions is more useful.

Similarities and differences between the South African and British models of judicial review of labour tribunals’ decisions are again revealed.\textsuperscript{1334} Both the ET and the CCMA have jurisdiction to hear unfair dismissal disputes and these disputes form the majority of their workloads.\textsuperscript{1335} In addition, these bodies were equally designed to provide accessible, inexpensive, efficient and relatively informal dispute resolution services.\textsuperscript{1336} Yet, the ET is

\textsuperscript{1329} Commission for Conciliation, Mediation and Arbitration (‘the CCMA’).
\textsuperscript{1330} Deakin & Morris at 76-83.
\textsuperscript{1331} Arbitrators’ decisions may be challenged on the basis of either lack of substantive jurisdiction or certain designated irregularities which may lead to substantial injustice; sections 67 & 68 of the Arbitration Act 1996 c23 read with the ACAS Arbitration Scheme SI2004/753; Deakin & Morris at 77.
\textsuperscript{1332} The right to have matters determined by arbitration at ACAS was established by section 4 of the ERDRA 1998. However, the necessary systems were not put in place until 2001; Deakin & Morris at 76.
\textsuperscript{1333} In fact, as Deakin and Morris point out, by 2008 following 7 years of the availability of ACAS arbitration, only 60 disputes had been heard by it. Since then, the incidence of ACAS arbitration has risen marginally but not significantly. During the 2010-2011 period, the institution heard 31 disputes, of which approximately one third concerned unfair dismissals and disciplinary matters; Advisory, Conciliation and Arbitration Service Advisory, Conciliation and Arbitration Service Annual Report and Accounts 2010/2011 HC 1172 (2011) at 13, available at http://www.acas.org.uk/CHttpHandler.ashx?id=2867&p=0, accessed on 13 December 2012; Deakin & Morris at 77 & 82-3 & 513; Comparatively, during the same period, ETs heard 10 300 unfair dismissal disputes and these disputes form the majority of their workloads.\textsuperscript{1335} In addition, these bodies were equally designed to provide accessible, inexpensive, efficient and relatively informal dispute resolution services.\textsuperscript{1336} Yet, the ET is

\textsuperscript{1334} The term ‘review’ is used here in its general sense, as covering both appeal and review.
\textsuperscript{1336} Deakin & Morris at 69 referring to the Royal Commission on Trade Unions and Employers’ Associations 1965-1968: Report Cmnd 3623 (1968) para 578; Sir William Wade & Christopher Forsyth Administrative Law 9 ed (2004) at 906. However, notwithstanding Parliament’s intention to create such a system, the formality with which ET proceedings are conducted is on the increase; Simon Honeyball & John Bowers Textbook on Labour Law 8 ed (2004) at 11-12; Deakin & Morris & 513.
entrusted with adjudicating disputes in an adversarial manner in contrast to the CCMA.\textsuperscript{1337} While the processes it follows remain less formal than those of the courts, it is not as flexible as its South African counterpart.\textsuperscript{1338} Moreover, in all matters before the ET, two lay persons and one legal chairman preside.\textsuperscript{1339} The chairman is required to have been qualified and practising as a barrister or solicitor for at least 7 years.\textsuperscript{1340} By comparison, only one CCMA commissioner presides over arbitrations and there is no requirement that commissioners have formal legal qualifications. Plainly, the two institutions are in this respect discrete. Augmenting this distinction is the right of all parties to ET proceedings to legal representation.\textsuperscript{1341} It may therefore be reasonably assumed that the ET is better equipped to deal with matters of both law and fact than the CCMA.\textsuperscript{1342} Coupled with the publicity of ET adjudications\textsuperscript{1343} lending greater accountability to the institution’s findings, the quality of ET determinations is better assured than those of the CCMA. This assurance suggests that the nature of review of ET decisions may validly be less exacting than that suited to reviews of CCMA awards.

Notwithstanding its vulnerability to judicial review, the ET was established as an inferior court rather than as an administrative tribunal.\textsuperscript{1344} The division between inferior courts and administrative bodies in the UK is often recognised as superficial\textsuperscript{1345} but the courts have stated that the test for review of courts’ decisions is less rigorous than that applicable to administrative institutions.\textsuperscript{1346} As a result, there are important differences between the CCMA and the ET in this regard too – again calling into question the suitability of the UK as a useful comparator. Supporting this conclusion are several additional factors. First, parties to ET proceedings have a right of appeal on points of law to the Employment Appeals Tribunal

\begin{footnotesize}
\begin{enumerate}
\item Deakin & Morris at 73.
\item Honeyball & Bowers at 11-12 & 17; Deakin & Morris at 513.
\item Each with an equal vote; Deakin & Morris at 68; Selwyn at 9.
\item Deakin & Morris at 68.
\item Section 6 of the ETA; Deakin & Morris at 66-67; Honeyball & Bowers at 11-12. According to Deakin and Morris, this right is frequently exercised too; Deakin & Morris at 73.
\item Given the presence of two lay persons on the tribunal’s panel as well as an experienced lawyer.
\item In the absence of exceptional circumstances warranting confidentiality, ET hearings are generally open to the public; Deakin & Morris at 72; Honeyball & Bowers at 17.
\item At least for the purposes of the Supreme Court Act 1981; Peach Grey & Co v Sommers [1995] IRLR 363 (QB Div Ct); Vidler v UNISON [1999] ICR 746; Michael Wynn ‘Contempt powers of Industrial Tribunals’ (1995) 24(3) Ind Law J 278 at 278; Selwyn at 9.
\item Wade & Forsyth at 909-910.
\end{enumerate}
\end{footnotesize}
(‘EAT’). While limiting appeals to ‘questions of law’ curbs this right, the meaning of the phrase remains broad. According to Deakin and Morris, errors of law may arise where an Employment Tribunal misdirected itself in law, misunderstood the law, misapplied the law, reached a factual conclusion unsupported by any evidence, or made a perverse decision. Perversity occurs where the decision was ‘patently wrong’ or was ‘one which no reasonable decision maker, properly applying itself in terms of the law, could have reached’.

Whereas the last of these errors is semantically identical to the South African notion of reasonableness, unreasonableness in the UK is a more stringent standard, requiring perversity, absurdity, gross unreasonableness or outrageousness. Piggot Bros & Co Ltd v Jackson provides an instructive example. There, the Court described perversity as permitting review in case of decisions based on absolutely no evidence or incorrect applications of law only. When engaged in unreasonable review, the weight attributable to evidentiary considerations is accordingly not a matter for judicial scrutiny or interference. This is distinct from the standard of reasonableness applicable to section 145

1347 Section 21 of the ETA; Deakin & Morris at 66-67 & 74; Selwyn at 583; Honeyball & Bowers at 16. The EAT was established in terms of section 87 of the EPA. The EAT is a superior court of record which falls outside the scope of administrative law – its decisions are therefore not subject to review in the High Court as those of the ET are; section 20 of the ETA; Wade & Forsyth at 908.
1348 Deakin & Morris at 74.
1349 Compare this to the South African test; Bestel v Astral Operations Ltd & others [2011] 2 BLLR 129 (LAC) paras 14-18.
1350 For an example of a defect not amounting to a legal error, see Yearwood v Commissioner of Police of the Metropolis and another [2004] ICR 1660 para 52, read with Housing Corp v Bryant [1999] ICR 123 at 130.
1351 Deakin & Morris at 75. For more on the scope of appeal, consult Noorani v Merseyside TEC Ltd [1999] IRLR 184 (CA) and Selwyn at 12 & 58. Selwyn records that in Hereford and Worcester County Council v Neale [1986] IRLR 168 (CA), the Court held that appeals would be allowed (in the absence of a clear error of law) only where the ET’s decision led the court to say: ‘Oh my goodness, that was certainly wrong!’
1352 Wade & Forsyth at 363; their description mimics the Sidumo test; Sidumo para 109.
1353 Noorani; Yeboah v Crofton [2002] IRLR 635 (CA) paras 92-93; Deakin & Morris at 75; Selwyn at 584. See also British Telecommunications v Sheridan [1990] IRLR 27 at 30; Melon v Hector Pove Ltd [1980] IRLR 477 at 479; Piggot Bros & Co Ltd v Jackson [1991] IRLR 309 at 312; Watling v William Bird & Son (Contractors) Ltd (1976) 11 ITR 70 at 71; East Berkshire Health Authority v Matadeen [1992] ICR 723. This is true in the field of administrative law too; Wade & Forsyth at 364; Cora Hoexter with Rosemary Lyster The new Constitutional and administrative law vol 2 (2002) at 186.
1355 Ibid.
1356 Eclipse Blinds Ltd v Wright [1992] IRLR 133; Selwyn at 585. Bear in mind that the proceedings of the ET are not formally recorded. There is therefore no transcript available to the EAT during appellate proceedings, making it far easier for the court to refrain from reweighing the merits of the dispute; Yeboah para 13.
proceedings, where the Labour Courts frequently do not refrain from assessing the weight allocated by commissioners to relevant evidentiary factors.

As such, despite the ostensible breadth of the concept of ‘error of law’, UK courts will not readily interfere with ET determinations. Not only will disputes of fact disguised as errors of law be dismissed but unreasonableness will be found only where there is ‘an overwhelming case’ for it. Demanding such extensive evidence clearly resembles a standard akin to gross unreasonableness or irrationality, further distancing the UK approach from that applicable in South Africa. In addition, procedural irregularities do not fall within the ambit of appeals to the EAT. They may instead either be challenged on review in the ET itself (should they fall within the ET’s designated powers of review) or referred to the High Court for ordinary judicial review. Aggrieved parties consequently have various avenues of relief available to them, in contrast to their South African contemporaries.

Clearly then, allegations of unreasonableness may arise in review proceedings in British High Courts too. Yet, the absence of a Constitutional basis for review in the UK denotes that

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1357 Section 145 of the Labour Relations Act 66 of 1995 (‘LRA’ or ‘the Act’).
1358 Whether reviewing courts have the authority to do so is questionable. It might be inferred from their entitlement to take alternative reasons into account when assessing the reasonableness of CCMA awards; Fidelity Cash Management Service v CCMA & others [2008] 3 BLLR 197 (LAC) para 102. Note, however, Transnet Freight Rail v Transnet Bargaining Council & others [2011] 6 BLLR 594 (LC) para 10. For cases in which courts have seemingly reweighed the evidence before commissioners nonetheless, see Zono v Gruss NO & others [2011] 9 BLLR 873 (LAC); Clarence v National Commissioner of the SA Police Service (2011) 32 ILJ 2927 (LAC) and National Union of Mineworkers obo Employees and Others v Commission for Conciliation Mediation and Arbitration and Others [2012] 1 BLLR 22 (LAC) (‘NUM obo 112 employees’).
1359 Yeboah paras 92-93; consider too Yeboah para 174. Still, where a tribunal reaches a finding unsupported by any factual evidence, it may be held to have committed an error of law; Wade & Forsyth at 942.
1360 Construing unreasonableness in this manner has been expressly rejected by the Labour Appeal Court (‘LAC’); Fidelity para 99. Compare this approach to UKAPE v ACAS [1981] AC 424; Craig (2008) at 618.
1361 For a case in which procedural irregularities were (unsuccessfully) alleged on appeal, see Yeboah para 86.
1362 Selwyn at 580-581; ET decisions may be challenged by way of review proceedings instituted in the ET itself but only in the following circumstances:
1. where the decision was wrongly made as a result of the ET’s staff’s conduct;
2. where one of the parties was not properly notified of the proceedings;
3. where the decision was made in the absence of one of the parties to the dispute;
4. where new evidence becomes available, of which the parties could not have been aware prior to the proceedings; or
5. where the interests of justice call for review.
1363 Wade & Forsyth at 33-34.
1364 See Sidumo para 104, where the Constitutional Court (‘CC’) held that parties to CCMA disputes are precluded from instituting judicial review proceedings based on the Promotion of Administrative Justice Act 3 of 2000 (‘PAJA’) or in the High Courts, when challenging commissioners’ awards.
1365 Unreasonableness arises where the applicant contends that the ET unreasonably exercised its discretion and, in so doing, exceeded its jurisdiction; Wade & Forsyth at 35-37 & 349-350.
the scope of review there may legitimately be narrower than it is in South Africa. In other words, a less intensive measure of scrutiny may be applied by British courts than that prescribed by section 33 of the Constitution.

Naturally some parallels may be drawn between the UK administrative standard of unreasonableness and the South African one. Both tests accept the need for deference to be paid to administrative decisions. They further focus on reasonableness as distinct from correctness, emphasizing that simple differences of opinion between administrators and reviewing courts do not justify review. However, unreasonableness in British administrative law is a stricter standard, often compared to gross unreasonableness, perversity or irrationality. In fact, Wednesbury unreasonableness remains the standard officially preferred by the courts when assessing discretionary determinations. Where legal findings

1366 Given the right to just administrative action in section 33 of the Constitution of the Republic of South Africa, 1996 (‘the Constitution’). The courts’ powers of judicial review in the UK are inherent powers and do not arise from legislation or a Constitution as such. The purpose of judicial review there, as in all commonwealth nations, is to ensure that the rule of law is maintained and that administrative bodies exercise their powers within the confines of the law; Wade & Forsyth at 33-34.

1367 The Constitution.

1368 Wade & Forsyth at 362 and 369. This is based on the doctrine of separation of powers.

1369 Yeboah paras 11 & 106. For a description of unreasonableness (and the limited scope of appeal) in the context of the ET’s decisions, see Noorani; G v G [1985] 1 WLR at 647; Wade & Forsyth at 363.

1370 Deakin & Morris at 75. For the nature of appeal, consult Noorani and Selwyn at 12 & 584-5.

1371 Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223. Wednesbury unreasonableness requires absurdity or gross unreasonableness; Wade & Forsyth at 364 & 371-372. In formulating this test, Lord Greene held: ‘It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. That, I think, is quite right; but to prove a case of that kind would require something overpowering…’; Wednesbury at 230. Gross unreasonableness has comparably been denoted as requiring an outrageously illogical decision or one which is contrary to moral principles; Council of Civil Service Unions v Minister for the Civil Service [1984] 3 All ER 935 para 410. Note that this test was equated with irrationality by the House of Lords in Council of Civil Service Unions. Wednesbury unreasonableness has essentially been cast as equivalent to gross unreasonableness in both South Africa and the UK; Hoexter with Lyster (2002) at 186; PP Craig Administrative Law 4 ed (1999) at 537; Peter Cane An Introduction to Administrative Law 3 ed (1996) at 209.

1372 At least to the extent that fundamental rights (which do not include the right to fair labour practices in the South African sense), European Community or European human rights law are not at stake. Where these rights are threatened, differing standards of reasonableness or of proportionality may apply; Wade & Forsyth at 367-368; Craig (2008) at 619, 19-005; Johannes Chan ‘A sliding scale of reasonableness in judicial review’ 2006 Acta Juridica 233 at 235-237. While the test has been slackened in certain cases, this has only consistently occurred where fundamental rights are affected by the decision; Craig (2008) at 617-619; Wade & Forsyth at 367-368; R v Lord Saville of Newdigate [2000] 1 WLR 1855 at 1867 para 37, cited by Chan at 235. In addition to these flexible interpretations of the test, calls to extend the limited nature of Wednesbury unreasonableness have arisen; R v Chief Constable of Sussex Ex p International Trader’s Ferry Ltd [1999] 2 AC at 418, R v Secretary of State for the Home Department Ex p Daly [2001] 2 AC 532 at 549; R (on the application of Louis Farrakhan) v Secretary of State for the Home Department [2002] 3 WLR 481; R (Alconbury Development Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] 2 WLR 1389 at 1406. These calls are yet to be heeded by the House of Lords. As such, the Wednesbury standard remains the official delineator of reasonableness review in the UK; Craig (2008) at 618; 19-004; Wade & Forsyth at 353-354, 371-372 & 906; R (Association of British Civilian Internes: Far East Region) v Secretary of State for Defence [2003] QB 1397; Chan at 235-236. For minor concessions made by the courts, refer to Craig (2008) at 617-618, 19-00.
are contested, correctness review applies.\textsuperscript{1373} There is thus little in the way of a middle ground in the UK, again distinguishing it from South Africa.\textsuperscript{1374}

In summary,\textsuperscript{1375} findings of unreasonableness in both the administrative and appellate contexts in Britain are rare.\textsuperscript{1376} While certain South African Labour Courts adopt an analogously reverent attitude to review, unreasonableness is by no means an uncommon conclusion.\textsuperscript{1377} Moreover, conceptualising the standard as requiring gross unreasonableness (in the \textit{Wednesbury} sense) has been rejected by both South Africa’s Constitutional and Labour Appeal Courts;\textsuperscript{1378} importing principles associated with a standard of reasonableness overtly denounced by the courts would evidently be inappropriate. As such, the comparative value of the UK model for the purposes of revising section 145 is limited. Whether the Australian system may be of greater assistance is evaluated below.

3. AUSTRALIA

Fair Work Australia (‘FWA’) is the dispute resolution body responsible for resolving labour disputes (including unfair dismissal disputes) in Australia.\textsuperscript{1380} Like ACAS, FWA is similar to the CCMA in numerous respects. Foremost of these is its nature – FWA was intended to provide an accessible, inexpensive, informal and efficient forum for dispute resolution. It

\textsuperscript{1373} To the extent to which they arise during appeal proceedings; Selwyn at 584-5; Wade & Forsyth at 33-34. Where points of law are raised on review, they are challenged on the basis of unlawfulness; Wade & Forsyth at 33-34, 917 & 941; \textit{R (Profile Alliance) v British Broadcasting Corp} [2003] 2 WLR 1403 at 75-76.

\textsuperscript{1374} For arguments in favour and against a third standard of review, refer to Craig (2008) at 471-472, 14-043.

\textsuperscript{1375} For example, consult chapters 3 and 4 of this thesis. Consider too Alan Rycroft ‘An evaluation of the Labour Court’ in Andrew Levy and Tanya Venter (eds) \textit{The Dispute Resolution Digest} 2012 (2012) 61. Rycroft records that 46% of reviews are successful and, of these, 63% succeed because the decision is found to be unreasonable; Rycroft at 66-67; note too \textit{Fidelity} para 100.

\textsuperscript{1376} Yeboah para 95; \textit{Derbyshire and others v St Helens Metropolitan Borough Council} [2006] ICR 90 para 19.

\textsuperscript{1377} Yeboah para 95; \textit{Derbyshire and others v St Helens Metropolitan Borough Council} [2006] ICR 90 para 19.

\textsuperscript{1378} As non-compliant with section 33 of the Constitution; \textit{Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others} 2004 (4) SA 490 (CC) paras 42-45; \textit{Sidumo} para 107, citing \textit{Bato Star}; \textit{Roman v Williams NO} 1998 (1) SA 270 (C) at 284-285; \textit{Fidelity} para 99.

\textsuperscript{1379} It was established by the Fair Work Act 2009 (‘FW Act’) and came into effect on 1 January 2010; Department of Education, Employment and Workplace Relations, Australian Government \textit{Australia’s Fair Work System} (July 2010), available at http://www.deewr.gov.au/WorkplaceRelations/NewWorkplaceRelations/Pages/FactSheets.aspx, accessed on 26 January 2012.
further has a broad discretion as to the manner in which it does so. Specialist ‘Fair Work Divisions’ of the Federal Courts have also been established to hear matters arising from the Fair Work Act 2009 (‘FW Act’). To this extent, Australia’s framework for labour dispute resolution is comparable to that of the LRA. Nevertheless, the systems are disparate in important respects. First, appeals from decisions of the FWA against unfair dismissal determinations may be instituted to a full bench of the FWA itself. Appeals constitute hearings de novo and the full bench may therefore admit additional evidence in specified circumstances. While appeals against unfair dismissal decisions are available in a confined set of circumstances, the mere presence of this right renders the countries’ labour dispute resolution models distinct. Compounding their differences, in Australia, matters of law or ‘stated cases’ may be referred to the Federal Courts for final determination, either during or after the FWA’s decision on the same matter. The FWA is then bound to vary its findings in accordance with the Federal Court’s judgment. This enables judicial intervention with the FWA’s functions at a more intrusive level than that appropriate to reviews of CCMA awards.

1383 Consider clauses 593 & 595 of the FW Act, for example. For further differences, see clauses 365, 368-371, read with 725-773 of the FW Act. For a case in which these clauses applied, see Manchin v Miners Tipper Services Pty Ltd [2011] FMCA 485.
1384 Thereafter, aggrieved parties may approach the courts for relief; clause 613, read with clauses 604 & 607 of the FW Act. Note that the FW Act does not provide for review of FWA determinations by the Administrative Appeals Tribunal; the FW Act read with section 25 of the Administrative Appeals Tribunal Act 1975. For an overview of the administrative tribunals system in Australia generally, refer to Lord Justice Carnwath et al ‘An overview of the tribunal scenes in Australia, Canada, New Zealand and the United Kingdom’ in Robin Creyke (ed) Tribunals in the Common Law World (2008) 1 at 2-7.
1385 Fair Work Bill 2008 Explanatory Memorandum at 353-354. Clause 607 of the FW Act; appeals against discretionary determinations are nevertheless unlikely to succeed in the absence of evidence that FWA:
   a) ‘acted upon a wrong principle;
   b) [was] guided by irrelevant factors;
   c) [mistook] the facts; or
   d) failed to take some material consideration into account.’
House v The King (1936) 55 CLR 488. Whereas these grounds resemble irregularities which oft arise during section 145 proceedings, the absence of unreasonableness as a specific ground renders the Australian approach unhelpful to this thesis.
1386 Permission to appeal will only be granted in case of unfair dismissal disputes where FWA made a significant error of fact during the initial hearing (or determination process) or where it is in the public interest to allow an appeal; clause 400 read with clause 604 of the FW Act.
1387 By the President of FWA.
1388 With the Court sitting as a court of first instance.
1389 Clause 608 of the FW Act; Australia’s Fair Work System; Fair Work Bill 2008 Explanatory Memorandum at 356.
1390 Ibid.
Decisions of the full bench of FWA remain subject to common law judicial review in the Supreme Courts of Australia.\textsuperscript{1391} As there are certain similarities between Australian and South African principles of common law review, Australia’s compatibility should again be considered here. What appears, however, is that Australia (like the UK) does not recognize unreasonableness in a manner comparable to South Africa.\textsuperscript{1392}

Grounds overlapping with unreasonableness – including irrationality or illogicality in the reasoning process and allegations that the decision was based on ‘literally no evidence’\textsuperscript{1393} – do exist in Australia. Still, courts interfere on these grounds in exceptional circumstances only.\textsuperscript{1394} Thus, the Australian standard may be likened to \textit{Wednesbury} or gross unreasonableness at best.\textsuperscript{1395} As discussed in the context of the British system, the legitimacy of importing principles premised upon a standard expressly rejected by both the Labour Appeal and Constitutional Courts is questionable.\textsuperscript{1396}

Moreover, given the restricted scope of review comparative to appeal, judicial review of FWA decisions is likely to be uncommon.\textsuperscript{1397} It is consequently anticipated that there will be minimal case law on the subject available for appraisal. In addition, and once more, in light of parties’ rights to appeal, the test for review of FWA decisions may justifiably be less exacting than that suited to reviews of CCMA awards.\textsuperscript{1398}

Finally, the relative youth of the legislation governing FWA renders the Australian system somewhat unhelpful as a comparator.\textsuperscript{1399} The jurisprudence applicable to the FW Act has had

\begin{enumerate}
\item Mark Aronson, Bruce Dyer & Matthew Groves \textit{Judicial Review of Administrative Action} 3 ed (2004) at 16 & 46. Ordinarily, judicial review proceedings would proceed in terms of the Administrative Decisions (Judicial Review) Act 1977 (Cth) (‘ADJRA’). However, Schedule 1, section 3(a) of ADJRA, read with section 19 thereto, excludes decisions taken in terms of the FW Act from its ambit.
\item At common law at least; in terms of section 6(2)(g) of ADJRA, review proceedings may be instituted on the basis that the decision taken was so unreasonable that no reasonable decision-maker could have made it. This test is akin to the irrationality test explained in Aronson, Dyer & Groves at 179.
\item Aronson, Dyer & Groves at 179.
\item Ibid.
\item See the discussion on the \textit{Wednesbury} standard above.
\item \textit{Roman} at 284-285; \textit{Bato Star} paras 44-45; \textit{Fidelity} para 99.
\item This is exacerbated by the fact that parties to dismissal disputes have an election to institute proceedings in the courts following the initial FWA conference. Should they choose to do so (rather than pursue the matter further via FWA), the relevant court sits as a court of first instance; clauses 365, 368-371, read with 725-773 of the FW Act.
\item As the legitimacy of FWA’s initial hearing would, by then, already have been reviewed. Accountability of the institution is accordingly better assured (as are the parties’ rights to fairness), where an appeal is allowed.
\item It was passed in 2009 and came into effect on 1 January 2010.
\end{enumerate}
little time to develop when compared to other commonwealth jurisdictions.\footnote{Simply because the Explanatory Memorandum to the FW Act indicates that for the purposes of appeals against FWA’s decisions, pre-existing jurisprudence remains applicable, does not justify extensive reliance thereon; \textit{Fair Work Bill 2008 Explanatory Memorandum} at 353-354. Note that the principles enunciated in \textit{Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission} (2000) 203 CLR 194, in particular, still constitute binding precedent.} On account of these numerous discrepancies between the Australian and South African systems, Australia does not constitute a viable jurisdiction from which to draw guidance on reformulating section 145 and the standard of reasonableness.\footnote{Section 33 of the Constitution.} Whether New Zealand does is addressed below.

\section{New Zealand}

The Employment Relations Authority (‘ERA’) (established in terms of the Employment Relations Act 2000)\footnote{Section 156 of the ER Act.} (‘the ER Act’) is the dispute resolution service entrusted with resolving dismissal disputes\footnote{Unjustified dismissals fall within the personal grievance category (section 103(1)(a)), over which the ERA has jurisdiction; section 161 of the ER Act. Unjustified dismissal disputes make up the majority of personal grievance disputes referred to the ERA; Department of Labour, Government of New Zealand \textit{Personal Grievance Determinations in the Employment Relations Authority 17 July – 18 August 2006} (2007) as cited in Paul Roth ‘Employment law’ 2008 \textit{NZL Rev} 159 at 160; see also Gordon Anderson \textit{Reconstructing New Zealand’s labour law: Consensus or divergence?} (2011) at 206.} in New Zealand. Analogously to FWA, ACAS, and the CCMA, it was designed to provide an informal, flexible, accessible and efficient system for the resolution of disputes.\footnote{Section 101, read with section 143 of the ER Act; consult too M Timmins ‘In search of good faith: The Employment Relations Act 2000’ (2000-2003) 9 \textit{Auckland UL Rev} 300 at 300-301.} Mediation is further favoured over other forms of dispute resolution in the ER Act.\footnote{Ibid.} Where a hearing is convened by the ERA, disputes are to be decided on the merits, and without regard to trivial technicalities.\footnote{The ER Act nevertheless takes the approach that difficult points of law and, in certain circumstances, employment disputes are better determined by courts of law; sections 177-178 of the ER Act.} In this way the characteristics of the ERA resemble those of the CCMA.\footnote{Section 101, read with section 143 of the ER Act; consult too M Timmins ‘In search of good faith: The Employment Relations Act 2000’ (2000-2003) 9 \textit{Auckland UL Rev} 300 at 300-301.} In addition, New Zealand law obliges employers to ensure that dismissals are both substantively and procedurally justifiable, similarly to the South African position.\footnote{Section 103, read with section 103A of the ER Act; see also Roth at 164-170 and the cases cited therein.}

However, there are again important differences between the two institutions indicating their incompatibility. First, the ERA has the power to refer questions of law to the Employment
Courts (‘EC’) for determination during the course of dispute resolution proceedings. Following receipt of an ERA decision, parties aggrieved by it may challenge the finding by way of an appeal to the EC. The EC is a specialist court tasked with hearing only labour matters and with exclusive jurisdiction over appeals and reviews of ERA determinations. In this respect, it compares to South Africa’s Labour Court. Yet, the permissible scope of EC appeals is far broader than that sanctioned by section 145 of the LRA. Whereas parties may not contest procedural aspects of ERA proceedings on appeal, they may request full hearings de novo on the facts. Alternatively, parties may choose to limit their appeals to particular questions or legal issues. Where procedural challenges are raised to ERA decisions, review proceedings may be instituted in the EC.

Notably, hearings de novo do not require the EC to refer to the ERA’s decision at all; rather they entitle the court to conduct full re-hearings of the dispute between the parties. Generally speaking, where a hearing de novo is requested, the EC will proceed on that basis. The court’s findings will then replace those of the ERA. Evidently, the scope of this right is broad and cannot reasonably be likened to review under section 145 of the LRA. Needless to say, it consequently bears minimal comparative value for the purposes of this thesis.

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1409 Section 186 of the ER Act established the EC as a court of record.
1410 Section 177 of the ER Act.
1411 Section 179 of the ER Act. While the term ‘appeal’ is used here, according to Anderson, proceedings instituted against decisions of the ERA do not strictly equate to appeals; Anderson at 146.
1412 Section 187 of the ER Act.
1413 Section 179(5) of the ER Act.
1414 Section 179(4) of the ER Act; Anderson at 146.
1415 In terms of section 183(3), read with section 194, of the ER Act. Appeals against ERA’s determinations are therefore distinct from reviews conducted under the ER Act; Telecom New Zealand Ltd v Nutter [2004] ERNZ 315 (CA) para 2. Compare section 179 of the ER Act with section 145 of the LRA, read with Sidumo. Note that appeals against decisions of the EC may nonetheless be instituted on the limited basis of legal error; section 214 of the ER Act; Telecom para 57. However, review proceedings may not be instituted where the party has a right of appeal on the same issue and has not yet exercised that right. Applications for review are further confined to jurisdictional issues and are conducted according to the provisions of the Judicature Amendment Act 1972, No 130 by the EC; sections 179, 184, 187 & 194 of the ER Act.
1416 Rawlings v Sanco NZ Ltd CHCH CC 2A/06 (23 June 2006) para 1 read with para 12; according to the Court in Rawlings, an ordinary appeal is in fact more limited than a hearing de novo. Thus, challenges to ERA decisions in this context are equivalent to fresh determinations of the relevant disputes.
1417 In limited circumstances, the EC may refuse to do so and may instead confine the scope of appeal; section 182 of the ER Act; Rawlings.
1418 Section 183 of the ER Act.
Given the breadth of the right of appeal as well as the fact that review proceedings may not be instituted where a right of appeal exists, appeals are the primary mechanism conceived of by the ER Act to challenge ERA determinations. As such, to the extent to which the ERA’s decisions are contested, any resulting case law will invariably canvass the nature of EC appeal and not that of review. Jurisprudence governing review of the ERA’s determinations is accordingly expected to be scarce. The presence of the right of appeal will further have a confining influence on the permissible ambit of review. For these reasons, New Zealand’s system of labour dispute resolution seems an inappropriate comparator for South Africa. Fortunately, Canadian law has more to offer. Evaluating Canadian administrative and labour law principles in turn, the comparative worth and compatibility of the jurisdiction’s legal system is detailed below.

5. CANADA

5.1 Canadian administrative law

The Canadian courts’ powers of judicial review originate from the Constitution Act, 1867 (‘the Canadian Constitution’) and the Charter of Rights and Freedoms (‘the Charter’). Section 7 of the Charter grants the courts the inherent power to review procedural irregularities; the authority to review substantive decisions is in turn derived from section 96 of the Canadian Constitution. While section 96 does not explicitly entitle courts to review administrative decisions for substantive defects, it has been interpreted as doing so. The rationale for this construction is that the legislature does not intend to afford administrators the authority to act beyond their conferred powers. In other words, to the extent to which administrators exceed their statutory grants of authority, they contravene legislative intent.

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1419 And which has not been exercised.
1420 Section 194 of the ER Act.
1422 In this regard, Timmins surmised (at the time of the legislation coming into effect) that the broad authority of the ERA, while subject to judicial review, might restrict the likelihood of review proceedings succeeding; Timmins at 305. For the ERA’s statutory authority, see sections 161 & 162 of the ER Act.
1423 Part 1 of the Constitution Act, 1982; together the Charter and the Canadian Constitution will be referred to as ‘the Constitution Acts’.
1424 Section 7 reads as follows: ‘Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.’
1425 Section 96 states: ‘The Governor General shall appoint the Judges of the Superior, District, and Country Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.’
1426 When passing legislation conferring such powers.
thereby justifying review. As the South African judiciary equally derives its powers of review from the Constitution, the countries’ foundations are aligned in this regard.

Due to Canada’s status as a parliamentary sovereignty, however, the supremacy of the Canadian Constitution is more compromised than South Africa’s. The appropriateness of importing Canadian principles into the South African context might thus be questioned. Fortunately, numerous similarities between the jurisdictions persist, alleviating this concern. First, the relationship between the executive, the legislature and the judiciary is governed by the doctrine of the separation of powers analogously to South Africa. In addition, the Canadian conception of reasonableness is significantly similar to the meaning attributed thereto by the South African courts. Parallels between the countries’ jurisprudence are further apparent in the permissible grounds for review.

Broadly speaking, the grounds on which judicial review proceedings may be instituted in Canada include procedural impropriety, illegality, unreasonableness and unconstitutionality. These imitate the grounds provided for in sections 33 and 36 of the Constitution. Procedural impropriety encompasses defects arising from the procedure adopted by the relevant decision-maker, while unconstitutionality arises where violations of the

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1428 Section 33, read with section 165, of the Constitution.

1429 Whereas parliament is bound by the provisions of both the Constitution Acts, it has the right to suspend certain sections of the Charter for a renewable period of 5 years; section 33 of the Charter. Fortunately, this right has only been exercised once; Herbert M Kritzer (ed) Legal Systems of the World: A Political, Social, and Cultural Encyclopaedia 1: A-D (2002) at 254-255.

1430 Given the difficulties with unscrupulous comparisons; Kahn-Freund.

1431 In other words, the legislature drafts legislation, the executive implements it and the judiciary interprets it; JM Keyes ‘Judicial review and the interpretation of legislation: Who gets the last word?’ (2006) 19 Can J Admin L & Prac 119 at 121.

1432 In the context of judicial review proceedings.

1433 Sidumo paras 109-110, read with Fidelity and Bato Star. This is distinct from other commonwealth jurisdictions.

1434 For further discussion of these grounds, consult G van Harten, G Heckman & D Mullan Administrative Law Cases, Texts and Materials 6 ed (2010) at 26-27; Baker v Canada (Minister of Citizenship and Immigration) [1999] 2 SCR 817. In various jurisdictions, as well as federally, provincial governments have enacted judicial review legislation stipulating the grounds of review on which administrative decisions may be challenged; examples include Ontario’s Judicial Review Procedure Act RSO 1990 cJ1; British Columbia’s Administrative Tribunals Act SBC 2004 c45 (‘ATA’) and the Federal Courts Act RSC 1985 c F-7 (‘FCA’).

1435 Included within the ground of illegality or unlawfulness are both jurisdictional errors and abuses of discretion; van Harten, Heckman & Mullan at 954-955; DP Jones & AS de Villars Principles of Administrative Law 5 ed (2009) at 7-8.

1436 Van Harten, Heckman & Mullan at 26-27.
Constitution Acts are alleged. Administratively conduct taken without lawful authority to do so may be challenged for illegality. Finally, reasonableness addresses the need for administrative powers to be exercised reasonably. For reasons apparent from preceding chapters, the grounds of illegality and unreasonableness are most relevant to this paper. The nature of review applicable to these grounds is described below.

The Canadian grounds of review may be divided into procedural challenges and allegations of substance. The principles applicable to substantive determinations are again of greater import to this thesis than those associated with procedural defects; as such, they form the focus of the ensuing discussion. Substantive decisions are scrutinised on either a reasonableness or correctness standard. In determining the standard applicable (and therefore the extent to which the reviewing court may delve into the merits) Canadian courts engage in an enquiry termed ‘the standard of review analysis.’ In essence, this analysis is concerned with contextual factors purportedly indicative of legislative intent. When undertaking the analysis, courts accordingly seek to identify the body which was intended by the legislature to be the final arbiter of the dispute in question.

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1437 Ibid.
1438 Ibid.
1439 Consider in particular, the overlap between excess of powers and reasonableness, referred to in Carephone (Pty) Ltd v Marcus NO & Others [1998] 11 BLLR 1093 (LAC) and later alluded to in cases such as Ellerine Holdings Ltd v CCMA & others [2008] JOL 22087 (LAC) and CUSA v Tao Ying Metal Industries & others [2009] 1 BLLR 1 (CC).
1441 Van Harten, Heckman & Mullan at 69. Jones & de Villars describe judicial review in Canada as essentially concerned with ‘jurisdictional defects’, which incorporate the following grounds of review: ‘a) substantive ultra vires… b) exercising a discretion for an improper purpose, with malice, in bad faith or by reference to irrelevant considerations… c) not considering relevant factors; d) making serious procedural errors; and e) making an error of law, in certain circumstances.’; Jones & de Villars at 7-8. The difficulties with defining the term ‘jurisdiction’ (as described in chapter 6) render the utility of their description debatable. For an alternative formulation of the grounds of review, consult G Gall The Canadian Legal System 5 ed (2004) at 545.
1442 Which would include allegations relating to unreasonableness or illegality.
1443 Reviewing procedural fairness has its own set of rules, details of which will not be addressed here. For relevant principles of procedural fairness, consult Jones & de Villars at 572-575; van Harten, Heckman & Mullan at 77-254; DJM Brown & JM Evans Judicial review of administrative action in Canada (1998; updated loose-leaf) at 7-65-70; Baker; Moreau-Berube v Nouveau-Brunswick [2002] 1 SCR 249 (SCC); Canadian Union of Public Employees v Ontario (Minister of Labour) 2003 SCC 29 para 103 (‘CUPE (2003)’).
1444 Consult the discussion of Dunsmuir in chapter 6 (and below) for this analysis.
1445 Van Harten, Heckman & Mullan at 72-73; Dunsmuir paras 30-31; Gall at 545; David Elliot ‘Khosa – Still searching for that star’ (2009) 33(2) Man LJ 14; CUPE (2003) para 149. This approach is not foreign to South African law or even to South African labour law; Hira & another v Booysen & another 1992 (4) SA 69 (AD) at 93C–H; Irvin & Johnson Ltd v CCMA & others [2006] 7 BLLR 613 (LAC) paras 48-49.
Once the apposite standard of review has been ascertained, the legitimacy of the relevant decision (in light of that standard) is assessed.\textsuperscript{1446} Where correctness applies, courts determine the matter of their own accord, independently of the decision-maker’s findings. Should their conclusions differ from those of the decision-maker, the latter’s findings may be quashed.\textsuperscript{1447} In contrast, where reasonableness applies – as in South Africa – the correctness of the determination is immaterial and deference is due. Further, in considering whether a decision is indeed reasonable, courts look both to the reasoning process adopted by decision-makers and the adequacy of their reasons therefore.\textsuperscript{1448} These assessments are conducted with reference to the context in which the decision was taken and the decision-maker operates.\textsuperscript{1449}

To this extent, the Canadian standard of reasonableness appears compatible with that applicable in section 145 proceedings.\textsuperscript{1450} Adding to this, Canada’s understanding of the distinction between appeals and reviews reflects that of the South African Labour Courts’.\textsuperscript{1451} Given these similarities, it may be appropriate to incorporate the more structured features of the Canadian approach into South African labour law. To do so of course, a more comprehensive analysis is necessary. Before undertaking that discussion in the following chapter, the Canadian framework of labour dispute resolution is addressed.\textsuperscript{1452} There too, certain connections are evident.

\textsuperscript{1446} Van Harten, Heckman & Mullan at 680.
\textsuperscript{1447} Dunsmuir para 50. Correctness review therefore resembles the concept of appeal as it is traditionally cast in Canada and South Africa; N Lambert ‘The nature of Federal Court jurisdiction: Statutory or inherent?’ [2010] 23 Can J Admin L & Prac 145 at 149-150. Lambert submits that, given the inevitable overlap between these processes, appeal is better understood as a species of review; for comparable sentiments, consult Emma Fergus ‘The distinction between appeals and reviews – Defining the limits of the Labour Courts’ powers of review’ (2010) 31 ILJ 1556.
\textsuperscript{1448} Dunsmuir paras 47-50. The principle purpose of this evaluation is to determine whether the outcome is ‘reasonable’ and the reasons ‘justifiable, transparent and intelligible’.
\textsuperscript{1449} Canada (Minister of Citizenship and Immigration) v Khosa 2009 SCC 12 paras 28 & 59.
\textsuperscript{1450} In so far as reasonableness gives effect to the Constitutional values of accountability, openness and transparency in administrative decision-making; sections 1, 33 and 195 of the Constitution. Compare the descriptions of reasonableness in chapter 6 with those in chapters 3 & 4.
\textsuperscript{1451} Analogously to South Africa, judicial review is distinct from appeal – while review is concerned with the legality of administrative determinations, appeal examines the correctness of decisions; Lambert at 149-150. Note, however, Lambert at 150, read with Dr Q v College of Physicians and Surgeons of British Columbia, [2003] 1 SCR 226. See also Fergus (2010) and the references cited therein.
\textsuperscript{1452} Specifically with a view to affirming its compatibility with South Africa’s.
5.2 Canadian labour law

Amplifying the parallels between Canadian and South African administrative law are similarities between the jurisdictions’ systems of labour dispute resolution.\(^{1453}\) Several differences naturally exist too. However, while visible in theory, these differences do not pose insurmountable obstacles for associating Canadian principles with those of South Africa.\(^{1454}\) The rationale for this view is explained with reference to the more pertinent of these principles below.

Canada has three discrete systems of labour law and regulation. The first governs organised or unionised employees, all of whom are covered by collective agreements. The employment relationships between these employees and their employers are regulated entirely by these agreements and the common law is completely excluded.\(^{1455}\) As is the case in South Africa, parties to collective agreements may neither strike nor lockout for the duration of the relevant agreement’s currency.\(^{1456}\) Generally speaking,\(^{1457}\) labour relations boards and labour arbitrators are responsible for resolving disputes between employers and unionised employees.\(^{1458}\) Distinctively, employment relationships in case of non-unionised employees are governed by the employees’ individual contracts of employment, to which the common law applies. Disputes between non-unionised employees and their employers are further resolved in the ordinary course - through adjudication by the courts.\(^{1459}\) The third system of


\(^{1454}\) Arthurs would likely disagree; Arthurs (2007). Even to the extent to which political, legal and Constitutional conditions in Canada differ from South Africa, however, Canada’s structured conception of reasonableness and its relationship with individual grounds of review may assist with defining the standard more clearly in South Africa.


\(^{1456}\) This is generally compelled by statute. Consider, for example, section 46 of Ontario’s Labour Relations Act 1995 SO c1 as amended (‘OLRA’); Carter et al at 361 para 779. For the South African position, refer to section 65 of the LRA.

\(^{1457}\) With the exception of Ontario, Saskatchewan, Quebec and Prince Edward Island, all provincial jurisdictions provide for disputes to be resolved either by arbitration or an alternative means. The exceptional jurisdictions declare arbitration compulsory in their labour relations legislation; see EB Willis & WK Winkler Willis and Winkler on Leading Labour Cases (2010) at 38.

\(^{1458}\) For general principles of Canadian labour law, see Carter et al; Mitchnick & Etherington (2006); Mitchnick & Etherington (2005; updated loose-leaf); Arthurs, Brown & Langille and the Labour Law Casebook Group.

\(^{1459}\) Carter et al at 366-367 paras 793-794.
regulation governs statutory employment standards and provides for the monitoring and enforcement thereof by selected administrative and judicial bodies.  

Whereas this divided structure is distinct from South Africa’s more inclusive approach, important similarities between them prevail. The first of these is the role of Canadian labour arbitrators and boards in resolving disputes, comparably to that of the CCMA.  

Boards and arbitrators together perform equivalent functions to those of the CCMA and its commissioners. They further conduct proceedings in an analogously flexible, efficient and informal manner. As a result, the Canadian courts adopt a reverent attitude to reviewing their determinations comparable to the reasonableness standard here. Thus, it is instructive to consider these institutions in more detail. By doing so, additional parallels between the South African and Canadian labour dispute resolution fora are revealed.

5.2.1 Labour relations boards and labour arbitrators

In the realm of labour relations, whether a dispute is heard by a labour relations board or arbitrator in Canada depends on the nature of the dispute in question. Generally speaking, labour arbitrators preside over matters arising from collective agreements, while disputes concerning organisational rights proceed to the relevant board. As collective agreements invariably prohibit dismissals ‘without just cause’, dismissal disputes are frequently heard by labour arbitrators. These hearings take a form comparable to that of CCMA proceedings. Both boards’ and arbitrators’ findings are final. While they are subject to judicial review, they

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1460 Carter et al at 40 para 47. These include legislation governing minimum wages, benefits and working conditions and occupational health and safety requirements, as well as various statutes prohibiting discrimination in the workplace and regulating pay and employment equity; examples include the Canadian Human Rights Act RSC 1985 cH-6; British Columbia’s Human Rights Code RSBC 1996 c210 (‘Human Rights Code’) and Ontario’s Human Rights Code RSO 1990 cH-19.  
1461 Each province or territory in Canada has a provincial labour relations board; for examples of their functions, consult the OLRA and British Columbia’s Labour Relations Code RSBC 1996 c244 (‘BC LRC’).  
1462 Still, as specific legislation does not govern judicial review of labour disputes exclusively in Canada, it is impossible to understand review in Canada without reference to general administrative law matters. As such, the case law addressed in this thesis is not confined to reviews of labour matters.  
1463 Consider, for example, Toronto (City) v CUPE Local 79 [2003] 3 SCR 77 para 68 (‘Toronto (City)’) and Art Hauser Centre Board Inc (City of Prince Albert) v CUPE Local No 882 2008 SKCA 121 para 23.  
1464 Carter et al at 370 para 806 & at 396 para 884.  
1465 Details of the phrase ‘just cause’ are discussed below, as is the frequency of ‘just cause’ provisions in collective agreements.
are not open to appeal.\footnote{1467}{Carter et al at 44 para 61. British Columbia’s Labour Board has only very limited authority to review the decisions of arbitrators however; section 99 of the BC LRC.} Other than between the parties themselves, these decisions further do not constitute binding precedent.\footnote{1468}{Keyes at 139; as Keyes records with reference to \textit{Lethbridge College v Lethbridge College Faculty Association} 2008 CarswellAlta 911 (Alta QB), they nonetheless remain influential in both judicial and arbitral proceedings.} In these respects, Canadian arbitration proceedings and awards are analogous in both status and form to those of the CCMA.\footnote{1469}{Carter et al at 371-372 para 809. Where agreement is not forthcoming, the parties may approach the Minister to appoint an arbitrator; Carter et al at 372 para 809. For the process in Ontario, consult section 49 of the \textit{OLRA}; for deviations from the general principle, consider New Brunswick’s \textit{Industrial Relations Act} RSNB 1973 c1-4 as amended and Nova Scotia’s \textit{Trade Union Act} RNS 1989 c475 as amended.}

Whereas labour boards are provincial governmental entities, labour arbitrators\footnote{1470}{For a practical illustration of arbitrators’ operations, visit the website of the Ontario Labour Management Arbitrators Association, available at \url{http://www.labourarbitrators.org/}, accessed on 28 January 2013.} are private individuals offering arbitral services for a fee.\footnote{1471}{Consult the various provincial Labour Codes for their statutory authority; section 48 of the \textit{OLRA} is one example.} As such, they operate independently of government. Due to their statutorily conferred authorities,\footnote{1472}{Section 145 of the LRA, read with section 33 of the Constitution.} however, both arbitrators and boards are administrative institutions and thus liable to review as aforementioned. To this extent, their authority is again similar to that of CCMA commissioners.\footnote{1473}{With the exception of those appointed by the Minister in terms of certain statutes; consider, for one, \textit{CUPE} (2003).} While in contrast to South Africa, Canadian arbitrators are appointed by agreement between the parties,\footnote{1474}{And parties may choose to appoint either one or three arbitrators. Note, however, that only very occasionally are three arbitrators appointed; one arbitrator usually presides over disputes; Carter et al at 371-372 para 809.} parties remain compelled to resolve their disputes by arbitration.\footnote{1475}{By applicable provincial and territorial legislation.} Arguably therefore, this distinction does not pose a substantial barrier to employing Canadian law as a comparative tool.

\section*{5.2.2 Judicial Review of labour boards’ and arbitrators’ decisions}

In addition to the associations between Canadian labour arbitrators and CCMA commissioners, the Canadian judiciary’s deferential approach to reviewing arbitrators’ decisions resembles that of the Labour Courts. While parties aggrieved by boards’ or
arbitrators’ decisions may institute review proceedings,\textsuperscript{1476} due to their expertise in the field of labour relations, decisions of these bodies enjoy greater deference than that afforded to most other administrative decision-makers.\textsuperscript{1477} The courts’ approach is endorsed by the design of the Canadian labour dispute resolution system which, like its South African equivalent, was established with flexibility, expeditiousness and cost-effectiveness in mind.\textsuperscript{1478} The Canadian judiciary’s attitude consequently mimics that of the Labour Courts during section 145 proceedings.\textsuperscript{1479} In \textit{Toronto (City) v CUPE, Local 79},\textsuperscript{1480} LeBel J explained the relationship between the characteristics of labour dispute resolution and review in the following terms:

‘This Court has repeatedly stressed the importance of judicial deference in the context of labour law. Labour relations statutes typically bestow broad powers on arbitrators and labour boards to resolve the wide range of problems that may arise in this field and protect the decisions of these adjudicators by privative clauses. Such legislative choices reflect the fact that, as Cory J noted in \textit{Toronto (City) Board of Education v OSTF District 15}, [1997] 1 SCR 487, at para 35, the field of labour relations is ‘sensitive and volatile’ and ‘[it] is essential that there be a means of providing speedy decisions by experts in the field who are sensitive to the situation, and which can be considered by both sides to be final and binding.’ …The application of a standard of review of correctness in the context of judicial review of labour adjudication is thus rare.’\textsuperscript{1481}

In addition to illustrating the countries’ comparable approaches, Canada’s deferential stance counters a potential objection to the jurisdictions’ compatibility. Specifically, as the LRA

\textsuperscript{1476} In the Superior Provincial Court governing their jurisdiction. Recall the limited powers of courts in British Columbia however; section 99 of the BC LRC.


\textsuperscript{1478} \textit{Dunsmuir} para 69; Henderson at 180; \textit{CUPE} (2003). The purposes of the OLRA, for one, include the expeditious resolution of labour disputes; Schedule A to the OLRA. For the analogous characteristics of the CCMA, consult the Explanatory Memorandum at 327-330; Benjamin & Cooper at 274-275 and chapter 1 of this dissertation.

\textsuperscript{1479} Sidumo paras 105-110; \textit{Palaborwa Mining Co Ltd v Cheetham & Others} (2008) 29 \textit{ILJ} 306 (LAC) paras 4-7 & 12-13 and \textit{Fidelity} paras 96-103; consider too chapters 3 and 4.

\textsuperscript{1480} 'Toronto (City) v CUPE Local 79 [2003] 3 SCR 77 para 68 (‘Toronto (City)’).

governs reviews of CCMA awards exclusively, Canada’s generic application of the common law to all administrative decisions may be seen as detracting from its comparative worth. Yet, given the Canadian judiciary’s acknowledgment of the unique exigencies of labour dispute resolution, the generality of Canadian principles need not defeat their compatibility with South Africa’s in this sphere.

5.2.3 No right to fair labour practices

The parallels between judicial review of labour boards’ and arbitrators’ decisions and the principles applicable to section 145 proceedings are plain. On the basis thereof, the jurisdictions’ systems seem well suited. However, one important discrepancy persists – neither of the Constitution Acts expressly recognises the right to fair labour practices. As such, employees in Canada do not enjoy Constitutional protection against the right not to be unfairly dismissed as South African workers do. Given the fundamental role of this right in South African labour law, it is necessary to address this difference before examining the intricacies of Canadian judicial review.

In addition to the absence of Constitutional protection, Canadian employees are afforded no statutory protection from unfair dismissal. Nonetheless, the common law does prohibit dismissals of non-unionised employees without ‘just cause’. Equally in case of unionised employees, collective agreements routinely include a provision to the effect that ‘just cause’ is a prerequisite for lawful dismissal. ‘Just cause’ in each case is accordingly premised on discrete causes of action. Despite their distinctive origins, the common law principles associated therewith are largely aligned. Furthermore, while Canadian courts have refrained from importing an implied duty of fairness into employment contracts, the notion of ‘just cause’ remains akin in many respects to the South African concept of ‘fair dismissal’. Carter et al describe the components of ‘just cause’ as follows:

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1482 And precludes reviews of CCMA awards under PAJA; Sidumo paras 94-104. PAJA (with a few exceptions) is otherwise universally applicable to administrative action in South Africa.

1483 Regardless of the grounds of review provided for in applicable legislation; refer, in this regard, to Khosa and the discussion thereof in chapter 6.

1484 Section 23 of the Constitution; sections 187 & 188 of the LRA.

1485 Carter et al at 189 para 350.

1486 Ibid.

'(1) The employer’s decision must be rational in the sense that the employee’s conduct must cause demonstrable and substantial harm to the production process or to management’s symbolic authority to command before cause will be grounded…

…(2) The penalty of dismissal must not be disproportionately severe on the worker in relation to the degree of harm sustained by the employer as a result of the employee’s behaviour…

…(3) The employer’s actions must be procedurally fair.'

Clearly, just as South African employers may dismiss employees for fair reasons alone, Canadian employers are prohibited from dismissing employees irrationally, on discriminatory grounds or in bad faith. The proportionality component of ‘just cause’ further obliges Canadian employers to take mitigating circumstances into account before terminating employment contracts. Moreover, they are required to implement corrective and progressive disciplinary measures prior to dismissal. Procedural fairness in turn dictates that employees should be forewarned of their employers’ dissatisfaction with their conduct or performance. In light of items 4, 8 and 9 of the Code of Good Practice: Dismissals in particular, the similarities between proportionality and procedural fairness in Canada and South Africa are evident. As such, the key elements of ‘just cause’ appear sufficiently analogous to those informing the concept of ‘fair dismissal’ in South Africa, to affirm the countries’ comparative suitability in this regard.

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1488 Incompetence, insubordination and serious misconduct may seemingly therefore all constitute ‘just cause’; Collier v Robinson Diesel Injection Ltd (1988) 89 CLLC 14037 (Sask QB); Veer v Dover Corp (Canada) Ltd (1999) 99 CLLC 210037 (Alta QB); Lee v Parking Corp of Vancouver (1999) 39 CCEL (2d) 135 (BCSC), as cited by Carter et al. Note too Alberta Union of Provincial Employees v Alberta 2010 ABCA 216; there, the Court of Appeal referred to the arbitrator’s finding that the employee’s conduct ‘…was serious enough to undermine the employment relationship beyond repair, justifying discharge.’ and that the employer accordingly had just cause for dismissal; AUPE 2010 ABCA para 45.


1490 See sections 187 & 188 of the LRA.

1491 Ibid; consider too the Employment Equity Act 55 of 1998 (‘EEA’).

1492 Ibid.

1493 Ibid at 189-190.

1494 See the Code of Good Practice Dismissals, Schedule 8 to the Labour Relations Act 66 of 1995.

Supporting these parallels are certain Canadian statutes, which expressly oblige arbitrators to take account of the Human Rights Code\textsuperscript{1496} when interpreting collective agreements.\textsuperscript{1497} In jurisdictions in which these statutes exist, employers are barred from disregarding their employees’ rights by relying directly on the provisions of otherwise relevant collective agreements. Violations of basic rights are therefore impermissible in the employment context, notwithstanding agreement to the contrary.\textsuperscript{1498} Once more, this reflects the position in South African law.\textsuperscript{1499} Given the Human Rights Code’s\textsuperscript{1500} standing, together with the similarities between ‘just cause’ and ‘fair dismissal’, South African employees’ Canadian counterparts are afforded at least a comparable measure of protection from dismissal.

When holistically assessed, the numerous links between the countries’ systems of labour dispute resolution counter the criticisms which may be levelled against their compatibility, due to the lack of Constitutional protection from unfair dismissal in Canada.\textsuperscript{1501} Endorsing this argument is the administrative principle of fairness, which infuses and informs Canadian judicial review generally.\textsuperscript{1502} In this way, fairness is granted a measure of Constitutional recognition in Canada too.\textsuperscript{1503} There is accordingly no reason why the absence of an express right to fair labour practices in Canada should preclude a comparison of the respective jurisdictions’ approaches.\textsuperscript{1504} Consequently, Canadian principles may legitimately be used as a basis from which to revise the South African test for review.\textsuperscript{1505} In order to do so, a

\textsuperscript{1496} The Human Rights Code RSO 1990 c H19 (‘Human Rights Code’). Note, however, that this code does not expressly recognize the right to fair labour practices as a fundamental human right.

\textsuperscript{1497} Consider, for example, section 48(12)(j) of Schedule A to the OLRA; the effect of the section is to incorporate the rights contained in the Human Rights Code into all collective agreements; Parry Sound (District) Social Services Administration Board v OPSEU, Local 324 [2003] 2 SCR 157.

\textsuperscript{1498} Parry Sound; Alberta (Solicitor General) and AUPE (Jungwirth) [2010] AGAA No 5 (QL) (Ponak).

\textsuperscript{1499} Section 189 of the LRA declares dismissal for discriminatory reasons automatically unfair; consider too the EEA which specifically prohibits discrimination in the workplace.

\textsuperscript{1500} The Human Rights Code. Every Canadian province and territory has now introduced human rights legislation; Carter et al at 102-103 para 198.

\textsuperscript{1501} The dangers of inappropriate comparative analyses are canvassed by both Kahn-Freund and Arthurs (2007).


\textsuperscript{1503} For the implications of the Constitution Acts and parties’ rights to procedural fairness, consult Baker and Gruber; Gruber avers that reviewing courts in Canada are ultimately concerned with determining whether challenged decisions are unjust or unfair.

\textsuperscript{1504} At the time of writing, Malawi was the only other known jurisdiction in which a right to fair labour practices was expressly incorporated into its Constitution; section 31 of the Constitution of the Republic of Malawi.

\textsuperscript{1505} Of CCMA arbitration awards under section 145 of the LRA at least.
comprehensive appraisal of Canadian principles of judicial review is necessary. This is conducted in the chapter which follows.
CHAPTER 6

THE CANADIAN LAW OF JUDICIAL REVIEW

1. INTRODUCTION

The appropriate application of reasonableness has been contentious in Canada for some time. While the details of reasonableness continue to challenge the judiciary, the wealth of Canadian jurisprudence on the subject forms an accessible and broad base from which to draw guidance. In addition, the Canadian courts have developed increasingly pragmatic and reliable measures of scrutiny. By analysing Canadian law and commentary, many of the questions arising from *Sidumo & another v Rustenburg Platinum Mines Ltd & others* may be resolved. Specifically, the boundaries between the section 145 grounds of review and reasonableness, and reasonableness and rational justifiability, may be clarified. The relationship between the procedural and substantive features of the standard and the circumstances in which reasonableness may be resolutely applied are similarly explained. Finally, Canadian contextual criteria, analogous to those described in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others*, reveal the most important of these for the purposes of delineating the scope of review. In turn, a more reliable and apposite formulation of reasonableness under section 145 may be devised.

The jurisdictions’ comparative compatibility was established in the preceding chapter. This chapter will focus on the substance of Canadian case law and commentary on judicial review, together with the insights these offer into understanding reasonableness under *Sidumo*. The value of these principles and their potential manner of application in South

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1506 See *Dunsmuir v New Brunswick* [2008] 1 SCR 190 paras 132-133.
1507 *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC).
1508 In particular, the boundaries between gross irregularities and reasonableness and reasonableness and excess of powers; section 145 of the Labour Relations Act 66 of 1995 (‘LRA’ or ‘the Act’).
1509 As defined in *Carephone (Pty) Ltd v Marcus NO & others* [1998] 11 BLLR 1093 (LAC), read with *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA & others* [2006] 11 BLLR 1021 (SCA) paras 29-30.
1510 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others* 2004 (7) BCLR 687 (CC) para 45.
Africa will then be examined. Finally, a revised approach to reasonableness under section 145 will be proposed.\(^{1512}\) By means of this approach, the uncertainty and inconsistency\(^{1513}\) surrounding reviews of CCMA\(^{1514}\) awards may be alleviated.

Amongst the most significant Canadian cases in this arena are *New Brunswick (Board of Management) v Dunsmuir*\(^{1515}\) and *Canada (Minister of Citizenship and Immigration) v Khosa*.\(^{1516}\) They are therefore discussed in depth below. Together, *Dunsmuir* and *Khosa* define both the nature of reasonableness and the relationship between common law principles and statutory grounds of review. They further outline the tenets of judicial review and many of the difficulties associated with it in Canada. Adding to these, the Supreme Court of Canada’s (‘SCC’) earlier judgment in *Baker v Canada (Minister of Citizenship and Immigration)*\(^{1517}\) is informative. So too are the *Federal Courts Act* (‘FCA’) and British Columbia’s *Administrative Tribunals Act* (‘ATA’) germane.\(^{1518}\) Both *Baker* and these statutes are consequently appraised following the analyses of *Dunsmuir* and *Khosa*. Before doing so, however, it is necessary to provide an overview of the principles applicable to review, prior to *Dunsmuir*.

2. **STANDARDS OF REVIEW PRIOR TO DUNSMUIR**

Before *Dunsmuir*, three standards of review were available to reviewing courts assessing allegedly substantive irregularities.\(^{1519}\) These included patent unreasonableness,\(^{1520}\) reasonableness *simpliciter*,\(^{1521}\) and correctness.\(^{1522}\) Whereas patent unreasonableness required

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\(^{1512}\) Note that unless otherwise stated, references to ‘section 145’ are references to section 145 of the LRA.

\(^{1513}\) In relation to both substantive law and the manner in which the standard is to be applied.

\(^{1514}\) The Commission for Conciliation, Mediation and Arbitration (‘the CCMA’).

\(^{1515}\) *Dunsmuir v New Brunswick* [2008] 1 SCR 190.

\(^{1516}\) *Canada (Minister of Citizenship and Immigration) v Khosa* 2009 SCC 12.

\(^{1517}\) *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817.

\(^{1518}\) *Federal Courts Act* RSC 1985 cF-7 (‘FCA’); *Administrative Tribunals Act* SBC 2004 c45 (‘ATA’).

\(^{1519}\) Substantive irregularities include the grounds of review relating to unreasonableness and illegality, as discussed in chapter 5.

\(^{1520}\) The concept of patent unreasonableness was first introduced by the SCC in *CUPE, Local 963 v New Brunswick Liquor Corp* [1979] 2 SCR 227 (‘CUPE (1979)’). The Court indicated that to survive the test, decisions should not be ‘so patently unreasonable that [the] construction [thereof … could not] be rationally supported by the relevant legislation and demands intervention by the court upon review.’; *CUPE (1979)* at 237.

\(^{1521}\) Reasonableness *simpliciter* was recognized for the first time in *Canada (Director of Investigation & Research) v Southam Inc* [1997] 1 SCR 748. In the Court’s view, unreasonable decisions were those which were not ‘…supported by any reasons that […] could… stand up to a somewhat probing examination.’; *Southam* para 57.
extreme deference to administrative determinations,\textsuperscript{1523} correctness allowed for consideration afresh, with reasonableness \textit{simpliciter} falling somewhere in between.\textsuperscript{1524} Generally speaking, when determining the appropriate standard\textsuperscript{1525} courts engaged in a ‘pragmatic and functional analysis’.\textsuperscript{1526} This entailed evaluating the following aspects of the dispute in question:

a) The presence (if any) of a privative or preclusive clause in the governing legislation;\textsuperscript{1527}

b) The nature of the question facing review;

c) The decision-maker’s expertise;\textsuperscript{1528} and

d) The purpose of the governing legislation and the framework in which it operated.\textsuperscript{1529}

\textsuperscript{1522} For examples of these standards, see \textit{Southam; Baker and Pushpanathan v Canada (Minister of Citizenship and Immigration)} [1998] 1 SCR 982. For the distinctions between the standards, consult \textit{Ryan v Law Society (New Brunswick)} [2003] 1 SCR 247 para 50.

\textsuperscript{1523} \textit{Dr Q v College of Physicians and Surgeons of British Columbia} [2003] 1 SCR 226 para 35.

\textsuperscript{1524} \textit{Dunsmuir} para 34. According to the Court in \textit{Southam}, while patent unreasonableness would be obvious and apparent on the face of the decision, unreasonable unreasonableness \textit{simpliciter} would only be detectable following a more searching examination. Similarly, in \textit{Ryan}, the SCC held that unreasonable decisions included those containing ‘no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived.’ A patently unreasonable decision, on the other hand, would be one suffering from a severe and obvious defect, ‘…so flawed that no amount of curial deference [could] justify letting it stand.’ \textit{Ryan} paras 52-53.

\textsuperscript{1525} The purpose of the analysis was (and still is) to determine whether the legislature intended the question in dispute to be decided by an administrative decision-maker or by the courts; G Cartier ‘The \textit{Baker} effect: A new interface between the Canadian Charter of Rights and Freedoms and administrative law – The case of discretion’ in David Dyzenhaus (ed) \textit{The Unity of Public Law} (1999) 61 at 64; Grant Huscroft ‘Judicial review from \textit{CUPE} to \textit{CUPE}: Less is not always more’ in G Huscroft & M Taggart M (eds) \textit{Inside and Outside Administrative Law: Essays in Honour of Mullan} (2006) 297 at 310-311; David Elliot ‘Khosa – Still Searching for that Star’ (2009) 33(2) \textit{Man LJ} 14.

\textsuperscript{1526} For recent discussions of the pragmatic and functional approach, refer to L Sossin & C Flood ‘The contextual turn: Iacobucci’s legacy and the standard of review in administrative law’ (2007) 57 \textit{UTLJ} 581; P Bryden ‘Understanding the standard of review in administrative law’ (2005) 54 \textit{UNBLJ} 75. The most significant decisions in this regard are \textit{Pushpanathan; UES, Local 298 v Bibeault} [1988] 2 SCR 1048 at 1083-1087; \textit{Suresh v Canada (Minister of Citizenship and Immigration)} [2002] 1 SCR 3 (Can); \textit{Ryan} and \textit{Dr Q}. Consider too DP Jones ‘Two more decisions by the Supreme Court of Canada on the standard of review’ (2003) 48(3d) \textit{Admin LR} 71. In both \textit{Suresh} and \textit{Dr Q}, the SCC suggested that it was necessary to apply a pragmatic and functional analysis in every case.

\textsuperscript{1527} Strong privative clauses usually indicated the need for greater deference, while the absence of a privative clause suggested review for correctness. Note, nonetheless, that even a statutory right of appeal did not always warrant correctness review; \textit{Dr Q para 27; Pezim v British Columbia (Superintendent Brokers)} [1994] 2 SCR 557 (SCC); Jones (2003) was one of many who questioned the validity of this approach, however.

\textsuperscript{1528} In numerous decisions, the Courts indicated that expertise was the critical factor in this analysis; \textit{Southam} para 50; \textit{United Brotherhood of Carpenters & Joiners of America, Local 579 v Braddock Construction Limited} [1993] 2 SCR 316; in \textit{Braddock}, the importance of expertise in the context of labour relations specifically was emphasized; \textit{Braddock} para 32. See also \textit{National Corn Growers Association v Canada (Import Tribunal)} [1990] 2 SCR 1324; \textit{Canada (Attorney General) v Mossop} [1993] 1 SCR 554 and \textit{Dr Q}. Expertise was assessed relatively to that of the reviewing court; DM Mullan ‘Establishing the standard of review: The struggle for complexity?’ (2004) 17 \textit{Can J Admin L & Prac} 59 at 73; JM Keyes ‘Judicial review and the interpretation of legislation: Who gets the last word?’ (2006) 19 \textit{Can J Admin L & Prac} 119 at 125.
Both the multiplicity of the available standards and the ‘pragmatic and functional analysis’ were severely criticised.\textsuperscript{1530} The primary basis of the attack against the former was the difficulty of distinguishing between patent unreasonableness and reasonableness \textit{simpliciter}.\textsuperscript{1531} Exacerbating the contention was the anomaly associated with patent unreasonableness, which allowed unreasonable decisions (provided they were not grossly or ‘patently’ unreasonable) to survive judicial scrutiny.\textsuperscript{1532} The ‘pragmatic and functional analysis’, on the other hand, was condemned for its distracting quality as a threshold enquiry. Rather than emphasising the merits of review proceedings, courts became preoccupied with the analysis, neglecting the true substance of disputes as a result.\textsuperscript{1533} In responding to these challenges in \textit{Dunsmuir}, the SCC re-evaluated Canadian principles of judicial review comprehensively, purportedly overhauling the test in the process. The Court’s decision is detailed below.

3. \textit{NEW BRUNSWICK (BOARD OF MANAGEMENT) V DUNSMUIR} \textsuperscript{1534}

In brief, the facts of \textit{Dunsmuir} were as follows: Dunsmuir was employed as a legal officer by the Department of Justice in New Brunswick. During his tenure,\textsuperscript{1535} he was repeatedly warned of the need to improve his performance. He was similarly reprimanded for working outside of his public office in the private sector.\textsuperscript{1536} After failing to rectify his behaviour, Dunsmuir’s employment was terminated with 4 months’ notice. While reference to

\textsuperscript{1529} G van Harten, G Heckman & D Mullan \textit{Administrative Law Cases, Texts and Materials} 6 ed (2010) at 679; \textit{Pushpanathan; Bibeault}. For a summary of the role of the ‘nature of the question in dispute’ in this analysis, consult Keyes at 129, 136-138 & 147. The pragmatic and functional analysis factors are comparable to those applicable in South Africa; \textit{Hira & another v Boosyen & another} 1992 (4) SA 69 (AD) at 93-95; \textit{Bato Star}.

\textsuperscript{1530} \textit{Toronto (City) v CUPE Local 79} [2003] 3 SCR 77 (‘\textit{Toronto (City)}’); \textit{Chamberlain Surrey School District No 36, 2002 SCC 86}; \textit{Voice Construction v Construction & General Workers Union, Local 92, 2004 SCC 23}; \textit{Council of Canadians with Disabilities v VIA Rail Canada Inc} 2007 SCC 15; \textit{Dunsmuir} para 32; Mullan ‘The struggle for complexity?’ (2004); Elliot. For further criticism of the state of judicial review at that time, see the references cited in \textit{Toronto (City)} para 61 onwards.

\textsuperscript{1531} In principle, the magnitude and immediacy of the defect distinguished patent unreasonableness from reasonableness \textit{simpliciter}; \textit{Ryan} paras 52-53; \textit{Southam; Toronto (City)}.


\textsuperscript{1533} \textit{Dunsmuir} para 133; for an extensive commentary on critiques of this approach, see Mullan ‘The struggle for complexity’ (2004); While these were not the only criticisms of the system, a comprehensive analysis thereof is beyond the scope of this thesis.

\textsuperscript{1534} \textit{Dunsmuir v New Brunswick} [2008] 1 SCR 190.

\textsuperscript{1535} Of approximately two and a half years.

\textsuperscript{1536} \textit{Dunsmuir} paras 2-7.
unsatisfactory skill level was made in the notice of termination, the reasons for his dismissal were not clearly stipulated.\textsuperscript{1537}

In response, Dunsmuir instituted grievance proceedings under the provisions of the \textit{Public Service Labour Relations Act} (‘\textit{PSLRA}’).\textsuperscript{1538} His complaints included that he had not been given reasons for his dismissal, he had not been afforded a reasonable opportunity to respond to his employer’s concerns of poor performance, his dismissal had been procedurally unfair and his notice period had been inadequate.\textsuperscript{1539} His grievance was unsuccessful, however, and Dunsmuir subsequently referred the matter for adjudication by an adjudicator appointed by the Labour and Employment Board.\textsuperscript{1540} The principal issues were twofold. The first questioned the adjudicator’s jurisdiction to determine whether Dunsmuir’s dismissal had been for cause, while the second addressed the procedural fairness of the termination of his employment.\textsuperscript{1541} Following an assessment of the law, the adjudicator concluded first that he did, indeed, have authority to consider whether the dismissal had been for cause.\textsuperscript{1542} Secondly, he found that Dunsmuir had been entitled to procedural fairness but had been denied that entitlement.\textsuperscript{1543} The termination of his employment was accordingly void \textit{ab initio} and reinstatement was warranted.\textsuperscript{1544} Furthermore, ruled the adjudicator, should his decision be overturned on review the appropriate notice period would be 8 months.\textsuperscript{1545}

Dunsmuir’s employer successfully instituted review proceedings in the Court of the Queen’s Bench.\textsuperscript{1546} The matter was then taken on appeal, where New Brunswick’s Appellate Court\textsuperscript{1547}

\begin{footnotes}
\item[1537] Ibid para 7.
\item[1538] \textit{Public Service Labour Relations Act} RSNB 1973 cP-25 (‘\textit{PSLRA}’).
\item[1539] \textit{Dunsmuir} para 9.
\item[1540] While appointed by the Labour and Employment Board, the adjudicator was selected by agreement between the parties in accordance with the provisions of the \textit{PSLRA}.
\item[1541] \textit{Dunsmuir} paras 10-17.
\item[1542] Ibid para 12; for confirmation that \textit{Dunsmuir} has not detracted from parties’ rights to procedural fairness in the general administrative sphere, see Canada (Attorney General) v Mavi [2011] 2 SCR 504.
\item[1543] Ibid para 15.
\item[1544] Ibid.
\item[1545] Ibid para 16.
\item[1546] \textit{New Brunswick v Dunsmuir} 2005 NBQB 270 (CanLII); \textit{Dunsmuir} paras 17 & 20. There, the Court had applied a correctness standard to the adjudicator’s jurisdictional finding, holding that he had exceeded his jurisdiction by entertaining an inquiry into the reasons for Dunsmuir’s dismissal. His preliminary ruling was consequently quashed. The adjudicator’s determination on the merits was similarly overturned. In the Court’s view, the determination did not meet the reasonableness \textit{simpliciter} standard. Only his direction to award Dunsmuir 8 months’ notice was upheld.
\item[1547] \textit{Dunsmuir v Her Majesty the Queen in Right of the Province of New Brunswick, as represented by the Board of Management} 2006 NBCA 27 (CanLII); \textit{Dunsmuir} para 21.
\end{footnotes}
confirmed the lower Court’s findings, albeit on the basis of discrete grounds of review. An aggrieved Dunsmuir proceeded to the SCC. The Court began by stating that a thorough reassessment of Canadian judicial review was necessary. From the outset, it emphasized the significance of review to the rule of law, describing it as follows:

‘By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process.’

The SCC cautioned, nonetheless, that the value of review was to be balanced against the supremacy of the legislature and the principles of democracy. As such, courts were to abstain from undue interference with administrative conduct. The primary role of reviewing courts was to establish whether the relevant decision-maker had kept within the confines of its statutorily granted authority. Only where it had not, would its decision be reviewable. Thus, when determining the applicable standard of review, held the SCC, the principal inquiry was directed at identifying the extent of the authority conferred upon the relevant decision-maker, with reference to the dispute concerned. That required ascertaining the legislature’s intent when conferring the administrative powers in question.

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1548 The Court applied the reasonableness standard to reviewing the adjudicator’s preliminary ruling and the correctness standard to his decision on the merits. It concluded that both his preliminary decision and his factual findings were reviewable and the appeal was accordingly dismissed; Dunsmuir paras 22-23.
1549 The SCC is the highest court in Canada with the final authority to determine disputes; Herbert M Kritzer (ed) Legal Systems of the World: A Political, Social, and Cultural Encyclopedia 1: A-D (2002) at 255-257; see also section 101 of the Constitution Act, 1867 (‘the Canadian Constitution’), read with the Supreme Court Act RSC 1985 cS-26.
1550 Dunsmuir paras 24-26; in the SCC’s view, the case required an assessment of judicial review principles applicable to both substance and procedure.
1552 Ibid para 27. To this end, there is again an association between the foundations of Canadian and South African judicial review; adding to this, the Canadian Courts’ authority to engage in judicial review of administrative decisions is analogously based on the Canadian Constitution and the Charter of Rights and Freedoms, Part 2 of the Constitution Act, 1982 (“the Charter”) (collectively hereinafter ‘the Constitution Acts’); Dunsmuir paras 31-32.
1553 Evidently, corresponding principles apply in South Africa. These were discussed in chapters 3 and 4 of this dissertation.
1554 Dunsmuir para 29.
1555 This approach reflects the long accepted jurisprudence of the Court; consider Toronto (City).
In the majority’s opinion, the Canadian system of judicial review was in desperate need of revision. Most concerning to the Court was that the existing approach failed to provide practical guidance as to when decisions were inadequate. What was needed therefore was: ‘… a test that offer[ed] guidance, [wa]s not formalistic or artificial, and permit[ted] review where justice require[d] it, but not otherwise.’

To begin with, the SCC dispensed with the dual concepts of reasonableness, collapsing reasonableness *simpliciter* and patent unreasonableness into a single standard of reasonableness. Importantly, remarked Bastarache and LeBel JJ, reducing the available standards from three to two did not invite lesser deference to administrative determinations – the purpose of doing so was merely to redirect judicial attention from the standard of review analysis to the substance of cases. Though the flexibility associated with multiple measures of reasonableness was laudable, the benefits thereof could equally be achieved by an adequate definition of the concept. In seeking this definition, the Court turned to the characteristics of reasonableness. First, reasonableness acknowledged that not all questions lent themselves to but one result. Instead, a range of rational outcomes might exist in any given case. When scrutinising decisions on the basis of alleged unreasonableness, courts were accordingly to:

‘…inquire into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes.’

In addition, and comparably to the South African standard, reasonableness comprised both procedural and substantive features. From the Court’s expression of these features, it may broadly be inferred that procedural reasonableness governs reasons while substantive reasonableness addresses findings. The implications of this for understanding *Sidumo* are

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1556 Dunsmuir para 33.
1557 As Gruber records: ‘A common argument raised by commentators is that Dunsmuir and Khosa do not provide a precise formula for determining either the applicable standard of review or the outcome from applying the standard.’; Gruber at 312. Note too Jones (2003) at 126.
1558 Dunsmuir para 43.
1559 Ibid paras 44-45.
1560 Writing for the majority of the Court.
1561 Dunsmuir para 48.
1562 Ibid paras 44-45.
1563 Ibid para 47.
1564 Note, however, Bastarache’s criticism of this view which is examined below; Michel Bastarache ‘Modernising judicial review’ (2009) 22 Can J Admin L & Prac 227. Comparably, in South Africa, both procedure and substance may be scrutinized when engaged in reasonableness review; Anton Myburgh
explained in later paragraphs. Expanding thereon in *Dunsmuir*, the SCC remarked that reasonableness was ultimately concerned with:

‘…the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law.’\(^{1565}\)

In other words, the essence of reasonableness in Canada is that, to pass muster, the decision-maker’s reasoning process must be justifiable, clear and comprehensible. Secondly, the decision-maker’s conclusion – while not obliged to be correct – must be supported by the evidence and the purportedly applicable law.\(^{1566}\) Whereas South African Labour Courts have failed to formulate reasonableness in terms precisely identical to these, the similarities between the jurisdictions’ constructions of reasonableness are plain.\(^{1567}\) As alluded to above, of greatest utility for South African courts, is the SCC’s pronouncement on the dual elements of reasonableness. By emphasizing the need for both aspects of reasonableness, the inability of substantive reasonableness in Canada to invariably remedy procedural defects is evident.\(^{1568}\) Moreover, the Court’s attention to the articulation of reasons when establishing reasonableness provides a starting point from which to identify the boundaries between substantive and procedural unreasonableness, while maintaining the distinctions between *Carephone* and *Sidumo* cited in *Fidelity*.\(^{1569}\) Additional clarity on these issues may be garnered from Khosa’s discussion of *Dunsmuir*. The manner in which they do so, is addressed in detail in subsequent sections of this chapter.

Having defined reasonableness in these terms, the SCC in *Dunsmuir* considered the related concept of deference. In Canada, the notions of reasonableness and deference are as intimately connected as they are in South Africa. There, deference will not be paid to a

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\(^{1565}\) ‘Reviewing the review test: Recent judgments and developments’ (2011) 32 *ILJ* 1497; *Sasol Mining (Pty) Ltd v Commissioner Nggeleni & others* [2011] 4 BLLR 404 (LC) para 11.

\(^{1566}\) *Dunsmuir* para 47. This again reflects the South African position; consider section 33 of the Constitution; *Fidelity Cash Management Service v CCMA & others* [2008] 3 BLLR 197 (LAC) paras 96-99 and chapter 3.

\(^{1567}\) For reasonableness review in South African labour dispute resolution, consult *Fidelity* paras 96-10; Myburgh (2011); Anton Myburgh ‘*Sidumo v Rastplats*: How have the Courts dealt with it?’ (2009) 30 *ILJ* 1 and Anton Myburgh ‘Determining and reviewing sanction after *Sidumo*’ (2010) 31 *ILJ* 1; see too chapters 3 and 4 hereof.

\(^{1568}\) The reach of substantive reasonableness (in so far as it may excuse procedural errors) is considered in later paragraphs; note, however, *Newfoundland and Labrador Nurses’ Union v Newfoundland and Labrador (Treasury Board)* [2011] 3 SCR 708.

\(^{1569}\) *Fidelity* paras 102-103. In turn, the limits of the intersection between gross irregularities and reasonableness, and section 145 and reasonableness generally, may be revealed.
decision-maker or its decision unless the reasonableness standard applies. As the Court noted in Dunsmuir, deference does not require complete judicial subservience to administrative decisions or interpretations; it merely proscribes undue intrusion. A suitable balance between the two must nevertheless be struck. In this regard, held the SCC, Dyzenhaus’s depiction of ‘deference as respect’ as requiring from the courts ‘not submission but a respectful attention to the reasons offered or which could be offered in support of a decision…’, was apt. So too was Mullan’s description of the relationship between reasonableness and deference. According to Mullan, deference:

‘…recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime.’

As such, surmised the majority, deference obliged reviewing courts to respect legislative allocations of decision-making power whether to the judiciary, executive or administration. Moreover, the notion demanded that respect be paid to the expertise and experience of administrative bodies, the processes and decisions in which they were involved, and the discrete functions assigned to the branches of government respectively. Yet, deference did not refute the need for correctness review in appropriate circumstances. On the contrary, observed the Court, the standard of correctness was crucial when reviewing jurisdictional and specified legal questions.

From the Court’s discussion of deference, clear parallels between Canadian and South African law are discernible. In the context of section 145 proceedings, both the expertise of CCMA commissioners and the conditions in which they operate are important considerations

1570 In contrast, correctness does not usually warrant a deferential approach to administrative decisions. In both Pezim and Southam, nonetheless, the SCC attested to the need for deference notwithstanding the presence of statutory rights of appeal in the relevant enabling statutes. There has thus been debate since Dunsmuir as to whether deference may continue to apply despite the absence of privative clauses from, or the presence of statutory rights of appeal in, enabling legislation; Mullan ‘The struggle for complexity’ (2004) at 76-78; David Quayat ‘The correctness battle rages: Alberta (Information & Privacy Commissioner) v Alberta Teachers’ Association’ (2012) 25 Can J Admin L & Prac 179 at 189-190.

1571 Dunsmuir para 48; see also David Dyzenhaus ‘The politics of deference: Judicial review and democracy’ in Michael Taggart (ed) The Province of Administrative Law (1997) 279 at 286; Baker para 65 and Ryan para 49.


1573 Dunsmuir para 49.

1574 Ibid para 50.
on review. However, in so far as the SCC referred to the role of correctness in evaluating legal findings, the jurisdictions’ positions are discrete. The Labour Court’s attitude to scrutinizing legal errors is unpredictable – in some instances correctness is applied while in others reasonableness is. Given the implications of inconsistency for substantive law, clarity on the proper approach is needed. How Canadian law assists in achieving this clarity is revealed through further analysis of Dunsmuir.

Having thoroughly canvassed deference, the SCC next revised the pragmatic and functional approach to determining the applicable standard of review. It began by formulating a set of guidelines for preliminary consideration. These guidelines pointed to but did not dictate the appropriate standard. Factors typically indicative of reasonableness included first, the presence of a privative clause in the decision-maker’s home statute. Where the question for determination involved interpreting enabling legislation (or legislation intimately connected to the relevant decision-maker’s daily functions), reasonableness was equally likely to apply. So too would deference be fitting in case of specialist decision-makers having particular experience or expertise. Notably, the Court stressed the experience and skills of labour adjudicators as exemplars of such expertise. In contrast, questions of law

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1575 Ibid. Sidumo para 118; Ellerine Holdings at 13.
1576 Whether the Labour Courts do so depends on the formulation they attribute to the error in question. Refer, in this regard, to Myburgh (2011) at 1518. Yet, South African courts frequently conflate ordinary legal questions with true questions of jurisdiction (or alleged excesses of power), thereby unduly enabling correctness review. Arguably, this occurred in SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others [2008] 9 BLLR 845 (LAC) (‘SARPA’) paras 39-40; Chabeli v CCMA & others [2010] 4 BLLR 389 (LC) paras 8-10; Gabriel Tsietsi Banda v Emfuleni Local Municipality & others (LC) unreported case no J1214/08 and Asara Wine Estate & Hotel (Pty) Ltd v van Rooyen & others (2012) 33 ILJ 363 (LC) amongst others. For further discussion of this issue, consult Emma Fergus ‘Circumventing review – When is a question jurisdictional?’ (2012) 29 SALJ 504. For the confusion surrounding jurisdictional questions generally, consider Chirwa v Transnet Ltd and others [2008] 2 BLLR 97 (CC); Makhanya v University of Zululand [2009] 4 All SA 146 (SCA) and Gcaba v Minister of Safety & Security [2009] 12 BLLR 1145 (CC).
1577 Compare, for example, Kievits Kroon Country Estate (Pty) Ltd v CCMA & others [2010] JOL 26444 (LC); Clarence v National Commissioner of the SA Police Service (2011) 32 ILJ 2927 (LAC); Shoprite Checkers (Pty) Ltd v CCMA & others [2008] 12 BLLR 1211 (LAC) (‘Shoprite Checkers 1’); Shoprite Checkers v CCMA & others [2008] 9 BLLR 838 (LAC) (‘Shoprite Checkers 2’) and Shoprite Checkers (Pty) Ltd v CCMA & others [2009] JOL 23356 (SCA) (‘Shoprite Checkers 3’) (collectively, the ‘Shoprite Checkers trilogy’) as discussed in chapter 3.
1578 Dunsmuir para 52. This factor was held not to be determinative, however.
1579 Ibid para 54. Since Dunsmuir, the SCC has indicated that reasonableness should be presumed to apply where decision-makers are interpreting their ‘home statutes’. Seemingly, the presumption may be rebutted where ‘true’ questions of jurisdiction arise; Alberta Teachers’ Association v Alberta (Information & Privacy Commissioner) 2011 SCC 61 para 39. For critique of this decision, see Quayat.
1580 Ibid. Note that expertise ostensibly constitutes the principal reason for paying deference to labour arbitrators’ adjudicators’ and boards’ decisions in Canada. While expertise and daily engagement have a role to play in justifying the need for deference in section 145 proceedings, the dominant justifications therefor in South Africa are efficiency and flexibility. The distinction may partly be explained by the fact that reviewing courts in Canada do not specialize in labour law as the Labour Courts in South Africa do.
of both ‘central importance to the legal system…and outside the… specialized area of expertise’ of the decision-maker would attract correctness review. So too would jurisdictional and Constitutional determinations. Correctness review of legal, jurisdictional and Constitutional findings, remarked the SCC, was pivotal to ensuring coherence and predictability in administrative decisions. It was further vital to maintaining the rule of law. Nonetheless, whereas many legal questions would be appraised on the basis of correctness, this would not be true of all cases. Where the question was one of mixed law and fact or of minimal import to the greater community, reasonableness would be warranted. Finally, factual, discretionary and policy based determinations would also invite reasonableness review.

To the extent to which these guidelines direct that labour boards’ and arbitrators’ decisions be reviewed for reasonableness, they reflect the principles associated with section 145. However, as alluded to above, the same cannot be said for the jurisdictions’ attitudes to legal findings. In South Africa, the approach to assessing commissioners’ legal determinations on review is contentious. The Dunsmuir directives consequently offer a valuable point of departure. Of greatest utility are the distinctions drawn by the SCC between the standards of review applicable to discrete forms of legal error. For various reasons, applying different measures of review to different types of legal error may be useful.

1581 Dunsmuir para 55. See too Toronto (City) para 62.
1582 Dunsmuir para 57; the SCC added that: ‘…true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be ultra vires or to constitute a wrongful decline of jurisdiction.’; Dunsmuir para 59.
1584 For further debate in this regard, see Keyes at 134-135.
1585 Dunsmuir para 51.
1586 Or, as previously noted, one pertaining to the decision-maker’s enabling statute or a statute intimately connected thereto.
1587 Dunsmuir para 53. For review of statutory interpretations before Dunsmuir, consult Keyes. Keyes validly questions whether reviewing courts are necessarily better equipped to interpret enabling (and related) statutes than administrative decision-makers are; Keyes at 121 & 149.
1588 Dunsmuir para 53. Consider too Mossop at 559-600; for discretionary decisions, refer to Baker and Mullan’s critique thereof; Mullan ‘The struggle for complexity’ (2004) at 64.
1589 Compare, for example, Clarence, Kievits Kroon (LC) and the Shoprite Checkers trilogy; for review of legal errors prior to Sidumo, see Irvin & Johnson Ltd v CCMA & others [2006] 7 BLLR 613 (LAC).
1590 Or at least purported errors; the proposal is expounded in later paragraphs and the conclusion to this thesis.
These reasons stem from the intended efficiency and informality of CCMA proceedings, the absence of legal representation from most arbitrations, and the circumstances in which commissioners function.\footnote{Consult, in this regard, chapter 1.} Of additional significance are the breadth of commissioners’ discretionary powers and the role of ‘soft law’ in resolving labour disputes.\footnote{Ibid; consider too the various codes of good practice promulgated under section 203 of the LRA.} The implications of these characteristics of CCMA proceedings are twofold. First, given the conditions in which they operate and the statutory constraints imposed upon them, commissioners cannot be expected to refer with meticulous precision to every legal principle and technicality in their awards.\footnote{Arguably nonetheless, the LAC in \textit{Clarence} evaluated the relevant award in an unduly formal and legalistic manner.} Secondly, the boundaries between legal and discretionary decisions are often unclear; the nature of any given question may therefore easily be manipulated by reviewing courts.\footnote{This is addressed in more detail below. For discretionary decisions in South Africa, consult JR De Ville \textit{Judicial Review of Administrative Action in South Africa} revised 1 ed (2005); De Ville defines discretionary decisions as those in which the decision-maker ‘…is required to take into account considerations of policy or desirability in the general interest or where opinion or estimation plays an important role’; De Ville (2005) at 151. See also \textit{Hira} at 93D-94A; Cora Hoexter \textit{Administrative law} (2007) at 258.} As such, permitting correctness review of all legal errors could result in inappropriate and excessive use of appellate style scrutiny. Notwithstanding these important factors, however, legal certainty and the rule of law remain crucial. To this end, the SCC’s pronouncement that legal questions of ‘central importance to the legal system…and outside the… specialized area of expertise’\footnote{\textit{Dunsmuir} para 155.} is instructive. In light of this, it may be apt to assign correctness review to commissioners’ findings in relation to common law principles only. Yet, where decisions concern the Codes of Good Practice, the LRA and any associated principles of labour law, the reasonableness standard should be retained. This would uphold legislative intent while simultaneously countering the threats to legal certainty posed by the Labour Courts’ unpredictable\footnote{And sometimes unduly intrusive or deferential attitudes to review; consider \textit{Kievits Kroon} (LC) and \textit{Clarence}.}\footnote{\textit{Dunsmuir} para 57.} approaches to review.

Returning to \textit{Dunsmuir}, after devising the aforementioned guidelines, the majority noted that analysing each guideline fully, in every case, would not always be necessary. In particular, where the standard of review applicable to the issue in dispute had already been definitively determined, no such assessment would be required.\footnote{\textit{Dunsmuir} para 57.}
The SCC then explained the refined approach to review as encompassing two stages. First, courts were to consider whether precedent indicated the appropriate standard already. To the extent to which it did, that standard would apply. In the absence thereof, reviewing courts were to proceed to the second stage: ‘the standard of review analysis.’

This enquiry, which replaced the ‘pragmatic and functional’ approach, involved an examination of the following factors:

‘…(1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal.’

Clearly, the contextual approach to reasonableness prevalent in South African law is reflected in the Canadian system. While the complexity and ambit of the Bato Star factors counteract their efficacy, Canada’s parallel factors are accessibly concise. As a result, they offer assistance with extracting the more significant of the Bato Star factors for the purposes of establishing reasonableness. In fact, when regard is had to the Canadian criteria, only two of them may vary during section 145 proceedings. The reasons for this are apparent. In all such proceedings, a privative clause will be present and there will be no room for manoeuvre there; similarly, the purposes of the enabling legislation will remain constant. Whereas differentiating between decisions of commissioners with differing levels of skill and experience might be sanctioned by Bato Star, the difficulties with distinguishing between them on this basis negates the potential value of this factor. If anything, attempting to draw such distinctions would compound the current confusion rather than alleviate it; consistency would then be further undermined. Comparatively, the nature

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1598 Ibid paras 62-63. Note that in numerous decisions since Dunsmuir the SCC has neither referred to nor applied this analysis at all; consider Plourde v Wal-Mart Canada Corp [2009] 3 SCR 465 (SCC); Syndicat de la fonction publique du Quebec v Quebec (Attorney General) 2010 SCC 28 (SCC); MiningWatch Canada v Canada (Fisheries and Oceans) [2010] 1 SCR 6; Gerald Heckman ‘Developments in administrative law: The 2009-2010 term’ (2010) 52 Sup Crt L Rev 25 at 38 onwards.

1599 Established in Bibeault. As repeatedly noted, the enquiry is essentially identical to its predecessor: the ‘pragmatic and functional analysis’; Bastarache at 232.

1600 Dunsmuir para 64; prior to the promulgation of the Promotion of Administrative Justice Act 3 of 2000 (‘PAJA’), a comparable approach was propounded by the Appellate Division in Hira at 93C–H.

1601 Consult chapter 4 for details thereof; see too Bato Star para 45.

1602 Compare these considerations to the contextual factors discussed in chapter 4 and Bato Star para 45.

1603 Section 145 of the LRA clearly constitutes a privative clause in so far as it restricts courts’ powers of review.

1604 The enabling legislation is the LRA; sections 112 and 115 of the LRA.

1605 Consider, for example, the difficulty of distinguishing between different commissioners’ skill levels. Reviewing courts cannot realistically be expected to analyse individual commissioners’ curricula vitae in detail and then devise the standard of review accordingly. As such, the skill and expertise of the decision-maker (as referred to in both Bato Star and Dunsmuir as a relevant contextual factor) must be understood to refer to the
of the question in dispute is both a feasible consideration and a variable one. If properly defined, it need not demand complicated assessments of commissioners’ qualifications. The utility of this factor only strengthens the submission that the SCC’s distinctions between standards of review applicable to different questions\(^\text{1607}\) should be moulded to fit reviews of CCMA awards.

That is not to suggest that the remaining *Bato Star* considerations are irrelevant. On the contrary, they assist in setting the tone for review in the labour sphere generally. They simply cannot be used to determine the nature of reasonableness on a case by case basis. Focusing on the nature of the question in dispute alone, when delineating the scope of the courts’ powers during section 145 proceedings, is more viable. The residual factors discussed in *Bato Star* and *Dunsmuir*, together with those addressed in previous chapters,\(^\text{1608}\) should nevertheless continue to inform the framework for section 145 proceedings.

Having revised its approach to review, the SCC in *Dunsmuir* applied it to the facts. Its conclusions illustrate how the aforementioned principles apply in practice. The Court began with the adjudicator’s preliminary ruling confirming his jurisdiction. As this had required interpreting the *PSLRA*, a question of law related to the adjudicator’s enabling legislation arose. That legislation - the *PSLRA* – contained a full and complete privative clause, expressly prohibiting review.\(^\text{1609}\) Together, held the SCC, these served as convincing indicators of reasonableness.\(^\text{1610}\) Of additional import was that the adjudicator operated in the labour relations arena. Given the superior expertise and experience of labour arbitrators in interpreting collective agreements and their enabling legislation, reasonableness was typically appropriate in this field.\(^\text{1611}\) The *PSLRA*’s purposeful establishment of timeous and cost-effective dispute resolution procedures, observed the Court, further supported this conclusion.\(^\text{1612}\)

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\(^{1607}\) *Dunsmuir* para 53.

\(^{1608}\) Specifically, the ‘second tier’ criteria as discussed in chapter 4.

\(^{1609}\) Section 101(1) of the *PSLRA* provides that: ‘…every order, award, direction, decision, declaration or ruling of…an adjudicator is final and shall not be questioned or reviewed in any court.’ Section 101(2) further states that: ‘No order shall be made or process entered, and no proceedings shall be undertaken in any court, whether by way of injunction, judicial review, or otherwise, to question, review, prohibit or restrain…an adjudicator in any of its or his proceedings.’

\(^{1610}\) *Dunsmuir* para 67.

\(^{1611}\) Ibid paras 68-69.

\(^{1612}\) Ibid.
not of fundamental significance to the legal system as a whole. As such, the majority had no doubt that the standard of reasonableness applied.\footnote{Ibid paras 70-71.}

In applying the standard, the Court first assessed the reasoning process which the adjudicator had followed. According to it, that process was radically flawed.\footnote{For one, the adjudicator had not accounted for the legislative context in which the decision was to be made.} Furthermore, his interpretations of the PSLRA fell outside the range of permissible ones, refuting the ruling’s substantive reasonableness. The decision therefore failed on both counts of reasonableness.\footnote{The SCC addressed the second issue in dispute (concerning procedural unfairness) distinctively from the adjudicator’s jurisdictional finding; Dunsmuir para 76. Without explanation as to why a standard of review analysis was unnecessary, the Court simply applied pertinent legal principles to the question. It concluded that Dunsmuir had not been entitled to a hearing before being dismissed. Thus, the adjudicator’s finding was incorrect and the appeal was dismissed; Dunsmuir paras 79 –117. The implication is that the correctness standard applies to questions of procedural fairness; for Binnie J’s thoughts, see Dunsmuir para 119. Consult too Khosa para 43 and Alberta v Alberta Union of Provincial Employees 2008 ABCA 258 (‘AUPE 2008 ABCA’) para 24.} In light of the ruling’s doubly poor performance, it is unclear from the decision whether reasonableness in outcome could have cured the unreasonable procedure. The SCC’s attention to both features of reasonableness suggests, however, that this might not have been the case.\footnote{Than that undertaken by the majority.}

Much of Binnie J’s concurring judgment endorses the principles set out by the majority. Certain of his assertions are nonetheless distinct. The most pertinent of these are discussed below. The Judge began by noting that a more extensive revision of the Canadian system of review\footnote{Ibid paras 132-133; Binnie J remarked further that the outcomes of review proceedings frequently turned on the chosen standard of review. The lack of predictability in the standard of review analysis therefore had a substantial impact on review proceedings generally; for similar sentiments, see Khosa paras 97-98.} was necessary.\footnote{For the uncertainty and complexity prevalent in section 145 proceedings, refer to chapters 3 & 4.} In Binnie J’s opinion, the system was unnecessarily complicated and led to inconsistent and unpredictable outcomes. Given parties’ entitlements to efficient and relatively inexpensive relief, inconsistency was unacceptable. Clarity was consequently needed.\footnote{For one, the adjudicator had not accounted for the legislative context in which the decision was to be made.} As comparable concerns exist in the context of section 145 proceedings,\footnote{Dunsmuir paras 119-122.} the suitability of transporting elements of Canada’s system into those proceedings is again divulged.

According to the Judge, in recasting the system, the fundamental tenets of judicial review were crucial. First amongst these was the legislature’s Constitutional authority to empower
non-judicial bodies to make certain decisions. Those decisions were, in turn, worthy of deference.\textsuperscript{1621} This did not allow decision-makers to act beyond the confines of the law. Yet, it simultaneously did not imply that judicial conclusions as to the proper outcomes of matters would inevitably be correct. On the contrary, remarked Binnie J, the common submission that decision-makers had ‘the right to be wrong’,\textsuperscript{1622} was ‘unduly court-centred’. As he put it: ‘[A] disagreement between the court and an administrator [did] not necessarily mean that the administrator [was] wrong.’\textsuperscript{1623}

In the context of CCMA proceedings, the Judge’s assertions are noteworthy. The Labour Courts’ oft inflexible approach to commissioners’ applications of the Codes of Good Practice,\textsuperscript{1624} for one, exemplifies the common assumption depicted by Binnie J.\textsuperscript{1625} That is not to suggest that courts are never better equipped to resolve questions in dispute – disputes concerning complex or technical legal principles may well be better suited to judicial determination. However, commissioners engage with the various Codes of Good Practice on a daily basis and have greater experience in interpreting those Codes than reviewing courts do.\textsuperscript{1626} In addition, reviewing courts do not benefit from the \textit{vive voce} evidence of the parties during review proceedings; frequently instead, they lack complete records of the arbitrations under review.\textsuperscript{1627} As such, when it comes to factual and discretionary findings in particular, commissioners are in a superior position to the courts.

\textsuperscript{1621} \textit{Dunsmuir} paras 123-124.
\textsuperscript{1622} Presumably in the context of reasonableness review; ibid para 125.
\textsuperscript{1623} \textit{Dunsmuir} para 125. For comparable views of South African commentators see Hoexter (2007) at 252; Lawrence Baxter \textit{Administrative Law} (1984) at 468; De Ville (2005) at 153 and JR De Ville \textit{Constitutional and statutory interpretation} (2000) at 8-14. \textit{Metropolitan Life Insurance Co v International Union of Operating Engineers, Local 796} [1970] SCR 425 was based on an equally problematic premise. There, the Court asserted that legislative provisions were necessarily capable of but one correct interpretation and that the judiciary was invariably better equipped to ascertain that interpretation than (even expert) administrative decision-makers; Van Harten, Heckman & Mullan at 805-806. For a similar case in South Africa, see \textit{Rainbow Farms (Pty) Ltd v CCMA & others} [2011] 5 BLLR 451 (LAC).
\textsuperscript{1624} Paul Benjamin ‘Friend or foe? The impact of judicial decisions on the operation of the CCMA’ (2007) 28 \textit{ILJ} 1 at 17-19.
\textsuperscript{1625} That in the event of a disagreement between a commissioner and a court, the court’s view is implicitly preferable. Consider \textit{Clarence and National Union of Mineworkers obo Employees and Others v Commission for Conciliation Mediation and Arbitration and Others} [2012] 1 BLLR 22 (LAC) (‘NUM obo 112 employees’) and the discussions thereof in chapter 3. Note also \textit{Housen v Nikolaisen} 2002 SCC 33 para 22; \textit{Alberta Union of Provincial Employees v Alberto} 2010 ABCA 216 (‘AUPE 2010 ABCA’) para 47.
\textsuperscript{1626} Refer, in this regard, to \textit{CWIU & Others v Sopelog CC} (1994) 15 \textit{ILJ} 90 (LAC) at 97B-E; Emma Fergus & Alan Rycroft ‘Refining review’ 2012 \textit{Acta Juridica} 170.
\textsuperscript{1627} Illustrative cases include \textit{Bestel v Astral Operations Ltd & others} [2011] 2 BLLR 129 (LAC) para 24 and \textit{Shoprite Checkers I}. 224
Binnie J’s qualifications to these sentiments are worthy of consideration too. In those he emphasized that decision-makers were bound by the limits of their statutory powers and that courts were authorised only to confirm decision-makers’ compliance therewith.\(^{1628}\) Accordingly, held the Judge, reviewing courts should be the final arbiters of all legal questions.\(^{1629}\) The single exception would arise in case of administrative interpretations of enabling statutes (and statutes intimately associated with them); rather than the standard of correctness, reasonableness ought to be the standard applicable to those interpretations.\(^{1630}\) Restricting correctness review of legal questions to issues of central importance to the entire legal system, noted the Judge, was unduly complex.\(^{1631}\) Barring the aforementioned exception therefore, in Binnie J’s view, deference was not to be paid to legal findings at all. All residual questions (procedural fairness aside)\(^{1632}\) would nevertheless warrant a deferential attitude.\(^{1633}\)

Whereas Binnie J’s approach to legal findings is important for maintaining the rule of law and legal certainty, its broad reach should be cautiously approached. Specifically, to the extent to which a similar stance might be assumed in South Africa, it should not permit correctness review of decisions taken under the LRA or Codes of Good Practice, where incidental reference to common law principles of labour law is necessary. Provided the question in dispute falls within the purported expertise of commissioners, reasonableness should be indicated.

The need to adapt the Judge’s remarks in this way arises from the LRA’s mandate of quick, informal and inexpensive dispute resolution, which is grounded in fairness and equity.\(^{1634}\) Were reasonableness confined to clean interpretations of the LRA and the Codes, almost all legal questions would become appealable.\(^{1635}\) In turn, the essence of CCMA arbitrations would be scuppered.\(^{1636}\) Moreover, legislative intent in entrusting labour dispute resolution to CCMA commissioners would be undermined. As fairness and equity inevitably involve value judgments and are subjectively debatable, applying reasonableness to such questions is, in

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\(^{1628}\) *Dunsmuir* paras 127-129; section 97 of the Canadian Constitution.

\(^{1629}\) Recall, however, *Keyes*, who questions the validity of this statement; *Keyes* at 121 & 149.

\(^{1630}\) Consult too, in this regard, *Voice Construction* para 29; *Pushpanathan* para 34.

\(^{1631}\) *Dunsmuir* paras 127-128.

\(^{1632}\) To which correctness review applied.

\(^{1633}\) *Dunsmuir* paras 127-129.

\(^{1634}\) Sections 1 & 151 of the LRA; the Explanatory Memorandum to the LRA (1995) 16 *ILJ* 278 (‘the Explanatory Memorandum’) at 318-319; Paul Benjamin & Carole Cooper ‘Innovation and continuity: Responding to the Labour Relations Bill’ (1995) 16 *ILJ* 258 (A).

\(^{1635}\) Correctness review is comparable to appeal.

\(^{1636}\) See chapter 1 for a full discussion of the features of CCMA proceedings.
any event, apt.\textsuperscript{1637} Naturally, there may be instances in which doing so defies important principles or leaves parties uncertain of the true legal position. In those cases, a more invasive measure of assessment may be required. It is at this juncture that the majority’s directive to distinguish between different types of legal error is instructive.\textsuperscript{1638} Formulating a test for review with analogous factors in mind would both preserve legal certainty\textsuperscript{1639} and maintain the purposively efficient, informal and flexible nature of CCMA proceedings.\textsuperscript{1640}

Binnie J next evaluated the controversy surrounding reasonableness and its allowance for judicial scrutiny of the merits of disputes.\textsuperscript{1641} He cautioned in this regard that:

\begin{quote}
‘The danger of labeling the most deferential standard as ‘reasonableness’ is that it may be taken (wrongly) as an invitation to reviewing judges not simply to identify the usual issues, such as whether irrelevant matters were taken into consideration, or relevant matters were not taken into consideration, but to reweigh the input that resulted in the administrator’s decision as if it were the judge’s view of reasonableness that counts. At this point, the judge’s role is to identify the outer boundaries of reasonable outcomes within which the administrator is free to choose.’\textsuperscript{1642}
\end{quote}

In closing, the Judge proposed a set of presumptions applicable to determining the relevant standards of review.\textsuperscript{1643} After applying these to the facts, he agreed with the majority that the adjudicator’s findings should be quashed.

Of final pertinence to this thesis is Deschamps J’s concurring judgment in \textit{Dunsmuir}. The crux of her decision was that the only determinant in standard of review analyses ought to be

\begin{itemize}
\item \textsuperscript{1637} Particularly in light of Binnie J’s earlier observation that courts should refrain from assuming that they are necessarily more capable of resolving resolve disputes ‘correctly’ than administrative decision-makers.
\item \textsuperscript{1638} \textit{Dunsmuir} para 54.
\item \textsuperscript{1639} Consistently with the right to lawful, reasonable and procedurally fair administrative action; section 33 of the Constitution. Hoexter submits that the requisite of ‘lawfulness’ could be interpreted to imply that all administrative errors of law are reviewable; Hoexter (2007) at 252. For a contrary view, see Margaret Beukes ‘Review as a tool for the development of a culture of accountability in the public administration’ 2002 \textit{SAPL} 244 at 256-257, as cited by De Ville (2005) at 153. Consult too Yvonne Burns (original text by Marinus Wiechners) ‘Unreasonable administrative action’ \textit{LAWSA} vol 1, 2 ed (2003) paras 174-175 and Arthur Chaskalson ‘Legal control of the administrative process’ 1985 \textit{SALJ} 419 at 426-427.
\item \textsuperscript{1640} Section 1(d) of the LRA; the Explanatory Memorandum at 318-319.
\item \textsuperscript{1641} \textit{Dunsmuir} paras 127-129. He then criticized the majority for failing to reduce the complexity associated with review in this respect; \textit{Dunsmuir} paras 130-131.
\item \textsuperscript{1642} \textit{Dunsmuir} para 141.
\item \textsuperscript{1643} Of these, the most significant was Binnie J’s recognition of the expertise of labour arbitrators; this, held the Judge, rendered it necessary for arbitrators’ interpretations of their enabling statutes (or statutes closely connected thereto) to be treated with substantial deference; \textit{Dunsmuir} paras 146-147.
\end{itemize}
the nature of the question in dispute. All other factors were superfluous. Deschamps J’s endorsement of the significance of the nature of the question in dispute reaffirms this criterion’s role in defining reasonableness in a variable manner. Once more, the proposal that this factor should be the primary consideration when delineating the scope of review under section 145 is strengthened.

4. EVALUATING DUNSMUIR

4.1 Criticism of Dunsmuir

The SCC’s re-appraisal of the standard of review analysis has attracted both criticism and praise from numerous sources. Before evaluating the Canadian approach and its potential value for South African labour law, it is necessary to address this critique. There are four criticisms of the judgment which are particularly germane. The first is the SCC’s failure to introduce more radical reforms. Just what reform might have been introduced, however, remains undefined. A second and related concern is that the revised standard of review analysis does little more than defer the difficulties associated with identifying the appropriate standard to a later stage of the process; this gives rise to an equally complex debate about the degree of deference due. To this extent, it has been contended that the SCC failed in its endeavours to simplify the system. It further neglected to refine the meaning of reasonableness with any meaningful degree of specificity.

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1644 Underhill essentially agrees; Mark Underhill ‘Dunsmuir v New Brunswick: A rose by any other name?’ (2008) 21 Can J Admin L & Prac 247 at 254. Still, he adds that the expertise of the reviewing court relative to that of the decision-maker remains relevant.

1645 Given the relative constancy of the remaining considerations.

1646 Deschamp J’s view that discrete standards of review should not apply to different types of legal question is nonetheless debatable; Dunsmuir paras 158-173.


1648 Underhill submits, however, that the SCC simplified the issues as much as could be expected; Underhill at 247; see also Bastarache; Woolley at 269 and Mullan ‘Let’s try again!’ (2008).

1649 Underhill submits, however, that the SCC simplified the issues as much as could be expected; Underhill at 247; see also Bastarache; Woolley at 269 and Mullan ‘Let’s try again!’ (2008).


1651 Ibid; R Goltz ‘Patent unreasonableness is dead and we have killed it - A critique of the Supreme Court of Canada’s decision in Dunsmuir’ (2008) 46 Alta L Rev 253 at 261; Gruber at 312.

Third, the SCC’s application of reasonableness to the facts of *Dunsmuir*’s case has been criticized for implying that administrative decisions now attract lower degrees of deference.\(^\text{1652}\) Mullan submits in this regard that while the adjudicator’s decision in *Dunsmuir* might well have been incorrect, it was not unreasonable.\(^\text{1653}\) In his view, the Court’s conclusion was anomalous with the principles of reasonableness. In light of the majority’s express stipulation that collapsing the standards of reasonableness *simpliciter* and patent unreasonableness into a single standard did not invite greater judicial scrutiny, it was also ironic.\(^\text{1654}\) These controversies have been exacerbated by the distinctively more reverent attitude of the SCC in *Khosa*.\(^\text{1655}\) Given the context of labour relations in which *Dunsmuir* was decided,\(^\text{1656}\) justifying the discrepancies between these matters is difficult.\(^\text{1657}\)

Fourth, whereas jurisdictional errors may demand correctness review, identifying those errors is by no means straightforward.\(^\text{1658}\) It is alleged under this critique that, rather than clarifying the complexities associated with the enquiry, the SCC’s definition of ‘jurisdictional’ aggravated them.\(^\text{1659}\) Instead of affirming the former and simpler conception of jurisdictional issues as those attracting correctness review following a pragmatic and functional analysis,\(^\text{1660}\) the Court in *Dunsmuir* provided only a vague description of the term ‘jurisdictional’ – one easily manipulated by interventionist courts.\(^\text{1661}\) The tendency of South African courts to manipulate the term ‘jurisdictional’, together with the proposal that the nature of the question in dispute be the key determinant of the standard of review, necessitates that the proper approach to defining jurisdictional issues be ascertained. The

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\(^{1652}\) Notwithstanding the majority’s express stipulation to the contrary; *Dunsmuir* para 48; Henderson at 181; Jennifer A Klinck ‘Reasonableness review: Conceptualising a single contextual standard from divergent approaches in *Dunsmuir* and *Khosa*’ (2011) 24 Can J Admin L & Prac 41 at 45-49; Mullan ‘Let’s try again!’ (2008).

\(^{1653}\) Mullan ‘Let’s try again!’ (2008) at 137-140; for a comparably questionable approach, consider *Rolling River School Division v Rolling River Teachers Association of the Manitoba Teachers’ Society* 2008 CarswellMan 394 (Man QB) and Henderson’s critique thereof; Henderson at 184-185. A full analysis of whether the adjudicator’s decision in *Dunsmuir* was unreasonable is beyond the scope of this thesis however.

\(^{1654}\) *Dunsmuir* para 48.

\(^{1655}\) Klinck at 44. *Khosa* is appraised in detail below.

\(^{1656}\) Comparatively to that of *Khosa* (which involved a decision concerning immigration law and policy).

\(^{1657}\) Klinck submits that the divergence in the Courts’ attitudes is explicable with reference to the discretionary nature of the challenged determination in *Khosa* and the decision-maker’s particular expertise; Klinck at 45.


\(^{1659}\) Mullan ‘Let’s try again!’ (2008) at 126-128.

\(^{1660}\) Pushpanathan para 28.

\(^{1661}\) Gerald Heckman ‘Substantive review in Appellate Courts since *Dunsmuir*’ (2009) 47 Osgoode Hall LJ 751 at 770-771.
subject is accordingly examined in subsequent paragraphs of this chapter. Before doing so, the positive attributes of the *Dunsmuir* decision are considered.

### 4.2 Acclaim for Dunsmuir

The Court’s decision in *Dunsmuir* is not without merit and it has been praised in various respects. Foremost here, the SCC’s attempt at redirecting judicial attention from the standard of review analysis towards the merits of challenged decisions has been welcomed.\(^{1662}\) The basis for this is that by reducing the need for full scale standard of review analyses in every case,\(^ {1663}\) judicial attention will be focused on the substance of disputes rather than threshold enquiries.\(^ {1664}\) Secondly, *Dunsmuir* has been applauded for easing the complexities associated with identifying the standard of review.\(^ {1665}\) Specifically, the Court’s articulation of finite principles governing the circumstances in which each standard should apply is valuable and offers useful instruction to lower courts tasked with review.\(^ {1666}\) Finally, the decision has been commended for reiterating the significance of the rule of law and parties’ rights to administrative justice during review proceedings, while concurrently recognising legislative intent.\(^ {1667}\)

Still, certain questions remain.\(^ {1668}\) These include whether there is a variable scale of reasonableness (or merely a single standard)\(^ {1669}\) and whether statutory rights of appeal dispense with the need for deference entirely.\(^ {1670}\) The relationship between reasonableness

\(^{1662}\) Particularly useful was the SCC’s indication that a full standard of review analysis may not always be required; Mullan ‘Let’s try again!’ (2008) at 149; David Corry ‘*Dunsmuir v New Brunswick*: Standards of review and employment contracts’ 28 April 2008, available at [http://ablwg.ca/author/dcorry/](http://ablwg.ca/author/dcorry/), accessed on 6 December 2012.

\(^{1663}\) Specifically, where precedent already indicated the applicable standard of review. According to Underhill, this has undoubtedly simplified the process; Underhill at 256. Note too Heckman (2009) at 784.

\(^{1664}\) Underhill at 256.

\(^{1665}\) Klinck at 52-54.

\(^{1666}\) Mullan ‘Let’s try again!’ (2008) at 149. It has further simplified the process of review; Bastarache at 233-234. For an alternative view, refer to DP Jones *Preliminary thoughts on Dunsmuir* Notes for a Talk to the Canadian Bar Association, Administrative Law Section, Northern Alberta (18 March 2008).

\(^{1667}\) In respect of the legislature’s allocations of administrative power, Heckman (2009) at 784-785.


\(^{1669}\) Mullan submits that Binnie J attested to the need for a sliding scale of reasonableness in his concurring decision; without such variability, the standard of reasonableness could become dangerously inflexible; Mullan ‘Let’s try again!’ (2008) at 132; *Dunsmuir* paras 135-141. Note, however, *Mills v Ontario (Workplace Safety and Appeals Tribunal)* 2008 ONCA 436.

\(^{1670}\) Mullan ‘Let’s try again!’ (2008) at 150. For the purposes of this thesis, it is unnecessary to explicate these here. For further commentary, refer to Bastarache at 234; Woolley at 266-267 and DP Jones ‘Annotation to
review, review of reasons and review of outcomes is equally obscure. Furthermore, neither the true meaning of ‘jurisdictional questions’ nor whether the principles enunciated by the Court apply to both adjudicative and policy-based determinations is certain. Finally, the relationship between statutory grounds of review and the common law principles depicted in Dunsmuir is unclear. If Canadian law is to assist with revising the Sidumo test, it is necessary to investigate these issues more fully. The more pertinent of these are addressed shortly.

Given that some of the confusion was remedied by the SCC’s decision in Khosa, however, that decision will first be appraised.

5. KHOSA V CANADA (MINISTER OF CITIZENSHIP & IMMIGRATION)

In Khosa v Canada (Minister of Citizenship & Immigration), judicial review proceedings were instituted against a decision of the Immigration Appeal Division (‘the Division’) of the Immigration and Refugee Board of Canada (‘the Board’). Khosa had applied to the Division to reverse the Board’s order that he return to India, but had been refused on the basis that there were insufficient humanitarian grounds for doing so. On review in the Federal Court, the Division’s decision was upheld. Yet, it was later overturned on appeal by the Federal Court of Appeal, where the decision was found to have been unreasonable. The matter was then referred to the SCC. Binnie J, writing for the majority, described the question before the Court as: ‘...the extent to which, if at all, the exercise by judges of

Khosa v Canada (Minister of Citizenship & Immigration)’ (2009) 82(4) Admin LR 123 at 123. Compare these views to Southam, Pecim and Dr Q para 27.

Heckman suggests that this has since been resolved; Heckman (2010) at 29. So too has the question of when precedent should be applied. In support of these contentions, Heckman cites Nolan v Kerry (Canada) Inc [2009] 2 SCR 678 (SCC). For additional questions arising from Dunsmuir, see van Harten, Heckman & Mullan at 691-696.

Another concern is whether the Dunsmuir guidelines have ‘presumptive force’ and if so, whether those presumptions are rebuttable; Heckman (2009) at 768; Idahosa v Canada (Minister of Public Safety & Emergency Preparedness) (2008) 385 NR 134 (FCA). Note, however, Alberta Teachers' Association para 39 and Quayat.

In particular, the relationship between the grounds of review prescribed by the FCA and the principles articulated in Dunsmuir was clarified. At the time of writing, the position in British Columbia nevertheless remained uncertain; Underhill at 247. Consider the conflicting judgments of the Courts in Howe v 3770010 Canada Inc 2008 BCSC 330 and Carter v Travelex Canada Ltd 2008 BCSC 405, as cited by Underhill at 257.

Khosa v Canada (Minister of Citizenship & Immigration) 2009 SCC 12.

While the Division’s decision did not concern a labour dispute, as the SCC’s analysis in Khosa addressed the relationship between statutory grounds of review and applicable standards of review, it is instructive to consider it in detail.
statutory powers of judicial review...is governed by the common law principles lately analysed by our Court in [Dunsmuir].\(^{1680}\)

The statutory powers in question were those provided for in section 18.1 of the Federal Courts Act (‘FCA’).\(^{1681}\) Of particular import was section 18.1(4) of the FCA, which lists the grounds for review of administrative decisions.\(^{1682}\) The section reads as follows:

‘Grounds of review
18.1…(4) The Federal Court may grant relief under subsection (3) if it is satisfied that
the federal board, commission or other tribunal:

(a) acted without jurisdiction, acted beyond its jurisdiction or refused to
exercise its jurisdiction;
(b) failed to observe a principle of natural justice, procedural fairness or other
procedure that it was required by law to observe;
(c) erred in law in making a decision or an order, whether or not the error
appears on the face of the record;
(d) based its decision or order on an erroneous finding of fact that it made in a
perverse or capricious manner or without regard for the material before it;
(e) acted, or failed to act, by reason of fraud or perjured evidence; or
(f) acted in any other way that was contrary to law.’

Evidently, these grounds are distinguished by the nature of the question in dispute; again, the relevance of this factor is espoused. In applying for review, Khosa had relied on subsection 18.1(4)(d) of the FCA regulating errors of fact – specifically, he alleged that the Division had made its decision in a perverse and capricious manner.\(^{1683}\) In response to Khosa’s allegations, the Minister contended that the common law principles had been displaced by the statutorily prescribed grounds.\(^{1684}\) As such, the Court’s findings in Dunsmuir had no application.\(^{1685}\) Instead, the standard of review applicable to factual determinations was patent unreasonableness, as indicated by section 18.1(4)(d). Patent unreasonableness was analogous to the statutory conception of ‘perverse or capricious’ errors of fact.\(^{1686}\) As the decision was not patently unreasonable, the Minister argued, the appeal ought to be upheld.

\(^{1680}\) Khosa para 1.
\(^{1681}\) Federal Courts Act RSC 1985 cF-7 (‘FCA’).
\(^{1682}\) The specific ground relied upon by Khosa was that provided for in section 18.1(4)(d) of the FCA.
\(^{1683}\) This was the only ground of review available to him.
\(^{1684}\) Khosa para 3.
\(^{1685}\) Ibid.
\(^{1686}\) Or those made by administrative decision-makers without regard to the material before them.
In responding to these submissions, Binnie J acknowledged Parliament’s entitlement to stipulate standards of review applicable to statutory grounds. Those stipulations were nevertheless subject to interpretation with reference to the Constitution Acts and the statute’s wording, context and purpose. Judicial review legislation was generally drafted in light of common law principles and it was fitting to consider those principles when interpreting the legislation concerned. In Binnie J’s opinion therefore, Dunsmuir’s depictions of deference and reasonableness applied to section 18.1(4) of the FCA.

Considering the legislative framework in which the FCA operated and the act’s objectives, the majority resolved that the grounds provided for in section 18.1(4) were of flexible application. As a result, assigning concrete standards to each was inappropriate. The Dunsmuir guidelines were key to understanding the FCA. These guidelines, held the Court, revealed that the grounds listed in both subsections 18.1(4)(a) and (b) of the FCA would attract correctness review. Similarly, section 18.1(4)(c) governing errors of law would usually indicate correctness. Only where a decision-maker was interpreting its enabling legislation (or legislation intimately connected thereto), would reasonableness apply. In contrast, section 18.1(4)(d) provided for factual errors to be reviewed in case of perversity, capriciousness or the failure to account for presented evidence. Consequently, held the SCC, the legislature had clearly intended factual findings to attract a high degree of deference, consistently with the Dunsmuir approach. Finally, the grounds under sections 18.1(4)(e) and (f) would give rise to correctness review. In the Court’s view, construing the legislative grounds in this way accorded not only with the common law but also with legislative intent.

The primary utility of Khosa arises from its practical illustration of the relationship between reasonableness, correctness and statutory grounds of review. From this, parallels may be drawn between the judgments’ findings and section 145’s association with reasonableness.

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1687 See also R v Owen [2003] 1 SCR 779.
1688 Khosa para 19.
1689 Ibid paras 19-25; see also Khosa para 26.
1690 Ibid paras 28 & 33.
1691 Recall Dunsmuir’s prescription that questions of jurisdiction and procedural fairness were to be tested against the standard of correctness. Furthermore, held the Court in Khosa, neither of these subsections expressly stipulated the applicable standard of review: Khosa paras 42-43.
1692 Ibid para 44.
1693 Ibid paras 45-46.
The essence of *Khosa* is simple - different standards may apply to different legislative grounds of review. In addition, when differentiating between the standards applicable to each ground, the question in dispute forms the principal criterion.

Understanding the defects provided for in section 145 as attracting discrete measures of scrutiny in distinct circumstances is useful. In particular, it may clarify the uncertainty around the relationship between section 145 and reasonableness and whether either exists independently of the other. Construing the two in this way, the permissible degree of judicial intrusion would differ depending on the nature of the defect alleged. Where an applicant contends that a commissioner committed a substantive error of fact, law, or discretion, reasonableness would apply. On the other hand, in case of jurisdictional defects or allegedly faulty procedures, the correctness standard would be indicated. Doing so would acknowledge the substantive nature of reasonableness while simultaneously maintaining the procedural role of the section 145 defects. The difficulties presented by the overlap between gross irregularities and reasonableness would regrettably remain. Looking to the FCA’s grounds, resolving these difficulties may necessitate a complete revision of section 145. Precisely how this could be achieved is discussed in the conclusion to this thesis.

The SCC’s decision in *Khosa* is equally instructive in its affirmation of the contextually dependent character of review. The Court’s statements regarding appropriate standards of review must accordingly be interpreted in a flexible manner. In turn, when reformulating section 145, scope for variation should be accounted for. Given the pertinence of the nature of the question in dispute to context, it is here that room for manoeuvre may be made. Contextual variation in this sense would permit distinctions between correctness and reasonableness review; arguably too, distinctions between discrete forms of reasonableness could be applied.

\[\text{1695 With the exceptions discussed in the conclusion to this thesis.}\]
\[\text{1696 For the overlap, consult Minister of Health and Another v New Clicks SA (Pty) Ltd and Others (Treatment Action Campaign and Innovative Medicines SA as Amici Curiae) 2006 (1) BCLR 1 (CC) para 511; Pam Golding Properties (Pty) Ltd v Erasmas & others [2010] JOL 24963 (LC) paras 5-6; Sidumo para 268; Gaga v Anglo Platinum Ltd & Others (2012) 33 ILJ 329 (LAC) para 44; Ellerine Holdings at 13 and Southern Sun Hotel Interests (Pty) Ltd v CCMA & others [2009] 11 BLLR 1128 (LC).}\]
\[\text{1697 Given the difficulties experienced in Canada with distinguishing between different degrees of unreasonableness, when revising the test for review under section 145 of the LRA, the boundaries between applicable standards of review must be clearly defined.}\]
Section 18.1(4)(d) of the FCA depicts different measures of reasonableness. Factual determinations are reviewable only in case of perversity, capricious decision-making or where no regard was had to the material before the decision-maker concerned. Due to this legislative prescription, prior to Khosa, reviewing courts evaluated factual findings against the standard of patent unreasonableness. The test for reasonableness in relation to these findings was therefore more limited than in other cases. There are clear parallels between patent unreasonableness and gross unreasonableness. As the latter has been explicitly rejected by South African courts, the legitimacy of implementing such a test in the South African context may be questioned. However, implicit in the contextual essence of reasonableness is that the standard may look different in different circumstances. Consequently, regardless of the label attached to the test, reviewing commissioners’ factual findings in a manner equivalent to section 18.1(4)(d) of the FCA may be fitting.

The suitability of restricting review in case of factual determinations is apparent. First, it enables adequate deference to be paid to commissioners’ awards and so recognises the need for efficiency and informality in labour dispute resolution. As the allowable reach of deference ends at decisions devoid of precedential or legal implications, no risk is posed to legal certainty or the rule of law. Whereas it might be argued that reducing the ambit of

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1698 Section 18.1(4) as a whole attests to the sense of differentiating between standards of review with reference to the nature of the question in dispute.

1699 Consult the Federal Court’s and Federal Court of Appeal’s decisions in Khosa, referred to above. Allegations based on the remaining grounds in section 18.1(4) of the FCA were assessed either on the basis of correctness or following a pragmatic and functional analysis. Note too the general approach to evaluating factual findings during both trials and review proceedings, which affirms the need for reviewing courts to defer to tribunals’ determinations; Housen para 22; AUPE 2010 ABCA para 47.

1700 Consider the analogy between patent unreasonableness and Wednesbury unreasonableness impliedly drawn by Mullan in Mullan ‘Proportionality’ at 233. See too Huscroft at 309. Canadian Courts have not invariably accepted the concepts’ equivalence, however, Victoria Times Colonist, a Division of Canwest Mediaworks Publications Inc v Communications, Energy and Paperworks Union of Canada, Local 25-G 2009 BCCA 229; Woods v British Columbia (Workers Compensation Board) 2009 BCJ 2018; Westergaard v Registrar of Mortgage Brokers 2011 BCCA 344 and Pacific Newspaper Group Inc v CEP, Local 2000 (2009) 2010 CLLC 220-009 (BCSC), where the Courts applied the rationality standard rather than section 58(3)’s formulation of patent unreasonableness. Irrationality is arguably akin to gross or Wednesbury unreasonableness; De Ville (2005) at 154 fn.499.


1702 Khosa paras 28 & 59.

1703 Housen para 22; AUPE 2010 ABCA para 47.

1704 The Explanatory Memorandum at 327-330; Benjamin & Cooper at 274-275; chapter 1.

1705 For the import of legal certainty and parties’ rights thereto, refer to Food & Allied Workers Union on behalf of Mbatha & others v Pioneer Foods (Pty) Ltd t/a Sasko Milling & Baking & others (2011) 32 ILJ 2916 (SCA) (‘FAWU’) paras 19-21.
reasonableness detracts from the parties’ Constitutional right to administrative justice, failing to do so may detract just as severely from their right to fair labour practices.\(^\text{1706}\)

As discussed in earlier chapters, the inferior position of reviewing courts relative to commissioners in resolving factual disputes is plain. Review proceedings do not entail the presentation of \textit{viva voce} evidence and presiding judges neither hear the parties’ testimonies first hand nor witness the relationship between them.\(^\text{1707}\) Judicial conclusions of fact during section 145 proceedings are based entirely on the records of proceedings,\(^\text{1708}\) which are frequently incomplete.\(^\text{1709}\) In the absence of arbitrary or capriciousness decision-making therefore, it is improbable that courts’ factual findings will be superior to commissioners’.\(^\text{1710}\) To the extent to which they are not, permitting courts to engage in intensive scrutiny of commissioners’ factual decisions, may lead to awards being inappropriately quashed. Parties’ rights to fair labour practices may then be threatened. By comparison, constraining the reach of the reasonableness standard in case of factual questions need not be conceived as detracting from parties’ rights to just administrative action. It is merely an apposite consequence of the standard’s contextual dependency.\(^\text{1711}\) Section 18.1(4)(d)’s formulation of reasonableness is thus both useful for revising section 145 of the LRA and critical to protecting parties’ rights to fair labour practices.

Returning to \textit{Khosa}, Binnie J then considered the standard of review applicable to the case at hand. Consistently with \textit{Dunsmuir’s} two step analysis, he found judicial precedent pointed cleanly towards reasonableness.\(^\text{1712}\) This test’s suitability was endorsed by the second stage of the enquiry – the standard of review analysis.\(^\text{1713}\) In re-affirming the contextual essence of the analysis,\(^\text{1714}\) the Judge described reasonableness as a single standard. Nonetheless, he

\(^{1706}\) Sections 33 and 23 of the Constitution respectively.

\(^{1707}\) The Explanatory Memorandum at 327-330; Benjamin & Cooper at 274-275; chapter 1.

\(^{1708}\) In Canada, judicial review proceedings proceed purely on the records of proceedings before the relevant decision-maker; Gruber at 304. In contrast to South Africa, however, in most cases, witness testimonies are not formally recorded and so do not form part of the records.

\(^{1709}\) See, for example, \textit{Shoprite Checkers 1} and \textit{Bestel}.

\(^{1710}\) \textit{Housen} para 22; \textit{AUPE} 2010 ABCA para 47.

\(^{1711}\) De Ville (2005) at 212, read with his cautionary remarks in JR De Ville 'Deference as respect and deference as sacrifice: A reading of \textit{Bato Star Fishing v Minister of Environmental Affairs'} (2004) 20 SAJHR 577.

\(^{1712}\) In all other instances involving decisions taken in accordance with the same provisions of the \textit{IRPA}, reviewing courts had applied the reasonableness standard.

\(^{1713}\) \textit{Khosa} paras 52-54.

\(^{1714}\) Ibid paras 28 & 59.
remarked, it ‘would take its colour from the context’. The implications of this statement are unclear. They are accordingly evaluated in more detail, in later paragraphs.

Of further significance in *Khosa* was the Court’s recognition of the Division’s expertise and broad discretion under the Immigration and Refugee Protection Act (‘IRPA’) to decide the question before it. Considerable deference to the Division’s findings was therefore due. When paying such deference, observed the SCC, courts were precluded from re-weighing the evidence before decision-makers. Attributing weight was an exclusively administrative function, beyond the powers of the judiciary. Applying these principles to the facts, Binnie J concluded that as the decision disclosed the Division’s reasons, referred to all pertinent legal principles and was both clear and comprehensible, it fell within the range of permissible decisions available to it. As such, the decision was immune from review.

While the majority’s judgment is helpful in many respects, certain issues remain. The first is illustrated by Fish J’s dissenting judgment in which he contested the prohibition against judicial allocations of weight. While Fish J agreed with Binnie J’s conception of the law, he dissented from the Court’s eventual finding of reasonableness. According to him, the Division had inappropriately ‘fixated’ upon a single factor for consideration. In Fish J’s words:

‘The majority’s inordinate focus on [an isolated consideration] and its failure to consider contrary evidence do not ‘fit comfortably with the principles of justification, transparency and intelligibility’ that are required in order to withstand reasonable review.’

Evidently, before resolving the matter in favour of Khosa, the Judge re-assessed the Division’s allocation of weight to the evidence which had been before it. The majority’s assertion that weight allocations were reserved for administrative decision-makers alone

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1715 Ibid.
1716 IRPA.
1717 *Khosa* paras 59-62; note too *Suresh* and the discussion of discretionary decisions (and *Baker*) below.
1718 *Khosa* paras 63-64.
1719 Ibid para 67.
1720 See also Rothstein J’s dissenting judgment; *Khosa* paras 70-137.
1721 *Khosa* paras 139-161.
1722 Ibid para 156. As the Division’s task had been to evaluate all the circumstances of Khosa’s case in order to ascertain whether there were sufficient humanitarian and compassionate grounds on which to allow relief from his removal order, the Division’s nominal regard for all but one consideration demonstrated that the decision had not been taken in accordance with reason.
renders his argument questionable.\footnote{\textit{Khosa} paras 4 and 65-67; see further \textit{Suresh} paras 29 & 34; \textit{Dunsmuir} para 47 and the discussion on judicial weight allocations below. For the view that indiscriminate disregard for administrative exercises of discretion is equally undesirable; refer to Klinck at 55; Mullan ‘Proportionality’ at 257-258.} Still, Fish J’s contentions expose an important concern: disproportionate emphasis by decision-makers on single or specific factors may be as harmful to parties’ rights as complete disregard therefore.\footnote{\textit{Ibid}.} Thus, a balance must be struck between unwarranted interference with weight allocations and formalistic attention thereto. Alongside outstanding questions arising from \textit{Dunsmuir} and \textit{Khosa}, potential means of achieving that balance are examined below.

### 6. UNANSWERED QUESTIONS

#### 6.1 Is reasonableness a variable enquiry?

The extent of the standard’s variability is the first of the obscurities associated with reasonableness.\footnote{\textit{Ibid}.} In \textit{Dunsmuir}, the Court stated that reasonableness entailed a contextual enquiry,\footnote{Consider, for one, the Court’s construction of \textit{Dunsmuir} in \textit{Manz v Sundher} 2009 BCCA 92.} implying flexibility in its application.\footnote{\textit{Dunsmuir} paras 30 & 52-62. Binnie J and Deschamps J ostensibly endorsed this view too.} Then in \textit{Khosa}, the same Court remarked that the standard, while single in nature, ‘would take its colour from the context’.\footnote{Mullan ‘Let’s try again!’ (2008) at 133-135; Lorne Sossin ‘\textit{Dunsmuir} – Plus ca change’ \textit{The Court} 17 March 2008, available at http://www.thecourt.ca/2008/03/17/dunsmuir, accessed on 6 December 2012.} The connotation is again that the standard’s boundaries may vary from one dispute to the next. Yet in earlier judgments, the SCC had condemned the notion that the standard ‘float[ed] along a spectrum of deference’.\footnote{\textit{Khosa} paras 52-58.} The Court’s pronouncement in \textit{Law Society of New Brunswick v Ryan}\footnote{\textit{Ryan v Law Society (New Brunswick)} [2003] 1 SCR 247.} is telling; in \textit{Ryan} it held:

> ‘The suggestion that reasonableness is an ‘area’ allowing for more or less deferential articulations would require that the court ask different questions of the decision depending on the circumstances and would be incompatible with the idea of a meaningful standard.’\footnote{Ibid para 47; the SCC explained the metaphor of a spectrum as follows: ‘The metaphor suggests standards arranged along a gradient of deference but it was never meant to suggest an infinite number of possible standards. That the metaphor relates to a spectrum of deference not a spectrum of standards has become increasingly clear since the use of the term ‘spectrum’ in \textit{Pezim}….’; \textit{Ryan} para 45.}
Bastarache supports this view, submitting that the SCC in *Dunsmuir* did not suggest that reasonableness existed on a sliding scale. According to him, the contextual essence of the test implied only that context dictates the breadth of the range of reasonable decisions available. In this way, flexibility may be maintained and multiple measures of reasonableness avoided. Expanding on this approach, Heckman asserts that the range of reasonable outcomes will be broader in matters involving ‘policy-infused discretion[s]’, for instance, than in those incorporating straightforward legislative interpretations.

Bastarache’s logic is appealing in so far as it purports to synchronise the various approaches. It has further been judicially endorsed. In *Mills v Ontario (Workplace Safety and Appeals Tribunal)*, for example, the Ontario Court of Appeal confirmed reasonableness to be a single standard. Writing for the majority in *Mills*, Rouleau J rejected the submission that reasonableness implied fluctuating degrees of deference, observing instead that:

> ‘The existence of varying degrees of deference within the single reasonableness standard suggests that a decision made by a tribunal will be found to be unreasonable if the court accords the tribunal a low degree of deference but that the same decision will be found to be reasonable if the court decides to accord the tribunal a high degree of deference. I do not read the decision of the majority in *Dunsmuir* as encompassing any such approach.’

Implicit in the Judge’s remarks is the assumption that defining reasonableness as a single standard is irreconcilable with varying levels of deference. However, whether adopting this view is distinct from acknowledging a spectrum of deference is doubtful. It is difficult to see how reviewing courts can reasonably be expected to avoid discrete levels of deference, while still defining the range of reasonable outcomes with greater or lesser breadth in any

1732 And the extent of coherence and comprehensiveness required of the reasons; Bastarache at 235. Klinck validly argues that if the notion of reasonableness as a single but contextual enquiry is to be reconciled with variability in the range of reasonable outcomes available, contextual factors should be limited to the nature of the question in dispute and the expertise of the relevant decision-maker; Klinck at 42, 49 & 52.

1733 Bastarache at 235; Woolley observes that, despite the demise of patent unreasonableness, reviewing courts will inevitably be more deferential on some occasions than on others; Woolley at 266-267.


1735 See, for example, *Mills* paras 14-24 and *Khosa* para 59.


1737 Ibid para 19.

given case.\textsuperscript{1739} Equally tricky to conceive is how precedent may be applied consistently with \textit{Dunsmuir}’s mandate, without accepting that distinctive degrees of reasonableness persist.\textsuperscript{1740}

An Alberta court’s decision in \textit{Lethbridge College v Lethbridge College Faculty Association}\textsuperscript{1741} exemplifies the conundrum. There, the Alberta Court of the Queen’s Bench expressly cast reasonableness as a single standard. Yet, it simultaneously held that labour arbitrators were entitled to higher degrees of deference than most other administrative decision-makers.\textsuperscript{1742} Given that prior to \textit{Dunsmuir}, the standard of patent unreasonableness generally applied to labour boards’ and arbitrators’ determinations,\textsuperscript{1743} just how reviewing courts may apply precedent to such cases (without offending \textit{Ryan})\textsuperscript{1744} is uncertain.\textsuperscript{1745}

Whether the notion of reasonableness as a single standard may truly be aligned with variable levels of deference is therefore doubtful. Arguably, the debate is a matter of semantics rather than of substance.\textsuperscript{1746} At the very least, it must be conceded that distinctive degrees of deference may apply to discrete administrative determinations.\textsuperscript{1747} As such, for the purposes of section 145 review proceedings, adopting distinguishable standards with reference to the nature of the question in dispute remains viable.

\textsuperscript{1739} Van Harten, Heckman and Mullan’s explanation of the variability of reasonableness assists to a degree; the authors submit that: ‘…a court, applying the reasonableness standard, has determined that it should show deference, although the manner in which it defers will depend on the circumstances…’; Van Harten, Heckman and Mullan at 861.

\textsuperscript{1740} Given that prior to \textit{Dunsmuir} two standards of reasonableness existed; Heckman (2009) at 775-776; \textit{Mills} para 22. Heckman records that the Federal and Alberta Courts of Appeal have adopted similar attitudes; Heckman (2009) at 780-781. Consider too \textit{Lake v Canada (Minister of Justice) [2008] 1 SCR 761}, where the SCC arguably applied ‘considerable deference’ to the Minister’s policy-laden decision, implying that reasonableness is indeed a flexible test; Heckman (2009) at 777-778.

\textsuperscript{1741} \textit{Lethbridge College v Lethbridge College Faculty Association} 2008 CarswellAlta 911 (Alta QB); note also Henderson at 184-185.

\textsuperscript{1742} Ibid. Comparably, in \textit{Khosa}, the SCC both confirmed reasonableness to be a single standard of review and repeatedly referred to ‘degrees of deference’; \textit{Khosa} paras 4, 19, 46 & 59.

\textsuperscript{1743} Henderson at 180; note, however, Henderson at 185.

\textsuperscript{1744} As prescribed by the Court in \textit{Dunsmuir} para 57; \textit{Ryan} para 47.

\textsuperscript{1745} This is particularly true in British Columbia where the ATA expressly provides for patent unreasonableness in certain circumstances; consider \textit{Evans v University of British Columbia} 2008 BCSC 1026 para 11.

\textsuperscript{1746} As Willis and Winkler comment, the new standard of reasonableness is intended: ‘…to encompass the same span of deference offered by its predecessors, now its components: the intellectually distinct but operationally indistinct standards of patent unreasonableness and reasonableness \textit{simpliciter}…’; Willis & Winkler (2008-2009) at 37.

\textsuperscript{1747} In addition, regardless of whether reasonableness is variable in nature, the benefits of collapsing the former two standards into one, are hindered by the complexity of the enquiry and the questions it has raised; van Harten, Heckman & Mullan at 847.
6.2 The relationship between reasonableness, review of reasons and review of outcomes

Just as the constituents of procedural and substantive unreasonableness in South Africa are vague, Bastarache and LeBel JJ’s emphases on the dual features of reasonableness have sparked debate. In order to uncover the true nature of reasonableness, it is necessary to address this controversy. By doing so, some of the uncertainty surrounding section 145 may be remedied. The majority’s observation in Dunsmuir that reasonableness ‘…refer[s] both to the process of articulating the reasons and to outcomes,’ is a useful starting point in this regard.

On the basis of this observation, Mullan submits that the coherence and intelligibility of a decision-maker’s reasoning process alone are insufficient to found reasonableness. Instead, both reasonableness in process and reasonableness in substance are necessary. In addition, when assessing substantive reasonableness, reviewing courts are not confined to analysing decision-maker’s reasons. As Mullan notes, when emphasising the duality of reasonableness, the SCC in Dunsmuir endorsed Dyzenhaus’s notion of ‘deference as respect’ as requiring: ‘…not submission but a respectful attention to the reasons offered or which could be offered in support of a decision.’

Thus, argues Mullan, where the reasons given for a decision are poor, the decision may still be upheld if reasons other than those provided by the decision-maker support it. The decision-maker’s reasons need not therefore constitute the sole justification for his or her ruling. More important is that the outcome of the dispute falls within the range of reasonable ones identified by the reviewing court. Mullan adds in this regard that reasons do not assure reasonableness. Rather,

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1748 Dunsmuir para 47.
1749 Instead, according to Mullan, to meet the requisites of coherence and intelligibility, decision-makers’ reasons should comprise ‘…a reasoned and reasonable articulation of the conclusion reached’; Mullan ‘Let’s try again!’ (2008) at 136.
1751 Mullan ‘Let’s try again!’ (2008) at 136. Reasons must still be coherent and intelligible, however.
1752 Heckman agrees with reference to Mills and Gagne c Autorite des Marches Financiers [2008] JQ no 7830 (CA) (QL); Heckman (2009) at 782-783. For the circumstances in which decision-makers are obliged to provide reasons, see Baker paras 20-28 and van Harten, Heckman & Mullan at 67 onwards.
1753 Mullan ‘Let’s try again!’ (2008) at 136; Bastarache at 232.
1754 Ibid; Heckman (2009) at 776-777. This view has since been confirmed by the SCC in Newfoundland and Labrador Nurses’ Union paras 14 &15.
reasonableness must be defined substantively, with reference both to the statutory context and the alleged grounds for review.\textsuperscript{1755}

The implications of Mullan’s formulation of reasonableness are debatable. One construction is that the substantive component of reasonableness is capable of remedying faulty reasoning. Conceivably, this might be inferred from the SCC’s statement in \textit{Newfoundland and Labrador Nurses’ Union v Newfoundland and Labrador (Treasury Board)}\textsuperscript{1756} that reviewing courts may entertain alternative reasons for decisions where the relevant decision-maker’s reasons do not justify its findings.\textsuperscript{1757} Adding to this, the Court held that the mere inadequacy of administrative reasons would not necessarily warrant review.\textsuperscript{1758} Thus, it might be assumed that satisfactory reasons\textsuperscript{1759} have become irrelevant to the enquiry on review.

Yet, when the judgment is examined more closely, vital qualifications to this inference appear, rendering its validity doubtful. The SCC’s explanation of the circumstances in which reasons would meet the \textit{Dunsmuir} requisites of ‘justification, transparency and intelligibility’ illustrates the point well.\textsuperscript{1760} It noted in this regard:

‘…if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the \textit{Dunsmuir} criteria are met.’\textsuperscript{1761}

By doing so, the Court acknowledged the continued functionality of administrative reasons and the need for reasons to meet certain basic standards in order to ensure that the purposes thereof are served. Logically then, where reasons fall short of these standards decisions resulting therefrom may be set aside.

In any event and as previously contended, the legitimacy of proposing that following \textit{Dunsmuir},\textsuperscript{1762} the quality of administrative reasons is unimportant is dubious. On the

\begin{footnotesize}
\begin{enumerate}
  \item Mullan ‘Proportionality’ at 251.
  \item \textit{Newfoundland and Labrador Nurses’ Union v Newfoundland and Labrador (Treasury Board)} [2011] 3 SCR 708 para 14.
  \item Ibid paras 12-14 & 17.
  \item Ibid para 14.
  \item And by implication, satisfactory reasoning processes.
  \item \textit{Dunsmuir} para 47.
  \item \textit{Newfoundland and Labrador Nurses’ Union} para 16.
  \item And by analogy \textit{Sidumo}.
\end{enumerate}
\end{footnotesize}
contrary, the import of adequate reasoning is plain. As such, reasonableness in outcome should not be capable of overriding poor reasoning processes, where the poverty in process renders the decision-maker’s reasons inadequate. Canadian courts since Dunsmuir have confirmed the need for satisfactory reasons, and Mullan’s acknowledgment of both features of reasonableness does too. Understanding his submissions as negating the significance of reasoning (and, by inference, of procedural unreasonableness) is consequently paradoxical. A preferable interpretation is reached by emphasizing Mullan’s recognition of the dual features of reasonableness and the materiality of each. Adopting this approach accords both elements of the test due weight. One proviso to it is nonetheless necessary. Only where administrative reasons are inadequate on account of deficiencies other than the substantive rationale for the decision, should those deficiencies supersede substantive conclusions. Construing the duality of reasonableness in this way ensures that both deference and the need for adequate administrative reasoning are acknowledged during review proceedings.

Bastarache disagrees with Mullan’s stance. First, he contests Mullan’s depiction of reasonableness as comprising two distinct features, doubting the power of reviewing courts to cite alternative reasons when validating otherwise irregular decisions. According to him, it is difficult to conceive of ‘rational and coherent reasons’ leading to unreasonable results. Further, in his view, Mullan’s interpretation of reasonableness misconstrues the SCC’s endorsement of ‘deference as respect’.

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1763 Consider Strategic Liquor Services v Mvumbi NO and Others 2010 (2) SA 92 (CC) para 17, citing Mphalele v First National Bank of South Africa Ltd 1999 (2) SA 667 (CC) para 12 and the discussion thereof in chapter 4.

1764 In the sense that the reasons in question do not serve the purposes for which they were given or do not meet the prescribed minimum standards.


1767 Recall Mullan’s contention that, following Dunsmuir, even where decision-makers’ reasons are coherent, reviewing courts remain obliged to assess reasonableness in outcome; Mullan ‘Let’s try again!’ (2008) at 136.

1768 Bastarache at 236; Heckman disagrees, citing Baker as an example of a case in which the reasoning process of the decision-maker was rational but the outcome was nevertheless unreasonable; Heckman (2009) at 777 fn 114; Consider further Canadian Union of Public Employees v Ontario (Minister of Labour) 2003 SCC 29 para 103 (‘CUPE (2003)’) and Montreal (City) v Montreal Port Authority [2010] 1 SCR 427.

1769 Dunsmuir para 48.
‘What was intended [instead] is that a court may consider the reasons that could have been offered as a means of evaluating the coherence of the reasons provided. The reasons that could have been offered thus serve to highlight any deficiencies in the reasons of the administrative decision-maker. A court is not invited to substitute such reasons for those provided.’

Whereas in some cases Bastarache’s depiction of reasonableness may be true, Heckman names several matters in which the reasoning process of the relevant decision-maker was starkly rational but the resultant decision still unreasonable. In *Montreal (City) v Montreal Port Authority*, for example, the SCC held both that the decision-maker’s reasons were transparent and intelligible (in that they had been clearly explained to the grievant) and that the decision-makers’ conclusions were unreasonable. Willis and Winkler, referring to the decision in *Clifford v Ontario (Attorney General)*, similarly espouse the dual elements of reasonableness. They aver that, since *Dunsmuir*, there is an evident distinction between adequacy of reasons and reasonableness of outcomes.

Consequently, both judicial and theoretical statements proclaim the legitimacy of assessing adequacy in reasoning as well as reasonableness in outcome. That is not to suggest that the two enquiries are cleanly separable. There is a necessary and inevitable overlap between them. Nonetheless, it remains useful, when conceptualising the dual features of reasonableness, to distinguish between the concepts at some level. Thus, where reasons do not serve the purposes for which they are given and so fall short of the stipulated minimum

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1770 Bastarache at 236.
1771 Which effectively reduces the standard to a requirement for adequate reasoning.
1772 See Baker; Heckman (2009) at 777 fn 114; *CUPE (2003)* and *Montreal (City)*. For a decision evincing an inadequate reasoning process, see Walsh.
1773 *Montreal (City) v Montreal Port Authority* [2010] 1 SCR 427.
1774 The decision-makers’ conclusion flowed from their interpretation of the relevant statute. In the Court’s view, that interpretation was materially erroneous and the decision-makers’ exercise of discretionary powers was accordingly inconsistent with the statutory principles at stake; Heckman (2009) at 777.
1775 *Clifford v Ontario (Attorney General)* (2009) 188 LAC (4th) 97 (Ont CA).
1776 EB Willis & WK Winkler *Willis and Winkler on Leading Labour Cases* (2010) at 25-26. According to Willis and Winkler there are now two components of reasonableness – the first concerns the process of articulating reasons and the second requires reasonableness in outcome: decisions must therefore be defensible in terms of the facts and the law; Willis & Winkler (2008-2009) at 35.
1777 Ibid; see too Khosa para 63; *Dunsmuir* para 47 and *Audmax Inc v Ontario Human Rights Tribunal* 2011 ONSC 315, where the Ontario Divisional Court evaluated both the adequacy of the Tribunal’s reasons and the reasonableness of its findings.
1779 That reasonableness comprises both substantive and procedural elements has been repeatedly confirmed by the Labour Courts in South Africa too and so cannot be ignored; *Southern Sun Hotel Interests* paras 14-17; *SAMWU v South African Local Government Bargaining Council & others* [2012] 4 BLLR 334 (LAC) (‘SAMWU’) para 10.
standards for adequate reasoning, the procedural element of reasonableness will not be met; the ensuing decision would then be vulnerable to review. Comparably, where the outcome is unreasonable, the decision may be overturned for substantive unreasonableness. Defining reasonableness in this manner\textsuperscript{1780} accords well with the characteristics of the test under section 145.\textsuperscript{1781} Pertinently too, it recognises the susceptibility of both poor reasoning and unsatisfactory outcomes to review. In turn, the Constitutional values of accountability, transparency and openness are secured, and the function of review in facilitating improved future decisions is acknowledged.\textsuperscript{1782} The qualification to this construction, however, as discussed under Mullan’s submissions above, remains critical: substantive reasonableness should be capable of remedying inadequate reasons only in relation to substantive inadequacies in those reasons. Defects in reasoning other than those which affect the outcome therefore remain reviewable. Doing so reconciles the tension between reviewing courts’ powers to consider alternative reasons and the role of satisfactory reasoning. In addition, it divulges the distinction between Carephone and Sidumo: while the Carephone test conforms to Bastarache’s stance, the Sidumo standard is consistent with Mullan’s. Additional clarity on the uncertainties surrounding section 145 may be obtained from further analysis of the procedural and substantive features of reasonableness. That analysis follows.

6.3 When will reasons be adequate?

If the proposed construction of the boundaries between substantive and procedural reasonableness is to be adopted, the constituents of adequate reasoning require definition. In Canada, the principal obligation in this regard is that decision-makers explain their decisions. Those explanations must be articulate and comprehensible.\textsuperscript{1783} In Khosa,\textsuperscript{1784} the Court discussed the features of adequate reasoning with reference to its findings in Dunsmuir.\textsuperscript{1785} First, it recounted the function of reasons in securing administrative accountability.\textsuperscript{1786} Accountability was owed not only to affected parties but also to reviewing courts and the

\textsuperscript{1780} Coupled with the qualification explained above with reference to Mullan’s interpretation of the Canadian text.
\textsuperscript{1781} Sasol Mining; Strategic Liquor Services para 17, citing Mpalhele para 12; chapters 3 & 4.
\textsuperscript{1783} Bastarache at 236. For the constituents of ‘coherence’ and ‘rationality’ (or ‘intelligibility’) in the context of administrative reasons, consult Mullan (Let’s try again!) (2008) at 136; Dunsmuir para 47 and Bastarache at 237.
\textsuperscript{1784} Khosa para 63.
\textsuperscript{1785} Where the requisites of ‘justifiability, transparency and intelligibility’ had been emphasized; Dunsmuir para 47.
\textsuperscript{1786} Ibid; Khosa para 63. See also Clifford para 31; Baker para 43.
As for the stipulation that decisions be ‘justifiable, transparent and intelligible’, Heckman instructively summarizes the SCC’s directives in *Khosa* as to when reasons will meet these requirements. He submits that the Divisions’ reasons did so as they:

‘...disclosed with clarity the considerations in support of both points of view, considered the appropriate factors, reviewed the evidence and attributed significant weight to the respondent’s evidence of remorse and prospects for rehabilitation, and came to their own conclusions based on their appreciation of that evidence.’

As such, the requirements of justifiability, transparency and intelligibility ostensibly infuse both elements of reasonableness. For the purposes of ascertaining the sufficiency of a decision-maker’s reasons specifically, the Court’s emphases on clarity and disclosure are key. Together they reveal that reasons must be clear and must indicate precisely what the decision-maker took into account when reaching its findings. Where these requisites are met, administrative reasons will be adequate.

In *Lake v Canada (Minister of Justice)*, the SCC expanded on the detail required of administrative reasons, with specific reference to the purposes of reasons. It held:

‘[The decision-maker’s] reasons need not be comprehensive. The purpose of providing reasons is twofold: to allow the individual to understand why the decision was made; and to allow the reviewing court to assess the validity of the decision. The [decision-maker]’s reasons must make it clear that he considered the individual’s submissions against extradition and must provide some basis for understanding why those submissions were rejected. Though the [decision-maker’s] Cotroni analysis was brief in the instant case, it was in my view sufficient. The [decision-maker] is not required to provide a detailed analysis for every factor. An explanation based on what

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1787 Given the significance of satisfactory reasoning, *Dunsmuir*’s endorsement of ‘deference as respect’ was not to be understood as detracting from the need for adequate reasons; *Khosa* para 63, read with *Dunsmuir*.

1788 *Dunsmuir* para 47.

1789 Note, however, that with the exception of Constitutional matters and legal questions of central importance to the legal community as a whole, reviewing courts are not generally entitled to reweigh the evidence before the relevant decision-maker; *Dunsmuir* para 60; *Toronto (City)* para 62; *Suresh* para 37; *Dr Q* paras 16 & 17. Thus, while the SCC in *Khosa* made express reference to the Division’s attribution of ‘significant weight’ to certain factors, the reference should be construed with this limitation in mind; consider the discussion of discretionary decisions below.


1791 Heckman’s appraisal of the Court’s findings concerning substantive unreasonableness is addressed in later paragraphs.

1792 *Lake v Canada (Minister of Justice)* [2008] 1 SCR 761.

1793 The reference to the *Cotroni* analysis is a reference to the factors the decision-maker was obliged to take into account in light of earlier case law.
the [decision-maker] considers the most persuasive factors will be sufficient for a reviewing court to determine whether his conclusion was reasonable. 1794

Read with Khosa, from these sentiments the core features of adequate reasoning may be extracted. 1795 First, reasons must serve the purposes for which they are given. 1796 They must accordingly be sufficiently clear and comprehensive as to inform both the parties and the reviewing court 1797 of the raison d’etre for the decision. 1798 Every trivial detail need not, however, be recorded. 1799 Reasons must simply demonstrate due consideration of relevant factual and legal factors and offer legitimate bases for the conclusions drawn. After all, deference dictates that a measure of leeway remains available to decision-makers. 1800 As the Court of Appeal in Clifford v Ontario (Attorney General) described this requirement, the tribunal must ‘grapple with the substance of the matter’, and that engagement must be apparent from the reasons provided. 1801 In other words, the decision-maker’s reasoning path should be evident and lucid and the basis for its findings should be satisfactorily explained and logically linked to the outcome. 1802 Where reasons comply with these requirements, the procedural aspect of reasonableness will be met. 1803

Given that the Labour Courts have frequently recalled the need for adequate reasons while acknowledging that minor details need not be recorded in awards, 1804 adopting a comparable attitude during section 145 proceedings would accord with CCMA commissioners’ current obligations. 1805 For the reasons discussed above, doing so need not impinge upon the declared distinctions between Carephone and Sidumo. 1806

1794 Lake para 46; see too Newfoundland and Labrador Nurses’ Union para 16; Anand, Edelstein & Wong-Chong at 159.
1795 As Jones & de Villars observe, unreasonableness may or may not be evident from the reasons themselves; DP Jones & AS de Villars Principles of Administrative Law 5 ed (2009) at 576-577.
1797 Audmax para 8.
1798 Lake para 46; Khosa paras 63-65; Clifford para 31; Maritime Paper Products para 36.
1799 Sufficiency rather than perfection is the threshold; Willis & Winkler (2010) at 25-26; Limestone District School Board v Ontario Secondary School Teachers’ Federation 2008 CanLII 63992 (ON SCDC) para 24; Newfoundland and Labrador Nurses’ Union para 16.
1800 Khosa para 63.
1801 Clifford para 31.
1803 And the reasons will be adequate.
1804 C Garbers ‘Reviewing CCMA awards in the aftermath of Sidumo’ (2008) 17(9) Contemporary Labour Law 84 at 86; Strategic Liquor Services para 17 citing Mpahlehle para 12.
1805 Consult, in this regard, section 138(7)(a) of the LRA; County Fair Foods (Pty) Ltd v CCMA & others (1999) 20 ILJ 1701 (LAC) at 1717C-E, read with Zondo JP’s qualifying remarks in Maepe v Commission for Conciliation, Arbitration and Mediation and another (2008) 29 ILJ 2189 (LAC) para 8 and CUSA v Tao Ying Metal Industries & others [2009] 1 BLLR 1 (CC) para 140.
1806 Fidelity paras 102-103.
6.4 When will a decision be substantively reasonable?

Following *Dunsmuir*, in addition to the confusion around the constituents of reasonableness, the meaning of substantive unreasonableness was uncertain. Delineating the boundaries of this concept is challenging. As Woolley comments: ‘No test can tell one how to be deferential; since deference is neither capitulation nor substitution of judgment it necessarily requires the drawing of fine lines in particular cases.’\(^{1807}\) Moreover, as argued in preceding chapters, defining the standard too clearly may detract from its contextual nature.\(^{1808}\) Attempting to describe its limits should therefore be undertaken with caution. Provided, however, that any description of reasonableness makes suitable allowance for contextual variation, the standard’s character need not be undermined. Given the benefits to consistency and predictability in review proceedings should a more structured approach to reasonableness be devised, demarcating the standard more concisely is crucial.

When doing so,\(^{1809}\) it is informative to begin with the guiding principles of reasonableness in Canada generally. The first of these is that reasonableness does not equate to correctness.\(^{1810}\) Supplementing this is the principle that administrative determinations will be unreasonable only where they fall outside the range of permissible ones.\(^{1811}\) Whereas decision-makers may be empowered to decide disputes,\(^{1812}\) reviewing courts are tasked with identifying the range of reasonable findings available.\(^{1813}\) Finally, the directive that decisions should be defensible in terms of both the facts and applicable law is pertinent.\(^{1814}\) Findings riddled with legal and factual errors, or which are illogical or unsupportable, may consequently be overturned for substantive unreasonableness.\(^{1815}\)

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\(^{1807}\) Woolley at 269.

\(^{1808}\) De Ville (2005) at 213-214. Consider too chapters 3 and 4 of this thesis.

\(^{1809}\) Particularly in so far as Canadian courts’ inconsistent attitudes to the concept divulge the difficulties associated with it; Heckman (2010) at 38. Compare, for example, *Plourde*; Desbiens v Wal-mart Canada Corp [2009] 3 SCR 540 (SCC); Syndicat de la fonction publique du Quebec; MiningWatch Canada and Montreal (City), read with Heckman (2010) at 43-46.

\(^{1810}\) *Dunsmuir* para 47. As the Court in *UNA, Local 301 v Capital Health Authority* (2009) 184 LAC (4th) 193 (CA) remarked, the outcome need not even be the most likely one; it must simply fall within the range of reasonable outcomes available; *UNA Local 301* paras 8-9.

\(^{1811}\) Ibid.

\(^{1812}\) Provided they are acting within the confines of their jurisdiction.

\(^{1813}\) *Dunsmuir* para 47.

\(^{1814}\) Ibid; for further references to these principles, consult *Dunsmuir* itself.

\(^{1815}\) For a comprehensive discussion of findings riddled with errors, see *Audmax*. 

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While these principles are established not only in Canada but also in South Africa, their apposite application is tricky. As a result, they require qualification. Binnie J’s caveat in *Khosa*, that a simple disagreement between an administrative decision-maker and a court is insufficient to warrant review, provides a valid starting point. Klinck expands on the notion with reference to *Dunsmuir* itself. According to her, the SCC’s rigid articulation of what it deemed the suitable statutory interpretation to be was incongruent with the spirit of reasonableness. In presuming the existence of a singularly correct interpretation of the legislation, the Court had erroneously implied that:

‘…‘the range of reasonable outcomes’ is somehow determined with reference to the court’s own assessment of the correct result. That is, ‘that the range of acceptable outcomes’ might simply be the acceptable ‘margin of error’ for administrative decision-makers under a reasonableness standard.’

As Klinck observes, crafting reasonableness review as a means of condoning decision-maker’s mistakes both detracts from Dyzenhaus’s conception of ‘deference as respect’ and encourages unwarranted interference with administrative determinations. Rather than defining a reasonable decision with reference to judicial opinions of the ‘correct’ outcome, reasonableness should be understood with reference to the acceptable outcomes available. These outcomes need not resemble each other. In Klinck’s view, two perfectly reasonable findings may actually be contrary in conclusion. Given the contextual dependency of reasonableness, the theoretical legitimacy of Klinck’s sentiments is apparent. In addition, envisaging reasonableness in this way ought to discourage appellate-like review under the guise of deference. Her formulation of the standard is thus an edifying conception of reasonableness, of value to section 145 proceedings.

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1816 At least in part; consider, for example, the LAC’s synopsis of reasonableness in *Fidelity* and chapter 3.
1818 Klinck at 48; for a comparable view, see Mullan ‘Let’s try again!’ (2008) at 137-140.
1819 Klinck at 49; for analogous judicial sentiments, see *Ryan* para 54.
1821 Klinck at 49.
1822 Ibid; Klinck agrees with Bastarache’s view that the contextual nature of reasonableness does not imply a spectrum but instead connotes the span of permissible, reasonable outcomes and processes available.
1823 Ibid.
1824 As not requiring correctness.
Of related consequence when refining the test is Dunsmuir’s declaration that reasonable decisions must be defensible in terms of both the facts and the relevant law.\textsuperscript{1825} To the extent to which the parameters of the applicable law are unclear, legislative intent as to whom the power to identify the law has been granted must be ascertained.\textsuperscript{1826} Only where the legislature has granted that power to the courts, should the standard of review be correctness. Contrarily, where decision-makers have been entrusted with deciding the issue at hand, reasonableness should apply.\textsuperscript{1827} It is at this point that recalling Binnie J’s and Klinck’s advice is vital. South African courts would do well to take heed of that advice, remembering that the applicable law in any given case may not be as amenable to finite definition as judicial assertions might otherwise suggest.

These principles are fundamental to reasonableness review. Yet, if consistency and reliability during section 145 proceedings are to be achieved, an even more succinct configuration of reasonableness is necessary. Reading the SCC’s pronouncements in Dunsmuir together with its discussion in Khosa as to when decisions will be ‘transparent, intelligible and justifiable’,\textsuperscript{1828} offers some direction.\textsuperscript{1829} In brief, these indicate that to be reasonable, decisions must evince:

\begin{itemize}
\item[a)] Consideration and acknowledgement of both parties’ accounts of the dispute;
\item[b)] Appraisal of all relevant legal principles;
\item[c)] Application of these principles to the core facts and allocation of weight thereto;\textsuperscript{1830} and
\item[d)] Conclusions independently reached.\textsuperscript{1831}
\end{itemize}

In other words, for a decision to be reasonable, the decision-maker must have recognised and understood the principal facts, identified the applicable law, related the facts to the law by balancing the key factors for consideration, and resolved the dispute impartially. Importantly,

\textsuperscript{1825} Van Harten, Heckman & Mullan at 872; Audmax.
\textsuperscript{1826} Consult the discussion on jurisdictional questions below; see too CUPE (2003), where the impact of legislative intent on the standard of review was emphasized; CUPE (2003) para 149; Huscroft at 310.
\textsuperscript{1827} Ibid.
\textsuperscript{1828} As described above; Heckman (2009) at 782; Khosa paras 66-67.
\textsuperscript{1829} Dunsmuir para 47.
\textsuperscript{1830} This accords with the Labour Courts’ current approach to review, evinced in matters such as Astore Africa (Pty) Ltd v CCMA & others [2008] 1 BLLR 14 (LC) paras 32-33. Recall the prohibition in Canada against judicial re-allocations of weight however; Dunsmuir para 60; Toronto (City) para 62; Suresh para 37 and Dr Q paras 16 & 17.
\textsuperscript{1831} This criterion flows logically from the requisites of natural justice, one of which is impartiality.
it is the decision-maker’s ‘appreciation of the evidence’\(^{1832}\) which is germane, rather than that of the courts. Augmenting this is the principle that reviewing courts are precluded from re-allocating the weight attributed by decision-makers to relevant factors.\(^{1833}\) It might be contended that this interpretation of reasonableness neglects the standard’s substantive character. However, that is not the case. Identifying ‘relevant’ legal principles and ‘core’ facts invariably involves value judgments,\(^{1834}\) necessitating evaluations of the merits of disputes. It is here that the contextual variability and substantive nature of reasonableness may be accounted for on review.

Certain Canadian judicial review statutes provide additional assistance in defining reasonableness. Judicial review legislation has been passed both in the federal and provincial spheres; there is accordingly a wealth of statutory provisions from which to draw.\(^{1835}\) For the purposes of this chapter, in addition to the FCA,\(^{1836}\) British Columbia’s \textit{Administrative Tribunals Act} (‘ATA’) is most useful.\(^{1837}\) Distinctively to other review acts, the ATA expressly provides for the standards of review applicable to each ground.\(^{1838}\) It adds to these prescriptions a concise definition of ‘patent unreasonableness’ – the standard stipulated for discretionary determinations.\(^{1839}\) It also distinguishes between review proceedings where a decision-maker’s enabling statute is covered by a privative clause and where it is not.\(^{1840}\) While section 58 of the ATA governs the former category, section 59 addresses the latter. As section 145 of the LRA constitutes a form of privative clause, section 58 of the ATA is of greater comparative pertinence than section 59. The relevance of section 58 to labour disputes is supported by British Columbia’s \textit{Labour Relations Code}, which itself contains a privative

\(^{1832}\) Heckman (2009) at 782; \textit{Khosa} paras 66-67.

\(^{1833}\) \textit{Dunsmuir} para 60; \textit{Toronto (City)} para 62; \textit{Suresh} para 37; \textit{Dr Q} paras 16 & 17. As expounded in the conclusion to this thesis, should judicial re-assessments of weight be prohibited in section 145 proceedings, the prohibition should be subject to the proviso that commissioners’ weight attributions may not be manifestly disproportionate in light of the facts and pertinent law.

\(^{1834}\) In \textit{Baker}, for one, the SCC conceded that discretionary and legal determinations necessarily entailed subjectivity; \textit{Baker} paras 54-56.

\(^{1835}\) Not all provincial jurisdictions have done so however; Jones & de Villars (2009) at 663.

\(^{1836}\) The relevant provisions of which have been addressed under \textit{Khosa} above.

\(^{1837}\) \textit{Administrative Tribunals Act} SBC 2004 c45 (‘ATA’).

\(^{1838}\) Jones (2009) at 123. In contrast to the FCA; \textit{Khosa}.

\(^{1839}\) Section 58(3)(d) of the ATA. Given \textit{Dunsmuir}’s abandonment of this standard, the impact of \textit{Dunsmuir} and \textit{Khosa} is more pronounced in British Columbia (‘BC’) than in other provinces; Elliot at 16. For the confusion caused by \textit{Khosa} in BC, see \textit{Khosa} paras 59 & 108, read with Jones (2009) fn t 4.

In other words, the section applies to reviews of labour boards’ and arbitrators’ decisions there. The significant provisions of the ATA read as follows:

‘Standard of review if tribunal's enabling Act has [a] privative clause

58 (1) ...  
(2) In a judicial review proceeding relating to expert tribunals under subsection (1)

(a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,

(b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and

(c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.

(3) For the purposes of subsection (2) (a), a discretionary decision is patently unreasonable if the discretion

(a) is exercised arbitrarily or in bad faith,

(b) is exercised for an improper purpose,

(c) is based entirely or predominantly on irrelevant factors, or

(d) fails to take statutory requirements into account.’

Due to *Dunsmuir*’s removal of patent unreasonableness from the landscape of review, the continued validity of sections 58(2)(a) and 58(3) is contentious. In particular, the proper approach to reviewing factual, discretionary and legal questions in British Columbia is indefinite. The meaning of statutory patent unreasonableness and its relationship to

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1841 Section 138 of the *Labour Relations Code* RSBC 1996 c244.
1842 Section 58(1) reads: ‘If the tribunal's enabling act contains a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.’
1843 Prior to *Dunsmuir*, in British Columbia, only discretionary decisions attracted the statutory definition of patent unreasonableness; the common law conception of patent unreasonableness applied to factual and legal determinations therefore; Underhill at 256-257.
1844 Simon Ruel ‘The top administrative law cases of 2011 and why they matter’ (2012) 25 Can J Admin L & Prac 25 at 26. In Ruel’s opinion, the position has been largely clarified by cases such as *Manz, Victoria Times Colonist* and *Kerton v British Columbia (Workers’ Compensation Appeal Tribunal)* 2011 BCCA 7. In *Kerton*, the Court of Appeal held that while common law principles are informative, ‘particular attention must be paid to the governing legislative provisions…’, including section 58 of the ATA; *Kerton* para 29. The statement is useful to a degree. Still, the precise relationship between the legislative standard and the common law test for reasonableness remains indeterminate. In addition, it is unclear whether the common law principles applicable to patent unreasonableness in the pre-*Dunsmuir* era have retained their relevance or whether reviewing courts are now obliged to apply patent unreasonableness with reference to the general standard of reasonableness enunciated in *Dunsmuir*.
1845 Compare *Manz*; *Asquini v British Columbia (Workers’ Compensation Appeal Tribunal)* 2009 BCSC 62; *Victoria Times Colonist*; *Woods*; *Westergaard* and *Pacific Newspaper Group*; Marcia McNeil *British
common law principles is similarly uncertain. Despite the lack of clarity in these areas, the standard’s statutory definition offers a practical means of refining the features of reasonableness under section 145. Of comparable utility are the ATA’s directives as to the standards applicable to different types of question. Read with Dunsmuir and Khosa, they elucidate the relationship between section 145 defects and the reasonableness enquiry. The statute’s provisions further attest to the logic of distinguishing between standards of review applicable to administrative findings and those regulating procedure. In terms of the ATA, while substantive findings attract reasonableness review in varying degrees, questions of procedural fairness are assessed against the standards of fairness and natural justice. The test prescribed for procedural fairness is aligned with that applicable to South African labour disputes – in essence, the test asks whether the procedures followed (or neglected) deprived the parties of a fair hearing. Finally, all residual (and allegedly defective) administrative conduct may be challenged on the basis of correctness.

Before recasting the aforementioned principles into a composite test for review, Canadian courts’ approaches to reviewing discretionary and jurisdictional determinations require attention. These are discussed below.

6.5 Reasonableness review of discretionary determinations

Given the controversy around judicial allocations of weight in South Africa and the link between administrative weight allocations and reviews of discretionary decisions in Canada, a suitable method of evaluating discretionary findings must be found. While the Court in Dunsmuir affirmed the need for deference to be paid to these findings, it failed to expound its remarks in this regard. It is therefore difficult to discern from the judgment precisely how administrative exercises of discretion should be examined. Fortunately, the SCC’s earlier


Ibid. According to Ruel, however, the position has now largely been clarified; Ruel at 50-52. Kerton para 29.

In section 58(3) of the ATA.

With the exception of jurisdictional conclusions. Note too (for the purposes of revising section 145) that legal questions of significant importance to the legal fraternity as a whole, or which concern common law principles unrelated to labour law, should give rise to correctness review; Dunsmuir para 53.

Transnet Freight Rail para 17; Fipaza v Eskom Holdings Ltd (2010) 31 ILJ 2903 (LC) para 58.

Refer, in this regard, to chapters 3 and 4; Transnet Freight Rail and NUM obo 112 Employees. Note also the inevitable relationship between reasonableness and discretionary decisions; Burns (2003) para 142.
decision in *Baker v Canada (Minister of Citizenship and Immigration)*\(^{1851}\) provides some bearing.

Prior to *Baker*, abuses of discretion\(^{1852}\) were reviewable for want of correctness, distinctively to errors of law.\(^{1853}\) The Court in *Baker* saw the anomaly of this distinction, noting that both legal and discretionary findings inevitably involved statutory or legal interpretation; differentiating between them was accordingly nonsensical.\(^{1854}\) Provided a pragmatic and functional analysis pointed to reasonableness, held the Court, deference was due to discretionary determinations. In turn, the correctness standard was no longer apt.\(^{1855}\) The implication of this was that judicial re-allocations of weight were inappropriate. In the SCC’s view nonetheless, this did not exempt discretionary findings which were inconsistent with enabling legislation, principles of administrative law and the rule of law, fundamental values of Canadian society or the Charter, from review.\(^{1856}\)

Applying these principles to the facts in *Baker*, the Court concluded that the decision-maker there had failed both to consider particular factors and to attribute ‘significant weight’ to them.\(^{1857}\) Specifically, certain fundamental values of Canadian society had not been accounted for.\(^{1858}\) This rendered its decision contrary to legislative intent and susceptible to review.\(^{1859}\) In theory, it was plain following *Baker* that reviewing courts were barred from re-evaluating decision-makers’ attributions of weight.\(^{1860}\) Yet, the SCC’s qualification and application of this principle to the facts left the extent of the prohibition debatable.

\(^{1851}\) *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817.

\(^{1852}\) For abuses of discretion as a ground of review, consult van Harten, Heckman & Mullan at 954-955; for the origin of courts’ powers to review abuses of discretion, see *Roncarelli v Du Plessis* [1959] SCR 121 (Que) at 140.

\(^{1853}\) Errors of law were reviewed on the standard of either patent unreasonableness or unreasonableness simpliciter; van Harten, Heckman & Mullan at 955; Cartier at 61; Gratton at 483. In specified cases, however, the *Wednesbury* standard was applied; *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA); *Baker* para 53. For review of discretionary determinations in the labour context, see *National Bank v Canada v Retail Clerks International Union* [1984] 1 SCR 269 (Can).

\(^{1854}\) Interpreting legislation invariably involves a measure of subjectivity; *Baker* paras 54-56.

\(^{1855}\) *Baker* paras 54-56; note, however, Mullan’s cautionary remarks in ‘The struggle for complexity’ (2004) at 66.

\(^{1856}\) *Baker* para 53.

\(^{1857}\) Ibid paras 74-77.


\(^{1859}\) *Baker* paras 74-76.

\(^{1860}\) Van Harten, Heckman & Mullan at 955; Cartier at 61.
In *Suresh v Canada (Minister of Citizenship and Immigration)*, the Court sought to clarify the issue. It began by rejecting the view that courts were permitted to re-assess administrative allocations of weight during reviews of discretionary findings. According to the SCC, *Baker* had not interfered with this principle. The case was merely authority for the power of reviewing courts to evaluate whether a decision-maker had ‘failed to consider and weigh’ important factors. While decision-makers were obliged to attend to all relevant considerations and allocate some weight to each, determining the suitability of their allocations fell beyond the scope of judicial review. This approach has been confirmed by the SCC in subsequent matters. Still, despite judicial confirmation of the prohibition, the *Baker* Court’s declaration that administrative findings must be consistent with stipulated values and principles endures.

Since *Dunsmuir*, these principles have been affirmed by the courts. In both *Montreal (City) v Montreal Port Authority* and *Bell Canada v Bell Aliant Regional Communications*, for instance, the SCC held that to survive review, discretionary decisions needed to be aligned with the values underpinning the legislative grant of the discretionary power concerned. Consequently, decisions offensive to the objects of enabling legislation would generally be unreasonable. Read with the *Dunsmuir* guidelines, the proviso to this must be that where legal questions relating to the Constitution Acts or questions of fundamental import to the legal community face review, the correctness standard should apply.

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1861 *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3 (Can).
1862 Ibid paras 29 & 34; see also *Pezim* at 607. Whether the Court in *Baker* truly refrained from re-weighing relevant considerations nevertheless remains doubtful; recall too *Khosa* paras 4 & 65-67.
1863 *Suresh* paras 29 & 34.
1864 *Khosa* paras 4 & 66-67; *Halifax* para 79; *Pezim* at 607. In *Montreal (City)*, the SCC confirmed the qualifications to this rule stipulated in *Baker*. As Heckman records, however, it failed to indicate the extent to which decision-makers may identify relevant values of their own accord; Heckman (2010) at 41-42. Consult further, in this regard, *CUPE (2003)* and Huscroft at 307-8.
1865 And specifically with the underlying purposes of the original grant of discretion.
1866 Consider *Montreal (City)* and *Bell Canada v Bell Aliant Regional Communications* [2009] 2 SCR 764 (SCC).
1867 *Montreal (City)*.
1868 *Bell Canada*.
1869 Ibid.
1870 *Dunsmuir* para 58.
Canadian courts’ emphasis on societal values and legislative purpose is consistent with the Labour Courts’ attitude since Carephone. Applying a test akin to the Canadian one in South Africa therefore seems fitting. The benefits of doing so are palpable. Were courts to refrain from re-examining commissioners’ allocations of weight to relevant factors, undue judicial interference would be reduced. Likely too, the instance of review proceedings would decline. Given commissioners’ broad discretions to determine the fairness of dismissals, the appropriateness of sanctions and the form of arbitration proceedings, the approach would further comply with legislative intent. Thus, delineating the boundaries of review as preclusive of judicial attributions of weight offers a feasible means of defining the limits of reviewing courts’ powers. If suitably qualified, applying it in practice need endanger neither legal certainty nor precedent.

Nevertheless, two conditions ought to attach to this proposed restraint of judicial power. The first arises from the Canadian principle that Constitutional questions should be evaluated on the standard of correctness. Given the import of the Constitution, the notion seems apt. Still, whether applying an analogous principle in South Africa would be fitting is questionable. The second contests the appropriateness of an outright ban on judicial assessments of weight. These concerns (and potential solutions thereto) are considered in turn below.

The first stems from the inevitable presence of South Africa’s Constitutional right to fair labour practices in all CCMA arbitrations. This is exacerbated by the right to administrative justice’s role in all review proceedings. Given the overlap between these rights and Constitutional and public values, were the Canadian approach applied to section 145 proceedings, the prohibition against judicial assessments of weight would be

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1871 In Carephone, the LAC referred to the need to conduct review with reference to the Bill of Rights, the objects of the LRA and sections 23 and 33 of the Constitution; Carephone paras 11-37; chapter 2.  
1872 See section 138 of the LRA; Shoprite Checkers 3 para 32; Myburgh (2010) at 15-16 and the CCMA Guidelines: Misconduct Arbitrations in GenN 602 GG 34573 of 2 September 2011, read with chapter 1 of this thesis.  
1873 Refer to JL Clark ‘A mixed question of fact and law’ (1908-1909) 18 Yale LJ 404 at 404. While Clark’s argument was made in the context of appeals rather than reviews, it is of analogous import to review in the traditional sense.  
1874 Dunsmuir para 58.  
1875 See section 23 of the Constitution, read with section 1(a) of the LRA.  
1876 Sanctioning judicial re-assessments of weight in light of societal values, Charter principles and the like.
Constitutional questions of a discretionary nature should accordingly not be tested against the standard of correctness when reviewing CCMA awards.

Turning to the second difficulty with the proposed ban, whether a complete prohibition of judicial weight allocations is desirable, may be disputed. The majority’s purported refusal in *Khosa* to evaluate the Division’s assessment of weight at all, comparatively to Fish J’s stance, illustrates the problem. As Klinck observes:

‘…such an absolute refusal to assess the weight assigned to discretionary factors undercuts the legal requirement to take certain factors into account. Indeed, it is easy for administrative decision-makers to simply canvass the necessary factors, while failing to give some of them any genuine consideration.’

The legitimacy of her remarks is plain. Of related value is Mullan’s suggestion that discretionary determinations should be reviewed with reference to the proportionality test – purportedly a broader measure of reasonableness. As he argues, devising reasonableness in this way would lend greater structure to the concept. The standard’s susceptibility to manipulation by officious courts would then be curbed. Applying proportionality review to discretionary findings, submits Mullan, could entail asking whether the decision-maker’s allocation of weight to stipulated factors was ‘manifestly disproportionate’.

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1877 As all reviews would then allow for judicial re-allocations of weight or assessment on the basis of correctness (contrary to legislative intent); section 1(d) of the LRA.
1878 *As Dunsmuir directed: Dunsmuir* para 58.
1879 Which Jones submits the SCC in *Baker* was guilty of contravening; Jones (2003). For the prohibition generally, see *Suresh* para 37; *Dr Q* paras 16-17 and *Khosa* paras 66-67.
1880 Recall Fish J’s view that the Division had fixated on a single factor; *Khosa* para 156.
1881 *Khosa* para 62. Despite the prohibition, the SCC in *Khosa* commended the decision-maker for having attributed ‘significant weight’ to the relevant factors; *Khosa* paras 65-67.
1882 Klinck at 55.
1885 Mullan ‘Proportionality’ at 256; *CUPE* (2003).
1886 Mullan ‘Proportionality’ at 257-258; *Khosa* para 156. See also Johannes Chan ‘A sliding scale of reasonableness in judicial review’ 2006 Acta Juridica 233; *R (Daly) v Secretary of State for the Home
precluding full scale judicial re-assessments of weight, that test would ensure that grossly unbalanced outcomes would be quashed. In chapter 4, it was submitted that proportionality\textsuperscript{1887} is of limited pertinence to section 145 proceedings.\textsuperscript{1888} However, should the proposed ban on judicial assessments of weight be incorporated into the test for review of CCMA awards, the import of Klinck’s and Mullan’s sentiments must be acknowledged.\textsuperscript{1889} As such, some allowance for evaluating commissioners’ allocations of weight must be made. In line with Mullan’s proposal, that allowance could permit review of grossly or egregiously disproportionate weight allocations.\textsuperscript{1890} Yet, the pliability of labels such as ‘gross’ and ‘egregious’ may expose the scope of this test to radical fluctuations between cases. Confining the enquiry to the question of whether commissioners had attributed at least some weight to each relevant consideration may therefore be preferable.\textsuperscript{1891}

6.6 True questions of ‘jurisdiction’

It has been proposed that the nature of the question in dispute be determinative of the standard of review. From the Canadian experience it is clear that one of the key difficulties with this model is defining the term ‘jurisdictional’.\textsuperscript{1892} When reformulating the test for review of CCMA awards, it is sensible to anticipate this problem.\textsuperscript{1893} The Canadian courts’ attitudes to jurisdictional decisions, and the SCC’s definition thereof in Dunsmuir, constitute useful points of departure in this regard.\textsuperscript{1894} Before examining the Dunsmuir definition, it is helpful to canvass the pitfalls associated with identifying jurisdictional issues in Canada generally.

\textit{Department [2001]} 2 AC 532 at 547. The test for proportionality in Canadian law (which applies to allegedly unconstitutional irregularities) closely resembles section 36 of the Constitution.\textsuperscript{1887} As defined by Hoexter; Hoexter (2007) at 309-310.\textsuperscript{1888} For the complete argument, refer to chapter 4.\textsuperscript{1889} Particularly given the ostensible (albeit debatable) poverty of many CCMA awards; Sasol Mining para 7.\textsuperscript{1889} Comparably to the test articulated by Conradie JA in County Fair Foods para 43.\textsuperscript{1890} See the discussion of Khosa above.\textsuperscript{1891} In so far as the definition is vague, courts may inappropriately label questions as jurisdictional, thereby enabling correctness review; Heckman (2010); Heckman (2009); Mullan ‘Let’s try again!’ (2008) at 126-127; Dustin Kenall ‘De-regulating the regulatory compact: The legacy of Dunsmuir and the “jurisdictional” question doctrine’ (2011) 24 Can J Admin L & Prac 115 at 117. For the principles of review governing jurisdictional questions in Canada, see Heckman (2009) at 770. Compare the Canadian experience to that of pre-democratic South Africa, with reference to De Ville (2005) at 150-152 and Hoexter (2007) at 252-258. For the position in the labour arena, consult Fergus (2012).\textsuperscript{1892} There is evidence to suggest that the Labour Courts are already attributing the ‘jurisdictional’ label inappropriately; see Fergus (2012) and the cases cited therein. A preferable stance was taken in EOH Abantu (Pty) Ltd v Commission for Conciliation, Arbitration and Mediation & others (2010) 31 ILJ 937 (LC) para 28.\textsuperscript{1893} Note, however, that in Alberta Teachers’ Association v Alberta (Information & Privacy Commissioner) 2011 SCC 61, the SCC expressed skepticism as to whether a separate category of ‘jurisdictional’ question existed at all; Alberta Teachers’ Association para 34; Quayat at 184.
Well before Dunsmuir, whether a question was jurisdictional was determined with reference to either the ‘preliminary question doctrine’ or by asking whether the decision-maker had asked the ‘wrong question.’ The former obliged courts to consider whether the issue in dispute was a condition precedent to the decision-maker’s exercise of jurisdiction or collateral to the merits, or whether it fell within the prescribed limits of the decision-maker’s jurisdiction. Where the question was ‘preliminary’ to jurisdiction or ‘collateral’ to the merits, it was subject to correctness review. In contrast, questions of law or fact beyond these parameters were immunised from review entirely, provided only that the enabling legislation contained a privative clause. The primary difficulty with this doctrine was the flexibility of the terms ‘preliminary’ and ‘collateral’. This allowed interventionist courts to style legal questions as jurisdictional issues, enabling correctness review in the process.

Equally problematic, the wrong question doctrine held that a decision could be set aside if the decision-maker had: ‘…asked itself the ‘wrong question’, taken into consideration legally irrelevant factors, or ignored factors that it was legally required to consider.’ Again, the doctrine’s principal shortcoming was its failure to distinguish meaningfully between

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1895. The doctrine followed the House of Lord’s decision in Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147 but was not entirely accepted by Canadian Courts. In Metropolitan Life Insurance Co, the SCC nonetheless adopted the precise language used in Anisminic, obliging lower courts to apply it; van Harten, Heckman & Mullan at 803-804.
1897. Ibid at 805.
1898. Ibid.
1900. See, for example, Bora Laskin ‘Certiorari to labour boards: The apparent futility of privative clauses’ (1952) 30 Can Bar Rev 986 at 989-991, 994 & 996.
1901. See, for example, Shell Canada Products Ltd v Vancouver (City) [1994] 1 SCR 231 (BC); Mullan ‘The struggle for complexity’ (2004) at 79-80; Council of Canadians with Disabilities; there, the SCC warned that the preliminary question doctrine: ‘…has the capacity to unravel the essence of the decision and undermine the very characteristic of the Agency which entitles it to the highest level of deference from a court – its specialized expertise.’; Council of Canadians with Disabilities para 88.
1903. Van Harten, Heckman & Mullan at 805; Anisminic.
questions of jurisdiction and questions of law. This jeopardised the principle that legal questions were exempt from correctness review.\textsuperscript{1904}

In response to these difficulties, the SCC in \textit{Canadian Union of Public Employees Local 963 v New Brunswick Liquor Corporation (‘CUPE (1979)’)}\textsuperscript{1905} stated that: ‘The courts…should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so.’\textsuperscript{1906} Jurisdiction was thus to be construed in the narrow sense, as concerning the decision-maker’s authority to entertain the enquiry at hand to the exclusion of other concerns.\textsuperscript{1907} Notwithstanding this directive, officious courts continued to escape reasonableness review via doubtful attributions of the ‘jurisdictional’ label.\textsuperscript{1908}

Seeking to remedy the problem in \textit{UES, Local 298 v Bibeault}, the SCC introduced the pragmatic and functional analysis.\textsuperscript{1909} Later, in \textit{Pushpanathan v Canada (Minister of Citizenship and Immigration)},\textsuperscript{1910} it confined jurisdictional questions to those attracting correctness review under this analysis.\textsuperscript{1911} Consistently with the purpose of the analysis,

\textsuperscript{1904} Van Harten, Heckman & Mullan at 806.

\textsuperscript{1905} \textit{Canadian Union of Public Employees Local 963 v New Brunswick Liquor Corporation} [1979] 2 SCR 227 at 233 (‘CUPE (1979)’). Note also, \textit{Paschienyk v Saskatchewan (Workers Compensation Board)} [1997] 2 SCR 890. The SCC in \textit{CUPE (1979)} explained its departure from the preliminary question doctrine on the basis that the dispute had arisen in the labour relations context, holding that: ‘[p]rivative clauses of this type are typically found in labour relations legislation. The rationale for protection of a labour relations board’s decisions within jurisdiction is straightforward and compelling. The labour board is a specialized tribunal which administers a comprehensive statute regulating labour relations. In the administration of that regime, a board is called upon not only to find facts and decide questions of law, but also to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada, and its labour relations sense acquired from accumulated expertise in the field.’; \textit{CUPE (1979)} at 421-424. For further commentary on \textit{CUPE (1979)}, refer to Langille (1986) at 191-194.

\textsuperscript{1906} \textit{CUPE (1979)} at 233; consider too \textit{Nipawin} at 389.

\textsuperscript{1907} Ibid.


\textsuperscript{1909} Which seeks to ascertain legislative intent as to the body upon which the legislature intended to confer the decision-making power in question; \textit{Bibeault} at 1083-1087; Heckman (2009) at 770 – 771; \textit{Dunsmuir} paras 30-31; Mullan ‘Let’s try again!’ (2008) at 130.

\textsuperscript{1910} \textit{Pushpanathan v Canada (Minister of Citizenship and Immigration)} [1998] 1 SCR 982.

\textsuperscript{1911} Ibid para 28.
determining the nature of the question in dispute was associated with identifying legislative intent.  

While the Pushpanathan method alleviated the confusion, in Dunsmuir, the SCC returned to an equivocal definition of ‘jurisdictional’. It held:

‘…true jurisdictional questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be ultra vires or to constitute a wrongful decline of jurisdiction.’

This vague depiction of ‘jurisdictional questions’ exposed the jurisdictional label to judicial manipulation once more. Recognising this danger in Nolan v Kerry (Canada) Inc, the Court reiterated that true questions of jurisdiction were limited and that:

‘The inference to be drawn from paras 54 and 59 of Dunsmuir is that courts should usually defer when the tribunal is interpreting its own statute and will only exceptionally apply a correctness standard when an interpretation of that statute raises a broad question of the tribunal’s authority.’

Still, the Court offered no indication of how jurisdictional issues were to be distinguished from other matters. Reviewing courts’ attitudes thereto have therefore been erratic since Nolan. Of these, the Court’s description of ‘jurisdiction’ in Public Service Alliance of Canada v Canadian Federal Pilots Association et al is preferable. There, Evans JA

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1913 Dunsmuir para 59.

1914 Mullan ‘Let’s try again!’ (2008) at 129; consider too Mullan’s criticism of Bell v Ontario and Bastarache’s response thereto; Bastarache at 233. For varying interpretations of Dunsmuir’s formulation of jurisdictional issues, see Gruber at 313; Heckman (2009) at 770-774; Canada (Attorney General) v Watkin (2008) 378 NR 268 (FCA); Nolan at 32-35; Public Service Alliance of Canada v Canadian Federal Pilots Association 2009 FCA 223 and van Harten, Heckman & Mullan at 798. For the view that following Dunsmuir, courts have progressively moved away from inopportune labeling questions as jurisdictional, consult Kenall.


1916 Ibid para 35. Thus, the interpretation of the tribunal’s home statute in Nolan did not comprise a jurisdictional question and instead attracted deference; Heckman (2009) at 772.

1917 Heckman (2009) at 772; Northrop Grumman Overseas Services Corp v Canada (Attorney General) [2009] 3 SCR 309 (SCC). In Heckman’s view, the SCC’s conception of ‘jurisdictional’ in Northrop was unduly broad; Heckman (2010) at 33; for a comparable approach in the federal sphere, see Watkin; consult too Heckman (2009) at 772-774; Heckman (2010) at 34-35 and Assoc des courtiers et agents immobiliers du Quebec v Propio Direct Inc [2008] 2 SCR 195 (SCC) para 67, as cited therein.

asserted that in disputes involving adjudicative or policy-making functions at least, the presence of jurisdictional questions was best ascertained with reference to the standard of review analysis. This did not imply that jurisdictional issues would never arise; it was merely necessary to limit their incidence appropriately. It consequently remained crucial that: ‘the tribunal [had] the legal authority to interpret and apply the disputed provision of its enabling legislation.’ In other words, provided that the statute concerned authorises the decision-maker to engage with the issue in dispute, the question will not be jurisdictional.

The merits of Canadian Federal Pilots resemble those of many CCMA arbitrations. As such, the principles articulated therein are well suited to section 145 review proceedings. If unwarranted intrusion is to be avoided, adopting an equivalent attitude to jurisdictional issues during these proceedings may be necessary. When determining the jurisdictional status of a question, the apposite enquiry might therefore be whether the legislature intended commissioners to be the final arbiters of the issue. Where the answer to this enquiry is yes, the question should not be cast as jurisdictional.

Of course, just as the term ‘jurisdictional’ is open to abuse, so too may formulations of the nature of the question in dispute be manipulated. As Underhill remarks:

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1919 Note that when engaged in arbitration proceedings, CCMA commissioners are performing an adjudicative function.
1920 This is analogous to the Pushpanathan test; Canadian Federal Pilots paras 37-49; note also Council of Canadians with Disabilities para 88. For an example of a truly jurisdictional issue (according to the Court), see United Taxi Drivers’ Fellowship of Southern Alberta v Calgary (City) [2004] 1 SCR 485 and Canadian Federal Pilots para 5, read with Dunsmuir.
1921 Canadian Federal Pilots para 51. In the ordinary course, the authority of decision-makers to render determinations is either expressly or implicitly conferred by statute; Canadian Federal Pilots para 51; Nova Scotia (Workers’ Compensation Board) v Martin [2003] 2 SCR 504 paras 40-41; AUPE 2008 ABCA paras 15-16.
1922 This approach was seemingly followed in R v Ontario Public Service Employees Union (OPSEU) 2010 ONSC 4006 and again in Toronto Hydro-Electric System Ltd v Ontario (Energy Board) 2010 ONCA 284 (‘THESL’) paras 22, 33 & 34.
1923 For the facts of the case, refer to Canadian Federal Pilots paras 3, 20 & 53. On the strength of those facts, the Court concluded that the question in dispute was not jurisdictional and the reasonableness standard therefore applied.
1924 For examples of abuse, consider Bell v Ontario and Bibeault; Mullan ‘The struggle for complexity’ (2008) at 74.
‘…defining the nature of the question in such a way as to lead to a standard of correctness is not unknown for an interventionist court unhappy with the bottom line of a particular administrative decision.’

To guard against this, reviewing courts must define the boundaries of questions before them carefully, with reference to the case at hand. Should the nature of the question in dispute become the chief determinant of applicable standards of review, doing so will be imperative. Without careful delineation of questions in dispute, consistency and coherency during review proceedings may not be achieved.

7. CONCLUSION

Much of the uncertainty evident in section 145 proceedings may be resolved with reference to Canadian principles of judicial review. While comparative analysis should be treated with caution, the numerous parallels between the countries’ administrative and labour law regimes suggest that Canadian law would be a viable starting point from which to clarify the South African position. Of particular utility are the SCC’s judgments in Dunsmuir and Khosa. While in Dunsmuir the ambit and application of the reasonableness standard were revised, in Khosa, the SCC explained the common law’s relationship with judicial review legislation. Together these decisions demonstrate that the Canadian conception of reasonableness (comparably to South Africa’s), is concerned with ensuring that administrative decision-makers remain within the confines of the law when resolving disputes. In turn, the rule of law is upheld. Moreover, reasonableness dictates that respect be shown for the proper separation of powers between the legislature, executive and judiciary. This implies that a measure of deference is due to administrative decisions facing review. When engaged in review proceedings therefore, courts must recall that

1928 Underhill at 256; Underhill refers in this regard to Harrison v British Columbia (Information & Privacy Commissioner) 2008 BCSC 411. See also, Barrie Public Utilities v Canadian Cable Television Assn [2003] 1 SCR 476 para 16 and Deputy Minister of National Revenue Canada v Mattel Canada Inc [2001] 2 SCR 100 paras 33 & 86-87.
1929 Heckman (2009) at 760; Junger at 66; cases in which precedent was arguably relied upon inappropriately include Propio Direct Inc; Canadian National Railway v Canadian Transportation Agency (2008) 378 NCR 121 (FCA) and Northrop; Heckman (2010) at 32-33; Heckman (2009) at 765-766. For the tension between the presumption of reasonableness where decision-makers interpret their home statues and Dunsmuir’s directive to apply precedent, consult Quayat at 191.
1930 As proposed above and addressed in more detail below and in the conclusion to this thesis.
1931 Defining the nature of the question in dispute correctly is particularly important in Canada, where precedent (rather than a full standard of review analysis) may dictate the applicable standard of review; Heckman (2009) at 765-766, read with Dunsmuir.
1932 See, in this regard, Kahn-Freund; Arthurs (2007).
1933 Dunsmuir paras 27-28.
reasonableness does not equate to correctness. Instead, to be reasonable, a decision must simply fall within the range of acceptable outcomes identified by the reviewing court.\textsuperscript{1934} When delineating the breadth of this range, contextual considerations come into play.\textsuperscript{1935} Here, the intersection between the Canadian formulation of reasonableness and that of the Labour Courts\textsuperscript{1936} is overt. Some might argue that Canadian law resultantly has little to offer in the search for a reliable and concise test for review.\textsuperscript{1937} However, the opposite is true. The submissions of Canadian commentators and judges since Dunsmuir describe the limits of reasonableness in an accessible and instructive way.\textsuperscript{1938}

The first important principle, which may be drawn from Canadian law, is that reasonableness is not the only basis on which administrative determinations may be assessed. In certain circumstances, the correctness standard is more fitting.\textsuperscript{1939} In other words, different tests apply to different contexts. The primary criterion for determining the applicable standard is the nature of the defective conduct alleged. Were an equivalent construction of reasonableness adopted in South Africa, the controversy around the relationship between reasonableness and section 145 may be remedied.\textsuperscript{1940} Rather than wavering between discrete measures of scrutiny, this would enable reviewing courts to apply prescribed standards (of either reasonableness or correctness) to each of the statutory grounds. Consistently with Khosa, when doing so, some room for contextual variation should be retained.\textsuperscript{1941}

When determining applicable standards of review, Canadian courts are obliged by Dunsmuir to consider judicial precedent. Where precedent clearly indicates the relevant standard, that standard should be used. On the other hand, where no indication of the appropriate test is available, reviewing courts must engage in the standard of review analysis.\textsuperscript{1942} The primary object of this analysis is to identify legislative intent and specifically, the body upon whom the legislature purported to confer the power to decide the matter at stake.\textsuperscript{1943} Like the Bato Star factors, the standard of review analysis emphasises the context in which the decision was

\textsuperscript{1934} Ibid para 47.
\textsuperscript{1935} Khosa paras 28 & 59.
\textsuperscript{1936} For details, refer to Sidumo, Fidelity and chapters 3 and 4.
\textsuperscript{1937} Ibid.
\textsuperscript{1938} In the specific context of section 145 proceedings.
\textsuperscript{1939} Dunsmuir para 66.
\textsuperscript{1940} With reference to Khosa’s stipulation that the Dunsmuir principles applied to statutory grounds of review too.
\textsuperscript{1941} Khosa paras 28 & 59.
\textsuperscript{1942} Unless precedent clearly indicates the applicable standard.
\textsuperscript{1943} Dunsmuir para 29; THESL para 22; Kenall at 122.
taken, with reference to specified criteria.\textsuperscript{1944} Of these criteria, the most pertinent to section 145 proceedings is ‘the nature of the question in dispute’. It has accordingly been proposed that this factor be adopted as the principal determinant of reasonableness’s contextual flexibility in different cases. By confining contextual consideration to this factor, the difficulties associated with the \textit{Bato Star} criteria may be assuaged.\textsuperscript{1945}

Of further value in Canadian law are the guidelines devised by the SCC in \textit{Dunsmuir}, suggesting, but not prescribing, the standard of review applicable. These affirm the pivotal role of the nature of the question in dispute in defining the scope of review. The first of them is that questions of fact, discretion and policy generally attract reasonableness review. Legal questions arising from a decision-maker’s enabling statute\textsuperscript{1946} or which entail its specific expertise similarly demand deference.\textsuperscript{1947} Determinations of law of fundamental importance to the legal community as a whole, together with those falling outside the skills and expertise of the relevant decision-maker, are nonetheless to be evaluated for correctness. This ensures that legal certainty and the rule of law are adequately preserved.\textsuperscript{1948} Finally, both true questions of jurisdiction and all remaining irregularities (aside from those addressing procedural fairness), invite correctness review.\textsuperscript{1949}

The SCC’s assertion that distinctive tests for review may apply to discrete legal questions is significant. Given the broad legislative discretions CCMA commissioners enjoy,\textsuperscript{1950} the pressures under which they operate, and the intended informality of arbitration proceedings,\textsuperscript{1951} differentiating between distinct legal issues on review is apt. The SCC’s guidelines are helpful at a general level too. Adapting them to section 145 proceedings would lend greater structure to the Labour Courts’ unpredictable interpretations of reasonableness. Details of how this may be achieved are provided in the conclusion to this dissertation.

\textsuperscript{1944} Ibid para 64.
\textsuperscript{1945} As discussed in chapter 4. The principal difficulty with the \textit{Bato Star} (and related) factors is that there are too many of them to assess each and every one during review proceedings. The factors nonetheless set the contextual tone for review.
\textsuperscript{1946} Or statutes closely connected thereto.
\textsuperscript{1947} \textit{Dunsmuir} paras 51-56.
\textsuperscript{1948} Ibid paras 29-31, 50 & 163.
\textsuperscript{1949} Ibid.
\textsuperscript{1950} Section 138 of the LRA.
\textsuperscript{1951} For details thereof, consult chapter 1.
Supplementing these guidelines, the Court in *Dunsmuir* described the core features of reasonableness. Paramount amongst these is that reasonableness looks both to reasoning process and findings. Secondly, the principal components of reasonable decisions are ‘justifiability, transparency and intelligibility.’ To meet these standards, decisions are required to be defensible in terms of both the facts and the law. These characteristics of reasonableness are familiar and arguably of minimal comparative worth therefore. Yet, when examined with reference to the remainder of the SCC’s judgment in *Dunsmuir* and *Khosa*, they clarify much of the uncertainty surrounding reasonableness review. Later judicial pronouncements, as well as the commentary on these decisions, are equally informative.

From these, it is plain that reasonableness in outcome will absolve procedural defects in decision-makers’ reasoning in limited circumstances only. Specifically, excepting questions of procedural fairness or ‘true’ jurisdiction, substantive reasonableness may remedy procedural unreasonableness only where the relevant decision-maker’s reasons are adequate. To this extent, in Canada, both procedural and substantive reasonableness are required to countenance alleged irregularities. An apposite construction of when decisions may be overturned for want of procedural unreasonableness (despite adequacy in outcome) appears from the SCC’s formulations of adequate reasons, read with Mullan’s discussion of the issue. These indicate that while both procedural and substantive reasonableness are necessary to sustain decisions, when evaluating the latter, alternative reasons may be considered. Again, the Canadian approach is aligned with that of the Labour Courts in South Africa.

What may be inferred from this model is that where a decision-maker’s reasons (or reasoning process) are unsatisfactory only in so far as the substance thereof does not justify the outcome reached, if alternative reasons supporting the decision exist, the decision-maker’s findings may stand. On the other hand, where reasons fall short of the prescribed basic standards for satisfactory reasoning, the decision may be quashed regardless of its substantive

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1952 *Dunsmuir* para 47.
1953 Ibid.
1954 In that they meet the basic standards for satisfactory reasons delineated above; crucially too, administrative reasons must serve the purposes for which the reasons are given.
1955 Whether in the form of reasoning process or adequate reasons. Regardless of the term attributed thereto, reasoning process and adequate reasons are necessarily intertwined.
1956 See chapters 3 and 4 and *Fidelity*.
1957 Mullan ‘Let’s try again!’ (2008) at 136; *Newfoundland and Labrador Nurses’ Union* para 15.
reasonableness. To ensure the effective implementation of this notion in practice, it is vital to delineate the procedural ingredients of adequate reasons properly. These were addressed by the SCC in *Khosa*. According to the Court, to escape review, reasons must be comprehensible and expressed with clarity. In addition, they should be consistent with the purpose of granting the legislative power in question. Finally, reasons must be logically linked to the outcome and must disclose the reasoning path which the decision-maker followed. To summarise: clarity, disclosure and rational connections constitute the primary components of adequate reasons.

Differentiating between the procedural and substantive elements of reasonableness in this way accords with the functions of review and concurrently leaves room for deference. If imported into section 145 proceedings, it would explain the relationship between the *Carephone* and *Sidumo* standards too. It may further elucidate the circumstances in which substantive reasonableness may validly be applied as a resolutive test. The confusion around these issues and the association between procedural and substantive reasonableness might then be resolved.

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1958 *Newfoundland and Labrador Nurses’ Union* para 16; Edwards expresses a different view, arguing that the enquiry into the adequacy of decision-makers’ reasons has been entirely ‘subsumed’ into the reasonableness test since *Dunsmuir*; Dave Edwards ‘Judicial review of administrative action’ (2011) 24 *Can J Admin L & Prac* 151 at 158. While, in light of *Newfoundland and Labrador Nurses’ Union*, Edward’s submission may be legitimate in Canada, the courts in South Africa continue to hold that reasonableness comprises two components – procedural and substantive. To understand these, it is necessary to differentiate the two enquiries to some degree. Whereas the SCC in *Newfoundland and Labrador Nurses’ Union* noted that the adequacy of reasons could not be separately evaluated from the substance of the resultant decision, the candidate does not propose that drawing a clean division between reasons and outcome is necessarily possible or even desirable. Nonetheless, to understand both the distinction between *Carephone* and *Sidumo* and the dual aspects of reasonableness, a measure of distinction is necessary. Note, however, Edwards at 158.

1959 *Khosa* paras 66-67; the SCC’s comments in *Khosa* were later augmented in *Lake* para 46.


1961 Ibid.

1962 In facilitating improved future decision-making and maintaining the rule of law; sections 1(d), 33 & 195 of the Constitution; Jowell (2006) at 16-17; Hoexter in Corder & van der Vijver (eds) (2002) at 27; Corder in Corder & van der Vijver (eds) (2002) at 1-2; Mureinik (2006). See too Anand, Edelstein & Wong-Chong’s interpretation of *Newfoundland and Labrador Nurses’ Union*, who cite the case as authority for the view that ‘reasons for a decision remain important as they provide important safeguards and thus “serve several statutory purposes.”’; Anand, Edelstein & Wong-Chong at 159; consider also Anand, Edelstein & Wong-Chong at 178.

1963 Ibid.

1964 Which still troubles the courts; compare Bestel para 18; *Ellerine Holdings* at 15; *Shoprite Checkers 1* para 23 and *Super Group Autoparts t/a Autozone v Hlongwane NO & others* [2010] 4 BLLR 458 (LC) para 7.

1965 See *Clarence and Edcon Ltd v Pillemer NO & others* (2009) 30 ILJ 2642 (SCA), as discussed in chapters 3 and 4.

1966 For the procedural and substantive features of reasonableness, consult *Sasol Mining* and the discussion thereof in chapter 3, together with *Southern Sun Hotel Interests* para 17 and *SAMWU* para 11.
Starting with the distinction between Carephone and Sidumo, it is now clear that while the Carephone test precluded assessments of alternative reasons to justify awards, the Sidumo standard does not.\textsuperscript{1967} Notwithstanding this, overlaps between the standards persist and courts continue to conflate their meanings. In turn, it is debatable whether the standards are distinguishable at all. Were the substantive and procedural features of reasonableness to be understood in South Africa as proposed above, much of this uncertainty would fade. In its stead, it would appear that the Carephone standard emphasises the substantive reasonableness (or rationality) of commissioners’ findings with reference to the adequacy of their reasons specifically. Comparatively, Sidumo looks to each aspect of reasonableness with a measure of independence. Thus, while adequate reasons (as defined) remain important for procedural reasonableness,\textsuperscript{1968} the substantive legitimacy of commissioners’ reasons has lost its significance. Commissioners remain obliged to provide satisfactory explanations for their awards, but the precise factors considered by them when reaching their findings no longer need be the only justifications therefore. Provided their reasons evince ‘clarity, disclosure and rational connections’,\textsuperscript{1969} alternative reasons may be appraised to endorse the awards. What is left of Carephone accordingly resides in the realm of suitable reasoning rather than in substantive outcomes.\textsuperscript{1970} Not only does this depiction of the two tests rectify the controversy, but it explains the dual features of reasonableness.\textsuperscript{1971} Simultaneously too, the circumstances in which substantive reasonableness may remedy so-called ‘procedural unreasonableness’ are identified.\textsuperscript{1972}

The substantive aspect of reasonableness is more difficult to define.\textsuperscript{1973} While the SCC in Dunsmuir described the characteristics of reasonable decisions as discussed above, applying these coherently in practice is challenging. The Court’s subsequent sentiments in Khosa shed some light on the problem. There, the SCC observed that reasonableness consists of only one standard. Still, in different contexts or when faced with different questions, discrete

\textsuperscript{1967} Fidelity paras 102-103; PAK Le Roux & K Young ‘The role of reasonableness in dismissal’ (2007) 17(3) Contemporary Labour Law 21 at 29; Bato Star para 186.  
\textsuperscript{1968} Newfoundland and Labrador Nurses’ Union para 16.  
\textsuperscript{1969} Lake para 46; Khosa paras 66-67.  
\textsuperscript{1970} And there is little doubt that this requirement remains valid; Strategic Liquor Services para 17, citing Mpahlehle para 12.  
\textsuperscript{1971} Consider Fidelity and Sasol Mining.  
\textsuperscript{1972} That is, when commissioners’ reasons are procedurally adequate but do not justify their findings of their own accord, alternative reasons may be consulted. See Edcon and the discussion thereof in chapter 3.  
\textsuperscript{1973} Woolley at 269.
approaches to review (and to reasonableness) may be appropriate.\textsuperscript{1974} Furthermore, reviewing courts should recall that reasonableness does not arise from the right of decision-makers to err. Instead, it acknowledges that, in certain circumstances, administrative decision-makers are better placed to decide disputes than the courts.\textsuperscript{1975} In case of CCMA commissioners’ factual and discretionary findings, this principle is particularly apt. As such, when engaged in reasonableness review during section 145 proceedings, the Labour Courts would do well to recount it. When revising the current test for review too, these elements of reasonableness should be accounted for.

The ambit of reasonableness is further illuminated by relevant provisions of the ATA and the FCA, read with \textit{Khosa’s} discussion of the latter. The \textit{Dunsmuir} guidelines prescribe an approach to reasonableness which distinguishes between standards of review attributable to distinct types of question. The ATA and FCA add to this by exposing the logic of assessing procedural conduct and substantive findings discretely. The value of this approach lies in its potential to reduce the overlaps between statutory procedural defects and reasonableness.\textsuperscript{1976} In so doing, consistency and clarity may be enhanced. Separating strictly procedural errors from substantive ones when reformulating the test for review of CCMA awards may consequently prove helpful.\textsuperscript{1977}

Two additional points require attention. First is the Canadian approach to evaluating discretionary findings. Secondly, the meaning of ‘jurisdictional questions’ must be addressed. In relation to the former, the SCC in \textit{Baker} held that discretionary determinations were susceptible to review for reasonableness in the same way that legal findings were. Reviewing courts were therefore precluded from re-evaluating the weight assigned to pertinent factors by decision-makers. Nevertheless, administrative decisions remained bound to comply with the rule of law (and associated principles of administrative law), the objects of the decision-maker’s enabling legislation, the fundamental values of Canadian society, and the Charter.\textsuperscript{1978}

As a result, judicial allocations of weight are largely prohibited in Canada during reviews of discretionary decisions. Evidently, this is a feasible and valid means of limiting courts’

\textsuperscript{1974} \textit{Khosa} para 125.
\textsuperscript{1975} Ibid; Klinck at 48-49; Mullan ‘Let’s try again!’ (2008) at 137-140.
\textsuperscript{1976} Most importantly, the overlap(s) between gross irregularities and reasonableness may be reduced. For the difficulties with the overlap, refer to chapters 3 and 4.
\textsuperscript{1977} The proposal is explained in greater detail in the conclusion to this thesis.
\textsuperscript{1978} \textit{Baker} para 53.
powers. Still, as both Mullan and Klinck warn, outright bans on judicial assessments of weight are dangerous.\footnote{Klinck at 55; Mullan ‘Proportionality’ at 233.} Any such ban should accordingly be qualified by the requirement that, to survive review, administrative attributions of weight must not be ‘manifestly disproportionate’.\footnote{Mullan ‘Proportionality’ at 257-258.} For the reasons asserted above, were these principles to be implemented in section 145 proceedings, the enquiry should be confined to asking whether the commissioner had addressed all relevant factors and allocated at least some weight to each.\footnote{Consult the discussion in relation to Khosa paras 66-67 above and Heckman (2009) at 782.} Doing so would remedy much of the controversy around the powers of reviewing courts’ to re-assess commissioners’ weight allocations.\footnote{Compare Transnet Freight Rail with NUM obo 112 Employees, read with the critique thereof in chapter 3.}

Finally, the Canadian courts’ difficulties with identifying when a question is truly jurisdictional are revealing. In light of the proposal that the nature of the challenged conduct be determinative of the standard of review, addressing this issue is crucial.\footnote{Heckman (2009) at 760; Underhill at 256. The overlaps between the statutory grounds of review in the LRA render it particularly important to define the nature of the question in dispute clearly. For examples of these grounds, see Reunert Industries (Pty) Limited v/a Reutech Defence Industries v Naicker & others [1997] 12 BLLR 1632 (LC) at 1634-1637; Moloi v Euijen & others [1997] 8 BLLR 1022 (LC); Sampson Associates (Pty) Ltd v/a Interbrand Sampson v Cities Shepherd & others [2010] 7 BLLR 746 (LC); Jafja v Commission for Conciliation, Mediation & Arbitration & Others (2006) 27 ILJ 2368 (LC); Sasol Mining; United National Breweries (SA) Ltd v Khanyeza & others [2006] 4 BLLR 321 (LAC); Darcy Du Toit et al Labour Relations Law: A Comprehensive Guide 4 ed (2003) at 152-155 and the cases cited in Myburgh (2009); Myburgh (2010) and Myburgh (2011).} Judicial constructions of ‘jurisdictional’ have been inconsistent over the years in Canada. Recently, in Canadian Federal Pilots, however, Evans JA affirmed the Pushpanathan approach to ascertaining jurisdictional questions and it is submitted that this approach is preferable. He held that when determining whether a question is jurisdictional, reviewing courts must identify the body to which the power to decide the matter has been granted.\footnote{Canadian Federal Pilots para 14.} Where administrative decision-makers have been entrusted with that power, reasonableness rather than correctness will apply. One important proviso supplements this rule – the enabling legislation must authorise the decision-maker to ‘interpret and apply the disputed provision’ concerned.\footnote{Ibid para 51.} Were a comparable attitude assumed by the Labour Courts, the problems associated with reviewing purportedly jurisdictional questions, as well as those arising from the overlap between reasonableness and ‘excesses of power’, may be avoided.\footnote{‘For the difficulties with the Labour Courts’ current approach to jurisdictional questions, see Fergus (2012), read with SARPA, Banda, Chabeli and Asara Wine Estate, amongst others. For excesses of power generally, consult section 145(2)(a)(iii) of the LRA and Myburgh (2011) at 1518. Given the interplay between...}
Having consolidated these accounts of reasonableness, a clean revision of section 145(2) of the LRA is seemingly necessary. That task is undertaken in the conclusion to this thesis which follows.
RECOMMENDATIONS AND CONCLUSION

1. A SYNOPSIS OF THE ARGUMENT

The primary purpose of this thesis was to pinpoint the test for review of CCMA arbitration awards. As difficulties with doing so were anticipated, an incidental goal was devised – to develop a clear, practical and reliable test for review. The difficulties arise from the ostensible discord between the Constitutional rights to fair labour practices\textsuperscript{1987} and just administrative action.\textsuperscript{1988} Whereas efficiency, accessibility, flexibility and informality in dispute resolution are prized by the former,\textsuperscript{1989} the right to administrative justice holds accountability, transparency, legal certainty and reasonableness above these values.\textsuperscript{1990}

Aligning the constraints imposed by the latter, with the unique requisites of labour dispute resolution is tricky and reviewing courts have accordingly struggled to achieve an appropriate balance between them. If consistency in outcomes and legal certainty are to be preserved, however, formulating a pragmatic and clear test for review is crucial.

Froneman DJP’s decision in \textit{Carephone} marked a turning point in section 145 review proceedings. Particularly significant was the LAC’s emphasis on the implications of section 33 of the Constitution on the courts’ powers of review under the LRA.\textsuperscript{1991} As a result, following \textit{Carephone} awards were reviewable for rational justifiability. This standard permitted a measure of substantive review, but stopped short of granting full scale powers of appeal to the courts. The need to retain the distinction between appeal and review stemmed from the CCMA’s administrative status.\textsuperscript{1992} This necessitated that apposite deference be paid to commissioners’ awards. Reviewing courts interpreted Froneman’s judgment in \textit{Carephone} in different ways and it was only in \textit{Rustenburg Platinum Mines} that the confusion was

\textsuperscript{1987} Section 23 of the the Constitution of the Republic of South Africa, 1996 (‘the Constitution’).

\textsuperscript{1988} Section 33 of the Constitution. This is important due to the CCMA’s status as an administrative institution; \textit{Carephone (Pty) Ltd v Marcus NO & Others} [1998] 11 BLLR 1093 (LAC) paras 11-16; \textit{Sidumo & another v Rustenburg Platinum Mines Ltd & others} [2007] 12 BLLR 1097 (CC) paras 88-89.

\textsuperscript{1989} Recall that the CCMA was established with these principles in mind, as an efficient, flexible and informal body. Furthermore, courts’ powers of review under the LRA are designed to prevent undue judicial interference and unnecessary delay; they are therefore narrow in scope. Section 145 of the Labour Relations Act 66 of 1995 (‘the LRA’ or ‘the Act’); The Explanatory Memorandum to the Labour Relations Act 1995 16 ILJ 278 (‘The Explanatory Memorandum’) at 318-319; \textit{Food & Allied Workers Union on behalf of Mbatha & others v Pioneer Foods (Pty) Ltd t/a Sasko Milling & Baking & others} (2011) 32 ILJ 2916 (SCA) (‘FAWU’) paras 21-22.

\textsuperscript{1990} Amongst other values such as procedural fairness and openness; see sections 33 and 195 of the Constitution in particular.

\textsuperscript{1991} \textit{Carephone} para 37.

\textsuperscript{1992} Evident in its exercise of legislatively conferred public power; \textit{Carephone} paras 11-19 & 32.
According to the SCA therein, the focus of the ‘rational justifiability’ test fell on the rationality of the connections made by commissioners between evidence, outcomes and reasons, rather than on the rationality of their findings as such.\textsuperscript{1994}

The decision in \textit{Rustenburg Platinum Mines} was taken on appeal to the Constitutional Court.\textsuperscript{1995} Agreeing with the LAC’s pronouncement that the Constitution had introduced a substantive element into section 145 proceedings, the CC nonetheless held that rational justifiability lacked currency. In its place, the reasonableness standard was to apply consistently with the final Constitution.\textsuperscript{1996} Like rational justifiability, reasonableness review permits scrutiny of outcomes and courts are consequently not confined to assessing procedural defects alone.\textsuperscript{1997} Still, the standard stops short of appeal. Subsequent courts have confirmed additional principles applicable to reasonableness. These may be broken down into four broad statements.

The first is that reasonableness does not equate to correctness; to be unreasonable, however, gross unreasonableness is not required.\textsuperscript{1998} Secondly, the grounds for review of section 145 remain valid and relevant.\textsuperscript{1999} Third, reasonableness is a substantive measure of review; as such, it allows courts to consider alternative reasons for commissioners’ awards when determining their susceptibility to review.\textsuperscript{2000} Yet, this does not imply that the distinction between appeals and reviews is obsolete; on the contrary, it remains key.\textsuperscript{2001} Thus, when evaluating commissioners’ awards, attention must be paid to the informal, efficient and accessible nature of CCMA arbitrations and the daily pressures commissioners face.\textsuperscript{2002} With these contextual factors in mind, suitable levels of deference should be afforded to commissioners’ decisions.\textsuperscript{2003} Finally, reasonableness comprises both substantive and

\begin{footnotes}
\textsuperscript{1993} Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA & others [2006] 11 BLLR 1021 (SCA).
\textsuperscript{1994} ibid para 29.
\textsuperscript{1995} See Sidumo.
\textsuperscript{1996} Sidumo para 109.
\textsuperscript{1997} In terms of section 145 of the LRA.
\textsuperscript{1998} Fidelity Cash Management Service v CCMA & others [2008] 3 BLLR 197 (LAC) para 99, read with Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others 2004 (7) BCLR 687 (CC) paras 44-45.
\textsuperscript{1999} Fidelity para 101; Southern Sun Hotel Interests (Pty) Ltd v CCMA & others [2009] 11 BLLR 1128 (LC) paras 14 & 17.
\textsuperscript{2000} Sidumo para 108.
\textsuperscript{2001} Consider Carephone para 32-37; Sidumo paras 105-110 and Fidelity paras 92-101.
\textsuperscript{2002} Sidumo para 118; Ellerine Holdings Ltd v CCMA & others [2008] JOL 22087 (LAC) at 11.
\end{footnotes}
procedural components. While the attributes of these dual features of reasonableness are unclear, the courts have repeatedly affirmed their existence.2004

Supplementing these principles, it has been argued that section 145’s suffusion with the standard of reasonableness has extended, rather than restricted, the permissible scope of review.2005 In other words, it has given broader powers to the courts to scrutinize awards.2006 The raison d’etre of the test supports this contention. By introducing reasonableness, the CC sought to protect the rights of all parties to lawful, reasonable and procedurally fair administrative action. Courts are accordingly obliged to evaluate CCMA arbitrations (as a form of administrative action) against the requisites of this right.2007 In turn, accountability, transparency and openness are secured,2008 alongside the rule of law and legal certainty.2009 Suggesting that the Constitutional Court constrained reviewing courts’ powers in order to promote these objectives runs counter to its rationale for implementing the standard – a plainly illogical proposal.2010

Despite these established principles of reasonableness, the standard has been difficult to apply in practice. Instead, an array of judicial attitudes to it, together with further inconsistency and uncertainty, has arisen. The confusion centres around four particular issues. Chief amongst these are the relationship between reasonableness and section 145; the correlations between the Sidumo and Carephone standards (and the latter’s enduring

2005 See chapters 3 & 4 of this thesis and Carephone paras 37-38; Consider too Sidumo para 140 and Value Logistics Ltd v Basson & Others (2011) 32 ILJ 2552 (LC).
2006 Ibid; or at least broader powers than those conferred by section 145 of the LRA alone.
2007 Carephone paras 11-16; Sidumo paras 88-89.
2008 Sections 33 and 195(1) of the Constitution.
2009 Carephone para 9; Shoprite Checkers (Pty) Ltd v CCMA & others [2009] JOL 23356 (SCA) (‘Shoprite Checkers 3’) para 31; Cape Bar Council v Judicial Service Commission and another (Centre for Constitutional Rights and another as amici curiae) [2012] 2 All SA 143 (WCC) paras 25-26; Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1999 (1) SA 374 (CC) para 58; Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC) para 33.
2010 This is subject to the CC’s decision in Sidumo to abandon the ‘reasonable employer’ test, simultaneously to introducing the reasonableness standard of review. To this extent only, the effect of the CC’s decision was to limit courts’ authority to scrutinise awards (as the discretion of commissioners was expanded upon). The limitation, however, did not arise from the test for review itself.
Seeking to answer these questions with reference to South African principles of labour and administrative law alone, has failed to achieve clarity. Whereas definitions of reasonableness developed in the general administrative law arena offer some guidance, the standard’s contextual nature demands a more nuanced approach.

Strict definitions of the standard are unhelpful and due recognition for contextual variation is needed. However, the multiplicity of factors pertinent to reasonableness in labour dispute resolution renders determining reasonableness on a case by case basis unduly onerous. Neither reviewing courts nor parties to proceedings can realistically be expected to engage with all these factors either prior to or during review proceedings. The uncomfortable coupling of section 145 of the LRA with section 33 of the Constitution must nonetheless be appeased in some way. In the absence of doing so, the unpredictability and inconsistency prevalent in labour court decisions will endure; ultimately, legal certainty and the rule of law may be undermined.

At the outset of this thesis, the intentions of both the LRA’s and the Constitution’s drafters were sketched. It was mooted that had they consulted when drafting these Acts, much of the controversy arising from Sidumo could have been avoided. Yet, just how might they have reconciled the tension between section 145 and section 33? Conceivably, they would have turned to foreign jurisprudence for guidance. When doing so, Canadian law might have caught their attention.

Canadian principles of judicial review in the labour sphere offer possible solutions to many of the questions surrounding reasonableness. Furthermore, they assist with constructing the foundations for revising section 145, congruently with Sidumo. Seven specific ways in which Canadian law explicates the standard have been identified. First is Canada’s recognition that statutory grounds of review may attract different degrees of judicial scrutiny. Reasonableness

For an in-depth discussion of these issues, consult chapter 3.


Consult in this regard Bato Star and chapter 4 of this thesis.


Section 39(c) of the Constitution encourages courts to consider foreign law.
is therefore not the only available test on review. Whether reasonableness or correctness applies to any given ground depends on the context at hand.\textsuperscript{2017} In this way, where the reasonableness standard applies, adequate room for manoeuvre is retained, in accord with the standard’s inherent variability.\textsuperscript{2018} Secondly, the Canadian courts have developed a set of contextual criteria to be considered when determining the standard applicable. Collectively, these criteria are known as the ‘standard of review analysis,’ an analysis primarily directed at identifying legislative intent.\textsuperscript{2019} Four considerations are prescribed in this regard. Comparatively to the \textit{Bato Star} list, only one of these factors is likely to vary between CCMA disputes. That factor is the nature of the question in dispute.\textsuperscript{2020} Applying this criterion exclusively when determining reasonableness will allow for contextual variation while setting feasible limits. The Canadian standard of review analysis thus constitutes a more practical tool for the contextual delineation of reasonableness than \textit{Bato Star} and related contextual considerations do.\textsuperscript{2021}

Third, the guidelines expounded in \textit{Dunsmuir} are instructive in linking the statutory defects in section 145 with appropriate standards of review.\textsuperscript{2022} Again, the SCC’s focus in \textit{Dunsmuir} fell on the nature of the question in dispute. Paramount in this regard was its emphasis on distinguishing between different types of legal question.\textsuperscript{2023} The Court’s declaration that reasonableness requires ‘justifiability, transparency and intelligibility,’\textsuperscript{2024} is equally useful. Not only does this description correlate with \textit{Sidumo’s} focus on ‘transparency, openness and accountability’ but \textit{Dunsmuir’s} endorsement of intelligibility affirms the significance of adequate reasoning for administrative accountability. These three elements of reasonableness were elucidated in both \textit{Khosa} and \textit{Lake}.\textsuperscript{2025} Together, the judgments confirm that the requisites of adequate reasons include that reasons display clarity, disclosure and a rational connection between reasons and findings.\textsuperscript{2026}

\textsuperscript{2017} \textit{Dunsmuir v New Brunswick} [2008] 1 SCR 190 para 66.
\textsuperscript{2018} \textit{Canada (Minister of Citizenship and Immigration) v Khosa} 2009 SCC 12 paras 28 & 59.
\textsuperscript{2019} \textit{Dunsmuir} para 29.
\textsuperscript{2020} In other words, whether the issue contested on review is a question of law, fact, discretion, jurisdiction or procedure.
\textsuperscript{2021} See \textit{Bato Star} para 45 and chapter 4 of this dissertation.
\textsuperscript{2022} \textit{Dunsmuir} paras 51-56.
\textsuperscript{2023} Ibid paras 29-31, 50 & 163.
\textsuperscript{2024} Ibid para 47.
\textsuperscript{2025} \textit{Khosa} paras 66-67; \textit{Lake v Canada (Minister of Justice)} [2008] 1 SCR 761 para 46.
\textsuperscript{2026} Ibid.
Fourth, according to Dunsmuir, reasonableness looks both to substance and procedure.\footnote{Dunsmuir para 47.} While the relationship between the two was initially contentious, Mullan proposed a sensible conciliation thereof which essentially coheres with subsequent judicial pronouncements.\footnote{David Mullan ‘Dunsmuir v New Brunswick, Standard of review and procedural fairness for public servants: Let’s try again!’ 21 Can J Admin L & Prac 117 at 136; Newfoundland and Labrador Nurses’ Union v Newfoundland and Labrador (Treasury Board) 2011 SCC 62.} He argued that where the reasons given for a decision are not substantively capable of justifying a decision on their own but alternative reasons are, reasonableness in outcome will be established.\footnote{Ibid.} Mullan’s approach is best understood in light of the principle that reasonableness relates not only to substance but also to procedure. In effect, while the substance of a decision-maker’s reasons need not be sufficient in themselves to justify the decision, the reasons must still comply with certain minimum standards.\footnote{Being clarity, disclosure and rationality of connections between reasons and outcome; consult chapter 6 in this regard.} Where they do not, the decision may be subject to review for so-called procedural unreasonableness,\footnote{In essence, inadequate reasons or reasoning. Procedural unreasonableness in this sense is distinct from the notion of process-related unreasonableness which Myburgh discussed in Anton Myburgh ‘Sidumo v Rustplats: How have the courts dealt with it?’ (2009) 30 ILJ 1 at 16-17. Rather than covering gross irregularities, failures to take relevant factors into account and the like, the concept as it is used here is confined to reasons which are unclear or which do not explain the ‘why’ and the ‘how’ of the relevant commissioner’s finding.} regardless of its substantive justifiability.\footnote{While the SCC in Newfoundland and Labrador Nurses’ Union stated that the procedural and substantive components of reasonableness could not be separated, in order to explain the Labour Courts’ approach to review, it is helpful to distinguish between them to a certain degree; Newfoundland and Labrador Nurses’ Union para 14. Whether the SCC’s sentiments in this regard are correct is, in any event, debatable.}

Construing the dual features of reasonableness in this way resolves a number of the questions arising from Sidumo. Amongst these are the continued role of the Carephone standard and its association with reasonableness; the circumstances in which reasonableness may be resolutely applied and the interplay between the procedural and substantive facets of the standard.\footnote{Full discussions of the manner in which Canadian law clarifies these issues are provided in chapter 6; they are therefore not discussed here.}

The fifth significant feature of Canadian law appears from legislation – specifically from the Federal Courts and Administrative Tribunals Acts.\footnote{Section 18.1(4) of the Federal Courts Act RSC 1985 cF-7 (‘FCA’); section 58 of the Administrative Tribunals Act SBC 2004 c45 (‘ATA’).} Both of these statutes stipulate grounds
of review and, in varying degrees, the standards applicable to each ground. Notably, allegations of procedural irregularities are subject to scrutiny based on the principles of natural justice and fairness. In contrast, substantive issues are reviewable for want of either reasonableness or correctness. The logic of assessing procedural and substantive defects separately is evident. Were a comparable approach to be adopted in South Africa, the confusion resulting from the overlap between gross irregularities and reasonableness may be remedied. In turn, the danger of reviewing courts adopting discrete measures of review depending on the particular formulation of an applicant’s grounds may be reduced.

Sixth, the SCC’s directive in Baker and subsequent cases, that judicial reallocations of weight are impermissible, is important. Given the courts’ obligation to refrain from usurping decision-makers’ powers, applying an equivalent prohibition when reviewing CCMA awards seems fitting. However, as Mullan points out, ‘manifestly disproportionate’ findings must be avoided and any proscription against judicial re-allocations of weight should therefore be suitably qualified.

Finally, the Canadian courts’ attitude to jurisdictional questions offers useful guidance. In Canada, the principle that correctness rather than reasonableness applies to jurisdictional

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2035 The FCA has been held, however, to indicate the applicable standard of review only to a limited degree. Thus, the standard applicable may vary from one case to the next notwithstanding that the ground or defect alleged remains the same: Khosa paras 28 & 33.

2036 Khosa paras 42-48, read with section 18.1(4) of the FCA and section 58 of the ATA.

2037 By limiting the scope of the enquiry to actual procedures followed by commissioners during arbitration proceedings (to the exclusion of those involved when writing awards and reaching conclusions), gross irregularities may be clearly distinguished from reasonableness. Doing so would be consistent with the current test for gross irregularities, which focuses on whether the procedural irregularity deprived the parties of a fair hearing. Further details of the applicable enquiry are addressed below. Consider too, in this regard, the distinction drawn between patent and latent irregularities in Toyota SA Motors (Pty) Ltd v Radebe & Others (2000) 21 ILJ 340 (LAC).

2038 For examples of relevant cases in this regard consult chapter 3.

2039 Subject to certain criteria being met, including (amongst others) that the decision be consistent with the values of Canadian society; Baker v Canada (Minister of Citizenship and Immigration) [1999] 2 SCR 817 para 53.

2040 Baker paras 54-56 & 74-77, read with Suresh v Canada (Minister of Citizenship and Immigration) [2002] 1 SCR 3 (Can) paras 29 & 34; Khosa paras 4 and 66-67. Note that this relates specifically to discretionary determinations by administrative decision-makers.


2042 This is addressed in more detail in later paragraphs. Ibid; chapter 6.

2043 For the difficulties with the current approach to allegations that a commissioner acted outside of their jurisdiction, or in excess of their powers, consult Emma Fergus ‘Circumventing review – When is a question jurisdictional?’ (2012) 129 SALJ 504.
issues is well established.\textsuperscript{2044} While the precise test for jurisdictional questions was not specified in \textit{Dunsmuir}, both \textit{Pushpanathan} and \textit{Canadian Federal Pilots} offer apposite solutions.\textsuperscript{2045} In terms thereof, when reviewing purportedly jurisdictional findings, courts should first identify the institution to which the legislature intended to confer the power to decide the question in dispute.\textsuperscript{2046} Where the answer to this enquiry is the decision-maker,\textsuperscript{2047} the question will not be jurisdictional and reasonableness will apply. Conversely, where the court resolves that the legislature intended the question to be judicially determined, the finding may be reviewed for correctness. The proviso to this rule, emphasized in \textit{Canadian Federal Pilots}, is that the decision-maker must at least have had the power to interpret and apply the legislation (or law) concerned.\textsuperscript{2048} Considering the South African courts’ incoherent approaches to questions of jurisdiction, adopting an analogous test here would promote both predictability in outcomes and the rule of law.\textsuperscript{2049}

2. \textbf{RECOMMENDATIONS: A NEW TEST FOR REVIEW}

By consolidating these principles and perspectives, section 145(2) may be reformulated to incorporate reasonableness. When amending the section, it is proposed that the following considerations be accounted for.

First, questions of procedure should be distinguished from questions of substance. Procedural defects (whether termed ‘gross irregularities’ or otherwise) should be confined to strict issues of procedure. Only conduct arising during the arbitration itself ought accordingly to fall into this category.\textsuperscript{2050} The process followed by a commissioner in analysing the evidence and law and articulating his or her reasons for an award after the conclusion of the arbitration

\textsuperscript{2044} The same is true in South Africa yet this principle is poorly applied here; Anton Myburgh ‘Reviewing the review test: Recent judgments and developments’ (2011) 32 \textit{ILJ} 1497 at 1518; Fergus (2012) \textit{SALJ}. Consider too \textit{SA Rugby Players’ Association (SARPA) & others v SA Rugby (Pty) Ltd & others; SA Rugby (Pty) Ltd v SARPU & another} [2008] 9 BLLR 845 (LAC), where the LAC arguably assumed an inappropriate approach to determining whether the question in dispute was jurisdictional.


\textsuperscript{2046} Ibid.

\textsuperscript{2047} In other words, the administrative decision-maker.

\textsuperscript{2048} \textit{Canadian Federal Pilots} para 51.

\textsuperscript{2049} Fergus (2012) \textit{SALJ}.

\textsuperscript{2050} By differentiating between these defects and those concerning awards or findings, the overlap between gross irregularities and procedural unreasonableness may be dissolved, leaving a clearer measure of review.
proceedings, should be excluded.\textsuperscript{2051} Determining the legitimacy of procedural challenges to arbitrations should focus on the established test of whether parties had been ‘deprived of their rights to a fair hearing’,\textsuperscript{2052} as a result of the commissioner’s failure to follow an appropriate procedure.\textsuperscript{2053} Provided the requisites of fairness and natural justice are met, defects should not be found.

Substantive findings\textsuperscript{2054} ought to be reviewed on an altogether different basis. When investigating challenges of this nature, defects in reasons and defects in outcome should be distinguished.\textsuperscript{2055} The test for adequate reasons may be couched as follows:

\begin{itemize}
\item[a)] Are the commissioner’s reasons clear and comprehensible?; and
\item[b)] Did the commissioner refer to these reasons when explaining the outcome of his or her award?
\end{itemize}

The crux of this assessment is whether the court and the parties\textsuperscript{2056} are able to understand why and how the commissioner reached the conclusions he or she did.\textsuperscript{2057} If this is answered affirmatively, the commissioner’s reasons will be adequate, regardless of whether they justify the award on the merits.\textsuperscript{2058}

In contrast, when testing reasonableness in outcome the following questions may be applied:

\textsuperscript{2051} Factors excluded may include, for example, assessing whether the commissioner took all relevant factors into account and whether the commissioner applied his or her mind to the dispute; These have been labelled as procedural instances of unreasonableness in numerous cases. Yet, they do not always fit comfortably within this category; \textit{Fidelity} para 36. For a discussion of the courts’ characterisations of ‘process-related unreasonableness’, consult Myburgh (2012).

\textsuperscript{2052} Myburgh argues that, in \textit{Herholdt}, the LAC found this test to set too high a threshold for review; Myburgh (2012) at 7; \textit{Herholdt} para 39. Whether this interpretation of the case is valid is debatable. It is nonetheless beyond the scope of this paper to examine it further here. \textit{Transnet Freight Rail v Transnet Bargaining Council & others} [2011] 6 BLLR 594 (LC) para 17; \textit{Sidumo} para 268; \textit{Gaga v Anglo Platinum Ltd & others} (2012) 33 ILJ 329 (LAC) para 44; \textit{Information Trust Corporation v Gous & others} (2005) 26 ILJ 2351 (LAC) paras 9-10; \textit{Miladys v Naidoo & others} (2002) 23 ILJ 1234 (LAC) para 30; \textit{Toyota SA Motors (Pty) Ltd v Radebe & Others} (2000) 21 ILJ 340 (LAC) para 41.

\textsuperscript{2053} Examples of defects in this category might include where a commissioner neglects to afford the parties the right to cross-examine the other’s witnesses, or where a commissioner refuses to admit relevant evidence.

\textsuperscript{2054} Including processes related thereto, such as the thought processes necessary to writing reasons for awards.

\textsuperscript{2055} That is not to suggest, however, that the two aspects are unrelated; on the contrary they are necessarily interlinked; \textit{Newfoundland and Labrador Nurses’ Union} para 14. Nevertheless, for the purposes of understanding the distinction between procedural and substantive reasonableness in the South African context, it is useful to differentiate them in this way.

\textsuperscript{2056} Remembering that often the parties to CCMA proceedings will be lay persons with minimal or no legal skills and expertise.

\textsuperscript{2057} \textit{Lake} para 46, read with \textit{Khosa} paras 66-67.

\textsuperscript{2058} In other words, regardless of whether they justify the award at a substantive level.
a) Did the commissioner discuss the applicable legal principles?; 2059  
b) Did the commissioner identify the core facts?; 2060  
c) Did the commissioner engage in a thorough balancing act when applying the law to the facts?; 2061 and  
d) When doing so, did the commissioner consider all relevant factors and allocate at least some weight to each? 2062

Provided the answers to these questions are ‘yes’, awards should be exempt from review. Different standards of review ought nevertheless to apply to each separate enquiry. First, when evaluating commissioners’ references to applicable legal principles, the nature of the law concerned is relevant. Specifically, where common law principles or statutes unrelated to the LRA arise, commissioners’ legal declarations should be scrutinised for correctness. 2063 These questions will generally go beyond commissioners’ expert knowledge. 2064 In addition, they may have implications for the labour fraternity as a whole. 2065 It may therefore be

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2059 This element of the test addresses the established requirement that commissioners must identify the relevant law. Coupled with the remaining questions proposed above, the primary elements of reasonableness are met. For these elements, consult Coetzee v Lebea NO & Another (1999) 20 ILJ 129 (LC) para 10 and County Fair Foods (Pty) Ltd v CCMA & others [1999] 11 BLLR 1117 (LAC) para 27. See also Calvin William Sharpe ‘Reviewing CCMA arbitration awards: Towards clarity in the Labour Courts’ (2000) 21 ILJ 2160 at 2173.

2060 In other words, the material evidence; consult The South African Municipal Workers Union v The South African Local Government Bargaining Council & others (LAC) unreported case no DA06/09 of 29 November 2011 (‘SAMWU’) paras 10-11. To the extent to which the court considers the depth of the commissioner’s engagement, the established ground of ‘failure to apply the mind’ may be suitably accounted for at this stage; SAMWU paras 10-11. See also CUSA v Tao Ying Metal Industries & others [2009] 1 BLLR 1 (CC) para 76; Sidumo para 117. Consider too the comments expressed by Botma and van der Walt in Carli Botma & Adrian van der Walt ‘The role of reasonableness in the review of labour arbitration awards (Part 2)’ 2009 Obiter 530 at 539.


2063 Consider CWIU & Others v Sopelog CC (1994) 15 ILJ 90 (LAC) at 97B-E.

2064 In Reunert Industries (Pty) Limited v/ Reutech Defence Industries v Naicker & others [1997] 12 BLLR 1632 (LC) at 1636, Landman J submitted (without deciding the issue) that in light of the Constitution, errors of law may well be reviewable in and of themselves, in accordance with the rule of law and the need for lawfulness. See also Herholdt paras 55-56; Hoexter (2007) at 252; De Ville (2005) at 153.
presumed that the legislature intended the courts to be the final arbiters of this type of question.\(^{2066}\)

On the other hand, where identifying the applicable law entails interpreting and applying the LRA and related codes of good practice,\(^{2067}\) an assessment of legislative intent points to the contrary; that is to say, in crafting the LRA, the legislature ostensibly conferred powers of determination in respect of these issues on commissioners.\(^{2068}\) As a result, commissioners’ findings in this category should be examined on the basis of reasonableness alone, with the emphasis resting on whether there is sufficient justification given for a commissioner’s statement of the law. When applying reasonableness here, the dangers of judicial assumptions of superiority should be recalled.\(^{2069}\) So too ought the intended informality of CCMA proceedings and the pressures under which commissioners operate, be accounted for.\(^{2070}\)

Recently, in *Herholdt v Nedbank Ltd*,\(^{2071}\) the LAC called for the statutory preclusion of appeals against CCMA awards to be reconsidered, averring that:

> ‘The inexorable truth is that wrong decisions are rarely reasonable. If that is true, the hypothetical reward from limiting intervention to a reasonableness or rationality review is dubious. On the contrary we risk reducing the final adjudication to an exercise in semantics or hair splitting in pursuit of a perceived socially expedient advantage that is at best illusory… I would tentatively venture that the time has come for the social partners and the legislature to think again. Justice for all concerned might better be served were the relief against awards to take the form of an appeal rather than a review. The protection granted by a narrower basis for intervention is, in all likelihood, fanciful – a chimera.’\(^{2072}\)

The emphasis on efficiency as the primary justification for limiting review of CCMA awards is indeed misplaced.\(^{2073}\) Yet, there are other meritorious reasons for restricting review. These were recognised long before the CCMA’s establishment in 1995. The LAC’s discussion of


\(^{2067}\) Or at least those promulgated under the LRA; ibid.

\(^{2068}\) Consider the purpose of the Canadian standard of review analysis cited above; Fergus (2012); *Canadian Federal Pilots* paras 37-49 & 51.

\(^{2069}\) In particular, reviewing courts should not presume that their interpretation of a provision of the LRA is necessarily correct; *Dunsmuir* para 125.

\(^{2070}\) *Sidumo* para 118; *Ellerine Holdings* at 11.

\(^{2071}\) *Herholdt v Nedbank Ltd* (2012) 33 *ILJ* 1789 (LAC).

\(^{2072}\) *Ibid* paras 55-56.

\(^{2073}\) See too O’Regan J’s decision in *Sidumo*. 
the issue (albeit in the context of appeals against the Industrial Court’s findings) in *Chemical Workers Industrial Union & Others Sopelog CC*

This is instructive. There, the Court acknowledged that questions of fairness concern neither strict law nor fact; it then dismissed the view that determining whether conduct amounted to an unfair labour practice was a question of statutory interpretation. Instead, the Court held that matters of that nature were discretionary. In turn, a narrow scope of review was indicated. In reaching this conclusion, the LAC recorded the need to respect the Industrial Court’s credibility findings in particular. Thring J added:

> ‘It seems to me that it can be expected that the members and additional members of the Industrial Court will have their fingers on the pulse of industrial relations, and will be sufficiently immersed in and conversant with the morals of the (labour) market place, and the business and labour ethics of that section of the community, to justify confidence that their discretionary decisions of what is fair and what is unfair in that field, …, will usually correctly reflect the general sense of fairness and justice of that community.’

While declared in the context of an appeal against a decision of the Industrial Court, the Judge’s remarks apply equally to reviews of CCMA awards. Fairness cannot be determined on a strict interpretation of the law. As a result, it is inappropriate to assess commissioners’ findings on a standard comparable to that applied in ordinary appeals against inferior courts’ decisions. That reviewing courts do not have the benefit of hearing witness testimonies first hand or in many instances of accessing the complete records of proceedings, only confirms the inappropriateness of the appellate standard. Of course, uncertainty in substantive principles of labour law is concerning. Still, by allowing a measure of appeal as proposed (applicable to broader questions of law only), a suitable balance may be struck between these competing considerations.

For one, differentiating between classes of legal error will ease the uncertainty in substantive law arising from inopportune displays of judicial deference. Simultaneously, due respect

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2074 *Sopelog* at 94-98.
2075 Ibid at 94-96.
2076 Ibid.
2077 Ibid at 95.
2078 Ibid at 97-98.
2079 Compare, for example, *Shoprite Checkers (Pty) Ltd v CCMA & others* [2008] 12 BLLR 1211 (LAC) (“*Shoprite Checkers 1*”), *Shoprite Checkers v CCMA & others* [2008] 9 BLLR 838 (LAC) (“*Shoprite Checkers 2*”), *Shoprite Checkers 3 and Edcon Lid v Pillemer NO & others* (2009) 30 ILJ 2642 (SCA). Thompson, in fact, predicted that inconsistency would result from the dispute resolution system provided for in the LRA, prior to
for Constitutional and legislative intent in the sphere of labour dispute resolution will be maintained. Naturally, determining whether a commissioner’s legal conclusions are warranted entails a value judgment. As such, deciding precisely to what extent and in what circumstances a court may interfere will remain a subjective and difficult task. Yet, as labour law is based not only on strict legal principles but also on fairness and equity, subjectivity can never be entirely extricated from the test on review. A measure of uncertainty must inevitably be endured.

Looking to the second enquiry governing commissioners’ factual determinations, the standard of review there should again be reasonableness. There are good reasons for this. Foremost is the superior position of CCMA commissioners comparative to that of reviewing courts, in evaluating evidence presented during arbitration proceedings. Not only are commissioners better placed to assess the credibility of witnesses, but they hear and see all of the evidence presented. In contrast, reviewing courts often have access to only incomplete records of proceedings and do not benefit from first hand testimonies. The FCA’s approach to factual findings is accordingly suitable here and errors of fact should be scrutinised in a manner akin to section 18.1(4)(d) of the FCA. The test may be devised to determine whether the commissioner:

‘…based [the award]… on an erroneous finding of fact that [was] made in a perverse or capricious manner or without regard for the material before… [the commissioner].’

the Act’s promulgation; Clive Thompson ‘The 1995 Labour Relations Bill’ (1995) IMSSA Bulletin at 23. Consider too Mondi Paper Co v Dlamini [1996] 9 BLLR 1109 (LAC); Astore Africa (Pty) Ltd v CCMA & others [2008] 1 BLLR 14 (LC); Scrader Automotive (Pty) Ltd v Metal Industries Bargaining Council and Others (LC) unreported case no P488/05 of 26 September 2008 and Cheetham. See also, Transnet Freight Rail. De Ville supports this approach and proposes that different standards of review should apply to allegations of errors of law brought under section 6(2)(d) of the Promotion of Administrative Justice Act 3 of 2000 (‘PAJA’); De Ville (2005) at 154.

Super Group Autoparts t/a Autozone v Hlongwane NO & others [2010] 4 BLLR 458 (LC) para 11; section 151 of the LRA. Value judgments are arguably a necessary evil of reasonableness review; Carephone para 36; Sidumo paras 108-109 & 179.

Cheetham para 13.

Both generally and in terms of the credibility of witnesses who testify during proceedings; consult, in this regard, Aronson, Dyer & Groves at 180; Housen v Nikolaisen 2002 SCC 33 para 22; Alberta Union of Provincial Employees (‘AUPE’) v Alberta 2010 ABCA 216 para 47.

Bestel v Astral Operations Ltd & others [2011] 2 BLLR 129 (LAC) para 24; Shoprite Checkers 1 at para 30; Aronson, Dyer & Groves at 180.

Whilst the Court in Khosa indicated that the ground depicted therein did not prescribe a standard, the section evidently alludes to some measure of reasonableness review.

Section 18.1(4)(d) of the FCA. It has now been suggested (and arguably established) in South African law that gross irregularities committed by commissioners may be assessed by asking whether the irregularity
While debatably equivalent to gross unreasonableness, applying this approach would have nominal precedential implications (if any). Thus, it need not be detrimental to future decisions. Further, parties’ rights to procedural fairness, reasonableness and lawfulness would not be unjustifiably limited by it. If anything, allowing courts to interfere too readily with commissioners’ factual findings may actually jeopardise, rather than protect, their rights. In addition, awards made in palpably erroneous ways would remain open to review. At the same time the intended nature of labour dispute resolution as informal and efficient may be protected and the final and binding nature of CCMA awards maintained. Applying greater deference to this category of defect is therefore apt.

The third question listed above acknowledges the breadth of commissioners’ discretions to resolve disputes, while recognizing their obligation to apply the relevant law to the facts. This is the point where fairness comes into play and these decisions are discretionary in nature. Consequently, when examining such findings, reviewing courts should be precluded from re-allocating weight to relevant factors. To pass muster, awards ought merely to reveal commissioners’ attention to all pertinent factors, and not that the weight attributed

‘materially influenced the outcome’ or at least whether there was ‘potential prejudice’ to the parties as a result of the commissioner’s conduct; Sasol Mining para 11; Herholdt para 39; Myburgh (2012) at 7.

Which was expressly rejected in both Bato Star and Fidelity.

See Canada (Director of Investigation & Research) v Southam Inc [1997] 1 SCR 748 for a discussion of the need for intrusive review in case of decisions having precedential implications only.


Given the superior position of commissioners in assessing evidence as presiding officers in a tribunal of first instance; Housen para 22; AUPE 2010 ABCA para 47.

Section 143(1) of the LRA. For the intentionally narrow scope of review, consider section 145 of the LRA; The Explanatory Memorandum at 318-319 and FAWU paras 21-22.


And to take all relevant considerations into account. Pam Golding paras 5-6. Inevitably, findings of mixed fact and law may overlap. Yet, as commissioners enjoy a broad discretion to resolve disputes generally, no significant difficulty with conflating these two should arise; sections 138 and 194 of the LRA, read with the Code of Good Practice: Dismissals; Schedule 8 to the Labour Relations Act 66 of 1995.

See Media Workers Association at 1400 (recently cited with approval in Kemp T/A Centralmed v Rawlins (2009) 30 ILJ 2677 (LAC)) and Sopelog at 95. Consult too National Union of Metalworkers of SA v G M Vincent Metal Sections (Pty) Ltd (1999) 20 ILJ 2003 (SCA) para 18, where the Court held that fairness is not a strict question of law; it described the enquiry instead as ‘the passing of a moral judgment on a combination of findings of facts and opinions’. 
to each was equivalent to that due in a court’s opinion.\textsuperscript{2094} To circumvent the problem of commissioners paying lip-service to each factor, courts may nonetheless be permitted to investigate whether weight was allocated in a ‘grossly unbalanced fashion’.\textsuperscript{2095}

To the extent to which jurisdictional challenges are raised, or excesses of power alleged, the true nature of the allegation must be established.\textsuperscript{2096} Consistently with the Canadian approach, this investigation should focus on determining the body upon whom the legislature purported to grant the authority to decide the issue.\textsuperscript{2097} Where commissioners hold this authority, the reasonableness of their findings should be assessed according to the three-tier test for substantive reasonableness cited above. Where the LRA points to the contrary,\textsuperscript{2098} however, the standard of correctness should apply. The only qualification to this enquiry need be that the commissioner had the authority ‘to interpret and apply the legislative provision at hand’.\textsuperscript{2099}

Finally, where parties allege misconduct, or that an award was improperly obtained,\textsuperscript{2100} the correctness standard will be indicated. Determining the validity of these contentions is a factual enquiry, emphasizing the conduct of commissioners (and occasionally parties to disputes) preceding, during or after arbitration proceedings.\textsuperscript{2101} Generally speaking, evaluating the merits of the actual dispute is unnecessary in this context. When reviewing defects in these categories, the Labour Courts sit as courts of first instance, rather than as courts of review.\textsuperscript{2102} Still, a word of caution is due here. The boundary between misconduct

\begin{footnotesize}
\begin{enumerate}
\item Media Workers Association at 1398; there, Grosskopf JA addressed the nature of discretionary decisions and the need for courts to abstain from inappropriately interfering therewith. Consult too the references cited by Grosskopf JA, including WA Wilson ‘A note on fact and law’ (1963) 26 MLR 609 at 617 and Salmond (1966) at 65-75.
\item Mullan (2010) at 233 & 257-258; Klinck at 55.
\item Underhill at 256.
\item Fergus (2012); Dunsmuir para 29; THESL paras 22, 33 & 34; Kenall.
\item In other words, where the Act indicates that the relevant commissioner did not have the power to engage with the question at all or that the legislature granted the final decision-making power to the courts.
\item Canadian Federal Pilots para 51. See also Fergus (2012). Consequently, determinations taken under the Employment Equity Act 55 of 1998 (‘the EEA’), for example, should be subject to review on the basis of correctness; in most of these matters, commissioners do not have the principal authority to decide the issues in dispute (as they fall within the provisions of the EEA); sections 10(5) & 10(6) of the EEA. Similar principles ought to apply to disputes concerning the Basic Conditions of Employment Act 75 of 1997 (‘BCEA’). Specifically, only to the extent to which commissioners are authorised to resolve such disputes (as provided for in section 74(2) of the BCEA), should their findings be evaluated against the standard of reasonableness.
\item Sections 145(2)(a)(i) & (b) of the LRA.
\item Ibid.
\end{enumerate}
\end{footnotesize}
and procedural irregularities arising during the proceedings must be clearly defined. In the absence of doing so, parties may disguise procedural defects as misconduct in order to secure correctness review. It is proposed that this boundary be delineated by confining misconduct to cases involving personal turpitude on the part of presiding commissioners. Similarly, contentions that an award was ‘improperly obtained’ relate to allegedly partial conduct by commissioners. As these defects emphasize the mindset or behaviour of commissioners, rather than the substance of parties’ disputes, the correctness standard is fitting.

Interpreting reasonableness as Canadian courts do provides necessary direction for South African labour law. As this dissertation has shown, by construing the Sidumo test along comparable lines, many of the outstanding questions arising from the judgment may be answered. In turn, it has been possible to formulate a test for review specifically suited to the exigencies of section 145 proceedings. The proposed test differentiates between standards of review applicable to discrete categories of defect. By doing so, the contextual variability of reasonableness is accounted for and due scope for flexibility retained. The configuration of the proposed test is markedly more structured than the divergent attitudes to review currently evident in judicial determinations. As such, it promotes legal certainty and consistency in outcomes on review, while concurrently assisting parties and courts at a practical level. Were this test to replace section 145 of the LRA, an appropriate balance between the requisites of the rights to fair labour practices and just administrative action may conceivably be achieved.

Consider the overlap between gross irregularities and misconduct apparent from cases such as County Fair Foods and Sampson Associates (Pty) Ltd t/a Interbrand Sampson v Cities Shepherd & others [2010] 7 BLLR 746 (LC) paras 31-38. The role of personal turpitude in establishing misconduct was discussed in Reunert Industries at 1634-1636. Arguably, this occurred in Sampson Associates. There, the applicant contended that ‘[t]he second respondent thus committed misconduct in his capacity as a commissioner by ignoring relevant evidence and taking irrelevant considerations into account failing to justify the award of [a] relatively high amount of compensation…’; Sampson Associates para 36. Consult Reunert Industries at 1634-1636. It is beyond the scope of this paper to detail the indicators of personal turpitude here. Albeit oft incentivized by one of the parties to the dispute. Accepting bribes is one example of this type of defect; Moloi v Euijen & others (1997) ILJ 1372 (LC) at 1397. Read with section 33 of the Constitution and Sidumo. Sections 23 and 33 of the LRA.
BIBLIOGRAPHY

1. SOUTH AFRICAN SECONDARY SOURCES

1.1 Books and chapters in books

Corder, H ‘Reviewing review: much achieved, much more to do’ in Corder, H & van der Vijver, L (eds) Realising Administrative Justice (2002) 1 Siber Ink, Cape Town
De Ville, JR Constitutional and statutory interpretation (2000) Interdoc Consultants, Goodwood, Cape Town
Du Plessis, L & Corder, H Understanding South Africa’s Transitional Bill of Rights (1994) Juta, Kenwyn
Ellis, I & Dendy, M ‘Civil procedure: High Court’ *The Law of South Africa* vol 3(1) 2 ed (2007) Lexisnexis, Durban
Hoexter, C *Administrative law in South Africa* (2007) Juta, Cape Town
Rose Innes, LA *Judicial Review of Administrative Tribunals in South Africa* (1963) Juta, Cape Town
1.2 Journals and other articles

Benjamin, P & Cooper, C ‘Innovation and continuity: Responding to the Labour Relations Bill (1995) 16 ILJ 258 (A)


Benjamin, P ‘Conciliation, arbitration and enforcement: The CCMA’s achievements and challenges’ (2009) 30 ILJ 26

Benjamin, P ‘Friend or foe? The impact of judicial decisions on the operation of the CCMA’ (2007) 28 ILJ 1

Beukes, M ‘Review as a tool for the development of a culture of accountability in the public administration’ 2002 SAPL 244

Botma, C & van der Walt, A ‘The role of reasonableness in the review of labour arbitration awards (Part 1)’ 2009 Obiter 328

Botma, C & van der Walt, A ‘The role of reasonableness in the review of labour arbitration awards (Part 2)’ 2009 Obiter 530

Brand, J ‘CCMA: Achievements and challenges – Lessons from the first three years’ (2000) 21 ILJ 77

Butler, D ‘Expediting commercial arbitration proceedings: Recent trends’ (1994) 6 SA Merc LJ 251

Chan, J ‘A sliding scale of reasonableness in judicial review’ 2006 Acta Juridica 233

Chaskalson, A ‘Legal control of the administrative process’ 1985 SALJ 419

Cheadle, H ‘Regulated flexibility: Revisiting the LRA and the BCEA’ (2006) 27 ILJ 663

Clark, J ‘Arbitration in dismissal disputes in South Africa and the UK’ (1997) 18 ILJ 609

Corder, H ‘Comparing administrative justice across the Commonwealth: A first scan’ 2006 Acta Juridica 1

Currie, I ‘What difference does the Promotion of Administrative Justice Act make to administrative law?’ 2006 Acta Juridica 325
Davis, DM ‘To defer and when? Administrative law and Constitutional democracy’ 2006 Acta Juridica 23
De Ville, JR ‘Deferece as respect and deference as sacrifice: A reading of Bato Star Fishing v Minister of Environmental Affairs’ (2004) 20 SAJHR 577
De Ville, JR ‘The rule of law and judicial review’ 2006 Acta Juridica 62
Fergus, E & Rycroft, A ‘Refining review’ 2012 Acta Juridica 170
Fergus, E ‘Circumventing review – When is a question jurisdictional?’ (2012) 129 SALJ 504
Fergus, E ‘The distinction between appeals and reviews – Defining the limits of the Labour Court’s powers of review’ (2010) 31 ILJ 1556
Garbers, C ‘Reviewing CCMA awards in the aftermath of Sidumo’ (2008) 17(9) Contemporary Labour Law 84
Garbers, C ‘The demise of the “reasonable employer” test’ (2000) 9(9) Contemporary Labour Law 81
Grant, B ‘The review of arbitration awards in terms of the Labour Relations Act’ (1999) 2 Stell LR 251
Grogan, J ‘Death of the reasonable employer: The seismology of review’ (2000) 16(2) Employment Law 4
Grogan, J ‘In the shadow of Sidumo: Applying the ‘reasonable commissioner’ test’ (2008) 24(6) Employment Law 3
Grogan, J ‘Stalled reviews: Lessons by the DOL’ (2005) 21(5) Employment Law 16
Hoexter, C ‘Administrative action in the courts’ 2006 Acta Juridica 303
Hoexter, C ‘The future of judicial review in South African administrative law’ (2000) 117(3) SALJ 484
Hutchinson, W ‘Grounds for review: Sections 145 and section 158(1)(g) of the Labour Relations Act’ (2009) 18(8) Contemporary Labour Law 79
Hutchinson, WJ ‘The Supreme Court of Appeal restores administrative justice’ (2007) 28 ILJ 92
Hutchison, W ‘Is the Labour Appeal Court succeeding in its endeavours to create certainty in our jurisprudence?’ (2001) 22 ILJ 2223


Landman, AA ‘A study in deference: Labour Court deference to CCMA arbitration awards’ (2008) 29 ILJ 1613

Le Roux, PAK & Young, K ‘The role of reasonableness in dismissal: the Constitutional Court looks at who has the final say’ (2007) 17(3) Contemporary Labour Law 21


Loveday, G ‘Justifiability is the key: Review judgments reviewed’ (1998) 14(5) Employment Law 4

McLahlan, R ‘Lack of justifiability or rationality as a ground for review of private arbitration awards’ (2002) 5 De Rebus 49

Meyer, DJ ‘Comparing apples with pears: Shoprite Checkers (Pty) Ltd v CCMA and Others and Shoprite Checkers (Pty) Ltd v CCMA’ (2010) 43(2) De Jure 344

Mureinik, E ‘A bridge to where? Introducing the interim Bill of Rights’ (1994) 10 SAJHR 31


Myburgh, A ‘Determining and reviewing sanction after Sidumo’ (2010) 31 ILJ 1

Myburgh, A ‘Reviewing the review test: Recent judgments and developments’ (2011) 32 ILJ 1497

Myburgh, A ‘Sidumo v Rustplats: How have the courts dealt with it?’ (2009) 30 ILJ 1

Myburgh, J SC & van Niekerk, A ‘Dismissal as a penalty for misconduct: The reasonable employer and other approaches’ (2000) 21 ILJ 2145


O’Regan, C ‘Breaking ground: Some thoughts on the seismic shifts in our administrative law’ (2004) 121 SALJ 424

Pfaff, R & Schneider, H ‘The Promotion of Administrative Justice Act from a German perspective’ (2001) 17 SAJHR 59
Pillay, A ‘Reviewing reasonableness: An appropriate standard for evaluating state action and inaction?’ (2005) 122 SALJ 419
Pretorius, DM ‘Making you whistle: the Labour Appeal Court’s approach to reviews of CCMA arbitration awards’ (2000) 21 ILJ 1506
Quinot, G ‘Towards effective judicial review of state commercial activity’ (2009) 3 TSAR 436
Rycroft, A ‘Rethinking the con-arb procedure’ (2003) 24 ILJ 699
Saunders, C ‘Apples, oranges and comparative administrative law’ 2006 Acta Juridica 423
Smit, N ‘How do you determine a fair sanction? Dismissal as an appropriate sanction in cases of dismissal for (mis)conduct’ (2011) 1 De Jure 49
Smit, N ‘When is dismissal an appropriate sanction and when should a court set aside an arbitration award? Sidumo and Another v Rustenburg Platinum Mines Ltd & Others (2007) 28 ILJ 2405 (CC)’ (2008) 29 ILJ 1635
Steenkamp, A and Bosch, C ‘Labour dispute resolution under the 1995 LRA: Problems, pitfalls and potential’ 2012 Acta Juridica 120
Theron, J & Godfrey, S ‘The labour dispute resolution system and the quest for social justice: A case study on the CCMA, unfair dismissals and small business’ (2002) SAJLR 21
Wesley, M ‘Review of CCMA arbitration awards: Shoprite Checkers (Pty) Ltd v Ramdaw & others’ (2001) 22 ILJ 1515
Young, K ‘Labour Court review applications: Diligence and the onus to pursue without undue delay’ (2007) 16(8) Contemporary Labour law 87
1.3 Research papers; Conference papers; Lectures and Reports


Department of Labour The Innes Labour Brief: A strategic approach for the Minister of Labour (1994) 6(1) Department of Labour, Pretoria


Myburgh, A Clarifying the review test Paper presented at the 2011 CCMA Commissioners Indaba; Lagoon Beach Hotel, Cape Town (December 2011)


1.4 PhD Thesis

2. FOREIGN SECONDARY SOURCES

2.1 Books and chapters in books

Anderson, G *Reconstructing New Zealand’s labour law: Consensus or divergence?* (2011) Victoria University Press, Victoria


Brown, DJM & Evans, JM *Judicial review of administrative action in Canada* (1998; updated loose-leaf) Canvasback, Toronto


Mitchnick, M & Etherington, B Leading Cases on Labour Arbitration (2005; updated loose-leaf) Lancaster House, Toronto
Mullan, D ‘The McLachlin Court and the public law standard of review: A major irritant soothed or a significant ongoing problem?’ in Wright, DA & Dodek, AM Public law at the McLachlin Court (2011) 79 Irwin Law, Toronto
Mullan, D *Administrative Law* (2001) Irwin Law, Toronto


Weiler, PC *In the last resort: A critical study of the Supreme Court of Canada* (1974) Carswell, Toronto


### 2.2 Journals and other articles

Adams, G ‘Bell Canada and the older worker: Who will review the judges?’ (1974) 12 *Osgoode Hall LJ* 389
Adams, G ‘Grievance arbitration and judicial review in North America’ (1971) 9 Osgoode Hall LJ 443
Bryden, P ‘Understanding the standard of review in administrative law’ (2005) 54 UNBLJ 75
Choudry, S & Roach, K ‘Racial and ethnic profiling: Statutory discretion, Constitutional remedies, and democratic accountability’ (2003) 41 Osgoode Hall LJ 1
Clark, JL ‘A mixed question of fact and law’ (1908-1909) 18 Yale LJ 404
Elliot, D ‘Khosa – Still searching for that star’ (2009) 33(2) Man LJ 14
Goltz, R ‘Patent unreasonableness is dead and we have killed it - A critique of the Supreme Court of Canada’s decision in Dunsmuir’ (2008) 46 Alta L Rev 253
Heckman, G ‘Substantive review in Appellate Courts since Dunsmuir’ (2009) 47 Osgoode Hall LJ 751
Henderson, P ‘Supreme Court of Canada’s new ‘reasonableness’ standard of review applied in recent education cases’ (2008) 18 Educ & L J 179
Hogg, PW ‘The jurisdictional fact doctrine in the Supreme Court of Canada: Bell v Ontario (Human Rights Commission)’ (1971) 19 Osgoode Hall LJ 203
Jones, DP ‘Annotation to Khosa v Canada (Minister of Citizenship & Immigration)’ (2009) 82(4) Admin LR 123
Jones, DP ‘Two more decisions by the Supreme Court of Canada on the standard of review’ (2003) 48(3d) Admin LR 71
Kahn-Freund, O ‘On uses and misuses of comparative law’ (1974) 37 Mod L Rev 1
Kenall, D ‘De-regulating the regulatory compact: The legacy of Dunsmuir and the “jurisdictional” question doctrine’ (2011) 24 Can J Admin L & Prac 115
Klinck, JA ‘Reasonableness review: Conceptualising a single contextual standard from divergent approaches in Dunsmuir and Khosa’ (2011) 24 Can J Admin L & Prac 41
Langille, B ‘Judicial review, judicial revisionism and judicial responsibility’ (1986) 17 Rev Gen 169
Laskin, B ‘Certiorari to labour boards: The apparent futility of privative clauses’ (1952) 30 Can Bar Rev 986
Mullan, D ‘A blast from the past – A surreptitious resurgence of Metropolitan Life?’ (1992) 5(2d) Admin Law Reports 97
Mullan, D ‘Administrative tribunals and judicial review of charter issues after Multani’ (2006-2007) 21 NJCL 127
Mullan, D ‘Proportionality – A proportionate response to an emerging crisis in Canadian judicial review law?’ 2010 NZ L Rev 233

Mullan, D ‘Section 7 and administrative law deference: No room at the inn?’ (2006) 34(2d) Sup Crt L Rev 227

Mullan, D ‘The jurisdictional fact doctrine in the Supreme Court of Canada – a mitigating plea’ (1972) 10 Osgoode Hall LJ 440


Ross, J ‘Applying the Charter to discretionary authority’ (1991) 29 Alta L Rev 382

Roth, P ‘Employment law’ 2008 NZL Rev 159


Sossin, L & Flood, C ‘The contextual turn: Iacobucci’s legacy and the standard of review in administrative law’ (2007) 57 UTLJ 581


Taggart, M ‘Proportionality, Deference, Wednesbury’ 2008 NZ L Rev 423


Weiler, P ‘The ‘slippery slope’ of judicial intervention: The Supreme Court and Canadian labour relations 1950-1970’ (1971) 9 Osgoode Hall LJ 1

Wilson, WA ‘A note on fact and law’ (1963) 26 MLR 609
Wynn, M ‘Contempt powers of Industrial Tribunals’ (1995) 24(3) Ind Law J 278

### 2.3 Research papers; Conference papers; Lectures and Reports

Jones, DP Preliminary thoughts on Dunsmuir Notes for a Talk to the Canadian Bar Association, Administrative Law Section, Northern Alberta (18 March 2008)

### 2.4 Miscellaneous

The Ontario Labour Management Arbitrators’ Association website: http://www.labourarbitrators.org/
3. SOUTH AFRICAN PRIMARY SOURCES

3.1 Government and CCMA related publications and documents


3.2 Legislation, bills and legislative instruments

Arbitration Act 42 of 1965

Basic Conditions of Employment Act 75 of 1997

CCMA Guidelines: Misconduct Arbitrations GenN 602 GG 34573 of 2 September 2011

Code of good practice: Dismissal, Schedule 8 to the Labour Relations Act 66 of 1995

Code of good practice on dismissal based on operational requirements GenN 1517 GG 20254 of 16 July 1999

Code of good practice: Who is an employee? GenN 1774 of 1 December 2006
Constitution of the Republic of South Africa Act 200 of 1993
Constitution Seventeenth Amendment Bill GG 32311 of 17 June 2009
Employment Equity Act 55 of 1998
Explanatory Memorandum to the Labour Relations Act (1995) 16 ILJ 278
Judicial Matters Amendment Act 12 of 2002
Labour Relations Act 66 of 1995
Prescription Act 68 of 1969
Promotion of Administrative Justice Act 3 of 2000
Public Finance Management Act 1 of 1999
Rules for the conduct of proceedings before the CCMA GNR 1448 GG 25515 of 10 October 2003
Small Claims Court Act 61 of 1984
Superior Courts Bill GG 33216 of 21 May 2010
4. FOREIGN PRIMARY SOURCES

4.1 Legislation and legislative instruments

ACAS Arbitration Scheme SI2004/753
Administrative Appeals Tribunal Act 1975
Administrative Decisions (Judicial Review) Act 1977 (Cth)
Administrative Tribunals Act SBC 2004 c45
Arbitration Act 1996 c23
Canadian Human Rights Act RSC 1985 cH-6
Charter of Rights and Freedoms, Part 2 of the Constitution Act, 1982
Constitution Act, 1867
Constitution of the Republic of Malawi
Employment Protection Act 1975
Employment Rights (Dispute Resolution) Act 1998
Employment Tribunals Act 1996
Fair Work Act 2009
Federal Courts Act RSC 1985 cF-7
Human Rights Code RSBC 1996 c210
Human Rights Code RSO 1990 cH19
Immigration and Refugee Protection Act SC 2001 c27
Industrial Relations Act RSNB 1973 c1-4 as amended
Judicature Amendment Act 1972, No 130
Judicial Review Procedure Act RSO 1990 cJ1
Labour Relations Act 1995 SO c1 as amended
Labour Relations Code RSBC 1996 c244
Public Service Labour Relations Act RSNB 1973 cP-25
Supreme Court Act 1981
Supreme Court Act RSC 1985 cs-26
Trade Union Act RNS 1989 c475 as amended
4.2 Foreign government publications


4.3 International instruments

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BMD Knitting Mills (Pty) Ltd v SACTWU [2001] 7 BLLR 705 (LAC)
Bombardier Transportation (Pty) Ltd v Mtiya NO & others [2010] 8 BLLR 840 (LC)
Booysen v Minister of Safety and Security & others (2011) 32 ILJ 112 (LAC)
Bourke’s Estate v Commissioner for Inland Revenue [1991] 4 All SA 94 (AD)
Boxer Superstores (Pty) Ltd v Zuma & others [2008] 9 BLLR 823 (LAC)
Branford v Metrorail Services (Durban) & others (2003) 24 ILJ 2269 (LAC)
Calibre Clinical Consultants (Pty) Ltd & another v NBCRFI & another [2010] JOL 25831 (SCA)
Cape Bar Council v Judicial Service Commission & another (Centre for Constitutional Rights & another as amici curiae) [2011] JOL 27947 (WCC)
Cape Bar Council v Judicial Service Commission and another (Centre for Constitutional Rights and another as amici curiae) [2012] 2 All SA 143 (WCC)
Carephone (Pty) Ltd v Marcus NO & others [1998] 11 BLLR 1093 (LAC)
CEPPWAWU v NBCCI & others [2011] 2 BLLR 137 (LAC)
Chabeli v CCMA & others [2010] 4 BLLR 389 (LC)
Char Technology (Pty) Ltd v Mnisi & others [2000] 7 BLLR 778 (LC)
Chemical Workers Industrial Union & Others Sopelog CC (1994) 15 ILJ 90 (LAC)
Chevron Engineering (Pty) Ltd v Nkambule & Others (2001) 22 ILJ 627 (LAC)
Chevron Engineering (Pty) Ltd v Nkambule & others [2003] 7 BLLR 631 (SCA)
Chirwa v Transnet Ltd (2008) 4 SA 367 (CC)
Chirwa v Transnet Ltd and others [2008] 2 BLLR 97 (CC)
Clarence v The National Commissioner of the SA Police Service (2011) 32 ILJ 2927 (LAC)
Coetzee v Lebea NO & another (1999) 20 ILJ 129 (LC)
County Fair Foods (Pty Ltd v CCMA & others [1999] 11 BLLR 1117 (LAC)
County Fair Foods (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others (1999) 20 ILJ 1701 (LAC)
Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp & others [2002] 6 BLLR 493 (LAC)
Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp & Others (2002) 23 ILJ 863 (LAC)
CUSA v Tao Ying Metal Industries & others [2009] 1 BLLR 1 (CC)
CWIU & Others v Sopelog CC (1994) 15 ILJ 90 (LAC)
Dadoo Ltd & others v Krugersdorp Municipal Council 1920 AD 530
De Beers Consolidated Mines Ltd v CCMA & others [2000] 9 BLLR 995 (LAC)
De Lange v Smuts NO 1998 (3) SA 785 (CC)
Dell v Seton South Africa (Pty) Ltd & others [2011] 9 BLLR 846 (LAC)
Dimbaza Foundaries Ltd v CCMA & others [1999] 8 BLLR 779 (LC)
Discovery Health Limited v CCMA and others [2008] 7 BLLR 633 (LC)
Dunwell Property Services CC v Siband & others [2012] 2 BLLR 131 (LAC)
Dyokhwe v De Kock NO & others (2012) 33 ILJ 2401 (LC)
Eastern Cape Agricultural Cooperative v Du Plessis & others (2000) 21 ILJ 1335 (LC)
Edcon Ltd v Pillemer NO & others (2009) 30 ILJ 2642 (SCA)
Edcon Ltd v Pillemer NO & others [2010] 1 BLLR 1 (SCA)
Edgars Stores (Pty) Ltd v Director, CCMA & others [1998] 11 BLLR 1093 (LAC)
Edgars Stores (Pty) Ltd v Director, Commission for Conciliation, Mediation and Arbitration & others (1998) 19 ILJ 350 (LC)
Ellerine Holdings Ltd v CCMA & others [2008] JOL 22087 (LAC)
Ellis v Morgan 1909 TS 576
Engen Petroleum Ltd v CCMA & others [2007] 8 BLLR 707 (LAC)
EOH Abantu (Pty) Ltd v Commission for Conciliation, Arbitration and Mediation & others (2010) 31 ILJ 937 (LC)
Equity Aviation Services (Pty) Ltd v CCMA & others [2008] 12 BLLR 1129 (CC)
Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1999 (1) SA 374 (CC)
Fidelity Cash Management Service v CCMA & others [2008] 3 BLLR 197 (LAC)
Fipaza v Eskom Holdings Ltd (2010) 31 ILJ 2903 (LC)
Food & Allied Workers Union on behalf of Mbatha & others v Pioneer Foods (Pty) Ltd t/a Sasko Milling & Baking & others (2011) 32 ILJ 2916 (SCA)
Foodcorp (Pty) Ltd v Deputy Director-General, Department of Environmental Affairs & Tourism: Branch Marine & Coastal Management & others 2006 (2) SA 191 (SCA)  
Foschini Group (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others (2002) 23 ILJ 1048 (LC)  
Gabriel Tsietsi Banda v Emfuleni Local Municipality & others (LC) unreported case no J1214/08  
Gaga v Anglo Platinum Ltd & Others (2012) 33 ILJ 329 (LAC)  
Gcaba v Minister for Safety and Security & others 2010 (1) SA 238 (CC)  
Gcaba v Minister of Safety and Security & others [2009] 12 BLLR 1145 (CC)  
Goldfields Investment Ltd & another v City Council of Johannesburg & another 1938 TPD 551  
Government of the Republic of South Africa & others v Grootboom & others 2001 (1) SA 46 (CC)  
Grey’s Marine Hout Bay (Pty) Ltd and others v Minister of Public Works and others 2005 (6) SA 313 (SCA)  
Gubevu Security Group (Pty) Ltd v Ruggiero NO & others [2012] 4 BLLR 354 (LC)  
Hammond & Others v L Suzman Distributors (Pty) Ltd (1999) 20 ILJ 3010 (CCMA)  
Herholdt v Nedbank Ltd (2012) 33 ILJ 1789 (LAC)  
Hira & another v Booyse & another 1992 (4) SA 69 (A)  
HOSPERSA obo Venter v SA Nursing Council [2006] 6 BLLR 558 (LC)  
Information Trust Corporation v Gous & others (2005) 26 ILJ 2351 (LAC)  
Irvin & Johnson Ltd v CCMA & others [2006] 7 BLLR 613 (LAC)  
Johannesburg Consolidated Investment Co v Johannesburg Town Council 1903 (1) SA 111 (A)  
Johannesburg Stock Exchange v Witwatersrand Nigel Ltd 1988 (3) SA 132 (A)  
Jordaan v CCMA & others [2010] 12 BLLR 1235 (LAC)  
Joseph v University of Limpopo & Others (2011) 32 ILJ 2085 (LAC)  
Kaefer Insulation (Pty) Ltd v President of the Industrial Court & others (1998) 19 ILJ 567 (LAC)  
Kemp T/A Centralmed v Rawlins (2009) 30 ILJ 2677 (LAC)  
Khanyile v Billiton Aluminium SA Ltd t/a Hillside Aluminium (LAC) unreported case no DA24/06 of 24 February 2009
Kievits Kroon Country Estate (Pty) Ltd v CCMA & others [2010] JOL 26444 (LC)
Kievits Kroon Country Estate v MMolodi & others (LAC) unreported case no JA78/10 of 24 July 2012
Kriel v The Legal Aid Board [2009] 9 BLLR 854 (SCA)
Kynoch Feeds (Pty) Ltd v CCMA & Others (1998) 19 ILJ 836 (LC)
Kynoch Feeds (Pty) Ltd v CCMA & others [1998] 4 BLLR 384 (LC)
Law Society of the Northern Provinces v Minister of Labour and Others (NGHC) unreported case no 61197/11 of 15 October 2012
Le Monde Luggage t/a Pakwells Petje v Commissioner Dunn & others [2007] 10 BLLR 909 (LAC)
Liberty Life Association of Africa Ltd v Kachelhoffer & others [2004] 10 BLLR 1043 (C)
Linda Deutsch v Pinto & another (1997) 18 ILJ 1008 (LC)
Lucky Horseshoe (Pty) Ltd v Minister of Mineral and Energy Affairs 1992 (3) SA 838 (T)
Maepe v CCMA & another [2008] 8 BLLR 723 (LAC)
Maepe v Commission for Conciliation, Mediation and Arbitration & another (2008) 29 ILJ 2189 (LAC)
Makhanya v University of Zululand [2009] 4 All SA 146 (SCA)
Manana v Department of Labour & others [2010] 6 BLLR 664 (LC)
Maneche & others v Commission for Conciliation, Mediation and Arbitration & others (2007) 28 ILJ 2594 (LC)
MEC for Health (Gauteng) v Mathamini & others (2008) 29 ILJ 366 (LC)
Media Workers Association of SA & Others v The Press Corporation of SA Ltd (1992) 13 ILJ 1391 (A)
Metcash Trading (Pty) Ltd t/a Trador Cash & Carry Wholesalers v Sithole & others (1998) JOL 3591 (LC)
Metro Cash & Carry Ltd v Le Roux NO & others [1999] 4 BLLR 351 (LC)
Miladys v Naidoo & others (2002) 23 ILJ 1234 (LAC)
Minister of Health & another v New Clicks South Africa (Pty) Ltd & others (Treatment Action Campaign & another as amici curiae) 2006 (2) SA 311 (CC)
Minister of Health and Another v New Clicks SA (Pty) Ltd and Others (Treatment Action Campaign and Innovative Medicines SA as Amici Curiae) 2006 (1) BCLR 1 (CC)
Minister of Safety and Security v Madisha & others [2009] 1 BLLR 80 (LC)
Miyambo v Commission for Conciliation, Mediation and Arbitration & others (2010) 31 ILJ 2031 (LAC)
Mlaba v Masonite (Africa) Ltd & others [1998] 3 BLLR 291 (LC)
Moloi v Euijen & others (1997) ILJ 1372 (LC)
Moloi v Euijen & others [1997] 8 BLLR 1022 (LC)
Mondi Paper Co v Dlamini [1996] 9 BLLR 1109 (LAC)
Motsamai v Everite Building Products (Pty) Ltd [2011] 2 BLLR 144 (LAC)
Mpahlehle v First National Bank of South Africa Ltd 1999 (2) SA 667 (CC)
Mthembu & Mahomed Attorneys v Commission for Conciliation, Mediation & Arbitration & others (1998) 19 ILJ 143 (LAC)
Mutual Construction Co Tvl (Pty) Ltd v Ntombela NO & others (2010) 31 ILJ 901 (LAC)
Mutual Construction Company Tvl (Pty) Ltd v Ntombela NO & others [2010] 5 BLLR 513 (LAC)
Myers v National Commissioner of the South African Police Services and Others (SCA) unreported case no 425/2012 of 29 November 2012
Nakin v MEC, Department of Education, Eastern Cape Province and Another 2008 (6) BCLR 643 (Ck)
Nampak Corrugated Wadeville v Khoza (1999) 20 ILJ 578 (LAC)
Naraindath v CCMA & others (2000) 21 ILJ 1151 (LC)
Naraindath v CCMA & others [2000] 6 BLLR 716 (LC)
National Commissioner of the SA Police Service v Potterill NO & others (2003) 24 ILJ 1984 (LC)
National Education, Health and Allied Workers Union v University of Cape Town and others 2003 (2) BCLR 154 (CC)
National Union of Mineworkers & another v CCMA & others (LC) unreported case no C507/06 of 22 October 2010
National Union of Mineworkers & Another v Samancor Ltd (Tubatse Ferrochrome) & Others (2011) 32 ILJ 1618 (SCA)
National Union of Mineworkers obo Employees & others v Commission for Conciliation Mediation and Arbitration & others [2012] 1 BLLR 22 (LAC)
Netherburn Engineering CC t/a Netherburn Ceramics v Mudau & others [2003] 10 BLLR 1034 (LC)
Netherburn Engineering CC t/a Netherburn Ceramics v Mudau NO & others [2009] 6 BLLR 517 (CC)
Netherburn Engineering CC t/a Netherburn Ceramics v Mudau NO & others [2009] 4 BLLR 299 (LAC)
Northern Training Trust v Maake & others [2006] 5 BLLR 496 (LC)
Ntshangane v Speciality Metals CC [1998] 3 BLLR 305 (LC)
NUM & others v CCMA & others [2010] 6 BLLR 681 (LC)
NUMSA & others v Bader Bop (Pty) Ltd & another [2003] 2 BLLR 103 (CC)
NUMSA & others v Fry’s Metals (Pty) Ltd [2005] 5 BLLR 430 (SCA)
OK Bazaars (A Division of Shoprite Checkers) v Commission for Conciliation, Mediation & Arbitration & others (2000) 21 ILJ 1188 (LC)
Palaborwa Mining Co Ltd v Cheetham & Others (2008) 29 ILJ 306 (LAC)
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Pep Stores Ltd v Advocate AP Laka NO & others [1998] 9 BLLR 952 (LC)
Pep Stores Pty Ltd v Laka NO & others (1998) 19 ILJ 1534 (LC)
Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex parte President of the Republic of South Africa and Others 2000 (3) BCLR 241 (CC)
Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC)
PPWAWU & another v Commissioner CCMA (Port Elizabeth) & another [1998] 5 BLLR 499 (LC)
President of the Republic of South Africa v South African Rugby and Football Union & Others 2000 (1) SA 1 (CC)
Qozeleni v Minister of Law and Order & another 1994 (1) BCLR 75 (E)
R v Dhlumayo 1948 (2) SA 677 (A)
Rainbow Farms (Pty) Ltd v CCMA & others [2011] 5 BLLR 451 (LAC)
Relyant Retail Ltd t/a Bears Furnishers v CCMA & others [2009] JOL 24327 (LC)
Republican Press (Pty) Ltd v CEPPWAWU & Gumede & others [2007] 11 BLLR 1001 (SCA)
Reunert Industries (Pty) Limited t/a Reutech Defence Industries v Naicker & others [1997] 12 BLLR 1632 (LC)
Roman v Williams NO 1997 (9) BCLR 1267 (C)
Roman v Williams NO 1998 (1) SA 270 (C)
Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA & others [1997] 11 BLLR 1475 (LC)
Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA & others [2006] 11 BLLR 1021 (SCA)
Rustenburg Platinum Mines Ltd v CCMA & others [2004] JOL 12787 (LAC)
S v Mhlungu and others 1995 (3) SA 867 (CC)
S v Rens 1996 (1) SA 1218 (CC)
SA Maritime Safety Authority v McKenzie (2010) 31 ILJ 529 (SCA)
SA Municipal Workers Union on behalf of Petersen v City of Cape Town & others (2009) 30 ILJ 1347 (LC)
SA Rugby Players’ Association (SARPA) & others v SA Rugby (Pty) Ltd & others; SA Rugby (Pty) Ltd v SARPU & another [2008] 9 BLLR 845 (LAC)
Samancor Manganese (Pty) Ltd v CCMA & others (LAC) unreported case no JA17/2009 of 24 February 2009
Samancor Tubatse Ferrochrome v Metal & Engineering Industries Bargaining Council & others (2010) 31 ILJ 1838 (LAC)
Sampson Associates (Pty) Ltd t/a Interbrand Sampson v Cities Shepherd & others [2010] 7 BLLR 746 (LC)
Sasol Mining (Pty) Ltd v Commissioner Ngqeleni & others [2011] 4 BLLR 404 (LC)
Scrader Automotive (Pty) Ltd v Metal Industries Bargaining Council and Others (LC) unreported case no P488/05 of 26 September 2008
Shoprite Checkers (Pty) Ltd v CCMA & others [1998] 5 BLLR 510 (LC)
Shoprite Checkers (Pty) Ltd v CCMA & others [2008] 12 BLLR 1211 (LAC)
Shoprite Checkers (Pty) Ltd v CCMA & others [2009] JOL 23356 (SCA)
Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others (2000) 21 ILJ 1232 (LC)
Shoprite Checkers (Pty) Ltd v Ramdaw NO & others [2000] 7 BLLR 835 (LC)
Shoprite Checkers (Pty) Ltd v Ramdaw NO & others [2001] 9 BLLR 1011 (LAC)
Shoprite Checkers (Pty) Ltd v Ramdaw NO & others 2001 (3) SA 68 (LC)
Shoprite Checkers v CCMA & others [2008] 9 BLLR 838 (LAC)
Sidumo & another v Rustenburg Platinum Mines Ltd & others [2007] 12 BLLR 1097 (CC)
Sil Farming CC t/a Wigwam v CCMA (LC) unreported case no JR3347/05 of 2005

Solomon v Commission for Conciliation, Mediation and Arbitration & others (1999) 20 ILJ 2960 (LC)

Sondolo IT (Pty) Ltd v Howes & others [2009] 5 BLLR 499 (LC)

South African Post Office Ltd v CCMA & others (LAC) unreported case no JA56/06 of 3 August 2011

Southern Sun Hotel Interests (Pty) Ltd v CCMA & others [2009] 11 BLLR 1128 (LC)

Standard Bank of Bophuthututswana Ltd v Reynolds NO & others (1995) 16 ILJ 1380 (BG)

Standard Bank of South Africa v CCMA & others [1998] 6 BLLR 622 (LC)

State Information Technology Agency (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & others (2008) 29 ILJ 2234 (LAC)

Steelworkers v Warrior & Gulf Navigation Co 363 US 564 (1960)

Steyn v Middleburg Ferrochrome (a division of Samancor) and others (2009) 30 ILJ 1637 (LC)

Strategic Liquor Services v Mvumbi NO and Others 2010 (2) SA 92 (CC)

Super Group Autoparts t/a Autozone v Hlongwane NO & others (2010) 31 ILJ 1248 (LC)

Super Group Autoparts t/a Autozone v Hlongwane NO & others [2010] 4 BLLR 458 (LC)

Tao Ying Metal Industry (Pty) Ltd v Pooe NO & Others (2007) 28 ILJ 1949 (SCA)

Telcordia Technologies Inc v Telkom SA Ltd [2007] 2 All SA 243 (SCA)

Telcordia Technologies Inc v Telkom SA Ltd 2007 (5) BCLR 503 (SCA)

The Foschini Group v Maidi & others [2010] 7 BLLR 689 (LAC)

The South African Municipal Workers Union v The South African Local Government Bargaining Council & others (LAC) unreported case no DA06/09 of 29 November 2011

Timothy v Nampak Corrugated Containers (Pty) Ltd [2010] 8 BLLR 830 (LAC)

Total Support Management (Pty) Ltd & another v Diversified Health Systems (SA) Pty Ltd 2002 (4) SA 661 (SCA)

Toyota SA Motors (Pty) Ltd v Radebe & Others (2000) 21 ILJ 340 (LAC)

Transnet Freight Rail v Transnet Bargaining Council & others [2011] JOL 26922 (LC)

Transnet Freight Rail v Transnet Bargaining Council & others [2011] 6 BLLR 594 (LC)

Union Government (Minister of Mines and Industries) v Union Steel Corporation (South Africa) Ltd 1928 AD 220

United National Breweries (SA) Ltd v Khanyeza & others [2006] 4 BLLR 321 (LAC)

Value Logistics Ltd v Basson & Others (2011) 32 ILJ 2552 (LC)
Venture Motor Holdings Ltd t/a Williams Hunt Delta v Biyana & Others (1998) 19 ILJ 1266 (LC)

Volkswagen SA (Pty) Ltd v Brand NO & others (2001) 22 ILJ 993 (LC)

Woolworths (Pty) Ltd v CCMA & others [2010] 5 BLLR 577 (LC)

Woolworths (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others (2011) 32 ILJ 2455 (LAC)

Zono v Gruss NO & others [2011] 9 BLLR 873 (LAC)
2. FOREIGN CASES

Africa Personnel Services (Pty) Ltd v Government of The Republic of Namibia and Others 2009 (2) NR 596 (SC)
Alberta (Solicitor General) and AUPE (Jungwirth) [2010] AGAA No 5 (QL) (Ponak)
Alberta Teachers’ Association v Alberta (Information & Privacy Commissioner) 2011 SCC 61
Alberta Union of Provincial Employees v Alberta 2010 ABCA 216
Alberta v Alberta Union of Provincial Employees 2008 ABCA 258
Allman v Amacon Property Management Services Inc 2006 BCSC 725
Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147
Art Hauser Centre Board Inc (City of Prince Albert) v CUPE Local No 882 2008 SKCA 121
Asquini v British Columbia (Workers’ Compensation Appeal Tribunal) 2009 BCSC 62
Assoc des courtiers et agents immobiliers du Quebec v Propio Direct Inc [2008] 2 SCR 195
Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1947] 2 All ER 680
Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223
Audmax Inc v Ontario Human Rights Tribunal 2011 ONSC 315
Baker v Canada (Minister of Citizenship and Immigration) [1999] 2 SCR 817
Barrie Public Utilities v Canadian Cable Television Assn [2003] 1 SCR 476
Bell Canada v Bell Aliant Regional Communications [2009] 2 SCR 764
Bell v Ontario (Human Rights Commission) [1971] SCR 756
British Telecommunications v Sheridan [1990] IRLR 27
Canada (Attorney General) v Mavi [2011] 2 SCR 504
Canada (Attorney General) v Mossop [1993] 1 SCR 554
Canada (Attorney General) v PSAC [1991] 1 SCR 614
Canada (Attorney General) v Watkin (2008) 378 NR 268 (FCA)
Canada (Director of Investigation & Research) v Southam Inc [1997] 1 SCR 748
Canada (Minister of Citizenship and Immigration) v Khosa 2009 SCC 12
Canadian National Railway v Canadian Transportation Agency (2008) 378 NCR 121 (FCA)
Canadian Union of Public Employees, Local 963 v New Brunswick Liquor Corporation [1979] 2 SCR 227
Canadian Union of Public Employees v Ontario (Minister of Labour) 2003 SCC 29
Carter v Travelex Canada Ltd 2008 BCSC 405
Chamberlain Surrey School District No 36 2002 SCC 86

315
Clifford v Ontario (Attorney General) (2009) 188 LAC (4th) 97 (Ont CA)
Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission (2000) 203 CLR 194
Collier v Robinson Diesel Injection Ltd (1988) 89 CLLC 14037 (Sask QB)
Council of Canadians with Disabilities v VIA Rail Canada Inc 2007 SCC 15
Council of Civil Service Unions v Minister for the Civil Service [1984] 3 All ER 935
Crevier v Attorney General of Quebec [1981] 2 SCR 220
CUPE, Local 963 v New Brunswick Liquor Corp [1979] 2 SCR 227
Deputy Minister of National Revenue Canada v Mattel Canada Inc [2001] 2 SCR 100
Derbyshire and others v St Helens Metropolitan Borough Council [2006] ICR 90
Desbiens v Wal-mart Canada Corp [2009] 3 SCR 540 (SCC)
Dr Q v College of Physicians and Surgeons of British Columbia, [2003] 1 SCR 226
Dunsmuir v Her Majesty the Queen in Right of the Province of New Brunswick, as represented by the Board of Management 2006 NBCA 27
Dunsmuir v New Brunswick [2008] 1 SCR 190
East Berkshire Health Authority v Matadeen [1992] ICR 723
Eclipse Blinds Ltd v Wright [1992] IRLR 133
Evans v University of British Columbia 2008 BCSC 1026
G v G [1985] 1 WLR
Halifax (Regional Municipality) v NSUPE, Local 13 (2009) 187 LAC (4th) 353
Harrison v British Columbia (Information & Privacy Commissioner) 2008 BCSC 411
Hereford and Worcester County Council v Neale [1986] IRLR 168 (CA)
House v The King (1936) 55 CLR 488
Housen v Nikolaisen 2002 SCC 33
Housing Corp v Bryant [1999] ICR 123
Howe v 3770010 Canada Inc 2008 BCSC 330
Idahosa v Canada (Minister of Public Safety & Emergency Preparedness) (2008) 385 NR 134 (FCA)
Kerton v British Columbia (Workers’ Compensation Appeal Tribunal) 2011 BCCA 7
Khosa v Canada (Minister of Citizenship and Immigration) [2007] 4 FCR 332
Khosa v Canada (Minister of Citizenship and Immigration) 2005 FC 1218
Lake v Canada (Minister of Justice) [2008] 1 SCR 761
Lee v Parking Corp of Vancouver (1999) 39 CCEL (2d) 135 (BCSC)
Lesotho Highlands Development Authority v Impreglio SpA and Others [2006] 1 AC 221 [HL]
Lethbridge College v Lethbridge College Faculty Association 2008 CarswellAlta 911 (Alta QB)
Limestone District School Board v Ontario Secondary School Teachers’ Federation 2008 CanLII 63992 (ON SCDC)
LSUC v Neinstein [2010] ONCA 193
Manchin v Miners Tipper Services Pty Ltd [2011] FMCA 485
Manz v Sundher 2009 BCCA 92
Maritime Paper Products Ltd v CEP, Local 1520 (2009) 183 LAC (4th) 289
Melon v Hector Powe Ltd [1980] IRLR 477
Mills and Gagne c Autorite des Marches Financiers [2008] JQ no 7830 (CA) (QL)
Mills v Ontario (Workplace Safety and Appeals Tribunal) 2008 ONCA 436
MiningWatch Canada v Canada (Fisheries and Oceans) [2010] 1 SCR 6
Montreal (City) v Montreal Port Authority [2010] 1 SCR 427
Moreau-Berube c Nouveau-Brunswick [2002] 1 SCR 249 (SCC)
Multani c Marguerite-Bourgeoys (Commission scolaire) [2006] 1 SCR 256
National Bank v Canada v Retail Clerks International Union [1984] 1 SCR 269 (Can)
National Corn Growers Association v Canada (Import Tribunal) [1990] 2 SCR 1324
New Brunswick v Dunsmuir 2005 NBQB 270
Newfoundland and Labrador Nurses’ Union v Newfoundland and Labrador (Treasury Board) 2011 SCC 62
Newfoundland and Labrador Nurses’ Union v Newfoundland and Labrador (Treasury Board) [2011] 3 SCR 708
Nolan v Kerry (Canada) Inc [2009] 2 SCR 678
Noorani v Merseyside TEC Ltd [1999] IRLR 184 (CA)
Northrop Grumman Overseas Services Corp v Canada (Attorney General) [2009] 3 SCR 309 (SCC)
Nova Scotia (Workers ’ Compensation Board) v Martin [2003] 2 SCR 504
Parry Sound (District) Social Services Administration Board v OPSEU, Local 324 [2003] 2 SCR 157
Paschienyk v Saskatchewan (Workers Compensation Board) [1997] 2 SCR 890
Pezim v British Columbia (Superintendent Brokers) [1994] 2 SCR 557 (SCC)
Piggot Bros & Co Ltd v Jackson [1991] IRLR 309
Port Arthur Shipbuilding Co v Arthurs et al [1969] SCR 85
Public Service Alliance of Canada v Canadian Federal Pilots Association 2009 FCA 223
Pushpanathan v Canada (Minister of Citizenship and Immigration) [1998] 1 SCR 982
R (Alconbury Development Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] 2 WLR 1389
R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence [2003] QB 1397
R (Daly) v Secretary of State for the Home Department [2001] 1 WLR 1855
R (on the application of Louis Farrakhan) v Secretary of State for the Home Department [2002] 3 WLR 481
R (Prolife Alliance) v British Broadcasting Corp [2003] 2 WLR 1403
R v Chief Constable of Sussex Ex p International Trader’s Ferry Ltd [1999] 2 AC 418
R v Hull University Visitor Ex p Page [1993] AC 682
R v Lord Saville of Newdigate [2000] 2 WLR 1389
R v Ontario Public Service Employees Union (OPSEU) 2010 ONSC 4006
R v Owen [2003] 1 SCR 779
R v Secretary of State for the Home Department Ex p Daly [2001] 1 SCR 779
Rawlings v Sanco NZ Ltd CHCH CC 2A/06 (23 June 2006)
Re Racial Communications Ltd [1981] AC 374
Reference Re Public Service Employee Relations Act (Alta) [1987] 1 SCR 313
Rolling River School Division v Rolling River Teachers Association of the Manitoba Teachers’ Society 2008 CarswellMan 394 (Man QB)
Roncarelli v Du Plessis [1959] SCR 121 (Que)
Ryan v Law Society (New Brunswick) [2003] 1 SCR 247
Service Employees’ International Union, Local No 333 v Nipawin District Staff Nurses Association et al [1975] 1 SCR 382
Shell Canada Products Ltd v Vancouver (City) [1994] 1 SCR 231 (BC)
Suresh v Canada (Minister of Citizenship and Immigration) [2002] 1 SCR 3 (Can)
Syndicat de la fonction publique du Québec v Quebec (Attorney General) 2010 SCC 28
Telecom New Zealand Ltd v Nutter [2004] ERNZ 315 (CA)
Toronto (City) v CUPE, Local 79 [2003] 3 SCR 77
Toronto Hydro-Electric System Ltd v Ontario (Energy Board) 2010 ONCA 284
UES, Local 298 v Bibeault [1988] 2 SCR 1048
UKAPE v ACAS [1981] AC 424
UNA, Local 301 v Capital Health Authority (2009) 184 LAC (4th) 193 (ABCA)
United Brotherhood of Carpenters & Joiners of America, Local 579 v Bradco Construction Limited [1993] 2 SCR 316
United Taxi Drivers’ Fellowship of Southern Alberta v Calgary (City) [2004] 1 SCR 485
Veer v Dover Corp (Canada) Ltd (1999) 99 CLLC 210037 (Alta QB)
Victoria Times Colonist, a Division of Canwest Mediaworks Publications Inc v Communications, Energy and Paperworks Union of Canada, Local 25-G 2009 BCCA 229
Vidler v UNISON [1999] ICR 746
Voice Construction v Construction & General Workers Union, Local 92 2004 SCC 23
Wallace v United Grain Growers Ltd [1998] 3 SCR 701
Walsh v Council for Licensed Practical Nurses [2010] NJ No 41 (CA)
Watling v William Bird & Son (Contractors) Ltd (1976) 11 ITR 70
Weber v Ontario Hydro [1995] 2 SCR 929
Westcoast Energy Inc v Canada (National Energy Board) [1998] 1 SCR 322
Westergaard v Registrar of Mortgage Brokers 2011 BCCA 344
Woods v British Columbia (Workers Compensation Board) 2009 BCJ 2018
Yearwood v Commissioner of Police of the Metropolis and another [2004] ICR 1660
Yeboah v Crofton [2002] IRLR 635 (CA)