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

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Commercial Law Department
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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

University of Cape Town

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.

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University of Cape Town

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INTRODUCTION

1. THE ORIGIN OF THE PROBLEM

Picture the drafters of the Labour Relations Act ('LRA' or 'the Act').¹ 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.² These features they deemed crucial to the unique exigencies of employment relationships.³ Thus, when an appropriate measure of judicial scrutiny was ultimately agreed upon, the possibility of appeal from CCMA awards was excluded from the LRA.⁴ In its place, limited grounds of review akin to those in the Arbitration Act were prescribed.⁵ By doing so, the drafters of the Act sought to promote the efficiency and authority of the CCMA.⁶ Simultaneously, by minimising judicial intervention with CCMA proceedings, the informality necessary for effective labour dispute resolution was to be maintained.

In another room,⁷ 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.⁸ Still incensed by the injustices committed by South Africa's erstwhile government, they sought to define judicial powers of review to ensure that all

¹ The Labour Relations Act 66 of 1995 ('LRA' or 'the Act').

² Paul Benjamin 'Friend or foe? The impact of judicial decisions on the operation of the CCMA' (2007) 28 *ILJ* 1 at 3-6; The Explanatory Memorandum to the Labour Relations Act 1995 16 *ILJ* 278 ('The Explanatory Memorandum') at 279 & 318-319; Consult too Paul Benjamin & Carole Cooper 'Innovation and continuity: Responding to the Labour Relations Bill' (1995) 16 *ILJ* 258 (A).

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.

⁵ The Arbitration Act 42 of 1965.

⁶ Benjamin (2007) at 3-6; The Explanatory Memorandum; *Carephone (Pty) Ltd v Marcus NO & Others* [1998] 11 BLLR 1093 (LAC) para 25; *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC) para 245.

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.⁹ To achieve this, the drafters surmised, public institutions would need to act with accountability, transparency and openness.¹⁰ Furthermore, any actions taken by the administration would be required to meet constitutional standards of reasonableness, lawfulness and procedural fairness.¹¹ In their view, it was only in this way that administrative justice could be assured.¹²

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.¹³ 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*.¹⁴ 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,¹⁵ were suffused by the constitutional standard of reasonableness.¹⁶ In accordance with

⁹ Hugh Corder ‘Comparing administrative justice across the Commonwealth: A first scan’ 2006 *Acta Juridica* 1 at 2; Lourens du Plessis & Hugh Corder *Understanding South Africa’s Transitional Bill of Rights* (1994) at 165-170; Iain Currie and Johan De Waal *The Bill of Rights Handbook* 5 ed (2005) at 642-643; Etienne Mureinik ‘A bridge to where? Introducing the interim Bill of Rights’ (1994) 10 *SAJHR* 31. The government nevertheless did express fears that socio-economic reform might be hampered by affording the courts powers of review which were too expansive; Hugh Corder ‘Administrative justice’ in D van Wyk et al (eds) *Rights and Constitutionalism* (1994) 387 at 398.

¹⁰ See sections 1(d), 195(1) and 33 of the Constitution in particular. For the importance of administrative justice to South Africa’s democracy generally, consult Hugh Corder ‘Reviewing review: much achieved, much more to do’ in Hugh Corder & Linda van der Vijver (eds) *Realising Administrative Justice* (2002) 1; Cora Hoexter ‘The current state of South African administrative law’ in Hugh Corder & Linda van der Vijver (eds) *Realising Administrative Justice* (2002) 20; Etienne Mureinik ‘Reconsidering review: Participation and accountability’ 1993 *Acta Juridica* 35 and Jeffrey Jowell in ‘The democratic necessity of administrative justice’ 2006 *Acta Juridica* 13.

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.

¹⁴ *Sidumo v Rustenburg Platinum Mines Ltd & others* 2007 [12] BCLR 1097 (CC).

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?'¹⁷

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.¹⁸ These range from complete disregard for the reasonableness test to intricate and involved assessments thereof.¹⁹ Specifically, some courts depict the reasonableness standard as a resolute one, sufficient to excuse other irregularities in arbitration awards.²⁰ Others pay only nominal attention to it in favour of the applicant's allegations of section 145 defects,²¹ while still others dismiss these grounds entirely preferring to apply reasonableness alone.²² In addition, whether the introduction of the reasonableness standard has narrowed the grounds for review or expanded upon them remains uncertain.²³ Equally debatable are the questions whether reasonableness comprises both procedural and substantive elements and if so, what these are.²⁴ Finally, the differences between the *Carephone*²⁵ and *Sidumo* tests are unclear – again this is evident from reviewing

¹⁷ *Sidumo* para 110.

¹⁸ *Southern Sun Hotel Interests* para 13; C Garbers 'Reviewing CCMA awards in the aftermath of *Sidumo*' (2008) 17(9) *Contemporary Labour Law* 84 at 84; PAK Le Roux & K Young 'The role of reasonableness in dismissal' (2007) 17(3) *Contemporary Labour Law* 21 at 30. For different approaches to review, compare *The Foschini Group v Maidi & others* [2010] 7 BLLR 689 (LAC) with *State Information Technology Agency (SITA) (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & others* (2008) 29 ILJ 2234 (LAC).

¹⁹ Compare *Fidelity Cash Management Service v CCMA & others* [2008] 3 BLLR 197 (LAC), *Ellerine Holdings Ltd v CCMA & others* [2008] JOL 22087 (LAC), *Sasol Mining (Pty) Ltd v Commissioner Nggeleni & others* [2011] 4 BLLR 404 (LC) and *Transnet Freight Rail v Transnet Bargaining Council & others* [2011] 6 BLLR 594 (LC), for example, with *Kievits Kroon Country Estate (Pty) Ltd v CCMA & others* [2010] JOL 26444 (LC) and *Clarence v The National Commissioner of the SA Police Service* (2011) 32 ILJ 2927 (LAC).

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.

²¹ *Maepe v Commission for Conciliation, Mediation and Arbitration & another* (2008) 29 ILJ 2189 (LAC); Consult chapters 3 and 4 of this thesis for details; 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 2; *Manana v Department of Labour & others* [2010] 6 BLLR 664 (LC).

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.²⁶ Compounding the confusion, and despite the import of the distinction between appeal and review,²⁷ frequent references to the 'correct', 'wrong' or 'incorrect' findings of commissioners appear in Labour and Labour Appeal Court judgments.²⁸ Altogether, the result has been inconsistency and unpredictability in review proceedings²⁹ – an intolerable outcome, given the LRA's principal objective of promoting effective dispute resolution.³⁰

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

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

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 *ILJ* 1556. Consult this work for the differences between appeal and review generally and the rationale behind the distinction.

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

²⁹ Compare *Shoprite Checkers 1* with *Shoprite Checkers (Pty) Ltd v CCMA & others* [2009] JOL 23356 (SCA) ('*Shoprite Checkers 3*') and *Shoprite Checkers v CCMA & others* [2008] 9 BLLR 838 (LAC) ('*Shoprite Checkers 2*'). See also Myburgh (2009) and 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.

³⁰ Section 1(d)(iv) of the LRA.

³¹ *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).

³² Section 1(d)(iv) of the LRA; The Explanatory Memorandum at 279 & 318-319; *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. Consider, however, *Herholdt v Nedbank Ltd* (2012) 33 *ILJ* 1789 (LAC) paras 52-56.

³³ For the unique nature of labour dispute resolution generally, see Brand et al (2008). Consider too the Namibian judgment of *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; *Dyokhwe v De Kock NO & others* (2012) 33 *ILJ* 2401 (LC) para 28. In *Reference Re Public Service Employee Relations Act (Alta)* [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 *HOSPERSA obo Venter v SA Nursing Council* [2006] 6 BLLR 558 (LC) para 27 and again in *Standard Bank of South Africa v CCMA & others* [2008] 4 BLLR 356 (LC) para 65.

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

³⁵ John Brand 'CCMA: Achievements and challenges – Lessons from the first three years' (2000) 21 *ILJ* 77 at 77; Benjamin (2007) at 32.

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.

⁴⁴ *Sidumo* paras 88, 138 & 140; *Carephone* paras 34-37; Garbers (2008) at 86; Ray-Howett at 1628. For the role of review in ensuring accountability while still maintaining the separation of powers between executive, legislature and judiciary, consult Cora Hoexter *Administrative Law in South Africa* (2007) at 131 and Lawrence Baxter *Administrative Law* (1984) at 305. For the positive impact of review on improving administrative performance, see Jowell and JR De Ville *Judicial Review of Administrative Action in South Africa* revised 1 ed (2005) at 30.

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.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.⁴⁷ Together with pertinent principles of administrative law (which are relevant in light of the CCMA's status as an administrative body),⁴⁸ this is the framework in which CCMA awards ought to be evaluated. Having addressed the context for review of CCMA decisions,⁴⁹ the dissertation turns to the Labour Appeal Court's judgment in *Carephone (Pty) Ltd v Marcus NO & others*⁵⁰ and the implications thereof for the statutory grounds of review.

3.2 Chapter 2

In chapter 2, Froneman DJP's decision in *Carephone* that the grounds for review in section 145 of the LRA were infused by the Constitutional requirement that awards 'be justifiable in

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

⁴⁷ Recognised in the CCMA's Annual Report for the period 2009-2010 (specifically at 3); *CCMA Annual Report 2009-2010* Department of Labour RP: 84/2010, available at www.ccma.org.za, accessed on 12 August 2012.

⁴⁸ *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; *Carephone* paras 9, 19 & 34-37; *Sidumo* paras 138 & 140.

⁴⁹ The importance of context is clear as the nature and scope of the reasonableness standard is contextually dependent; *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 *The Fundamental Right to Just Administrative Action: Judicial Review of Administrative Action in the Democratic South Africa* (PhD Thesis) 2002 at 339-363.

⁵⁰ *Carephone (Pty) Ltd v Marcus NO & Others* [1998] 11 BLLR 1093 (LAC).

relation to the reasons given for them',⁵¹ is examined.⁵² 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.⁵³ Naturally the phrase 'rational justifiability' is distinct from that of 'reasonableness' applicable under the final Constitution.⁵⁴ 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.⁵⁵ 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*.⁵⁶ 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?'⁵⁷

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 t/a 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.

⁵⁶ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC).

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.⁵⁸ 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.⁵⁹ 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,⁶⁰ 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

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.⁶¹ 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.⁶² 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.⁶³ 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.⁶⁴ The chapter opens with a brief description of the former test for

⁶¹ Including those associated with rationality, justifiability and proportionality specifically.

⁶² De Ville (2005) at 212; Hoexter (2007) at 315; Plasket at 339-363; *Bato Star* para 45.

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.⁶⁵ Of these, the most pivotal is *Dunsmuir v New Brunswick*.⁶⁶ Following the discussion of relevant case law, the critique⁶⁷ 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,⁶⁸ 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.⁶⁹

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.

⁶⁶ *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 Amongst other texts, Michel Bastarache 'Modernising judicial review' (2009) 22 *Can J Admin L & Prac* 227; Piper Henderson 'Supreme Court of Canada's new 'reasonableness' standard of review applied in recent education cases' [2008] 18 *Educ & LJ* 179; David Mullan '*Dunsmuir v New Brunswick*, Standard of review and procedural fairness for public servants: Let's try again!' [2008] 21 *Can J Admin L & Prac* 117, are considered.

⁶⁸ With reference to a finite but still apt set of contextual considerations drawn primarily from the Canadian approach.

⁶⁹ 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*,⁷⁰ the Constitutional Court held that arbitrations of the Commission for Conciliation, Mediation and Arbitration ('CCMA')⁷¹ constitute administrative action for the purposes of section 33 of the Constitution.⁷² 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'),⁷³ but also in accordance with the Constitutional right to just administrative action.⁷⁴ 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,⁷⁵ extending reviewing courts' powers consistently with this right should not be frivolously undertaken.⁷⁶ 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

⁷⁰ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC) para 88.

⁷¹ The Commission for Conciliation, Mediation 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 Or 'the Act'.

⁷⁴ Section 33 of the Constitution. Ordinarily, in terms of this right, administrative action is reviewable on any of the grounds provided for in section 6 of the Promotion of Administrative Justice Act 3 of 2000 ('the PAJA'). See, for example, *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) para 25, where the Court held: 'The cause of action for the judicial review of administrative action now ordinarily arises from the PAJA, not from the common law as in the past...' and *Kriel v The Legal Aid Board* [2009] 9 BLLR 854 (SCA). In *Kriel*, the Supreme Court of Appeal similarly noted that: 'It is trite that the appellant can only be entitled to relief in terms of the PAJA if his dismissal amounted to administrative action.' Consult too *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999 (1) SA 374 (CC) para 26 and Cora Hoexter 'Administrative action in the courts' 2006 *Acta Juridica* 303 at 307. For reasons discussed in more detail in later chapters of this paper, the Constitutional Court in *Sidumo* found that CCMA arbitration awards were not subject to review on the grounds provided for in the PAJA. Applicants in review proceedings involving such awards were instead required to base their applications on the grounds set out in section 145 of the LRA, subject to the suffusion of these grounds with the constitutional standard of reasonableness; *Sidumo* para 109; consider, however, Grant Ray-Howett 'Is it reasonable for CCMA commissioners to act irrationally?' (2008) 29 *ILJ* 1619 at 1626.

⁷⁵ The Explanatory Memorandum to the Labour Relations Act (1995) 16 *ILJ* 278 ('the Explanatory Memorandum') at 318-319; Paul Benjamin 'Friend or foe? The impact of judicial decisions on the operation of the CCMA' (2007) 28 *ILJ* 1 at 41; see also *Sidumo* paras 143, 158 & 245; *Carephone (Pty) Ltd v Marcus NO & others* [1998] 11 BLLR 1093 para 25.

⁷⁶ 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.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.⁷⁸ In turn, social justice was to be achieved.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.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.

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 *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 *ILJ* 26 at 26 & 42-43.

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

⁷⁹ Ibid; Paul Benjamin 'Assessing South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA)' Publication pending (2013) at 1. Consult generally, the *Commission for Conciliation, Mediation and Arbitration Annual Report 2009-2010* Department of Labour RP: 84/2010, available at www.ccma.org.za, accessed on 12 October 2012; for more recent but less specific figures, see the *Commission for Conciliation, Mediation and Arbitration Annual Report 2010-2011* Department of Labour RP: 58/2011, available at www.ccma.org.za, accessed on 12 October 2012. Consider too 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.

⁸⁰ Note that while contested by some, the evaluation is premised on the Constitutional Court's ('CC') finding in *Sidumo* that CCMA arbitrations constitute administrative action. For the protracted debate on whether CCMA arbitrations constitute administrative action, consider *Carephone; Netherburn Engineering CC t/a Netherburn Ceramics v Mudau & others* [2003] 10 BLLR 1034 (LC); *Kynoch Feeds (Pty) Ltd v CCMA & Others* (1998) 19 *ILJ* 836 (LC) para 46; *Shoprite Checkers (Pty) Ltd v Ramdau NO and Others* [2001] 9 BLLR 1011 (LAC); *Volkswagen SA (Pty) Ltd v Brand NO* (2001) 22 *ILJ* 993 (LC); *Shoprite Checkers (Pty) Ltd v Ramdau NO & Others* (2000) 21 *ILJ* 1232 (LC). For the test for administrative action generally, see *Nakin v MEC, Department of Education, Eastern Cape Province and Another* 2008 (6) BCLR 643 (Ck); *Fedsure*; section 1 of PAJA; *President of the Republic of South Africa v South African Rugby and Football Union & Others* 2000 (1) SA 1 (CC) ('SARFU'); *Calibre Clinical Consultants (Pty) Ltd & another v NBCRFI & another* [2010] JOL 25831 (SCA); Hoexter 2006 *Acta Juridica* at 307 and Iain Currie 'What difference does the Promotion of Administrative Justice Act make to administrative law?' 2006 *Acta Juridica* 325; *Grey's Marine Hout Bay (Pty) Ltd and others v Minister of Public Works and others* 2005 (6) SA 313 (SCA); *Chirwa v Transnet Ltd* (2008) 4 SA 367 (CC) and *Gcaba v Minister of Safety and Security & others* [2009] 12 BLLR 1145 (CC); Iain Currie & Johan De Waal *The Bill of Rights Handbook* 5 ed (2005) at 650-662; JR De Ville *Judicial Review of Administrative Action in South Africa* revised 1 ed (2005) at 1-69; Hoexter 2006 *Acta Juridica*; Cora Hoexter 'The future of judicial review in South African administrative law' (2000) 117(3) *SALJ* 484; Catherine O'Regan 'Breaking ground: Some thoughts on the seismic shifts in our administrative law' (2004) 121 *SALJ* 424; Cora Hoexter *Administrative law in South Africa* (2007); Lawrence Baxter *Administrative Law* (1984); Iain Currie & Jonathan Klaaren *The Promotion of Administrative Justice Act benchbook* (2001); Cora Hoexter with Rosemary Lyster *The New Constitutional and Administrative Law* vol 2 (2002).

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

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 review⁹³ 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; *Sidumo* paras 163, 164 & 200-240. For detailed discussions of the doctrine of legality, consult *Fedure* para 56 and *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* 2006 (11) BCLR 1255 para 39. Consider too *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (5) BCLR 391 (CC) para 49; *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC); *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 *SARFU* para 38.

⁹³ Section 6 of PAJA.

⁹⁴ *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 justice⁹⁹ 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.

¹⁰⁰ *CCMA Annual Report 2009-2010* at 2. See also Benjamin (2013) at 53; For contrary views on the CCMA's achievement of social justice, compare Theron & Godfrey (2002) at 63 with the Organisation for Economic Co-operation and Development's ('OECD') *Territorial Reviews: The Gauteng City - Region, South Africa* © OECD (2011).

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.¹⁰³ Finally, crafting the CCMA in this way was intended to ensure a ‘credible, legitimate alternative process’, which would reduce industrial action arising from dismissals.¹⁰⁴ In turn, the problems associated with the former conciliation boards and the Industrial Court were to be avoided.¹⁰⁵

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;¹⁰⁶ 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.¹⁰⁷

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 fn13 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 *Nat'l Acad Arb's 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 body¹⁰⁹ which consists of a chairperson, the director of the CCMA¹¹⁰ 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

• publish guidelines on any aspect of the LRA and to make rules.'

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.¹¹⁵ Cooperation from all parties to CCMA disputes is concurrently encouraged.¹¹⁶ 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.¹¹⁷

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.¹¹⁸ Still, given its administrative standing,¹¹⁹ 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.¹²⁰ A statement of the CCMA's estimated income, expenditure and future financing needs must similarly be provided.¹²¹ The institution's accountability, coupled with its duty to compile and publish information and statistics on its activities,¹²² preserve the CCMA's integrity. All told, it enjoys measurable respect from the public and its stakeholders as a result.¹²³ The features of CCMA proceedings complement this and a discussion of those features follows.

¹¹⁵ 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 <http://www.ilo.org/gb/AboutGB/lang--en/index.htm>, accessed on 19 October 2010.

¹¹⁶ 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.

¹¹⁷ Section 117 of the LRA; Department of Justice *The Code of Conduct – Commissioners Consolidated Labour Court Directive* 2010, available at <http://www.worklaw.co.za/SearchDirectory/Codes Of Good Practice/COMMISSIONERS.asp>, accessed on 18 July 2012.

¹¹⁸ Details of its financing obligations and allowances are set out in section 122 of the LRA.

¹¹⁹ See the discussion above and *SARFU* para 138.

¹²⁰ Section 122(3) of the LRA. This report must be tabled in parliament by the Minister within 14 days of its submission.

¹²¹ Section 122(3) of the LRA.

¹²² Section 115(d) of the LRA.

¹²³ Benjamin (2013) at 53.

3.2 The features of CCMA proceedings

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.¹²⁴ It is instructive to address these in turn.

3.2.1 Accessibility

First, CCMA proceedings are designed to be accessible to the general public.¹²⁵ There are at least three ways in which this objective is achieved. To begin with, the CCMA's services are essentially free.¹²⁶ 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').¹²⁷ 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.¹²⁸ 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.¹²⁹ While

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 Rules for the conduct of proceedings before the CCMA GNR 1448 GG 25515 of 10 October 2003 ('the CCMA Rules').

¹²⁸ 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).

¹²⁹ 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,¹³⁰ its principal impact on accessibility is that it minimizes the costs of arbitration proceedings.¹³¹ 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.¹³² These are considered under ‘expeditiousness’ below. Unfortunately, the frequency of review proceedings curtails the value of Rule 25 and the CCMA’s free services;¹³³ 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.¹³⁴

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.¹³⁵ Section 138 of the LRA is the principal statutory mechanism for enabling flexibility.¹³⁶

(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.

¹³⁰ 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*.

¹³¹ 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.

¹³² For one, commissioners are denied the benefits enjoyed by the courts of assistance from the parties’ legal representatives; Benjamin (2007) at 9.

¹³³ Consult, however, *Herholdt v Nedbank Ltd* (2012) 33 ILJ 1789 (LAC) paras 53-56, where the Judge contested this view.

¹³⁴ 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.

¹³⁵ 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.

¹³⁶ 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.¹³⁷ 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...¹³⁸
- ...(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.'¹³⁹

It is significant that commissioners are afforded substantial discretion by this section to determine the form which arbitration proceedings take.¹⁴⁰ In addition to reducing the

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,¹⁴¹ the legislature's intention when granting this discretion was to promote flexibility and informality in CCMA arbitrations.¹⁴² 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.¹⁴³ 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,¹⁴⁴ when doing so, courts should recount both the extent of commissioners' discretionary powers and the rationale underlying them.¹⁴⁵

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.¹⁴⁶

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 Maudi & 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.

¹⁴⁶ Section 138 of the LRA; Benjamin (2007) at 8-9. Consider too *Sondolo IT (Pty) Ltd v Howes & others* [2009] 5 BLLR 499 (LC) paras 8-11 and *Minister of Safety and Security v Madisha & others* [2009] 1 BLLR 80 (LC) paras 12-13.

In *Naraindath v CCMA & others*,¹⁴⁷ Wallis AJ examined the nature of commissioners' discretionary powers in detail.¹⁴⁸ 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.¹⁴⁹ 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.¹⁵⁰ Arbitration awards evincing such deprivation would be susceptible to review.¹⁵¹ According to him, specific guidelines for arbitration proceedings could accordingly not be formulated.¹⁵² While at times the 'traditional adversarial approach' to proceedings might be warranted, the Judge expected those occasions to be scarce.¹⁵³ 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

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.

¹⁵³ *Naraindath* para 32; consider too *Foschini* (2010) (LAC) paras 32-35 and *Pep Stores*.

determined by the commissioner subject to the overriding need to comply with the principles of natural justice.’¹⁵⁴

Subsequently, in *CUSA v Tao Ying Metal Industries & others*,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.’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.’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.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 *Tao Ying*,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.’¹⁶⁰

Thus, commissioners remain bound to apply the basic tenets of adjudication when doing so is necessary to secure fairness.¹⁶¹ Since *Tao Ying*, the LC in *Transnet Freight Rail v Transnet*

¹⁵⁴ *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; *Foschini* (2010) (LAC) paras 32-35; *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.’

¹⁵⁵ *CUSA v Tao Ying Metal Industries & others* [2009] 1 BLLR 1 (CC)

¹⁵⁶ *Ibid* para 65.

¹⁵⁷ *Ibid*.

¹⁵⁸ *Ibid*.

¹⁵⁹ *CUSA v Tao Ying Metal Industries & others* [2009] 1 BLLR 1 (CC).

¹⁶⁰ *Ibid* para 152.

¹⁶¹ *Ibid*; *Carephone* para 20; *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; *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

¹⁶² *Transnet Freight Rail v Transnet Bargaining Council & others* [2011] 6 BLLR 594 (LC).

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 Ngqeleni & 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 dismissal arbitrations 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>, 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,¹⁶⁹ Brand describes it as envisaging the parties as embroiled in a contest against one another, with the presiding officer performing the role of ‘umpire’.¹⁷⁰ 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.¹⁷¹ The system ensures that witnesses are subjected to cross-examination,¹⁷² but it essentially submits control of the proceedings to the parties.¹⁷³ 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.¹⁷⁴

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.¹⁷⁵ Moreover, it obliges decision-makers to ‘dominate’ the proceedings, demanding greater skill and competency on their part than is needed for adversarial processes.¹⁷⁶ Adding to these difficulties are those associated with

¹⁶⁹ Which is traditionally used by the courts.

¹⁷⁰ John Brand ‘How to participate in the arbitration process’ in Paul Pretorius (ed) *Dispute Resolution* (1993) at 105-106; see also David Butler ‘Expediting commercial arbitration proceedings: Recent trends’ (1994) 6 *SA Merc LJ* 251 at 260-261 and DW Butler (original text by C Smith) ‘Arbitration’ *The Law of South Africa* vol 1 2 ed (2003) para 588, where the author describes the interventionist role which arbitrators may adopt.

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.¹⁷⁷ As Brand submits, ‘justice and fairness’ may require time to achieve and efficiency should not be prized at their expense.¹⁷⁸ Thus, some structure and order is necessary, in the absence of which, parties’ rights to fairness may be undermined.¹⁷⁹ Chaotic attitudes to arbitrations accordingly cannot be tolerated.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),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.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.¹⁸³ As such, it is unsurprising that the Act endorses the inquisitorial method, rather than adversarial processes.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.¹⁸⁵ Unfortunately nonetheless, commissioners

¹⁷⁷ Brand (2000) at 86-87; Brand et al (2008) at 16.

¹⁷⁸ Ibid.

¹⁷⁹ Ibid. Consult too *Maake* para 29 and Benjamin (2013) at 24, together with the references cited therein.

¹⁸⁰ Brand et al (2008) at 17.

¹⁸¹ Clark (1997) at 615; Brand et al (2008) at 146.

¹⁸² Clark (1997) at 611; Guideline 33 of the Guidelines.

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.

¹⁸⁴ Clark (1997) at 615, citing Brand (1993) at 106.

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.’

Clark (1997) at 622-623, citing J Wood ‘Dispute resolution - conciliation, mediation and arbitration’ in W McCarthy (ed) *Legal Intervention in Industrial Relations: Gains and Losses* (1992) at 268, 261, 257-8 & 260.

regularly do not conduct arbitrations in a typically inquisitorial fashion, preferring the ‘safer’ route promised by adversarial or court-like processes.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.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.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.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.¹⁹⁰

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.

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).

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.

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

¹⁹⁰ Brand (2000) at 86-87.

At first glance, the IMSSA method seems entirely compatible with CCMA arbitration proceedings.¹⁹¹ However, in the context of the CCMA, the Constitutional rights of the parties to fair labour practices and a fair hearing are paramount,¹⁹² 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,¹⁹³ conducting CCMA arbitrations along identical lines would be inappropriate.¹⁹⁴ 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.¹⁹⁵ As such, neither a strictly inquisitorial model nor a stereotypically adversarial process should be favoured to the complete exclusion of the other.¹⁹⁶

An additional consideration when determining the appropriateness of the degree to which the inquisitorial approach¹⁹⁷ 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.¹⁹⁸ 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

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. The 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 Pooe 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.

¹⁹⁴ Brand (2000) at 86-87; *Naraindath* para 27; *PPWAWU & another v Commissioner CCMA (Port Elizabeth) & another* [1998] 5 BLLR 499 (LC) paras 7-9.

¹⁹⁵ Benjamin (2007) at 17-19.

¹⁹⁶ Benjamin (2013) at 24.

¹⁹⁷ Or 'investigative' approach as Clark labels it; Clark (1997) at 609-610.

¹⁹⁸ Clark (1997) at 612.

proceedings may be better.¹⁹⁹ Rule 25 of the CCMA Rules, while largely supportive of inquisitorial methods of conducting CCMA arbitrations,²⁰⁰ concurrently recognises the need for legal representation where complex legal questions arise.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,²⁰² determining the appropriate manner of proceedings can be onerous.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.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.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.²⁰⁶ According to Clark, section 138(2) leaves the grant of that right in the hands of the relevant commissioner. Yet, the

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 *Law Society of the Northern Provinces*.

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.

²⁰¹ Rule 25(1)(c) of the CCMA Rules.

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.

²⁰³ Benjamin (2007) at 8; for the approach which commissioners are obliged to adopt when conducting arbitration proceedings involving lay persons, see *Char Technology* para 1 and *Eastern Cape Agricultural Cooperative* paras 31-32.

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, *Chemical Workers Industrial Union & Others Sopolog CC* (1994) 15 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.

²⁰⁵ Clark (1997) at 616-617.

²⁰⁶ Ibid.

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.

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.²¹³ 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'),²¹⁴ which plays a critical role in most arbitrations.²¹⁵ 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.²¹⁶ 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.²¹⁷ Unfortunately, this has not been the case.²¹⁸ 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.'²¹⁹

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,²²⁰ the codification

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.²²¹ Yet, they have not been regularly revised and are now outdated,²²² requiring extensive supplementation from legal precedent.²²³ 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’.²²⁴

As Theron and Godfrey observe, the vital role flexibility plays in labour dispute resolution is demonstrated by the position of small businesses.²²⁵ When deciding disputes, the distinctive needs of these entities must therefore be accounted for by commissioners.²²⁶ 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

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.

²²⁵ Theron & Godfrey (2000). Consult too, Theron & Godfrey (2002). For the United Kingdom’s equivalent to the Code for Dismissals, see the Advisory, Conciliation and Arbitration Service’s (‘ACAS’) Advisory Handbook – Discipline at Work, available at <http://www.acas.org.uk>, accessed on 12 May 2012. Significantly, ACAS’s handbook suggests different approaches to disciplinary proceedings for small and large enterprises.

²²⁶ Theron & Godfrey (2000) at 55; Theron & Godfrey (2002) at 32.

characterise the parties' working relationships.²²⁷ Resultantly, argue Theron and Godfrey, reinstatement is likely to be less suited to disputes involving small businesses than to cases involving larger ones.²²⁸ 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.²²⁹

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.²³⁰ 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,²³¹ 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.²³² 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.²³³ The perception is aggravated by the Labour Courts' formal attitudes to CCMA awards.²³⁴ 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

²²⁷ Theron & Godfrey (2000) at 71.

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.

²³² Theron & Godfrey (2000) at 69. See also Theron & Godfrey (2002) at 37 & 53-4 and Cheadle at 685-686.

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.

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

3.2.3 *Expediiousness and efficiency*

The LRA intends to promote the 'effective' resolution of disputes.²³⁵ It is therefore unsurprising that one of the features of the CCMA is efficiency in dispute resolution.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.²³⁷ The LRA promotes expediiousness in CCMA proceedings in several ways,²³⁸ not least of all by requiring employees to refer unfair dismissal disputes for conciliation within 30 days of the dismissal in question.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.²⁴⁰ Once a referral has been received, the CCMA is obliged to conciliate the matter within 30 days.²⁴¹ Where conciliation fails, parties have 90 days in which to refer the unresolved dispute to arbitration.²⁴² Compared to the time periods involved in court proceedings (where prescription is often the only constraint placed on permissible

²³⁵ Section 1(d)(iv) of the LRA.

²³⁶ *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; section 1(d)(iv) of the LRA; Benjamin (2007) at 3-6; the Explanatory Memorandum at 279 & 318-319; Benjamin (2009); Benjamin & Cooper.

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.

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.

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.

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.

²⁴¹ Section 135(2) of the LRA.

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)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'.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.²⁴⁵ If conciliation is unsuccessful, the commissioner proceeds directly to arbitration, without the need for subsequent referral to arbitration.²⁴⁶ As Benjamin notes, con-arb has had a measurable impact on the time spent finalising disputes. Again, this process advances efficiency.²⁴⁷

Of further import is the statutory duty of commissioners to issue awards within 14 days of the conclusion of arbitration proceedings.²⁴⁸ CCMA awards are final and binding,²⁴⁹ and no appeal lies against them.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 1965.²⁵¹ The aim of confining their reach was to discourage review of CCMA awards, thereby

²⁴³ The Prescription Act 68 of 1969. In terms of this act, debts (for one) prescribe following periods of between three and thirty years. For the common law principles of prescription, consult JS Saner (original text by HJ Fabricius) 'Prescription' *The Law of South Africa* vol 21 2 ed (2010) para 106.

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 *ILJ* 699; see also Albertyn (1993) at 120-121.

²⁴⁵ For the implications of this process both on the parties to disputes and the proceedings themselves, see Rycroft (2003) at 703-709.

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).

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 *CCMA Annual Report 2010-2011*. For the successes and failures of con-arb, see Venter & Levy at 31-33.

²⁴⁸ Section 138(7) of the LRA.

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.

²⁵⁰ Sections 143 & 145 of the LRA.

²⁵¹ Benjamin (2007) at 33; *Shoprite Checkers* (2000) (LC). For an informative discussion of these grounds and their narrow nature, see *Amalgamated Clothing & Textile Workers Union of SA v Veldspun (Pty) Ltd* (1993) 14 *ILJ* 1431 (A).

avoiding the delays associated with court processes.²⁵² The need for efficiency in labour dispute resolution and the stark consequences of delay, submits Benjamin, justified doing so.²⁵³ Since their enactment nevertheless, the grounds provided for in section 145 have been extended by the CC to incorporate the constitutional standard of reasonableness.²⁵⁴

The Explanatory Memorandum to the LRA explains the rationale for prohibiting appeals against CCMA awards.²⁵⁵ 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.²⁵⁶ 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.'²⁵⁷

The courts have repeatedly affirmed the import of the LRA's dispute resolution structure, as well as its preclusion of appeals.²⁵⁸ Ironically, this is undercut by the cumbersome structure

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.

²⁵³ Benjamin (2007) at 31-32.

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; *Coetzee 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.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.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.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.²⁶² Applications for review may accordingly be instituted²⁶³ but never heard.²⁶⁴

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

for Conciliation, Mediation & Arbitration & others (1998) 19 ILJ 143 (LAC). More recently, however, see *Herholdt* paras 53-56.

²⁵⁹ 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 *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 Benjamin (2009) at 41; Benjamin (2007) at 34; Benjamin & Gruen at 35-36.

²⁶² Benjamin (2009) at 42; John Grogan 'Stalled reviews: Lessons by the DOL' (2005) 21(5) *Employment Law* 16.

²⁶³ 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 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 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 *Ibid.*

²⁶⁷ 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.²⁶⁸ Whether it did so, however, remains unclear.²⁶⁹ Arguably instead, *Sidumo* has augmented the difficulties with review. As indicated above, in *Sidumo*, the Court held that section 145 had been suffused by the constitutional standard of reasonableness.²⁷⁰ Reasonableness is generally acknowledged to permit more intrusive review than rational justifiability.²⁷¹ Thus, it seems improbable that by replacing the *Carephone* standard²⁷² with reasonableness, the incidence of review proceedings will be suppressed. Still, whatever the impact of *Sidumo* is, the benefits for efficiency of discouraging review proceedings persist; they are therefore relevant on review.²⁷³

Whereas the prohibition against appeals supports efficiency and accessibility, it is by no means beyond criticism.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.²⁷⁵ In Brand's view, while limiting challenges to private arbitrators' decisions is apt, the same cannot be said of statutorily compelled arbitral awards.²⁷⁶ As such, extending the ambit of review (in *Carephone* and subsequently in *Sidumo*) was debatably a necessary evil.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.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

²⁶⁸ Benjamin (2009) at 43.

²⁶⁹ Consider Alan Rycroft 'An evaluation of the Labour Court' at 64-68 in Andrew Levy & Tanya Venter (eds) *The Dispute Resolution Digest 2012* (2012) 61, read with the *CCMA Annual Report 2010-2011*.

²⁷⁰ *Sidumo* para 109.

²⁷¹ For the relationship between rationality and reasonableness, consult chapters 3, 4 and 6 of this thesis.

²⁷² *Carephone* para 37.

²⁷³ Benjamin (2009) at 47-48. Note, however, Tuchten J's contrary sentiments in *Herholdt* paras 53-56. See also O'Regan J's argument in *Sidumo* that extending section 145 to incorporate reasonableness would not hamper efficiency.

²⁷⁴ Consider *Herholdt* paras 53-56; Benjamin & Cooper at 275, citing Clive Thompson 'The 1995 Labour Relations Bill' *IMSSA Bulletin* (1995) at 23.

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.

²⁷⁶ Brand (2000) at 90; see also Sharpe (2000) at 2173.

²⁷⁷ Brand (2000) at 90.

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.²⁷⁹ Instead, commissioners receive but brief statements of the parties' cases which rarely include legal references or argument.²⁸⁰ Once more, this is a feature of the CCMA process to which reviewing courts should be alive when assessing awards.²⁸¹

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.²⁸² 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.²⁸³ The extent of the strain imposed on commissioners is revealed by the figures depicted in the CCMA's Annual Reports.²⁸⁴ In particular, the figures cited in its report of 2009/2010 are exemplary;²⁸⁵ that report is discussed below.²⁸⁶

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.²⁸⁷ As a result of these challenges, the South African government was obliged to

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.

²⁸⁰ See the LRA Referral Forms 7.11 and 7.13, available at <http://www.ccma.org.za>, accessed on 20 November 2012.

²⁸¹ Benjamin (2007) at 13.

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.²⁸⁸ 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.²⁸⁹ 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.²⁹⁰ This marked an increase of 9% in the institution's caseload. Of these disputes, the vast majority concerned unfair dismissals.²⁹¹ 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.²⁹² 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.²⁹³

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.²⁹⁴ 99% of the arbitration awards issued were rendered within the 30 day statutory time period therefore²⁹⁵ and the average time from referral to finalisation was 39 days.²⁹⁶ Finally, 24 778 additional ‘processes’²⁹⁷ were heard during 2009/2010, reflecting a 10% increase from 2008/2009, and 10 506 applications for certification of arbitration awards were received.²⁹⁸

Both the immensity of these figures and the speed with which conciliations and arbitrations are handled²⁹⁹ 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 2007/2008.³⁰⁰ 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.³⁰¹ 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.³⁰²

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’

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.

²⁹⁶ *CCMA Annual Report 2009-2010* at 19. Consider too Benjamin & Gruen at 28.

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.³⁰³

5. CONCLUSION

The Constitutional Court has confirmed the status of CCMA arbitration proceedings as administrative action.³⁰⁴ Still, the characteristics of the institution distinguish it from archetypal administrative bodies. These features are crucial to achieving the CCMA's objects³⁰⁵ and concurrently those of the LRA.³⁰⁶ 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.³⁰⁷

Included amongst the relevant traits of the CCMA are its independence, accessibility, efficiency, and flexibility.³⁰⁸ 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.³⁰⁹ 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.³¹⁰ 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

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.

³⁰⁵ *CCMA Annual Report 2009-2010* at 2.

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 Act³¹¹ and commissioners' broad discretions to conduct arbitrations in any appropriate manner but 'with the minimum of legal formalities',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.³¹³ In addition, their statutory mandate to finalise disputes quickly places them under considerable pressure.³¹⁴ Frequently, changing economic, social, and political forces aggravate these stressors.³¹⁵ In spite of this, the CCMA's recorded performance and efficiency are impressive.³¹⁶ Its contribution to alleviating tensions arising in the employment arena is well recognised³¹⁷ and it enjoys wide esteem within the communities it serves.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.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

³¹¹ Section 213 of the LRA.

³¹² Section 138(1) of the LRA.

³¹³ Rule 25 of the CCMA Rules, read with the discussion thereon above.

³¹⁴ Section 138(7) of the LRA.

³¹⁵ *CCMA Annual Report 2009-2010* at 2-3.

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; *CCMA Annual Report 2009-2010* at 13.

³¹⁷ Consult, for example, Benjamin (2013) at 52-53.

³¹⁸ Du Toit et al (2003) at 42-45; Benjamin (2009) at 26. Theron & Godfrey (2000) at 56 and Brand (2000) at 78. Furthermore, the institution was awarded the Public Sector Gold Award for the best reputation in the legal sector in the financial year of 2009 to 2010; *CCMA Annual Report 2009-2010* at 10. Note, however, Theron & Godfrey (2002) at 45-46 and Brand (2000) at 81.

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*.

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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*,³²⁰ the scope of the test for review of CCMA arbitration awards had been comprehensively considered in *Carephone (Pty) Ltd v Marcus NO & others*.³²¹ 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,³²² *Sidumo* followed the final Constitution.³²³ 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.³²⁴

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

In *Carephone (Pty) Ltd v Marcus NO & others*,³²⁵ the Labour Appeal Court ('LAC') was called to establish the nature and extent of the courts' powers of review over CCMA arbitration awards.³²⁶ 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,³²⁷ or whether applicants were confined to bringing proceedings under

³²⁰ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC).

³²¹ *Carephone (Pty) Ltd v Marcus NO & Others* [1998] 11 BLLR 1093 (LAC).

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 145.³²⁸ The principal basis of the argument for the former was that section 145, in so far as it offered only limited grounds of review,³²⁹ failed to give adequate effect to the parties' rights to just administrative action.³³⁰ To circumvent this difficulty, section 158(1)(g)³³¹ had sometimes been construed as a permissible avenue for reviewing arbitration awards.³³² In *Carephone*, Froneman DJP rejected this approach.³³³

Before doing so, however, the question of whether CCMA arbitrations constituted administrative action required attention.³³⁴ 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.³³⁵ Thus, in Froneman DJP's view, the CCMA was clearly an administrative body for the purposes of the

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

In the lead up to *Carephone*, the Labour Courts had passed conflicting judgments on the question; *Carephone* para 4; Daniel Malan Pretorius 'Making you whistle: the Labour Appeal Court's approach to reviews of CCMA arbitration awards' (2000) 21 *ILJ* 1506; B Grant 'The review of arbitration awards in terms of the Labour Relations Act' (1999) 2 *Stell LR* 251 at 252-253; *Standard Bank of South Africa v CCMA & others* [1998] 6 BLLR 622 (LC); *Linda Deutsch v Pinto & another* (1997) 18 *ILJ* 1008 (LC); *Ntshangane v Speciality Metals CC* [1998] 3 BLLR 305 (LC); *Pep Stores Ltd v Advocate AP Laka NO & others* [1998] 9 BLLR 952 (LC); *Edgars Stores (Pty) Ltd v Director, CCMA & others* [1998] 11 BLLR 1093 (LAC); *Kynoch Feeds (Pty) Ltd v CCMA & others* [1998] 4 BLLR 384 (LC); *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA & others* [1997] 11 BLLR 1475 (LC); *Shoprite Checkers (Pty) Ltd v CCMA & others* [1998] 5 BLLR 510 (LC). Note that in terms of the Judicial Matters Amendment Act 12 of 2002, the section was amended and the word 'despite' was replaced with the phrase 'subject to'. According to Benjamin, the original section was an 'obvious drafting error'; Paul Benjamin 'Friend or foe? The impact of judicial decisions on the operation of the CCMA' (2007) 28 *ILJ* 1 at 32.

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* (1998) 19 *ILJ* 1425 (LAC)' (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 Whitear-Nel at 1484; Sharpe (2000) at 2161-2163; see too the decisions cited in *Carephone* para 4.

³³³ 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.

³³⁴ *Carephone* para 15.

³³⁵ See, in particular, sections 195(1) & 2, 8, 33, 165-166 and 239 of the Constitution; *Carephone* paras 11-16.

Constitution.³³⁶ Amongst other obligations,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.³³⁸ Apposite adherence to the rule of law was of further import.³³⁹

This outcome was endorsed by the substantive component of the right to just administrative action.³⁴⁰ Accountability, responsiveness and openness in all public institutions, noted Froneman DJP, were the core values upon which the right was based.³⁴¹ The suggestion that the CCMA, while a public body, was exempt from upholding those values³⁴² was contrary to the essence of the right.³⁴³ There could be no doubt therefore, held the Judge, that when conducting arbitrations, the CCMA engaged in administrative action.³⁴⁴ This, in turn, imposed Constitutional constraints upon the exercise of commissioners' arbitral powers; these constraints were described in *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.'³⁴⁵

Having identified these limits, Froneman DJP examined the relevant provisions of the LRA³⁴⁶ and resolved that the Act complied with them.³⁴⁷ To the extent to which commissioners failed to adhere to these constraints, review proceedings were available. Section 145(2)(a)(iii)³⁴⁸ was more than sufficient for protecting parties' rights in this regard

³³⁶ *Carephone* paras 17-18.

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.

³³⁸ Section 195(1)(d) of the Constitution; *Carephone* paras 11-16.

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 *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.

³⁴⁰ Section 33 of the Constitution; *Carephone* para 19.

³⁴¹ *Ibid*; *Carephone* para 35..

³⁴² On the basis that arbitration proceedings did not constitute administrative action.

³⁴³ *Carephone* para 19.

³⁴⁴ *Ibid* paras 11-19.

³⁴⁵ *Ibid* para 20.

³⁴⁶ Specifically, he examined sections 136-138 of the LRA.

³⁴⁷ *Carephone* paras 21-22; sections 136-138 of the LRA.

³⁴⁸ The subsection permits review on the basis that a commissioner exceeded his or her powers.

and there was accordingly no need to permit review under section 158(1)(g).³⁴⁹ In fact, warned the Judge, permitting such review would only impede the expeditiousness and informality with which CCMA proceedings were intended to be resolved.³⁵⁰

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.³⁵¹ This was apparent from the Constitutional stipulation that administrative action be justifiable in relation to the reasons for it.³⁵² This requirement introduced a need for rationality in the merits or outcome of administrative decisions.³⁵³ In other words, irrationality as a ground of review was no longer confined to review for procedural irregularities or constitutive merely as evidence thereof.³⁵⁴

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.’³⁵⁵ Yet, it did not require that administrative action in fact be ‘just, justified or correct.’³⁵⁶ According to Froneman DJP, this fine discrepancy was crucial to sustaining the discrete characteristics of appeal and review.³⁵⁷ Informing the distinction was respect for the proper separation of powers between the legislature, the executive and the judiciary.³⁵⁸ This obliged reviewing courts to refrain from

³⁴⁹ *Carephone* paras 24-29.

³⁵⁰ *Ibid* para 28, read with the implications of the Judge’s earlier remarks; *Carephone* para 21. Those included that section 138(1) of the LRA required commissioners to conduct arbitration proceedings quickly and with the minimum of legal formalities.

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.

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.

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 t/a 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).

³⁵⁴ *Carephone* paras 30-31.

³⁵⁵ *Ibid* para 32.

³⁵⁶ *Ibid*.

³⁵⁷ *Ibid*.

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.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.³⁶⁰ In his view, however, it was unhelpful to redefine it. Instead, the appropriate test for review could be formulated plainly as follows:

‘...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?’³⁶¹

Applying the new standard to the matter before the Court,³⁶² Froneman DJP found the Commissioner's award rationally justifiable.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).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

justifiability standard required courts to: ‘...afford administrative bodies a significant margin of appreciation and [did] not [permit them to] evaluate their actions in terms of value judgments which the courts impose upon the activities of such bodies.’; *BMD Knitting Mills* para 18.

³⁵⁹ *Carephone* paras 33-35. In reaching this conclusion, Froneman DJP referred to *Hira* at 91E-I; 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.

³⁶⁰ For alternative meanings associated with the concept (and the relationship between ‘reasonableness’ and ‘appropriateness’), see Whítear-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.

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.

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.

³⁶³ *Carephone* para 53.

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 & others*³⁶⁸ – 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.

³⁶⁶ Garbers (2000) at 86-87 would arguably disagree.

³⁶⁷ Consider *Makhanya v University of Zululand* [2009] 4 All SA 146 (SCA) paras 50-54 and *Reunert Industries (Pty) Limited t/a Reutech Defence Industries v Naicker & others* [1997] 12 BLLR 1632 (LC). In *Reunert Industries*, the Court described the ground of excess of powers in detail, noting that: '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.'; *Reunert Industries* at 1637. Consult too *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* (2000) 21 ILJ 1232 (LC) para 53 and *Bombardier Transportation (Pty) Ltd v Mtiya NO & others* [2010] 8 BLLR 840 (LC). For the meaning of jurisdiction, see I Ellis 'Civil Procedure: Magistrates Courts' *The Law of South Africa* vol 3(2) 2 ed (2006) para 26 and Emma Fergus 'Circumventing review – When is a question jurisdictional?' (2012) 129 SALJ 504.

³⁶⁸ *Reunert Industries (Pty) Limited t/a Reutech Defence Industries v Naicker & others* [1997] 12 BLLR 1632 (LC).

(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...³⁶⁹

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.³⁷⁰ 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.³⁷¹ 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.³⁷² Yet, the creation of that right does not necessarily give rise to a corresponding power.³⁷³ If it did, the result would be an exceptionally generous construction of 'excess of powers' which would enable undue judicial interference with commissioners' awards.³⁷⁴ 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.³⁷⁵ 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.'³⁷⁶

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

³⁶⁹ Ibid at 1636-1637.

³⁷⁰ *Sidumo* para 165; see also *Telcordia Technologies Inc v Telkom SA Ltd* [2007] 2 All SA 243 (SCA) para 52 and the SCA's reference thereto in *Lesotho Highlands Development Authority v Impreglio SpA and Others* [2006] 1 AC 221 [HL] para 24. Consider too Cora Hoexter *Administrative Law in South Africa* (2007) at 228-229 and Lawrence Baxter *Administrative Law* (1984) at 386-389.

³⁷¹ *Carephone* paras 22-24.

³⁷² Iain Currie & Johan de Waal *The Bill of Rights Handbook* 5 ed (2005) at 642-644.

³⁷³ Hugh Corder 'Reviewing review: much achieved, much more to do' in Hugh Corder & Linda van der Vijver (eds) *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.

³⁷⁴ *Reunert Industries* at 1636-1637.

³⁷⁵ *Sidumo* para 172. Note too, however, Ngcobo J's judgment in *Sidumo*; *Sidumo* paras 273-277.

³⁷⁶ MH Cheadle, DM Davis & NRL Haysom *South African Constitutional Law: The Bill of Rights* (2010; updated loose-leaf) at 1-1.

‘Arbitrators...[are under a] duty to seek, but not necessarily to achieve, a lawful, just, fair and proper decision...’³⁷⁷

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.³⁷⁸

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.³⁷⁹ 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,³⁸⁰ 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.³⁸¹ Given the dual components of review,³⁸² reading section 145

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* (2000)(LC), Wallis J held:

‘It is certainly novel to suggest, as the judgment in *Carephone* suggests at paragraph 53 thereof, that justifiability of the award on the merits of the material placed before the arbitrator can properly fall within the ambit of an excess of the arbitrator’s powers. To adopt that approach is effectively to say that the only jurisdiction which the arbitrator has is to decide the case correctly and that is not only contrary to authority but would have the effect of transforming a review into an appeal.’; *Shoprite Checkers* (2000) (LC) para 53.

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) (LAC) 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.

generally³⁸³ – as impliedly incorporating substantive rationality independently of the grounds provided for therein – would accordingly have been preferable.³⁸⁴

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.³⁸⁵ 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.³⁸⁶ Finally, it was apparent from Froneman DJP's decision that the original section 145 grounds of review remained applicable.³⁸⁷ Notwithstanding the clarity of his decision, however, later courts failed to apply the test consistently.³⁸⁸ 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.³⁸⁹ The first questioned whether CCMA arbitrations constituted administrative action.³⁹⁰ 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 (LAC) para 39.

³⁸⁵ *Carephone* paras 15-37. For a positive appraisal of *Carephone*, see PAK Le Roux 'The test for review of CCMA commissioners: Some certainty at last?' (2001) 10(12) *Contemporary Labour Law* 117.

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 t/a Rocklands Poultry v Kapp & others* [2002] 6 BLLR 493 (LAC) 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.

³⁹⁰ *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 t/a 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.³⁹¹ Thirdly, the LAC was criticised for inappropriately investigating section 145's compatibility with section 33,³⁹² in the absence of a direct Constitutional challenge to the section.³⁹³ Finally, controversy arose around the confines and meaning of the rational justifiability standard.³⁹⁴ In particular, its aptitude for fudging the distinction between appeal and review was contested.³⁹⁵ 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.³⁹⁶ The LAC's entitlement to question section 145's Constitutional compliance³⁹⁷ will similarly be accepted.³⁹⁸ As to the second challenge, it may readily be dispensed with. In fact, the legislature has since intervened.³⁹⁹ 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.

³⁹⁶ 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').

³⁹⁷ In the absence of a Constitutional challenge thereto.

³⁹⁸ 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.

³⁹⁹ 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).

⁴⁰³ For a discussion of this case, see John Grogan 'Blowing the whistle: The test for evaluating CCMA awards' (1999) 15(6) *Employment Law* 14.

⁴⁰⁴ *County Fair Foods* 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*,⁴⁰⁸ Kroon JA criticised the distinction drawn by the LAC between 'justifiable' and 'just, justified or correct'.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.”’⁴¹⁰

Given the emphasis on review proceedings precluding judicial analyses of the correctness of a tribunal's findings,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.⁴¹² In other words, whether a decision was correct was immaterial – justifiable awards required only that corroborative explanations accompany them.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.⁴¹⁴ First, the Commissioner's factual findings indicated that he had not applied his mind to relevant evidence.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.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.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.⁴¹⁸

Want of rationality (or reasonableness) in administrative determinations has long been recognized⁴¹⁹ as a potentially adequate basis from which to infer failures to apply the mind.⁴²⁰ In this form, it constitutes a procedural irregularity capable of review.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 *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 sanction⁴²² 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.⁴²³ At a glance, Ngcobo AJP's findings seem consonant with the distinction between appeal and

⁴¹⁶ Ibid para 17.

⁴¹⁷ Including the interests of the parties involved; ibid para 18.

⁴¹⁸ *County Fair Foods* para 20.

⁴¹⁹ Both prior to and since *Carephone*. See, for example, *Venture Motor Holdings* paras 5 & 26; *Hira, Johannesburg Stock Exchange* and *Kynoch Feeds* (1998) (LC) paras 33-36.

⁴²⁰ See Darcy Du Toit et al *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.

⁴²¹ *Coetzee* para 10; Hoexter (2007) at 294-295; De Ville (2005) at 209; *Union Government (Minister of Mines and Industries) v Union Steel Corporation (South Africa) Ltd* 1928 AD 220 at 237; Du Toit et al (2003) at 153-155.

⁴²² Ngcobo AJP found that the employer's sanction was 'reasonable'.

⁴²³ *County Fair Foods* paras 36-37.

review.⁴²⁴ 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.’⁴²⁵

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.’⁴²⁶

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.⁴²⁷ 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.⁴²⁸ 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.⁴²⁹ Applying this approach after analysing both the evidence and the award, the

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.⁴³⁰ Consequently, the award ought to have stood.⁴³¹

Conradie JA’s judgment reflects a standard of review akin to ‘gross unreasonableness’ or the *Wednesbury* test.⁴³² This test essentially renders the question of whether interference is justified, a matter of degree. The *Wednesbury* standard may be suitably deferential to commissioners’ findings⁴³³ but it also poses difficulties. First, the standard fails to provide an objective basis from which judges may assess rational justifiability.⁴³⁴ 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.⁴³⁵ 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.⁴³⁶ 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.⁴³⁷

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.

⁴³⁰ *County Fair Foods* para 48.

⁴³¹ *Ibid* para 47.

⁴³² *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.

⁴³³ Consistently with the doctrine of the SOP and the implications of the right to just administrative action.

⁴³⁴ 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.

⁴³⁵ Hoexter with Lyster (2002) at 518; Hoexter (2007) at 311-318 and De Ville (2005) at 209-211.

⁴³⁶ 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.

⁴³⁷ 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

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 The employees had been dismissed for fraud.

⁴⁴⁵ *De Beers* para 8.

⁴⁴⁶ *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.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.⁴⁴⁹ In addition, he did not succumb to the temptation of substituting his own opinion of the matter for that of the Commissioner.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.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.⁴⁵²

Conradie JA approached the enquiry somewhat differently.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.⁴⁵⁴ Having decried the validity of certain of these findings,⁴⁵⁵ Conradie JA evaluated the Commissioner's reasons. He described these reasons in turn as incorrect,⁴⁵⁶ 'bizarre'⁴⁵⁷ and based on a misunderstanding of applicable legal principles.⁴⁵⁸ According to him, supplementary to the factors considered by the

⁴⁴⁸ *De Beers* para 13.

⁴⁴⁹ *Carephone* paras 20 & 31-38.

⁴⁵⁰ This aptly accords with the principles devised in *Carephone*; *Carephone* para 36.

⁴⁵¹ Section 1(d) of the Constitution; *Carephone* para 19.

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.

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*.

⁴⁵⁴ *De Beers* paras 17-19.

⁴⁵⁵ *Ibid* para 17.

⁴⁵⁶ *Ibid* para 20.

⁴⁵⁷ *Ibid* para 21.

⁴⁵⁸ *Ibid* para 22.

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.⁴⁵⁹

Conradie JA's approach demonstrates an interpretation of rational justifiability commonly adopted by the courts following *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.⁴⁶⁰ As such, Conradie JA's stance does not strictly comply with the *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 *Carephone*, the validity of permitting it on review was (at the time of *De Beers*) debatable.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.'⁴⁶² As a result, her award was irrational and liable to be set aside.⁴⁶³ Ostensibly therefore, in the Judge's view, irrationality incorporated errors of law.⁴⁶⁴ While review for material error of law had repeatedly been declared legitimate,⁴⁶⁵ whether minor errors

⁴⁵⁹ Ibid para 25.

⁴⁶⁰ *Carephone* para 37.

⁴⁶¹ Note that this issue was ostensibly resolved by the CC in *Sidumo*.

⁴⁶² *De Beers* para 27.

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 *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.

⁴⁶⁴ Consider too *Metcash Trading (Pty) Ltd t/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.

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.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 *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,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.'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.⁴⁶⁹ Willis JA's emphasis on the relationship between the Commissioner's evidence, reasons and award⁴⁷⁰ 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

others (2000) 21 ILJ 1188 (LC) para 10 and *Foschini Group (Pty) Ltd v CCMA & others* (2002) 23 ILJ 1048 (LC) para 25. In *Mlaba* the enquiry into materiality was formulated as:

'If, in the exercise of this discretion, a commissioner makes an error of law, this does not render the decision of the commissioner reviewable unless it is a material error in the sense that it results in the commissioner asking the wrong question or basing his or her decision on a matter not prescribed by the statute.' *Mlaba* at 301.

Consider too *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation, Arbitration and Mediation & others* (2006) 27 ILJ 1644 (LC); *Coin Security (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2005) 26 ILJ 849 (LC) paras 40-53; Baxter at 521.

⁴⁶⁶ *Ibid*; *National Commissioner of the SA Police Service v Potterill NO & others* (2003) 24 ILJ 1984 (LC) paras 23-25; *Hira* at 93. In *Hira*, the Appellate Division held that only material errors of law were reviewable; *Hira* at 91. See also Willis JA's views on review for error of law; *De Beers* paras 55-56.

⁴⁶⁷ *De Beers* paras 28-39.

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.

⁴⁶⁹ *De Beers* para 42.

⁴⁷⁰ This is discussed in more detail below.

simply on her own assessment of fairness.⁴⁷¹ In doing so, she had exceeded her powers,⁴⁷² and the award consequently fell to be set aside.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.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,⁴⁷⁵ nonetheless demonstrates the difficulties with defining the standard appropriately.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.⁴⁷⁷ Notwithstanding the substantive rationality of the Commissioner's award, Willis AJ deemed the legality of her approach to resolving the dispute, faulty.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.⁴⁷⁹ Remembering that *Carephone* was a prelude to *Sidumo*, Willis JA's decision usefully endorses their enduring relevance.⁴⁸⁰

⁴⁷¹ Willis JA evidently deemed the reasonable employer test to be the appropriate test for determining fairness. This test has since been rejected by the Constitutional Court in *Sidumo*. For discussions of the test, see *BMD Knitting Mills; Engen Petroleum Ltd v Commission for Conciliation, Mediation & Arbitration & Others* (2007) 28 ILJ 1507 (LAC); *Rustenburg Platinum Mines* (SCA) paras 40-41; *Nampak Corrugated Wadeville v Khoza* (1999) 20 ILJ 578 (LAC) para 33; Van Niekerk et al (2012) at 51-52; Nicola Smit '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 at 1637-1639; Wayne Hutchinson 'Is the Labour Appeal Court succeeding in its endeavours to create certainty in our jurisprudence?' (2001) 22 ILJ 2223; Wayne J Hutchinson 'The Supreme Court of Appeal restores administrative justice' (2007) 28 ILJ 92; John Grogan 'Death of the reasonable employer: The seismology of review' (2000) 16(2) *Employment Law* 4; John Myburgh SC & André van Niekerk 'Dismissal as a penalty for misconduct: The reasonable employer and other approaches' (2000) 21 ILJ 2145; Garbers (2000).

⁴⁷² In support of this determination, he cited *Amalgamated Clothing and Textile Workers Union v Veldspun (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).'; *Veldspun* at 169C.

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.

⁴⁷⁴ *De Beers* para 40.

⁴⁷⁵ Particularly when compared to the conclusive remarks of Conradie JA to the contrary.

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.

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

⁴⁷⁸ *De Beers* paras 50-62.

⁴⁷⁹ Consider, for example, *Kievits Kroon Country Estate (Pty) Ltd v CCMA & others* [2010] JOL 26444 (LC) and *Edcon*.

⁴⁸⁰ See too *Crown Chickens* para 58.

4.3 *Shoprite Checkers (Pty) Ltd v Ramdaw NO & others*⁴⁸¹

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.⁴⁸² 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,⁴⁸³
- 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;⁴⁸⁴ and
- c) CCMA arbitrations did not constitute administrative action.⁴⁸⁵

Predictably, controversy ensued.⁴⁸⁶

4.4 *Shoprite Checkers (Pty) Ltd v Ramdaw NO & others*⁴⁸⁷

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)*').⁴⁸⁸ While the rational justifiability test faced scrutiny, the primary question before the Court in *Shoprite Checkers (LAC)* was

⁴⁸¹ *Shoprite Checkers* (2000) (LC).

⁴⁸² *Ibid* para 91. For similar sentiments, see *Volkswagen SA* para 62.

⁴⁸³ *Shoprite Checkers* (2000) (LC) paras 58-60 & para 73. Recall that Constitutional considerations prevail over legislative provisions, however; section 2(1) of the Constitution; *Kynoch Feeds* (1998) (LC) para 47; *Carephone* paras 8-9; note, nonetheless, the SCA's comments in *Rustenburg Platinum Mines* (SCA) paras 23-24.

⁴⁸⁴ *Shoprite Checkers* (2000) (LC) paras 75-77. In addition, the LAC's reasoning process had been fatally flawed. Since then, the CC has held that, where there is a legal issue apparent on the papers before the court which has not been raised by the parties, it is incumbent upon the court to address it *mero motu*; *Tao Ying* para 68. Note, however, O'Regan J's dissenting remarks; *Tao Ying* paras 130-134.

⁴⁸⁵ *Shoprite Checkers* (2000) (LC) paras 88-90; for a comparable approach, consult *Volkswagen SA* paras 53-55. In *Volkswagen SA*, Landman J refused to follow *Carephone* on the basis that it had been decided on a subsequently outdated Constitutional provision; *Volkswagen SA* paras 57-62.

⁴⁸⁶ *Ibid*.

⁴⁸⁷ *Shoprite Checkers (Pty) Ltd v Ramdaw NO & others* [2001] 9 BLLR 1011 (LAC); for a general discussion of this case, see Wesley.

⁴⁸⁸ *Ibid*.

whether CCMA arbitrations constituted administrative action.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.⁴⁹⁰ As commissioners were clearly exercising public power during arbitration proceedings, to the extent to which the meanings of ‘rationality’ and ‘justifiability’⁴⁹¹ were adequately aligned, the administrative nature of CCMA arbitrations would be immaterial.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.’⁴⁹³

In effect, for the purposes of review at least, rationality and justifiability were interchangeable.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;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.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;⁴⁹⁷ it was accordingly

⁴⁸⁹ *Shoprite Checkers* (2001) (LAC) para 3.

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.

⁴⁹¹ *Shoprite Checkers* (2001) (LAC) paras 21 & 26.

⁴⁹² *Ibid* para 19.

⁴⁹³ *Ibid* para 25.

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

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.

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.⁴⁹⁸ 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.⁴⁹⁹ Yet, the Judge's failures to affirm the Constitutional status of CCMA arbitrations and to acknowledge the distinction⁵⁰⁰ between justifiability and rationality were regrettable.⁵⁰¹ 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.⁵⁰²

4.5 *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp & others*⁵⁰³

*Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp & others*⁵⁰⁴ 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 JA⁵⁰⁵ 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

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 Sasko Milling & Baking & others* (2011) 32 ILJ 2916 (SCA) ('FAWU') para 19.

⁴⁹⁸ *Shoprte Checkers* (2001) (LAC) paras 83-84.

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; *Shoprte Checkers* (2001) (LAC) para 83.

⁵⁰² *Rustenburg Platinum Mines* (SCA) paras 29-30; Pretorius.

⁵⁰³ *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp & others* [2002] 6 BLLR 493 (LAC).

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.⁵⁰⁶

The passage is lucid and ostensibly apposite. However, the Court's findings were disappointingly inconsistent with it.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.⁵⁰⁸ Thus, despite his emphasis on rationality review as entailing assessments of the reasoning process and logicity of commissioners' decisions (with reference to the reasons given for decisions), Nicholson JA ultimately concerned himself with alternative reasons capable of sustaining the award.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*⁵¹⁰

In *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA & others*,⁵¹¹ the SCA remedied at least some of the debate. In the process, it addressed the relationship between section 6 of the PAJA⁵¹² and section 145 of the LRA.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.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')⁵¹⁵ was applied - both tests produced the same result.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

⁵⁰⁶ *Crown Chickens* para 58.

⁵⁰⁷ *Ibid* para 64.

⁵⁰⁸ *Ibid* paras 64 & 65-67.

⁵⁰⁹ *Ibid*.

⁵¹⁰ *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA & others* [2006] 11 BLLR 1021 (SCA).

⁵¹¹ *Ibid*.

⁵¹² Section 6 of the PAJA lists the grounds of review on which review proceedings may be instituted against administrative action generally.

⁵¹³ *Rustenburg Platinum Mines* (SCA) paras 18-27.

⁵¹⁴ *Ibid* paras 24-27.

⁵¹⁵ The Promotion of Administrative Justice Act 3 of 2000 ('PAJA').

⁵¹⁶ *Rustenburg Platinum Mines* (SCA) para 26.

basis justifying the connection the commissioner made between the material before him and the conclusion he reached.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.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.⁵¹⁹

The significance of the SCA's interpretation of the *Carephone* standard lies in its reversion to the original delineation of the standard.⁵²⁰ The Court suitably refrained from examining the simple rationality of the Commissioner's final award, as many courts had formerly done.⁵²¹ As Cameron JA observed, the effect of this approach had been to collapse the standard into little more than a deferential appeal.⁵²² Comparatively, the SCA's emphasis on the rationality of the Commissioner's reasoning process⁵²³ enabled it to maintain the distinction between review and appeal recognised in *Carephone*.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.⁵²⁵ The SCA's decision is usefully coherent with that of the LAC's in *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.

⁵¹⁷ Ibid para 29.

⁵¹⁸ Ibid paras 29-30.

⁵¹⁹ Ibid paras 30-35 & para 53.

⁵²⁰ Compare the SCA's decision in *Rustenburg Platinum Mines* (SCA) para 29 to *Carephone* para 37.

⁵²¹ See the Labour Courts' decisions in *County Fair Foods* and *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; *Metro Cash & Carry Ltd v Le Roux NO & others* [1999] 4 BLLR 351 (LC) paras 12-19.

⁵²² *Rustenburg Platinum Mines* (SCA) paras 29-30.

⁵²³ Ibid para 29.

⁵²⁴ *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.

⁵²⁵ *Rustenburg Platinum Mines* (SCA) para 29.

5. CONCLUSION

Carephone extended the grounds of review available to parties aggrieved by CCMA awards.⁵²⁶ 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.⁵²⁷ 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.⁵²⁸ 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*,⁵²⁹ before examining *Sidumo* it is instructive to recount the principles and values addressed in these two fundamental judgments.⁵³⁰

The first evident principle was that review was comprised of both procedural and substantive elements.⁵³¹ 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.⁵³² At the time of

⁵²⁶ Sharpe (2000) at 2174; Grant at 255-256; Loveday (1998).

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.⁵³³ Notwithstanding the introduction of rationality review, the section 145 grounds of review still maintained their currency.⁵³⁴ The scope of review had simply been extended.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.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.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.⁵³⁸ Appraising alternative reasons for awards intruded upon this distinction, facilitating appellate like attitudes to review.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.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.⁵⁴¹ Underpinning this right were the values of accountability,

⁵³³ *Carephone* paras 15 & 31; section 33 read with item 23(2) of Schedule 6 to the Constitution.

⁵³⁴ *De Beers* paras 56-62; *Solomon* paras 19 & 21. In *Solomon*, the Court emphasized the function of judicial review in ensuring due process.

⁵³⁵ *Carephone* paras 30-31; *Whitewar-Nel* at 1486; *Sharpe* (2000) at 2174; *Grant* at 255-256 and *Loveday* (1998).

⁵³⁶ *Rustenburg Platinum Mines* (SCA) paras 29-30; *Sharpe* (2000) at 2168.

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.

⁵³⁸ *Rustenburg Platinum Mines* (SCA) paras 29-30; *Sharpe* (2000) at 2168; *Shoprite Checkers* (2000) (LC) paras 29-30.

⁵³⁹ *Rustenburg Platinum Mines* (SCA) paras 29-30.

⁵⁴⁰ *Fidelity Cash Management Service v CCMA & others* [2008] 3 BLLR 197 (LAC) para 102.

⁵⁴¹ *County Fair Foods* para 5.

transparency and openness, with which all administrative bodies were Constitutionally obliged to comply.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.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.⁵⁴⁴ The expeditiousness with which labour disputes were to be resolved, however, remained a significant consideration in review proceedings.⁵⁴⁵ Similarly, the separation of powers between the executive (encompassing the public administration), the legislature and the judiciary was germane to review.⁵⁴⁶ Consequently, exercising a degree of deference towards commissioners' determinations was fitting.⁵⁴⁷

Following *Carephone*, it was these principles and values which informed⁵⁴⁸ 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,⁵⁴⁹ they bear corresponding relevance to the scope of review following *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 *Sidumo* and key judgments flowing from it, this measure of review is discussed in depth in the chapters which follow.

⁵⁴² Sections 1(d) & 195 of the Constitution; *Carephone* paras 9-13.

⁵⁴³ *Carephone* paras 8-9 & 30-31; *Whitear-Nel* at 1486; *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 *Chirwa and Gcaba v Minister for Safety & Security & others* 2010 (1) SA 238 (CC).

⁵⁴⁴ Section 23 of the Constitution; consider, in this regard, *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.

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

⁵⁴⁶ *Carephone* para 34. For the doctrine of SOP, see *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.

⁵⁴⁷ This may be inferred from Zondo JP's comments in *Rustenburg Platinum Mines* (2004) (LAC) para 15; Smit (2008) at 1636; *BMD Knitting Mills* para 18.

⁵⁴⁸ Or at the very least ought to have informed.

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*,⁵⁵⁰ in the seminal decision of *Sidumo & another v Rustenburg Platinum Mines Ltd & others*,⁵⁵¹ 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?'⁵⁵²

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.⁵⁵³ 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.⁵⁵⁴ Parties' rights

⁵⁵⁰ *Carephone (Pty) Ltd v Marcus NO & Others* [1998] 11 BLLR 1093 (LAC).

⁵⁵¹ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC).

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.

⁵⁵⁴ Lawrence Baxter *Administrative Law* (1984) at 305; Cora Hoexter *Administrative law in South Africa* (2007) at 49-54; Cora Hoexter with Rosemary Lyster *The new Constitutional and administrative law* vol 2 (2002) at 186 & 131-134. Consider too De Ville's approach in JR De Ville *Judicial Review of Administrative Action in South Africa* revised 1 ed (2005) at 30; Emma Fergus 'The distinction between appeals and reviews – Defining the limits of the Labour Court's powers of review' (2010) 31 *ILJ* 1556 at 1569-1570. In *Engen Petroleum Ltd v*

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*⁵⁵⁵

Following *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA & others*,⁵⁵⁶ *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's⁵⁵⁷ 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.⁵⁵⁸ 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.⁵⁵⁹ Its third finding was again contrary to the SCA's conclusions, however. According to the majority,⁵⁶⁰ CCMA awards

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.

⁵⁵⁵ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC).

⁵⁵⁶ *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA & others* [2006] 11 BLLR 1021 (SCA).

⁵⁵⁷ Section 6 of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA').

⁵⁵⁸ *Sidumo* paras 62-79. The question is addressed in more detail later.

⁵⁵⁹ *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.

⁵⁶⁰ 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.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.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.⁵⁶³ Adding to this, lawyers were expressly excluded from attending most arbitrations and resultant awards bore no precedential value.⁵⁶⁴ The resolution of disputes by the CCMA was compelled by statute which differentiated its proceedings from private and voluntary arbitrations.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.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.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

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.

⁵⁶² *Sidumo* paras 81-87.

⁵⁶³ *Ibid* para 85; see also section 138 of the LRA.

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 ftnt 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.

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 ftnt 34; *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (5) BCLR 503 (SCA) para 45 and *Reunert Industries (Pty) Limited t/a Reutech Defence Industries v Naicker & others* [1997] 12 BLLR 1632 (LC) paras 3-4 & 6.

⁵⁶⁶ *Sidumo* para 98-100. See also chapter 1, *Sidumo* paras 81-84 and the case law referred to therein.

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...’⁵⁶⁸ 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.’⁵⁶⁹

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.⁵⁷⁰ 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.⁵⁷¹

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.⁵⁷² Primarily, this stemmed from the expertise and efficiency with which labour disputes were to be finalised.⁵⁷³ The scope of the courts’ powers under PAJA and the LRA were resultantly disparate.⁵⁷⁴ Further suggesting the uniqueness of dispute resolution in the labour sphere was section 210

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 LRA⁵⁷⁹ 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 *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 *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; *Sidumo* para 101.

⁵⁷⁷ *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 *Sidumo* para 105.

⁵⁸¹ Section 24 of the Constitution of the Republic of South Africa Act 200 of 1993 ('the interim Constitution'); *Carephone* was formally decided in accordance with section 33, read with item 23(2) of Schedule 6, of the Constitution; *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 *Acta Juridica* 35.

⁵⁸³ See section 33 of the Constitution.

⁵⁸⁴ *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 *Rustplats*' (2007) 23(6) *Employment Law* 3 at 7.

⁵⁸⁶ *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.⁵⁸⁷ Thus, requiring commissioners' decisions to be reasonable would enhance the likelihood of decisions being fair.⁵⁸⁸ 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.⁵⁸⁹ Various challenges may be levelled against this view and they are fully discussed in later paragraphs.⁵⁹⁰ Suffice to say here that, in her concurring judgment in *Sidumo*, O'Regan J⁵⁹¹ held the reasonableness standard to have extended the scope of review.⁵⁹² Her statement alone points to the illegitimacy of the construction.⁵⁹³ 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.⁵⁹⁴

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 Mhlungu 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, Navsa 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.

⁵⁸⁹ *Shoprite Checkers (Pty) Ltd v CCMA & others* [2008] 12 BLLR 1211 (LAC) ('*Shoprite Checkers 1*') para 19; *Cheetham* para 6; John Grogan 'In the shadow of *Sidumo*: Applying the 'reasonable commissioner' test' (2008) 24(6) *Employment Law* 3 at 3; C Garbers 'Reviewing CCMA awards in the aftermath of *Sidumo*' (2008) 17(9) *Contemporary Labour Law* 84 at 85; Grogan (2007) at 22. Compare this approach, however, to that of the Labour Court in *Value Logistics Ltd v Basson & Others* (2011) 32 ILJ 2552 (LC) paras 40-43 and *Ellerine Holdings Ltd v CCMA & others* [2008] JOL 22087 (LAC) at 10-11.

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 Hoexter (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 145.⁵⁹⁵ 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,⁵⁹⁶ 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.⁵⁹⁷ 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.⁵⁹⁸

The breadth of the PAJA's grounds for review⁵⁹⁹ equally illustrates the irony of dispensing with section 145 in favour of reasonableness exclusively.⁶⁰⁰ 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.⁶⁰¹ 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.⁶⁰² In *Sidumo*, O'Regan J contested the alleged significance of the SOP to section 145 proceedings, observing that:

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.

⁵⁹⁶ *Kievits Kroon Country Estate (Pty) Ltd v CCMA & others* [2010] JOL 26444 (LC) para 28. Note, however, the LAC's rejection of this view in *Kievits Kroon Country Estate v MMedi & others* (LAC) unreported case no JA78/10 of 24 July 2012 para 21 and *Fidelity Cash Management Service v CCMA & others* [2008] 3 *BLLR* 197 (LAC).

⁵⁹⁷ Garbers (2008) at 86; Grant Ray-Howett 'Is it reasonable for CCMA commissioners to act irrationally?' (2008) 29 *ILJ* 1619 at 1628-1634.

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.’⁶⁰³

While at first glance her comments decry the doctrine’s relevance to the issue, a closer look reveals a different picture.⁶⁰⁴ Notably, the Judge expressed these sentiments following her discussion of the cases in which public institutions had been exempt from reasonableness review altogether.⁶⁰⁵ 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 restraint⁶⁰⁶ – consequently remains significant.⁶⁰⁷

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.⁶⁰⁸ 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.⁶⁰⁹ It is resultantly fortunate that this interpretation has now been refuted by the LAC.⁶¹⁰

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*,⁶¹¹ in which the

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

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.

⁶¹⁸ For deference generally, consult DM Davis ‘To defer and when? Administrative law and Constitutional democracy’ 2006 *Acta Juridica* 23; H Corder ‘From despair to deference: same difference?’ in G Huscroft & M Taggart (eds) *Inside and Outside Canadian Administrative Law* (2006) at 375 and Hoexter (2007) at 138-47. For ‘deference as respect’, see David Dyzenhaus (ed) *The Unity of Public Law* (2004).

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

⁶²⁰ AA Landman ‘A study in deference: Labour Court deference to CCMA arbitration awards’ (2008) 29 *ILJ* 1613 at 1615-1616.

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 Gruss 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); *Miyambo 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, *Maephe 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

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,⁶³⁴ and finally that the Commissioner had acted in excess of his powers.⁶³⁵ 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.⁶³⁶ More probable is that the remaining grounds simply did not justify review. Alternatively,⁶³⁷ 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.⁶³⁸

Concurring with Navsa AJ's principal findings,⁶³⁹ 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.⁶⁴⁰ Requiring administrative action to be lawful, reasonable and procedurally fair ensured that exercises of public power were

⁶³⁴ And had committed a gross irregularity by doing so.

⁶³⁵ *Sidumo* para 23 & 185.

⁶³⁶ For this view, consider *Kievits Kroon* (LC).

⁶³⁷ 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.

⁶³⁸ For similar attitudes to reasonableness, consult *Afrox Healthcare Ltd v Commission for Conciliation, Mediation & Arbitration & Others* (2012) 33 *ILJ* 1381 (LAC) para 21; *Bestel v Astral Operations Ltd & others* [2011] 2 *BLLR* 129 (LAC) paras 16-17 and *SA Municipal Workers Union on behalf of Petersen v City of Cape Town & others* (2009) 30 *ILJ* 1347 (LC) paras 53-54 ('*Petersen*'), read with paras 26-27.

⁶³⁹ 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.

⁶⁴⁰ See section 1 of the Constitution.

conducted with due accountability, openness and transparency.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.⁶⁴² Nonetheless aware of the dangers associated with extending review,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,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.'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.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

⁶⁴¹ *Sidumo* para 138. See too *Solomon v Commission for Conciliation, Mediation and Arbitration & others* (1999) 20 ILJ 2960 (LC) paras 19 & 21.

⁶⁴² *Sidumo* para 140.

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.

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.

⁶⁴⁵ *Sidumo* para 140.

⁶⁴⁶ *Ibid.*

key Constitutional values are upheld.⁶⁴⁷ In practical terms,⁶⁴⁸ this translates into adequate scrutiny and supervision of administrative determinations, thereby facilitating improved future decision-making.⁶⁴⁹ 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.⁶⁵⁰ 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.⁶⁵¹ In addition, should the test be inadequately, inconsistently or ambiguously applied,⁶⁵² the probability of frivolous review proceedings may be increased.⁶⁵³

In a dissenting minority decision, Ngcobo DJP held that CCMA arbitrations did not constitute administrative action.⁶⁵⁴ 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,⁶⁵⁵ have been repeatedly cited by reviewing courts.⁶⁵⁶ As such, Ngcobo J's judgment is informative when identifying the confines of review.⁶⁵⁷

⁶⁴⁷ Ibid para 138; sections 1(d), 33 & 195 of the Constitution.

⁶⁴⁸ And while not expressly stated in *Sidumo*.

⁶⁴⁹ For the constituents of administrative justice generally, consult Jeffrey Jowell 'The democratic necessity of administrative justice' 2006 *Acta Juridica* 13 at 16-17; Cora Hoexter 'The current state of South African administrative law' in H Corder & L van der Vijver (eds) *Realising Administrative Justice* (2002) 20 at 27; 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 and Mureinik (1993).

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.

⁶⁵⁵ Ibid para 268. *Ellerine Holdings* para 12; *Afrox Healthcare* para 21.

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.⁶⁵⁸ 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.⁶⁵⁹ 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 objects⁶⁶⁰ were of equivalent worth.⁶⁶¹

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.'⁶⁶²

In other words, on account of their duty to determine matters procedurally fairly, commissioners' failures to do so are 'grossly irregular'.⁶⁶³ 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*.⁶⁶⁴ 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,⁶⁶⁵ 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.⁶⁶⁶ In some instances, the section 145 grounds are completely disregarded⁶⁶⁷ 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.⁶⁶⁸ Finally, contention around the question of whether reasonableness extends or restricts the legitimate sphere of review abounds.⁶⁶⁹ What follows is an analysis of court decisions in which the aforementioned controversies are most apparent.⁶⁷⁰ 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; *Kievits Kroon* (LC); *Dunwell* para 17. Compare these cases, however, to the courts' remarks in *Fidelity and Sasol Mining (Pty) Ltd v Commissioner Nggeleni & 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 Maldi & 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 & Others⁶⁷¹

The first of the LAC's decisions following *Sidumo* was *Palaborwa Mining Co Ltd v Cheetham & Others*.⁶⁷² 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.’⁶⁷³

Thus, according to the Judge, the LRA's conferral of power on commissioners (rather than courts)⁶⁷⁴ 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.’⁶⁷⁵ Notwithstanding his recognition of deference, Willis JA emphasized the quasi-judicial nature of CCMA arbitration proceedings.⁶⁷⁶ 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.’⁶⁷⁷

however, *Shoprite Checkers (Pty) Ltd v CCMA & others* [2009] JOL 23356 (SCA) (*‘Shoprite Checkers 3’*) para 9. For the LAC's powers generally, see section 174 of the LRA.

⁶⁷¹ *Palaborwa Mining Co Ltd v Cheetham & Others* (2008) 29 ILJ 306 (LAC).

⁶⁷² *Ibid.*

⁶⁷³ *Ibid* para 6. For challenges to this approach, consider Garbers (2008) and Ray-Howett.

⁶⁷⁴ At least in so far as determining fairness was concerned.

⁶⁷⁵ *Cheetham* 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.

⁶⁷⁶ *Cheetham* para 6.

⁶⁷⁷ *Ibid.* 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.⁶⁷⁸ 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.⁶⁷⁹ Supplementing these difficulties, critics have argued that a less deferential approach would better promote efficiency and expeditiousness in labour dispute resolution.⁶⁸⁰ 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.⁶⁸¹

Of course, there is just as strong an argument to be made to the contrary.⁶⁸² Subjecting administrative decisions too readily to judicial review may obstruct administrative efficiency and effectiveness. Not only does inadequate deference impair cost effectiveness⁶⁸³ but it aggravates the omnipresent problem of administrative ineptitude.⁶⁸⁴ To the extent to which courts are too dictatorial in their attitudes to review, administrators may misunderstand what is expected of them.⁶⁸⁵ They may consequently adopt unnecessarily protracted procedures when fulfilling their functions, in desperate attempts at covering every possible contingency.⁶⁸⁶

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.

⁶⁸⁰ De Ville (2005) at 30; Jowell (2006) at 17. Compare, however, Davis (2006) and *Government of the Republic of South Africa & others v Grootboom & others* 2001 (1) SA 46 (CC).

⁶⁸¹ Ray-Howett at 1628. For further discussions of 'deference' and the rationale behind it, consult Landman at 1615-1616. For deference generally, see Davis (2006); Corder in G Huscroft & M Taggart (2006) at 375 and Hoexter (2007) at 138-47. For the incidence and success of review, see 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 and Alan Rycroft 'An evaluation of the Labour Court' in Andrew Levy and Tanya Venter (eds) *Dispute Resolution Digest 2012* (2012) 61. Consult too the *CCMA Annual Report 2009-2010* Department of Labour RP: 84/2010, available at www.ccma.org.za, accessed on 12 October 2012 and the *CCMA Annual Report 2010-2011* Department of Labour RP: 58/2011, available at www.ccma.org.za, accessed on 12 October 2012.

⁶⁸² Albeit in the context of commercial administrative activity.

⁶⁸³ Quinot at 440.

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 practices⁶⁸⁷ 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.⁶⁸⁸ 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 decision⁶⁸⁹ that he considered reasonableness to be an independent test for review.⁶⁹⁰

Pateli JA and Molahleli JA concurred in Willis JA's judgment,⁶⁹¹ agreeing that reasonableness afforded commissioners greater latitude than previously granted.⁶⁹² 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.⁶⁹³ 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*, where the SCA reiterated that the starting point must always be the Constitution; *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 *Dunwell* 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 may lead to different results, it is unfortunately a situation which has to be endured with fortitude despite the uncertainty it may create.’⁶⁹⁴

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.⁶⁹⁵

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.⁶⁹⁶ 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.⁶⁹⁷ Ostensibly, their argument was based on the need for efficiency in labour dispute resolution, congruently with section 1(d)(iv) of the LRA.⁶⁹⁸ However, as O’Regan J reflected in *Sidumo*,⁶⁹⁹ extending review to encompass reasonableness need not defeat the speed with which labour disputes are resolved.⁷⁰⁰ 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.⁷⁰¹ For these reasons, infusing section 145 with the constitutional standard of reasonableness necessarily augmented the Labour Courts’ powers of judicial review.⁷⁰²

⁶⁹⁴ *Cheetham* para 13.

⁶⁹⁵ For the meaning of administrative justice, see 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 and Mureinik (1993).

⁶⁹⁵ For examples of successful grounds for review, consult the cases referred to in Myburgh (2009); Myburgh (2010) and Myburgh (2011).

⁶⁹⁶ *Cheetham* para 13.

⁶⁹⁷ See, in this regard, sections 23, 33 & 1(d)(iv) & 195(1) of the Constitution.

⁶⁹⁸ 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.

⁶⁹⁹ *Sidumo* para 140; for similar sentiments, see *Foschini Group* (2010) (LAC) para 28.

⁷⁰⁰ *Ibid.*

⁷⁰¹ Section 195 of the Constitution; Garbers (2008) at 86; Ray-Howett at 1628.

⁷⁰² *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.⁷⁰³ 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*,⁷⁰⁴ 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.⁷⁰⁵ 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.⁷⁰⁶ 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.⁷⁰⁷ On that basis, it is nonsensical to suggest that reasonableness sets a lower threshold for review than that applicable under rational justifiability.⁷⁰⁸

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.⁷⁰⁹ 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.

further suggests that reasonableness was intended to allow greater scrutiny of administrative decisions than that permissible under the interim Constitution. For the history of these sections generally, see Hugh Corder 'Comparing administrative justice across the Commonwealth: A first scan' 2006 *Acta Juridica* 1 at 2; Lourens du Plessis & Hugh Corder *Understanding South Africa's Transitional Bill of Rights* (1994) at 165-170; Currie & De Waal at 642-643; Etienne Mureinik 'A bridge to where? Introducing the interim Bill of Rights' (1994) 10 *SAJHR* 31 and Hugh Corder 'Administrative justice' in D van Wyk et al (eds) *Rights and Constitutionalism* (1994) 387 at 398.

⁷⁰³ For a recent discussion of the distinction, consult *Value Logistics* paras 38-44.

⁷⁰⁴ *Pharmaceutical Manufacturers* para 85. Consider too in this regard, Hoexter (2007) at 306-309; Pillay, at 425-429 and chapter 4 of this thesis.

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 been 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'.⁷¹⁰ Resultantly, following *Sidumo*, commissioners were not required to accede to employers' sanctions.⁷¹¹ 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.⁷¹² Naturally, to the degree to which commissioners' powers were widened by *Sidumo*, the scope for judicial intervention was reduced.⁷¹³ 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.⁷¹⁴ It further has no application to commissioners' findings which do not address sanction.⁷¹⁵ Proposing simply that reasonableness limits courts' powers of review is accordingly misleading and incomplete.⁷¹⁶ 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.⁷¹⁷ 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.⁷¹⁸

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

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.

⁷¹³ Grogan (2007); Myburgh (2010) at 14-15.

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.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.⁷²⁰ They simply provide reviewing courts with a way to envisage review comparative to appeal.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 *Cheetham*, the Judges' concerns spoke to the function of judicial review in facilitating improved future decision-making.⁷²² This function is well established in administrative circles. It further espouses an interpretation of reasonableness consistent with constitutional principles and values.⁷²³ Overturning substandard awards not only upholds parties' rights but it enables the judiciary to direct commissioners towards more appropriate ways of resolving disputes.⁷²⁴ In turn, it is a pertinent consideration during all section 145 proceedings.

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

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

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

⁷²⁰ The implications of her sentiments are discussed more fully under *Ellerine Holdings* below.

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

⁷²² For the functions of judicial review, see Jowell (2006) 13 at 16-17; Hoexter in Corder & van der Vijver (eds) (2002) at 27; Corder in Corder & van der Vijver (eds) (2002) at 1-2 and Mureinik (1993).

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

⁷²⁴ Consider Cheryl Saunders 'Apples, oranges and comparative administrative law' 2006 *Acta Juridica* 423 at 429.

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

⁷²⁶ *Fidelity Cash Management Service v CCMA & others* [2008] 3 BLLR 197 (LAC).

⁷²⁷ *Kievits Kroon Country Estate (Pty) Ltd v CCMA & others* [2010] JOL 26444 (LC).

⁷²⁸ *Sasol Mining (Pty) Ltd v Commissioner Ngqeleni & others* [2011] 4 BLLR 404 (LC).

⁷²⁹ *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.⁷²⁹ 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.⁷³⁰ 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.⁷³¹ 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.⁷³² 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.⁷³³ 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.

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.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.’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.’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.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

⁷³⁴ Contrary to legislative intent; *Fidelity* para 98.

⁷³⁵ *Fidelity* para 99.

⁷³⁶ *Ibid* para 100.

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 awards⁷³⁸ 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.⁷³⁹ Consequently, in the event of a commissioner's alleged excess of powers, for example, unreasonableness need not be established (or raised) to found review.⁷⁴⁰ 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*.⁷⁴¹ Conceivably, the Court perceived no necessary nexus between reasonableness and excesses of power. Once again,⁷⁴² it may be inferred that reasonableness comprises an autonomous basis for review which need not be associated with section 145 or related procedural irregularities.⁷⁴³

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*.⁷⁴⁴ 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.⁷⁴⁵ The LC ignored these grounds averring confidently instead that:

⁷³⁸ *Fidelity* para 100.

⁷³⁹ 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.

⁷⁴⁰ *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.

⁷⁴¹ In relation to rational justifiability; *Carephone* para 24.

⁷⁴² And consistently with *Cheetham*.

⁷⁴³ This remains a contested proposal; compare Du Toit (2010) at 3; *Ellerine Holdings* (as discussed below) and *Fidelity* para 101.

⁷⁴⁴ *Kievits Kroon Country Estate (Pty) Ltd v CCMA & others* [2010] JOL 26444 (LC).

⁷⁴⁵ *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.’⁷⁴⁶

In light of *Fidelity*,⁷⁴⁷ the basis for the Court’s statement in *Kievits* is uncertain.⁷⁴⁸ 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.⁷⁴⁹ 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.⁷⁵⁰ This ensures that legal certainty and the rule of law are maintained while simultaneously protecting parties’ rights to procedurally fair and lawful administrative action.⁷⁵¹ Supplementing this are the Constitutional values of accountability, transparency and openness.⁷⁵² 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.⁷⁵³

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.

⁷⁵¹ *Shoprite Checkers 3* para 31; *Herholdt v Nedbank Ltd* (2012) 33 ILJ 1789 (LAC) para 54; Clive Thompson ‘The 1995 Labour Relations Bill’ *IMSSA Bulletin* (1995) at 23, as cited in Benjamin & Cooper at 275; the Explanatory Memorandum at 319.

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 irrationality⁷⁵⁴ of his findings.⁷⁵⁵ In thoroughly assessing each ground, the LAC's theoretical approach to review (and endorsement of section 145) was verified in practice.⁷⁵⁶ Notwithstanding this, the Court has been criticised for construing the *Sidumo* test as tolerating substantively reasonable awards despite inadequacies in commissioners' reasoning processes.⁷⁵⁷ 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:

'...[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.'⁷⁵⁸

Similarly in *Strategic Liquor Services v Mvumbi NO and Others*,⁷⁵⁹ when recounting its observations in *Mpahlehle v First National Bank of South Africa Ltd*, the CC held that reasons:

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 Bophuthutswana 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; *Mpahlehle v 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.’⁷⁶⁰

In other words, prescribing adequate reasons both guarantees better decision-making and promotes the Constitutional values of accountability, transparency and openness, underpinning section 33.⁷⁶¹ Poor reasons ought therefore to be met with review.⁷⁶²

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.⁷⁶³ In *Bestel v Astral Operations Ltd and Others*,⁷⁶⁴ for example, the LAC upheld the commissioner’s award,⁷⁶⁵ recording that:

‘[The commissioner had] ‘engaged in a careful analysis of the testimony presented to him.’⁷⁶⁶

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

⁷⁵⁹ *Strategic Liquor Services v Mvumbi NO and Others* 2010 (2) SA 92 (CC) para 17.

⁷⁶⁰ *Ibid*, citing *Mpahlehle 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 Vijver (eds) (2002); Hoexter in Corder & van der Vijver (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.

⁷⁶⁴ *Bestel v Astral Operations Ltd & others* [2011] 2 BLLR 129 (LAC).

⁷⁶⁵ *Ibid* para 31

⁷⁶⁶ *Ibid* para 9.

alleged in relation to a specific statutory ground of review⁷⁶⁷ 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.⁷⁶⁸

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.⁷⁶⁹ 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.⁷⁷⁰ *Sasol Mining (Pty) Ltd v Commissioner Nggeleni & others*⁷⁷¹ illustrates the position well. There, the applicant contended that the commissioner's gross irregularity had resulted in an unreasonable outcome.⁷⁷² 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’.⁷⁷³

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.⁷⁷⁴ 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 'SAA', 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.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 *Sidumo* standard or simply confirms the principles applicable prior to *Sidumo* is questionable.⁷⁷⁶

Still, *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.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.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

⁷⁷⁵ Ibid.

⁷⁷⁶ Consider *Ellerine Holdings* at 13 and *Bestel* para 14. For review of gross irregularities prior to *Sidumo*, consult *Information Trust Corporation v Gous & others* (2005) 26 ILJ 2351 (LAC) paras 9-10; *Miladys v Naidoo & others* (2002) 23 ILJ 1234 (LAC) para 30; *Toyota SA Motors (Pty) Ltd v Radebe & Others* (2000) 21 ILJ 340 (LAC) para 41; *County Fair Foods* and *Reunert Industries*.

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 *Southern Sun Hotel Interests* paras 13-17.

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 *New Clicks* para 511; *Reunert Industries*. Plasket discusses the grounds of review (listed in PAJA) which relate to the constitutional standard of reasonableness; Plasket at 363. Consider too *Anglo Platinum* (2010) (LC) as referred to in *Myburgh* (Paper presented at the 2011 CCMA Commissioners Indaba); *Afrox Healthcare* para 21; *Value Logistics* para 46; *Kaefter Insulation* para 21 and *Standard Bank* (1995) (BG) at 1397.

‘outcomes based enquiry’.⁷⁷⁹ Where courts have combined substantive and procedural review, they have done so primarily while acknowledging the overlap between gross irregularities and unreasonableness.⁷⁸⁰ 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,⁷⁸¹ the courts’ confinement of this overlap to gross irregularities, to the exclusion of the remaining grounds, is sensible.⁷⁸² 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.⁷⁸³ 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); *Jafta 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).

⁷⁸² Notwithstanding the LAC’s location of rational justifiability under excess of powers in *Carephone*. Consider, in this regard, *Reunert Industries* at 1634-1637; *Myburgh* (2011) at 1518 and *Shoprite Checkers (Pty) Ltd v Ramdaw & others* [2000] 7 BLLR 835 (LC) paras 48-55.

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.⁷⁸⁴ First, the Court confirmed the different Constitutional bases for each: whereas *Carephone* was decided under the interim Constitution,⁷⁸⁵ the final Constitution's formulation of the right to just administrative action informed *Sidumo*.⁷⁸⁶ 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.⁷⁸⁷ Thus, courts were not confined to appraising only those reasons and facts covered by commissioners in their awards.⁷⁸⁸ Instead, held the LAC, the enquiry was an objective one.⁷⁸⁹ 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*.⁷⁹⁰ Nonetheless, the tests have been frequently conflated by reviewing courts, which regularly use the terms interchangeably.⁷⁹¹

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.⁷⁹² 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

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.

⁷⁸⁹ *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.

⁷⁹⁰ *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.

⁷⁹¹ 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.

⁷⁹² 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*.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*)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*,⁷⁹⁵ *Afrox Healthcare Limited v the CCMA & others*⁷⁹⁶ and *Boxer Superstores (Pty) Ltd v Zuma & others*⁷⁹⁷

The LAC's decision in *Ellerine Holdings Ltd v CCMA & others*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.'⁷⁹⁹

Presumably, this was subject to rational justifiability's substitution with reasonableness.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.⁸⁰¹ By failing to explicate their distinguishing features, the LAC left the existence

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.

⁷⁹⁴ *Rustenburg Platinum Mines* (SCA) para 26.

⁷⁹⁵ *Ellerine Holdings Ltd v CCMA & others* [2008] JOL 22087 (LAC).

⁷⁹⁶ *Afrox Healthcare Ltd v Commission for Conciliation, Mediation & Arbitration & Others* (2012) 33 ILJ 1381 (LAC).

⁷⁹⁷ *Boxer Superstores (Pty) Ltd v Zuma & others* [2008] 9 BLLR 823 (LAC).

⁷⁹⁸ *Ellerine Holdings Ltd v CCMA & others* [2008] JOL 22087 (LAC).

⁷⁹⁹ *Ibid* at 10.

⁸⁰⁰ *Ibid*.

⁸⁰¹ *Ellerine Holdings* at 15. See too *Bestel* paras 16-17 and *Du Toit* (2010) at 2.

of a distinction between the tests in doubt.⁸⁰² Simultaneously, the validity of its pronouncements on the issue in *Fidelity* went unconfirmed.⁸⁰³

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).⁸⁰⁴ Apparently, its reference to excess of powers was remiss.⁸⁰⁵

*Afrox Healthcare Limited v the CCMA & others*⁸⁰⁶ 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.⁸⁰⁷ 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.'⁸⁰⁸ The allegation mimics the test delineated in *Carephone*. However, the Court preferred to apply reasonableness.⁸⁰⁹ When doing so,⁸¹⁰ 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:

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.

⁸⁰⁶ *Afrox Healthcare Ltd v Commission for Conciliation, Mediation & Arbitration & Others* (2012) 33 ILJ 1381 (LAC).

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.

⁸¹⁰ With reference to *National Union of Mineworkers & Another v Samancor Ltd (Tubatse Ferrochrome) & Others* (2011) 32 ILJ 1618 (SCA) para 13; *Afrox Healthcare* para 20.

‘...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*...’⁸¹¹

Conceding that the *Carephone* enquiry had been replaced by the *Sidumo* test,⁸¹² 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.’⁸¹³

The connotation is that reasonableness and rationality are equivalent.⁸¹⁴ Yet, as discussed above, according to *Rustenburg Platinum Mines*,⁸¹⁵ 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.⁸¹⁶ 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.⁸¹⁷ 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 hesitation 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*.⁸¹⁸ 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.⁸¹⁹ 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*

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.

⁸¹⁸ *Boxer Superstores (Pty) Ltd v Zuma & others* [2008] 9 BLLR 823 (LAC).

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.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.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.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.⁸²³ Referring to *Shoprite Checkers (Pty) Ltd v Ramdaw NO & others*,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.⁸²⁵ To avoid this, deference was due to commissioners' awards.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.⁸²⁷ Applying a standard sufficiently intrusive to preserve parties' Constitutional rights, while still respecting

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.

⁸²¹ *Ellerine Holdings* at 10-11.

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 7; *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.

⁸²³ *Ellerine Holdings* at 10-11, referring to *Sidumo* para 116 and *Shoprite Checkers* (2001) (LAC). For an interpretation of the Court's judgment in this regard, consult Myburgh (2009) at 4.

⁸²⁴ *Shoprite Checkers (Pty) Ltd v Ramdaw NO & others* [2001] 9 BLLR 1011 (LAC) at 1636H-I.

⁸²⁵ *Ibid*, as cited in *Ellerine Holdings* at 11; see too section 1(d)(iv) of the LRA.

⁸²⁶ For the original conception of 'deference as respect', consult Dyzenhaus (2004); more recently, see Hoexter (2007) at 138-47.

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.

legislative intent and the doctrine of SOP, is no easy task.⁸²⁸ 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.⁸²⁹ 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,⁸³⁰ overturning awards on account of trivial defects alone, or where doing so would not influence the outcome,⁸³¹ is unwarranted.⁸³² 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.⁸³³

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.⁸³⁴ Instead, it found the general body of evidence supportive of the award, engaging in measurable scrutiny of the merits in the process.⁸³⁵ 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.⁸³⁶ 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

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...'⁸³⁷

In passing these remarks, the LAC again recognised the significance of context in defining the ambit of review.⁸³⁸ When measuring the reasonableness of awards, the context in which commissioners operate is accordingly germane.⁸³⁹ 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,⁸⁴⁰ appraising its substantive reasonableness would not assist the respondents.⁸⁴¹ The statement is noteworthy but puzzling. In its expression, the Court acknowledged the substantive nature of reasonableness, defining it as an 'outcomes based enquiry'.⁸⁴² 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.⁸⁴³ 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.⁸⁴⁴ To remedy this, a test capable of

⁸³⁷ Ibid at 13.

⁸³⁸ *Bato Star* para 45; Hoexter (2007) at 315; De Ville (2005) at 212-214; Plasket at 339-363.

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.

Consider too Myburgh (2009) at 22; *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp & others* [2002] 6 BLLR 493 (LAC) para 58; *Reunert Industries* and Plasket at 363. For the association between reasonableness and excess of powers, see Garbers (2008) at 86-87 and *Carephone*. Note however, Myburgh (2011) at 1518 and Fergus (2012).

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.⁸⁴⁵

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.⁸⁴⁶ Matters such as *Amazwi Power Products (Pty) Ltd v Turnbull*,⁸⁴⁷ *Khanyile v Billiton Aluminium SA Ltd t/a Hillside Aluminium*⁸⁴⁸ and *Motsamai v Everite Building Products (Pty) Ltd*,⁸⁴⁹ 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'.⁸⁵⁰ Comparably, albeit with a contrary outcome, in *Motsamai* the Court held that by awarding re-employment the Commissioner had: '...clearly got it wrong.'⁸⁵¹ In *Khanyile*, the LAC again deemed the Commissioner's order 'correct'.⁸⁵² It concurrently asserted that there could 'be no doubt', in fact, of the award's correctness.⁸⁵³ Ironically too in *Khanyile*, the Court criticized the LC for having engaged in an appellate like procedure, rather than conducting a review.⁸⁵⁴ 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.⁸⁵⁵ That enquiry is

Vijver (eds) (2002) at 1-2; Mureinik (1993); Garbers (2008) at 86; Ray-Howett at 1628-1634. *Sidumo* paras, 88, 138 & 140; *Carephone* paras 9, 19 & 34-35.

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

⁸⁴⁶ Examples include *CEPPWAWU v NBCCI & others* [2011] 2 BLLR 137 (LAC) paras 22-23 and *Samancor Ltd (Tubatse Ferrochrome)* (2011) (SCA) para 7.

⁸⁴⁷ *Amazwi Power Products (Pty) Ltd v Turnbull* [2008] 9 BLLR 817 (LAC).

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

⁸⁴⁹ *Motsamai v Everite Building Products (Pty) Ltd* [2011] 2 BLLR 144 (LAC).

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.⁸⁵⁶ Regardless of the veracity of the LAC's substantive findings in these matters,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.⁸⁵⁸ *Samancor Manganese (Pty) Ltd v CCMA and others*⁸⁵⁹ overtly illustrates the quandary.⁸⁶⁰

In *Samancor Manganese*, the review application was premised on the allegedly 'erroneous' findings of the relevant Commissioner.⁸⁶¹ Given the nature of review as preclusive of enquiries into correctness,⁸⁶² the legitimacy of the application was disputable. Disappointingly, however, neither the LC nor the LAC dismissed it on this basis.⁸⁶³ Instead, the application was dismissed on account of the accuracy of the Commissioner's award.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.⁸⁶⁵

der Walt (Part 1) at 332; Fergus (2010); I Ellis & M Dendy 'Civil procedure: High Court' *The Law of South Africa* vol 3(1) 2 ed (2007) para 394; *Transnet Freight Rail* paras 74-75 and *Herholdt* paras 55-56.

⁸⁵⁶ Ibid. Note, however, that where an error of law is committed by a commissioner, this may amount to a reviewable gross irregularity. In such cases, reference may be made to the commissioner's erroneous understanding of the law. Refer, in this regard, to *Timothy v Nampak Corrugated Containers (Pty) Ltd* [2010] 8 BLLR 830 (LAC) at 833 and *Pam Golding* paras 12-16 & paras 17-20. In *Pam Golding*, while referring to *State Information Technology Agency (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2008) 29 ILJ 2234 (LAC), the Court noted that minor mistakes of law will not, however, necessarily justify review. For errors of law generally, see *De Beers Consolidated Mines Ltd v CCMA & others* [2000] 9 BLLR 995 (LAC) para 55; *Fipaza* para 58; *Hira & another v Booyesen & another* 1992 (4) SA 69 (A) and *Liberty Life Association of Africa Ltd v Kachelhoffer & others* [2004] 10 BLLR 1043 (C) paras 47-48.

⁸⁵⁷ Particularly where the nature of the offence involved is extreme; consider *Motsamai*.

⁸⁵⁸ Remembering that reasonableness does not require correctness or perfection and that there may be a range of permissible outcomes available to the presiding commissioner; *Sidumo* para 118; Garbers (2008) at 84. In *Motsamai*, Waglay AJA was ostensibly aware of this hazard but he held nonetheless that:

'I am mindful of the fact that this is an appeal of a review application and therefore what I may believe to be an appropriate sanction is irrelevant. However, having regard to all the facts and circumstances as set out above I do not believe that any person in the position of the Commissioner could reasonably arrive at a decision other than the one that the dismissal of the appellant was fair...'; *Motsamai* para 27.

⁸⁵⁹ *Samancor Manganese (Pty) Ltd v CCMA & others* (LAC) unreported case no JA17/2009 of 24 February 2009.

⁸⁶⁰ In *CEPPWAWU*, for example, the LAC referred to the 'correctness' of the commissioner's findings; *CEPPWAWU* paras 22-23.

⁸⁶¹ *Samancor Manganese* para 34.

⁸⁶² *Sidumo* para 118; Garbers (2008) at 84.

⁸⁶³ Consider, in this regard, the SCA's remarks in *Samancor Ltd (Tubatse Ferrochrome)* (2011) (SCA) para 7 & 15-16.

⁸⁶⁴ *Samancor Manganese* paras 39-63.

⁸⁶⁵ Ibid para 64. Note too *Clarence* para 26; in *Clarence*, the LAC unapologetically dismissed the Commissioner's award and determined the matter of its own accord. See also *Zono* paras 14, 15 & 36 and *Mutual Construction*.

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 (Tubatse Ferrochrome)* (2011) (SCA) paras 5, 7 & 17, regarding the LAC's approach in *Samancor Tubatse 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.

⁸⁷⁰ *Rainbow Farms (Pty) Ltd v CCMA & others* [2011] 5 BLLR 451 (LAC).

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.

⁸⁷² *Foschini Group* (2010) (LAC) para 48.

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.⁸⁷⁶ 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,⁸⁷⁷ detracting 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.⁸⁷⁸

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.⁸⁷⁹ 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.⁸⁸⁰

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.⁸⁸¹

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 *Sopelog* at 97B-E.

⁸⁷⁹ *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.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.⁸⁸³ In the first of these matters, *Shoprite Checkers (Pty) Ltd v CCMA & others ('Shoprite Checkers 1')*,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.⁸⁸⁵ The employee simultaneously instituted a cross-appeal.

Shoprite contended that the Commissioner's finding of unfair dismissal was unjustified.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.'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

⁸⁸² Fergus & Rycroft.

⁸⁸³ Compare *Shoprite Checkers 1* with *Shoprite Checkers v CCMA & others* [2008] 9 BLLR 838 (LAC) ('*Shoprite Checkers 2*') and *Shoprite Checkers 3*.

⁸⁸⁴ *Shoprite Checkers (Pty) Ltd v CCMA & others* [2008] 12 BLLR 1211 (LAC) ('*Shoprite Checkers 1*').

⁸⁸⁵ *Ibid* paras 1-9.

⁸⁸⁶ Specifically in light of the nature of the employee's misconduct; *Shoprite Checkers 1* para 19.

⁸⁸⁷ *Shoprite Checkers 1* para 19.

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*.⁸⁹⁸ This was true notwithstanding that the full record of proceedings was not before the Court.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 *Shoprite Checkers (Pty) Ltd v CCMA & others* ('*Shoprite Checkers 3*').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.⁹⁰¹

Applying these remarks to the facts of *Shoprite Checkers 3*, the SCA emphasized the broad discretion afforded to commissioners by the Act to determine the appropriateness of retrospective reinstatement.⁹⁰² This discretion, held the Court, restricted the permissible scope of judicial interference.⁹⁰³ Of relevance too in the matter before it was the absence of a complete record of proceedings.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.⁹⁰⁵ His award was instead reasonable⁹⁰⁶ and the employee's cross-appeal ought to have been dismissed.⁹⁰⁷ The SCA thus upheld the appeal.

While the Court's pronouncements in *Shoprite Checkers 3* were largely trite, they are a critical reminder of the breadth of commissioners' discretionary powers, particularly

⁸⁹⁸ Ibid para 30. See also *Transnet Freight Rail* para 10; *Fidelity* para 102.

⁸⁹⁹ *Shoprite Checkers 1* para 30.

⁹⁰⁰ *Shoprite Checkers (Pty) Ltd v CCMA & others* [2009] JOL 23356 (SCA). ('*Shoprite Checkers 3*')

⁹⁰¹ *Shoprite Checkers 3* paras 26-28. Consider too *Samancor Ltd (Tubatse Ferrochrome)* (2011) (SCA) paras 5 & 7.

⁹⁰² Section 193(a) of the LRA.

⁹⁰³ *Shoprite Checkers 3* para 32. See also Myburgh (2010) at 15-16.

⁹⁰⁴ *Shoprite Checkers 3* para 30.

⁹⁰⁵ Ibid.

⁹⁰⁶ Ibid para 30. The appeal was accordingly upheld; *Shoprite Checkers 3* para 35.

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.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 *Shoprite Checkers 1* and *Shoprite Checkers 3*, *Shoprite Checkers (Pty) Ltd v CCMA & others ('Shoprite Checkers 2')*⁹⁰⁹ was decided. There, the LAC granted an appeal against the reviewing court's decision to uphold the Commissioner's award.⁹¹⁰ The facts of *Shoprite Checkers 2* imitate those of *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.⁹¹¹

Nonetheless, on appeal, the employee conceded culpability. The review was consequently confined to the appropriateness of his dismissal.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')⁹¹³ but he had failed to account for all relevant factors before reaching his decision.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.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 *Shoprite Checkers 1*,⁹¹⁶ in which it

⁹⁰⁸ For a comprehensive discussion of the proper approach to review of discretionary determinations, refer to chapter 6.

⁹⁰⁹ *Shoprite Checkers v CCMA & others* [2008] 9 BLLR 838 (LAC) ('*Shoprite Checkers 2*').

⁹¹⁰ *Ibid* paras 4 & 26. On review, the Commissioner's order of reinstatement had been confirmed subject to a final written warning.

⁹¹¹ *Shoprite Checkers 2* para 3.

⁹¹² *Ibid* paras 5 & 14.

⁹¹³ *Ibid* para 11.

⁹¹⁴ *Ibid*.

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 *Samancor Ltd (Tubatse Ferrochrome)* (2011) (SCA) para 7.

⁹¹⁶ *Shoprite Checkers 1* para 30.

had departed somewhat from these authorities.⁹¹⁷ In Davis JA's opinion,⁹¹⁸ the matters were distinguishable. Thus, it was fair to confirm the employee's dismissal despite the trivial nature of the theft involved.⁹¹⁹

The Court's conclusion in *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.⁹²⁰

Secondly, the Courts' judgments display disparate levels of engagement with the law. In *Shoprite Checkers 1*, the LAC considered the fairness of sanction⁹²¹ with minimal reference to case authorities.⁹²² Comparatively, in *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.⁹²³ Specifically, the weight attributable to the Code for Dismissals relative to case law is indefinite.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.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

⁹¹⁷ Notably, no reference was made to these cases at all in *Shoprite Checkers 1*.

⁹¹⁸ Writing for an unanimous court in *Shoprite Checkers 2*.

⁹¹⁹ *Shoprite Checkers 2* paras 15-25.

⁹²⁰ Consistently with the nature of the reasonableness enquiry which recognizes that more than one reasonable outcome may exist in any given case.

⁹²¹ Albeit in the context of a purported enquiry into reasonableness.

⁹²² *Sidumo* aside, the Court made only brief reference to case authority; specifically, it referred to *Republican Press (Pty) Ltd v CEPPWAWU & Gumede & others* [2007] 11 BLLR 1001 (SCA); *Shoprite Checkers 1* para 29. The limited nature of the LAC's appraisal of the case law is disparate from the Court's extensive review thereof in *Shoprite Checkers 2*; *Shoprite Checkers 2* paras 16-21.

⁹²³ 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; *Transnet Freight Rail* paras 11-13. For proposed reconciliations of *Shoprite Checkers 1* and *Shoprite Checkers 2*, consult 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 and Smit (2011) at 72-73.

⁹²⁴ 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 *Carephone* and by Ngcobo J in *Sidumo*.

⁹²⁵ Garbers (2008) at 86; Ray-Howett at 1628. *Sidumo* paras, 88, 138 & 140; *Carephone* paras 9, 19 & 34-35; Jowell (2006); De Ville (2005) at 30.

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 & others*⁹²⁶ 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

⁹²⁶ *Transnet Freight Rail v Transnet Bargaining Council & others* [2011] 6 BLLR 594 (LC).

⁹²⁷ *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*').

⁹²⁸ *Transnet Freight Rail v Transnet Bargaining Council & others* [2011] 6 BLLR 594 (LC).

⁹²⁹ *Ibid* para 10. See also *Relyant Retail* paras 21-22.

⁹³⁰ For justification, consult chapter 6.

⁹³¹ *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*').

⁹³² Schedule 8 to the LRA read with section 68(5) of the LRA; *NUM obo 112 Employees* paras 10-11.

⁹³³ *NUM obo 112 Employees* paras 23-25.

found the dismissals to have been manifestly unfair; as a result, the award was unreasonable.⁹³⁴

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.⁹³⁵ 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.⁹³⁶ 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.⁹³⁷ To the extent to which this occurred in *NUM obo 112 Employees*, the legitimacy of the LAC's decision is questionable.⁹³⁸

3.7 The relationship between gross irregularities and unreasonableness: CUSA v Tao Ying Metal Industries & others,⁹³⁹ Anglo Platinum Ltd v CCMA & others⁹⁴⁰ and Transnet Freight Rail v Transnet Bargaining Council & others⁹⁴¹

In the midst of the *Shoprite Checkers* cases, the CC gave judgment in *CUSA v Tao Ying Metal Industries & others*.⁹⁴² *Tao Ying* concerned the interpretation of a collective agreement which the presiding Commissioner had construed in favour of the employees.⁹⁴³ The LC and

⁹³⁴ Ibid paras 25-28.

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).

⁹⁴¹ *Transnet Freight Rail v Transnet Bargaining Council & others* [2011] 6 BLLR 594 (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 *Maephe*. 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.⁹⁵⁵ 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.⁹⁵⁶ 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.⁹⁵⁷ At the very least, the right to administrative justice will be at stake in all review proceedings.⁹⁵⁸ So too will the right to fair labour practices be present.⁹⁵⁹ 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.⁹⁶⁰ 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;⁹⁶¹ this rendered her award irrational.⁹⁶²

⁹⁵⁴ For the CC's earlier pronouncements on this debate, see *Bato Star*.

⁹⁵⁵ *Tao Ying* para 150.

⁹⁵⁶ *Ibid* paras 130-132.

⁹⁵⁷ Jowell (2006); De Ville (2005) at 30.

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',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 standards⁹⁶⁴ was disappointing; if anything, it added to the prevailing confusion. Secondly, O'Regan J's observations imply that procedural irregularities are prerequisites for unreasonableness.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.⁹⁶⁶ It further suggests a return to the doctrine of symptomatic unreasonableness despite its abandonment in South Africa's Constitutional dispensation.⁹⁶⁷ Arguably therefore, O'Regan J's decision should not be interpreted as indicating that procedural defects must be present to establish unreasonableness;⁹⁶⁸ a better construction is that her decision merely affirms the overlap between gross irregularities⁹⁶⁹ and substantive unreasonableness.⁹⁷⁰

In *Anglo Platinum Ltd v CCMA & others*⁹⁷¹ the LC addressed this convergence once more, albeit without reference to *Tao Ying*. In *Anglo Platinum*,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

⁹⁶³ Consistently with the SCA's findings; *ibid*.

⁹⁶⁴ Together with her reasons for departing from the term 'reasonable'.

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.

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.

⁹⁶⁷ Hoexter with Lyster (2002) at 170-187; *Standard Bank* (1995) (BG); Yvonne Burns (original text by Marinus Wiechers) 'Administrative Law' *The Law of South Africa* vol 1 2 ed (2003) para 144.

⁹⁶⁸ Analogous decisions should similarly not be understood to suggest this; for an example thereof, consider *Parmalat* paras 14-16.

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.

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.

⁹⁷¹ *Anglo Platinum Ltd v CCMA & others* [2010] JOL 25372 (LC).

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.⁹⁷³

By implication, at least some procedural grounds of review (including failures to take relevant considerations into account)⁹⁷⁴ 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,⁹⁷⁵ 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 irregularity⁹⁷⁶ could similarly not be held responsible for the award's substantive reasonableness (or unreasonableness).⁹⁷⁷ Of course, had the Court's comments in *Anglo Platinum* been based on the procedural component of reasonableness,⁹⁷⁸ 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 &*

⁹⁷³ Ibid; see too Myburgh (Paper presented at the 2011 CCMA Commissioners Indaba).

⁹⁷⁴ Ibid.

⁹⁷⁵ *Consani Engineering (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & others* (2004) 25 ILJ 1707 para 11; *Shoprite Checkers 1* para 5; *Shoprite Checkers 2* paras 23-25. Note, however, *MEC for Health (Gauteng) v Mathamini & others* (2008) 29 ILJ 366 (LC) paras 17-18 and *Mutual Construction*, in which the Courts ostensibly adopted an alternative view.

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; *Maepa* 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.

⁹⁷⁸ *Anglo Platinum* (2010) (LC).

others⁹⁷⁹ too. There, the LC held that when determining whether a gross irregularity had occurred, the critical question was ‘...whether the conduct... complained of prevented a fair trial of issues.’⁹⁸⁰ In so far as it had done so materially, a gross irregularity would arise.⁹⁸¹ 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,⁹⁸² 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.’⁹⁸³

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,⁹⁸⁴ the incoherence of equating these enquiries is apparent.⁹⁸⁵ Clearly a means of differentiating between these grounds is needed.

**3.8 Reasonableness as a resolute ground of review: *Edcon Ltd v Pillemer NO*⁹⁸⁶
and *Clarence v The National Commissioner of the South African Police Service*⁹⁸⁷**

Perhaps it was a similar rationale which informed the SCA’s findings in *Edcon Ltd v Pillemer NO*.⁹⁸⁸ In *Edcon*, the employee had been dismissed for dishonesty.⁹⁸⁹ Following arbitration

⁹⁷⁹ *Transnet Freight Rail v Transnet Bargaining Council & others* [2011] 6 BLLR 594 (LC).

⁹⁸⁰ *Ibid* para 17.

⁹⁸¹ Applying these principles to the facts, the Court found that the Commissioner’s misapplication of the law to the facts comprised a material gross irregularity; *Transnet Freight Rail* para 17.

⁹⁸² *Transnet Freight Rail* para 17.

⁹⁸³ *Ibid* para 57.

⁹⁸⁴ *Sidumo* para 106 & 108; see also *Carephone* para 25.

⁹⁸⁵ *Transnet Freight Rail* para 57. The Court nevertheless reached comparable conclusions in respect of the remaining grounds of review, with the exception of the allegation that the commissioner had exceeded his powers by ordering rehabilitation; *Transnet Freight Rail* paras 65 & 66-75. In doing so, it implied that the test for excess of powers was correctness rather than reasonableness. For confirmation of this principle, see Myburgh (2011) at 1518 and *Afrox Healthcare*.

⁹⁸⁶ *Edcon Ltd v Pillemer NO & others* [2010] 1 BLLR 1 (SCA).

⁹⁸⁷ *Clarence v The National Commissioner of the SA Police Service* (2011) 32 ILJ 2927 (LAC); for another case in which reasonableness was seemingly applied as a resolute ground, see *Joseph v University of Limpopo & Others* (2011) 32 ILJ 2085 (LAC).

⁹⁸⁸ *Edcon Ltd v Pillemer NO & others* [2010] 1 BLLR 1 (SCA).

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.

⁹⁹⁷ *Edcon* para 16. Consult too *Afrox Healthcare* para 21.

⁹⁹⁸ *Sidumo* para 110; *Rustenburg Platinum Mines (SCA)* paras 26-28.

have bothered to reformulate the right to just administrative action as they did.⁹⁹⁹ 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.¹⁰⁰⁰

Applying these equivocal sentiments to the facts nonetheless, the SCA held the Commissioner's decision¹⁰⁰¹ reasonable. It accordingly dismissed the appeal, upholding the award in the process.¹⁰⁰² 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.¹⁰⁰³ 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.¹⁰⁰⁴ Of associated import is the judgment's implicit directive that reasonableness may remedy procedural deficiencies in awards.¹⁰⁰⁵

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 145.¹⁰⁰⁶ While in certain cases, the nature of the contended grounds for review may fall within the scope of reasonableness¹⁰⁰⁷ 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.¹⁰⁰⁸ 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.

⁹⁹⁹ Compare section 24 of the interim Constitution with section 33 of the Constitution.

¹⁰⁰⁰ *Rustenburg Platinum Mines* (SCA) para 30.

¹⁰⁰¹ That there was no evidence of a breakdown in the trust relationship between the parties.

¹⁰⁰² *Edcon* paras 23-24.

¹⁰⁰³ *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 BLLR 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.

¹⁰⁰⁴ For challenges to this view, see Le Roux and Young at 30 and Du Toit (2010) at 4-6 & 8.

¹⁰⁰⁵ The LAC's decision in *Clarence* has comparable implications; *Clarence* paras 26 - 41.

¹⁰⁰⁶ *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*.

¹⁰⁰⁷ Examples include failing to take relevant considerations into account or considering irrelevant factors.

¹⁰⁰⁸ *Value Logistics* paras 53-54.

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.¹⁰⁰⁹ By means of review, the quality of future decisions may be enhanced. Concurrently, lawfulness and procedural fairness are preserved.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.¹⁰¹¹ Favours substance over procedure as the Court in *Edcon* did, may similarly flout the right to fair labour practices. Reasonableness should therefore not be seen as a resolute test, capable of absolving awards of procedural irregularities.¹⁰¹² On the contrary, the status of procedural defects as legitimate bases for review must be maintained.¹⁰¹³

Linked to the difficulties posed by *Edcon* are the problems revealed by *Clarence v The National Commissioner of the South African Police Service*.¹⁰¹⁴ When conducting the review in *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:

‘[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.’¹⁰¹⁵

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'

¹⁰⁰⁹ Ray-Howett at 1628-1634; *Cheetham*; Garbers (2008) at 86 & 87; *Sidumo* para 138; section 33, read with section 195(1), of the Constitution.

¹⁰¹⁰ Consider, in this regard, Du Toit (2010) at 9.

¹⁰¹¹ Ray-Howett 1630-1632; *Tao Ying* para 131; section 33 of the Constitution.

¹⁰¹² For confirmation of the need to retain both procedural and substantive review, see *SAMWU* para 11 and *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.

¹⁰¹³ For implicit affirmation of this approach, note *Maepa* para 22 and *Tao Ying* paras 76 & 150. See too Myburgh (2009) at 18.

¹⁰¹⁴ *Clarence v The National Commissioner of the SA Police Service* (2011) 32 ILJ 2927 (LAC).

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.¹⁰¹⁶ It concluded that the employee’s guilt had not been proven on a balance of probabilities.¹⁰¹⁷ In turn, despite the Commissioner’s failure to resolve the dispute in a ‘rational way’,¹⁰¹⁸ or to refer to purportedly relevant law, his award was upheld.¹⁰¹⁹

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,¹⁰²⁰ in an informal and accessible way.¹⁰²¹ 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.¹⁰²² 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.¹⁰²³ Commissioners may further become obsessed with legal precision in their findings, impairing the intended efficiency and informality of the labour dispute resolution system.¹⁰²⁴ Finally, demanding legal perfection would result in comparable difficulties for employers, who cannot fairly be expected to unravel complex legal issues before dismissing

¹⁰¹⁶ Ibid paras 15-26.

¹⁰¹⁷ Ibid paras 27-41.

¹⁰¹⁸ Ibid para 26.

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 Section 138(7)(a) of the LRA.

¹⁰²⁴ Sections 1(d)(iv) and 138 of the LRA; the Explanatory Memorandum at 318-319. Consider too Quinot at 442.

employees.¹⁰²⁵ 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' relationship¹⁰²⁶ 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.¹⁰²⁷

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.¹⁰²⁸ 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 resolute 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 procedures¹⁰²⁹ cannot, however, be so easily condoned.¹⁰³⁰ Given the inferior position of reviewing courts to

¹⁰²⁵ Without legal advice at least.

¹⁰²⁶ Amongst other things.

¹⁰²⁷ See *Sopellog* at 97B-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,¹⁰³¹ prizing their assessments of reasonableness is even less appropriate.¹⁰³²

Nonetheless, in certain instances, the applicant's purportedly procedural grounds of review may fall within the broad ambit of reasonableness.¹⁰³³ 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.¹⁰³⁴ 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,¹⁰³⁵ 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.¹⁰³⁶ Augmenting these aspects of reasonableness is the context in which CCMA arbitrations are conducted.¹⁰³⁷ 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).

¹⁰³⁴ Hutchinson (2009) at 79-80.

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.¹⁰³⁸ 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.¹⁰³⁹ 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.¹⁰⁴⁰ Supporting this right are the Constitutional norms of accountability, transparency and openness in the public administration.¹⁰⁴¹ Coupled with the right to just administrative action, these values ensure that the rule of law is maintained.¹⁰⁴² 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.¹⁰⁴³ 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.¹⁰⁴⁴

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.¹⁰⁴⁵ 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.¹⁰⁴⁶ 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.¹⁰⁴⁷ 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,¹⁰⁴⁸ 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

¹⁰⁴⁵ Nicola Smit '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 at 1646.

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,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.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.¹⁰⁵¹

Secondly, subject to the provisos discussed more fully in the 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 33.¹⁰⁵³ 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.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.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 145.¹⁰⁵⁶ 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.

¹⁰⁵⁵ Garbers (2008) at 81 & 84-85.

¹⁰⁵⁶ Examples include *Ellerine Holdings*, *Transnet Freight Rail* and *Tao Ying*.

essence of section 145 with the substantive character of the *Sidumo* enquiry.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.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.¹⁰⁵⁹ On account of the inevitable interplay between gross irregularities and reasonableness,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.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.¹⁰⁶² Aggravating the debate are judicial depictions of reasonableness as encompassing both procedural and substantive elements. These depictions are not entirely inappropriate¹⁰⁶³ 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.

¹⁰⁵⁷ *Sidumo* para 106 and *Carephone* para 25.

¹⁰⁵⁸ Consider *Edcon* and the discussion on the admission of hearsay evidence above.

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.

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

¹⁰⁶¹ See *Edcon* and *Clarence* and the discussion thereof above.

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

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,¹⁰⁶⁴ the Labour Courts have not consistently followed this approach.¹⁰⁶⁵ In its stead, courts sometimes use the terms interchangeably and sometimes distinctively, with no indication of their reasons therefore.¹⁰⁶⁶ Nor have the courts agreed upon the continued functionality (if at all) of the *Carephone* standard.¹⁰⁶⁷ 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,¹⁰⁶⁸ demarcating the confines of permissible judicial interference with administrative action in the labour sphere¹⁰⁶⁹ 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.¹⁰⁷⁰

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.

¹⁰⁷¹ Note, however, *Southern Sun Hotel Interests (Pty) Ltd v CCMA & others* [2009] 11 BLLR 1128 (LC) where the Court acknowledged the uncertainty surrounding reasonableness; *Southern Sun Hotel Interests* para 13. See too *Herholdt v Nedbank Ltd* (2012) 33 ILJ 1789 (LAC); Anton Myburgh *The LAC's latest trilogy of review judgments: Is the Sidumo test in decline?* Paper presented at the SASLAW Gauteng Chapter Seminar, Cliffe Dekker Hofmeyr Inc, Johannesburg (24 July 2012).

¹⁰⁷² C Garbers 'Reviewing CCMA awards in the aftermath of *Sidumo*' (2008) 17(9) *Contemporary Labour Law* 84 at 84; 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 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 Maudi & 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 dependent¹⁰⁷⁵ and a measure of flexibility must inevitably be tolerated, regardless of the challenges it poses to certainty and coherence.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 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others*,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.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.

2.1 *The foundations of the reasonableness enquiry*

First, the underlying basis for introducing reasonableness is evident. By suffusing section 145¹⁰⁷⁹ with the standard, the Constitutional Court ('CC') in *Sidumo* sought to give effect to section 33 of the Constitution.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

¹⁰⁷⁵ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others* 2004 (7) BCLR 687 (CC) paras 41 & 54; *Sidumo* para 118; Cora Hoexter *Administrative Law in South Africa* (2007) at 321; JR De Ville *Judicial Review of Administrative Action in South Africa* revised 1 ed (2005) at 211.

¹⁰⁷⁶ *Palaborwa Mining Co Ltd v Cheetham & Others* (2008) 29 ILJ 306 (LAC) para 6.

¹⁰⁷⁷ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others* 2004 (7) BCLR 687 (CC).

¹⁰⁷⁸ Consult the discussion of Canadian law in chapter 6; *Dunsmuir v New Brunswick* [2008] 1 SCR 190 para 64.

¹⁰⁷⁹ Section 145 of the Labour Relations Act 66 of 1995 ('LRA' or 'the Act').

¹⁰⁸⁰ The Constitution of the Republic of South Africa, 1996 ('the Constitution'); *Sidumo* para 110.

and procedurally fairly.¹⁰⁸¹ Where commissioners fail to comply with these constraints, parties' rights to just administrative action are threatened and resultant awards may be overturned.¹⁰⁸²

As mentioned in chapter 3, the Court in *Sidumo* held that review for unreasonableness would give effect to the right to fair labour practices.¹⁰⁸³ 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.¹⁰⁸⁴

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*.¹⁰⁸⁵ 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?'¹⁰⁸⁶

To be subject to review on the basis of this test, decisions need not be grossly or egregiously unreasonable – they need simply be unreasonable.¹⁰⁸⁷

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.¹⁰⁸⁸ To this extent, the scope of reviewing courts' powers has been extended¹⁰⁸⁹ to permit investigations into the reasonableness of commissioners' findings.¹⁰⁹⁰ Determining reasonableness in outcome entails a value judgment.¹⁰⁹¹ 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.¹⁰⁹²

The standard has at times been asserted as comprising both procedural and substantive elements.¹⁰⁹³ In so far as unreasonableness overlaps with gross irregularities, the dual components of reasonableness must be acknowledged.¹⁰⁹⁴ 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.¹⁰⁹⁵ As such, its value is doubtful. Understanding

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.

¹⁰⁹³ *Southern Sun Hotel Interests* para 14; *Sasol Mining (Pty) Ltd v Commissioner Nggeleni & others* [2011] 4 BLLR 404 (LC) para 11; Anton Myburgh 'Determining and reviewing sanction after *Sidumo*' (2010) 31 *ILJ* 1 at 16; *Pam Golding Properties (Pty) Ltd v Erasmus & others* (2010) 31 *ILJ* 1460 (LC) para 8; *Parmalat SA (Pty) Ltd v CCMA & others* (LC) unreported case no C486/10 of 2 December 2011 paras 14-16; Anton Myburgh '*Sidumo v Rustplats*: How have the courts dealt with it?' (2009) 30 *ILJ* 1 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 an instructive discussion of the distinction between procedural and substantive irregularities in the context of the *Carephone* test, consult *Solomon v Commission for Conciliation, Mediation and Arbitration & others* (1999) 20 *ILJ* 2960 (LC) paras 19 & 21.

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 (LAC) 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 (LAC) para 21 and *Standard Bank of Bophuthutswana Ltd v Reynolds NO & others* (1995) 16 *ILJ* 1380 (BG) at 1397.

¹⁰⁹⁵ Or even the pre-*Carephone* era.

reasonableness as only substantive in nature¹⁰⁹⁶ 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.¹⁰⁹⁷ A more legitimate explanation of the dual features of reasonableness and the procedural grounds associated with it would be preferable.¹⁰⁹⁸

2.4 The relationship between reasonableness and correctness

The fourth uncontroversial feature of reasonableness is that it does not equate to ‘correctness’.¹⁰⁹⁹ 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.¹¹⁰⁰ 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.¹¹⁰¹ Consequently, while careful scrutiny is fitting, courts should not be overzealous in setting CCMA awards aside.¹¹⁰² A measure of deference is due to their findings.

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*.

¹¹⁰⁰ *Ellerine Holdings* at 10-11 & 18; *Foschini Group* (2010) (LAC) para 48.

¹¹⁰¹ *Sidumo* paras 105-110; *Tao Ying* paras 64-67; *Bato Star* paras 45-46; *Carephone* para 35; *Engen Petroleum Ltd v CCMA & others* [2007] 8 BLLR 707 (LAC) para 72. Recall, however, O’Regan J’s remarks in *Sidumo* regarding the doctrine of SOP and the discussion thereof in chapter 3; *Sidumo* paras 136-137. For this doctrine generally, consult Lawrence Baxter *Administrative Law* (1984) at 305; Hoexter (2007) at 49-54; Cora Hoexter with Rosemary Lyster *The new Constitutional and administrative law* vol 2 (2002) at 186 at 131-134; De Ville (2005) at 30; Emma Fergus ‘The distinction between appeals and reviews – Defining the limits of the Labour Court’s powers of review’ (2010) 31 ILJ 1556 at 1569-1570.

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.¹¹⁰³ As argued elsewhere,¹¹⁰⁴ it is debatable whether the distinction (in itself) contributes meaningfully to the apposite application of the reasonableness standard.¹¹⁰⁵ Nonetheless, in so far as it reminds reviewing courts to assess reasonableness and not correctness¹¹⁰⁶ and that respect is payable to commissioners' findings, the distinction is useful.¹¹⁰⁷

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.¹¹⁰⁸ Reviewing courts are therefore not confined to assessing only the reasons offered by commissioners for their decisions when determining reasonableness.¹¹⁰⁹ 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.¹¹¹⁰

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

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 Fergus (2010).

¹¹⁰⁵ *Ibid.* Nonetheless, the distinction serves as an important reminder to reviewing courts to refrain from overzealous interference with commissioners' awards.

¹¹⁰⁶ 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 *CEPPWAWU v NBCCI & others* [2011] 2 BLLR 137 (LAC) paras 22-23; *National Union of Mineworkers & Another v Samancor Ltd (Tubatse 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.

¹¹⁰⁷ Chapter 3; *Bato Star* para 48; *Cheetham* para 6; DM Davis 'To defer and when? Administrative law and Constitutional democracy' 2006 *Acta Juridica* 23.

¹¹⁰⁸ *Fidelity* para 102; *Edcon* para 16.

¹¹⁰⁹ *Sidumo* paras 105-110; *Fidelity* para 102; *Foschini Group* (2010) (LAC) para 29. In contrast to the position under *Carephone*; *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA & others* [2006] 11 BLLR 1021 (SCA) paras 29-31.

¹¹¹⁰ *Fidelity* para 102.

repeatedly affirmed in theory.¹¹¹¹ 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.¹¹¹² 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.¹¹¹³

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.¹¹¹⁴ By implication, the standard is flexible in nature¹¹¹⁵ and its appropriate application contextually dependent.¹¹¹⁶ 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*.¹¹¹⁷ In addition to them, factors specific to labour dispute resolution

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.

¹¹¹² See *New Clicks* para 511; *Reunert Industries (Pty) Limited t/a Reutech Defence Industries v Naicker & others* [1997] 12 BLLR 1632 (LC); Plasket at 363; *Anglo Platinum* (2010) (LC); *Afrox Healthcare* para 21; *Value Logistics* para 46; *Kaefer Insulation* para 21; *Standard Bank* (1995) (BG) at 1397 and *Pam Golding* para 5.

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).

¹¹¹⁴ *Bato Star* paras 41, 44 & 54; *Sidumo* para 118; De Ville (2005) at 30-31; Hoexter with Lyster (2002) at 66-7; Davis (2006) at 32-33; JR De Ville 'The rule of law and judicial review' 2006 *Acta Juridica* 62 at 63; Hoexter (2007) at 315. Consider too *Shoprite Checkers 3* para 23. For the 'ground rules' relevant to applying reasonableness in practice, refer to Catherine O'Regan 'Breaking ground: Some thoughts on the seismic shift in our administrative law' (2004) 121 *SALJ* 424 at 435-436.

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.’¹¹¹⁸

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)¹¹¹⁹ 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.¹¹²⁰

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.¹¹²¹ In this way, they strongly resemble judicial decisions.¹¹²² Given the need for deference to be paid to commissioners’ findings¹¹²³ and the variable nature of disputes entrusted to them, the scope of reasonableness in individual cases

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.¹¹²⁴ Discretionary determinations might analogously see reasonableness assume an altogether different form, somewhere between intrusive and reverential review.¹¹²⁵ Comparably, where subjective value judgments are involved (rather than strict applications of law), the level of intrusion may be lowered.¹¹²⁶

The critical role of fairness and equity in resolving labour disputes must nevertheless be recognised in all cases.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.¹¹²⁸ This is primarily due to their daily exposure to parties to employment relationships and the evidentiary advantages which they enjoy over reviewing courts.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.¹¹³⁰ In certain jurisdictions, for example, the nature of reasonableness assumes greater breadth where decisions affect fundamental human rights.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.¹¹³² Similarly, the right to just

¹¹²⁴ For commissioners' errors of law to be set aside on review, proof that the error was material ought nonetheless to be required; *Hira & another v Booysen* 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.

¹¹²⁵ Consider *Roman v Williams NO* 1998 (1) SA 270 (C) at 283; *Lucky Horseshoe (Pty) Ltd v Minister of Mineral and Energy Affairs* 1992 (3) SA 838 (T) at 848I-J; *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; *Equity Aviation Services (Pty) Ltd v CCMA & others* [2008] 12 BLLR 1129 (CC) para 36.

¹¹²⁶ For review of value judgments, see *Sidumo* paras 178-179.

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

¹¹²⁸ *Ibid.*

¹¹²⁹ As tribunals of first instance.

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

¹¹³¹ *Johannes Chan 'A sliding scale of reasonableness in judicial review' 2006 Acta Juridica* 233 at 236; see too *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.

¹¹³² Section 23 of the Constitution.

administrative action is germane to all section 145 proceedings.¹¹³³ 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.¹¹³⁴

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.¹¹³⁵ 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,¹¹³⁶ the award might face greater scrutiny than one refusing reinstatement of an employee guilty of misconduct and with a breadwinning wife and no children.¹¹³⁷ 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.¹¹³⁸ Court-like procedures are generally inappropriate.¹¹³⁹ Furthermore, consistently with the purposes of the LRA, disputes are to be resolved expeditiously.¹¹⁴⁰ Legislative intent in this regard is apparent from section 138(1)¹¹⁴¹

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.’¹¹⁴² The extent of commissioners’ discretionary powers under section 138 was detailed in chapter 1 and the discussion is not repeated here.¹¹⁴³ 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.¹¹⁴⁴ As such, a degree of due process is required.¹¹⁴⁵ 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.¹¹⁴⁶ In addition, they operate under severe pressure¹¹⁴⁷ 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.

¹¹⁴³ For details thereof, consult *Carephone* para 21; The Code of Good Practice Dismissals, Schedule 8 to the Labour Relations Act 66 of 1995 (‘Code for Dismissals’); Benjamin (2009) at 27; Darcy Du Toit et al *Labour Relations Law: A Comprehensive Guide* 4 ed (2003) at 378; Myburgh (2009) at 2-12.

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 law¹¹⁴⁸ 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.¹¹⁴⁹ As a result, reviewing courts should not approach them as they would judgments of the ordinary courts.¹¹⁵⁰ 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.’¹¹⁵¹

In order to ensure fairness, tempering this respectful attitude may still be necessary in some cases.¹¹⁵² Amongst other factors, the substantial constraints under which commissioners work¹¹⁵³ dictate, that while paying deference to awards, reviewing courts must intervene when warranted. A measure of deference is crucial but too little is not.¹¹⁵⁴ Not only does undue deference endanger parties’ rights, but it undermines the role and functions of judicial review.¹¹⁵⁵

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

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).

¹¹⁵¹ *Ellerine Holdings* at 10-11; Mark Aronson, Bruce Dyer & Matthew Groves *Judicial Review of Administrative Action* 3ed (2004) at 180.

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.

¹¹⁵³ *Ibid*; consider too section 138(7) of the LRA and the *CCMA Annual Reports*, available at www.ccma.org.za, accessed on 12 October 2012.

¹¹⁵⁴ *Fidelity* para 100; Hoexter (2007) at 501-502; Davis (2006).

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 arbitrations¹¹⁵⁶ 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.¹¹⁵⁷ 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.¹¹⁵⁸ That code is the Code of Good Practice for Dismissals,¹¹⁵⁹ which guides commissioners in both misconduct and incapacity dismissal disputes.¹¹⁶⁰ 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—

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.¹¹⁶¹

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

- ‘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.¹¹⁶²

Thus, legal precedent aside,¹¹⁶³ commissioners are (at a minimum) bound to consider these factors when determining the fairness of misconduct and incapacity dismissals.¹¹⁶⁴ Reviewing courts ought similarly to address these considerations. Where additional legal principles arise, they too require attention.¹¹⁶⁵ Finally, the objects and underlying values of the LRA are relevant.¹¹⁶⁶ Given the critical relationship between these objects and the right to fair labour practices,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.

¹¹⁶¹ Item 7 of the Code for Dismissals.

¹¹⁶² Item 9 of the Code for Dismissals.

¹¹⁶³ Which some courts apply more strictly than others. For an example of a strict approach, see *Clarence*.

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.

¹¹⁶⁵ *Ibid.*

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.

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,¹¹⁶⁸ 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,¹¹⁶⁹ 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.¹¹⁷⁰

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.¹¹⁷¹ 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.¹¹⁷² In *Maepe v CCMA & another*, the LAC emphasised that commissioners' reasons ought at least to include:¹¹⁷³

'...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.'¹¹⁷⁴

¹¹⁶⁸ 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).

¹¹⁶⁹ *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.

¹¹⁷⁰ These are addressed in chapter 6.

¹¹⁷¹ Section 138(7) of the LRA.

¹¹⁷² *Maepe* para 8.

¹¹⁷³ *Maepe v CCMA & another* [2008] 8 BLLR 723 (LAC) para 8.

¹¹⁷⁴ *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.¹¹⁷⁵ 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*,¹¹⁷⁶ 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.’¹¹⁷⁷

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.¹¹⁷⁸ In turn, commissioners' reasons must (at a minimum) disclose the principal grounds for their awards and evince well founded reasoning processes.¹¹⁷⁹ 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.¹¹⁸⁰ The degree to which commissioners' reasoning processes may justify review where the outcome of their findings is substantively reasonable is equally unclear.¹¹⁸¹ Again, Canadian principles of review offer guidance in these respects.

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.¹¹⁸² The CCMA was designed to mitigate this.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.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,¹¹⁸⁵ a less rigorous approach to the reasonableness enquiry may apply.¹¹⁸⁶

Still, given the structure of the CCMA and the need to find a reasonable equilibrium between both parties' interests,¹¹⁸⁷ reviews must remain impartial and objective.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,¹¹⁸⁹ and where they fail to do so satisfactorily their awards may be unreasonable. Unfortunately, no tangible means of determining how this criterion

¹¹⁸² *Sidumo* para 72, citing PL Davies & M Freedland *Kahn-Freund's Labour and the Law* 3 ed (1983) at 18; Servais at 75-76 and E Barak 'The principle of good faith in labour law' in R Blanpain (ed) *Labour law, human rights and social policy* (2001) 227 at 232.

¹¹⁸³ *Sidumo* paras 72-74.

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).

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

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.

¹¹⁸⁷ *Bato Star* paras 48-50.

¹¹⁸⁸ Neither party's interests should outweigh the others.

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.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.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,¹¹⁹² and the need for large retailing employers to reduce stock losses.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.¹¹⁹⁴ As the LRA provides for compensation to be awarded up to a maximum of 12 month's remuneration,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

¹¹⁹⁰ Both unemployment and poverty in South Africa are rife; Statistics South Africa *Statistical Release P0211: Quarterly Labour Force Survey: Quarter 2 2012* (31 July 2012) at v, available at <http://www.statssa.gov.za/publications/P0211/P02112ndQuarter2012.pdf>, accessed on 22 August 2012; Consult too *Law Society of the Northern Provinces* paras 28-30.

¹¹⁹¹ On the basis of *Bato Star* at least.

¹¹⁹² Particularly where the dispute involves an allegedly unfair dismissal.

¹¹⁹³ In turn, they may dismiss employees for petty theft; consider the *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 *SALJ* 419.

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.

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 averted 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.

¹²⁰⁰ Section 1(d) of the Constitution. For the requisites of administrative justice, consult Jeffrey Jowell 'The democratic necessity of administrative justice' 2006 *Acta Juridica* 13 at 16-17; *Cape Bar Council* paras 25-30 and Cora Hoexter 'The current state of South African administrative law' in H Corder & L van der Vijver (eds) *Realising Administrative Justice* (2002) 20 at 27; note too *Strategic Liquor Services* para 17 citing *Mpahlehle* para 12 and Garbers (2008) at 86, which highlight the need for adequate reasoning in commissioners' awards.

courts, there is no reason why the CCMA as an administrative body should not be held to account on the basis of these Constitutional imperatives.¹²⁰¹

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.¹²⁰² CCMA arbitrations constitute administrative action.¹²⁰³ 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.¹²⁰⁴ The difficulty with this is that the CC has explicitly rejected PAJA's application to CCMA awards.¹²⁰⁵ In any event, the test for reasonableness delineated in *Sidumo* is no different to that stipulated in PAJA.¹²⁰⁶ The statute's provisions accordingly contribute little to the enquiry.¹²⁰⁷ To the extent to which PAJA includes grounds other than reasonableness (and grounds related thereto),¹²⁰⁸ it nonetheless affirms the enduring import of parties' rights to procedural fairness and lawfulness. In turn, the continued role of section 145 is verified.¹²⁰⁹

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.¹²¹⁰ In its most rudimentary form, the doctrine demands that reviewing courts show respect for administrative decisions.¹²¹¹ 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

¹²⁰¹ *Carephone* paras 10, 19 & 34-35; Garbers (2008) at 86.

¹²⁰² Section 33 of the Constitution.

¹²⁰³ *Sidumo* para 88.

¹²⁰⁴ Ray-Howett at 1625-1626; 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. For general administrative law principles in this regard, refer to Plasket at 363-364 and De Ville (2005) at 203-210.

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; *Kaefter 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.

¹²¹¹ Hoexter with Lyster (2002) at 69-76; Hoexter (2007) at 490 and Fergus (2010) at 1568-1573.

undermine the supervisory and guiding functions of review. Thus, where decisions are truly unreasonable¹²¹² they ought to be set aside.¹²¹³

Adding to these generic administrative law factors, are considerations specific to labour dispute resolution. Foremost of these is the right to fair labour practices¹²¹⁴ which reviewing courts are obliged to interpret harmoniously with the right to just administrative action.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.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.’¹²¹⁷

Section 138 of the LRA and the Explanatory Memorandum to the Act reveal the residual themes of informality, cost-effectiveness and accessibility.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.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.¹²²⁰

¹²¹² Or otherwise amenable to review.

¹²¹³ *Bato Star* para 48. O’Regan J’s explication of this principle in *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...’

¹²¹⁴ The right to fair labour practices; section 23 of the Constitution.

¹²¹⁵ *Sidumo* para 148; section 39(2) of the Constitution; *S v Mhlungu and others* 1995 (3) SA 867 (CC) para 108.

¹²¹⁶ For the proper approach to interpreting the LRA, see *NUMSA & others v Bader Bop (Pty) Ltd & another* [2003] 2 BLLR 103 (CC) paras 13 & 26-46 and *Aviation Union of SA & another v SA Airways (Pty) Ltd & others* [2012] 3 BLLR 211 (CC).

¹²¹⁷ Section 1(d)(iv) of the LRA. For the impact of efficiency on review, consult *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 *Herholdt* paras 52-56.

¹²¹⁸ The Explanatory Memorandum at 318; section 191 of the LRA; *Sidumo* para 85; chapter 1 of this thesis.

¹²¹⁹ *Sidumo* para 94; the Explanatory Memorandum at 317-320.

¹²²⁰ *Fidelity* para 100; *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.¹²²¹ 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.¹²²² 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.¹²²³ 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.¹²²⁴ There are several problems with doing so. First, equating these terms disregards the discrete characteristics of review under *Carephone* and *Sidumo*.¹²²⁵ While the SCA in *Edcon* held that their differences were semantic, earlier in *Rustenburg Platinum Mines*,¹²²⁶ the same Court had limited the enquiry

¹²²¹ *Bato Star* paras 41 & 54; De Ville (2005) at 212; Hoexter (2007) at 315; Plasket at 339 onwards. Note, however, 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.

¹²²² *Southern Sun Hotel Interests* para 13. In the context of section 145 proceedings specifically, compare Garbers (2008) at 85-88; Myburgh (2009) at 16-17; *Tao Ying* para 150 and Le Roux & Young at 30. See also *Shoprite Checkers (Pty) Ltd v Ramdaw NO & others* [2001] 9 BLLR 1011 (LAC).

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 criticised¹²³² 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

¹²²⁷ *Rustenburg Platinum Mines* (SCA) para 26.

¹²²⁸ See also Mureinik (1994) at 40 fnnt 34. There, 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.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.¹²³⁵ If rationality and justifiability are equally comparable, the scope for distinguishing between rationality and reasonableness disappears. In turn, the differences between the *Sidumo* and *Carephone*¹²³⁶ standards are ignored.¹²³⁷

Notwithstanding these problems, courts continue to conflate the terms. In *Shoprite Checkers I*, for example, Zondo JP held the Commissioner's decision to be neither 'justifiable, rational [n]or reasonable'.¹²³⁸ As recorded above, the SCA in *Edcon* depicted reasonableness as conceptually no different to rational justifiability under *Carephone*.¹²³⁹ Later, in *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.¹²⁴⁰ When read with the Judge's decision as a whole, it might be inferred that rationality is indistinguishable from reasonableness.¹²⁴¹ Yet, in light of *Bato Star*¹²⁴² and the judgments canvassed below, the inference would be misguided.¹²⁴³

¹²³⁴ Ibid para 25; see also R McLachlan 'Lack of justifiability or rationality as a ground for review of private arbitration awards' (2002) 5 *De Rebus* 49.

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; *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 *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; *Bel Porto School Governing Body and Others v Premier of the Province, Western Cape and Another* 2002 (3) SA 265 (CC) at 427; *Bestel* para 18 and *Kievits Kroon Country Estate v MMoleli & others* (LAC) unreported case no JA78/10 of 24 July 2012 para 20.

¹²³⁶ *Rustenburg Platinum Mines* (SCA) para 26; *Sidumo* paras 105-110; *Carephone* para 37.

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.

¹²³⁸ *Shoprite Checkers I* paras 23 & 26; for a comparable approach, see *Shoprite Checkers* (2001) (LAC).

¹²³⁹ *Edcon* para 16; Pillay would likely disagree; Pillay at 429.

¹²⁴⁰ *Tao Ying* para 150.

¹²⁴¹ Ibid paras 108-153.

¹²⁴² In which O'Regan wrote the majority judgment. Note that beyond the courtroom, O'Regan J has argued that rationality (as defined in *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.

¹²⁴³ Consider, for example, the CC's description of rationality (as it applies to executive conduct) in *Pharmaceutical Manufacturers*; the Court held:

By comparison, in *Bestel v Astral Operations Ltd and Others*,¹²⁴⁴ the LAC emphasised that the crucial enquiry on review was whether awards were justified,¹²⁴⁵ suggesting a return to the *Carephone* position.¹²⁴⁶ This did not permit reviewing courts to replace commissioners' findings with those of their own preference.¹²⁴⁷ In Davis JA's view, decisions were merely required to be rationally connected to the evidence presented.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,¹²⁴⁹ the Court's endorsement of *Carephone* in *Bestel* is instructive.

In *Value Logistics Ltd v Basson & Others*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.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.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

'It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement...'; *Pharmaceutical Manufacturers* para 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.

¹²⁴⁴ *Bestel v Astral Operations Ltd & others* [2011] 2 BLLR 129 (LAC).

¹²⁴⁵ Note too *Kievits Kroon* (2012) (LAC) para 20.

¹²⁴⁶ *Bestel* para 18.

¹²⁴⁷ *Ibid.*

¹²⁴⁸ *Ibid* paras 16-17.

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).

¹²⁵⁰ *Value Logistics Ltd v Basson & Others* (2011) 32 ILJ 2552 (LC).

¹²⁵¹ *Ibid* para 40.

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 rationality¹²⁵⁷ 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

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 (Pty) Ltd v Deputy Director-General, Department of Environmental Affairs & Tourism: Branch Marine & Coastal Management & others* 2006 (2) SA 191 (SCA).

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).

¹²⁶⁰ Hoexter (2007) at 307; note also Hoexter (2012) at 340.

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.¹²⁶² Her argument proceeds along the following lines: All executive action is amenable to review on the basis of irrationality.¹²⁶³ 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.¹²⁶⁴ 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.¹²⁶⁵ 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.¹²⁶⁶ Proportionality makes up the other.¹²⁶⁷ 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.’¹²⁶⁸

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.¹²⁶⁹ How this declared change in the law impacts on section 145 proceedings requires explanation. Fortunately, Canadian law assists with unravelling the issue.¹²⁷⁰

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.

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.

¹²⁷⁵ *Bato Star* para 45. See too Hoexter (2007) at 315; De Ville (2005) at 212-214; Plasket at 339-363 and *Ellerine Holdings* at 13.

Two supplementary hurdles concerning the proposed elements of reasonableness¹²⁷⁶ 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.¹²⁷⁷ 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.¹²⁷⁸

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.¹²⁷⁹ Rigidity and formalism in defining its boundaries should thus be avoided.¹²⁸⁰ Given the variability of reasonableness, its components need to be pliable. Neither rationality¹²⁸¹ 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.¹²⁸² 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.'¹²⁸³

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 *Kievits 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.

¹²⁷⁹ *Bato Star* paras 41, 44 & 45; Hoexter (2007) at 502; Cora Hoexter 'The principle of legality in South African administrative law' (2004) 4 *Macquarie Law Journal* 165 at 166-169 & 177; O'Regan (2004) at 432-436.

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)¹²⁸⁴ 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.¹²⁸⁵ In light of the courts' inconsistent attitudes to reasonableness, however, lending some structure to the standard remains necessary.¹²⁸⁶

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.¹²⁸⁷

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,¹²⁸⁸ 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...’¹²⁸⁹

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.

¹²⁹¹ Garbers (2008) at 85; *Southern Sun Hotel Interests* para 13; Hoexter (2007) at 311.

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.

¹²⁹⁴ Ibid paras 13-15; Myburgh (2009).

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;¹²⁹⁶ 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.¹²⁹⁷ 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.¹²⁹⁸ 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.¹²⁹⁹

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 145.¹³⁰⁰ As the Court's delineation of reasonableness focused on commissioners' factual findings, its emphasis on the evidence presented is unsurprising.¹³⁰¹ From it, it may be inferred that discrete forms of

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.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.

4. CONCLUSION

Notwithstanding the Court's attempts in *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 145.¹³⁰³ 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.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.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 *Bato Star* as pertinent to defining reasonableness.¹³⁰⁶ Together, these contextual factors set the backdrop for review at a theoretical level. However, obliging reviewing courts to assess all 6 of the *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.

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 *Bato Star* paras 41 & 54.

¹³⁰³ *Sidumo* paras 106-107; *Carephone* para 25.

¹³⁰⁴ As was the case under *Carephone*; *Rustenburg Platinum Mines* (SCA) para 26. *Fidelity* para 102; *Edcon* para 16. For the principle that reasonableness does not equate to correctness, see *Bestel* paras 16-17, citing Schwartz at 133; *Carephone* paras 32-37; *Ellerine Holdings* at 10-11; *Khanyile* (2009)(LAC) para 34 and *Woolworths*.

¹³⁰⁵ *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.

¹³⁰⁶ *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.¹³⁰⁷ Proportionality, according to Hoexter and Pillay at least,¹³⁰⁸ comprises the second. While helpful to a degree,¹³⁰⁹ problems with this description appear. For one, the contextual dependency of reasonableness dictates that rigid delineations of the standard be avoided.¹³¹⁰ On the contrary, reasonableness must be capable of assuming discrete forms in discrete circumstances.¹³¹¹ 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,¹³¹² 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.¹³¹³ 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,¹³¹⁴ *Carephone* must still apply in part. The precise degree to which it does so¹³¹⁵ nonetheless awaits definition. Thirdly, the sensibility and practicality of construing reasonableness as comprising both procedural and substantive aspects is doubtful.¹³¹⁶ While the need for adequate reasons might

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*.

¹³⁰⁸ Hoexter (2007) at 224-292 & 301-321; Pillay at 439.

¹³⁰⁹ Particularly in understanding the relationship between *Carephone* and *Sidumo*.

¹³¹⁰ Hoexter (2007) at 502; Hoexter 2006 *Acta Juridica* at 303-304 & 318-319; De Ville (2004) at 579-580.

¹³¹¹ *Ibid.*

¹³¹² 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).

¹³¹³ For further discussion of the controversy, see chapter 3 and the cases considered therein, including *Kievits Kroon Country Estate (Pty) Ltd v CCMA & others* [2010] JOL 26444 (LC); *Edcon* and *Maepa*. Consult also Du Toit (2010).

¹³¹⁴ And proportionality the other; Hoexter (2007) at 301-321 & 224-292; Pillay at 439.

¹³¹⁵ Particularly in light of the uncomfortable relationship between procedural reasonableness and the entitlement of reviewing courts to entertain alternative reasons for commissioners' awards.

¹³¹⁶ 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.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,¹³¹⁸ but it may simultaneously explain the circumstances in which reasonableness may be resolutely applied.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.

13; *Pam Golding* para 5; *Southern Sun Hotel Interests* para 17; *New Clicks* para 511; *Afrox Healthcare* para 21; *Value Logistics* para 46.

¹³¹⁷ *Fidelity* para 102.

¹³¹⁸ And arguably between excesses of power and unreasonableness.

¹³¹⁹ For examples of cases in which reasonableness was applied in a resolute 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.¹³²⁰ However, given the dangers of indiscriminate legal comparisons,¹³²¹ guidance should not be sought from Canadian law before the country's comparative compatibility has been confirmed. Thus, whether Canada's legal system¹³²² 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.¹³²³ 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')¹³²⁴ currently has a dual system of dealing with employment disputes. Unfair dismissals may first be referred to the Advisory, Conciliation and Arbitration Service ('ACAS')¹³²⁵ for conciliation.¹³²⁶ Should conciliation fail, parties have an election to refer these matters to adjudication by the Employment Tribunal ('ET')¹³²⁷ or to arbitration by an arbitrator appointed by ACAS.¹³²⁸ Where the latter route is adopted, the process follows a

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.

¹³²¹ Otto Kahn-Freund 'On uses and misuses of comparative law' (1974) 37 *Mod L Rev* 1; M Reimann & R Zimmerman (eds) *The Oxford Handbook of Comparative Law* (2006); K Zweigert & H Kotz *An Introduction to Comparative Law* 3 ed (1998); HW Arthurs 'Compared to what? The UCLA comparative labor law project and the future of comparative labor law' (2007) 28 *Comparative Labor Law & Policy Journal* 591; Cheryl Saunders 'Apples, oranges and comparative administrative law' 2006 *Acta Juridica* 423 at 423-426.

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 CCMA¹³²⁹ proceedings.¹³³⁰ Appeals from ACAS arbitrations are not allowed and the scope of judicial review of ACAS determinations is narrow.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.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.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.¹³³⁴ Both the ET and the CCMA have jurisdiction to hear unfair dismissal disputes and these disputes form the majority of their workloads.¹³³⁵ In addition, these bodies were equally designed to provide accessible, inexpensive, efficient and relatively informal dispute resolution services.¹³³⁶ Yet, the ET is

¹³²⁹ Commission for Conciliation, Mediation and Arbitration ('the CCMA').

¹³³⁰ Deakin & Morris at 76-83.

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.

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.

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; The Ministry of Justice *Employment Tribunals and EAT Statistics 2010-11* (1 April 2010-31 March 2011) 1 September 2011 at 9 Table 3, available at <http://www.justice.gov.uk/downloads/statistics/mojstats/employment-trib-stats-april-march-2010-11.pdf>, accessed on 13 December 2012.

¹³³⁴ The term 'review' is used here in its general sense, as covering both appeal and review.

¹³³⁵ See the *ETs & EATs Statistics*; the *CCMA Annual Report 2009-2010* Department of Labour RP: 84/2010, available at www.ccma.org.za, accessed on 12 October 2012 and the *CCMA Annual Report 2010-2011* Department of Labour RP: 58/2011, available at www.ccma.org.za, accessed on 12 October 2012; Deakin & Morris at 67; Paul Benjamin 'Assessing South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA)' Publication pending (2013) at 1.

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.¹³³⁷ While the processes it follows remain less formal than those of the courts, it is not as flexible as its South African counterpart.¹³³⁸ Moreover, in all matters before the ET, two lay persons and one legal chairman preside.¹³³⁹ The chairman is required to have been qualified and practising as a barrister or solicitor for at least 7 years.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.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.¹³⁴² Coupled with the publicity of ET adjudications¹³⁴³ 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.¹³⁴⁴ The division between inferior courts and administrative bodies in the UK is often recognised as superficial¹³⁴⁵ but the courts have stated that the test for review of courts' decisions is less rigorous than that applicable to administrative institutions.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

¹³³⁷ Deakin & Morris at 73.

¹³³⁸ Honeyball & Bowers at 11-12 & 17; Deakin & Morris at 513.

¹³³⁹ Each with an equal vote; Deakin & Morris at 68; Selwyn at 9.

¹³⁴⁰ Deakin & Morris at 68.

¹³⁴¹ 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.

¹³⁴² Given the presence of two lay persons on the tribunal's panel as well as an experienced lawyer.

¹³⁴³ In the absence of exceptional circumstances warranting confidentiality, ET hearings are generally open to the public; Deakin & Morris at 72; Honeyball & Bowers at 17.

¹³⁴⁴ 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.

¹³⁴⁵ Wade & Forsyth at 909-910.

¹³⁴⁶ *Ibid*; *Re Racal Communications Ltd* [1981] AC 374 at 382-383; Paul Craig *Administrative Law* 6 ed (2008) at 458 & 467, 14-040; According to Craig, this approach was followed in *R v Hull University Visitor Ex p Page* [1993] AC 682; Craig (2008) at 459-460, 14-033.

(‘EAT’).¹³⁴⁷ While limiting appeals to ‘questions of law’ curbs this right, the meaning of the phrase remains broad.¹³⁴⁸ 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,¹³⁴⁹ or made a perverse decision.¹³⁵⁰ 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’.¹³⁵¹

Whereas the last of these errors is semantically identical to the South African notion of reasonableness,¹³⁵² unreasonableness in the UK is a more stringent standard, requiring perversity, absurdity, gross unreasonableness or outrageousness.¹³⁵³ *Piggot Bros & Co Ltd v Jackson*¹³⁵⁴ 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.¹³⁵⁵ When engaged in unreasonableness review, the weight attributable to evidentiary considerations is accordingly not a matter for judicial scrutiny or interference.¹³⁵⁶ 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 Powe 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.

¹³⁵⁴ *Piggot Bros & Co Ltd v Jackson* [1991] IRLR 309.

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,¹³⁵⁷ where the Labour Courts frequently do not refrain from assessing the weight allocated by commissioners to relevant evidentiary factors.¹³⁵⁸

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.¹³⁵⁹ 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.¹³⁶⁰ In addition, procedural irregularities do not fall within the ambit of appeals to the EAT.¹³⁶¹ They may instead either be challenged on review in the ET itself (should they fall within the ET’s designated powers of review)¹³⁶² or referred to the High Court for ordinary judicial review.¹³⁶³ Aggrieved parties consequently have various avenues of relief available to them, in contrast to their South African contemporaries.¹³⁶⁴

Clearly then, allegations of unreasonableness may arise in review proceedings in British High Courts too.¹³⁶⁵ Yet, the absence of a Constitutional basis for review in the UK denotes that

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.

Clause 34(3) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 SI 2004/1861 as amended.

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.¹³⁶⁶ In other words, a less intensive measure of scrutiny may be applied by British courts than that prescribed by section 33 of the Constitution.¹³⁶⁷

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.¹³⁶⁸ They further focus on reasonableness as distinct from correctness, emphasizing that simple differences of opinion between administrators and reviewing courts do not justify review.¹³⁶⁹ However, unreasonableness in British administrative law is a stricter standard, often compared to gross unreasonableness, perversity or irrationality.¹³⁷⁰ In fact, *Wednesbury*¹³⁷¹ unreasonableness remains the standard officially preferred by the courts when assessing discretionary determinations.¹³⁷² 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 overwhelming...'; *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 418 at 452, *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 Internees: 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.¹³⁷³ There is thus little in the way of a middle ground in the UK, again distinguishing it from South Africa.¹³⁷⁴

In summary,¹³⁷⁵ findings of unreasonableness in both the administrative and appellate¹³⁷⁶ contexts in Britain are rare.¹³⁷⁷ While certain South African Labour Courts adopt an analogously reverent attitude to review, unreasonableness is by no means an uncommon conclusion.¹³⁷⁸ Moreover, conceptualising the standard as requiring gross unreasonableness (in the *Wednesbury* sense) has been rejected by both South Africa's Constitutional and Labour Appeal Courts;¹³⁷⁹ 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.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

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; *R (Prolife Alliance) v British Broadcasting Corp* [2003] 2 WLR 1403 at 75-76.

¹³⁷⁴ For arguments in favour and against a third standard of review, refer to Craig (2008) at 471-472, 14-043.

¹³⁷⁵ And as unreasonableness in EAT proceedings is limited to perversity; Deakin & Morris at 75; *Yeboah; Noorani*; Selwyn at 12; *British Telecommunications* at 30; *Melon* at 479; *Piggot Bros* at 312; *Watling* at 71; Selwyn at 584-585.

¹³⁷⁶ In the context of appeals against ET determinations.

¹³⁷⁷ *Yeboah* para 95; *Derbyshire and others v St Helens Metropolitan Borough Council* [2006] ICR 90 para 19.

¹³⁷⁸ For examples, 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) *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 *Fidelity* para 100.

¹³⁷⁹ As non-compliant with section 33 of the Constitution; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) paras 42-45; *Sidumo* para 107, citing *Bato Star*; *Roman v Williams NO* 1998 (1) SA 270 (C) at 284-285; *Fidelity* para 99.

¹³⁸⁰ 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 *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.¹³⁸¹ Specialist ‘Fair Work Divisions’ of the Federal Courts have also been established to hear matters arising from the Fair Work Act 2009 (‘FW Act’).¹³⁸² 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.¹³⁸³ First, appeals from decisions of the FWA against unfair dismissal determinations may be instituted to a full bench of the FWA itself.¹³⁸⁴ Appeals constitute hearings de novo and the full bench may therefore admit additional evidence in specified circumstances.¹³⁸⁵ While appeals against unfair dismissal decisions are available in a confined set of circumstances,¹³⁸⁶ 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 referred¹³⁸⁷ to the Federal Courts for final determination,¹³⁸⁸ either during or after the FWA’s decision on the same matter.¹³⁸⁹ The FWA is then bound to vary its findings in accordance with the Federal Court’s judgment.¹³⁹⁰ This enables judicial intervention with the FWA’s functions at a more intrusive level than that appropriate to reviews of CCMA awards.

¹³⁸¹ *Australia’s Fair Work System*; The Parliament of the Commonwealth of Australia: House of Representatives *Fair Work Bill 2008 Explanatory Memorandum* (2008); consider clauses 589, 593 & 595 of the FW Act in particular.

¹³⁸² *Australia’s Fair Work System*; clauses 560, 562-563 & 566-567 of the FW Act.

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.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.¹³⁹²

Grounds overlapping with unreasonableness – including irrationality or illogicality in the reasoning process and allegations that the decision was based on 'literally no evidence'¹³⁹³ – do exist in Australia. Still, courts interfere on these grounds in exceptional circumstances only.¹³⁹⁴ Thus, the Australian standard may be likened to *Wednesbury* or gross unreasonableness at best.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.¹³⁹⁶

Moreover, given the restricted scope of review comparative to appeal, judicial review of FWA decisions is likely to be uncommon.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.¹³⁹⁸

Finally, the relative youth of the legislation governing FWA renders the Australian system somewhat unhelpful as a comparator.¹³⁹⁹ The jurisprudence applicable to the FW Act has had

¹³⁹¹ Mark Aronson, Bruce Dyer & Matthew Groves *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.

¹³⁹² 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.

¹³⁹³ Aronson, Dyer & Groves at 179.

¹³⁹⁴ *Ibid.*

¹³⁹⁵ See the discussion on the *Wednesbury* standard above.

¹³⁹⁶ *Roman* at 284-285; *Bato Star* paras 44-45; *Fidelity* para 99.

¹³⁹⁷ 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.

¹³⁹⁸ 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.

¹³⁹⁹ It was passed in 2009 and came into effect on 1 January 2010.

little time to develop when compared to other commonwealth jurisdictions.¹⁴⁰⁰ 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.¹⁴⁰¹ Whether New Zealand does is addressed below.

4. NEW ZEALAND

The Employment Relations Authority ('ERA') (established in terms of the Employment Relations Act 2000)¹⁴⁰² ('the ER Act') is the dispute resolution service entrusted with resolving dismissal disputes¹⁴⁰³ 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.¹⁴⁰⁴ Mediation is further favoured over other forms of dispute resolution in the ER Act.¹⁴⁰⁵ Where a hearing is convened by the ERA, disputes are to be decided on the merits, and without regard to trivial technicalities.¹⁴⁰⁶ In this way the characteristics of the ERA resemble those of the CCMA.¹⁴⁰⁷ In addition, New Zealand law obliges employers to ensure that dismissals are both substantively and procedurally justifiable, similarly to the South African position.¹⁴⁰⁸

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

¹⁴⁰⁰ 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; *Fair Work Bill 2008 Explanatory Memorandum* at 353-354. Note that the principles enunciated in *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194, in particular, still constitute binding precedent.

¹⁴⁰¹ Section 33 of the Constitution.

¹⁴⁰² Section 156 of the ER Act.

¹⁴⁰³ 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 *Personal Grievance Determinations in the Employment Relations Authority 17 July – 18 August 2006* (2007) as cited in Paul Roth 'Employment law' 2008 *NZL Rev* 159 at 160; see also Gordon Anderson *Reconstructing New Zealand's labour law: Consensus or divergence?* (2011) at 206.

¹⁴⁰⁴ Section 101, read with section 143 of the ER Act; Anderson at 145-146.

¹⁴⁰⁵ *Ibid.*

¹⁴⁰⁶ 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.

¹⁴⁰⁷ 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 *Auckland UL Rev* 300 at 300-301.

¹⁴⁰⁸ Section 103, read with section 103A of the ER Act; see also Roth at 164-170 and the cases cited therein.

Courts ('EC')¹⁴⁰⁹ for determination during the course of dispute resolution proceedings.¹⁴¹⁰ Following receipt of an ERA decision, parties aggrieved by it may challenge the finding by way of an appeal to the EC.¹⁴¹¹ The EC is a specialist court tasked with hearing only labour matters and with exclusive jurisdiction over appeals and reviews of ERA determinations.¹⁴¹² 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,¹⁴¹³ they may request full hearings de novo on the facts. Alternatively, parties may choose to limit their appeals to particular questions or legal issues.¹⁴¹⁴ Where procedural challenges are raised to ERA decisions, review proceedings may be instituted in the EC.¹⁴¹⁵

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.¹⁴¹⁶ Generally speaking, where a hearing de novo is requested, the EC will proceed on that basis.¹⁴¹⁷ The court's findings will then replace those of the ERA.¹⁴¹⁸ 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.

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,¹⁴¹⁹ appeals are the primary mechanism conceived of by the ER Act to challenge ERA determinations.¹⁴²⁰ 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.¹⁴²¹ The presence of the right of appeal will further have a confining influence on the permissible ambit of review.¹⁴²² 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').¹⁴²³ Section 7 of the Charter grants the courts the inherent power to review procedural irregularities;¹⁴²⁴ 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,¹⁴²⁵ 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.¹⁴²⁶ In other words, to the extent to which administrators exceed their statutory grants of authority, they contravene legislative intent,

¹⁴¹⁹ And which has not been exercised.

¹⁴²⁰ Section 194 of the ER Act.

¹⁴²¹ For an informative discussion of deference in New Zealand generally, consult Michael Taggart 'Proportionality, Deference, *Wednesbury*' 2008 *NZ L Rev* 423.

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.¹⁴²⁷ As the South African judiciary equally derives its powers of review from the Constitution,¹⁴²⁸ 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.¹⁴²⁹ The appropriateness of importing Canadian principles into the South African context might thus be questioned. Fortunately,¹⁴³⁰ 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.¹⁴³¹ In addition, the Canadian conception of reasonableness¹⁴³² is significantly similar to the meaning attributed thereto by the South African courts.¹⁴³³ 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 Canada¹⁴³⁴ include procedural impropriety, illegality,¹⁴³⁵ unreasonableness and unconstitutionality.¹⁴³⁶ 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

¹⁴²⁷ *Dunsmuir v New Brunswick* [2008] 1 SCR 190 para 131; *Crevier v Attorney General of Quebec* [1981] 2 SCR 220 paras 237-238. In the absence of justification, there would be no available remedy for administrative excesses of jurisdiction.

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.¹⁴³⁷ Administrative 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.¹⁴³⁸ For reasons apparent from preceding chapters,¹⁴³⁹ 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 challenges¹⁴⁴⁰ and allegations of substance.¹⁴⁴¹ The principles applicable to substantive determinations¹⁴⁴² are again of greater import to this thesis than those associated with procedural defects; as such, they form the focus of the ensuing discussion.¹⁴⁴³ 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.’¹⁴⁴⁴ 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.¹⁴⁴⁵

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).

¹⁴⁴⁰ Procedural fairness incorporates the principles of natural justice, *audi alteram partem* and the rule against bias; Jones & de Villars at 8. See, however, DM Mullan ‘Establishing the standard of review: The struggle for complexity?’ (2004) 17 *Can J Admin L & Prac* 59 at 86.

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 c 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.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.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.¹⁴⁴⁸ These assessments are conducted with reference to the context in which the decision was taken and the decision-maker operates.¹⁴⁴⁹ To this extent, the Canadian standard of reasonableness appears compatible with that applicable in section 145 proceedings.¹⁴⁵⁰ Adding to this, Canada's understanding of the distinction between appeals and reviews reflects that of the South African Labour Courts'.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.¹⁴⁵² There too, certain connections are evident.

¹⁴⁴⁶ Van Harten, Heckman & Mullan at 680.

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.

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'.

¹⁴⁴⁹ *Canada (Minister of Citizenship and Immigration) v Khosa* 2009 SCC 12 paras 28 & 59.

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.

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.

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

¹⁴⁵³ For labour law and labour arbitration in Canada generally, consult HW Arthurs, RM Brown & B Langille (eds) *Labour Law: Cases, Materials and Commentary* 6 ed (1998) The Labour Law Casebook Group *Labour and Employment Law: Cases, Materials and Commentary* 8 ed (2011); Mort Mitchnick & Brian Etherington *Labour Arbitration in Canada* (2006); Mort Mitchnick & Brian Etherington *Leading Cases on Labour Arbitration* (2005; updated loose-leaf); Donald JM Brown & David M Beatty *Canadian Labour Arbitration* 4 ed vol 1 (2009; updated loose-leaf).

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.

¹⁴⁵⁵ Donald D Carter et al *Labour Law in Canada* 5 ed (2002) at 361 para 779.

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.¹⁴⁶⁰

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.¹⁴⁶¹ Boards and arbitrators together perform equivalent functions to those of the CCMA and its commissioners.¹⁴⁶² 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.¹⁴⁶³ 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,¹⁴⁶⁴ while disputes concerning organisational rights proceed to the relevant board.¹⁴⁶⁵ As collective agreements invariably prohibit dismissals 'without just cause',¹⁴⁶⁶ 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

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 Carter et al at 44 para 61. Union certification powers and the power to grant relief in case of unfair labour practices are conferred on all labour relations boards. Broader powers are afforded to labour boards in certain jurisdictions too.

¹⁴⁶⁶ 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.¹⁴⁶⁷ Other than between the parties themselves, these decisions further do not constitute binding precedent.¹⁴⁶⁸ In these respects, Canadian arbitration proceedings and awards are analogous in both status and form to those of the CCMA.¹⁴⁶⁹

Whereas labour boards are provincial governmental entities, labour arbitrators¹⁴⁷⁰ are private individuals offering arbitral services for a fee.¹⁴⁷¹ As such, they operate independently of government. Due to their statutorily conferred authorities,¹⁴⁷² 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.¹⁴⁷³ While in contrast to South Africa, Canadian arbitrators are appointed by agreement between the parties,¹⁴⁷⁴ parties remain compelled to resolve their disputes by arbitration.¹⁴⁷⁵ Arguably therefore, this distinction does not pose a substantial barrier to employing Canadian law as a comparative tool.

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

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*.

¹⁴⁶⁸ Keyes at 139; as Keyes records with reference to *Lethbridge College v Lethbridge College Faculty Association* 2008 CarswellAlta 911 (Alta QB), they nonetheless remain influential in both judicial and arbitral proceedings.

¹⁴⁶⁹ CCMA awards are final and binding and no right to appeal lies against them; sections 143 & 145 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) at 275.

¹⁴⁷⁰ With the exception of those appointed by the Minister in terms of certain statutes; consider, for one, *CUPE* (2003).

¹⁴⁷¹ For a practical illustration of arbitrators' operations, visit the website of the Ontario Labour Management Arbitrators Association, available at <http://www.labourarbitrators.org/>, accessed on 28 January 2013.

¹⁴⁷² Consult the various provincial Labour Codes for their statutory authority; section 48 of the *OLRA* is one example.

¹⁴⁷³ Section 145 of the LRA, read with section 33 of the Constitution.

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. 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 *OLRA*; for deviations from the general principle, consider New Brunswick's *Industrial Relations Act* RSNB 1973 c1-4 as amended and Nova Scotia's *Trade Union Act* RNS 1989 c475 as amended.

¹⁴⁷⁵ By applicable provincial and territorial legislation.

arbitrators' decisions may institute review proceedings,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.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.¹⁴⁷⁸ The Canadian judiciary's attitude consequently mimics that of the Labour Courts during section 145 proceedings.¹⁴⁷⁹ In *Toronto (City) v CUPE, Local 79*,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 *Toronto (City) Board of Education v OSSTF 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.'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

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*.

¹⁴⁷⁷ Gall at 565; *Toronto (City); CUPE* (2003); *Dunsmuir*; Piper Henderson 'Supreme Court of Canada's new 'reasonableness' standard of review applied in recent education cases' (2008) 18 *Educ & L J* 179 at 180. See also David E Gruber 'Judicial review advocacy in the post-Dunsmuir era' (2009) 22 *Can J Admin L & Prac* 303 at 306-307; G Huscroft 'Judicial review from *CUPE* to *CUPE*: Less is not always more' in G Huscroft & M Taggart M (eds) *Inside and Outside Administrative Law: Essays in Honour of Mullan* (2006) 297 at 296 and Willis & Winkler (2010) at 105.

¹⁴⁷⁸ *Dunsmuir* para 69; Henderson at 180; *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.

¹⁴⁷⁹ *Sidumo* paras 105-110; *Palaborwa Mining Co Ltd v Cheetham & Others* (2008) 29 *ILJ* 306 (LAC) paras 4-7 & 12-13 and *Fidelity* paras 96-103; consider too chapters 3 and 4.

¹⁴⁸⁰ *Toronto (City) v CUPE Local 79* [2003] 3 SCR 77 para 68 ('*Toronto (City)*').

¹⁴⁸¹ *Ibid* para 68; *Art Hauser* para 23; *Dunsmuir* paras 68-69; for a more extreme view, see Harry Arthurs 'The Constitutionalisation of labour rights' *Institute for Development and Labour Law Occasional Paper 1/2004* (reprinted March 2005) at 8-11. Compare these sentiments to Huscroft at 311-312 and David Mullan (ed) *Administrative Law: Cases, Texts and Materials* 5 ed (2003) at 698. A similar downhill trend in the quality of CCMA awards was alluded to in *Sasol Mining (Pty) Ltd v Commissioner Ngqeleni & others* [2011] 4 *BLLR* 404 (LC) para 7.

governs reviews of CCMA awards exclusively,¹⁴⁸² Canada's generic application of the common law to all administrative decisions¹⁴⁸³ 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.¹⁴⁸⁴ 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'.¹⁴⁸⁵ 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.¹⁴⁸⁶ Furthermore, while Canadian courts have refrained from importing an implied duty of fairness into employment contracts,¹⁴⁸⁷ 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:

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.*

¹⁴⁸⁷ Carter et al at 155-156 para 302A; *Wallace v United Grain Growers Ltd* [1998] 3 SCR 701. Consult further G England, R Wood & I Christie *Employment Law in Canada* 4 ed (2005) at chapter 14. Canadian courts' reluctance to acknowledge an implied term of fairness in employment contracts again resembles South African law; *SA Maritime Safety Authority v McKenzie* (2010) 31 ILJ 529 (SCA).

‘(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....’¹⁴⁸⁸

...(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.’¹⁴⁸⁹

Clearly, just as South African employers may dismiss employees for fair reasons alone,¹⁴⁹⁰ Canadian employers are prohibited from dismissing employees irrationally, on discriminatory grounds or in bad faith.¹⁴⁹¹ The proportionality component of ‘just cause’ further obliges Canadian employers to take mitigating circumstances into account before terminating employment contracts.¹⁴⁹² 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.¹⁴⁹³ In light of items 4, 8 and 9 of the Code of Good Practice: Dismissals¹⁴⁹⁴ 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.¹⁴⁹⁵

¹⁴⁸⁸ Incompetence, insubordination and serious misconduct may seemingly therefore all constitute ‘just cause’; *Colliar 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.

¹⁴⁸⁹ Carter et al at 189 para 350; England, Wood & Christie at chapter 14.

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.

¹⁴⁹⁵ *Ibid*. For general principles of unfair dismissal law in South Africa, refer to Darcy Du Toit et al *Labour Relations Law: A comprehensive guide* 5 ed (2006); John Grogan *Workplace Law* 10 ed (2009) and Andre Van Niekerk et al *Law@Work* (2008). For the impact of just cause on employees’ rights to notice of termination, consult Carter et al at 189 para 350; England, Wood & Christie at chapter 14. Compare this to the South African position; section 37 of the Basic Conditions of Employment Act 75 of 1997 (‘the BCEA’).

Supporting these parallels are certain Canadian statutes, which expressly oblige arbitrators to take account of the *Human Rights Code*¹⁴⁹⁶ when interpreting collective agreements.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.¹⁴⁹⁸ Once more, this reflects the position in South African law.¹⁴⁹⁹ Given the *Human Rights Code's*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.¹⁵⁰¹ Endorsing this argument is the administrative principle of fairness, which infuses and informs Canadian judicial review generally.¹⁵⁰² In this way, fairness is granted a measure of Constitutional recognition in Canada too.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.¹⁵⁰⁴ Consequently, Canadian principles may legitimately be used as a basis from which to revise the South African test for review.¹⁵⁰⁵ In order to do so, a

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.

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.

¹⁴⁹⁸ *Parry Sound; Alberta (Solicitor General) and AUPE (Jungwirth)* [2010] AGAA No 5 (QL) (Ponak).

¹⁴⁹⁹ Section 189 of the LRA declares dismissal for discriminatory reasons automatically unfair; consider too the EEA which specifically prohibits discrimination in the workplace.

¹⁵⁰⁰ The *Human Rights Code*. Every Canadian province and territory has now introduced human rights legislation; Carter et al at 102-103 para 198.

¹⁵⁰¹ The dangers of inappropriate comparative analyses are canvassed by both Kahn-Freund and Arthurs (2007).

¹⁵⁰² Adding a further Constitutional element to labour dispute resolution in Canada is the authority of labour arbitrators to award Charter remedies; *Weber v Ontario Hydro* [1995] 2 SCR 929; David Mullan 'Recent developments in administrative law – The apparent triumph of deference!' (1998-1999) 12 *Can J Admin L & Prac* 191 at 203-204; for critique of *Weber*, consult Ray Brown & Brian Etherington 'Weber v Ontario Hydro: A denial of access to justice for the organized employee?' (1996) 4 *Canadian Labour & Employment Law Journal* 183.

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.

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.

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.¹⁵⁰⁶ 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*¹⁵⁰⁷ may be resolved. Specifically, the boundaries between the section 145 grounds of review and reasonableness,¹⁵⁰⁸ and reasonableness and rational justifiability,¹⁵⁰⁹ 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*,¹⁵¹⁰ 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.¹⁵¹¹ 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

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.

¹⁵¹¹ For difficulties with comparative analysis generally, see Otto Kahn-Freund 'On uses and misuses of comparative law' (1974) 37 *Mod L Rev* 1; M Reimann & R Zimmerman (eds) *The Oxford Handbook of Comparative Law* (2006); K Zweigert & H Kotz *An Introduction to comparative law* 3 ed (1998) and HW Arthurs 'Compared to what? The UCLA comparative labor law project and the future of comparative labor law' (2007) 28 *Comparative Labor Law & Policy Journal* 591.

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 inconsistency¹⁵¹³ surrounding reviews of CCMA¹⁵¹⁴ 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

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,¹⁵²³ correctness allowed for consideration afresh, with reasonableness *simpliciter* falling somewhere in between.¹⁵²⁴ Generally speaking, when determining the appropriate standard¹⁵²⁵ courts engaged in a ‘pragmatic and functional analysis’.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;¹⁵²⁷
- b) The nature of the question facing review;
- c) The decision-maker’s expertise;¹⁵²⁸ and
- d) The purpose of the governing legislation and the framework in which it operated.¹⁵²⁹

¹⁵²² For examples of these standards, see *Southam; Baker and Pushpanathan v Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982. For the distinctions between the standards, consult *Ryan v Law Society (New Brunswick)* [2003] 1 SCR 247 para 50.

¹⁵²³ *Dr Q v College of Physicians and Surgeons of British Columbia* [2003] 1 SCR 226 para 35.

¹⁵²⁴ *Dunsmuir* para 34. According to the Court in *Southam*, while patent unreasonableness would be obvious and apparent on the face of the decision, unreasonableness *simpliciter* would only be detectable following a more searching examination. Similarly, in *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.’; *Ryan* paras 52-53.

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 *Baker* effect: A new interface between the Canadian Charter of Rights and Freedoms and administrative law – The case of discretion’ in David Dyzenhaus (ed) *The Unity of Public Law* (1999) 61 at 64; Grant Huscroft ‘Judicial review from *CUPE* to *CUPE*: Less is not always more’ in G Huscroft & M Taggart M (eds) *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) *Man LJ* 14.

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 *UTLJ* 581; P Bryden ‘Understanding the standard of review in administrative law’ (2005) 54 *UNBLJ* 75. The most significant decisions in this regard are *Pushpanathan; UES, Local 298 v Bibeault* [1988] 2 SCR 1048 at 1083-1087; *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3 (Can); *Ryan* and *Dr Q*. Consider too DP Jones ‘Two more decisions by the Supreme Court of Canada on the standard of review’ (2003) 48(3d) *Admin LR* 71. In both *Suresh* and *Dr Q*, the SCC suggested that it was necessary to apply a pragmatic and functional analysis in every case.

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; *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.

¹⁵²⁸ In numerous decisions, the Courts indicated that expertise was the critical factor in this analysis; *Southam* para 50; *United Brotherhood of Carpenters & Joiners of America, Local 579 v Bradco Construction Limited* [1993] 2 SCR 316; in *Bradco*, the importance of expertise in the context of labour relations specifically was emphasized; *Bradco* para 32. See also *National Corn Growers Association v Canada (Import Tribunal)* [1990] 2 SCR 1324; *Canada (Attorney General) v Mossop* [1993] 1 SCR 554 and *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 *Can J Admin L & Prac* 59 at 73; JM Keyes ‘Judicial review and the interpretation of legislation: Who gets the last word?’ (2006) 19 *Can J Admin L & Prac* 119 at 125.

Both the multiplicity of the available standards and the ‘pragmatic and functional analysis’ were severely criticised.¹⁵³⁰ The primary basis of the attack against the former was the difficulty of distinguishing between patent unreasonableness and reasonableness *simpliciter*.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.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.¹⁵³³ In responding to these challenges in *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. *NEW BRUNSWICK (BOARD OF MANAGEMENT) V DUNSMUIR*¹⁵³⁴

In brief, the facts of *Dunsmuir* were as follows: Dunsmuir was employed as a legal officer by the Department of Justice in New Brunswick. During his tenure,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.¹⁵³⁶ After failing to rectify his behaviour, Dunsmuir’s employment was terminated with 4 months’ notice. While reference to

¹⁵²⁹ G van Harten, G Heckman & D Mullan *Administrative Law Cases, Texts and Materials* 6 ed (2010) at 679; *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; *Hira & another v Booysen & another* 1992 (4) SA 69 (AD) at 93-95; *Bato Star*.

¹⁵³⁰ *Toronto (City) v CUPE Local 79* [2003] 3 SCR 77 (‘*Toronto (City)*’); *Chamberlain Surrey School District No 36*, 2002 SCC 86; *Voice Construction v Construction & General Workers Union, Local 92*, 2004 SCC 23; *Council of Canadians with Disabilities v VIA Rail Canada Inc* 2007 SCC 15; *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 *Toronto (City)* para 61 onwards.

¹⁵³¹ In principle, the magnitude and immediacy of the defect distinguished patent unreasonableness from reasonableness *simpliciter*; *Ryan* paras 52-53; *Southam*; *Toronto (City)*.

¹⁵³² *Toronto (City)* para 108; *Dunsmuir* paras 42 & 97; *Voice Construction*; DM Mullan ‘Recent developments in the standard of review’ in Canadian Bar Association (Ontario) *Taking the Tribunal to Court: A Practical Guide for Administrative Law Practitioners* (2000) at 25; David E Gruber ‘Judicial review advocacy in the post-*Dunsmuir* era’ (2009) 22 *Can J Admin L & Prac* 303 at 308.

¹⁵³³ *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.

¹⁵³⁴ *Dunsmuir v New Brunswick* [2008] 1 SCR 190.

¹⁵³⁵ Of approximately two and a half years.

¹⁵³⁶ *Dunsmuir* paras 2-7.

unsatisfactory skill level was made in the notice of termination, the reasons for his dismissal were not clearly stipulated.¹⁵³⁷

In response, Dunsmuir instituted grievance proceedings under the provisions of the *Public Service Labour Relations Act* ('PSLRA').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.¹⁵³⁹ His grievance was unsuccessful, however, and Dunsmuir subsequently referred the matter for adjudication by an adjudicator appointed by the Labour and Employment Board.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.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.¹⁵⁴² Secondly, he found that Dunsmuir had been entitled to procedural fairness but had been denied that entitlement.¹⁵⁴³ The termination of his employment was accordingly void *ab initio* and reinstatement was warranted.¹⁵⁴⁴ Furthermore, ruled the adjudicator, should his decision be overturned on review the appropriate notice period would be 8 months.¹⁵⁴⁵

Dunsmuir's employer successfully instituted review proceedings in the Court of the Queen's Bench.¹⁵⁴⁶ The matter was then taken on appeal, where New Brunswick's Appellate Court¹⁵⁴⁷

¹⁵³⁷ Ibid para 7.

¹⁵³⁸ *Public Service Labour Relations Act* RSNB 1973 cP-25 ('PSLRA').

¹⁵³⁹ *Dunsmuir* para 9.

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 *PSLRA*.

¹⁵⁴¹ *Dunsmuir* paras 10-17.

¹⁵⁴² Ibid para 12; for confirmation that *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.

¹⁵⁴³ Ibid para 15.

¹⁵⁴⁴ Ibid.

¹⁵⁴⁵ Ibid para 16.

¹⁵⁴⁶ *New Brunswick v Dunsmuir* 2005 NBQB 270 (CanLII); *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 *simpliciter* standard. Only his direction to award Dunsmuir 8 months' notice was upheld.

¹⁵⁴⁷ *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); *Dunsmuir* para 21.

confirmed the lower Court's findings, albeit on the basis of discrete grounds of review.¹⁵⁴⁸ An aggrieved *Dunsmuir* proceeded to the SCC.¹⁵⁴⁹ The Court began by stating that a thorough re-assessment of Canadian judicial review was necessary.¹⁵⁵⁰ 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.'¹⁵⁵¹

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.¹⁵⁵² 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.¹⁵⁵³ 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.¹⁵⁵⁴ That required ascertaining the legislature's intent when conferring the administrative powers in question.¹⁵⁵⁵

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 Encyclopaedia* 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.

¹⁵⁵¹ *Ibid* para 28. Note once more the similarity between this formulation and section 33 of the Constitution of the Republic of South Africa, 1996 ('the Constitution').

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.¹⁵⁵⁶ Most concerning to the Court was that the existing approach failed to provide practical guidance as to when decisions were inadequate.¹⁵⁵⁷ 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.'¹⁵⁵⁸

To begin with, the SCC dispensed with the dual concepts of reasonableness, collapsing reasonableness *simpliciter* and patent unreasonableness into a single standard of reasonableness.¹⁵⁵⁹ Importantly, remarked Bastarache and LeBel JJ,¹⁵⁶⁰ 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.¹⁵⁶¹ 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.¹⁵⁶² 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.'¹⁵⁶³

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.¹⁵⁶⁴ The implications of this for understanding *Sidumo* are

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

‘Reviewing the review test: Recent judgments and developments’ (2011) 32 *ILJ* 1497; *Sasol Mining (Pty) Ltd v Commissioner Ngqeleni & others* [2011] 4 BLLR 404 (LC) para 11.

¹⁵⁶⁵ *Dunsmuir* para 47.

¹⁵⁶⁶ *Ibid* 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 Rustplats*: 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.¹⁵⁷⁰ 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...',¹⁵⁷¹ 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.'¹⁵⁷²

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.¹⁵⁷³ 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.¹⁵⁷⁴

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.

¹⁵⁷² *Dunsmuir* para 49, citing Mullan 'The struggle for complexity?' (2004) at 93. For comparable sentiments in the South African setting, consider *Sidumo* para 118 and *Ellerine Holdings Ltd v CCMA & others* [2008] JOL 22087 (LAC) at 13.

¹⁵⁷³ *Dunsmuir* para 49.

¹⁵⁷⁴ *Ibid* para 50.

on review.¹⁵⁷⁵ However, in so far as the SCC referred to the role of correctness in evaluating legal findings, the jurisdictions' positions are discrete.¹⁵⁷⁶ The Labour Court's attitude to scrutinizing legal errors is unpredictable – in some instances correctness is applied while in others reasonableness is.¹⁵⁷⁷ 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.¹⁵⁷⁸ 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.¹⁵⁷⁹ 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.¹⁵⁸⁰ In contrast, questions of law

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.¹⁵⁸¹ So too would jurisdictional¹⁵⁸² and Constitutional determinations.¹⁵⁸³ Correctness review of legal, jurisdictional and Constitutional findings, remarked the SCC, was pivotal to ensuring coherence and predictability in administrative decisions.¹⁵⁸⁴ 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.¹⁵⁸⁵ Where the question was one of mixed law and fact or of minimal import to the greater community,¹⁵⁸⁶ reasonableness would be warranted.¹⁵⁸⁷ Finally, factual, discretionary and policy based determinations would also invite reasonableness review.¹⁵⁸⁸

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.¹⁵⁸⁹ 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.¹⁵⁹⁰

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.

¹⁵⁸³ *Dunsmuir* paras 57-59 & 123-124. Consider too *Westcoast Energy Inc v Canada (National Energy Board)* [1998] 1 SCR 322. For general principles of Constitutional review in Canada, consult *Multani c Marguerite-Bourgeois (Commission scolaire)* [2006] 1 SCR 256; David Mullan ‘*Dunsmuir v New Brunswick: Standard of review and procedural fairness for public servants: Let’s try again!*’ (2008) 21 *Can J Admin L & Prac* 117 fnt 40; David Mullan ‘Section 7 and administrative law deference: No room at the inn?’ (2006) 34(2d) *Sup Crt L Rev* 227 and David Mullan ‘Administrative tribunals and judicial review of charter issues after *Multani*’ (2006-2007) 21 *NJCL* 127; compare too Mullan ‘The struggle for complexity’ (2004) at 77.

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.¹⁵⁹¹ Of additional significance are the breadth of commissioners' discretionary powers and the role of 'soft law' in resolving labour disputes.¹⁵⁹² 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.¹⁵⁹³ 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.¹⁵⁹⁴ 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'¹⁵⁹⁵ 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' unpredictable¹⁵⁹⁶ approaches to review.

Returning to *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.¹⁵⁹⁷

¹⁵⁹¹ Consult, in this regard, chapter 1.

¹⁵⁹² *Ibid*; consider too the various codes of good practice promulgated under section 203 of the LRA.

¹⁵⁹³ Arguably nonetheless, the LAC in *Clarence* evaluated the relevant award in an unduly formal and legalistic manner.

¹⁵⁹⁴ This is addressed in more detail below. For discretionary decisions in South Africa, consult JR De Ville *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 *Hira* at 93D-94A; Cora Hoexter *Administrative law* (2007) at 258.

¹⁵⁹⁵ *Dunsmuir* para 155.

¹⁵⁹⁶ And sometimes unduly intrusive or deferential attitudes to review; consider *Kievits Kroon* (LC) and *Clarence*.

¹⁵⁹⁷ *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.’¹⁵⁹⁸ This enquiry, which replaced the ‘pragmatic and functional’ approach,¹⁵⁹⁹ 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.’¹⁶⁰⁰

Clearly, the contextual approach to reasonableness prevalent in South African law¹⁶⁰¹ is reflected in the Canadian system.¹⁶⁰² 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 present¹⁶⁰³ and there will be no room for manoeuvre there; similarly, the purposes of the enabling legislation¹⁶⁰⁴ will remain constant.¹⁶⁰⁵ 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;¹⁶⁰⁶ consistency would then be further undermined. Comparatively, the nature

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 Québec v Québec (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(2d) *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 Section 1(d) of the LRA.

¹⁶⁰⁶ 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 questions¹⁶⁰⁷ 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,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.¹⁶⁰⁹ Together, held the SCC, these served as convincing indicators of reasonableness.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.¹⁶¹¹ The *PSLRA*'s purposeful establishment of timeous and cost-effective dispute resolution procedures, observed the Court, further supported this conclusion.¹⁶¹² Finally, while the question before the adjudicator was legal in nature, it was

skill and expertise of CCMA commissioners (or labour boards and arbitrators) generally. Consider too, in this regard, *Transnet Freight Rail v Transnet Bargaining Council & others* [2011] 6 BLLR 594 (LC) paras 7-17.

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.¹⁶¹³

In applying the standard, the Court first assessed the reasoning process which the adjudicator had followed. According to it, that process was radically flawed.¹⁶¹⁴ 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.¹⁶¹⁵ 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.¹⁶¹⁶

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 review¹⁶¹⁷ was necessary.¹⁶¹⁸ 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.¹⁶¹⁹ As comparable concerns exist in the context of section 145 proceedings,¹⁶²⁰ 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

¹⁶¹³ Ibid paras 70-71.

¹⁶¹⁴ For one, the adjudicator had not accounted for the legislative context in which the decision was to be made.

¹⁶¹⁵ *Dunsmuir* paras 72-76.

¹⁶¹⁶ 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.

¹⁶¹⁷ Than that undertaken by the majority.

¹⁶¹⁸ *Dunsmuir* paras 119-122.

¹⁶¹⁹ 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.

¹⁶²⁰ For the uncertainty and complexity prevalent in section 145 proceedings, refer to chapters 3 & 4.

non-judicial bodies to make certain decisions. Those decisions were, in turn, worthy of deference.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’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.’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,¹⁶²⁴ for one, exemplifies the common assumption depicted by Binnie J.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.¹⁶²⁶ In addition, reviewing courts do not benefit from the *vive voce* evidence of the parties during review proceedings; frequently instead, they lack complete records of the arbitrations under review.¹⁶²⁷ As such, when it comes to factual and discretionary findings in particular, commissioners are in a superior position to the courts.

¹⁶²¹ *Dunsmuir* paras 123-124.

¹⁶²² Presumably in the context of reasonableness review; *ibid* para 125.

¹⁶²³ *Dunsmuir* para 125. For comparable views of South African commentators see Hoexter (2007) at 252; Lawrence Baxter *Administrative Law* (1984) at 468; De Ville (2005) at 153 and JR De Ville *Constitutional and statutory interpretation* (2000) at 8-14. *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 *Rainbow Farms (Pty) Ltd v CCMA & others* [2011] 5 BLLR 451 (LAC).

¹⁶²⁴ Paul Benjamin ‘Friend or foe? The impact of judicial decisions on the operation of the CCMA’ (2007) 28 *ILJ* 1at 17-19.

¹⁶²⁵ That in the event of a disagreement between a commissioner and a court, the court’s view is implicitly preferable. Consider *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 *Housen v Nikolaisen* 2002 SCC 33 para 22; *Alberta Union of Provincial Employees v Alberta* 2010 ABCA 216 (*AUPE 2010 ABCA*) para 47.

¹⁶²⁶ Refer, in this regard, to *CWIU & Others v Sopelog CC* (1994) 15 *ILJ* 90 (LAC) at 97B-E; Emma Fergus & Alan Rycroft ‘Refining review’ 2012 *Acta Juridica* 170.

¹⁶²⁷ Illustrative cases include *Bestel v Astral Operations Ltd & others* [2011] 2 BLLR 129 (LAC) para 24 and *Shoprite Checkers I*.

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

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.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.¹⁶³⁸ Formulating a test for review with analogous factors in mind would both preserve legal certainty¹⁶³⁹ and maintain the purposively efficient, informal and flexible nature of CCMA proceedings.¹⁶⁴⁰

Binnie J next evaluated the controversy surrounding reasonableness and its allowance for judicial scrutiny of the merits of disputes.¹⁶⁴¹ He cautioned in this regard that:

‘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.’¹⁶⁴²

In closing, the Judge proposed a set of presumptions applicable to determining the relevant standards of review.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 *Dunsmuir*. The crux of her decision was that the only determinant in standard of review analyses ought to be

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.

¹⁶³⁸ *Dunsmuir* para 54.

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 *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’ *LAWSA* vol 1, 2 ed (2003) paras 174-175 and Arthur Chaskalson ‘Legal control of the administrative process’ 1985 *SALJ* 419 at 426-427.

¹⁶⁴⁰ Section 1(d) of the LRA; the Explanatory Memorandum at 318-319.

¹⁶⁴¹ *Dunsmuir* paras 127-129. He then criticized the majority for failing to reduce the complexity associated with review in this respect; *Dunsmuir* paras 130-131.

¹⁶⁴² *Dunsmuir* para 141.

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; *Dunsmuir* paras 146-147.

the nature of the question in dispute.¹⁶⁴⁴ 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.¹⁶⁴⁵ Once more, the proposal that this factor should be the primary consideration when delineating the scope of review under section 145 is strengthened.¹⁶⁴⁶

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.¹⁶⁴⁷ 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.¹⁶⁴⁸ 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.¹⁶⁴⁹ To this extent, it has been contended that the SCC failed in its endeavours to simplify the system.¹⁶⁵⁰ It further neglected to refine the meaning of reasonableness with any meaningful degree of specificity.¹⁶⁵¹

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 Deschamps J's view that discrete standards of review should not apply to different types of legal question is nonetheless debatable; *Dunsmuir* paras 158-173.

¹⁶⁴⁷ Heckman (2010) at 26; Alice Woolley 'The metaphysical court: *Dunsmuir v New Brunswick* and the standard of review' (2008) 21 *Can J Admin L & Prac* 259 at 259; Quayat at 180; consider too David Mullan 'The McLachlin Court and the public law standard of review: A major irritant soothed or a significant ongoing problem?' in David A Wright & Adam M Dodek *Public law at the McLachlin Court* (2011) 79.

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 Mullan 'Let's try again!' (2008) at 125; Piper Henderson 'Supreme Court of Canada's new 'reasonableness' standard of review applied in recent education cases' (2008) 18 *Educ & IJ* 179 at 181.

¹⁶⁵⁰ 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.

¹⁶⁵¹ David Mullan 'Proportionality - A proportionate response to an emerging crisis in Canadian judicial review law?' 2010 *NZ L Rev* 233 at 262-264.

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.¹⁶⁵² Mullan submits in this regard that while the adjudicator's decision in *Dunsmuir* might well have been incorrect, it was not unreasonable.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.¹⁶⁵⁴ These controversies have been exacerbated by the distinctively more reverent attitude of the SCC in *Khosa*.¹⁶⁵⁵ Given the context of labour relations in which *Dunsmuir* was decided,¹⁶⁵⁶ justifying the discrepancies between these matters is difficult.¹⁶⁵⁷

Fourth, whereas jurisdictional errors may demand correctness review, identifying those errors is by no means straightforward.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.¹⁶⁵⁹ Instead of affirming the former and simpler conception of jurisdictional issues as those attracting correctness review following a pragmatic and functional analysis,¹⁶⁶⁰ the Court in *Dunsmuir* provided only a vague description of the term 'jurisdictional' – one easily manipulated by interventionist courts.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

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.

¹⁶⁵⁸ Susan L Gratton 'Standing at the divide: The relationship between administrative law and the Charter post *Multani*' (2008) 53 *McGill LJ* 477. Gratton criticized the SCC in *Dunsmuir* for its formalistic approach to distinguishing between jurisdictional, legal, factual, policy-based and discretionary decisions; Gratton at 487. Consider further *Alberta Teachers' Association* para 42.

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://ablawg.ca/author/dccorry/>, 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.

¹⁶⁶⁸ Laverne Jacobs 'Developments in administrative law: The 2007-2008 term - The impact of *Dunsmuir*' (2008) 43(2d) *Sup Ct L Rev* 1 at 1-34.

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’¹⁶⁷¹ nor whether the principles enunciated by the Court apply to both adjudicative and policy-based determinations is certain.¹⁶⁷² 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.¹⁶⁷³ Given that some of the confusion was remedied by the SCC’s decision in *Khosa*, however, that decision will first be appraised.¹⁶⁷⁴

5. *KHOSA V CANADA (MINISTER OF CITIZENSHIP & IMMIGRATION)*¹⁶⁷⁵

In *Khosa v Canada (Minister of Citizenship & Immigration)*,¹⁶⁷⁶ 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.¹⁶⁷⁷ 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.¹⁶⁷⁸ The matter was then referred to the SCC.¹⁶⁷⁹ 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, Pezim and Dr Q* para 27.

¹⁶⁷¹ 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.

¹⁶⁷² Mullan ‘Let’s try again!’ (2008) at 150.

¹⁶⁷³ 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.

¹⁶⁷⁴ 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.

¹⁶⁷⁵ *Khosa v Canada (Minister of Citizenship & Immigration)* 2009 SCC 12.

¹⁶⁷⁶ *Ibid.* For further analysis of *Khosa*, consult Laverne Jacobs ‘Developments in administrative law: The 2008-2009 term: Contemplating legislative (im)precision’ (2009) 48 *Sup Cr L Rev* 43 at 43-70.

¹⁶⁷⁷ In accordance with the *Immigration and Refugee Protection Act* SC 2001 c27 (‘IRPA’).

¹⁶⁷⁸ *Khosa* paras 10-14; *Khosa v Canada (Minister of Citizenship and Immigration)* 2005 FC 1218 (CanLII); *Khosa v Canada (Minister of Citizenship and Immigration)* [2007] 4 FCR 332.

¹⁶⁷⁹ 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.¹⁶⁸⁷ Those stipulations were nevertheless subject to interpretation with reference to the Constitution Acts and the statute's wording, context and purpose.¹⁶⁸⁸ 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.¹⁶⁸⁹

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.¹⁶⁹⁰ 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.¹⁶⁹¹ 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.¹⁶⁹² 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.¹⁶⁹³ Finally, the grounds under sections 18.1(4)(e) and (f) would give rise to correctness review.¹⁶⁹⁴ 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.

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.

¹⁶⁹⁴ *Ibid* paras 47-48.

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, law¹⁶⁹⁵ 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.¹⁶⁹⁶ 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.¹⁶⁹⁷

¹⁶⁹⁵ With the exceptions discussed in the conclusion to this thesis.

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 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 (Pty) Ltd v CCMA & others* [2009] 11 BLLR 1128 (LC).

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.¹⁶⁹⁸ 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.¹⁶⁹⁹ 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.¹⁷⁰⁰ As the latter has been explicitly rejected by South African courts,¹⁷⁰¹ 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.¹⁷⁰² 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.¹⁷⁰³ First, it enables adequate deference to be paid to commissioners' awards and so recognises the need for efficiency and informality in labour dispute resolution.¹⁷⁰⁴ 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.¹⁷⁰⁵ Whereas it might be argued that reducing the ambit of

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 fnt 499.

¹⁷⁰¹ *Bato Star* para 44; *Myers v National Commissioner of the South African Police Services and Others (SCA)* unreported case no 425/2012 of 29 November 2012 para 28.

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.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 *viva voce* evidence and presiding judges neither hear the parties' testimonies first hand nor witness the relationship between them.¹⁷⁰⁷ Judicial conclusions of fact during section 145 proceedings are based entirely on the records of proceedings,¹⁷⁰⁸ which are frequently incomplete.¹⁷⁰⁹ In the absence of arbitrary or capriciousness decision-making therefore, it is improbable that courts' factual findings will be superior to commissioners'.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.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 *Khosa*, Binnie J then considered the standard of review applicable to the case at hand. Consistently with *Dunsmuir's* two step analysis, he found judicial precedent pointed cleanly towards reasonableness.¹⁷¹² This test's suitability was endorsed by the second stage of the enquiry – the standard of review analysis.¹⁷¹³ In re-affirming the contextual essence of the analysis,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, *Shoprite Checkers 1 and Bestel*.

¹⁷¹⁰ *Housen* para 22; *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 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 *IRPA*, reviewing courts had applied the reasonableness standard.

¹⁷¹³ *Khosa* paras 52-54.

¹⁷¹⁴ *Ibid* paras 28 & 59.

remarked, it ‘would take its colour from the context’.¹⁷¹⁵ 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’)¹⁷¹⁶ 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.¹⁷¹⁷ 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,¹⁷¹⁸ it fell within the range of permissible decisions available to it. As such, the decision was immune from review.¹⁷¹⁹

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.¹⁷²⁰ 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.¹⁷²¹ 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.’¹⁷²²

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

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.¹⁷²³ 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.¹⁷²⁴ Thus, a balance must be struck between unwarranted interference with weight allocations and formalistic attention thereto. Alongside outstanding questions arising from *Dunsmuir* and *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.¹⁷²⁵ In *Dunsmuir*, the Court stated that reasonableness entailed a contextual enquiry,¹⁷²⁶ implying flexibility in its application.¹⁷²⁷ Then in *Khosa*, the same Court remarked that the standard, while single in nature, 'would take its colour from the context'.¹⁷²⁸ 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'.¹⁷²⁹ The Court's pronouncement in *Law Society of New Brunswick v Ryan*¹⁷³⁰ is telling; in *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.'¹⁷³¹

¹⁷²³ *Khosa* paras 4 and 65- 67; see further *Suresh* paras 29 & 34; *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.

¹⁷²⁴ *Ibid.*

¹⁷²⁵ Consider, for one, the Court's construction of *Dunsmuir* in *Manz v Sundher* 2009 BCCA 92.

¹⁷²⁶ *Dunsmuir* paras 30 & 52-62. Binnie J and Deschamps J ostensibly endorsed this view too.

¹⁷²⁷ Mullan 'Let's try again!' (2008) at 133-135; Lorne Sossin 'Dunsmuir – Plus ca change' *The Court* 17 March 2008, available at <http://www.thecourt.ca/2008/03/17/dunsmuir>, accessed on 6 December 2012.

¹⁷²⁸ *Khosa* paras 52-58.

¹⁷²⁹ *Ryan* paras 43-47.

¹⁷³⁰ *Ryan v Law Society (New Brunswick)* [2003] 1 SCR 247.

¹⁷³¹ *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 *Pezim....*'; *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.¹⁷³² In this way, flexibility may be maintained and multiple measures of reasonableness avoided.¹⁷³³ 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.¹⁷³⁴

Bastarache’s logic is appealing in so far as it purports to synchronise the various approaches. It has further been judicially endorsed.¹⁷³⁵ In *Mills v Ontario (Workplace Safety and Appeals Tribunal)*,¹⁷³⁶ 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.’¹⁷³⁷

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.¹⁷³⁸ 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.

¹⁷³⁴ Heckman (2009) at 759 & 784; consult too Heckman (2010) at 27 fnt 19 and Klinck at 49.

¹⁷³⁵ See, for example, *Mills* paras 14-24 and *Khosa* para 59.

¹⁷³⁶ *Mills v Ontario (Workplace Safety and Appeals Tribunal)* 2008 ONCA 436 paras 14-24.

¹⁷³⁷ *Ibid* para 19.

¹⁷³⁸ EB Willis & WK Winkler *Willis and Winkler on Leading Labour Cases* (2008-2009) at 37.

given case.¹⁷³⁹ Equally tricky to conceive is how precedent may be applied consistently with *Dunsmuir*'s mandate, without accepting that distinctive degrees of reasonableness persist.¹⁷⁴⁰

An Alberta court's decision in *Lethbridge College v Lethbridge College Faculty Association*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.¹⁷⁴² Given that prior to *Dunsmuir*, the standard of patent unreasonableness generally applied to labour boards' and arbitrators' determinations,¹⁷⁴³ just how reviewing courts may apply precedent to such cases (without offending *Ryan*)¹⁷⁴⁴ is uncertain.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.¹⁷⁴⁶ At the very least, it must be conceded that distinctive degrees of deference may apply to discrete administrative determinations.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.

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.

¹⁷⁴⁰ Given that prior to *Dunsmuir* two standards of reasonableness existed; Heckman (2009) at 775-776; *Mills* para 22. Heckman records that the Federal and Alberta Courts of Appeal have adopted similar attitudes; Heckman (2009) at 780-781. Consider too *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.

¹⁷⁴¹ *Lethbridge College v Lethbridge College Faculty Association* 2008 CarswellAlta 911 (Alta QB); note also Henderson at 184-185.

¹⁷⁴² *Ibid.* Comparably, in *Khosa*, the SCC both confirmed reasonableness to be a single standard of review and repeatedly referred to 'degrees of deference'; *Khosa* paras 4, 19, 46 & 59.

¹⁷⁴³ Henderson at 180; note, however, Henderson at 185.

¹⁷⁴⁴ As prescribed by the Court in *Dunsmuir* para 57; *Ryan* para 47.

¹⁷⁴⁵ This is particularly true in British Columbia where the ATA expressly provides for patent unreasonableness in certain circumstances; consider *Evans v University of British Columbia* 2008 BCSC 1026 para 11.

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 *simpliciter*...'; Willis & Winkler (2008-2009) at 37.

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'¹⁷⁴⁸ 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.¹⁷⁴⁹ 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.'¹⁷⁵⁰ Thus, argues Mullan, where the reasons given for a decision are poor,¹⁷⁵¹ the decision may still be upheld if reasons other than those provided by the decision-maker support it.¹⁷⁵² The decision-maker's reasons need not therefore constitute the sole justification for his or her ruling.¹⁷⁵³ More important is that the outcome of the dispute falls within the range of reasonable ones identified by the reviewing court.¹⁷⁵⁴ Mullan adds in this regard that reasons do not assure reasonableness. Rather,

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.

¹⁷⁵⁰ *Dunsmuir* para 48; Dyzenhaus in Taggart (ed) (1997) at 286.

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.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 *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*¹⁷⁵⁶ that reviewing courts may entertain alternative reasons for decisions where the relevant decision-maker's reasons do not justify its findings.¹⁷⁵⁷ Adding to this, the Court held that the mere inadequacy of administrative reasons would not necessarily warrant review.¹⁷⁵⁸ Thus, it might be assumed that satisfactory reasons¹⁷⁵⁹ 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 *Dunsmuir* requisites of 'justification, transparency and intelligibility' illustrates the point well.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 *Dunsmuir* criteria are met.'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 *Dunsmuir*,¹⁷⁶² the quality of administrative reasons is unimportant is dubious. On the

¹⁷⁵⁵ Mullan 'Proportionality' at 251.

¹⁷⁵⁶ *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)* [2011] 3 SCR 708 para 14.

¹⁷⁵⁷ *Ibid* paras 12-14 & 17.

¹⁷⁵⁸ *Ibid* para 14.

¹⁷⁵⁹ And by implication, satisfactory reasoning processes.

¹⁷⁶⁰ *Dunsmuir* para 47.

¹⁷⁶¹ *Newfoundland and Labrador Nurses' Union* para 16.

¹⁷⁶² And by analogy *Sidumo*.

contrary, the import of adequate reasoning is plain.¹⁷⁶³ 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.¹⁷⁶⁴ Canadian courts since *Dunsmuir* have confirmed the need for satisfactory reasons,¹⁷⁶⁵ 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.¹⁷⁶⁶

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.¹⁷⁶⁷ According to him, it is difficult to conceive of 'rational and coherent reasons' leading to unreasonable results.¹⁷⁶⁸ Further, in his view, Mullan's interpretation of reasonableness misconstrues the SCC's endorsement of 'deference as respect'.¹⁷⁶⁹ Bastarache avers in this regard that:

¹⁷⁶³ Consider *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 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.

¹⁷⁶⁵ *Khosa* para 63; *Clifford v Ontario (Attorney General)* (2009) 188 LAC (4th) 97 (Ont CA) para 31; *LSUC v Neinstein* [2010] ONCA 193; *Walsh v Council for Licensed Practical Nurses* [2010] NJ No 41 (CA.).

¹⁷⁶⁶ Given the import of judicial review to facilitating improved decision-making; Jeffrey Jowell 'The democratic necessity of administrative justice' 2006 *Acta Juridica* 13 at 16-17; Cora Hoexter 'The current state of South African administrative law' in Hugh Corder & Linda van der Vijver (eds) *Realising Administrative Justice* (2002) 20 at 27; Hugh Corder 'Reviewing review: much achieved, much more to do' in Hugh Corder & Linda van der Vijver (eds) *Realising Administrative Justice* (2002) 1 at 1-2 and Etienne Mureinik 'Reconsidering review: participation and accountability' 2006 *Acta Juridica* 35.

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.’¹⁷⁷⁰

Whereas in some cases Bastarache’s depiction of reasonableness¹⁷⁷¹ 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.¹⁷⁷² In *Montreal (City) v Montreal Port Authority*,¹⁷⁷³ 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.¹⁷⁷⁴ Willis and Winkler, referring to the decision in *Clifford v Ontario (Attorney General)*,¹⁷⁷⁵ 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.¹⁷⁷⁶

Consequently, both judicial and theoretical statements proclaim the legitimacy of assessing adequacy in reasoning as well as reasonableness in outcome.¹⁷⁷⁷ That is not to suggest that the two enquiries are cleanly separable. There is a necessary and inevitable overlap between them.¹⁷⁷⁸ Nonetheless, it remains useful, when conceptualising the dual features of reasonableness,¹⁷⁷⁹ 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

¹⁷⁷⁰ Bastarache at 236.

¹⁷⁷¹ Which effectively reduces the standard to a requirement for adequate reasoning.

¹⁷⁷² See *Baker*; Heckman (2009) at 777 fnt 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.

¹⁷⁷⁸ *Newfoundland and Labrador Nurses’ Union* para 14; Raj Anand, Mark Edelstein & Christine Wong-Chong ‘A survey of recent developments on judicial review of professional discipline’ (2012) 25 *Can J Admin L & Prac* 147 at 158-161.

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 manner¹⁷⁸⁰ accords well with the characteristics of the test under section 145.¹⁷⁸¹ 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.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.¹⁷⁸³ In *Khosa*,¹⁷⁸⁴ the Court discussed the features of adequate reasoning with reference to its findings in *Dunsmuir*.¹⁷⁸⁵ First, it recounted the function of reasons in securing administrative accountability.¹⁷⁸⁶ Accountability was owed not only to affected parties but also to reviewing courts and the

¹⁷⁸⁰ Coupled with the qualification explained above with reference to Mullan's interpretation of the Canadian test.

¹⁷⁸¹ *Sasol Mining; Strategic Liquor Services* para 17, citing *Mpahlele* para 12; chapters 3 & 4.

¹⁷⁸² Sections 1(d) & 195 of the Constitution; Jowell (2006) at 16-17; Corder in Corder & van der Vijver (eds) (2002) at 1-2; Hoexter in Corder & van der Vijver (eds) (2002) at 27; Mureinik (2006).

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.

¹⁷⁸⁴ *Khosa* para 63.

¹⁷⁸⁵ Where the requisites of 'justifiability, transparency and intelligibility' had been emphasized; *Dunsmuir* para 47.

¹⁷⁸⁶ *Ibid*; *Khosa* para 63. See also *Clifford* para 31; *Baker* para 43.

public at large.¹⁷⁸⁷ As for the stipulation that decisions be ‘justifiable, transparent and intelligible’,¹⁷⁸⁸ 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 weight¹⁷⁸⁹ to the respondent’s evidence of remorse and prospects for rehabilitation, and came to their own conclusions based on their appreciation of that evidence.’¹⁷⁹⁰

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.¹⁷⁹¹

In *Lake v Canada (Minister of Justice)*,¹⁷⁹² 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,¹⁷⁹³ 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

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.

¹⁷⁹⁰ Heckman (2009) at 782; *Khosa* paras 66-67.

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 court¹⁷⁹⁷ of the *raison d'être* 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.

¹⁷⁹⁶ *Lake* para 46; *Khosa* para 63; *Maritime Paper Products Ltd v CEP, Local 1520* (2009) 183 LAC (4th) 289.

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.

¹⁸⁰² *Ibid*; see also Willis & Winkler (2010) at 25-26.

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 unsupported, may consequently be overturned for substantive unreasonableness.¹⁸¹⁵

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*.

While these principles are established not only in Canada but also in South Africa,¹⁸¹⁶ 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.¹⁸¹⁷ 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.¹⁸¹⁸ 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.’¹⁸¹⁹

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’¹⁸²⁰ and encourages unwarranted interference with administrative determinations.¹⁸²¹ 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.¹⁸²² These outcomes need not resemble each other. In Klinck's view, two perfectly reasonable findings may actually be contrary in conclusion.¹⁸²³ Given the contextual dependency of reasonableness,¹⁸²⁴ 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.

¹⁸¹⁶ At least in part; consider, for example, the LAC's synopsis of reasonableness in *Fidelity* and chapter 3.

¹⁸¹⁷ *Khosa* para 125. Note too *Halifax (Regional Municipality) v NSUPE, Local 13* (2009) 187 LAC (4th) 353 para 79.

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.

¹⁸²⁰ Dyzenhaus in Taggart (ed) (1997).

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.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.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.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',¹⁸²⁸ offers some direction.¹⁸²⁹ In brief, these indicate that to be reasonable, decisions must evince:

- a) Consideration and acknowledgement of both parties' accounts of the dispute;
- b) Appraisal of all relevant legal principles;
- c) Application of these principles to the core facts and allocation of weight thereto;¹⁸³⁰
and
- d) Conclusions independently reached.¹⁸³¹

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,

¹⁸²⁵ Van Harten, Heckman & Mullan at 872; *Audmax*.

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.

¹⁸²⁷ *Ibid*.

¹⁸²⁸ As described above; Heckman (2009) at 782; *Khosa* paras 66-67.

¹⁸²⁹ *Dunsmuir* para 47.

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.

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 *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 *Labour Relations Code*, which itself contains a privative

¹⁸³² Heckman (2009) at 782; *Khosa* paras 66-67.

¹⁸³³ *Dunsmuir* para 60; *Toronto (City)* para 62; *Suresh* para 37; *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 *Baker*, for one, the SCC conceded that discretionary and legal determinations necessarily entailed subjectivity; *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 *Khosa* above.

¹⁸³⁷ *Administrative Tribunals Act* SBC 2004 c45 ('ATA').

¹⁸³⁸ Jones (2009) at 123. In contrast to the FCA; *Khosa*.

¹⁸³⁹ Section 58(3)(d) of the ATA. Given *Dunsmuir's* abandonment of this standard, the impact of *Dunsmuir* and *Khosa* is more pronounced in British Columbia ('BC') than in other provinces; Elliot at 16. For the confusion caused by *Khosa* in BC, see *Khosa* paras 59 & 108, read with Jones (2009) ftnt 4.

¹⁸⁴⁰ For a brief critique of BC's adoption of the ATA, consult JM Evans 'Administrative justice reform in England and Wales: Some Canadian reflections' (2011) 24 *Can J Admin L & Prac* 11.

clause.¹⁸⁴¹ 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) ...¹⁸⁴²

(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.¹⁸⁴³

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.¹⁸⁴⁴ In particular, the proper approach to reviewing factual, discretionary and legal questions in British Columbia is indefinite.¹⁸⁴⁵ The meaning of statutory patent unreasonableness and its relationship to

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.¹⁸⁴⁶ Despite the lack of clarity in these areas, the standard's statutory definition¹⁸⁴⁷ 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,¹⁸⁴⁸ 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.¹⁸⁴⁹ 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 Africa¹⁸⁵⁰ 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

Columbia's exercise in sampling, the 'Administrative Tribunals Act', Dunsmuir and Khosa Paper presented at the National Administrative Law and Labour and Employment Law CLE Conference, Fairmont Chateau Laurier Hotel, Ottawa (20-21 November 2009) at 4-7; Elliot. For the position prior to *Dunsmuir*, consider R Junger 'British Columbia's experience with the Administrative Tribunals Act' (2008) 21 *Can J Admin L & Prac* 51 at 65; see also *Allman v Amacon Property Management Services Inc* 2006 BCSC 725 paras 46-49.

¹⁸⁴⁶ Ibid. According to Ruel, however, the position has now largely been clarified; Ruel at 50-52. *Kerton* para 29.

¹⁸⁴⁷ In section 58(3) of the ATA.

¹⁸⁴⁸ 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.

¹⁸⁴⁹ *Transnet Freight Rail* para 17; *Fipaza v Eskom Holdings Ltd* (2010) 31 *ILJ* 2903 (LC) para 58.

¹⁸⁵⁰ 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 discretion¹⁸⁵² 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.

¹⁸⁵⁸ The decision-maker had been obliged to account for the best interests of the children, with reference to the guidelines in Citizenship and Immigration Canada, Government of Canada *Immigration Manual: Examination and Enforcement*, available at www.cic.gc.ca/english/resources/manuals/index.asp, accessed on 14 January 2013 and the United Nations Convention on the Rights of the Child 28 ILM 1448 (1989), but had failed to do so; *Baker* at 72-73. For the difficulty of reviewing decisions based on soft law, consider Gratton at 509.

¹⁸⁵⁹ *Baker* paras 74-76.

¹⁸⁶⁰ Van Harten, Heckman & Mullan at 955; Cartier at 61.

In *Suresh v Canada (Minister of Citizenship and Immigration)*,¹⁸⁶¹ 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.¹⁸⁶² 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.¹⁸⁶³ This approach has been confirmed by the SCC in subsequent matters.¹⁸⁶⁴ Still, despite judicial confirmation of the prohibition, the *Baker* Court’s declaration that administrative findings must be consistent with stipulated values and principles¹⁸⁶⁵ endures.¹⁸⁶⁶

Since *Dunsmuir*, these principles have been affirmed by the courts. In both *Montreal (City) v Montreal Port Authority*¹⁸⁶⁷ and *Bell Canada v Bell Aliant Regional Communications*,¹⁸⁶⁸ 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.¹⁸⁶⁹ 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.¹⁸⁷⁰

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-weighting 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*.¹⁸⁷¹ 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,¹⁸⁷² 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.¹⁸⁷³

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.¹⁸⁷⁴ 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.¹⁸⁷⁵ 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,¹⁸⁷⁶ the prohibition against judicial assessments of weight would be

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.

redundant.¹⁸⁷⁷ Constitutional questions of a discretionary nature should accordingly not be tested against the standard of correctness¹⁸⁷⁸ when reviewing CCMA awards.

Turning to the second difficulty with the proposed ban,¹⁸⁷⁹ 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,¹⁸⁸⁰ illustrates the problem.¹⁸⁸¹ 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.’¹⁸⁸²

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.¹⁸⁸³ As he argues, devising reasonableness in this way would lend greater structure to the concept.¹⁸⁸⁴ The standard's susceptibility to manipulation by officious courts would then be curbed.¹⁸⁸⁵ 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’.¹⁸⁸⁶ While

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.

¹⁸⁸³ Mullan ‘Proportionality’ at 233; Michael Taggart ‘Proportionality, Deference, *Wednesbury*’ 2008 *NZ L Rev* 423; For proportionality review in Canada generally, consult Mullan ‘Proportionality’; *Multani*; Cartier; Evan Fox-Decent ‘The Charter and administrative law: Cross-fertilization in public law’ in C Flood & L Sossin (eds) *Administrative law in context* (2008) 169 at 181-189; Gratton; J Ross ‘Applying the Charter to discretionary authority’ (1991) 29 *Alta L Rev* 382; S Choudry & K Roach ‘Racial and ethnic profiling: Statutory discretion, Constitutional remedies, and democratic accountability’ (2003) 41 *Osgoode Hall LJ* 1; Lorne Sossin ‘Discretion unbound: Reconciling the Charter and soft law’ (2003) 45 *Can Pub Admin* 465; David Dyzenhaus ‘*Baker*: The unity of public law’ in David Dyzenhaus (ed) *The Unity of Public Law* (2004) 1; Mullan ‘Charter issues after *Multani*’ (2006-2007).

¹⁸⁸⁴ Mullan ‘Proportionality’ at 233. Prior to *Dunsmuir*, others had advocated for proportionality review too; Guy Regimbald ‘Correctness, reasonableness and proportionality: A new standard of judicial review’ (2005-2006) 31 *Manitoba Law Journal* 239; Evan Fox-Decent ‘The internal morality of administration: The form and structure of reasonableness’ in David Dyzenhaus (ed) *The Unity of Public Law* (1999) 143; Sossin & Flood (2007).

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 proportionality¹⁸⁸⁷ is of limited pertinence to section 145 proceedings.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.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.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.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'.¹⁸⁹² When reformulating the test for review of CCMA awards, it is sensible to anticipate this problem.¹⁸⁹³ The Canadian courts' attitudes to jurisdictional decisions, and the SCC's definition thereof in *Dunsmuir*, constitute useful points of departure in this regard.¹⁸⁹⁴ Before examining the *Dunsmuir* definition, it is helpful to canvass the pitfalls associated with identifying jurisdictional issues in Canada generally.

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.

¹⁸⁸⁷ As defined by Hoexter; Hoexter (2007) at 309-310.

¹⁸⁸⁸ For the complete argument, refer to chapter 4.

¹⁸⁸⁹ Particularly given the ostensible (albeit debatable) poverty of many CCMA awards; *Sasol Mining* para 7.

¹⁸⁹⁰ Comparably to the test articulated by Conradie JA in *County Fair Foods* para 43.

¹⁸⁹¹ See the discussion of *Khosa* above.

¹⁸⁹² 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).

¹⁸⁹³ 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.

¹⁸⁹⁴ 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.’¹⁸⁹⁵ 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.¹⁸⁹⁶ Where the question was ‘preliminary’ to jurisdiction or ‘collateral’ to the merits, it was subject to correctness review.¹⁸⁹⁷ 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.¹⁸⁹⁸ The primary difficulty with this doctrine¹⁸⁹⁹ was the flexibility of the terms ‘preliminary’ and ‘collateral’.¹⁹⁰⁰ This allowed interventionist courts to style legal questions as jurisdictional issues, enabling correctness review in the process.¹⁹⁰¹

Equally problematic,¹⁹⁰² 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.’¹⁹⁰³ Again, the doctrine’s principal shortcoming was its failure to distinguish meaningfully between

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.

¹⁸⁹⁶ Van Harten, Heckman & Mullan at 804-806.

¹⁸⁹⁷ *Ibid* at 805.

¹⁸⁹⁸ *Ibid*.

¹⁸⁹⁹ For further criticism thereof, refer to van Harten, Heckman & Mullan at 805; *CUPE* (1979) at 233, citing HWR Wade *Administrative Law* 4 ed (1977) at 245; David Mullan ‘Tribunals and courts — The contemporary terrain: Lessons from human rights regimes’ (1999) 24 *Queen’s LJ* 643 at 660; *Council of Canadians with Disabilities* at 88-89. For critique in the labour context, see Brian Langille ‘Judicial review, judicial revisionism and judicial responsibility’ (1986) 17 *Rev Gen* 169 at 184; Paul Weiler ‘The ‘slippery slope’ of judicial intervention: The Supreme Court and Canadian labour relations 1950-1970’ (1971) 9 *Osgoode Hall LJ* 1 at 33; G Adams ‘*Bell Canada* and the older worker: Who will review the judges?’ (1974) 12 *Osgoode Hall LJ* 389 and G Adams ‘Grievance arbitration and judicial review in North America’ (1971) 9 *Osgoode Hall LJ* 443.

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.

¹⁹⁰² For critique of the doctrine, consult David Mullan ‘A blast from the past – A surreptitious resurgence of *Metropolitan Life*?’ (1992) 5(2d) *Admin Law Reports* 97; *CUPE* (1979) and *Service Employees’ International Union, Local No 333 v Nipawin District Staff Nurses Association et al* [1975] 1 SCR 382 at 389; van Harten, Heckman & Mullan at 804-806.

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.¹⁹⁰⁴

In response to these difficulties, the SCC in *Canadian Union of Public Employees Local 963 v New Brunswick Liquor Corporation* ('CUPE (1979)')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.'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.¹⁹⁰⁷ Notwithstanding this directive, officious courts continued to escape reasonableness review via doubtful attributions of the 'jurisdictional' label.¹⁹⁰⁸

Seeking to remedy the problem in *UES, Local 298 v Bibeault*, the SCC introduced the pragmatic and functional analysis.¹⁹⁰⁹ Later, in *Pushpanathan v Canada (Minister of Citizenship and Immigration)*,¹⁹¹⁰ it confined jurisdictional questions to those attracting correctness review under this analysis.¹⁹¹¹ Consistently with the purpose of the analysis,

¹⁹⁰⁴ Van Harten, Heckman & Mullan at 806.

¹⁹⁰⁵ *Canadian Union of Public Employees Local 963 v New Brunswick Liquor Corporation* [1979] 2 SCR 227 at 233 ('CUPE (1979)'). Note also, *Paschienyk v Saskatchewan (Workers Compensation Board)* [1997] 2 SCR 890. The SCC in *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.'; *CUPE (1979)* at 421-424. For further commentary on *CUPE (1979)*, refer to Langille (1986) at 191-194.

¹⁹⁰⁶ *CUPE (1979)* at 233; consider too *Nipawin* at 389.

¹⁹⁰⁷ *Ibid.*

¹⁹⁰⁸ *Bell v Ontario (Human Rights Commission)* [1971] SCR 756 (SCC); Mullan 'Let's try again!' (2008) at 129-130; Mullan 'A blast from the past'; *Metropolitan Life Insurance Co*; Langille (1986) at 190; Paul C Weiler *In the last resort: A critical study of the Supreme Court of Canada* (1974) at 129-31; Weiler (1971) and PW Hogg 'The jurisdictional fact doctrine in the Supreme Court of Canada: *Bell v Ontario (Human Rights Commission)*' (1971) 19 *Osgoode Hall LJ* 203; David Mullan 'The jurisdictional fact doctrine in the Supreme Court of Canada – a mitigating plea' (1972) 10 *Osgoode Hall LJ* 440. For a comparably aggressive approach, see *Port Arthur Shipbuilding Co v Arthurs et al* [1969] SCR 85, as cited by Langille (1986) at 189.

¹⁹⁰⁹ Which seeks to ascertain legislative intent as to the body upon which the legislature intended to confer the decision-making power in question; *Bibeault* at 1083-1087; Heckman (2009) at 770 – 771; *Dunsmuir* paras 30-31; Mullan 'Let's try again!' (2008) at 130.

¹⁹¹⁰ *Pushpanathan v Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982.

¹⁹¹¹ *Ibid* para 28.

determining the nature of the question in dispute was associated with identifying legislative intent.¹⁹¹²

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.’¹⁹¹³

This vague depiction of ‘jurisdictional questions’ exposed the jurisdictional label to judicial manipulation once more.¹⁹¹⁴ Recognising this danger in *Nolan v Kerry (Canada) Inc*,¹⁹¹⁵ 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.’¹⁹¹⁶

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*.¹⁹¹⁷ Of these, the Court’s description of ‘jurisdiction’ in *Public Service Alliance of Canada v Canadian Federal Pilots Association et al*,¹⁹¹⁸ is preferable. There, Evans JA

¹⁹¹² Ibid para 26; van Harten, Heckman & Mullan at 798; *Paschienenyk* para 18; Huscroft at 309. Note the similar approach adopted in *Council of Canadians with Disabilities* para 90, citing DP Jones & AS de Villars *Principles of Administrative Law* 4 ed (2004) at 140 and *Canada (Attorney General) v PSAC* [1991] 1 SCR 614 at 14.

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 inopportunistly labeling questions as jurisdictional, consult Kenall.

¹⁹¹⁵ *Nolan v Kerry (Canada) Inc* [2009] 2 SCR. 678 (SCC).

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.

¹⁹¹⁸ *Public Service Alliance of Canada v Canadian Federal Pilots Association et al* (2009) 392 NR 128 (FCA).

asserted that in disputes involving adjudicative or policy-making functions at least,¹⁹¹⁹ the presence of jurisdictional questions was best ascertained with reference to the standard of review analysis.¹⁹²⁰ 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.’¹⁹²¹ 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.¹⁹²²

The merits of *Canadian Federal Pilots* resemble those of many CCMA arbitrations.¹⁹²³ 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.¹⁹²⁴ 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.¹⁹²⁵ Where the answer to this enquiry is yes, the question should not be cast as jurisdictional.¹⁹²⁶

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.¹⁹²⁷ As Underhill remarks:

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 Heckman (2009) at 774-775. Consider too *Pushpanathan*.

¹⁹²⁵ *CUPE* (2003) para 149; Huscroft at 310; Keyes at 120-121 & 149; *Dunsmuir* paras 30-31.

¹⁹²⁶ When applying this test, reviewing courts should recall that commissioners are not tasked with resolving disputes correctly. Similarly, it should be remembered that jurisdictional issues cannot be determined with reference to the merits of disputes; *Gcaba* paras 74-75; *Booyesen v Minister of Safety and Security & others* (2011) 32 *ILJ* 112 (LAC) para 37; *Chirwa* para 155 and Fergus (2012).

¹⁹²⁷ 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.’¹⁹²⁸

To guard against this, reviewing courts must define the boundaries of questions before them carefully, with reference to the case at hand.¹⁹²⁹ Should the nature of the question in dispute become the chief determinant of applicable standards of review, doing so will be imperative.¹⁹³⁰ Without careful delineation of questions in dispute, consistency and coherency during review proceedings may not be achieved.¹⁹³¹

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,¹⁹³² 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.¹⁹³³ 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 statutes 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.¹⁹³⁴ When delineating the breadth of this range, contextual considerations come into play.¹⁹³⁵ Here, the intersection between the Canadian formulation of reasonableness and that of the Labour Courts¹⁹³⁶ is overt. Some might argue that Canadian law resultantly has little to offer in the search for a reliable and concise test for review.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.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.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.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.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.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.¹⁹⁴³ Like the *Bato Star* factors, the standard of review analysis emphasises the context in which the decision was

¹⁹³⁴ Ibid para 47.

¹⁹³⁵ *Khosa* paras 28 & 59.

¹⁹³⁶ For details, refer to *Sidumo*, *Fidelity* and chapters 3 and 4.

¹⁹³⁷ Ibid.

¹⁹³⁸ In the specific context of section 145 proceedings.

¹⁹³⁹ *Dunsmuir* para 66.

¹⁹⁴⁰ With reference to *Khosa*'s stipulation that the *Dunsmuir* principles applied to statutory grounds of review too.

¹⁹⁴¹ *Khosa* paras 28 & 59.

¹⁹⁴² Unless precedent clearly indicates the applicable standard.

¹⁹⁴³ *Dunsmuir* para 29; *THESL* para 22; Kenall at 122.

taken, with reference to specified criteria.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 *Bato Star* criteria may be assuaged.¹⁹⁴⁵

Of further value in Canadian law are the guidelines devised by the SCC in *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 statute¹⁹⁴⁶ or which entail its specific expertise similarly demand deference.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.¹⁹⁴⁸ Finally, both true questions of jurisdiction and all remaining irregularities (aside from those addressing procedural fairness), invite correctness review.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,¹⁹⁵⁰ the pressures under which they operate, and the intended informality of arbitration proceedings,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.

¹⁹⁴⁴ Ibid para 64.

¹⁹⁴⁵ As discussed in chapter 4. The principal difficulty with the *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.

¹⁹⁴⁶ Or statutes closely connected thereto.

¹⁹⁴⁷ *Dunsmuir* paras 51-56.

¹⁹⁴⁸ Ibid paras 29-31, 50 & 163.

¹⁹⁴⁹ Ibid.

¹⁹⁵⁰ Section 138 of the LRA.

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 ‘justifiab[ility], transparen[cy] and intelligibil[ity].’¹⁹⁵² To meet these standards, decisions are required to be defensible in terms of both the facts and the law.¹⁹⁵³ 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.¹⁹⁵⁴ To this extent, in Canada, both procedural¹⁹⁵⁵ 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.¹⁹⁵⁶

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.¹⁹⁵⁷ 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

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.¹⁹⁵⁸ To ensure the effective implementation of this notion in practice, it is vital to delineate the procedural ingredients of adequate reasons properly.¹⁹⁵⁹ These were addressed by the SCC in *Khosa*.¹⁹⁶⁰ 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.¹⁹⁶¹ Finally, reasons must be logically linked to the outcome and must disclose the reasoning path which the decision-maker followed.¹⁹⁶² 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 review¹⁹⁶³ and concurrently leaves room for deference. If imported into section 145 proceedings, it would explain the relationship between the *Carephone* and *Sidumo* standards too.¹⁹⁶⁴ It may further elucidate the circumstances in which substantive reasonableness may validly be applied as a resolute test.¹⁹⁶⁵ The confusion around these issues and the association between procedural and substantive reasonableness might then be resolved.¹⁹⁶⁶

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.

¹⁹⁵⁹ 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.

¹⁹⁶⁰ *Khosa* paras 66-67; the SCC's comments in *Khosa* were later augmented in *Lake* para 46.

¹⁹⁶¹ *Lake* para 46; *Khosa* paras 66-67.

¹⁹⁶² *Ibid.*

¹⁹⁶³ 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.

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.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,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',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.¹⁹⁷⁰ Not only does this depiction of the two tests rectify the controversy, but it explains the dual features of reasonableness.¹⁹⁷¹ Simultaneously too, the circumstances in which substantive reasonableness may remedy so-called 'procedural unreasonableness' are identified.¹⁹⁷²

The substantive aspect of reasonableness is more difficult to define.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

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.

¹⁹⁶⁸ *Newfoundland and Labrador Nurses' Union* para 16.

¹⁹⁶⁹ *Lake* para 46; *Khosa* paras 66-67.

¹⁹⁷⁰ And there is little doubt that this requirement remains valid; *Strategic Liquor Services* para 17, citing *Mpahlele* para 12.

¹⁹⁷¹ Consider *Fidelity* and *Sasol Mining*.

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.

¹⁹⁷³ *Woolley* at 269.

approaches to review (and to reasonableness) may be appropriate.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.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 *Khosa's* discussion of the latter. The *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.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.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 *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.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'

¹⁹⁷⁴ *Khosa* para 125.

¹⁹⁷⁵ *Ibid*; Klinck at 48-49; Mullan 'Let's try again!' (2008) at 137-140.

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.

¹⁹⁷⁷ The proposal is explained in greater detail in the conclusion to this thesis.

¹⁹⁷⁸ *Baker* para 53.

powers. Still, as both Mullan and Klinck warn, outright bans on judicial assessments of weight are dangerous.¹⁹⁷⁹ Any such ban should accordingly be qualified by the requirement that, to survive review, administrative attributions of weight must not be ‘manifestly disproportionate’.¹⁹⁸⁰ 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.¹⁹⁸¹ Doing so would remedy much of the controversy around the powers of reviewing courts’ to re-assess commissioners’ weight allocations.¹⁹⁸²

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.¹⁹⁸³ 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.¹⁹⁸⁴ 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.¹⁹⁸⁵ 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.¹⁹⁸⁶

¹⁹⁷⁹ Klinck at 55; Mullan ‘Proportionality’ at 233.

¹⁹⁸⁰ Mullan ‘Proportionality’ at 257-258.

¹⁹⁸¹ Consult the discussion in relation to *Khosa* paras 66-67 above and Heckman (2009) at 782.

¹⁹⁸² Compare *Transnet Freight Rail v NUM obo 112 Employees*, read with the critique thereof in chapter 3.

¹⁹⁸³ 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 t/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 t/a Interbrand Sampson v Cities Shepherd & others* [2010] 7 BLLR 746 (LC); *Jafta 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).

¹⁹⁸⁴ *Canadian Federal Pilots* para 14.

¹⁹⁸⁵ *Ibid* para 51.

¹⁹⁸⁶ 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.

jurisdictional questions and excesses of power, the proposed approach ought to apply equally to allegations arising under section 145(2)(a)(iii) of the LRA.

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 practices¹⁹⁸⁷ and just administrative action.¹⁹⁸⁸ Whereas efficiency, accessibility, flexibility and informality in dispute resolution are prized by the former,¹⁹⁸⁹ the right to administrative justice holds accountability, transparency, legal certainty and reasonableness above these values.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 *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.¹⁹⁹¹ As a result, following *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.¹⁹⁹² This necessitated that apposite deference be paid to commissioners' awards. Reviewing courts interpreted Froneman's judgment in *Carephone* in different ways and it was only in *Rustenburg Platinum Mines* that the confusion was

¹⁹⁸⁷ Section 23 of the the Constitution of the Republic of South Africa, 1996 ('the Constitution').

¹⁹⁸⁸ Section 33 of the Constitution. This is important due to the CCMA's status as an administrative institution; *Carephone (Pty) Ltd v Marcus NO & Others* [1998] 11 BLLR 1093 (LAC) paras 11-16; *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC) paras 88-89.

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; *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.

¹⁹⁹⁰ Amongst other values such as procedural fairness and openness; see sections 33 and 195 of the Constitution in particular.

¹⁹⁹¹ *Carephone* para 37.

¹⁹⁹² Evident in its exercise of legislatively conferred public power; *Carephone* paras 11-19 & 32.

clarified.¹⁹⁹³ 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.¹⁹⁹⁴

The decision in *Rustenburg Platinum Mines* was taken on appeal to the Constitutional Court.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.¹⁹⁹⁶ Like rational justifiability, reasonableness review permits scrutiny of outcomes and courts are consequently not confined to assessing procedural defects alone.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.¹⁹⁹⁸ Secondly, the grounds for review of section 145 remain valid and relevant.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.²⁰⁰⁰ Yet, this does not imply that the distinction between appeals and reviews is obsolete; on the contrary, it remains key.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.²⁰⁰² With these contextual factors in mind, suitable levels of deference should be afforded to commissioners’ decisions.²⁰⁰³ Finally, reasonableness comprises both substantive and

¹⁹⁹³ *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA & others* [2006] 11 BLLR 1021 (SCA).

¹⁹⁹⁴ *Ibid* para 29.

¹⁹⁹⁵ See *Sidumo*.

¹⁹⁹⁶ *Sidumo* para 109.

¹⁹⁹⁷ In terms of section 145 of the LRA.

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.

¹⁹⁹⁹ *Fidelity* para 101; *Southern Sun Hotel Interests (Pty) Ltd v CCMA & others* [2009] 11 BLLR 1128 (LC) paras 14 & 17.

²⁰⁰⁰ *Sidumo* para 108.

²⁰⁰¹ Consider *Carephone* para 32-37; *Sidumo* paras 105-110 and *Fidelity* paras 92-101.

²⁰⁰² *Sidumo* para 118; *Ellerine Holdings Ltd v CCMA & others* [2008] JOL 22087 (LAC) at 11.

²⁰⁰³ *Sidumo* para 109; *Palaborwa Mining Co Ltd v Cheetham & Others* (2008) 29 ILJ 306 (LAC) para 6.

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'être* 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

²⁰⁰⁴ *Southern Sun Hotel Interests* para 14; *Sasol Mining (Pty) Ltd v Commissioner Ngqeleni & others* [2011] 4 BLLR 404 (LC); *Pam Golding Properties (Pty) Ltd v Erasmus & others* [2010] JOL 24963 (LC) para 8. Consult too Anton Myburgh *The LAC's latest trilogy of review judgments: Is the Sidumo test in decline?* Paper presented at the SASLAW Gauteng Chapter Seminar, Cliffe Dekker Hofmeyr Inc, Johannesburg (24 July 2012) at 9-10.

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.

relevance, if any); the circumstances in which reasonableness may appropriately be applied as a resolute test and the designation and scope of the reasonableness standard.²⁰¹¹

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.²⁰¹² Strict definitions of the standard are unhelpful and due recognition for contextual variation is needed.²⁰¹³ However, the multiplicity of factors pertinent to reasonableness in labour dispute resolution renders determining reasonableness on a case by case basis unduly onerous.²⁰¹⁴ 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.²⁰¹⁵

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.²⁰¹⁶ 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

²⁰¹¹ For an in-depth discussion of these issues, consult chapter 3.

²⁰¹² *Bato Star* paras 41 & 54; *Sidumo* para 118; Cora Hoexter *Administrative law in South Africa* (2007) at 321; JR De Ville *Judicial Review of Administrative Action in South Africa* revised 1 ed (2005) at 211.

²⁰¹³ Hoexter (2007) at 502; Cora Hoexter 'Administrative action in the courts' 2006 *Acta Juridica* 303 at 303-304 & 318-319; De Ville (2005) at 213-214.

²⁰¹⁴ Consult in this regard *Bato Star* and chapter 4 of this thesis.

²⁰¹⁵ *Shoprite Checkers 3* para 31; *Herholdt v Nedbank Ltd* (2012) 33 *ILJ* 1789 (LAC) para 54.

²⁰¹⁶ 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.²⁰¹⁷ In this way, where the reasonableness standard applies, adequate room for manoeuvre is retained, in accord with the standard's inherent variability.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.²⁰¹⁹ Four considerations are prescribed in this regard. Comparatively to the *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.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 *Bato Star* and related contextual considerations do.²⁰²¹

Third, the guidelines expounded in *Dunsmuir* are instructive in linking the statutory defects in section 145 with appropriate standards of review.²⁰²² Again, the SCC's focus in *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.²⁰²³ The Court's declaration that reasonableness requires 'justifiability, transparency and intelligibility'²⁰²⁴ is equally useful. Not only does this description correlate with *Sidumo's* focus on 'transparency, openness and accountability' but *Dunsmuir's* endorsement of intelligibility affirms the significance of adequate reasoning for administrative accountability. These three elements of reasonableness were elucidated in both *Khosa* and *Lake*.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.²⁰²⁶

²⁰¹⁷ *Dunsmuir v New Brunswick* [2008] 1 SCR 190 para 66.

²⁰¹⁸ *Canada (Minister of Citizenship and Immigration) v Khosa* 2009 SCC 12 paras 28 & 59.

²⁰¹⁹ *Dunsmuir* para 29.

²⁰²⁰ In other words, whether the issue contested on review is a question of law, fact, discretion, jurisdiction or procedure.

²⁰²¹ See *Bato Star* para 45 and chapter 4 of this dissertation.

²⁰²² *Dunsmuir* paras 51-56.

²⁰²³ *Ibid* paras 29-31, 50 & 163.

²⁰²⁴ *Ibid* para 47.

²⁰²⁵ *Khosa* paras 66-67; *Lake v Canada (Minister of Justice)* [2008] 1 SCR 761 para 46.

²⁰²⁶ *Ibid*.

Fourth, according to *Dunsmuir*, reasonableness looks both to substance and procedure.²⁰²⁷ While the relationship between the two was initially contentious, Mullan proposed a sensible conciliation thereof which essentially coheres with subsequent judicial pronouncements.²⁰²⁸ 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.²⁰²⁹ 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.²⁰³⁰ Where they do not, the decision may be subject to review for so-called procedural unreasonableness,²⁰³¹ regardless of its substantive justifiability.²⁰³²

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.²⁰³³

The fifth significant feature of Canadian law appears from legislation – specifically from the Federal Courts and Administrative Tribunals Acts.²⁰³⁴ Both of these statutes stipulate grounds

²⁰²⁷ *Dunsmuir* para 47.

²⁰²⁸ 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.

²⁰²⁹ *Ibid.*

²⁰³⁰ Being clarity, disclosure and rationality of connections between reasons and outcome; consult chapter 6 in this regard.

²⁰³¹ 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.

²⁰³² 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.

²⁰³³ Full discussions of the manner in which Canadian law clarifies these issues are provided in chapter 6; they are therefore not discussed here.

²⁰³⁴ 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').

of review and, in varying degrees, the standards applicable to each ground.²⁰³⁵ 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.²⁰³⁶ 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.²⁰³⁷ 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.²⁰³⁸

Sixth, the SCC's directive in *Baker*²⁰³⁹ and subsequent cases, that judicial reallocations of weight are impermissible, is important.²⁰⁴⁰ 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 avoided²⁰⁴¹ and any proscription against judicial re-allocations of weight should therefore be suitably qualified.²⁰⁴²

Finally, the Canadian courts' attitude to jurisdictional questions offers useful guidance.²⁰⁴³ In Canada, the principle that correctness rather than reasonableness applies to jurisdictional

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.

²⁰⁴¹ David Mullan 'Proportionality – A proportionate response to an emerging crisis in Canadian judicial review law?' [2010] *NZ L Rev* 233 at 233 & 257-258; 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 55.

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.²⁰⁴⁴ While the precise test for jurisdictional questions was not specified in *Dunsmuir*, both *Pushpanathan* and *Canadian Federal Pilots* offer apposite solutions.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.²⁰⁴⁶ Where the answer to this enquiry is the decision-maker,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 *Canadian Federal Pilots*, is that the decision-maker must at least have had the power to interpret and apply the legislation (or law) concerned.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.²⁰⁴⁹

2. 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.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

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 *ILJ* 1497 at 1518; Fergus (2012) *SALJ*. Consider too *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.

²⁰⁴⁵ *Pushpanathan v Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982 paras 26-28; *Public Service Alliance of Canada v Canadian Federal Pilots Association et al* (2009) 392 NR 128 (FCA). Consult too *Toronto Hydro-Electric System Ltd v Ontario (Energy Board)* 2010 ONCA 284 ('*THESL*') paras 22, 33 & 34 and Kenall's discussion thereof in Dustin Kenall 'De-regulating the regulatory compact: The legacy of *Dunsmuir* and the "jurisdictional" question doctrine' (2011) 24 *Can J Admin L & Prac* 115.

²⁰⁴⁶ *Ibid.*

²⁰⁴⁷ In other words, the administrative decision-maker.

²⁰⁴⁸ *Canadian Federal Pilots* para 51.

²⁰⁴⁹ Fergus (2012) *SALJ*.

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.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’²⁰⁵² as a result of the commissioner’s failure to follow an appropriate procedure.²⁰⁵³ Provided the requisites of fairness and natural justice are met, defects should not be found.

Substantive findings²⁰⁵⁴ 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.²⁰⁵⁵ The test for adequate reasons may be couched as follows:

- a) Are the commissioner’s reasons clear and comprehensible?; and
- b) Did the commissioner *refer* to these reasons when explaining the outcome of his or her award?

The crux of this assessment is whether the court and the parties²⁰⁵⁶ are able to understand why and how the commissioner reached the conclusions he or she did.²⁰⁵⁷ If this is answered affirmatively, the commissioner’s reasons will be adequate, regardless of whether they justify the award on the merits.²⁰⁵⁸

In contrast, when testing reasonableness in outcome the following questions may be applied:

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; *Fidelity* para 36. For a discussion of the courts’ characterisations of ‘process-related unreasonableness’, consult Myburgh (2012).

²⁰⁵² Myburgh argues that, in *Herholdt*, the LAC found this test to set too high a threshold for review; Myburgh (2012) at 7; *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. *Transnet Freight Rail v Transnet Bargaining Council & others* [2011] 6 BLLR 594 (LC) para 17; *Sidumo* para 268; *Gaga v Anglo Platinum Ltd & others* (2012) 33 ILJ 329 (LAC) para 44; *Information Trust Corporation v Gous & others* (2005) 26 ILJ 2351 (LAC) paras 9-10; *Miladys v Naidoo & others* (2002) 23 ILJ 1234 (LAC) para 30; *Toyota SA Motors (Pty) Ltd v Radebe & Others* (2000) 21 ILJ 340 (LAC) para 41.

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.

²⁰⁵⁴ Including processes related thereto, such as the thought processes necessary to writing reasons for awards.

²⁰⁵⁵ That is not to suggest, however, that the two aspects are unrelated; on the contrary they are necessarily interlinked; *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.

²⁰⁵⁶ Remembering that often the parties to CCMA proceedings will be lay persons with minimal or no legal skills and expertise.

²⁰⁵⁷ *Lake* para 46, read with *Khosa* paras 66-67.

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

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.

²⁰⁶¹ 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 & Adriaan van der Walt ‘The role of reasonableness in the review of labour arbitration awards (Part 2)’ 2009 *Obiter* 530 at 539.

²⁰⁶² The test posed here distinguishes between questions of law, fact and discretion. Drawing these distinctions may be difficult but it nevertheless (arguably) remains possible. Mark G Underhill ‘*Dunsmuir v New Brunswick: A rose by any other name?*’ (2008) 21 *Can J Admin L & Prac* 247 at 256; Mark Aronson, Bruce Dyer & Matthew Groves *Judicial Review of Administrative Action* 3 ed (2004) at 184-187 fnnts 23-25. An instructive discussion of how to differentiate between these questions was provided in *Media Workers Association of SA & Others v The Press Corporation of SA Ltd* (1992) 13 *ILJ* 1391 (A) at 1396-1398. See also the references cited therein and specifically John Salmond (P Fitzgerald ed) *Jurisprudence: or the Theory of the Law* 12 ed (1966) at 65-75.

²⁰⁶³ With due reference to the established principle that where errors of law are immaterial, they do not warrant review; *Hira & another v Booyesen & another* 1992 (4) SA 69 (A); *Timothy v Nampak Corrugated Containers (Pty) Ltd* [2010] 8 *BLLR* 830 (LAC) at 833; *Pam Golding* paras 12-16 & paras 17-20; *State Information Technology Agency (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2008) 29 *ILJ* 2234 (LAC) (‘*SITA*’); consult too Nicci Whitear-Nel ‘*Carephone (Pty) Ltd v Marcus NO & Others*’ (1998) 19 *ILJ* 1425 (LAC) (1999) 20 *ILJ* 1483 at 1488-1489.

²⁰⁶⁴ Consider *CWIU & Others v Sopelogg CC* (1994) 15 *ILJ* 90 (LAC) at 97B-E.

²⁰⁶⁵ In *Reunert Industries (Pty) Limited t/a 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

²⁰⁶⁶ Consider, in this regard, *Alberta Teachers' Association v Alberta (Information & Privacy Commissioner)* 2011 SCC 61 para 34; David Quayat 'The correctness battle rages: *Alberta (Information & Privacy Commissioner) v Alberta Teachers' Association*' (2012) 25 *Can J Admin L & Prac* 179. Note, however, Quayat's argument at 188-189.

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*²⁰⁷⁴ 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.²⁰⁷⁵ Instead, the Court held that matters of that nature were discretionary. In turn, a narrow scope of review was indicated.²⁰⁷⁶ In reaching this conclusion, the LAC recorded the need to respect the Industrial Court's credibility findings in particular.²⁰⁷⁷ 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.'²⁰⁷⁸

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.²⁰⁷⁹ Simultaneously, due respect

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 Ltd 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.²⁰⁸⁰ A measure of uncertainty must inevitably be endured.²⁰⁸¹

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.²⁰⁸² 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.²⁰⁸³ 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.²⁰⁸⁴ 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].’²⁰⁸⁵

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.

²⁰⁸⁰ *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.

²⁰⁸¹ *Cheetham* para 13.

²⁰⁸² 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.

²⁰⁸³ *Bestel v Astral Operations Ltd & others* [2011] 2 BLLR 129 (LAC) para 24; *Shoprite Checkers 1* at para 30; Aronson, Dyer & Groves at 180.

²⁰⁸⁴ 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.

²⁰⁸⁵ 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,²⁰⁸⁶ applying this approach would have nominal precedential implications (if any). Thus, it need not be detrimental to future decisions.²⁰⁸⁷ Further, parties' rights to procedural fairness, reasonableness and lawfulness would not be unjustifiably limited by it.²⁰⁸⁸ If anything, allowing courts to interfere too readily with commissioners' factual findings may actually jeopardise, rather than protect, their rights.²⁰⁸⁹ 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.²⁰⁹⁰ Applying greater deference to this category of defect is therefore apt.²⁰⁹¹

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.²⁰⁹² This is the point where fairness comes into play and these decisions are discretionary in nature.²⁰⁹³ 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.

²⁰⁸⁶ Which was expressly rejected in both *Bato Star* and *Fidelity*.

²⁰⁸⁷ 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.

²⁰⁸⁸ Consider in this regard, *Whitear-Nel* at 1486; John Grogan 'Death of the reasonable employer: the seismology of review' (2000) 16(2) *Employment Law* 4; *Kynoch Feeds (Pty) Ltd v CCMA & others* [1998] 4 BLLR 384 (LC) at 395-396 and C Garbers 'Reviewing CCMA awards in the aftermath of *Sidumo*' 2008 (17) *Contemporary Labour Law* 84 at 85.

²⁰⁸⁹ 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.

²⁰⁹⁰ 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.

²⁰⁹¹ See Sharpe (2000) at 2164 fn 13; According to Sharpe, '...the American labour arbitration structure and experience testifies that a broad scope of judicial review of arbitration awards undermines these attributes of arbitration.' Consider too Harry Arthurs 'The Constitutionalisation of labour rights' *Institute for Development and Labour Law Occasional paper* 1/2004 (reprinted March 2005) at 8-11.

²⁰⁹² 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.

²⁰⁹³ 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.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'.²⁰⁹⁵

To the extent to which jurisdictional challenges are raised, or excesses of power alleged, the true nature of the allegation must be established.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.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,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'.²⁰⁹⁹

Finally, where parties allege misconduct, or that an award was improperly obtained,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.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.²¹⁰² Still, a word of caution is due here. The boundary between misconduct

²⁰⁹⁴ *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.

²⁰⁹⁵ Mullan (2010) at 233 & 257-258; Klinck at 55.

²⁰⁹⁶ Underhill at 256.

²⁰⁹⁷ Fergus (2012); *Dunsmuir* para 29; *THESL* paras 22, 33 & 34; Kenall.

²⁰⁹⁸ 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.

²⁰⁹⁹ *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.

²¹⁰⁰ Sections 145(2)(a)(i) & (b) of the LRA.

²¹⁰¹ David Mullan 'Establishing the standard of review: The struggle for complexity?' (2004) 17 *Can J Admin L & Prac* 59 at 66.

²¹⁰² *Ibid.*

and procedural irregularities arising during the proceedings must be clearly defined.²¹⁰³ In the absence of doing so, parties may disguise procedural defects as misconduct in order to secure correctness review.²¹⁰⁴ It is proposed that this boundary be delineated by confining misconduct to cases involving personal turpitude on the part of presiding commissioners.²¹⁰⁵ Similarly, contentions that an award was ‘improperly obtained’ relate to allegedly partial conduct by commissioners.²¹⁰⁶ 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.²¹⁰⁷ 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.²¹⁰⁸

²¹⁰³ 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.

²¹⁰⁴ 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.

²¹⁰⁵ Consult *Reunert Industries* at 1634-1636. It is beyond the scope of this paper to detail the indicators of personal turpitude here.

²¹⁰⁶ 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.

²¹⁰⁷ Read with section 33 of the Constitution and *Sidumo*.

²¹⁰⁸ Sections 23 and 33 of the LRA.

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