THE ROLE OF REASONABLENESS IN THE REVIEW OF LABOUR ARBITRATON AWARDS (PART 2)

Carli Botma
LLB LLM
Attorney, Francois le Roux Attorneys
Research Associate:
Labour and Social Security Law Unit
Nelson Mandela Metropolitan University
Port Elizabeth

Adriaan van der Walt
Bluris BA(Hons) LLB
Associate Professor
Head: Labour and Social Security Law Unit
Nelson Mandela Metropolitan University
Port Elizabeth

SUMMARY

This article is published in two parts. In the first part (published in the previous edition of *Obiter*) the general principles relating to administration review were established and the different forms of review considered. It was also established that the making of a CCMA arbitration award constitutes administrative action that is subject to the constitutional right to administrative justice; that justifiability is a constitutional requirement for just administrative action and that a failure to make a decision that is justifiable in terms of the reasons given may render an award reviewable in terms of section 145 of the LRA.

This second part of the article will build on the conclusions of the first by focusing on setting out the key findings made by the CC in *Sidumo v Rustenburg Platinum Mines Ltd* (2007 12 BLLR 1097 (CC)) as regards the test for reviewing arbitration awards in terms of section 145 of the LRA. The purpose is to establish how reasonableness might best be understood and defined as well as to determine its implications for subsequent review proceedings.

Case law that has sought to interpret and apply the principles established in *Sidumo,* will likewise be discussed in order to contextualise the place of reasonableness in the review of arbitration awards with a view better to understand its implications for the courts' review function. Particular attention will be given to determining the applicability of the reasonableness standard to jurisdictional reviews.

The principles laid down by the labour appeal court[1] in *Fidelity Cash Management Service v CCMA* (2008 3 BLLR 197 (LAC)) will also be discussed with the objective of determining whether the court's approach that an award is not reviewable because of flawed reasoning determining that the outcome is sustainable according to reasons identified in the record, and whether this finding is consistent with CC's findings in *Sidumo*.

It will also be considered whether the reasonableness standard as introduced by *Sidumo* will have any influence on the review of private arbitration awards in terms of section 33 of the Arbitration Act 42 of 1965[2] and whether parties can agree that an award would be reviewable on the same grounds and subject to the same test as a CCMA award.

Finally, proposals will be made in respect of the interpretation and application of the reasonableness principle for the purpose of assisting in review proceedings to come.

1 *SIDUMO* AND THE REVIEW OF CCMA ARBITRATION AWARDS

1 1 Introduction

In part one of this article, it was indicated that the leading case of *Carephone (Pty) Ltd v Marcus NO*[3] was decided on the basis of the wording of the administrative justice provision as contained in the 1993 Constitution, namely that administrative action should be *justifiable* in relation to the reasons given for it.[4] The 1996 Constitution, however, no longer uses this wording, but in section 33(1) rather provides that administrative action should be lawful, *reasonable* and procedurally fair.

The question subsequently arose whether the change in wording was material to the mannerism in which section 145 must be read, the argument being that the choice of words must be significant. In *Carephone*, however, the court seemed to regard "justifiability" and "reasonableness" as one and the same when it held that:[5]

> "Many formulations have been suggested for this kind of substantive rationality required of administrative decision-makers, such as 'reasonableness', 'rationality', 'proportionality' and the like (*cf eg* Craig *Administrative Law* above at 337 – 3349; Schwarze *European Administrative Law* (1992) 677). Without denying that the application of these formulations in particular cases may be instructive, I see no need to stray from the concept of 'justifiability' itself."

In *Shoprite Checkers* the court also demonstrated a willingness to view justifiability and rationality as similar, if not synonymous, concepts.[6] It was, however, only with *Sidumo supra* that the CC was finally offered an

1 Hereinafter "the LAC".
2 Hereinafter "the AA".
3 1998 11 BLLR 1093 (LAC).
4 S 24(d).
5 Par 37.
6 Par 25.

opportunity to express its opinion on the legal position in this regard. The CC, however, did not confine itself to such a determination, but also set out the standard to be applied in the review of arbitration awards in terms of section 145 of the LRA. In this paragraph the findings of the CC will be examined to establish the content of that standard.

1 2 *Sidumo* and the CC

The facts of the *Sidumo* case were not very complex. It basically involved the dismissal of a security guard tasked with guarding a high risk security point because he repeatedly neglected to search, either properly or at all, employees exiting the security point. Sidumo subsequently requested the CCMA to set an unfair dismissal dispute down for arbitration, at the conclusion of which the commissioner ruled that, although Sidumo was guilty of misconduct, dismissal was not an appropriate or fair sanction. Although the mine's subsequent review to the LC and appeal to the LAC was unsuccessful, a further appeal to the Supreme Court of Appeal[7] resulted in the overturning of both these decisions and the commissioner's finding being replaced with a ruling that the dismissal was fair. In reaching such a conclusion, the SCA made two important findings: firstly, the court held that a commissioner was required to show a measure of deference to the sanction imposed by the employer provided it was fair;[8] and secondly, it held that the Promotion of Administrative Justice Act 3 of 2000[9] subsumed the grounds of review in section 145(2) of the LRA, superceding the specialised enactment of the LRA.[10] On a further appeal to the CC, the latter, however, begged to differ and adopted a different approach which is discussed below.

1 2 1 The PAJA or the LRA

In part one of the article it was briefly considered whether a commissioner, in making an arbitration award, is performing an administrative act. In a sense, the PAJA's definition of administrative action in section 1 makes the determination easy: the courts are able to ask whether the nature of CCMA arbitration proceedings is such that it constitutes a decision taken by an organ of state exercising a public power or performing a public function in terms of legislation. The answer to this question is important in light of the enactment of the PAJA and its grounds for reviewing administrative action as contained in section 6(2); the contention being that, if answered in the affirmative, arbitration awards would be rendered subject to review in terms of the PAJA.

As mentioned above, the courts have held in *Carephone* and *Mkhize v CCMA*[11] that the CCMA constitutes an organ of state for purposes of the

7 Hereinafter "the SCA"'.
8 Par 48.
9 Hereinafter "the PAJA".
10 Par 25.
11 2001 1 SA 338 (LC).

1993 and 1996 Constitution respectively.[12] Besides the fact that the PAJA adopted the same definition of an "organ of state", the CCMA, in adjudicating labour disputes, is also generally recognised as a public institution created by statute, involved in the exercise of a public power and function.[13] On the face of it, the CCMA thus appears to engage in administrative action and should be subject to the PAJA. In fact, the only stroke against compulsory arbitration being classified as administrative action appears to be the requirement that a "decision" must be "of an administrative nature".[14] What is meant by this phrase remains something of a puzzle. According to Hoexter, however, any interpretation that attempts to re-introduce the classification of administrative functions as "judicial", "quasi-judicial", "legislative" and "purely administrative" should be resisted:[15]

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

The courts have had different opinions in relation to the question whether CCMA arbitrations are subject to the constitutional right to just administrative action. In *PSA obo Haschke v MEC for Agriculture*,[16] Pillay J held that:

> "Conceptually, arbitration is distinct from an administrative process (*Shoprite Checkers* (LC) at paragraph 89). It is adjudication that is alternative to litigation. Arbitration may have many features common with adjudicative administrative acts. However, merely because an official is conducting it under the auspices of an administrative organ does not alter its essential character."

In *Sidumo*, the CC was called upon to establish whether the SCA was correct in finding that CCMA arbitrations in terms of the LRA constitutes administrative action under the PAJA, having the effect that its decisions are subject to the PAJA standard of review, including being reviewable if not rationally connected to the information before the commissioner and the reasons for it.[17]

The CC agreed with the SCA that a commissioner, conducting a CCMA arbitration, is performing an administrative function,[18] but reasoned that the PAJA is not the exclusive legislative basis for review[19] and that section 145

---

12 See par 3 2 in Botma and Van der Walt "The Role of Reasonableness in the Review of Labour Arbitration Awards (Part 1)" 2009 *Obiter* 328 340.

13 See Hoexter *Administrative Law in South Africa* (2007) 52.

14 See s 1 of the PAJA.

15 Hoexter 191.

16 2004 8 BLLR 822 (LC) par 20.

17 Par 1.

18 Par 88.

19 Par 91-92.

of the LRA constitutes national legislation in respect of administrative action within the specialised labour law sphere:[20]

> "Section 33(3) read with item 23(2) of Schedule 6 to the Constitution contemplates that the national legislation referred to in section 33 of the Constitution is to be enacted in the future. It is clear that what was envisaged was legislation of general application. PAJA was the resultant legislation. The definition of administrative action in PAJA is extensive and intended to 'cover the field'. Nothing in section 33 of the Constitution precludes specialised legislative regulation of administrative action such as section 145 of the LRA alongside general legislation such as PAJA."

According to the court, such a conclusion is supported by section 210 of the LRA, which confirms the applicability of the latter act in the case of a conflict between its provisions and that of any other piece of legislation, and the principle that general legislation, unless specifically indicated, does not derogate from special legislation.[21] It is submitted that such reasoning is above reproach especially when considering what was contended before in respect of special statutory review.[22]

1 2 2 Justifiability or reasonableness

The court then proceeded to consider whether section 145 of the LRA is constitutionally compliant[23] and in the process indicated that it was not blind to the undesirability of having extensive grounds for review. Sachs J made the following comment:[24]

> "[I]n an open and democratic society based on human dignity, equality and freedom, it would be inappropriate to restrict review of the commissioner's decision to the very narrow grounds of procedural misconduct that a first reading of section 145(2) would suggest; at the same time, the labour-law setting, requiring a speedy resolution of the dispute with the outcome basically limited to dismissal or reinstatement, makes it inappropriate to apply the full PAJA-type administrative review on substantive as well as procedural grounds."

In seeking to read section 145 in a manner that meets the requirements of section 33(1) of the 1996 Constitution,[25] the court referred to *Carephone*:[26]

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

---

20 Par 89-90.
21 Par 99-103.
22 See par 2 2 5 in Botma and Van der Walt 2009 *Obiter* 338.
23 Par 89.
24 Par 158.
25 Par 105.
26 Par 106.

The CC then noted that, as opposed to the 1993 Constitution, the 1996 Constitution requires administrative action to be lawful, reasonable and procedurally fair.[27] The CC accordingly drew a distinction between the justifiability test as enunciated in *Carephone* and that of reasonableness:[28]

> "Carephone held that section 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is 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?"

Bato Star,[29] relied on by the CC in *Sidumo,* concerned a case wherein the CC had previously been called upon to consider the lawfulness of administrative action in the allocation of fishing quotas within the context of section 6(2)(h) of the PAJA. In that case the court had found that the section's *proviso* that a decision was reviewable "if it was so unreasonable that no reasonable person could have exercised the power" was to be construed:[30]

> "[C]onsistently with the Constitution and in particular section 33 which requires administrative action to be 'reasonable'. Section 6(2)(h) should then be understood to require a simple test, namely, that an administrative decision will be reviewable if, in Lord Cooke's words, it is one that a reasonable decision-maker could not reach."

In that case the court had also identified a few factors that can assist with the determination whether a decision was one that a reasonable decision-maker could not reach, which included 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 of the lives and well-being of those affected.[31]

On the basis of *Bato Star* the CC in *Sidumo* thus concluded that the standard of reasonableness entailed asking whether the decision reached by the commissioner was one that a reasonable decision-maker could not reach.

As was done in *Carephone* with justifiability, the court in *Sidumo* did not hold that reasonableness was an independent ground of review. It is submitted that the court, as in *Bato Star supra*, construed section 145 consistently with the 1996 Constitution and section 33(1) in particular. It is for this reason that the CC held that "section 145 is now suffused by the constitutional standard of reasonableness".[32] According to the ordinary

---

27 Par 105-106.
28 Par 110.
29 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC).
30 Par 44.
31 Par 45.
32 Par 106.

dictionary meaning of "suffuse", reasonableness is "spread over" or "covering" the section 145 grounds for review.[33] Lending further support to such an interpretation is the CC's continuous referral to the "standard for review" rather that the "ground for review".

Ngcobo J did not seem to understand this subtle difference when he rejected the submission that the rationality test, and, it is submitted, also the reasonableness test, are not independent grounds of review but grounds flowing from the provisions of section 145(2). According to him:[34]

> "[T]he effect of the test contended for by COSATU seems, to me, to be the same. It imports a constitutional standard for review that is based on the test that we announced in Pharmaceuticals in connection with constitutional constraints on the exercise of public power in general."

It is respectfully submitted that such an interpretation is incorrect. If the section 145 grounds for review are read so as to conform to the constitutional right to reasonable administrative action, it would amount to an indirect application of the 1996 Constitution. In terms of section 39(2) of the 1996 Constitution, courts are specifically required to promote the spirit, purport and objects of the Bill of Rights. This does however not mean that the LRA and section 145 are circumvented in order to rely directly on the 1996 Constitution. Ngcobo J actually acknowledged this when he held that:[35]

> "[W]here the legislation which is enacted to give effect to a constitutional right specifies the grounds upon which decisions of tribunals giving effect to that legislation may be reviewed, a court reviewing the decision of that tribunal should start with the interpretation of the statutory provision in question. And of course *the provision under consideration must be construed in conformity with the Constitution*."

It can be deduced that the CC only deviated from *Carephone* in so far as it held that the test or judicial threshold for interference on review was now reasonableness rather than justifiability. Although the CC held that section 145 was suffused by reasonableness, it is difficult to conclude from its judgment whether the court regarded reasonableness as a distinctive and separate ground of review or whether it approved of *Carephone's* approach, namely that reasonableness was to be deduced from section 145(2)(a)(iii) or any of the other remaining subsections. This submission is supported by the fact that it is difficult to reconcile the CC's finding with the arguments made before it, especially in so far as the Respondent employer in argument before the CC relied on the ground of unjustifiability, alternatively irrationality, as the basis for its attack,[36] without reference to any of the grounds of review contained in section 145(2)(a).

---

33 See explanation for "suffuse" in *Oxford Paperback Thesaurus* 2ed (2001) 218.

34 Par 251.

35 Par 249 (authors' own emphasis added).

36 Par 279.

1 2 3 Standard of reasonableness applied

Another question that arose in *Sidumo* was whether an award was reviewable because of a defective process of reasoning if the conclusions reached by the commissioner were nevertheless reasonable in relation to the evidentiary material before him as demonstrated by reasons other than those relied on by him. The SCA answered this question in the positive: contending that the focus was on the manner in which the commissioner had arrived at his conclusions:[37]

> "The question on review is not whether the record reveals relevant considerations that are capable of justifying the outcome. That test applies when a court hears an appeal: then the enquiry is whether the record contains material showing that the decision – notwithstanding any errors of reasoning – was correct. This is because in an appeal, the only determination is whether the decision is right or wrong … In a review, the question is not whether the decision is capable of being justified (or, as the Labour Appeal Court thought, whether it is not so incorrect as to make intervention doubtful), but whether the decision maker properly exercised the powers entrusted to him or her. The focus is on the process, and on the way in which the decision maker came to the challenged conclusion."

A study of the CC's judgment in *Sidumo* shows that, although it did not expressly approve of the approach of the SCA, it did not reject it out of hand. It is submitted that such a conclusion is supported by the following: The CC noted that the commissioner had basically advanced three reasons why the sanction of dismissal was unfair: firstly, no losses were sustained, secondly, the misconduct was unintentional or a mistake and lastly, there was no dishonesty.[38] However, although the CC accepted that there was no evidence that losses had flowed from Sidumo's neglect and that the commissioner was accordingly correct in his conclusion in that regard, the court found that the commissioner had erred in his remaining two reasons for finding the sanction of dismissal unfair. More particularly, Navsa AJ held that:[39]

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

Likewise, Navsa AJ held that:[40]

> "In respect of the absence of dishonesty, the Labour Appeal Court found the commissioner's statement in this regard 'baffling'. In my view, the commissioner cannot be faulted for considering the absence of dishonesty a

---

37 Par 30-31.

38 Par 113.

39 Par 116 (authors' own emphasis added).

40 *Ibid*.

> relevant factor in relation to the misconduct. However, *the commissioner was wrong to conclude that the relationship of trust may have not been breached.* Mr Sidumo was employed to protect the Mine's valuable property which he did not do. *However, this is not the end of the inquiry. It is still necessary to weigh all the relevant factors together in light of the seriousness of the breach.*"

Despite these erroneous findings made by the commissioner, the court noted among others Sidumo's years of clean and lengthy service and concluded that:[41]

> "[H]aving regard to the reasoning of the commissioner, *based on the material before him*, it cannot be said that his conclusion was one that a reasonable decision-maker could not reach. This is one of those cases where the decision-makers acting reasonably may reach different conclusions. The LRA has given that decision-making power to a commissioner."

From the CC's judgment it can be deduced that when a commissioner then makes a value judgment as to whether dismissal is unfair or too harsh a sanction in the circumstances, he must consider all materially relevant factors:[42]

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

Ray-Howett also contends that, by so applying the reasonableness test to the facts, the CC actually adopted the approach of the SCA:[43]

> "If one reads the judgment, it becomes evident that in assessing whether the commissioner's decision was reasonable, the court analysed the reasoning process followed by the commissioner and decided that it was not unreasonable primarily on the basis that while the commissioner's reasoning process was defective in one or two instances, these defects were not sufficiently serious to warrant a review of the ultimate decision."

It is submitted that it can also be said that, because the erroneous reasons of the commissioner did not amount to a defect in terms of section 145(2), the decision was not reviewable. *Sidumo* can accordingly be described as authority for the proposition that an award would not be reviewable merely because a commissioner advanced erroneous reasons for his finding; at best the erroneous reasons will serve as evidence of a reviewable ground that will in conjunction with other considerations have to

---

41 Par 119 (authors' own emphasis added).

42 Par 117 (authors' own emphasis added).

43 Ray-Howett "Is it Reasonable for CCMA Commissioners to Act Irrationally?" 2008 29 *ILJ* 1619 1629.

be sufficiently compelling to justify an inference that the decision is unreasonable.[44]

On the other hand, a commissioner's failure to consider all materially relevant factors can result in his decision being set aside on review, not because the decision itself is unreasonable, but because it does not reflect the outcome of a weighing-up of all of the materially relevant factors – the focus always being on the way in which the commissioner came to his decision.

1 3 Conclusion

It this paragraph it has been established that the CC in *Sidumo* confirmed that CCMA arbitration proceedings constitute administrative action, but that its awards are to be taken on review in terms of the LRA and not that of the PAJA and that the question on review is that of reasonableness and not justifiability. Further, it has been established that reasonableness is not a ground of review in addition to those listed in section 145(2) of the LRA, but a standard against which the reviewability of a decision is to be tested. In applying the standard of reasonableness, the LC is required to pose the question whether the decision, alleged to have been made by the commissioner as a result of the occurrence of one or more of the section 145 grounds for review, is one that a reasonable decision-maker could not reach.

Sidumo has further confirmed that erroneous reasons for decisions *per se* do not render awards reviewable. The focus will always be on the manner in which the commissioner came to the decision and whether the erroneous reasons are materially relevant thereto. The question will accordingly not be whether or not the reason is satisfactory or correct but whether it serves as evidence of a reviewable ground that will alone or in conjunction with other considerations be sufficiently compelling to justify an inference that the decision is unreasonable.

To this end, the nature of the erroneous reasons will have to be scrutinised by have regarding to the award and the record of the arbitration proceedings. Likewise the party bringing the review can substantiate his allegation that an award is reviewable with reference to the award and the record of the arbitration proceedings. It is, however, not the result *per se* that is attacked on review.

The CC's exposition of the content of the reasonableness standard is, however, not that clear and it can be foreseen that it will be those courts, charged with interpreting and applying *Sidumo*, that will add substance to the reasonableness standard as introduced in *Sidumo*. It can, however, be deducted from the CC's judgment, and more particularly its referral to a "range of reasonableness", that various findings made by a commissioner

[44] See *RSA Geological Services (A Division of De Beers Consolidated Mines Ltd) v Grogan* 2008 2 BLLR 184 (LC) par 50; and *Total Support Management (Pty) Ltd v Diversified Health Systems (SA) (Pty) Ltd* 2002 4 SA 661 (SCA).

can and will fall with the ambit of what is to be perceived as reasonable: reducing the possibility of awards being set aside on review. This more than anything else confirms that the focus on review is the alleged defect committed by the commissioner and not the correctness of the outcome of the award, cementing the distinction between an appeal and review.

2 SIDUMO AS INTERPRETED AND APPLIED IN SUBSEQUENT CASE LAW

2 1 Introduction

After the CC's judgment in *Sidumo* was handed down, various questions arose in relation to its interpretation and application for the purpose of dealing with subsequent review applications. In the process, case law seeking to clarify some of the confusion that has arisen in the aftermath of *Sidumo* followed quickly. In this paragraph, it will be discussed how the courts have interpreted and applied the *Sidumo* judgment in respect of the following: firstly, it will be established whether the courts have interpreted reasonableness as a test or ground for review. Secondly, it will be considered whether a reviewing court is entitled to rely on reasons other than those provided for by the commissioner in his award to determine the reasonableness of his decision. Adjacent hereto, it will be established whether the answer to the former question is influenced by review proceedings being classified as process- or outcome-focused. Then, following a discussion of the duty to consider materially relevant factors when making value judgments, the influence of reasonableness on jurisdictional reviews will be contemplated.

2 2 Reasonableness: test or ground

Ever since *Carephone* introduced justifiability to the review of arbitration awards, the courts have struggled to decide whether it should be described as a "test" or a "ground" for review.[45] That *Sidumo* has not changed this is evident from *Fidelity Cash Management supra* where Zondo JP, in his comments on *Sidumo*, alternated between referring to reasonableness as a "ground for review" and a "test on review". On the one hand, Zondo JP held that:[46]

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

On the other hand, Zondo JP described reasonableness as the "test on review" and a "stringent test".[47]

---

45 See par 3 in Botma and Van der Walt 2009 *Obiter* 339.
46 Par 92.
47 Par 99-100.

It is, however, submitted that the two terms should not be used interchangeably. This submission is based on the reasoning that there is a clear distinction between a "ground" and a "test" for review, which, depending on the one applicable, will have important implications for the review of awards. More particularly, it is submitted that, as a "ground" for review, reasonableness would constitute a reference to the *reason* for the review:[48] that is, parties to a dispute will launch a review application on the basis of an allegation that the award is unreasonable *per se*, which would by implication have the effect of extending the ambit of review. On the other hand, as a test for review, reasonableness would not necessarily extend the section 145(2) grounds for review, but would rather be a measure employed to examine whether the ground for interference on review, as captured in section 145(2), exists.[49] It is submitted that, in light of the findings in *Carephone* and *Sidumo*, the latter interpretation is to be preferred.

Although the judgment in *Sidumo* does not expressly apply the reasonableness standard to any particular ground for review contained in section 145(2), it is submitted that it is nevertheless what was contemplated by the CC when it held that the reasonableness standard should suffuse section 145 of the LRA. Such an interpretation is supported by the court's reliance on *Carephone*. In that case, the court had held that a commissioner had exceeded his powers in terms of section 145(2)(a)(iii) because his actions were not justifiable in terms of the reasons given for them. Not only does the *Sidumo* judgment consistently describe reasonableness as a standard rather than a ground for review, it also makes it clear that it only deviates from *Carephone* to the extent that "justifiability" is now replaced by "reasonableness":[50]

> "To summarise, *Carephone* held that section 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that section 145 is now suffused by the constitutional standard of reasonableness."

It is submitted that justifiability, as it was then, and reasonableness, as it is now, can be introduced as an independent ground of review, but only if the constitutionality of section 145 is challenged. In particular, litigants will have to challenge the constitutionality of section 145 of the LRA by either alleging that the remedy of review as provided for therein is inadequate[51] or does not give proper effect to the right to just administrative action as contained in the 1996 Constitution. The court will then be called upon to determine whether section 145 infringes the right to just administrative action as contained in the 1996 Constitution and, if so, whether the infringement can be justified as a permissible limitation in terms of the section 36 of the 1996 Constitution, failing which section 145 would be capable of being declared

---

48 Waite *The Oxford Paperback Thesaurus* 2ed (2001) 383.
49 Waite 870.
50 Par 110.
51 Currie and De Waal *The Bill of Rights Handbook* 5ed 32.

unconstitutional.[52] It is important to note that the constitutionality of section 145 was not challenged in *Sidumo* and that that aspect was accordingly not considered by the court.

2 3 Applying the reasonableness standard

When it is accepted that reasonableness is the *standard* applicable on review, the question that automatically follows is how this standard must be applied. A study of case law is invaluable in this regard. In *Fidelity Cash Management*, the court held that the reasonableness standard made it clear that a reviewing court was not to interfere with a commissioner's finding merely because it would have dealt with the matter differently:[53]

> "The court will need to remind itself that it is dealing with the matter on review and the test on review is not whether or not the dismissal is fair or unfair but whether or not the commissioner's decision, one way or another, is one that a reasonable decision-maker could not reach in all the circumstances."

Zondo JP also warned that:[54]

> "The test enunciated by the Constitutional Court in *Sidumo* for determining whether a decision or arbitration award of a CCMA commissioner is reasonable is a stringent test that will ensure that such awards are not 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 finding 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."

Similarly, in *Palaborwa Mining Co Ltd v Cheetam*,[55] a differently constituted LAC ruled that the test on review was narrower and simpler:[56]

> "The decision of the Constitutional Court in *Sidumo* does not entail a shift away only from any degree of deference towards employers. It also:
>
> (a) as in this case, reduces the scope for a dissatisfied employee to take his or her dispute further; and
>
> (b) reduces 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."

It is interesting to note that the SCA, in commenting on *Sidumo* in *Edgars Consolidated Ltd v Pillemer NO,*[57] does not believe that there is even a distinction between *Sidumo* and *Carephone* and held that:

---

52 See also *South African National Defense Union v Minister of Defense Chief of the South African National Defense Force* 2007 9 BLLR 785 (CC).

53 Par 99.

54 Par 100.

55 2008 6 BLLR 553 (LAC).

56 Par 6.

57 2010 1 BLLR 1 (SCA) par 16.

> "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 had preferred 'justifiability' whilst the Constitutional Court has preferred the term 'reasonableness.'"

The SCA accordingly found that the award was compliant with the *Sidumo* standard of reasonableness because the arbitrator's conclusion was rationally connected to the reasons she gave, based on the material available to her:[58]

> It is incredible to conceive that the *Sidumo* matter had to go through approximately five courts to determine the correct approach on the review of awards, only to hear afterwards that *Carephone* could have been applied all along; save that the wording of the 1996 Constitution rather than that of the 1993 Constitution ought to be utilized. Moreover, in *S A Municipal Workers Union on behalf of Petersen v City of Cape Town & others,*[59] Molahlehi J accepted that the rationality test was still part of our law "in the sense that the factors used in the rationality test can be utlised in the determination of whether or not an award is reasonable".[60]

Be that as it may, these extracts from the cases confirm that reasonableness is not recognised as a ground for review that has extended the scope for review. On the contrary, reasonableness is regarded as a test, and a stringent one at that, which reduces the scope for review. It is submitted that such an interpretation is consistent with the legislature's purpose of finally and expeditiously resolving disputes.[61]

2 3 1 Reasonableness of outcome or process

In the previous paragraph it was argued that *Sidumo* is authority for the view that erroneous reasons for decisions *per se* do not render awards reviewable, but that it would depend on whether the erroneous reason demonstrates a defect in the arbitration proceedings as contemplated by section 145; something that can be established from a perusal of the award and the record of proceedings. In *Fidelity Cash Management,* the LAC was, however, of the opinion that *Sidumo* made it clear that flawed reasoning was not reviewable if the decision of the commissioner could ultimately be sustained on the evidence before him:[62]

> "*the reasonableness or otherwise of a commissioner's decision* does not depend – at least not solely – upon the reasons that the commissioner gives for the decision. In many cases, the reasons which the commissioner gives for his decision, finding or award will play a role in the subsequent assessment of whether or not such decision or finding is one that a reasonable decision-maker could or could not reach. However, other reasons upon which the commissioner did not rely, to support his or her decision or finding but which

---

58 Par 23.
59 2009 30 ILJ 1347 (LC).
60 Par 26.
61 See par 2 in Botma and Van der Walt 2009 *Obiter* 331.
62 Par 102.

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

Zondo JP then held that:[63]

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

It is submitted that where the reasons advanced by the commissioner are inadequate for the purpose of determining the reviewability of a decision, a court will be entitled to consider the "material before the commissioner", as reflected in the record, to determine whether reasons can be identified that would support the decision made.[64] Similarly, a reviewing court can consider the record of proceedings to establish whether the erroneous reasons advanced by the commissioner were materially relevant to the decision questioned on review.

It is, however, submitted that there are strong indications that *Fidelity Cash Management* is wrong in its conclusion that a decision should not be set aside on review, despite it having been reached as a result of the commission of one or more of the grounds for review, provided the result is somehow capable of being justified by reasons identified in the record. Not only is it doubtful whether the LAC's findings are in line with that of the CC[65] in *Sidumo*, but it is submitted that such an approach would blur the distinction between the appeal and review processes. This potential danger was also recognised by the SCA in *Sidumo*:[66]

> "While the LAC in *Fidelity* goes out of its way to stress that on review the court should not substitute its own view of what the correct decision is, it is clear that the test adopted by the court in *Fidelity* is more akin to that in an appeal process than in a review. It may be argued that the austere approach effectively results, at least in some cases, in an appeal process. As I have argued above, under the *Fidelity* approach, the reviewing court is compelled to try to find its own reasons to justify the arbitrator's findings, thereby inexorably drawing the court into stepping into the shoes of the arbitrator by substituting the commissioner's reasoning process with that of its own."

---

63 Par 103 (authors' own emphasis added).

64 Provided the failure to give reasons does not constitute a defect in terms of s 145.

65 See par 1 2 3 above.

66 Ray-Howett 2009 *ILJ* 1631; and see also par 2 2 in Botma and Van der Walt 2009 *Obiter* 335.

Despite this, a number of judgments handed down after *Sidumo* has approved of *Fidelity Cash Management's* approach. In *Shoprite Checkers (Pty) Ltd v Sebotha NO*,[67] Francis J held that:

> "This court is concerned with the reasonableness of the conclusion itself. If the outcome is reasonable, it does not matter that there are flaws in the reasoning employed by the commissioner."

Likewise, in *Edgards Consolidated Ltd (EDCON) v The CCMA, Bracks NO and Pillay,*[68] the court reasoned that:

> "The issue on review is not whether the commissioner has erred or whether one agrees or does not agree with the award but whether it is a decision that a reasonable decision-maker could not have made. The applicant has dissected the award in an attempt to prove that it was not reasonable. The award can be subjected to some criticism but that does not render the award reviewable. The commissioner may have taken a longer route to reach his destination but eventually arrived at the correct destination. How he got there might be subjected to criticism. Some commissioners will be concise. Others will be long-winded, but if they all arrive at the correct destination, that which a reasonable decision-maker would have decided, the decision cannot be reviewed. As stated above, this Court is concerned with the reasonableness of the conclusion itself. *If the outcome is reasonable, it does not matter that there are flaws in the reasoning employed by the commissioner*."

It is submitted that a better approach would be to hold that a decision is not reviewable merely because the reason(s) given for is(are) unsatisfactory but that its reviewability depends on whether the erroneous or "bad" reasons for the decision can be ascribed to the occurrence of one or more of the grounds for review recognised in section 145(2) of the LRA. This would be in line with the finding in *Shoprite Checkers v Ramdaw NO*:[69]

> "In my view, it is within the contemplation of the dispute resolution system prescribed by the Act that *there will be arbitration awards which are unsatisfactory in many respects, but nevertheless must be allowed to stand because they are not so unsatisfactory as to fall foul of the applicable grounds of review.* Without such contemplation, the Act's objective of the expeditious resolution of disputes would have no hope of being achieved. In my view, the [commissioner's] award cannot be said to be unjustifiable when regard is had to all the circumstances in this case and the material that was before him."'

Also in *RSA Geological Services (A Division of De Beers Consolidated Mines Ltd) v Grogan*,[70] Pillay J held that:[71]

> "The arbitrator's finding was therefore based on a mistake of fact that is foundational to his reasoning. He used incorrect criteria for determining the conduct of the employees. As such, the mistake amounts to a reviewable irregularity."

---

67 2009 8 BLLR 805 (LC) par 23.
68 2009 1 BLLR 56 (LC) par 28 (authors' own emphasis added).
69 Par 7-8.
70 2008 2 BLLR 184 (LC).
71 Par 50.

Senama v CCMA[72] also supports the contention that the erroneous reason must be indicative of one or more of the grounds for review in order to ensure the decision's reviewability:

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

If the "bad reasons" constitute proof that the decision was reached as a result of the occurrence of one or more of the section 145(2) grounds for review, it should be set aside on review regardless of the fact that the decision may be sustainable by other reasons identified in the record. This is because the focus on review should always be the process leading to the decision and not the decision itself.[73] On this basis it does not matter whether or not the *outcome* can be sustained by good reasons identified in the record.

The question will thus always be whether the commissioner's "bad" reasons or mistakes serve as evidence of the occurrence of one or more of the section 145(2) grounds for review. To this end, the nature of the "bad reasons" will have to be scrutinised. On the other hand, if the "bad reason" amounts to an incorrect factual finding, as in the *Sidumo* case, which, as discussed *supra* is not a ground for review, the award would not be reviewable unless the incorrect factual findings constitute evidence of one or more of the reviewable grounds.[74] This would also be in harmony with the distinction between an appeal and review.[75]

2 3 2 Value judgments and the duty to consider materially relevant factors

In *Sidumo* the CC confirmed that a commissioner was to determine the fairness or otherwise of the sanction of dismissal in accordance with his own sense of fairness.[76] Fairness is, however, an elusive concept and, in deciding whether the sanction of dismissal is fair, a commissioner is basically making a value judgment.[77] Taken together with the fact that there exists a permissible range of reasonableness, it is submitted that it will not often happen that the commissioner's finding that dismissal was fair or unfair would be regarded as falling foul of the standard of reasonableness.

---

72 2008 9 BLLR 896 (LC) par 18-19.
73 See par 2 2 in Botma and Van der Walt 2009 *Obiter* 335.
74 See par 1 2 3 above.
75 See par 2 2 in Botma and Van der Walt 2009 *Obiter* 335.
76 Par 75-76.
77 See *NUMSA v Vetsak Co-operative Ltd* 1996 6 BLLR 697 (A).

On the other hand, the CC in *Sidumo* also held that a commissioner must consider all relevant circumstances[78] and identified a non-exhaustive list of factors that were to be taken into account when making such a value judgment. These include the importance of the rule(s) breached, the reason why the employer imposed the sanction of dismissal, the basis of the employee's challenge to the dismissal, the harm caused by the employee's conduct, the effect of dismissal on the employee and the employee's service record.[79] From *Fidelity Cash Management supra* it can be deduced that a commissioner's failure to consider these factors or to determine the fairness of dismissal based on his own sense of fairness, will render an award reviewable:[80]

> "Once the commissioner has considered all the above factors and others not mentioned herein, *he or she would then have to answer the question whether dismissal was, in all of the circumstances, a fair sanction in such a case.* In answering that question, he or she would have to use [his] or her own sense of fairness. That the commissioner is required to use his or her own sense of justice or fairness to decide the fairness or otherwise of dismissal does not mean that he or she is at liberty to act arbitrarily or capriciously or to be *mala fide. He or she is required to make a finding that is reasonable*."

Like S*idumo, Fidelity Cash Management* makes it clear that a value judgment must be made only following upon a consideration of all materially relevant factors. Should a commissioner accordingly fail to consider all materially relevant factors when determining the fairness of dismissal in light of his own sense of fairness, the award would be reviewable if it can be attributed to one or more of the grounds for review identified in section 145.

This principle has merely been reaffirmed in *Hulett Aluminium (Pty) Ltd v Bargaining Council for the Metal Industry*.[81] In that case, the Court was requested to review and set aside an award which ordered the reinstatement of an employee on the basis that the arbitrator had misapplied the principles relating to consistency. The Court referred to *Sidumo* and noted that in determining the fairness of dismissals:[82]

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

In light of the above, the court held that it was required to determine whether a reasonable decision-maker, based on the evidence and material before him, would have derived at a different decision. In applying this

---

78 Par 79.
79 Par 78.
80 Par 95.
81 2008 3 BLLR 241 (LC).
82 Par 27-28.

standard, the court concluded that the award was, objectively speaking, unreasonable and constituted a misapplication of the principles of parity considering the following:[83]

> "I am of the view, for the reasons set out below, that the decision of the commissioner in the current case is not reasonable. Objectively speaking, a reasonable decision-maker would have in the first place taken into account the approach that has been followed by both the courts and other dispute resolution institutions in dealing with the issue of parity. Secondly, he or she would have taken into account the serious nature of the offence and the fact that Mr Cassim was found guilty of an offence of a less serious nature than that of the employee. He or she would have found that the case of the applicant and that of Mr Cassim had different features and therefore fairness would not dictate that they be treated [as] like cases."

Likewise in *Edcon v Pillemer NO*,[84] Sangoni AJA held that:

> "[M]eaningful strides are taken to refocus attention on the supposed impartiality of the commissioner as a decision-maker at the arbitration whose function it is to weigh all the relevant factors and circumstances of each case in order to come up with a reasonable decision. It is, in fact, the relevant factors and the circumstances of each case, objectively viewed, that should inform the element of reasonableness or lack thereof."

The perception that sanction reviews are not easily susceptible to review is therefore subject to the *proviso* that the award must reflect a consideration of all materially relevant factors, the absence of misdirection on the part of the commissioner and an application of his mind to the facts and the law.

In light of the aforementioned, the findings in *Palaborwa Mining Co Ltd v Cheetam*[85] are very interesting. In that case, the Appellant employee was dismissed after a random alcohol test indicated that, contrary to a workplace rule, he had more than 0.05 grams of alcohol per 100ml of blood while on duty. At arbitration, the commissioner found that the Appellant employee's dismissal was both substantively and procedurally fair, but on review the LC set the award aside on the basis that the dismissal was substantively unfair because the commissioner had failed to have regard to the Appellant employee's personal circumstances:[86]

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

It is submitted that, in line with *Sidumo*, the LC had held that the award was reviewable, not because the commissioner's value judgment was

---

83 Par 32.

84 2008 5 BLLR 391 (LAC) par 21.

85 *Supra*.

86 Par 2 (authors' own emphasis added).

wrong, but because, in making his value judgment, the commissioner had failed to consider all materially relevant facts. On appeal, the LAC, however, disagreed and, with reference to *Sidumo*, found that the LC had wrongly interfered with the award:[87]

> "Despite the fact that decision-makers, acting reasonably, may reach different conclusions, the LRA has given the decision-making power to the commissioner and there it rests, unless it be concluded that a reasonable decision-maker could not reach such a conclusion. Indeed, read together with *Bato Star*, upon which the majority decision in *Sidumo* so strongly relies, the judgment has the clear effect that the courts, and, in particular, the Labour Courts, must defer (but not in an absolute sense) to the decision of the commissioner."

Other than for the above, the LAC did not address the correctness or otherwise of the LC's finding that the award was reviewable because the commissioner had failed to consider materially relevant factors. It is submitted that it may have provided the LAC with just the reason to do more than sympathise with the employee:[88]

> "I myself have a fair amount of sympathy for the employee but that is not the test since the *Sidumo* judgment."

2 3 3 Jurisdictional reviews

In *Fidelity Cash Management*, Zondo JP held that:[89]

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

From the above *dictum* it appears as if reviews of findings by the CCMA in respect of jurisdiction are unaffected by the reasonableness standard. Such a conclusion is confirmed by the even more recent judgment of the LAC in *SA Rugby Players' Association (SARPA) v SA Rugby (Pty) Ltd; SA Rugby Pty Ltd v SARPU SARPA*[90]. In that case, the LAC considered whether the LC had correctly declined to review an award which found that the rugby players concerned had been constructively dismissed following a failure to renew their contracts on the same terms and conditions despite their reasonable expectation that their contracts were so going to be renewed.[91] In finding that no dismissal had been proved, Tlaletsi AJA referred to *Benicon Earthworks & Mining Services (Pty) Ltd v Jacobs NO*[92] and noted that:[93]

---

87 Par 5.
88 Par 12.
89 Par 101 (authors' own emphasis added).
90 2008 9 BLLR 845 (LAC).
91 Par 3.
92 1994 15 ILJ 801 (LAC) 804C-D.

> "[T]he old Labour Appeal Court [has] considered the position in relation to the Industrial Court established in terms of the predecessor to the current Act. *The court held that the validity of the proceedings before the Industrial Court is not dependent upon any finding which the Industrial Court may make with regard to jurisdictional facts, but upon their objective existence*. The court further held that any conclusion to which the Industrial Court arrived at on the issue has no legal significance. This means that, in the context of this case, the CCMA may not grant itself jurisdiction which it does not have. Nor may it deprive itself of jurisdiction by making a wrong finding that it lacks jurisdiction which it actually has jurisdiction."

The LAC then concluded that:[94]

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

It is submitted that in terms of the judgments referred to above, the reasonableness standard is not applicable to so-called jurisdictional reviews; the question simply being whether the jurisdictional fact exists or not. Applicants reviewing finding of jurisdiction would accordingly only be required to show that the finding was wrong in order to succeed with the review application. Such an approach was endorsed in *City of Cape Town v SAMWU obo Jacobs*,[95] where AJA Tlaletsi held that:

> "[I]t is the general principle of our law that in determining whether the council had jurisdiction, the enquiry is not whether a finding by the commissioner that a council had or did not have jurisdiction is justifiable, rational or reasonable. The question that the Labour Court should have asked itself was whether, objectively speaking, the facts which must exist to clothe the council with jurisdiction did exist. If they exist then the council would have jurisdiction. If they do not exist, then the council had no jurisdiction to determine the dispute."

Such a conclusion, however, seems contrary to *Sidumo* when it is considered that the CC has held that a commissioner, *conducting a CCMA arbitration*, was performing an administrative function[96] and that such function was to be exercised reasonably. The court did not stipulate that the reasonableness standard was only applicable in the case of value judgments;[97] nor did the court hold that different standards were to be applied depending on the nature of the dispute at arbitration. Further, any requirement that implies that the applicant on review must show that the commissioner's finding was "wrong" in order to have it set aside, also creates the risk of blurring the distinction between an appeal and review. It

---

93 Par 40.
94 Par 41.
95 2009 9 BLLR 882 (LAC) par 27.
96 Par 88.
97 *Eg*, sanction and relief.

also does not take cognisance of the two different categories of jurisdictional facts identified by Corbett J in *SA Defence & Aid Fund v Minister of Justice*[98] and approved of by Zondo JP in *Fidelity Guards Holdings (Pty) Ltd v Epstein NO.*[99] In the former case that court has held that:[100]

> "Upon a proper construction of the legislation concerned, a jurisdictional fact may fall into one or other of two broad categories. It may consist of a fact, or state of affairs, which, objectively speaking, must have existed before the statutory power could validly be exercised. In such a case, the objective existence of the jurisdictional fact as a prelude to the exercise of that power in a particular case is justiciable in a court of law. If the court finds that objectively the fact did not exist, it may then declare invalid the purported exercise of the power (see eg *Kellerman v Minister of Interior* 1945 TPD 179; *Tefu v Minister of Justice and Another* 1953 (2) SA 61 (T)). On the other hand, it may fall into the category comprised by instances where the statute itself has entrusted to the repository of the power the sole and exclusive function of determining whether in its opinion the pre-requisite fact, or state of affairs, existed prior to the exercise of the power. In that event, the jurisdictional fact is, in truth, not whether the prescribed fact, or state of affairs, existed in an objective sense but whether, subjectively speaking, the repository of the power had decided that it did. In cases falling into this category the existence of the fact, or state of affairs, is not justiciable in a Court of law. The Court can interfere and declare the exercise of the power invalid on the ground of a non-observance of the jurisdictional fact only where it is shown that the repository of the power, in deciding that the pre-requisite fact or state of affairs existed, acted *mala fide* or from ulterior motive or failed to apply his mind to the matter. (See *eg*, *Minister of the Interior v Bechler* (*supra*); *African Commercial and Distributive Workers' Union v Schoeman NO* 1951 4 SA266 (T); *R v Sachs*, 1953 (1) SA 392 (AD)."

Commissioners are entrusted with the function of determining whether they have jurisdiction in a particular case.[101] It is accordingly submitted that in the review of commissioners' findings that they have the prerequisite jurisdiction to exercise their arbitration function, the focus should be on the commissioner's subjective reasons for his findings rather than the jurisdictional fact's objective existence. The rationale for such an approach is evident from *SARPA supra*. The commissioner ruled that in his opinion the rugby players had had a reasonable expectation that their contracts would be renewed, that the contracts had not been so renewed and that the failure to renew those contracts constituted a constructive dismissal. It is submitted that it is difficult to perceive how these facts would be capable of being purely, objectively determined.

It is further submitted that a court on review will only be able to review a decision following upon the non-observance of a jurisdictional fact if the commissioner, in deciding that the jurisdictional fact existed, committed one or more of the section 145 grounds for review. Within the context of such an interpretation it would be proper for the court on review to ask whether a jurisdictional finding was one that a reasonable commissioner could make.

---

98 1967 1 SA 31 (C).

99 2000 12 BLLR 1389 (LAC).

100 34H-35D.

101 See Rule 22 of the Rules for the Conduct of Proceedings before the CCMA.

2 4 Conclusion

In this paragraph it has been established that reasonableness is a test for review and not a ground and that references to reasonableness as a ground for review should be avoided because of the distinction between the two concepts. Moreover, as a test as opposed to a ground, reasonableness has not extended the ambit of review, but has in fact simplified and narrowed it. When applied, the court is required to review and set aside an award if the decision, alleged to be arrived at as a result of the occurrence of one or more of the grounds for review contained in section 145(2) of the LRA, is one that a reasonable decision-maker could not have made in all the circumstances of the case.

It has further been established that it is doubtful whether *Fidelity Cash Management* was correct in holding that a flawed process of reasoning was not reviewable if the conclusion reached by the commissioner was sustainable on the evidence before him. The focus should always be on the way in which the commissioner arrived at his conclusions, rather than the outcome of the process. This does, however, not mean that any defect or error in the reasoning process will render a decision reviewable; it all depends on whether or not the erroneous or "bad" reasons for the decision can be ascribed to one or more of the grounds for review in terms of section 145 of the LRA.

It has further been established that in so far as the focus in jurisdictional reviews is on the commissioner's subjective reasons for his findings rather than the jurisdictional fact's objective existence, the reasonableness standard is capable of being applied thereto. It follows that a court on review will be able to set aside a decision following upon non-observance of the jurisdictional fact if the commissioner, in deciding that the jurisdictional fact existed, committed one or more of the section 145 grounds for review.

3 THE REASONABLENESS STANDARD AND PRIVATE ARBITRATION AWARD REVIEWS

3 1 Introduction

The AA and the resultant ability to agree to have a dispute heard and determined by an impartial third party pre-existed the LRA and the CCMA. Although today the LRA primarily allocates the function of conciliating and arbitrating disputes to the CCMA and bargaining councils, it has not deprived disputing parties from entering into agreements providing for the private arbitration of their dispute. The so-called distinguishable obligatory- and consensual arbitration processes accordingly co-exist within a single labour law system, often causing confusion when a party, dissatisfied with an award, seeks to challenge it: Not only does a challenge to the awards of both processes entail a review to the LC, meaning that both the remedy and the forum to approach to obtain such is the same, but the grounds on which

to do so appear upon a comparison, in both processes, for all intent and purposes also to be identical. Inherently the question arises whether or not section 33(1) of the 1996 Constitution also has the effect of suffusing the AA's grounds for review to the extent that it has to be established whether the decision is one that a reasonable decision-maker could not reach or whether the review of private arbitration awards are confined to the grounds expressly mentioned in section 33(1) of the AA. If the reasonableness standard is not so applicable to private arbitration award reviews, it must be considered whether disputing parties can nevertheless by agreement ensure its applicability or whether this would amount to imposing a jurisdiction on the LC that it does not have. Even when it is accepted that the disputing parties cannot conclude such an agreement, it only raises the question whether any other remedy is available to them to ensure that a decision is reflected upon on wider terms than that provided for in the AA.

In this paragraph the nature of private arbitrations will be discussed and essential characteristics thereof identified for the purpose of determining whether it, like CCMA arbitrations, also constitutes administrative action. The courts' different approaches to establishing whether or not private arbitration award reviews are also subject to the reasonableness standard will be discussed and the correct approach identified. In the course of the discussion, it will also be sought to establish whether there are other means, other than a review to the LC, by which disputing parties can ensure a scrutiny of a decision based on the principles of the reasonableness standard.

3 2 Nature of private arbitration

Bosch defines private arbitration as:[102]

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

In *Total Support Management (Pty) Ltd v Diversified Health Systems (SA) (Pty) Ltd*,[103] the SCA also described the distinctive attributes of private arbitration as follows:[104]

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

---

[102] Bosch, Molahlehi and Everett *The Conciliation and Arbitration Handbook A comprehensive Guide to Labour Dispute Resolution Procedures* (2004) 149.

[103] 2002 4 SA 661 (SCA).

[104] Par 24.

The voluntary nature of private arbitration proceedings, as emphasised in the above extracts, is notably different from the compulsory arbitrations conducted under the auspices of the CCMA.[105] It is submitted that these material differences contribute greatly towards determining whether the reasonableness standard is also applicable to private arbitration award reviews.

A study of case law however reveals that there is also an important similarity between a private and CMMA arbitration award review: the courts, in reviewing private arbitration awards, adopt a narrow approach to the grounds upon which an award may be set aside that is very similar to the one adopted in relation to CCMA arbitration awards. This is evident from *Academic & Professional Staff Association v Pretorius SC NO*:[106]

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

More specifically, case law reveals that in relation to the ground of misconduct, a *bona fide* mistake of law or fact does not qualify; neither does a gross or manifest mistake *per se* constitute misconduct.[107] Also, an irregularity in the proceedings must involve a "dialectical facet of the process" and "how the decision maker arrived at his decision" rather than the correctness of the finding of fact or law – to such an extent that it can be concluded that the affected party has been denied a fair hearing;[108] whereas a "mistaken action" must be of such a serious nature that it resulted in the applicant's case "not being fully and fairly determined".[109]

In *NUM obo 35 employees v Grogan NO*,[110] the court, however, explains the rationale behind such an approach:[111]

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

---

105 See *Seardel Group Trading (Pty) Ltd t/a The Bonwit Group v Andrews NO* 2000 10 BLLR 1219 (LC) par 43.

106 2008 1 BLLR 1 (LC) par 59.

107 *Dickenson & Brown v Fishers Executives* 1915 AD 166; and *Total Support Management (Pty) Ltd v Diversified Health Systems SA (Pty) Ltd supra* par 15 and 21.

108 See *Clear Channel Independent (Pty) Ltd v Savage NO* 2009 5 BLLR 439 (LC) par 43.

109 Par 45.

110 2007 4 BLLR 289 (LC).

111 Par 43.

In *Seardel Group Trading (Pty) Ltd t/a The Bonwit Group v Andrews NO,*[112] the court also accepted that section 33 of the AA is not unconstitutional to the extent that it limits the grounds for review:[113]

> "Further, the constitutionality of section 33 of the Arbitration Act has not been placed in dispute *in casu*. In my view, the clear purpose of section 33 of the Arbitration Act is to limit the grounds for review, both in regard to common law grounds of review and now also in regard to so-called 'constitutional grounds' of review.
>
> I, however, accept the constitutionality of these review provisions, also taking into account the judgment in *Patcor Quarries CC v Issroff and others* 1998 (4) BLLR 467 (SE) where it was held that section 33 of the Arbitration Act does not infringe upon the administrative justice clause of the Bill of Rights, that is, section 33 of the Constitution."

The approach to private arbitration award reviews is accordingly very similar to that of CCMA arbitration award reviews: applicants for review are confined to the grounds for review as laid down in section 33(1) of the AA and, like section 145 of the LRA, section 33(1) of the AA is not unconstitutional. The only question that remains is whether its grounds are also suffused by reasonableness. Arguments raised in support of such an interpretation include that there is a need for a single and uniform test to apply to labour-related review matters and that the constitutional right to fair labour practice applies to every employee.[114]

3 3 Reasonableness and private arbitration award reviews

The wording of section 33(1) of the 1996 Constitution makes it clear that reasonableness relates only to administrative action. It can thus be deduced that, on review, a private arbitration award would only be subject to the reasonableness standard as explained in *Sidumo* if private arbitrations, like CCMA arbitrations, can be classified as administrative action. This is evident from the following held in *NUM obo 35 employees supra*:[115]

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

Initially the courts, however, paid little attention to this basic qualification, focusing rather on the similarities between the grounds of review of CCMA and private arbitration awards, rather than the underlying nature of the

---

[112] 2000 10 BLLR 1219 (LC) par 35-36.
[113] Par 35-36.
[114] See *Clear Channel Independent (Pty) Ltd supra* par 24.
[115] Par 43.

arbitrations themselves. *Ntshangane v Speciality Metals CC*[116] is a case in point. In that case, Mlambo J noted that the provisions of section 33(1)(b) of the AA were almost identical to the provisions of section 145 of the LRA and held that:[117]

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

Similarly, in *Transnet Ltd v Hospersa*[118] Mlambo J again held that:

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

In *Orange Toyota (Kimberley) v Van der Walt*[119] Molahlehi AJ agreed with *Transnet supra* that the test for review of the CCMA arbitration awards, as set out in *Carephone* was equally applied to reviews in terms of section 33 of the AA. However, in *Eskom v Hiemstra NO*[120] Landman J disagreed with *Transnet* when he held that:

> "The basis of the decision in *Carephone* was that the CCMA was an organ of state. Being an organ of state and exercising a compulsory function, a commissioner of the CCMA was obliged to adhere to section 33 of the Bill of Rights included in the Constitution of the Republic of South Africa of 1996 (as read with item 23(b) of Schedule 6). This section deals with the nature of administrative fairness which persons may expect from an organ of state in South Africa.
>
> An arbitration, conducted on a voluntary basis in terms of the Arbitration Act of 1965 need not, and is usually not, conducted by an organ of state. In this case the parties' arbitrator is a private citizen and not an organ of state. Section 33 and the test of justifiability is not applicable to this situation. Policy considerations do not enter into picture for our law has always recognised that by choosing one's forum one may be choosing a different standard of justice. *A fortiori*, as in this case, the parties have chosen not to approach the Labour Court in the first instance."

Also, in *Seardel Group Trading*,[121] Basson J, with reference to section 40 of the AA, emphasised that arbitrations conducted under a collective

---

116 1998 3 BLLR 305 (LC).
117 Par 34.
118 1999 7 BLLR 732 (LC) par 15.
119 2001 1 BLLR 85 (LC).
120 1999 10 BLLR 1041 (LC) par 17-18.
121 Par 25-26.

agreement was consensual in nature and that the arbitration award *in casu* stood to be reviewed in terms of the limited grounds for review set out in section 33 of the AA:[122]

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

In *Stocks Civil Engineering (Pty) Ltd v Rip NO*,[123] the LAC had an opportunity to consider the applicability of the wider review test in private arbitrations and, in accepting the approach adopted in *Eskom v Hiemstra supra,* held that:

> "Private arbitrations are subject to the Arbitration Act 42 of 1965. Section 40 provides for an exception where an Act of Parliament expressly or by implication excludes its operation. An example is section 145 of the LRA. There is no such exception in the case of private arbitrations. Consideration of expediency based upon the fact that the arbitration provisions of the LRA coincides with those of the Arbitration Act and that it would be preferable for the Labour Court to apply one test throughout, cannot override the clear provisions of the Arbitration Act. I do not share the view of Molahlehi AJ (*sic*) in the *Orange* Toyota case (*supra* at paragraph 13) that the Arbitration Act is to be read subject to the Constitution and that therefore the test for the review of the CCMA arbitration awards set out in *Carephone* judgment will equally apply to reviews in terms of section 33 of the Arbitration Act. The important difference between the two types of arbitrations is that CCMA arbitrations were held to be by an organ of State to which the Constitutional precepts for just administrative action applied, whereas private arbitrations are not. This arbitration therefore has to be evaluated against the norms laid down in section 33(1) of the Arbitration Act as if this were a High Court doing likewise."

The matter was finally laid to rest by the SCA in *Total Support Management (Pty) Ltd G W Slabbert v Diversified Health Systems SA (Pty) Ltd P E B Reynolds.* The court, in addressing the impact of section 33(1) of the 1996 Constitution on private arbitration award reviews, noted that it was only administrative action that was subject to the administrative justice right in section 33(1). Smalberger ADP referred to both the general definition and the PAJA definition of administrative action and found that private arbitration did not fall within the purview thereof. According to the court, the distinctive attributes of private arbitration demonstrated that it arose through the exercise of private powers: the arbitration flowed from an agreement between parties that a binding decision will be taken by an arbitrator; the agreement prescribed the process by which the substantive rights of the parties were to be determined; the arbitrator, or the method of choosing an

---

[122] Par 33.

[123] 2002 3 BLLR 189 (LAC) par 24.

arbitrator, was agreed upon by the parties; and the dispute, formulated at the time of appointing the arbitrator, was determined in an impartial manner.[124]

Smalberger ADP concluded that:[125]

> "The hallmark of arbitration is that it is an adjudication, flowing from the consent of the parties to the arbitration agreement, who define the powers of adjudication, and are equally free to modify or withdraw that power at any time by way of further agreement. This is reflected in sec 3(1) of the Act. As arbitration is a form of private adjudication the function of an arbitrator is not administrative but judicial in nature. This accords with the conclusion reached by Mpati J in *Patcor Quarries CC v Issroff and Others* 1998 (4) SA 1069 (SECLD) at 1082 G. Decisions made in the exercise of judicial functions do not amount to administrative action (cf *Nel v Le Roux NO and Others* 1996 (3) SA 562 (CC) at 576 C (para [24]), and compare also the exclusionary provision to be found in (b) (ee) of the definition of 'administrative action' in sec 1 of the Promotion of Administrative Justice Act). It follows in my view that a consensual arbitration is not a species of administrative action and sec 33(1) of the Constitution has no application to a matter such as the present."

In *Telcordia Technologies supra*, Harms JA referred to *Total Support Management* with approval and confirmed that:[126]

> "Last, by agreeing to arbitration the parties limit interference by courts to the ground of procedural irregularities set out in s 33(1) of the Act. By necessary implication they waive the right to rely on any further ground of review, 'common law' or otherwise. If they wish to extend the grounds, they may do so by agreement but then they have to agree on an appeal panel because they cannot by agreement impose jurisdiction on the court. However, as will become apparent, the common-law ground of review on which Telkom relies is contained – by virtue of judicial interpretation – in the Act, and it is strictly unnecessary to deal with the common law in this regard."

It can thus be accepted that arbitrators do not engage in administrative action when issuing private arbitration awards and that such awards are accordingly not subject to the scrutiny of the reasonableness standard on review. The question whether parties can nevertheless agree in their terms of reference that such an award would be reviewable by the LC subject to the reasonableness standard is discussed below.

3 4 Application of the reasonableness standard by agreement

Case law reveals that the courts have different opinions in relation to this question.

In *Seardel Group Trading supra*, Basson J, in interpreting a collective agreement, accepted that although private arbitration awards were generally only reviewable in terms of section 33(1) of the AA,[127] parties could by

[124] Par 24.
[125] Par 25.
[126] Par 51.
[127] Par 59.

agreement render the justifiability standard applicable to private arbitration award reviews:[128]

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

The court then proceeded to apply the justifiability test and ruled that:[129]

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

In *NUM obo 35 employees,* the court also noted that the award was challenged on the assumption that the justifiability standard was applicable.[130] In determining whether such an assumption was correct, the court referred to *Total Support Management* and noted that in that case the SCA had found that private arbitration did not fall within the purview of administrative action in so far as it involved the exercise of private as opposed to public powers, rendering rationality review inapplicable.[131] The court accordingly held that:[132]

> "In the premises, I am of the view that I am limited to reviewing the arbitrator's award in accordance with the provisions of section 33 of the Arbitration Act. Therefore the question to be asked and answered is whether in reaching his conclusion that the dismissals were substantively unfair, the arbitrator committed misconduct or was guilty of a gross irregularity in the conduct of the arbitration."

In considering whether the parties could nevertheless by agreement incorporate the rationality review standard into private arbitration award proceedings, the court held that:[133]

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

---

[128] Par 55.
[129] Par 58.
[130] Par 41.
[131] Par 44.
[132] Par 44.
[133] Par 44.

On the other hand, in *RSA Geological Services (A Division of De Beers Consolidated Mines Ltd) v Grogan*,[134] Pillay J accepted the parties' agreement in the arbitrator's terms of reference that the award would be subject to review on the CCMA grounds, including the test of rationality or justifiability, without considering the question whether it did not constitute the imposition of jurisdiction that the court did not have:[135]

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

Also, in *Clear Channel Independent (Pty) Ltd supra,*[136] Molahlehi J held that:

> "In other words, by agreeing to refer their disputes to private arbitration the parties limit interference by court to the grounds of procedural irregularities as set out in section 33(1) of the Arbitration Act. The consequence of agreeing to refer the matter to private arbitration is that the parties waive right to rely on any further ground of review be it "common law" or otherwise. The grounds of review as set out in section 33(1) of the Arbitration Act can only be extended by agreement between the parties. It would seem to me in this regard that the parties may well agree that the grounds for review should include the reasonable decision maker test as suffused in section 145 if the LRA in term of the *Sidumo* decision, *supra*. In the absence of an agreement incorporating the reasonable decision-maker test into the terms of reference, the applicable law, in as far as review of private arbitration is concerned, is that as set out in *Telcordia*, *supra*."

It is submitted that, in light of the findings of the SCA in *Total Support Management* and *Telecordia Technologies*, the question whether or not parties can agree to the application of the reasonableness standard on review has become moot. It is, however, concerning that judgments like that in *RSA Geological Services* and *Clear Channel Independent (Pty) Ltd supra* are delivered contrary to the clear precedent available.

3 5 Conclusion

To the extent that section 33(1) of the AA limits the grounds for reviewing private arbitration awards, it is not unconstitutional; neither is such an arbitration a specie of administrative action. The consensual nature of private arbitration serves as justification for the restraint upon interference and is the reason why the reasonable standard is not applicable to the review of its awards. Review applications must accordingly be considered only in terms of the grounds explicitly mentioned in section 33(1) of the AA.

---

[134] *Supra*.
[135] Par 10.
[136] Par 38.

Parties can also not in their terms of reference agree on the applicability of the reasonableness standard on review because it would have the effect of parties by agreement imposing jurisdiction on the LC that the latter does not statutorily have. Nothing, however, precludes the disputing parties from agreeing on the appointment of a private review or appeal panel and clothing such body with the power to review on the basis of reasonableness.

4 CONCLUSION

It has been established that our labour law system is founded on the principle that labour disputes should be resolved quickly, finally and with the minimum of formality.[137] In giving effect to this objective, the legislature entrusts the CCMA with the function of resolving disputes at arbitration level without conferring a right of appeal against its findings to the LC. Rather such a high price is placed on the finality of arbitrations, that the legislature deems it adequate that disputing parties review awards in terms of the narrowly defined grounds for review provided for in section 145 of the LRA. This special statutory review remedy is of a far more restrictive scope than an appeal because the challenged decision cannot be set aside on review on the basis that it is incorrect; its reviewability depends on whether the arbitration proceedings or the commissioner's process of reasoning can be described as defective in one or more of the ways contemplated by section 145(2) of the LRA.[138]

The making of arbitration awards, however, also constitutes administrative action that is subject to the constitutional imperatives of the right to just administrative action as contained in the 1996 Constitution and reasonableness in particular.[139] This does, however, not mean that applicants on review can rely directly on section 33(1) of the 1996 Constitution or, to the extent that the PAJA has been enacted to give effect thereto, on the broader grounds of section 6(2) of the latter Act to review CCMA arbitration awards on the basis of unreasonableness. Section 145 of the LRA constitutes administrative action legislation within the specialised labour law sphere and applicants on review must rely on its provisions to secure the setting aside of a decision. The fact that reasonableness is not recognised as a ground therein is significant. The restrictive scope of section 145 does, nevertheless, not fall foul of the constitutional imperatives imposed by the right to just administrative action; a constitutionally consistent interpretation of it has the effect that reasonableness suffuses the statutory defined grounds for review. On this interpretation, reasonableness is a standard against which the reviewability of a decision is to be tested and it entails the LC posing the question whether the decision, alleged to have been made by the commissioner as a result of the occurrence of one or more of the section 145 grounds for review, is one that a reasonable decision-maker could not reach.

---

[137] See par 1 in Botma and Van der Walt 2009 *Obiter* 329.
[138] See par 2 in Botma and Van der Walt 2009 *Obiter* 331.
[139] See par 1 above.

In determining whether a decision falls within the permissible range of reasonableness, the LC is entitled to scrutinise both the award and the record of the arbitration proceedings. In doing so, courts must, however, be mindful that erroneous reasons for decisions *per se* do not render awards reviewable. The focus will always be on the manner in which the commissioner came to the decision and whether the erroneous reasons are materially relevant thereto. The question will accordingly not be whether or not the reason is satisfactory or correct but whether it serves as evidence of a reviewable ground that will alone or in conjunction with other considerations be sufficiently compelling to justify an inference that the decision is unreasonable. It is not the outcome *per se* that is attacked on review and the court should not consider the record merely for the purpose of identifying reasons that are capable of sustaining the conclusions reached.

It has further been established that the reasonableness standard is also capable of being applied to jurisdictional reviews because the focus is on the commissioner's subjective reasons for his findings rather than the jurisdictional fact's objective existence. A court on review will thus be able to set aside a decision following upon non-observance of the jurisdictional fact if the commissioner, in deciding that the jurisdictional fact existed, committed one or more of the section 145 grounds for review.

In the case of private arbitration awards, the AA caters for its review on grounds specified in section 33(1). Like the section 145(2) grounds for review, these grounds are also narrowly interpreted but not regarded as unconstitutional; neither is such an arbitration regarded as a specie of administrative action. The consensual nature of private arbitration serves as justification for the restraint upon interference and is the reason why the reasonable standard is not applicable to its review. Review applications must accordingly be considered only in terms of section 33 of the AA.

Parties can also not in their terms of reference agree on the applicability of the reasonableness standard because it would constitute by agreement imposing jurisdiction on the LC that it does not statutorily have. Nothing, however, precludes the disputing parties from agreeing on the appointment of a private review or appeal panel.

While it is clear that reasonableness is not applicable to private arbitration award reviews, it is equally clear that it has irrevocably been introduced in the review of CCMA arbitration awards brought in terms of section 145. While it has been attempted to explain the implications of such an introduction for litigants taking CCMA arbitration awards on review in terms of section 145, it can be expected that as time passes and review proceedings are initiated, questions will be identified that may not have been addressed herein. The wish can only be expressed that in time judicial precedent will be able to give more specific content to the broad concept of reasonableness within the context of the LRA's review provisions to such an extent that it will become trite.