PLENARY 8

A legal analysis on the 25 years of Labour Court Reviews

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25 years of reviews

Presentation outline

• Focus on s 145 and reasonableness
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Presentation outline


• What is the threshold for unreasonableness?

• When does reasonableness not apply?
Legislative choice of reviews over appeals

- Explanatory memorandum

“The absence of an appeal from the award speeds up the process and frees it from the legalism that accompanies appeal proceedings. It is tempting to provide for appeals because dismissal is a very serious matter. However, this temptation must be resisted as appeals lead to records, lengthy proceedings, lawyers, legalism, inordinate delays and high costs. Appeals have a negative impact on reinstatement as a remedy, they undermine the basic purpose of the legislation and they make the system too expensive for individuals and small business.”
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From 1996 to 2007

- Uncertainty about
  - Whether CCMA arbitration constituted admin action
  - Whether PAJA applied
  - How to locate a broader basis for review
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Sidumo (CC) 2007

- CCMA arbitration constitutes admin action into s 33 of the Constitution
- PAJA does not apply – limited to s 145
- But s 145 is suffused by reasonableness
Sidumo

“The better approach is that s 145 is now suffused by the constitutional standard of reasonableness. That standard is [this]: Is the decision reached by the commissioner one that a reasonable decision-maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair.”
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From 2007 to 2013

- Rise of reviews based on
  - Process-related / dialectical unreasonableness
  - Latent gross irregularity (extended meaning)
Dialectical UR reviews arose from *New Clicks* (CC) 2006

“There is obviously an overlap between the ground of review based on failure to take into consideration a relevant factor and one based on the unreasonableness of the decision. A consideration of the factors that a decision-maker is bound to take into account is essential to a reasonable decision. If a decision-maker fails to take into account a factor that he/she is bound to take into consideration, the resulting decision can hardly be said to be that of a reasonable decision-maker.”
Latent gross irregularity reviews arose from Ngcobo J’s finding in *Sidumo*

“Where a commissioner fails to have regard to material facts, the arbitration proceedings cannot in principle be said to be fair because the commissioner fails to perform his/her mandate. The commissioner's action prevents the aggrieved party from having its case fully and fairly determined. This constitutes a gross irregularity. And the ensuing award falls to be set aside not because the result is wrong but because the commissioner has committed a gross irregularity in the conduct of the arbitration proceedings.”
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**Herholdt (SCA) 2013**

- Put a stop to dialectical UR reviews – the result must be unreasonable
- Endorsed the traditional meaning of a latent gross irregularity – a misconception of the nature of the enquiry
- Classified an unreasonable result as a gross irregularity
Herholdt

“A review of an award is permissible if the defect in the proceedings falls within one of the grounds in s 145. For a defect in the conduct of the proceedings to amount to a gross irregularity, the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.”
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Mofokeng (LAC) 2015

- The only judgment that provides a mode of analysis for determining whether the outcome of an award is unreasonable
The *Mofokeng* mode of analysis

- The first enquiry is whether the facts or considerations ignored were material, which will be the case if a consideration of them would have caused the commissioner to come to a different result (the distorting effect enquiry).

- If this is established, the (objectively wrong) result arrived at by the commissioner is *prima facie* unreasonable.
The *Mofokeng* mode of analysis

- A second enquiry must then be embarked upon - it being whether there exists a basis in the evidence overall to displace the *prima facie* case of unreasonableness.

- If the answer to this enquiry is in the negative, then the decision stands to be set aside on review on the grounds of unreasonableness (and *vice versa*).
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**Duncanmec (CC) 2018**

- S 33(1) of the constitution guarantees admin action that is lawful, reasonable and procedurally fair

- *Sidumo* found that s 145 is suffused by reasonableness – thus giving rise to reasonableness review

- *Duncanmec* found that an award that fails to meet the lawful and procedurally fair requirements will also be reviewable

- In effect, direct reliance can be placed on s 33 of the constitution
“Since an award constitutes administrative action, the Constitution requires it to be procedurally fair, lawful and reasonable. This means that an award that fails to meet these requirements is liable to be set aside on review. These requirements are in addition to the grounds of review listed in s 145. However, to some extent the latter grounds may overlap with the constitutional requirements. But the reasonableness standard is sourced from s 33 of the Constitution alone. It does not form part of the overlap.”
The big unanswered question 25 years on

- What is the threshold for unreasonableness?
  - When will an award fall outside of a range of reasonable decisions?
  - How does one determine the range?
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The LAC is sometimes poles apart

- Zondo JP in *Fidelity* (LAC) 2008
  
  “The test enunciated in *Sidumo* is a stringent test that will ensure that awards are not lightly interfered with. … It will not be often that an award is found to be one which a reasonable decision-maker could not have made.”

- Compare this with Murphy AJA & Mlambo JP in *Herholdt* (LAC) 2012
  
  “Few decisions that are wrong are likely to be upheld as reasonable. The inexorable truth is that wrong decisions are rarely reasonable.”
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The issue is about the appropriate intensity of reasonableness review

- Sliding scale of reasonableness review
  - Light touch reasonableness review – policy decisions
  - Anxious scrutiny reasonableness review – constitutional rights
  - The higher the scrutiny, the more is required by way of justification

- Given the constitutional rights involved (fair labour practices and just admin action), CCMA awards should probably be subject to a relatively high degree of scrutiny
Reviews in the Labour Courts (LexisNexis)

“On an overall assessment of the jurisprudence of the LAC, it adopts a relatively high intensity reasonableness review. As a result of this where an award is obviously wrong, the LAC will typically set it aside on review on the grounds of unreasonableness – it does not have to be hopelessly wrong or absurd before it will do so (which is what the threshold in a lower intensity review might be).

Seen thus, the permissible margin for error by a CCMA commissioner is between what is objectively right and what is obviously wrong. Put differently, where a decision is obviously wrong, it falls outside of a range of reasonableness.”
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When does reasonableness not apply?

- When correctness review applies
- When a commissioner commits a gross irregularity or misconduct
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Correctness review

• **Jonsson Uniform Solutions (LAC) 2014**

  “The generally accepted view is that we have a bifurcated review standard, viz reasonableness and correctness. ... The issues in dispute will determine whether the one or the other of the review tests is harnessed in order to resolve the dispute.”
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Correctness review applies to (1) an excess of powers

- Territorial jurisdiction
- Existence of employment relationship
- Existence of dismissal
- Failing to apply non-reinstateble conditions
- Awards of compensation beyond the limits
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Fidelity (LAC) 2008

“If the CCMA had 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.”
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Correctness review applies to (2) material errors of law

- Misinterpretation of a union constitution
- Misinterpretation of a collective agreement or contract
- Misinterpretation or application of a statutory provision
- Errors in the classification of misconduct
- Errors in the application of law of evidence
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The implications of Duncanmec

• CCMA awards must be lawful

• Every error of law is reviewable provided it is material
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Assign Services (LAC) 2017

“A material error of law will result in both an incorrect and unreasonable award. Such an award can either be attacked on the basis of its correctness or for being unreasonable.”

MacDonald's Transport (LAC) 2016

“A reasonable arbitrator does not get a legal point wrong.”
The reach of an error of law – a controversial example

• Oscar Pistorius (SCA) 2016

“There [is] no difference in principle between the exclusion of relevant evidence by ruling it inadmissible and excluding such evidence, once admitted, by not taking it into account. In either event the judicial process becomes flawed by regard not being had to material which might affect the outcome. As much as excluding evidence on the basis of admissibility is a legal issue, it seems to me to also be a legal issue should account not be taken of any evidence placed before court which ought to be weighed in the scales.”
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Correctness review applies to (3) certain value judgments

- The decision to award / not award compensation ito s 193(1)(c)
“A review of a discretion exercised in terms of s 193(1)(c) [described as a value judgment] is essentially no different to an appeal because the reviewing court will be required to consider all the facts and circumstances which the arbitrator had before him/her and then decide based on a proper evaluation of those facts and circumstances whether or not the decision was judicially a correct one.”
Gross irregularity – reasonableness does not apply

- Two types of gross irregularity – latent (misconception of the enquiry) and patent (acts of procedural unfairness by commissioners)

- Where either is established, this will give rise to a review with there being no need to (also) establish that the result of the award was unreasonable

- In effect, this is also a type of correctness review
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Misconduct – reasonableness does not apply

• The same applies to misconduct
What is not hit by correctness review?

- Predominantly factual findings relating to guilt and sanction – here reasonableness review applies

- Correctness review applies to much of what happens before and after this, including (1) the determination of jurisdiction; (2) the conduct of the arbitration (procedural fairness); (3) law of evidence rulings; (4) the determination of legal questions in the award; and (5) aspects of relief
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Summing up

- The most significant development in our review jurisprudence in the last 25 years has been the expansion of the s 145 grounds to include reviews for reasonableness.
- The courts have been of little assistance in determining the threshold for unreasonableness.
- Unreasonableness need not be established where correctness review applies; nor where a gross irregularity or misconduct is established.
- Correctness review has a wide reach — it applies to an excess of powers, errors of law, certain value judgments, and acts of procedural unfairness.
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Questions and comments

“25 years in pursuit of social justice and equity”
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Citations (in order presented)

- *Minister of Health v New Clicks* 2006 (2) SA 311 (CC)
- *Herholdt v Nedbank* (2013) 34 ILJ 2795 (SCA)
- *Head of Department of Education v Mofokeng* (2015) 36 ILJ 2802 (LAC)
- *Duncanmec v Gaylard NO* (2018) 39 ILJ 2633 (CC)
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- Jonsson Uniform Solutions v Brown (DA10/2012) [2014] ZALCJHB 32 (this is actually a LAC judgment)
- Fidelity Cash Management Service v CCMA (2008) 29 ILJ 964 (LAC)
- Herholdt v Nedbank (2012) 33 ILJ 1789 (LAC)
- NUMSA v Assign Services (2017) 38 ILJ 1978 (LAC)
- MacDonald's Transport Upington v AMCU (2016) 37 ILJ 2593 (LAC)
- DPP, Gauteng v Pistorius 2016 (2) SA 317 (SCA)
- Kemp t/a Centralmed v Rawlins (2009) 30 ILJ 2677 (LAC)
THANK YOU

ngiyathokozaya!
ro livhuwa!
dankie!
inkomu!
ke a leboga!
thank you!
ke a leboha!
udo livhuwa!
siyabonga!

ngiyabonga!