The test for review of CCMA arbitration awards: an update

Herholdt v Nedbank (SCA) and Gold Fields v Moreki (LAC)

by Anton Myburgh SC

Since the advent of the Labour Relations Act 66 of 1995 (LRA) the labour courts have continuously been pushing the boundaries of the test for the review of CCMA arbitration awards. This culminated in the judgment of the LAC last year in Herholdt v Nedbank Ltd [2012] 9 BLLR 857 (LAC) (per Murphy AJA) in which the court developed the review test further. Although the result of the judgment was upheld on appeal by the SCA in September this year in Herholdt v Nedbank Ltd (COSATU as amicus curiae) (2013) 34 ILJ 2795 (SCA) (per Cachalia JA and Wallis JA) the SCA found that the LAC had erred in its development of the review test and cut back on it. What followed in November was the important judgment of the LAC (differently constituted) in Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA & others (JA2/2012) [2013] ZALAC 28 (4/11/2013) (per Waglay JP) in which the court, by and large, followed the approach of the SCA. Taken together the two recent judgments are a comprehensive statement of the law on reviews based on a latent gross irregularity and unreasonableness.

In this article, I analyse the findings made in these two judgments, point out the differences between them, identify potential flaws, and then summarise what I consider to be the legal position arising from them. Before doing so, and because both judgments depart in material respects from the LAC’s judgment in Herholdt, it is convenient to recap on what was found in that judgment. To begin with, I set out a brief glossary of terms.

Glossary of terms
As an aid to understanding what follows and to avoid unnecessary repetition, these terms bear the following meanings:

‘Section 145’ or ‘the grounds listed in s 145’: the reviewable defects of misconduct, gross irregularity and excess of powers listed in s 145(2) of the LRA.

‘Latent irregularity’: an irregularity which occurs in the mind of a commissioner at the time of writing his or her award and appears from it – for ex-

1) Available on SAFLII
ample, that material facts were ignored. It equates to an act of dialectical unreasonableness (see below).

‘Patent irregularity’: an irregularity which occurs during the course of the arbitration proceedings and which constitutes a breach of the rules of procedural fairness.

‘Substantive unreasonableness’: an unreasonable result.

‘Dialectical unreasonableness’: an unreasonable process failure (in the cognitive sense) involving, for example, the failure by a commissioner to consider material facts.

‘Process-related review’: a review application based on an attack on a commissioner’s reasoning and findings of fact, which typically highlights the failure to consider material facts and errors of fact.

Herholdt (LAC)

At stake in Herholdt was whether the commissioner had committed a reviewable defect in finding that the employee, a financial planner, had not acted dishonestly in failing to disclose under Nedbank’s conflict of interest policy that he had been appointed as a beneficiary in a dying client’s will. On appeal, the LAC upheld the judgment of the Labour Court setting aside the award on review and substituting it with an order that the employee’s dismissal was fair.

For present purposes, the key passage in the LAC’s judgment is this (para 39):

“One of the duties of a commissioner is to determine the material facts and then to apply the provisions of the LRA to those facts in answering the question whether the dismissal was for a fair reason. Commissioners who do not do so do not fairly adjudicate the issues and the resulting decision and award will be [dialectically] unreasonable. Whether or not an arbitration award or decision or finding of a commissioner is reasonable must be determined objectively with due regard to all the evidence that was before him or her and what the issues were. There is no requirement that the commissioner must have deprived the aggrieved party of a fair trial by misconceiving the whole nature of enquiry. The threshold for interference is lower than that: it being sufficient that the commissioner has failed to apply his mind to certain of the material facts or issues before him [which the LAC found constituted a gross irregularity], with such having potential for prejudice and the possibility that the result may have been different. This standard recognises that dialectical and substantive reasonableness are intrinsically inter-linked and that latent process irregularities carry the inherent risk of causing an unreasonable substantive outcome.” (My emphasis.)

While this is chewy stuff, the key to understanding the passage lies in an understanding of what the LAC meant by the terms ‘substantive unreasonableness’, ‘dialectical unreasonableness’, and a ‘gross irregularity’. Substantive unreasonableness is encompassed in the test set in para 110 of the majority judgment of the Constitutional Court in Sidumo & Another v Rustenburg Platinum Mines Ltd & Others [2007] 12 BLLR 1097 (CC): “Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?” I refer to this as ‘the Sidumo test’. Dialectical unreasonableness was a term coined by the LAC based principally on this finding by the Constitutional Court in Minister of Health & Another v New Clicks South Africa (Pty) Ltd & Others (Treatment Action Campaign & Another as amici curiae) 2006 (2) SA 311 (CC) at para 511: “A consideration of the factors that a decision-maker is bound to take into account is essential to a reasonable decision. If a decision-maker fails to take into account a factor that he or she is bound to take into consideration, the resulting decision can hardly be said to be that of a reasonable decision-maker.” And the LAC’s conception of a gross irregularity as arising from the failure by a commissioner to apply his or her mind to material facts was based on what I term as ‘Ngcobo J’s gross irregularity dictum’ in para 268 of the minority judgment in
Sidumo, which reads:

“It follows, therefore, that 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 or her mandate. In so doing, in the words of Ellis, the commissioner’s action prevents the aggrieved party from having its case fully and fairly determined. This constitutes a gross irregularity in the conduct of the arbitration proceedings, as contemplated in section 145(2)(a)(ii) of the LRA. 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.” (My emphasis.)

Having gained an understanding of what the LAC in Herholdt meant by the three terms explained above, para 39 of its judgment can be restated in these simple terms: firstly, where a commissioner fails to apply his or her mind to material facts, this deprives the losing party of a fair hearing and constitutes both a gross irregularity (as per Ngcobo J’s gross irregularity dictum) and an act of dialectical unreasonableness (as per New Clicks); secondly, this in itself serves as a basis to set aside the award on review, provided only that the applicant establishes that the result of the award may have been different if the commissioner had considered the material facts which were ignored (this being what I refer to as ‘the test for prejudice’); and, thirdly, a gross irregularity or act of dialectical unreasonableness may well culminate in the result of the award being substantively unreasonable (as per the Sidumo test) but an applicant who brings a review based on a gross irregularity or act of dialectical unreasonableness need not go this far in order to succeed.

Applying these legal principles to the errors committed by the commissioner, the LAC in Herholdt conclude as follows (para 51):

“The range and extent of latent irregularities in the award leave no doubt that there has not been a fair trial of the issues. The commissioner not only ignored material evidence in relation to the deliberate conduct of the appellant but fundamentally misconstrued the conflict of interests policy of the respondent with the consequence that her method in determining the issues was latently irregular and in the final analysis led concurrently to a result that was not only incorrect but substantively unreasonable ... ” (My emphasis.)

Read in the context of the judgment overall, what this reflects is that the LAC concluded that the award was reviewable on two separate grounds: firstly, the commissioner’s failure to apply her mind to material facts and considerations deprived Nedbank of a fair hearing and constituted a gross irregularity in terms of s 145 and an act of dialectical unreasonableness; and, secondly, these failures on the part of the commissioner culminated in the result of the award also being substantively unreasonable (i.e. it failed the Sidumo test).

The LAC’s judgment in Herholdt was, of course, good news for applicants on review (and the lawyers representing them) because of the light test for prejudice set by the LAC. This requires further explanation. Where a commissioner fails to apply his or her mind to material facts, notionally one of three tests for prejudice stand to be satisfied before an applicant can succeed on review. The three tests can be cast as follows – if the commissioner had considered the facts ignored by him or her, the result of the award: (1) may have been different; (2) would (objectively) have been different; or (3) is rendered unreasonable (i.e. a reasonable commissioner could not have reached the decision in question in the light of the facts which were ignored). Each of these tests is increasingly more onerous in that it is easier to convince a court of (1) than (2) and of (2) than (3).

The fact that the LAC in Herholdt opted for the lightest test for prejudice (test (1)) proved to be controversial because it, in effect, makes it easier to succeed on review than on appeal (where it must be established that the judgment of the court below is wrong and must be substituted). This renders an increasing number of awards liable to review, which detracts (so the argument goes) from the objective that disputes under the LRA
should be finally resolved expeditiously. It was for these reasons that COSATU intervened as *amicus curiae* (a friend of the court) in the ensuing appeal to the SCA.

**Herholdt (SCA)**

At the heart of the SCA’s judgment lies the question whether the LAC had unduly relaxed the grounds for challenging CCMA awards on review. In particular, was the LAC correct in developing the review test so as to permit reviews based on latent irregularities and dialectical unreasonableness, in circumstances where these provide a basis for review more extensive than the *Sidumo* test? Ultimately, the SCA found that the LAC had erred in doing so. This on the basis of what follows.

Dealing first with latent irregularities, the SCA was of the view that the legislature’s intention in 1995 was that a ‘gross irregularity’ in s 145 ought to bear the meaning ascribed to it in s 33 of the Arbitration Act 42 of 1965 (from which s 145 was copied). As the SCA put it, “The general principle is that a ‘gross irregularity’ concerns the conduct of the proceedings rather than the merits of the decision [these being patent irregularities]. A qualification to that principle is that a ‘gross irregularity’ is committed where decision-makers misconceive the whole nature of the enquiry and as a result misconceive their mandate or their duties in conducting the enquiry” (para 10). Later on in its judgment, along similar lines to the qualification mentioned above, the SCA held that a gross irregularity occurs “where the decision-maker has undertaken the wrong enquiry or undertaken the enquiry in the wrong manner” (para 21). I refer to this as ‘the historical meaning’ of a gross irregularity.

Dealing with the legal position after *Sidumo*, and with reference to an earlier judgment by it, the SCA went on to hold that the implications were that reviews could now be brought on the *Sidumo* test and on the grounds listed in s 145 (para 14). This in circumstances where it was held in *Sidumo* that the s 145 grounds were “suffused” with the constitutional standard of reasonableness.

As the SCA explained, “[w]hat this meant simply is that a ‘gross irregularity’ ... was not confined to a situation where the arbitrator misconceives the nature of the enquiry [this being the historical meaning of a gross irregularity], but extended to those instances where the result was unreasonable” in the sense that it failed the *Sidumo* test (para 14). This is a very important finding, which warrants repetition and emphasis: according to the SCA, commissioners commit a gross irregularity if they misconceive the nature of the enquiry or if they produce an unreasonable award. In a sense, the SCA thus both narrowed and widened the test for a gross irregularity (see further below).

Earlier in its judgment, the SCA provided this useful explanation of how the *Sidumo* test operates (para 12):

“That test involves the reviewing court examining the merits of the case ‘in the round’ by determining whether, in the light of the issues raised by the dispute under arbitration, the outcome reached by the arbitrator was not one that could reasonably be reached on the evidence and other material properly before the arbitrator. ... The reasons are still considered in order to see how the arbitrator reached the result. That assists the court to determine whether that result can reasonably be reached by that route. If not, however, the court must still consider whether apart from those reasons, the result is one that a reasonable decision-maker could reach in the light of the issues and the evidence.” (My emphasis.)

The SCA went on to reaffirm that although the reviewing court must scrutinise the evidence in order to determine whether the result was reasonable, it must preserve the distinction between an appeal and a review, and must not set aside an award simply because it would have arrived at a different result (para 13). With reference to an early LAC authority, the SCA also reaffirmed that the *Sidumo* test is a stringent test that will ensure that awards are not lightly interfered with, but held that the test “will ... justify the setting aside of an award on review if the decision is ‘entirely disconnected with the evidence’ or is

---

2) NUM & Another v Samancor Ltd (Tubatse Ferrochrome) & Others [2011] 11 BLLR 1041 (SCA) at para 5
3) Fidelity Cash Management Services v CCMA & Others [2008] 3 BLLR 197 (LAC) at para 100
‘unsupported by any evidence’ and involves speculation by the commissioner” (para 13).4

Turning to the findings made by the LAC in Herholdt regarding the meaning of a gross irregularity, the SCA made two points about the judgment: firstly, that the threshold for interference set by the LAC was lower than the Sidumo test; and, secondly, that on the LAC’s approach it was immaterial whether the result of the award could reasonably have been reached – the “mere possibility of prejudice will suffice to warrant interference” (para 17). Regarding Ngcobo J’s gross irregularity dictum, which formed the basis of the LAC’s findings, the SCA was critical of it in two main respects. Firstly, it was in conflict with the historical meaning of a gross irregularity. As the SCA put it (para 19):

“... an error of fact or law by the arbitrator would not justify the setting-aside of the award, unless it had the result that the arbitrator was diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination in the arbitration.”

Secondly, the dictum was in conflict with the approach endorsed in the majority judgment in Sidumo. As the SCA found (para 20):

“It is unnecessary to analyse this dictum further because it results in an approach to the review of CCMA arbitration awards that is contrary to that endorsed by the majority judgment in Sidumo. ... In other words the approach of the majority was clearly inconsistent with the approach suggested by Ngcobo J. As we, and all courts, are bound by the majority judgment, the development of the notion of latent irregularity, in the sense that it has assumed in the labour courts, cannot be accepted.” (My emphasis.)

Read in the light of what it had found earlier in its judgment, it is apparent that the SCA was of the view that Ngcobo J’s gross irregularity dictum was inconsistent with the majority judgment in Sidumo because, in terms thereof, in order to succeed on review an applicant has to establish that the result was unreasonable and cannot simply rely on the failure to apply the mind to material facts. Directly following this finding, the SCA reaffirmed that a gross irregularity should bear its historical meaning (para 21), which stands to be read together with its earlier finding that a commissioner also commits a gross irregularity if he or she produces an award which fails the Sidumo test. In so doing, the SCA adopted a significantly narrower approach to the term ‘gross irregularity’ than that adopted in Ngcobo J’s gross irregularity dictum.

Regarding dialectical unreasonableness, the SCA also found that the finding of the Constitutional Court relied on by the LAC, namely the passage quoted above from New Clicks, was not a basis upon which the LAC could have developed the review test to encompass such complaints. The principal reason for this is that the passage expressly related to the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and the manner in which they are to be applied. Because, as held in Sidumo, PAJA does not apply to reviews under s 145 of the LRA, the SCA found that the passage was of no application to CCMA awards (at para 24).

The SCA then provided this summary of the legal position (para 25):

“In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry 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.” (My emphasis.)

4) See along similar lines, Bestel v Astral Operations Ltd & Others [2011] 2 BLLR 129 (LAC) at para 14-16.
This is a key passage in the SCA’s judgment. It can be broken down into these three points: firstly, commissioners will commit a gross irregularity in framing their awards if they misconceive the nature of the enquiry (this being the historical meaning of a gross irregularity) or arrive at an unreasonable result (this because reasonableness has suffused the grounds of review listed in s 145); secondly, where commissioners commit material errors of fact or otherwise err in their evaluation of the evidence (typically as a consequence of their failure to apply their minds) this will not, in itself, give rise to a reviewable defect (this being different from Ngcobo J’s gross irregularity dictum); and, thirdly, in order to succeed with a review based on errors of this description (which involves a process-related review) the applicant must establish that the effect of the errors rendered the result of the award unreasonable (i.e. that the award fails the Sidumo test). In effect, the SCA thus increased the test for prejudice (see above) from level (1) set by the LAC to level (3). Importantly, despite having found that the LAC was wrong in law in developing the review test along the way in the respects discussed above.

Gold Fields (LAC)

The judgment is important because it is the first judgment of the LAC after Herholdt (SCA) dealing with the review test, albeit that the LAC only makes passing reference to the SCA’s judgment in a single footnote. Added to this is the fact that the judgment was written by the Judge President of the Labour Court and LAC (Waglay JP) and delivered following appeals from the LAC to the SCA having been cut off (see the Constitution Seventeenth Amendment Act 2012, which came into operation on 23 August 2013). As a matter of precedent, the two judgments may thus well be of equal standing.

At stake in Gold Fields was whether the commissioner’s award, in which he found that the employee, a senior sampler, was guilty of poor performance (as opposed to misconduct) and not deserving of dismissal, was reviewable. The employee was responsible for conducting measurements underground that formed the basis of mining decisions, and had submitted a wholly inaccurate set of measurements and then engaged in a disingenuous cover up.

Early on in its judgment, the LAC tackled head on the findings made in Herholdt (LAC) that CCMA awards can be reviewed on process-related grounds on a lesser test than the Sidumo test. The LAC disagreed in the following terms...
“Sidumo does not postulate a test that requires a simple evaluation of the evidence presented to the arbitrator and based on that evaluation, a determination of the reasonableness of the decision arrived at by the arbitrator. The court in Sidumo was at pains to state that [the review of] arbitration awards made under the [LRA] continue to be determined in terms of s 145 ... but that the constitutional standard of reasonableness is ‘suffused’ in the application of s 145 of the LRA. This implies that an application for review sought on the grounds of misconduct, gross irregularity in the conduct of the arbitration proceedings, and / or excess of powers will not lead automatically to a setting aside of the award if any of the above grounds are found to be present. In other words, in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions to which a reasonable decision-maker could come on the available material.” (My emphasis.)

This passage contains two main findings: firstly, reasonableness is not a self-standing ground of review; and, secondly, because reasonableness has ‘suffused’ the grounds of review listed in s 145, in order to succeed with a review based on a listed ground, the applicant must establish both the ground of review and that the result of the award was unreasonable. To my mind, both of these findings appear to be at odds with what was found in Herholdt (SCA). The SCA held that an applicant for review can rely on s 145 and, in addition, on unreasonableness – and thus seems to have contemplated that reasonableness is a self-standing ground of review. And in relation to reasonableness having ‘suffused’ s 145, the SCA went on to find, with reference to a gross irregularity, that the ground would be established if the historical legal test therefor is met or if the result was unreasonable – not that both tests have to be met. In effect, the SCA construed the ‘suffusing’ of reasonableness as having extended or augmented the s 145 grounds of review, whereas the LAC construed it as having set reasonableness as an additional test – over and above the legal test for each ground – to found a review based on the s 145 grounds. In my view, this is not what the Constitutional Court meant in Sidumo by reasonableness having ‘suffused’ the listed grounds, and the SCA’s approach is to be preferred. (I deal with this further below.)

Reverting to its judgment, the LAC continued as follows (para 15):

“A ‘process-related review’ suggests an extended standard of review, one that admits the review of an award on grounds of a failure by the arbitrator to take material facts into account, or by taking into account facts that are irrelevant, and the like. The emphasis here is on process, and not result. Proponents of this view argue that where an arbitrator has committed a gross irregularity in the conduct of the arbitration as contemplated by s 145(2), its remains open for the award to be reviewed and set aside irrespective of the fact that the decision arrived at by the arbitrator survives the Sidumo test. I disagree. What is required is first to consider the gross irregularity that the arbitrator is said to have committed and then to apply the reasonableness test established by Sidumo. The gross irregularity is not a self-standing ground insulated from or standing independent of the Sidumo test.” (My emphasis.)

It appears from this passage (and the next one quoted below) that the LAC was content to find that the failure to consider material facts does constitute a gross irregularity,5 but that in order to succeed on review, the applicant must go further and establish that this caused the result of the award to be unreasonable – this in line with the LAC’s earlier finding that both the listed ground of review in s 145 and unreasonableness must be established in order for a review to suc-

5) This can also be gleaned from para 15 of Herholdt (LAC).
ceed. Although the SCA in Herholdt found that the failure to consider material facts does not constitute a gross irregularity unless this resulted in the commissioner misconstruing the enquiry, which is a much narrower approach than that adopted by the LAC in Gold Fields, the SCA went on to find that a commissioner also commits a gross irregularity if the result of the award is unreasonable. Although arrived at by different routes, the findings of the SCA and LAC can thus be reconciled at this point: where a commissioner fails to apply his or her mind to material facts – and this results in the outcome of the award being unreasonable – the award will be liable to be set aside on review on the grounds of the commission of a gross irregularity.

Later in its judgment, the LAC made its position abundantly clear in finding (para 21):

“It follows that the argument that the failure to have regard to material facts may potentially result in a wrong decision has no place in review applications. Failure to have regard to material facts must actually defeat the constitutional imperative that the award must be rational and reasonable – there is no room for conjecture and guesswork.” (Original emphasis.)

In so finding, the LAC echoed the finding in Herholdt (SCA) that the potential for prejudice test set in Herholdt (LAC) is not good law. Consistent with Herholdt (SCA), the LAC found, in effect, that the test for prejudice is not level (1), but rather level (3) (see above).

As the SCA did in Herholdt, the LAC went on to give guidance about how the courts should go about assessing whether the result of an award is unreasonable (and thus the approach that practitioners must adopt).

The LAC eschewed a piecemeal approach where each factor that the commissioner failed to consider is analysed individually and independently, because this “assumes the form of an appeal” (and not a review) (para 21). Instead, “the review court must necessarily consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision-maker could make” (para 18). On this approach, the mere fact that a commissioner “fails to mention a material fact in his [or her] award”, “fails to deal in his/her award in some way with an issue which has some material bearing on the issue in dispute”, or “commits an error in respect of the evaluation or considerations of facts presented at the arbitration” would not, in itself, render the award liable to review (para 20).

That said, and without detracting from the mode of analysis that should be undertaken, the LAC went on to find that (para 21):

“Where an arbitrator fails to have regard to the material facts it is likely that he or she will fail to arrive at a reasonable decision. Where the arbitrator fails to follow proper process he or she may produce an unreasonable outcome ... .” (My emphasis.)

From an overall perspective, the LAC posed these questions with a view to determining whether a commissioner has properly acquitted him or herself (para 20):

“(i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he [or she] was required to arbitrate (this may in certain cases only become clear after both parties have led their evidence)? (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? And (v) is the arbitrator’s decision one that another decision-maker could reasonably have arrived at based on the evidence?”

These are important questions. A failure to satisfy question (i) would typically constitute a patent gross irregularity, whereas the failure to satisfy questions (ii), (iii) and (iv) would appear, on the LAC’s ensuing analysis, to constitute a latent gross irregularity, but they would only result in
the award being liable to review if question (v) was not satisfied and the result of the award failed the Sidumo test. (This is consistent with the LAC’s two-stage approach, i.e. that the s 145 ground of review and then unreasonableness needs to be established.)

Turning then to the award issued in the matter, the LAC found that the commissioner had gone wrong because he “misconceived the nature of the enquiry, which was to determine the fairness of a dismissal for misconduct” and not a dismissal for poor performance, as the commissioner had done (para 22). (Although the LAC did not say as much, the commissioner had potentially failed questions (ii), (iii) and (iv).)

The LAC then went on to find (para 31):

“It therefore follows that in approaching the dismissal as one effected for poor performance, the arbitrator committed a gross irregularity in the conduct of the proceedings. The conclusion he arrived at was influenced by the wrong categorisation of the case against the [employee]. This however is not sufficient for the award to be reviewed and set aside. The question needs to be asked: had the categorisation of the case against the [employee] been misconduct as opposed to poor work performance, is the arbitrator’s award nonetheless one that could be arrived at by a reasonable decision-maker? In my view it is clearly not.” (My emphasis.)

This passage reflects the practical application of the legal position pronounced upon by the LAC. The commissioner had committed a gross irregularity because he had “misconceived the nature of the enquiry”. But in addition to establishing the commission of a gross irregularity, the company had to go further and establish that the result of the award was unreasonable in order to succeed on review. This could be tested by asking the following question (which I have recast slightly): had the commissioner not committed the latent irregularity and instead properly categorised the basis of the employee’s dismissal as misconduct, was the result of the award one that a reasonable commissioner could have arrived at? On an overall conspectus of the evidence, the answer was in the negative, with the result that the award failed the Sidumo test and was thus reviewable.

Possible flaws

The last passage quoted above exposes the potential conceptual flaw in the LAC’s judgment in Gold Fields. Each of the grounds of review listed in s 145 has a historical legal meaning. To find, as the LAC does, that in order to succeed on review, the applicant must meet the legal meaning of the ground of review and then, in addition, establish that the result of the award is unreasonable is, in my view, misconceived and potentially more onerous. It is misconceived because one cannot find, as the LAC does, that a commissioner actually committed a ‘gross irregularity’ (as per s 145) but, at the same time, that something more must be established to succeed on review based on a ‘gross irregularity’. And it is potentially more onerous because there are instances of review where the law has long since recognised that the irregularity committed by the commissioner serves, in itself, to render the award reviewable irrespective of the result of the award. A classic example of this is where a commissioner is guilty of bias, which constitutes a classic patent gross irregularity and renders the proceedings a nullity.\(^6\)

Indeed, the more onerous contention is potentially demonstrated by contrasting the approach adopted by the LAC in Gold Fields with that adopted by the SCA in Herholdt. According to the SCA, where an arbitrator “misconceives the nature of the enquiry” this, in itself, constitutes a gross irregularity, without the need to establish that the result was unreasonable. Yet, while the LAC found that the error in question constituted a gross irregularity, it added the additional requirement of having to establish unreasonableness. However, the answer here probably lies in the fact that the misconception relied on by the LAC is not the sort of misconception that would qualify as a gross irregularity in terms of the

\(^6\) See by way of analogy, Ndemeni v Meeg Bank Ltd (Bank of Transkei) 2011 (1) SA 560 (SCA).
historical definition thereof. The example given by the SCA in *Herholdt* of when this would occur is where a decision-maker affords a party a review instead of an appeal in the wide-sense, and thus refuses to admit new evidence and decide the matter on the basis thereof (para 21). What the commissioner did in *Gold Fields* does not equate to this sort of fundamental misconception, but instead amounted, in effect, to an error of fact and law in the classification of the basis for the dismissal.\(^7\) The SCA would not have considered this, in itself, to constitute a gross irregularity, but would, assuming it assessed the evidence as the LAC did, have come to the conclusion that the award failed the *Sidumo* test and consequently that a gross irregularity had been committed on this basis. The approaches of the two courts on this issue can thus be reconciled in this way.

However, in the light of the above, it is perhaps better to construe the LAC’s requirement that, in the case of a latent irregularity, the result of the award must be unreasonable, as being the required test for prejudice to establish a *gross* irregularity, instead of it being something that must be established over and above a gross irregularity. Seen thus, a latent irregularity will only qualify as a gross irregularity warranting the setting aside of the award on review if it serves to render the result of the award unreasonable. Simply stated, unreasonableness is the test for prejudice in order to establish a gross irregularity.

There is another issue that warrants mention – it being that, different to *Herholdt* (SCA), the LAC’s judgment in *Gold Fields* makes no attempt whatsoever at addressing how to overcome Ngcobo J’s *gross irregularity dictum*. In fact, the LAC makes no mention of it at all. It will be recalled that Ngcobo J found that the failure to consider material facts constitutes a gross irregularity. In *Gold Fields*, the LAC appears to have accepted this as being accurate, but added the requirement that, in order to be liable for review, this must have culminated in the result of the award being unreasonable. But this approach conflicts with Ngcobo J’s finding that, in the case of a gross irregularity brought about by the failure to consider material facts, the award stands to be set aside irrespective of the merits of the result. (See further below regarding the binding force of Ngcobo J’s *gross irregularity dictum*.)

**The legal position in summary**

1. *Herholdt* (SCA) and *Gold Fields* dealt only (or at least principally) with latent irregularities and unreasonableness in the context of factual findings made by commissioners in relation to the issue of guilt. The judgments have no (or very little) bearing on, for example, reviews based on a lack of jurisdiction, errors of law, and patent irregularities.

2. In *Sidumo*, it was held that the constitutional requirement that all administrative action must be reasonable has “suffused” s 145, and that an award will be unreasonable if it could not have been reached by a reasonable decision-maker (this being the *Sidumo* test). Regarding the implications of reasonableness having “suffused” s 145:

   (i) according to *Herholdt* (SCA), awards can now be reviewed on the s 145 listed grounds and on the ground of unreasonableness; and

   (ii) according to *Gold Fields*, awards can only be reviewed on the s 145 listed grounds, with unreasonableness being an additional requirement that must be established in respect of each listed ground. (As dealt with above, the LAC’s approach appears questionable, at least in some respects.)

3. Regarding reviews based on the failure by commissioners to consider material facts (and the like) (i.e. process-related reviews):

   (i) according to *Herholdt* (SCA), this will only constitute a gross irregularity if it caused the commissioner to misconceive the nature of the enquiry (this being the historical meaning of a gross irregularity) or resulted in the award failing the *Sidumo* test;

   (ii) according to *Gold Fields*, this, in itself, constitutes a gross irregularity, but the award

\(^7\) For a comparable case, see NUM & Another v Samancor Ltd (Tubatse Ferrochrome) & Others [2011] 11 BLLR 1041 SCA.)
(iii) by and large, the approach of the two courts equates to the same thing. Fundamentally, both courts found that, in order to succeed with a review based on the commissioner’s failure to consider material facts (and the like), the applicant must establish that this culminated in the result of the award being substantively unreasonable (i.e. failing the Sidumo test).

4. In so finding, both Herholdt (SCA) and Gold Fields rejected, either expressly or implicitly, Ngcobo J’s gross irregularity dictum to the effect that the failure to consider material facts constitutes, in itself, a gross irregularity warranting a review without more.

5. In so finding, Herholdt (SCA) and Gold Fields also rejected the potential for prejudice test set in Herholdt (LAC) in terms of which, in the event of a commissioner having failed to apply his or her mind to material facts, an applicant need establish no more than that the result of the award may potentially have been different if the commissioner had considered the facts which were ignored. Given that the potential for prejudice test was the main innovation introduced by Herholdt (LAC) its unanimous rejection by both courts is important.

6. The LAC in Gold Fields also appears to have found that these additional errors would qualify as a gross irregularity – where the commissioner failed to identify the dispute he or she was required to arbitrate, did not understand the nature of the dispute he or she was required to arbitrate, or did not deal with the substantial merits of the dispute. But in each instance, on the LAC’s analysis, it would also have to be established that the award failed the Sidumo test in order for it to be set aside on review.

7. Regarding the operation of the Sidumo test:

(i) it was found in Herholdt (SCA) that it is a stringent result-based test, but that the test will be met where the “decision is ‘entirely disconnected with the evidence’ or is ‘unsupported by any evidence’ and involves speculation by the commissioner”;

(ii) it was found in Gold Fields that “where the arbitrator fails to have regard to material facts it is likely that he or she will fail to arrive at a reasonable decision”;

(iii) it was also found in Gold Fields that the following question can be posed to determine whether the Sidumo test is met: leaving aside the errors committed by the commissioner, is the award nevertheless one that could be arrived at by a reasonable decision-maker?; and

(iv) both Herholdt (SCA) and Gold Fields adopted the approach that the test will only be met if the result of the awards falls outside a notional band of reasonable decisions (in this way the distinction between an appeal and review is maintained).

8. Regarding the significance of process-related errors committed and bad reasons given by the commissioner in his or her award:

(i) it was found in both Herholdt (SCA) and Gold Fields that, in determining whether the Sidumo test is met, the courts should not simply focus on the errors committed by the commissioner, but should instead engage in a holistic analysis of all the evidence before the commissioner in order to determine whether the result of the award is capable of reasonable justification (thus holding the line between a review and an appeal); and

(ii) it was found in Herholdt (SCA) that, in order to meet the Sidumo test, the applicant must assail both the commissioner’s reasons and the result of the award.
Conclusion

From a practical perspective, Herholdt (SCA) and Gold Fields do not prevent process-related reviews, but they both held that the complaints typically underlying applications of this nature will not, in themselves, give rise to the award being set aside on review (as was the case under Herholdt (LAC)). In order for these complaints to do so, it must be established that they culminated in the result of the award being unreasonable.

While there will, no doubt, be those who contend that the result is to make it more difficult to succeed on review and that this is inappropriate, the following should be considered.

Since Sidumo, the LAC has set aside awards, or confirmed their setting aside on review in numerous judgments8) on the basis of (what amounted to) process-related errors having resulted in the award failing the Sidumo test. In only one of those judgments – Herholdt – did the LAC find that the process-related errors were, in themselves, sufficient to found a review without the Sidumo test being met (albeit that it went on to find that the award was nevertheless substantively unreasonable). Seen in this light, and from the perspective of the jurisprudence of the LAC, all that Herholdt (SCA) and Gold Fields do is to put us back into the legal position that we were in immediately before the judgment of the LAC in Herholdt last year. This is by no means radical.

Of as much importance, if not more, is the fact that – in both Herholdt (SCA) and Gold Fields – the courts found that the result of the commissioner’s award was unreasonable. There was nothing extraordinary about either of these cases. In both of them, judged objectively, the employees were guilty of misconduct and deserving of dismissal; the commissioner came to what was clearly the wrong conclusion as a consequence of the failure to apply the mind to material facts and considerations; and, in both instances, the SCA and LAC, respectively, had little difficulty in concluding that, in the result, the award failed the Sidumo test. What this goes to show is that despite the review test having been pulled back to some degree, where it can be established on review that the outcome of an award is objectively wrong, a review for want of reasonableness will more often than not succeed.

Whether Herholdt (SCA) and Gold Fields will be the last word on reviews seems unlikely. A potential problem with both judgments is that neither the SCA nor LAC recognised that Ngcobo J’s gross irregularity dictum, which formed the basis of Herholdt (LAC), was endorsed by the majority of the Constitutional Court in CUSA v Tao Ying Metal Industries & Others [2009] 1 BLLR 1 (CC) at para 76 in the ratio decidendi (the ground for decision) of its judgment. It was thus binding on both the SCA and LAC. In these circumstances, both courts may well have been wrong in cutting back on the development of the review test. But it will take a review judgment of the LAC to find its way to the Constitutional Court on appeal for this question to be answered finally.

Anton Myburgh SC

8) See for example; Shoprite Checkers (Pty) Ltd v CCMA & Others [2008] 9 BLLR 838 (LAC); Mutual Construction Company Tvl (Pty) Ltd v Ntomhela & Others [2010] 5 BLLR 513 (LAC); Timothy v Nampak Corrugated Containers (Pty) Ltd [2010] 8 BLLR 830 (LAC); Miyambo v CCMA & Others [2010] 10 BLLR 1017 (LAC); Motsami v Everite Building Products (Pty) Ltd [2011] 2 BLLR 144 (LAC); Woolworths (Pty) Ltd v CCMA & Others [2011] 10 BLLR 963 (LAC); Gaga v Anglo Platinum Ltd & Others [2012] 3 BLLR 285 (LAC); SAB v RAWU & Others (JA 10/2012) [2013] ZALAC 8 (29/5/13). See also, the SCA decision in Myers v National Commissioner of the SA Police Service & Others (2013) 34 ILJ 1729 (SCA).