order is quashed on judicial review, he would find that the appropriate notice period ought to be eight months.[362]

The matter was taken on judicial review. The Court held that the adjudicator did not have jurisdiction to inquire into the reasons for the termination and that he was only allowed to determine whether the notice period was reasonable.[363] The Court held that Dunsmuir had received procedural fairness by virtue of the grievance that was held before the adjudicator. Applying the reasonable *simpliciter* standard, the reviewing court set aside the adjudicator's decision regarding Dunsmuir's reinstatement, but upheld the adjudicator's provisional award of eight months' notice.[364]

The matter was taken on appeal to the New Brunswick Court of Appeal. The Court held that the correct standard of review was reas d not correctness. The Court further held that the adjudicator's decision majority of the Court held that the judicial review system in Canada h to apply, and reconsidered both the number and definitions of the vario held that there should only be two standards of review: correctness anc

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WESTERN CAPE

The correctness standard will apply to jurisdictional issues and where the question of law is in dispute. The reviewing court will look at the case afresh and determine whether it agrees with the decision of the adjudicator.[367] If the reviewing court does not agree with the decision made by the adjudicator, it will substitute its own view and determine the correct decision.[368] In essence the court needs to determine whether the decision of the adjudicator is correct.[369] This is similar to an appeal procedure which a grievance party cannot use as a remedy to review an arbitration award in South African courts. When reviewing a matter on appeal courts must decide

[362] *Dunsmuir v New Brunswick* [2008] 1 SCR 190 para 16.
[363] *Dunsmuir v New Brunswick* [2008] 1 SCR 190 para 17.
[364] *Dunsmuir v New Brunswick* [2008] 1 SCR 190 para 19.
[365] *Dunsmuir v New Brunswick* [2008] 1 SCR 190 para 22.
[366] *Dunsmuir v New Brunswick* [2008] 1 SCR 190 para 34.
[367] *Dunsmuir v New Brunswick* [2008] 1 SCR 190 para 50.
[368] *Dunsmuir v New Brunswick* [2008] 1 SCR 190 para 50.
[369] *Dunsmuir v New Brunswick* [2008] 1 SCR 190 para 50.

whether the decision of the court *a quo* was right or wrong[370] which will have to be decided on whether the decision was right or wrong on the facts or the law.[371] The Court in *Samancor* held that even if the reviewing court does not agree with the decision of the commissioner it does not grant the court the opportunity to substitute its own opinion. There are limited grounds upon which a reviewing court is entitled to interfere in terms of s145 of the LRA.[372]

In contrast to the correctness standard, when a reviewing court applies the standard of reasonableness it will have to analysis the qualities that make a decision reasonable.[373] The court will have to look at the process in reaching the decision, as well as the outcomes of the decision of the adjudicator.[374] When applying the standard of reasonableness the reviewing court is concerned with justification, transparency and intelligibility within the decision-making process, whether the decision is reasonable and can be justified on the facts and in law.[375] The standard of review determined by the CC in *Sidumo* is the reasonable standard of review test. This test requires the reviewing court to determine whether the decision reached by the commissioner is reasonable. The reviewing court must take into consideration the reasons provided by the commissioner and the material evidence which was before the commissioner. 'There must be a reasonably sustainable fit between the evidence and the outcome.'[376] The focus is largely on the outcome of the decision, as opposed to the manner in which the commissioner had arrived at the decision.[377]

The standard of reasonableness as determined in *Dunsmuir* is not similar to the reasonable decision-makers test as determined in *Sidumo*. The reviewing court in *Sidumo* is not concerned on whether the process in reaching the decision is reasonable. The outcomes of the decision

[370] Fergus E 'The distinction between appeal and reviews – Defining the limits of the labour court's powers of review' (2010) 31 *ILJ* 1556 1557.
[371] Hoexter G *Administration Law in South Africa* 2 ed (2012) 108.
[372] *National Union of Mine Workers v Samancor Ltd* (2011) 32 *ILJ* 1618 (SCA); [2011] 11 BLLR 1041 (SCA) para 5.
[373] *Dunsmuir v New Brunswick* [2008] 1 SCR 190 para 47.
[374] *Dunsmuir v New Brunswick* [2008] 1 SCR 190 para 47.
[375] *Dunsmuir v New Brunswick* [2008] 1 SCR 190 para 47.
[376] Le Roux PAK & Leigh Young K 'The role of reasonableness in dismissal: the Constitutional court looks at who has the final say' (2007) 17 *CLL* 29.
[377] Rogers P & Naidu C 'Test for review relooked – is there still scope for process related review or is it limited to Sidumo's outcome-based approach?' available at *http://www.lexology.com/library/detail.aspx?g=63b12c19-a56a-4a12-8f31-9b05de51fff5* (accessed 28 October 2014).

made by the Commissioner must be reasonable. The Court in *Dunsmuir* held that a reviewing court must be concerned with justification, transparency and intelligibility within the decision-making process. The reviewing court will have to determine whether the reasoning of the adjudicator is reasonable. In order to determine whether the decision made by the adjudicator is reasonable the reviewing court will have to look at the process of articulating the reasons and the outcomes of the decision made by the adjudicator.[378] In essence the reviewing court needs to determine whether the process in reaching the decision is reasonable.

3.8 COMPARISION WITH NAMIBIA'S JUDICIAL REVIEW PROCEDURE

As previously stated, the LRA does not allow a right of appeal against an arbitration award. The drafters of the LRA intentionally rejected the possibility of an appeal.[379] They believed that the exclusion of an appeal against the arbitrator's award would speed up the process and free it from the legalism and costs that accompany appeal proceedings.[380] Inherent delays in finalising disputes are common in both the South African and Namibian court systems, which is contrary to the objectives of labour legislation.[381]

UNIVERSITY of the WESTERN CAPE

The delays in finalising disputes did not stop Namibia from permitting an aggrieved party the choice between an appeal against or a review of arbitration proceedings, as opposed to the position in South Africa.[382] Appeals in Namibia are permitted on the basis of art 12(1)(a) of the Namibian Constitution,[383] which ensures that parties to arbitration proceedings are guaranteed a right to a fair trial.[384] Arbitration proceedings are considered to be a forum for the purpose of

[378] *Dunsmuir v New Brunswick* [2008] 1 SCR 190 para 47.
[379] *Herholdt v Nedbank Ltd and Another* (701/2012) [2013] ZASCA 97 para 9.
[380] The Explanatory Memorandum to the Labour Relations Act 1995 16 *ILJ* 278 318.
[381] Musukubili F & van der Walt 'The Namibian Labour Dispute Resolution System: Some Lessons from South Africa' (2014) 35(1) *Obiter* 133. See also *Herholdt v Nedbank Ltd* [2012] 9 BLLR 857 (LAC) para 53.
[382] Musukubili F & van der Walt 'The Namibian Labour Dispute Resolution System: Some Lessons from South Africa' (2014) 35(1) *Obiter* 133.
[383] Constitution of the Republic of Namibia (amended 1998).
[384] Musukubili F & van der Walt 'The Namibian Labour Dispute Resolution System: Some Lessons from South Africa' (2014) 35(1) *Obiter* 133.

resolving labour disputes. In South Africa, the CCMA is an administrative body as defined in s 33 of the Constitution.[385]

Appeals against arbitration proceedings can only be done on limited grounds. They can be done based on any question of law, of fact, or of a combination of both. [386] In *Shoprite Namibia* the appellant appealed on question of law against the arbitrator's award. The appellant was of the opinion that the arbitrator had erred on the law or on the facts in her finding of the material evidence. The Court held that s 89 (1)(a) of the Nambian Labour Act permits a court to hear an appeal on a question of law alone where the matter does not fall within the ambit of s 89(1)(b) of the Labour Act. Section 89 (1)(b) states that a party to a dispute may appeal to the Labour Court against an arbitrator's award, where an award in a dispute was initially referred to the Labour Commissioner on a question of fact, law or mixed fact and law. In essence the court cannot hear an appeal on a question of fact or both law and fact.[387]

The Court in *JB Cooling & Refrigeration*[388] reaffirmed that when an arbitration award is appealed against in terms of s 86(1)(a) of the Labour Act[389], but does not fall within the ambit of s 86(1)(b), such appeal must be on a question of law alone.[390] In order for a court to determine whether the appeal is on a question of law or fact, the reviewing Court will have to determine whether the LAC made the correct decision and order. In order for a court to determine that the decision made by the arbitrator is the correct one, it will first have to establish the facts which were common cause or not in issue before the arbitrator and then determine the relevant findings that arbitrator made.[391]

An arbitration award may be reviewed where the aggrieved party alleges a defect in the arbitration proceedings.[392] In terms of s 89(5) of the Labour Act[393], an award can be set aside on

[385] Musukubili F & van der Walt 'The Namibian Labour Dispute Resolution System: Some Lessons from South Africa' (2014) 35(1) *Obiter* 133.
[386] Section 89(1)(a) and (b) of the Labour Act 11 of 2007 (Labour Act).
[387] *Shoprite Namibia (Pty) Ltd v Paulo and Another* (LCA 02/2010) [2011] NALC 5 para 2.
[388] *JB Cooling & Refrigeration CC v Kavendjaa & Others* (LCA 15/2010) [2012] NALC 8.
[389] Labour Act 11 of 2007
[390] *JB Cooling & Refrigeration CC v Kavendjaa & Others* (LCA 15/2010) [2012] NALC 8 para 6.
[391] *JB Cooling & Refrigeration CC v Kavendjaa & Others* (LCA 15/2010) [2012] NALC 8 para 11.
[392] Section 89(4) of the Labour Act.
[393] Labour Act 11 of 2007

the grounds of misconduct, gross irregularity in the conduct of the arbitration proceedings, that the commissioner exceeded his/her power, or that award has been improperly obtained. These grounds are similar to the grounds set out in s 145(2) of the LRA[394].

In *Atlantic Chicken*[395] the applicant had brought a decision on review and fought to have it set aside. The LAC held that a review does not allow the court to reconsider the award made by the arbitrator.[396] A judicial review is concerned with the decision-making process as opposed to the arbitrator's decision.[397] In essence the applicant's grievance must be against the procedure followed during the arbitration proceedings.[398] This is similar to process related unreasonableness. The reviewing court will have to determine whether the process followed by the commissioner in reaching the decision was reasonable. This generous approach allowed by the LAC in *Herholdt* was rejected by the SCA in *Herholdt*. The SCA held that an award can be reviewed on the grounds set out in s 145 of the LRA which is suffused with the standard of reasonableness as determined in *Sidumo*. The Court in *Atlantic Chicken* held that awards can only be reviewed on the grounds set out in s 89(4) of the Labour Act[399], but the grievance party needs to prove that there was a defect in the process during the arbitration.[400]

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3.9 CONCLUSION

Arbitration awards can only be reviewed in exceptional cases.[401] The aim of the legislature was to ensure that CCMA awards would be final and only be interfered with in limited circumstances.[402] The narrow grounds of review ensure that parties are bound to the finding of the commissioner even if the commissioner has erred on the facts or the law.[403]

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[394] Labour Act 11 of 2007
[395] *Atlantic Chicken Company (Pty) Ltd v Mwandingi & Other* (LC 105/2011) [2012] NALC 11.
[396] *Atlantic Chicken Company (Pty) Ltd v Mwandingi & Other* (LC 105/2011) [2012] NALC 11 para 5.
[397] *Atlantic Chicken Company (Pty) Ltd v Mwandingi & Other* (LC 105/2011) [2012] NALC 11 para 5.
[398] *Atlantic Chicken Company (Pty) Ltd v Mwandingi & Other* (LC 105/2011) [2012] NALC 11 para 5.
[399] Labour Act 11 of 2007
[400] *Atlantic Chicken Company (Pty) Ltd v Mwandingi & Other* (LC 105/2011) [2012] NALC 11 para 5.
[401] Du Toit D *et al Labour Relations Law* 5 ed (2006) 198.
[402] Du Toit D *et al Labour Relations Law* 5 ed (2006) 198.
[403] Du Toit D *et al Labour Relations Law* 5 ed (2006) 198.

A reviewing court can only interfere with an arbitration award if the conduct of the commissioner amounts to gross irregularity. The conduct will only amount to gross irregularity where the commissioner had not afforded either party the opportunity of a fair trial. This will ensure that the decision made by the commissioner is reasonable and without procedural errors or poor reasoning, unless the commissioner misunderstood the issue before him or her.[404] Inadequate reasoning or failure to take into account all relevant factors will not make the commissioner's decision unreasonable.[405] This portrays that errors of law and fact are not important, yet these errors are in certain circumstances very important.[406] These errors determine whether the award is substantively unreasonable or not.

In the following chapter, concluding remarks will be made in respect to whether the standard of review determined in *Sidumo* is an appropriate mechanism for reviewing arbitral awards and whether the distinction between review and appeal is threatened.

UNIVERSITY of the
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[404] Fergus E 'Reviewing an Appeal: A response to Judge Murphy and the SCA' (2014) 35 *ILJ* 47-59.
[405] Fergus E 'Reviewing an Appeal: A response to Judge Murphy and the SCA' (2014) 35 *ILJ* 47-59.
[406] Fergus E 'Reviewing an Appeal: A response to Judge Murphy and the SCA' (2014) 35 *ILJ* 47-59.

CHAPTER 4

CONCLUSION

The aim of this thesis was to determine whether the standard of reasonableness as expressed by the Constitutional Court in *Sidumo* is an appropriate mechanism for reviewing arbitrational awards. S 33(1) of the Constitution[407] requires that administrative action must be 'reasonable'.[408] In order to determine whether a decision made by the Commissioner is reasonable or unreasonable is often thought to be an incurably substantive undertaking. There is a fear that courts will be drawn into the merits of the decision made by the Commissioner, which blurs the distinction between appeal and review.[409]

It is submitted that reviewing an arbitration award on the grounds of reasonableness does threaten the distinction between appeal and review, but to a limited extent where it is necessary for the court to scrutinise the merits of the Commissioner's decision.[410] It is impossible to determine whether a decision falls within the ambit of reasonableness without taking into consideration the material evidence before the Commissioner, with emphasis placed on various factors, inclusive of the purpose the decision sought to achieve. [411] The distinction between appeal and review can be best explained by distinguishing between review as a process and a remedy.[412] In the process of review, a reviewing court can scrutinise the arbitration award – but not to the extent where the court sets aside a commissioner's decision with which it does not agree.[413] The Court in *Bato Star* recognised this danger.[414] A reviewing court must determine whether or not the decision of a Commissioner falls within the ambit of reasonableness as determined in *Sidumo*.[415]

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[407] Constitution of the Republic of South Africa, 1996.
[408] Hoexter G *Administration Law in South Africa* 2 ed (2012) 327.
[409] Hoexter G *Administration Law in South Africa* 2 ed (2012) 327.
[410] Hoexter G *Administration Law in South Africa* 2 ed (2012) 351.
[411] Hoexter G *Administration Law in South Africa* 2 ed (2012) 351.
[412] Hoexter G *Administration Law in South Africa* 2 ed (2012) 352.
[413] Hoexter G *Administration Law in South Africa* 2 ed (2012) 352.
[414] *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs & Tourism and Others* 2004 (4) SA 490 (CC) para 45.
[415] *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC); (2007) 28 *ILJ* 2405 para 109.

related unreasonableness.[425] The arbitration awards in these cases had failed the *Sidumo* test. The LAC in *Herholdt* held that process-related errors are sufficient to have an award set aside without the *Sidumo* test being met.[426] An arbitration award will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material before them as was determined in *Sidumo*.[427] Courts cannot simply set aside an award on (even material) errors of fact, including the weight and relevance attached to particular facts, unless the outcome is unreasonable.[428]

In *Herholdt* and *Gold Fields* the SCA and LAC concluded that the Commissioner's award was unreasonable. The Commissioner in both cases held that the employees were guilty of misconduct and that dismissal was a fair sanction. The SCA and LAC held that the awards had failed the *Sidumo* test. Seemingly there has been a development in a different direction with regards to the review standard, which allows courts to set aside an award on the grounds of a latent irregularity as opposed to gross irregularity. Accordingly, if courts can determine on review that the outcome of an award was objectively wrong, an award will more often than not be set aside on the ground of unreasonableness.[429]

In conclusion, both courts where correct in stating that the awards had failed the *Sidumo* test as this was the standard determined by the CC in *Sidumo*. The LAC was incorrect in allowing awards to be set aside on the ground of latent irregularity. The LAC did not recognise the majority judgment of the CC in *Sidumo* which is binding on all lower courts including the SCA. In essence the LAC was incorrect in extending the grounds of review, to allow arbitration awards to be set aside on the ground of latent gross irregularity. Therefore the standard of reasonableness as determined by the Constitutional Court in Sidumo is an appropriate mechanism for reviewing arbitrational awards.

Word Count: 26 183 words

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[425] See for example; *Gaga v Anglo Platinum Ltd & others* (2012) 33 *ILJ* 329 (LAC); [2012] 3 BLLR 285 (LAC); *Afrox Healthcare Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2012) 33 *ILJ* 1381 (LAC); [2012] 7 BLLR 649 (LAC); *Herholdt v Nedbank Ltd* [2012] 9 BLLR 857 (LAC) para 39. See also Myburgh A 'The test for review of CCMA arbitration awards: an update' (2013) 23(4) *Contemporary Labour Law* 42.

[426] Myburgh A 'The test for review of CCMA arbitration awards: an update' (2013) 23(4) *Contemporary Labour Law* 42.

[427] *Herholdt v Nedbank Ltd and Another* (701/2012) [2013] ZASCA 97 para 25.

[428] *Herholdt v Nedbank Ltd and Another* (701/2012) [2013] ZASCA 97 para 25.

[429] Myburgh A 'The test for review of CCMA arbitration awards: an update' (2013) 23(4) *Contemporary Labour Law* 42.