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Life after Sidumo: clarifying the review test

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Sidumo v Rustenburg Platinum Mines Ltd & Others [2007] 12 BLLR 1097 (CC) is a landmark case in South African labour law, which among other things, established the test to be used by judges in reviewing awards made by commissioners.

Introduction

According to the Constitutional Court, the question to be asked when reviewing awards is; was the decision reached by the commissioner one that a reasonable decision-maker could not reach?

Further, the Court held that applying such decision must give effect to the constitutional right to fair labour practices as set out in section 23 of the Constitution, and the right to administrative action which is lawful, reasonable and procedurally fair.

After the *Sidumo* case, the question that riddled many is how one could possibly determine whether a reasonable decision-maker could not reach a certain decision. The Supreme Court and the Labour Appeal Court have provided clarity in this regard in two subsequent decisions.

The Herold Decision

In *Herholdt v Nedbank Ltd (2013) 34 ILJ 2795 (SCA)*, the Supreme Court stated that the review test involved the reviewing court examining the merits of the case "in the round".

This is done by determining whether in light of the issue raised by the dispute under arbitration, the outcome reached by the commissioner is not one that could reasonably be reached on the basis of the evidence and other material properly before the commissioner.

In doing this, the reasons provided by the commissioner in reaching his decision are to be considered. In the event that the court finds that the reasons provided by the arbitrator are erroneous and do not assist the court in determining whether the decision reached is one a reasonable decision-maker would reach, then the court must still consider whether apart from those reasons, the decision is one that could be reasonably reached in light of the issues and evidence in the matter.

The effect of the *Herholdt* decision is that, even where the reasons given by a commissioner are clearly wrong and there has been some irregularity, such a decision may not be set aside if on the basis of the issues raised and the evidence presented to the commissioner, the outcome was a reasonable one.

The *Sidumo* test will, however, justify setting aside an award on review if the decision is "entirely disconnected with the evidence" or is "unsupported by any evidence" and involves speculation by the commissioner.

The Sidumo Test

The Labour Appeal Court expanded on *Herholdt* in the case of *Gold Fields Mining South Africa (Pty) Ltd v CCMA and Others (2014) 35 ILJ (LAC)*, stating that *Sidumo* does not postulate a test that merely requires a simple evaluation of the evidence presented to a commissioner and based on that evaluation, a determination of the reasonableness of the decision arrived at by the commissioner.

The court went a step further and expressed that the court in *Sidumo* maintained that arbitration awards made under the Labour Relations Act 66 of 1995 should continue to be determined in terms of section 145 of the Act; however, the constitutional standard of reasonableness must be suffused in the application of section 145.

Section 145 provides for the instances under which a party may refer an arbitration award for review.

Therefore, 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 automatically lead to a setting aside of an award if any of the grounds are found to be present.

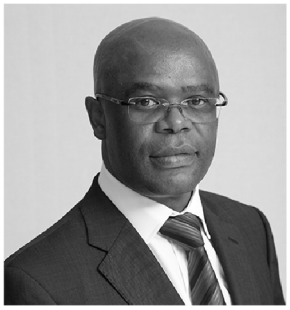
The decision in itself would need to be unreasonable on the basis of the evidence and issues before the commissioner, before the award may be set aside. Accordingly, where any of the above grounds are established, but the decision reached is still a reasonable decision, then such a decision may not be set aside.

Conclusion

Although the above case law provides clarity on the *Sidumo* test, it certainly poses greater difficulty for parties who bring an application for the review of an arbitration award.

Parties will not only be required to prove a defect in arbitration proceedings as set out in section 145, but also to prove that the decision in itself was unreasonable.

An award may therefore not be set aside on the basis of procedural challenges alone; the decision must be unreasonable, regardless of the reasons provided by the commissioner, before it may be set aside.



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