

**NEW CHALLENGES:
SHIFTING POWER IN
UNCERTAIN TIMES**
12-14 August 2009



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Revisiting review: when is an arbitration award reviewable?

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Introduction

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- In terms of section 145(2) of the LRA, a CCMA arbitration award is reviewable if:
 - the commissioner committed misconduct in relation to his duties, committed a gross irregularity in the conduct of the proceedings or exceeded his powers; or
 - if the award was improperly obtained.

Introduction (cont.)

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- In *Sidumo v Rustenburg Platinum Mines Ltd* [2007] 12 BLLR 1097 (CC), the court held that the constitutional standard of reasonableness (applicable to all administrative action) ‘suffuses’ section 145.
- The court went on to set the constitutional review test as follows:
 - *‘Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?’* (*‘the Sidumo test’*).

Introduction (cont.)

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- This is a stringent result-based test, which will only be met if the result / outcome of the award is incapable of reasonable justification (even for reasons not relied on by the commissioner): *Fidelity Cash Management Service v CCMA* [2008] 3 BLLR 197 (LAC).
- But this is not the only basis upon which a CCMA award can be reviewed. As demonstrated by the case study, an award will also be liable to review for process-related reasons, including, for example, the commission of a (latent) gross irregularity in the form of an error of law or the failure to apply the mind to materially relevant factors.

Introduction (cont.)

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- *Southern Sun Hotel Interests (Pty) Ltd v CCMA* (case no. JR243/05, dated 24/7/2009, per Van Niekerk J):
 - *‘It might be inferred from the Sidumo line of reasoning that in an application for review brought under s 145, process-related conduct by a commissioner is not relevant, and that the reviewing court should concern itself only with the record of the arbitration proceeding under review and its result. I do not understand the Sidumo judgment to have this consequence. Section 145 of the Act clearly invites a scrutiny of the process by which the result of an arbitration proceeding was achieved, and a right to intervene if the commissioner’s process-related conduct is found wanting.’*

Introduction (cont.)

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- *Southern Sun Hotel Interests (supra):*
 - ‘... section 145 requires that the outcome of CCMA arbitration proceedings ... must fall within a band of reasonableness, but this does not preclude this court from scrutinising the process in terms of which the decision was made. If a commissioner fails to take material evidence into account, or has regard to evidence that is irrelevant, or the commissioner commits some other misconduct or a gross irregularity during the proceedings under review and a party is likely to be prejudiced as a consequence, the commissioner’s decision is liable to being set aside regardless of the result of the proceedings or whether on the basis of the record of the proceedings, that result is nonetheless capable of justification [i.e. reasonable].’
- See generally: Anton Myburgh ‘*Sidumo v Rustplats: How have the courts dealt with it?*’ (2009) 30 ILJ 1.

Case Study

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- *NUMSA obo Khumalo v Aluminium World*
- Role players:
 - Khumalo: driver's assistant (dismissed employee);
 - Botha: truck driver;
 - Vilikazi: forklift driver;
 - Smuts: security guard employed by an external security company;
 - Swafo: warehouse supervisor (co witness 1);
 - Matsane: security supervisor (co witness 2);
 - Botes: administrative supervisor (co witness 3);
 - Duma: chairperson of disciplinary enquiry;
 - Dhlamini: NUMSA representative at CCMA;
 - Kotze: company representative at CCMA, and complainant at enquiry.

Case Study

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- The facts in summary:
 - 18 pallets (in all probability) of aluminium plates were loaded on a truck by Khumalo (driver's assistant), Vilikazi (forklift driver) and Smuts (security guard), with this being witnessed by Swafo (warehouse supervisor) and Matsane (security supervisor).
 - The truck, with Botha (driver) and Khumalo on board, left the company's premises, delivered 17 pallets to Zincor, and returned to the company empty.
 - When Matsane saw the delivery note, he raised a concern, which led to a stock-take being undertaken by Botes, which confirmed that stock to the equivalent of the 18th pallet was missing.
 - Botha, Khumalo and Vilikazi were all dismissed for being accomplices / accessories to the theft of the 18th pallet, and Smuts was reassigned.

Case Study

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- The commissioner found that Khumalo was not guilty, that the sanction of dismissal was, in any event, inappropriate, and that Khumalo's dismissal was procedurally unfair. In the result, Khumalo was reinstated.
- In his 'analysis and findings' (paras 20 – 25) the commissioner committed a total of 21 reviewable defects, each of which is now addressed.

Error 1: Credibility

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- Commissioner: *'I must say that I found Mr Khumalo to be an impressive and credible witness, in that he stuck to his version and did not contradict himself under cross-examination.'*

Error 1 (cont.)

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- This is reflective of the commissioner's failure to apply his mind to materially relevant factors, which constitutes a (latent) gross irregularity.
- The commissioner ignored the fact that Swafo and Matsane were not challenged about Khumalo's participation in loading the Zincor order, and that Khumalo's version (of not being involved because a forklift was used and because he went to the sick-bay) smacked of a recent fabrication.

Error 1 (cont.)

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- *Sidumo (supra):*
 - *‘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 ... 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 ... 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.’*

Error 1 (cont.)

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- Although the finding in question by the commissioner constitutes a credibility finding, it is one that can nevertheless be attacked on review.
- *S v Heslop* 2007 (4) SA 38 (SCA):
 - *‘It is a cause for concern to find laudatory epithets applied by a trial court to witnesses when the record shows that their performance, judged by the written record, was obviously far from satisfactory. In such cases an appeal court will more readily interfere with the findings of the trial court as to the weight to be attached to the witnesses’ evidence and its ultimate conclusion based on such evidence.’*

Error 2: Credibility

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- Commissioner: *'The same cannot be said for Messrs Swafo and Matsane, because they clearly contradicted one another regarding whether Mr Matsane would always check and stamp invoices before trucks left the premises, which contradiction casts serious doubt on their credibility as witnesses.'*

Error 2 (cont.)

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- This equates to an erroneous approach to the law of evidence, which constitutes a reviewable defect: *SA Veterinary Council v Veterinary Defence Association* 2003 (4) SA 546 (SCA).
- Nicholas ‘*Credibility of Witnesses*’ (1985) 102 SALJ:
 - ‘It is not the case that lack of consistency between witnesses affords any basis for an adverse finding on their credibility. Where contradictory statements are made by different witnesses, obviously at least one of them is erroneous, but one cannot, merely from the fact of the contradiction, say which one. It follows that an argument based only on a list of contradictions between witnesses leads nowhere so far as veracity is concerned. The argument must go further, and show that one of the witnesses is lying. It may be that the court is unable to say where the truth lies as between the contradictory statements, and that may affect the question of whether the onus of proof has been discharged: but that has nothing to do with the veracity of the witnesses.’

Error 3: Credibility

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- Commissioner: *'In the circumstances, I am forced to treat their evidence [i.e. that of Messrs Swafo and Matsane] with caution insofar as it conflicts with that of Mr Khumalo, and am thus inclined to accept Mr Khumalo's version over their version on this basis alone.'*

Error 3 (cont.)

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- The resolution of a factual dispute requires a balanced assessment of the reliability, credibility and probabilities associated with the evidence of the respective witnesses: *Stellenbosch Farmers' Winery Group Ltd v Martell & Co* 2003 (1) SA 11 (SCA).
- Where a commissioner purports to resolve a factual dispute with reference only to the credibility of a witness, and without an assessment of the probabilities and surrounding facts, this constitutes a reviewable defect: *Lukhanji Municipality v Nonxuba NO* [2007] 2 BLLR 130 (LC).

Error 4: Credibility

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- Commissioner: *‘As for Mr Botes, he was a single witness in relation to the issue of the stock-take, with it being trite law that the evidence of single witnesses must be treated with caution.’*

Error 4 (cont.)

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- This constitutes a misapplication of the cautionary rule applicable to a single witness (i.e. an erroneous approach to the law of evidence) and a reviewable defect: *Blue Ribbon Bakeries v Naicker* [2000] 12 BLLR 1411 (LC).
- *Blyvooruitzicht Gold Mining Co Ltd v Pretorius* [2000] 7 BLLR 751 (LAC):
 - ‘The court rejected Boshoff’s evidence because, as a single witness, it was said that his evidence had to be treated with caution. This is a perversion of the true rule. In criminal cases the evidence of a single witness is only treated with caution if it is contested by an accused. Evidence which is uncontradicted may only be rejected if it is inherently improbable.’

Error 5: Guilt

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- Commissioner: *'The deduction made by Mr Swafo [that 18 pallets were loaded] was based on a hearsay account of what Mr Smuts had said to Mr Vilikazi.'*

Error 5 (cont.)

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- This constitutes a misapplication of the rule against reliance on hearsay evidence (i.e. an erroneous approach to the law of evidence) and a reviewable defect.
- The ‘probative value’ of Swafo’s evidence about what he had heard Smuts say to Vilikazi (in Khumalo’s presence) did not ‘depend upon the credibility of any person other than’ Swafo. Accordingly, it did not constitute ‘hearsay evidence’, as defined in section 3(4) of the Law of Evidence Amendment Act 45 of 1988.
- Furthermore, in rejecting Swafo’s version on account only of the ‘hearsay’ component thereof, the commissioner failed to apply his mind to the other materially relevant factors making up such version.

Error 6: Guilt

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- Commissioner: *'There exists in my mind reasonable doubt as to the accuracy of Mr Matsane's evidence that he counted 18 pallets at the time of loading.'*

Error 6 (cont.)

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- This is reflective of the application of the criminal standard of proof (beyond a reasonable doubt) instead of the civil standard of proof (on a balance of probabilities) (i.e. an erroneous approach to the law of evidence) and constitutes a reviewable defect: *Avril Elizabeth Home for the Mentally Handicapped v CCMA* [2006] 9 BLLR 833 (LC).

Error 7: Guilt

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- This finding could also be attacked on review on account of the commissioner having failed to provide any reasons for rejecting Matsane's version.
- *Boxer Superstores (Pty) Ltd v Zuma* [2008] 9 BLLR 823 (LAC):
 - *'The commissioner's award was manifestly irrational and, to that extent, the judgment of [the Labour Court] is correct. It is irrational because the [commissioner] gave no reasons for awarding compensation after having found that the [company] had failed to discharge the onus in relation to substantive fairness.'*

Error 8: Guilt

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- Commissioner: *‘As for Mr Botes ... his evidence takes the matter no further, because the stock loss could obviously have occurred in many different ways – it being a well known fact (which I have learnt of from presiding over other matters) that employers involved in the metal industry suffer high levels of shrinkage through numerous different means.’*

Error 8 (cont.)

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- The material properly before a commissioner comprises evidence under oath (oral or written) or evidence introduced by agreement between the parties: *DB Thermal (Pty) Ltd v CCMA* [2000] 10 BLLR 1163 (LC).
- Where a commissioner relies on something other than this (as occurred herein), he commits a reviewable defect.

Error 9: Guilt

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- Commissioner: *'I am also inclined to accept Mr Khumalo's evidence that the ad hoc stock-takes undertaken by Mr Botes were frequently inaccurate, with the result that little weight can be attached to the result of the stock-take in question.'*

Error 9 (cont.)

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- If it is to be contended that the version of a witness is to be disbelieved, the opposing version must be put to the witness under cross-examination: *Small v Smit* 1954 (3) SA 434 (SWA).
- Where, in breach of this rule, a commissioner finds for an employee on an issue in circumstances where the company's version was not challenged under cross-examination (as occurred herein), this constitutes a reviewable defect: *American Leisure Corporation v Van Wyk* [2005] 11 BLLR 1043 (LC).

Error 10: Guilt

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- Commissioner: *'But even if I were to find that 18 pallets left the company's premises, there is nothing directly linking Mr Khumalo to the theft of the missing pallet – none of the company's witnesses were present during the journey to and from Zincor, and there was no tachograph or satellite surveillance evidence tendered to demonstrate that the truck deviated from the prescribed route.'*

Error 10 (cont.)

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- A commissioner commits a reviewable defect (as occurred herein) in focusing on the absence of direct evidence establishing the employee's guilt, and thus failing to recognise the existence of circumstantial evidence: *Aluminium City (Pty) Ltd v MEIBC* (2006) 27 ILJ 2567 (LC).
- A commissioner also commits a reviewable defect (as occurred herein) in evaluating evidence (of a circumstantial nature) on a piecemeal basis, instead of stepping back and drawing an inference on a balance of probabilities from the evidence as a whole: *Aluminium City (supra)*.

Error 11: Guilt

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- Commissioner: *'In addition, Mr Khumalo was steadfast that he knew nothing about what may or may not have happened to the 18th pallet, with this being supported by the evidence given by Mr Botha [the driver] at Mr Khumalo's disciplinary enquiry.'*

Error 11 (cont.)

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- The minutes of Khumalo's disciplinary enquiry (and Botha's version thereof) did not constitute evidence before the commissioner and ought thus not to have relied upon: *Karen Beef (Pty) Ltd v Bovane NO* [2008] 8 BLLR 766 (LC).
- Botha's 'evidence', as recorded in the minutes, constituted impermissible hearsay at the arbitration: *Secunda Supermarket CC v Dreyer NO* [1998] 10 BLLR 1062 (LC).

Error 12: Guilt

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- Commissioner: *'Given that Mr Khumalo was ill on the day in question and had taken medication shortly before the truck left the company's premises, it seems to me that Mr Khumalo may well have dozed off at the time that the 18th pallet disappeared.'*

Error 12 (cont.)

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- This was not something raised by Khumalo at the arbitration and equates to the arbitrator having given Khumalo the benefit of an ‘unarticulated defence’, which constitutes a reviewable defect: *Rustenburg Platinum Mines Ltd v CCMA* (2007) 28 ILJ 1107 (LC).

Error 13: Guilt

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- Commissioner: *'In the final result, given that the company cannot gainsay Mr Khumalo's evidence, I must accept it.'*

Error 13 (cont.)

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- This constitutes a reviewable defect, because the finding was arrived at in the absence of an analysis of the evidence in accordance with the recognised means of resolving factual disputes of the nature in question (see error 3 above).

Error 14: Guilt

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- Commissioner: *'As it bears the onus of proof, it was for the company to establish what happened to the 18th pallet, which it failed to do.'*

Error 14 (cont.)

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- Where the employer establishes a *prima facie* case, the evidentiary burden shifts to the employee to rebut the case by providing a credible explanation, failing which the case against the employee will be established: *Nampak Corrugated v Khoza* [1999] 2 BLLR 108 (LAC).
- The commissioner failed to recognise that Mr Khumalo bore the evidentiary burden to establish what became of the 18th pallet in the circumstances that transpired, which constitutes a reviewable defect (in the form of an erroneous approach to the law of evidence): *Aluminium City (supra)*.

Error 15: Sanction

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- Commissioner: *‘Quite clearly, the company gave no consideration to the fact that, at worst, Mr Khumalo was not himself guilty of theft, but rather guilty of the lesser offence of being an accomplice thereto (which is not an offence mentioned in the company’s disciplinary code).’*

Error 15 (cont.)

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- This constitutes a reviewable defect (in the form of a material error of law) because in labour law there is really no difference between being guilty of theft, attempted theft or being an accomplice to theft (*Rustenburg Platinum Mines Ltd v NUM* [2001] 3 BLLR 305 (LAC)) and because internal disciplinary codes are merely guidelines (*NUM v CCMA* [2003] 12 BLLR 1261 (LC)).

Error 16: Sanction

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- Commissioner: *'... the company did not rebut Mr Khumalo's evidence about the receptionist, with the result that I find that the company was guilty of the inconsistent application of discipline, which, in itself, renders the sanction of dismissal unfair.'*

Error 16 (cont.)

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- The commissioner failed to apply his mind to materially relevant factors (a latent gross irregularity) which served to distinguish the conduct of Khumalo from that of the receptionist: *Rustenburg Platinum Mines v CCMA* (2007) 28 ILJ 1114 (LC).
- The factors ignored by the commissioner included the difference in the charges and the value of the item involved, and the fact that the receptionist showed remorse.

Error 17: Procedure

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- Commissioner: *‘For the company to contend, as it did in argument, that giving short notice of the disciplinary enquiry [by 4 hours] was inconsequential, equates to paying lip service to its very own disciplinary procedure, which cannot be permitted.’*
- [The commissioner went on to find the dismissal procedurally unfair on this basis.]

Error 17 (cont.)

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- The commissioner committed a reviewable defect in failing to consider whether, despite the technical non-compliance with the disciplinary procedure, the actual procedure followed was fair: *Highveld District Council v CCMA* [2002] 12 BLLR 1158 (LAC).
- *Jonker v Okhahlamba Municipality* [2005] 6 BLLR 564 (LC):
 - ‘As a matter of labour law, the [employee] has to show actual prejudice arising from the procedure followed. A procedural irregularity that does not result in prejudice is not actionable.’

Error 18: Procedure

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- Commissioner: *'... the company [also] breached its disciplinary procedure in taking some six weeks to charge Mr Khumalo (instead of doing so within the prescribed 72 hours) which also cannot be condoned.'*

Error 18 (cont.)

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- This was not in issue at the arbitration, with the result that the commissioner committed a reviewable defect in raising and deciding the issue *mero moto*: *East Cape Agricultural Cooperative v Du Plessis* [2000] 9 BLLR 1027 (LC).

Error 19: Procedure

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- Commissioner: *‘Equally trite is the fact that an employee accused of serious misconduct is entitled to a hearing by an entirely independent and impartial chairperson, which Mr Duma was not because he had heard at least something about the incident before he commenced with the disciplinary enquiry.’*

Error 19 (cont.)

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- The commissioner committed a reviewable defect (in the form of a material error of law) in applying a ‘criminal justice model of procedural fairness’, which is in conflict with labour law: *Avril Elizabeth Home (supra)*.
- A degree of ‘institutional bias’, in the sense that it is inevitable that a chairperson drawn from the ranks of management will have heard something about the case or have some knowledge of the role players, is both unavoidable and not unacceptable: *Anglo American Farms v Komjwayo* (1992) 13 ILJ 573 (LAC).

Error 20: Procedure

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- Commissioner: *'I agree with the point made by Mr Dhlamini in argument that, given that Mr Duma has an office next door to Mr Kotze (who was the complainant at Mr Khumalo's disciplinary enquiry) they would surely have spoken about the matter before the enquiry.'*

Error 20 (cont.)

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- This constitutes a reviewable defect, because the submission in question made in argument did not constitute evidence before the commissioner (see error 8 above).

Error 21: Procedure

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- Commissioner: *'In these circumstances, I find that Mr Khumalo's dismissal was procedurally unfair.'*

Error 21 (cont.)

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- The commissioner failed to apply his mind to the materially relevant factor (a latent gross irregularity) that procedural errors can be cured in the course of an internal appeal: *Jerry's Security Services CC v CCMA* [2001] 7 BLLR 751 (LC).

Overall Comment

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- On an overall assessment of this matter, it would be wiser to pursue the review of the award on the basis of the commission of a series of (latent) gross irregularities (or acts of process-related unreasonableness) in the form of errors of law and the failure to apply the mind to materially relevant factors, instead of attempting to meet the *Sidumo* test.
- This is so because to succeed on the *Sidumo* test, the applicant must prove that the result (apart from the commissioner's bad reasoning) is incapable of justification, whereas to succeed with a process-related review, potential prejudice will suffice.