

Reviewing CCMA (and bargaining council) arbitration awards:

**HAS SECTION 145
BECOME
..... ACADEMIC?**



Appeal / Review

Review in terms of s 145(2):

- 'misconduct'
- 'gross irregularity'
- 'exceeded powers'

Carephone:

- arbitration = ‘administrative action’
- award must be “*justifiable in relation to the reasons given for it*”
(later: ‘rational’, ‘reasonable’)
- ‘unjustifiable’ = *ultra vires*

**Has the “extended”
(constitutional) ground of
review, (hereafter referred to as
“unreasonableness”)
superseded the specific grounds
of review in s 145?**

(The short answer:

Yes and no)

More questions:

What are the differences
between grounds of review?

(e.g.: “denied the applicant a fair hearing” – misconduct or gross irregularity?)

Why does a defect fall into one category rather than another?

(e.g.: failure to advise lay representative about proving documents = 'misconduct'; but ... about not challenging evidence = 'gross irregularity')

Is the constitutional ground (“unreasonableness”) an additional ground of review?

- “permissible grounds of review are wider” than those in s 145(2)
- Test on review: *decision must be shown to be “irrational”*
- “*result-based*” test in addition to “*process-related reasons*”

Has “unreasonableness” become a “catch-all” ground superseding the three specific grounds?

Is s 145 merely a peg on which to hang a review application?

Sidumo:

“...s 145 is now suffused by the constitutional standard of reasonableness” (*per* Navsa AJ)

Per Ngcobo J:

1. Applicants cannot rely directly on the Constitution
(*New Clicks, SANDU....*)

2. “Side-lining” of s 145 and introducing “additional” ground of review was “one of the unintended consequences of *Carephone*”

3. Review application can *only* be brought on one or more of the three grounds in s 145(2)

4. *All three* grounds of review in s 145(2) are “suffused” with constitutional standard(s)

5. The Labour Court and LAC must “give meaning and content to each of these grounds” in light of the Constitution

6. Party alleging a defect must show *which* defect is constituted by the facts

(Guidelines:

“misconduct” = impropriety

“failure to apply mind” = gross irregularity)

This means: *not* alleging
‘unreasonableness’ as
ground of review but using it
as *standard* (along with
others) in deciding whether a
ground of review (as alleged)
has been established

Does this blur the distinction
between “result-based” and
“process-related” review?

Unpack the distinction:

- Every review is “result-based”
- Every review is “process-related”
- Constitutional standards suffuse result as well as process

But practical distinction remains:
Application may fail on
“result” but succeed on
“process” (i.e., where “result
may have been different”)

Conclusion:

- Constitutional test does not remove difference between “review” and “appeal”
- S 145, interpreted in accordance with the Constitution, has not become academic