LIFE AFTER SIDUMO: CLARIFYING THE REVIEW TEST

By Sandile July, Director and Zaryl Bhero, Candidate Attorney

LEGAL BRIEF
FEBRUARY 2015

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 HERHOLD 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.

Legal notice: Nothing in this publication should be construed as legal advice from any lawyer or this firm. Readers are advised to consult professional legal advisors for guidance on legislation which may affect their businesses.

© 2015 Werksmans Incorporated trading as Werksmans Attorneys. All rights reserved.
ABOUT THE AUTHORS

SANDILE JULY

Title: Director
Office: Johannesburg
Direct line: +27 11 535 8163
Email: sjuly@werksmans.com

Sandile July has been a Director of Werksmans Attorneys since 2006 and is currently a member of the firm’s Labour & Employment Practice. A labour law specialist, Sandile frequently acts as an arbitrator at bargaining councils and represents employers and employees at various tribunals. In addition to his experience in labour-related litigation and dispute resolution, he advises clients on the implementation of the Basic Conditions of Employment Act, Labour Relations Act, Employment Equity Act and Skills Development Act. Sandile also has experience in the restructuring of state assets. He has a BProc LLB and a Higher Diploma in Tax Law from the University of the Witwatersrand and a Diploma in Alternative Dispute Resolution from the University of Pretoria.

ZARYL BHERO

Title: Candidate Attorney
Office: Johannesburg
Direct line: +27 11 535 8362
Email: zbhero@werksmans.com

Zaryl Bhero joined Werksmans Attorneys as a Candidate Attorney in 2014, in the firm’s Litigation and Dispute Resolution practice.

Her areas of speciality include employment and dispute resolution.

Zaryl graduated with an LLB from the University of KwaZulu Natal.
Established in the early 1900s, Werksmans Attorneys is a leading South African corporate and commercial law firm serving multinationals, listed companies, financial institutions, entrepreneurs and government.

Operating in Gauteng and the Western Cape, and connected to an extensive African legal network through LEX Africa, the firm’s reputation is built on the combined experience of Werksmans and Jan S. de Villiers, which merged in 2009.

LEX Africa was established in 1993 as the first and largest African legal network and offers huge potential for Werksmans’ clients as it provides a gateway to Africa to companies seeking to do business on the continent. Each LEX Africa member firm specialises in corporate and commercial law and dispute resolution combined with intimate knowledge of the local customs, business practices, cultures and languages of each country.

With a formidable track record in mergers and acquisitions, banking and finance, and commercial litigation and dispute resolution, Werksmans is distinguished by the people, clients and work that it attracts and retains.

Werksmans’ more than 180 lawyers are a powerful team of independent-minded individuals who share a common service ethos. The firm’s success is built on a solid foundation of insightful and innovative deal structuring and legal advice, a keen ability to understand business and economic imperatives and a strong focus on achieving the best legal outcome for clients.