

## Review

# A case study in determining fairness of dismissal as a sanction for misconduct in South Africa

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Accepted 6 October, 2010

In determining whether a dismissal based on misconduct is fair, all the facts surrounding the misconduct must be considered. The Commission for Conciliation, Mediation and Arbitration (CCMA) commissioner had to determine whether or not a misconduct dismissal was fair. CCMA unfair dismissals arbitration proceedings constituted hearings *de novo* which meant that the CCMA commissioner had to make his finding, as to the fairness of the dismissal, not on the basis only of evidence led at the internal disciplinary hearing, but on the basis of all evidence led at the CCMA arbitration proceedings, including evidence led that had not been led at the internal disciplinary hearing. The Constitutional Court had to decide whether a commissioner at CCMA arbitration was performing an administrative function. The Court concluded that the commissioner's arbitration was an administrative action but that Promotion of Administrative Justice Act No. 3 of 2000 is not applicable to CCMA arbitration awards.

**Key words:** Unfair dismissals, procedure, reasonableness, judgment, arbitration.

## INTRODUCTION

The South African Labour Law and Practice has changed significantly in a number of areas. South Africa may be described as a country of vast contrasts. The context in which labour relations emerges at different workplaces varies considerably (Finnemore, 1999). The make-up of today's workplace is characterised by the use of a wide array of modern working practices and technologies (Holman et al., 2005). Labour legislation, the impact of unions on all types of organized and unorganised employees and the variety of issues, topics and goals that characterize these relationships are among the factors that make labour relations such a challenging study (Bezuidenhout et al., 1999). Factors contributing to these changes were court decisions and socio-economic pressure brought about by global economic down turns such as apartheid. At present, the South African labour scene is an area of contention as never before. Dismissals

could also constitute an unfair labour practice and the employee is then also entitled to various remedies (Van Jaarsveld et al., 1998). Many dismissals are challenged in court. The individualistic and voluntary rights-based regulation of the employment relationship has drastically evolved since the emergence of trade unionism and the increased intervention of the State in the sphere of employment by means of legislation.

Misconduct is one of three grounds recognized by the Labour Relations Act 66 of 1995 as justifying the dismissal of an employee: the others being incapacitated or poor work performance and operational requirements (Grogan, 1999). Misconduct is prevalent in every workplace and its consequences may have far reaching implications. An employer has to adopt measures to curb misconduct (Van Zyl et al., 2008). This is done by implementing disciplinary rules in the form of a disciplinary code or a code of conduct.

As a means of enforcing workplace discipline, dismissals should be considered as a sanction of last resort (Grogan, 1999). The Labour Relations Act Code of Good Practice is contained in Schedule 8 and provides guidelines to the interpretation and application of the

**Abbreviations:** CCMA, Commission for conciliation; mediation and arbitration; LRA, labour relations act; PAJA, promotion of administrative justice act.

statutes in terms of which they are issued. Their status is something less than that of the legal provisions contained in the body of a statute; they may be regarded as having quasi-statutory force (Kantor, 2001).

Employers must take account of the code when managing discipline and incapacity cases. The key principle in this code is that employers and employees should treat one another with mutual respect (Nel, 2002). In determining whether the dismissal was a fair dismissal and whether the sanction of the dismissal was fair, the CCMA commissioner was required to refer to the decision of the employer, in the sense that the CCMA commissioner should regard the decision as to whether or not dismissal was a fair sanction. In this particular instance, falling primarily within the discretion of the employer, such a decision did not fall within the boundaries of a "reasonable" decision notwithstanding the CCMA commissioner's own view as to the fairness of the dismissal. Certain disputes (usually of major import), if not resolved by the CCMA in conciliation, may be referred to the Labour Court, after which these cases can be taken on appeal to the Labour Appeal Court (Barker, 1999).

## CASE STUDY

*Sidumo and Congress of SA Trade Unions v Rustenburg Platinum Mines Ltd, the CCMA and Moropa NO (2008) 19 SALLR 35 (CC)*: the following pertinent facts appear in this case.

The applicant, Mr Sidumo, was employed by the respondent employer, Rustenburg Platinum Mines Ltd in December 1985 as part of the latter's security services. In January 2000, Mr Sidumo was transferred to the Waterval Redressing Section, where he was responsible for access control, whereby he controlled the metals which were valuable and constituted the core business of Rustenburg Platinum Mines. Sidumo's main duty was to safeguard the precious metals of the mine through detailed compulsory search procedures for all persons leaving the section. His duties entailed an individual search of each person in a private cubicle involving a close personal inspection plus a metal detector scan.

As a consequence of a decline in its production, the employer had over three days in April 2000, resorted to video surveillance at various points which revealed that of 24 specifically monitored instances, Sidumo had conducted only one search in accordance with the established procedures. On eight occasions Sidumo had conducted no search at all and on 15 other searches he allowed persons to sign the search register without conducting any search at all. The employer charged Sidumo with the following misconduct: (1) Negligence by not following established procedures in terms of the Protection Services Department search procedure. This caused prejudice or possible prejudice to the Company in terms of production loss. (2) Failure to follow established

procedures in terms of the Protection Services Department search procedures.

Sidumo had been found guilty of negligence, not following laid down procedures, and dishonesty by the employer and dismissed on 26 June 2000. Mitigating factors were considered and the applicant's internal appeal were unsuccessful and he then referred an unfair dismissal dispute to the CCMA. The CCMA *per Maropa C* found that the applicant employee had correctly been found guilty of misconduct, but that the dismissal was not an appropriate and fair sanction and therefore reinstated the applicant employee with three months' compensation and subject to a written warning valid for three months.

The respondent employer tried to set the CCMA arbitration aside by appealing to the Labour Court but the court could not find any reviewable irregularity and dismissed the review application. Then the respondent employer appealed against the Labour Court judgment to the Labour Appeal Court. This court questioned the CCMA commissioner's reasons for reinstating the employee but agreed with the commissioner's finding that the dismissal was too harsh a sanction (Van Zyl et al., 2008).

The respondent employer then appealed to the Supreme Court of Appeal against the Labour Appeal Court's judgment and that court upheld the appeal and overturned the decision of both the Labour Court and the Labour Appeal Court and substituted the CCMA commissioner with a determination that the dismissal of the applicant employee was a fair dismissal. The applicant employee then applied to the Constitutional Court for leave of appeal against the Supreme Court of Appeal's judgment.

For the Constitutional Court to have jurisdiction to entertain the appeal against the Supreme Court of Appeal judgment it must be on one or more constitutional issues (Van Zyl et al., 2008). The first constitutional issue was the interpretation and application of the 1995 Labour Relations Act and the Promotion of Administrative Justice Act No 3 of 2000, both of which statutes had been enacted to give effect to the rights contained, respectively, section 23 and 33 of the Constitution. The Constitution states that everyone has the right to administrative action that is lawful, reasonable and fair and that everyone adversely affected by an administrative decision is entitled to written reasons for it (Ackermann et al., 2006).

The Constitution also states that Parliament has to give effect to this right by means of legislation. Parliament has done so by means of the Promotion of Administrative Act, 2000 (also known as "PAJA") which seems to be a codification or compilation of the right to administrative justice. PAJA seeks to realise a vision of open and accountable governance and a system of administrative justice that is fair and just (Devenish, 2001). Although the rules of administrative justice are focused on officials performing public functions, it makes sense for a private individual making decisions to involve and safeguard

himself from judicial interference at a later stage (Ackermann et al., 2006). However, experience in many countries has indicated that laws such as PAJA, at a practical level, are less successful in achieving their objectives (Devenish et al., 2001).

The second constitutional issue was the powers and functions of courts, in this case the powers and functions of the Labour Court and the Labour Appeal courts which have the same status as the High Court and the Supreme Court of Appeal. The Constitutional Court rejected the finding of the Supreme Court of Appeal "defence to employer" approach. The Commissioner of the CCMA acts under the auspices of the Commission, for Conciliation, Mediation and Arbitration and should approach a dismissal with a "measure of defence" (Sidumo) because it is primarily the function of the employer to decide on proper sanction. The commissioner need not be persuaded that the dismissal is the only fair sanction. The employer must establish that it was a fair sanction. In 'President of the' *RSA v SARFU* 1999 (4) SA 147 (CC), the court considered the issue of prejudice and the duty to act fairly. The true test as confirmed in 'President of the' *RSA v SARFU* 1999 (4) SA 147 (CC) stresses the important constituent element of the test that the commissioner must be a person who was reasonable, objective and informed and who would entertain a reasonable apprehension (Rudd, 2005). The requirements of natural justice is obliged with a function to act fairly whenever a decision which is likely to prejudice another is taken by such a person (*Du Preez v Truth and Reconciliation Commission* 1996 (8) BCLR 1123 (C). The Constitutional Court rejected the differential approach. The Bill of Rights serves as a touchstone for measuring the constitutionality (and acceptability) of laws and administrative acts of government (Ackermann et al., 2006). Section 23 of the Constitution guarantees the right to fundamental fair labour practices; therefore the applicant employee's right to security of employment and the right not to be unfairly dismissed (The Constitution of the Republic of South Africa, 1996). It does not only give effect to the constitutional rights to labour relations but also provides a legislative framework within which such rights can be exercised (Mubangizi, 2004). Section 185 of the 1995 LRA provides that every employee has the right not to be unfairly dismissed and gives effect to section 23 of the Constitution.

### **REJECTION BY THE CONSTITUTIONAL COURT OF "DEFENCE TO EMPLOYER" APPROACH**

Where an employee claims that he has been unfairly dismissed, he can refer the unfair dismissal dispute to the CCMA and the CCMA commissioner is then required to determine whether the disputed dismissal is fair or not. South African law together with both English and American

laws adheres in principle to the test of reasonableness of the decision-making process (Poolman, 1985). The commissioner has to determine the dismissal dispute as an impartial adjudicator. There is nothing in the constitutional and statutory process that suggested that in determining the fairness of a dismissal the commissioners have to approach the matter from the perspective of the employer. The changing dispensation in South Africa introduced the concept of fairness (Nel, 2002). Therefore the Constitutional Court concluded that any suggestion by the Supreme Court of Appeal that the deferential approach is rooted in the prescripts of the Labour Relations Act cannot be sustained.

Item 7(b)(iv) of the Code in Schedule 8 further states that "if a rule or standard was contravened, whether or not – dismissal was an appropriate sanction for the contravention of the rule or standard". The principle that the penalty must fit the offence requires an employer to consider alternative sanctions before taking the decision to dismiss (Grogan, 1999). This means that the CCMA commissioner had to consider whether dismissal was "an" appropriate sanction. The use of "an" and not "the" was not decisive. "An" is used for the indefinite as opposed to "the" used for definite. The Code in item 7 was merely a guide and cannot take precedence over the Constitution and the Commissioner, in determining the fairness of a dismissal, should approach the matter from the perspective of the employer (Kantor, 2001). The Commissioner should, therefore, approach the dismissal with a measure of defence.

The Supreme Court of Appeal's approach was deferential with three motivations for it. Firstly, a textual motivation as set out in principle 57 of the SALLR report: (1) S 188(2) of the 1995 LRA was of note, which section obliged commissioners, in considering whether or not the reasons for a dismissal were fair, to take into account the Code of Good Practice; (2) Item 7 (b)(iv) of the Code required the Commissioner to consider that the dismissal was "an" appropriate sanction (a guideline); (3) The Code also stated that it was generally inappropriate to dismiss employees for a first offence unless a continued relationship would be intolerable; therefore, a measure of subjectivity was brought into play. The primary assessment of intolerability was unavoidable and was the prerogative of the employer. Secondly, the conceptual motivation for the deferential approach was based on: (1) The concept of fairness was not absolute - it afforded a range of possible responses; (2) The court had to recognize that there might be a range of possible decisions that the employer could take, some of which might be fair and some unfair; (3) The court's duty was to determine whether the decision that the employer took fell within the range of decisions that might properly be described as being fair.

Thirdly, the institutional motivation for deferential approach was based on: (4) The solution to the problem of a flood of challenges to awards lay in pointing

commissioners firmly to the limits of the statute; (5) If commissioners could freely substitute their judgment and discretion for the judgment and discretion of the employer, employees would take every case to the CCMA.

The Constitutional Court rejected the deferential approach associated with the reasonable employer test, which is not applicable in our law. The deferential approach which was associated with the so-called reasonable employer test was used in England. This test had its origins in s 57(3) of the country's Employment Protection (Consolidated) Act of 1978. This act determines the question whether the dismissal was fair or unfair after the employer has shown the reasons and also if the employer can satisfy the tribunal that, in the circumstances that he acted, he was reasonable in treating it as a sufficient reason for dismissing the employee. The English Courts had, therefore, resorted to the "band of reasonableness test" as described by Lord Denning in 'British Leyland UK Ltd v Swift' (1981) IRLT 91. This approach of "band of reasonableness" had been extensively criticized in England on the basis that it did not allow for a proper balancing of the interests of employer and employee. The reasonable employer test differed materially from the South African statutory provisions.

The Constitution and the 1995 LRA sought to redress the power imbalance between employers and employees. None of them afforded any preferential status to the employer's view on the fairness of a dismissal. The constitutional values and norm did not give pre-eminence to the views of either party to a dispute.

### **CORRECT APPROACH TO BE ADOPTED BY CCMA COMMISSIONER IN DETERMINING WHETHER MISCONDUCT DISMISSAL WAS FAIR**

In determining whether a dismissal based on misconduct is fair, all the facts surrounding the misconduct must be considered (Grossett, 2002). The CCMA commissioner has to determine whether or not a misconduct dismissal was fair. Section 138 of the 1995 LRA stated that the commissioner had to do this fairly and quickly. Firstly, the commissioner has to determine whether or not misconduct on which the employer's decision to dismiss has been based had been committed. There must be an inquiry into whether there had been a workplace rule in existence and whether the employees had breached the rule. A conventional process of factual adjudication in which the commissioner made a determination on the issue of misconduct, had to be evident.

The determination and the assessment of fairness were not limited to what occurred at the internal disciplinary hearing. This means that the CCMA arbitration proceedings constituted a hearing *de nova*. The commissioner determined whether the dismissal was fair. The employer had the right to make a decision of dismissal, but the

determination of its fairness was done by the commissioner. Ultimately, the commissioner's sense of fairness was what had to prevail and not the employer's view. In approaching the dismissal dispute impartially, the commissioner should also take into account the totality of circumstances.

The rules to be followed by anyone who has to take a decision that may adversely affect the rights and interests of another (natural or juristic person) derive from the following questions: (1) What is the decision that I have to take? (2) Is the decision a lawful one? (3) Do I have the necessary legal authority to take that decision? Do I have all the necessary facts at my disposal to take a proper decision or should I obtain more information? (4) Will I be able to "hear the other side" or am I being presented with only one side of the story? (5) Will I be exercising a free and unfettered discretion? (6) Will I confine my judgments to matters relevant to the issue and not considered irrelevant material? (7) Will I apply my mind to the matter at hand without acting as a mere "rubberstamp" or "going through the motions"? (8) Will I be conveying my decision intelligibly and without undue delay to those concerned?

No matter how big or small the decision that is about to be taken, whether it involves a request of information, a disciplinary hearing, a security clearance, promotion or the awarding of a tender, it will be on firm ground if the abovementioned rules are followed before and during the decision-taking process (Ackermann et al., 2006). The emotions surrounding this issue run deep and are never far from the surface in any debate on the topic (Beckman, 2005).

The following should be considered by the commissioner:

- (1) The importance of the rule that had been breached;
- (2) The reason why the employer had imposed the sanction of dismissal;
- (3) The basis of the employee's challenge to the dismissal;
- (4) The harm caused by the employee's conduct;
- (5) Whether training and instruction might result in the employee's not repeating the misconduct;
- (6) The effect of dismissal on the employee;
- (7) The employee's long-service record.

The aforelisted is not a numerous *causa*. The decision itself must be reasonably reconcilable with the process (i.e., the decision should not have been for such a nature that no reasonable person in the same circumstances would have arrived at). This will lead to the strengthening of democracy; it will be in line with the spirit of the Constitution which requires the Bill of Rights to be given horizontal effect.

### **WAS PAJA APPLICABLE IN RESPECT OF THE REVIEW BY THE LABOUR COURT OF CCMA ARBITRATION AWARD?**

The Constitutional Court stated that the Supreme Court

of Appeal had found that PAJA applied, because PAJA was the national legislation passed to give effect to the constitutional right as provided in section 33, to just administrative action, and was required to “cover the field” and purported to do so. It also applied to CCMA commissioners’ arbitration awards.

The Constitutional Court rejected the finding of the Supreme Court of Appeal and found that PAJA did not apply to CCMA arbitration awards. Firstly, the Constitutional Court had to decide whether a commissioner at CCMA arbitration was performing an administrative function. The Court concluded that the commissioner arbitration was an administrative action but that PAJA is not applicable to CCMA arbitration awards. PAJA was general legislation and not special or specialized negotiated legislation like the 1995 LRA which gives effect to the right to fair labour practices. Section 33 of the Bill of Rights (the section dealing with the right to constitutional fair administrative action) precluded specialized legislative regulation of administrative action. Section 145 of the 1995 LRA precluded general legislation such as PAJA. The courts applied the general legislation and, unless specifically indicated, did not derogate from special legislation (Van Zyl et al., 2008). In Sidumo’s case, specialised provisions trumped the general provisions. The 1995 LRA was purposefully designed to provide accessible, speedy and inexpensive dispute resolution. Section 157(1) of the 1995 LRA provides a platform for forum-shopping.

The powers of the Labour Court in section 158 set out in the 1995 LRA were directed at remedying a wrong and providing finality speedily. This is contrary to the position under section 8 of PAJA where the Labour Court could set aside a CCMA arbitration award on review and could substitute the administrative decision. The powers of the Labour Court in the 1995 LRA, therefore, differed significantly from the powers of the court as set out in s8 of PAJA.

S210 of the 1995 LRA specifically provided that, if any conflict, relating to matters dealt with in the 1995 LRA, arose between the 1995 LRA and the provisions of any other law, the provisions of the 1995 LRA would prevail. The legislation had not, with the enactment of PAJA, amended or repealed s210 of the 1995 LRA.

#### **DETERMINING WHETHER STANDARD OF REVIEW SET BY S145 OF 1995 LRA WAS CONSTITUTIONALLY IN COMPLIANCE**

S3 of the 1995 LRA provided *inter alia* that its provisions had to be interpreted in compliance with the Constitution. Section 145 has to be read to ensure that administrative action by the CCMA was lawful, reasonable and procedurally fair. Section 33 (1) of the Bill of Rights states that everyone has the right to administrative action which is lawful, reasonable and procedurally fair (The Constitution,

1996). Section 145 of the 1995 LRA was now suffused by the constitutional standard of reasonableness.

In applying the correct standard of review, the question that the Constitutional Court had to answer was as follows: Was the decision reached by the commissioner one that a reasonable decision-maker could not reach? (Van Zyl et al., 2008). The Constitutional Court stated that the commissioner (based on the material before him), cannot say that the conclusion was one that a reasonable decision-maker could reach. This is a case where the decision-makers, acting reasonably, may reach different conclusions. The 1995 LRA has given that decision-making power to a commissioner.

The CCMA commissioner gave three reasons for regarding the sanction of dismissal *in casu* as being excessive or unfair, namely: (1) That no losses had been sustained; (3) The misconduct had been unintentional or a mistake; and (4) The absence of dishonesty.

The CCMA commissioner has also taken the view that the offence committed by the applicant employee had not gone to the heart of the relationship of trust between the parties. No evidence has been led at the CCMA arbitration proceedings to the effect that the respondent employer has suffered any loss as a consequence specifically of the applicant’s neglect.

The Constitutional Court also agreed that describing the applicant employee’s conduct as a mistake or unintentional error was confusing and agreed with the Supreme Court of Appeal that the CCMA commissioner has erred in his decision.

On the third factor, in the absence of dishonesty, the Constitutional Court disagreed with the Supreme Court of Appeal’s view that such factor was irrelevant, stating that the CCMA commissioner could not be faulted for considering the absence of dishonesty to be a relevant factor in relation to the misconduct.

On the issue of the breakdown of trust, the Constitutional Court agreed with the Supreme Court of Appeal that the CCMA commissioner had been wrong to conclude that the trust relationship might not have been breached as the applicant employee had been employed to protect the respondent employer’s valuable property and had not done so. However, the Constitutional Court stated that what was stated above did not constitute the end of the inquiry as it was still necessary to weigh all the relevant factors together in light of the seriousness of the breach.

The absence of dishonesty on the part of the employee *in casu* was a significant factor in favour of the application of progressive discipline rather than dismissal (Van Zyl et al., 2008). The applicant employee had also falsely denied that he had received appropriate training, and this factor counted against him.

The Constitutional Court concluded that the CCMA commissioner had carefully and thoroughly considered the different elements of the Code and had properly applied his mind to the appropriateness of the sanction.

## THE CONSTITUTIONAL JUDGMENT

The deferential/reasonable approach was not to be applied by the CCMA commissioners in deciding whether or not a misconduct dismissal was fair and in particular, whether the sanction imposed by the employer was fair. The CCMA commissioner was not required to show deference to the decision of the employer but had to decide for himself, with reference to all the relevant circumstances, whether or not the misconduct dismissal and in particular, the sanction, was fair.

CCMA unfair dismissals arbitration proceedings constituted hearings *de novo* which meant that the CCMA commissioner had to make his finding, as to the fairness of the dismissal, not on the basis only of evidence led at the internal disciplinary hearing, but on the basis of all evidence led at the CCMA arbitration proceedings, including evidence led that had not been led at the internal disciplinary hearing (Van Zyl et al., 2008).

The conduct by a commissioner of CCMA arbitration proceedings under the 1995 LRA did not constitute administrative action as envisaged by PAJA. Therefore, PAJA was not applicable in respect of reviews by the Labour Court of CCMA arbitration awards (Van Zyl et al., 2008).

Reviews are governed by s145 of the 1995 LRA infused by the constitutional standard of reasonableness which standard entailed that the Labour Court has to apply the following test in determining whether or not the arbitration award was reviewable: Was the decision reached by the commissioner one that a reasonable decision-maker could not reach?

## CONCLUSION

Even individuals who believe that the ideal world in which all human beings are fully able to enjoy fundamental human rights represents an unlikely utopia might be inspired to try to make choices that "do no harm" and that will minimize the experience of human rights abuses across the globe (DeLaet, 2006).

The human capital content of the occupational structure is increasing, notwithstanding segmentation. Given the enduring nature of the forces driving them, all these changes are likely to continue over the rest of this decade (Rajan, 1987). An effective internal communication strategy and a constructive relationship between the negotiation parties are essential (Landis et al., 2005). The Constitutional court judgment constituted the final stage in the lengthy road travelled by the employer and employee parties to an unfair dismissal dispute. The law and principles pertaining to dismissals have undergone significant changes over the past fifteen years, mainly because of the intervention of the courts, in order to ensure the job security of an employee. As long as economic activity takes place in society, we will find that

labour relations are topical. The field of labour is probably one of the most dynamic areas in society, and as we move into a new era in our history, new problems and opportunities will present themselves (Levy, 1992).

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## LEGISLATION

- Employment Protection (Consolidated) Act of 1978
- Labour Relations Act 66 of 1995.
- Promotion of Administrative Justice Act No.3 of 2000.
- The Constitution of the Republic of South Africa, 1996.

