Others[410], by concurring with the Constitutional Court that the staring point in any enquiry on the fairness of a dismissal is the Constitution[411]. According to the SCA, both employers and employees have a right to fair labour practices as provided in terms of section 23(1) of the Constitution. In addition it averred that the primary purpose of the LRA is to give effect to the fundamental right as provided in terms of section 23(1). The SCA held that whilst the employer had the discretion to dismiss, it did not have the discretion to determine that the dismissal was fair. In terms of the LRA, the commissioner determined whether the sanction of dismissal was fair. [412]

5.5 Conclusion

It is conclusive that South African law is now decisive through the decision of the Constitutional Court in *Sidumo & Another, supra,* that the fairness of a dismissal must be determined by a court based upon its own moral or value judgment on a combination of findings of fact and opinion. The Constitutional Court had furthermore put an end to the misconceived idea that there must be deference towards the sanction imposed by the employer, by stating that this principle is not prescripted in the LRA. To the contrary, the Constitutional Court rightfully concluded that fairness demanded that there must be a balance between the interests of the employee and the employer. The latter approach is consistent with the South African Constitution, the LRA and International Law.

[410] at page 46, paragraph [55]
[411] Constitution of the Republic of South Africa, Act 108 of 1996
[412] 2009 (3) SA 493 (SCA) at paragraphs [24] & [25]

Chapter 6
Conclusion

In conclusion, it is apparent from the content of this thesis, that South African labour history in relation to the appropriate test for determining the fairness of a dismissal for misconduct, had been marred by periods of inconsistency. As sketched, it appears that jurists had mistakenly imported rulings of English law, when determining unfair labour practices in terms of the Labour Relations Act 28 of 1956.

As indicated by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[413], the reasonable employer test has its origins from section 57(3) of England's Employment Protection (Consolidation) Act of 1978, and notably remarked that the provisions of that section is different from the provisions of the Labour Relations Act, related to the determination of the fairness of dismissals. This statement in itself, confirms that jurists had from the very beginning misinterpreted the actual provisions of the Labour Relations Statutes (old and new LRA).

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As had been illustrated throughout this thesis, there had been two distinct schools of thought, in relation to the test and the approach to be adopted when determining the fairness of dismissals for misconduct. In terms of the 'own opinion' approach the commissioner , arbitrator or the court had the discretion to express its own view based upon value judgments on the fairness of the dismissal, whereas, in terms of alternative approach or test, namely the reasonable employer test ('defer to the employer' approach), the commissioner had to defer to the decision of the employer, unless the dismissal is unfair to the extent that no reasonable employer would impose it, or it is so excessive that it would shock one's sense of fairness, then only may the commissioner interfere with the sanction imposed by the employer.

As a result of these conflictual approaches, the courts had during the old LRA and the new LRA, been inconsistent with the test in determining the fairness of dismissals. This had occurred, as illustrated, even when the highest court at the time of the old LRA, namely the

[413] 2008 (2) SA 24 at paragraph [68]

Appellate Division[414], held that fairness must be determined by a court on the basis of its moral judgment. As outlined in Chapter 3, there is a considerable line of authority, which had followed the approach adopted by the Appellate Division in *Perkor* and *Vetsak, supra,* under the old LRA. Despite these rulings by the highest court at the time, the LAC in *Nampak Corrugated Wadeville v Khoza[415]* and *County Fair Foods (Pty) Ltd v CCMA[416]* adopted the reasonable employer test (' defer to the employer' approach). These judgments were pronounced, even though the Appellate division ruled that fairness entailed balancing the interests of both the employer and the employee, with the ruling of an equitable approach in testing the fairness of a dismissal for misconduct. This had culminated to the LAC in *Toyota SA Motors (Pty) Ltd v Radebe & Others*[417] asserting that the reasonable employer test is not part of our law, and admittedly held that the LAC had made a palpable mistake in adopting the reasonable employer test.

As outlined in the thesis, mainly under Chapter 5, the debate reached the Constitutional Court in *NEHAWU v UCT*[418], where the Constitutional Court confirmed that fairness entailed a value judgment, as had been previously ruled. It furthermore outlined that in order to put content to the meaning of section 23(1) of the Constitution, the courts must take cognizance of past jurisprudence and International Law. As had been, illustrated in Chapter 4 of this thesis, the 'own opinion' approach is consistent with the South African Constitution.

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Despite the Constitutional Court rulings in *NEHAWU v UCT*, *supra,* the SCA in *Rustenburg Platinum Mines Ltd vs Commission for Conciliation, Mediation and Arbitration[419],* reintroduced the reasonable employer test (' defer to the employer' approach) into South African law. Having had a dissenting history, marred with inconsistency and confusion, it was fortunate that the debate relating to the test for dismissals reached the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others[420]* to put to rest this history of disparity.

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[414] Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd (hereinafter referred to as " Perskor') 1992 (4) SA 791 AD at page 798 & 800; Numsa v Vetsak Co-operative Ltd & others (herein after referred to as Vetsak) (1996) 17 ILJ 455 (A) at page 589
[415] (1999) 20 ILJ 578 (LAC) at paragraphs [33] –[35]
[416] (1999) 11 BLLR 1117 (LAC) at paragraph [28]-[31]
[417] (2000) 21 ILJ 340 (LAC) at paragraph [50]
[418] National Education Health and Allied Workers Union v UCT 2003 (3) SA 1 CC
[419] 2007 (1) SA 576 (SCA)
[420] 2008 (2) SA 24

At the outset, the Constitutional Court held that the deferential approach as suggested by the SCA is not prescripted and rooted in the Constitution. The Constitutional Court, with concurrence quoted *Perskor*, *supra,* where it was held that the fairness of dismissals had to be determined by passing a moral judgment by a court, hence the court is called upon as an independent adjudicator to determine fairness.[421] In relation to the principle of fairness, the Constitutional Court held that fairness entailed fairness to both the employee and the employer.[422] It furthermore held that the reasonable employer test ('defer to the employer' approach), as had been adopted by the SCA, did not manifest fairness in the sense of balancing the interests of both the employer and the employee.[423] It furthermore concluded that neither the LRA nor the Constitution afforded any preferential status to the employer's view, thereby further refuting the reasonable employer test ('defer to the employer' approach). [424]

As had been reflected in Chapter 5, the courts have applied and adopted the rulings of the Constitutional Court in *Sidumo and Another, supra*. The decision of the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others, supra,* has further illustrated that the tenets of our Constitution is based upon the principles of fairness and equity and has required that there be a balance between the interests of both, employers and employees, when determining the fairness of dismissals based upon misconduct.

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[421] At paragraph [63]
[422] At paragraph [64]-[65]
[423] At paragraph [68]
[424] At paragraph [74]

Bibliography
Statutes

1. Constitution of the Republic of South Africa, Act 108 of 1996
2. Employment Protection (Consolidation) Act of 1978 (United Kingdom)
3. Employment Rights Act of 1996 (United Kingdom)
4. Labour Relations Act 28 of 1956
5. Labour Relations Act 66 of 1995

Table of Cases

1. *Atlantis Diesel Engines (Pty) Ltd v NUMSA*1994 (15) ILJ 1257 (A)
2. *Betha v BTR SARMCOL, A division of BTR Dunlop Ltd* 1998 (3) SA 349 SCA
3. *Benicon Group v NUMSA & Others*1999 (20) ILJ 2777 (SCA)
4. *BMD Knitting Mills (Pty) Ltd v SACTWU* (2001) 22 ILJ 2264 (LAC)
5. *Boardman Brothers (Natal) v Chemical Workers Industrial Union*1998 (3) SA 53 (SCA)
6. *Building Construction and Allied Workers Union of SA & Another v West Rand Brick Works(Pty) Ltd* (1984) 5 ILJ 69 (IC)
7. *Chemical Workers Industrial Union & Others v Algorax (Pty) Ltd* (2003) 24 ILJ 1917 (LAC)
8. *Chemical Workers Industrial Union v Reckitt & Coleman*(1990) 11 ILJ 1319 (IC)
9. *Coin Security Group (Pty) Ltd v TGWU & Others* (1997) 10 BLLR 1261 (LAC)
10. *County Fair Foods (Pty) Ltd v CCMA & Others* (1999) 11 BLLR 1117 (LAC)
11. *De Beers Consolidated Mines Ltd v CCMA & Others* (2000) 9 BLLR 995 (LAC)
12. *Dube & Others v Nasionale Sweisware (Pty) Ltd* 1998 (3) SA 956 (SCA)Engen Petroleum Ltd v CCMA & Others [2007] 8 BLLR 707 (LAC)
13. *Edcon Ltd v Pillemer No & Others*(2008) 29 ILJ 614 (LAC)
14. *Edcon v Pillemer* (191/2008) [2009] ZASCA 135 (5 October 2009) (neutral citation)
15. *Ellerine Holdings Ltd v Commission for Conciliation Mediation & Arbitration & Others* (2008) 29 ILJ 2899 (LAC)

UNIVERSITY of the WESTERN CAPE

16. *Empangeni Transport (Pty) Ltd v Zulu* (1992) 13 ILJ 352 (LAC)

17. *Enterprise Foods (Pty) Ltd v Allen & Others* (2004) 25 ILJ 1251 (LAC)

18. *Fidelity Cash Management Service v CCMA & Others* (2008) 29 ILJ 964 (LAC)

19. *Food & Allied Workers Union & Others v CG Smith Sugar Ltd, Noodsberg* (1989) 10 ILJ 907 (IC)

20. *Food & Allied Workers Union & Another v SA Breweries Ltd (Denver)* (1992) 13 ILJ 209 (IC)

21. *Govender v SASKO (Pty) Ltd t/a Richards Bay Bakery* (1990) 11 ILJ 1282 (IC)

22. *Lefu & Others v Western Areas Gold Mining Co Ltd* (1985) 6 ILJ 307 (IC)

23. *Mambalu v AECI Explosives Ltd (Zomerveld)* (1995) 16 ILJ 960 (IC)

24. *Media Workers Association of SA v Press Corporation of SA Ltd* 1992 (4) SA 791 (A)

25. *Metro Cash & Carry Ltd v Tshela* (1996) 17 ILJ 1126 (LAC)

26. *Nampak Corrugated Wadeville v Khoza* (1999) 20 ILJ 578 (LAC)

27. *National Education Health and Allied Workers Union v University of Cape Town* 2003 (3) SA 1 CC

28. *NUM v Black Mountain Mineral Development Co (Pty) Ltd* 1997 (4) SA 51 (SCA)

29. National Union of Mineworkers v East Rand Gold & Uranium Co Ltd (1986) 7 ILJ 739 (IC)

30. National Union of Mineworkers and Others v Free State Consolidated Gold Mines (Operations) Ltd 1996 (1) SA 422 (A)

31. *National Union of Mineworkers & Another v Kloof Gold Mining Co Ltd* (1986) 7 ILJ 375 IC

32. *National Union of Mineworkers & Another v Western Areas Gold Mining Co Ltd* (1985) 6 ILJ 380 (IC)

33. *NUMSA & Others v Henred Fruehauf Trailers (Pty) Ltd* 1995 (4) SA 456 (A)

34. *National Union of Metalworkers of SA v Vetsak Co-Operative Ltd* 1996 (4) SA 577

35. *Old Mutual Life Assurance Co SA Ltd v Gumbi* 2007 (5) SA 552 (SCA)

36. *Performing Arts Council of the Transvaal v PPWAWU & Others* 1994 (2) SA 204 (A)

37. *Rustenburg Platinum Mines Ltd v CCMA* 2007 (1) SA 576 SCA

UNIVERSITY of the
WESTERN CAPE

38. *SA Chemical Workers Union & Others v CE Industrial (Pty) Ltd t/a Panvet* (1988) 9 ILJ 639 (IC)

39. *Scaw Metals Ltd v Vermeulen* (1993) 13 ILJ 672 (LAC)

40. *Shoprite Checkers (Pty) Ltd v CCMA & Others* 2009 (3) SA 493 (SCA)

41. *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 CC

42. *Toyota South Africa Motors [Pty] LTD v Radebe & Others*[2000] 3 BLLR 243 (LAC)

43. *Transvaal Press Nuts Bolts and Rivets (Pty) Ltd v President of the Industrial Court & others* (1989) 10 ILJ 48 (N)

44. *Trident Steel (Pty) Ltd v John NO & Others* (1987) 8ILJ 27 (W)

45. *Tubecon (Pty) Ltd and National Union of Metalworkers of SA* (1991) 12 ILJ 437 (ARB)

46. *Twala v ABC Shoe Store (*1987) 8 ILJ 714(IC)

47. *Wubbeling Engineering & Another v NUMSA*(1997) 18 ILJ 935 (SCA)

UNIVERSITY of the
WESTERN CAPE

List of Authors

Benjamin, Paul (2007)."Friend or Foe? The Impact of Judicial Decisions on the Operation of the CCMA" Industrial Law Journal. Volume 28. January 2007. at pages 26 -27

Brassey. The New Labour Law. Juta & Co. 1987 : at pages 71 – 78

Cheadle, Halton, Le Roux, PAK, Thompson, Clive and Van Niekerk, Andre. Current Labour Law. Juta & Co Ltd. 1993: at page13

Davis & Freedland.(1983). Kahn-Freund's Labour and the Law' 3 ed (Stevens & Son, London) at page 18

Du Toit et al. (2006). Labour Relations Law ' A Comprehensive Guide '. (5th ed). Lexis Nexus Butterworths. at page 399

Ellyn, Igor Q.C & MacNeil, Agnes E. (2000). " Proving Just Cause as Employer's Counsel : Warnings, fairness, condonation, standard of proof and onus". As presented at a continuing legal education seminar for lawyers. Toronto, May 21, 2002. at pages 2 & 5. http://www.ellynlaw.com

Flanagan, Jamie, Giesbrecht, Tina and Tetrault, McCarthy. (2005).'Terminating the Employment Relationship and Structuring Severance Packages" at page 6 http://www.mccarthy.ca/pubs/TermEmployRel.pdf

Fitzgerald PJ. [1966]. Salmond on Jurisprudence.12th Edition. Sweet & Maxwell Ltd. London. At page 70

Grogan, John (2000:6). ' Who is the fairest? Fitting punishments'. Employment Law. Vol. 16. No. 5. Butterworths

Le Roux, PAK and Van Niekerk, Andre. (1994). The South African Law of Unfair Dismissal. Juta & Co Ltd. at page 118

Myburgh, John and Van Niekerk, Andre (2000). Dismissal as a Penalty for Misconduct : The Reasonable Employer and Other Approaches. Vol. 21 Industrial Law Journal 2145.at page 2151.

Rycroft, Alan and Jordaan, Barney. (1992)." A Guide to South African Labour Law " .2nd edition. Juta & Co.at page 194,195

Todd, Chris and Damant, Graham.(2004).'Unfair Dismissal – operational requirement'. 25 ILJ 896

Smit, Nicola. (2008) " When is Dismissal an appropriate sanction and when should a court set aside an arbitration award? Sidumo & Another v Rustenburg Platinum Mines Ltd & Others (2007) 28 ILJ 2405 at Industrial Law Journal, Vol 29, July 2008.page 1644

Vettori, Maria-Stella, (2005).Alternative Means to regulate the Employment Relationship in the Changing World of Work. Doctoral Thesis (LLD).Dept. of Mercantile Law: Faculty of Law, University of Pretoria. at page 306

UNIVERSITY of the WESTERN CAPE

Foreign case Law

British Leyland UK Ltd v Swift [1981] IRLR 91 (CA)

Butler v C.N.R [1940] 1 D.L.R. 256

Matheson v Matheson International Trucks Ltd. (1984), 4 C.C.E.L. 271 (Ont.H.C.J.)

Makarchuk v Mid-Transportation Services Ltd (1985) 6 CCEL 169 (Ont. S.C.)

Marlowe v Ashland Canada Inc. [2001] B.C.J. No. 1338 (B.C.S.C.)

Toronto (City) Board of Education v Ontario Secondary School Teachers' Federation, District 15 (Toronto) [1997] 1 S.C.R. 487

Wallace v United Grain Growers Ltd[1997] 3 S.C.R. 701

International Convention

International Labour Organization (ILO) Convention on Termination of Employment 158 of 1982. http://www.ilo.org/ilolex/cgi-lex/convde.pl?C158