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The Labour Appeal Court in *Toyota South Africa Motors [Pty] Ltd, supra*, re-iterated the test as was outlined by arbitrator John Brand in *Tubecon ( Pty) Ltd and National Union of Metalworkers of SA* <sup>194</sup> where he spells out the approach to be adopted in determining the fairness of a dismissal as " .... The correct approach it seems to me is to consider whether the sanction is fair having regard to existing industrial relations common law and norms." <sup>195</sup>

It is clear that this approach of assessing fairness, is also based upon a value judgment, based upon an opinion, taking into consideration the existing industrial relations common law and norms.

In addition to the above mentioned approaches as applied by the LAC above being consistent with the AD judgments as in *Perskor* and *Vetsak, supra*, these approaches were more importantly in line with the Constitutional Court decision in *National Education Health and Allied Workers Union v UCT*<sup>196</sup> (herein after referred to as *NEHAWU v UCT*), where Ngcobo J, said: " .....what is fair depends upon the circumstances of a particular case and essentially involves a value judgment."

It suffices to say that the Constitutional court had already affirmed the rule in *NEHAWU v UCT, supra*, that fairness is based on a value judgment, taking into consideration all relevant facts of

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<sup>193</sup> *Toyota South Africa Motors [Pty] LTD v Radebe & Others, supra*, paragraph [50]

<sup>194</sup> (1991) 12 ILJ 437 (ARB) at pages 445B-445D

<sup>195</sup> cited in *Toyota South Africa Motors [Pty] LTD v Radebe & Others, supra*, at paragraph [49]

<sup>196</sup> 2003 (3) SA 1 CC at paragraph [33]

the case, balancing these and other factors on the requirements of equity and then making a value or moral judgment when determining the fairness of a dismissal. It is explicitly clear that the application of this test must be based upon the principles of equity, which means that the scales of measuring fairness, must be evenly balanced between the interests of the employer and that of the worker.

This 'value judgment' / 'own opinion' approach quite clearly elaborates a test that precludes showing deference to the decision of the employer and then only interfering if no reasonable employer would have dismissed the employee. The reasonable employer test ('defer to the employer' approach) defeats the principles of equity, in which equity requires a balanced approach, based upon a value judgment.

Based upon the aforementioned, it can rightfully be contended that the test endorsed by the courts, including the Constitutional Court, propogates an equitable approach, taking into account all relevant factors, with a determination on the basis of a value or moral judgment.

This approach furthermore requires that the commissioner or court must weigh all relevant factors, such as the importance of the rule, the reason as to why the employer wants to impose such a sanction for that particular infraction, the harm to the employer caused by the misconduct, the effect of progressive discipline as a preventative measure, additional training, the effect of dismissal on the employee, the employees length of service, and the like in making an equitable and fair decision. It should be indicated that this list is not an exhaustive list.<sup>197</sup>

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<sup>197</sup> *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 CC at paragraph [78]

In addition, the exercise of balancing the interests of the employer and the employee, must be determined and measured within the context of the objective normative value system of the South African Constitution<sup>198</sup> and in particular the guarantee to fair labour practices as provided in terms of section 23(1) of the South African Constitution. As enunciated by the Constitutional Court in *National Education Health and Allied Workers Union v UCT*<sup>199</sup>, the LRA must give effect to the Constitution, including section 23(1). It has been contended that in giving effect to section 23(1), serious consideration should be given to security of employment, which is regarded as a core value of the LRA, hence its comprehensive provisions under Chapter VIII to protect workers against unfair dismissals.<sup>200</sup> It can therefore be asserted that by applying the reasonable employer test or the defer to the employer approach, courts should recognize that this test and approach secures the interests of the employer or perceives the fairness of the dismissal through the perspective of the employer, which may make the security of employment of the employee vulnerable to scrupulous employers, who may take advantage of this approach. Hence, its notable inconsistency with the South African Constitution and the LRA in this respect must be recognized.

As provided in terms of the Labour Relations Act 66 of 1995, the commissioner or the court is also given guidance by Schedule 8: the Code of Good Practice: Dismissal, when determining the fairness of a dismissal<sup>201</sup> and its underlying principle that discipline is not punitive but should be more inclined to regulate employee's work based upon the employers standards. To this end, discipline is progressive<sup>202</sup> and that dismissal for a first offence should only be upheld

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<sup>198</sup> The Constitution of the Republic of South Africa Act 108 of 1996

<sup>199</sup> 2003 (3) SA 1 CC at paragraph [41]

<sup>200</sup> *NEHAWU v UCT, supra*, at paragraph [42]

<sup>201</sup> *Engen Petroleum Ltd, supra*, at paragraph [82]

<sup>202</sup> Item 3(2) of Schedule 8 to the LRA

if the misconduct makes continued employment relationship intolerable.<sup>203</sup> It is also critical to state that the sanction imposed by the employer must also be measured against the generally applicable industrial norms, which has been developed and established at the time.

Ultimately, it can be said that the LRA and judgments of the courts as mentioned above, will guide a commissioner or court in determining the fairness of a dismissal. What is explicitly clear is that South African jurisprudence as outlined above, promotes an equitable process, which is equitable to both employers and employees. It goes without stating that the reasonable employer test as adopted in *Nampak* and *County Fair supra*, is so one sided in its application that it falls foul of the tenet of fair labour practice as entrenched within section 23(1) of the Constitution of the Republic of South Africa Act 108 of 1996.

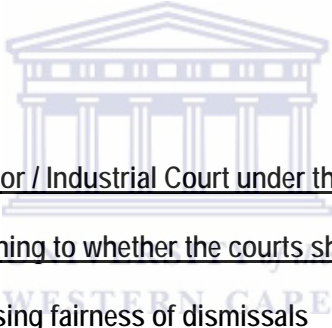
Within this sphere it furthermore needs to be stated that as outlined within *Perskor, supra*, the law had been pronounced by the Appellate Division, which ruled that fairness must be determined based upon a value judgment on facts and opinion. Despite the decisions of *Nampak* and *County Fair, supra*, which were decisions of the Labour Appeal Court, it needs to be stressed that the ruling of the Appellate Division as emanated from *Perskor*, would take precedence. In addition, as indicated above, the decision of Nicholson, JA in *Toyota South Africa Motors [Pty] Ltd, supra*, must be taken into account. The value judgment approach in determining fairness of a dismissal, was furthermore ratified by the Constitutional Court in *National Education Health and Allied Workers Union v UCT*<sup>204</sup>.

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<sup>203</sup> Item 3(4) of Schedule 8 to the LRA.

<sup>204</sup> 2003 (3) SA 1 CC at paragraph [33]

It is abundantly clear that based upon a historical journey through South African labour jurisprudence, it is evident that the law decided upon determining fairness based upon a value judgment, by either a commissioner or a court. It is apparent that the courts that had applied the reasonable employer test / defer to the employer approach, had failed to distinguish between the role of the employer in setting rules and standards and the decision to impose a sanction. In the latter instance, the LRA neither explicitly nor implicitly asserts that there must be deference shown to the sanction imposed by the employer. As illustrated above, South African law promotes an equitable approach, which balances the interests of both the employee and the employer. This culminates to the next heated debate around the belief that Commissioners and the Courts must show deference towards the sanction or decision imposed by the employer.



**3.2.4 Powers of the Arbitrator / Industrial Court under the Labour Relations Act 28 of 1956 ( Old LRA) pertaining to whether the courts should adopt a deferential approach when assessing fairness of dismissals**

Cognizance and reference to the interpretation of the old LRA and in particular to phrases and/or provisions relevant to the topic is essential, in amplifying and determining an interpretation on a question of law, such as the power of a commissioner and/or a court in determining a sanction imposed by an employer. The discussions below, will ascertain whether in terms of the old LRA, the arbitrator or the Industrial court was expected to defer to the sanction imposed by the employer when assessing the fairness of a dismissal, as required by the reasonable employer test ( ' defer to the employer ' approach). By referring to the interpretations of the old LRA in this respect, this may ensure that the mistakes of the past are not repeated, when interpreting the provisions of the new LRA and will also ensure that, that

which was good in the jurisprudence under the old LRA can be carried forth to the interpretation of the new LRA, as long as it is not inconsistent with the new LRA, its objects and the Constitution of the Republic of South Africa.<sup>205</sup>

The relevant phrase is " *to determine the dispute* " as contained in subsection 46(9)(c)<sup>206</sup> of the old LRA and subsection 138(1)<sup>207</sup> of the Labour Relations Act 66 of 1995. Hereunder the thesis shall present discussions and interpretations of the phrase " *to determine the dispute* ", as was ruled by the Appellate Division and the SCA, the highest court at the time under the old LRA and in terms of subsection 46(9) and judgments pursuant thereto.

Despite the Appellate Division [AD] in terms of the old LRA, ruling that the industrial court, old Labour Appeal Court and the Appellate Division itself were empowered to determine disputes relating to the sanction of dismissal, the Labour Appeal Court in cases such as *Empangeni Transport (Pty) Ltd v Zulu*<sup>208</sup>, *Coin Security Group (Pty) Ltd v TGWU & Others*<sup>209</sup>, *Nampak Corrugated Wadeville v Khoza*<sup>210</sup> and *County Fair Foods (Pty) Ltd v CCMA*<sup>211</sup> applied the

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<sup>205</sup> Act 108 of 1996 and as stated by Zondo, JP in *Engen Petroleum Ltd v CCMA & Others, supra*, at paragraph [35]

<sup>206</sup> Section 46(9)(c) : "The Industrial Court shall as soon as possible after receipt of the reference in terms of paragraph (b), determine the dispute on such terms as it may deem reasonable, including but not limited to the ordering of reinstatement or compensation, and the provisions of sections 49 to 58, 62 and 71 shall *mutatis mutandis* apply in respect of any determination made in terms of this subsection *in so far as such provisions can be so applied*. Provided that such determination may include any alleged unfair labour practice which is substantially contemplated by the referral to the industrial council or with the terms of reference of the conciliation board, determined in terms of section 35(3)(b)."

<sup>207</sup> 138(1) : " The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities."

<sup>208</sup> (1992) 13 ILJ 352 (LAC) at page 357

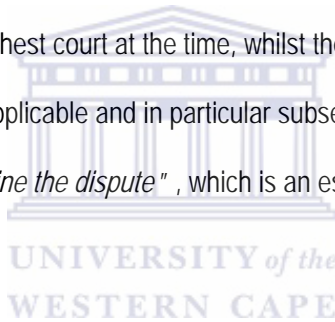
<sup>209</sup> [1997] 10 BLLR 1261 (LAC) at page 1280

<sup>210</sup> (1999) 20 ILJ 578 (LAC) at paragraphs [33] –[35]

<sup>211</sup> (1999) 11 BLLR 1117 (LAC) at paragraph [28]

approach and impliedly through their judgments that, there should be deference towards the decision of employers to impose the sanction of dismissal. This approach had furthermore been supported by academics and writers such as Prof. P.A.K le Roux in Cheadle et al [ 1993: 13]<sup>212</sup>. The content of the latter mentioned cases have been discussed within Chapter 2 of this thesis.

It is therefore necessary that we ascertain what were the powers of the arbitrator, and the various courts in terms of the old LRA to determine the fairness of a dismissal imposed by an employer and whether an arbitrator / Industrial Court must show deference to the employer's sanction. In order to address this question, this Chapter shall illustrate the applicable approach which had been ruled by the highest court at the time, whilst the provisions of the Labour Relations Act 28 of 1956 was applicable and in particular subsection 46(9) which empowered the Industrial Court " *to determine the dispute* ", which is an essential phrase within the debate.



In *Trident Steel v John NO & Others*<sup>213</sup>, Ackerman, J when interpreting the phrase, " to determine the dispute" in relation to the powers of the Industrial Court, as mentioned under subsection 46(9) of the Old Act, indicated that it meant to bring a dispute to an end. Thereby implying that the Industrial Court could resolve the dispute, with final determinations, if necessary.

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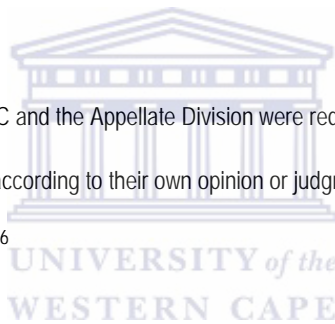
<sup>212</sup> Cheadle, Halton, Le Roux, PAK, Thompson, Clive, Van Niekerk, Andre. [1993] Current Labour Law. Juta & Co Ltd. at page13

<sup>213</sup> *Trident Steel (Pty) Ltd v John NO & Others* (1987) 8ILJ 27 (W) at page 39B-E

In the case of *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd* ( 'Perskor')<sup>214</sup>, the Appellate Division<sup>215</sup>, dealt with the question in relation to the Labour Relations Act 28 of 1956. It stated as follows : " Clearly, the Court's view as to what is fair in the circumstances is the essential determinant in deciding the ultimate question."

In *Perskor, supra*, these same words together with the statutory provisions of the Old Act which empowered the Labour Appeal Court ( LAC) 'to decide' an appeal concerning an alleged unfair dismissal and which bestowed similar respective powers upon the Appellate Division / Supreme Court of Appeal, was held in the *Perskor* judgment and subsequent decisions thereafter to mean:

" that the Industrial Court, the Old LAC and the Appellate Division were required to decide the fairness or otherwise of dismissal as a sanction, according to their own opinion or judgment of what was fair or unfair in all the circumstances of a particular case." <sup>216</sup>



What is furthermore relevant in this debate is that the Industrial Court was a creature of statute, and if it was empowered by the statute "*to determine the dispute*" then it is within its jurisdiction. For this purpose and for amplifying that the arbitrator could decide on the fairness of the sanction imposed by the employer, according to his/her own value judgment and impose an appropriate sanction, it is further essential to make reference to the ruling of the court in

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<sup>214</sup> 1992 (4) SA 791(A)

<sup>215</sup> as the Supreme Court of Appeal was then known

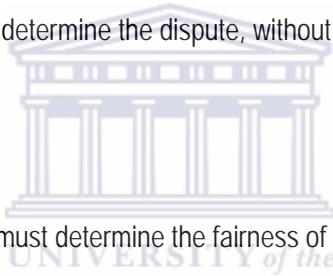
<sup>216</sup> *Engen Petroleum Ltd v CCMA & Others, supra*, paragraph [55] B-C

*Transvaal Pressed Nuts Bolts & Rivets (Pty) Ltd v President of the Industrial Court & others*<sup>217</sup>.

The Court stated that :

“ The Industrial Court.....exists only by virtue of the provisions of section 17 of the Labour Relations Act and is, accordingly, a creature of statute. It, accordingly, has no power to assume jurisdiction in respect of any matter beyond those encompassed by its statutory jurisdiction.”<sup>218</sup>

This judgment, furthermore amplifies the approach that arbitrators are enabled to determine the dispute as explicitly iterated in the old LRA. By applying the rationale as described by the Court in *Transvaal Pressed Nuts Bolts & Rivets ( Pty) Ltd , supra ,* to subsection 46(9) of the Old LRA, it is clear that the arbitrator may determine the dispute, without showing deference to the decision of the employer.



In further support that the court must determine the fairness of a dismissal based upon its own moral judgment on the findings of fact and opinions, with specific emphasis on the effects of the rulings on whether there must be deference to the sanction imposed by the employer or can a Court determine the fairness of the sanction based upon its own view, is the judgment of the Supreme Court of Appeal ( SCA) in the case of *Betha v BTR SARMCOL, A division of BTR Dunlop Ltd*<sup>219</sup>.

In this instance, the SCA re-affirmed the jurisprudence standpoint as per the Appellate Division, on whether the court can provide its own opinion in the determination of the fairness of a

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<sup>217</sup> *Transvaal Press Nuts Bolts and Rivets (Pty) Ltd v President of the Industrial Court & others* ( 1989) 10 ILJ 48 (N) at page 67D-F

<sup>218</sup> As cited by Zondo, JP in *Engen Petroleum Ltd v CCMA & Others, supra*, at paragraph [50] F-H

<sup>219</sup> 1998 (3) SA 349 SCA

dismissal or must it defer to the employer. The SCA quite expressly answered this question, with application of the definition of unfair labour practice, by stating:

“ And, when applying the definition, the Labour Appeal Court is expressly enjoined to have regard not only to law but also to fairness. A decision of the court pursuant to these provisions is not a decision on a question of law in the strict sense of the term. It is the passing of a moral judgment on a combination of findings of fact and opinions.....On this basis, this Court would be entitled to form its own view of what was fair and just on the basis of all the evidence.”<sup>220</sup>

In terms of subsection 46(9) of the Old LRA, the Industrial Court was given the power to deal with unfair labour practices, including disputes which entailed the fairness of dismissals. In terms hereof, unfair dismissal disputes had to be referred to the Industrial Court “ to determine” the fairness of a dismissal.<sup>221</sup> Even though between the 1980's and the repeal of the old LRA, the Act had undergone amendments at different stages, the power of the Industrial Court “to determine” a dispute concerning the fairness of a dismissal remained intact.<sup>222</sup> This approach was further re-affirmed by the Appellate Division in *Performing Arts Council v Paper Printing Wood & Allied Workers*<sup>223</sup>, where Goldstone, JA , indicated that the function of the Industrial Court was to “ ....determine the dispute on such terms as it may deem reasonable, including but not limited to the ordering of reinstatement or compensation....” (subsection 46(9)(c) of the Old LRA)

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<sup>220</sup> *Betha v BTR SARMCOL, A division of BTR Dunlop Ltd*, supra, at page 370, paragraph [A-B]

<sup>221</sup> *Engen Petroleum Ltd v CCMA & Others*, supra, at paragraph [11]

<sup>222</sup> *Engen Petroleum Ltd*, supra, at paragraph [12]

<sup>223</sup> 1994 (2) SA 204 AD at page 218, paragraph [E]

It is ironic that despite rulings of the AD that various courts at the time, could determine the fairness of the sanction of dismissal, based upon their own value judgment, there had been contradictory rulings by the lower courts, such as the Labour Appeal Court ( LAC).

It has been reported that <sup>224</sup>, no less than twenty judges of the Appellate Division / Supreme Court of Appeal applied the moral or value judgment, as prescribed by the Appellate Division in *Perskor*. It is therefore abundantly clear that the law had been conclusive and decisive, that courts and arbitrators could decide on the fairness of the dismissal imposed by the employer, without showing deference to the employer's decision.

Having substantially outlined the background and the rulings of the Courts in terms of the Old LRA, in relation to the determination of fairness and the powers of arbitrators in determining the dispute and whether they should defer to the decision of the employer, it is clear that the own opinion approach was ruled as the approach consistent with the Old LRA. It is also furthermore clear that arbitrators in terms of the old LRA, were not required to defer to the employer, when assessing the fairness of a dismissal. Taking into consideration the latter mentioned, and bearing in mind that this was the stance when the new LRA came into effect, it is integral to then refer to Zondo, JP's correct assertion, in *Engen Petroleum Ltd, supra*, that it is difficult to understand, that if the legislature uses the same words in a statute, which it had used in a repealed Statute, which deals with the same subject matter, that the Legislature would assign a different meaning in the new LRA, if the meaning does not lead to any absurdity. <sup>225</sup>

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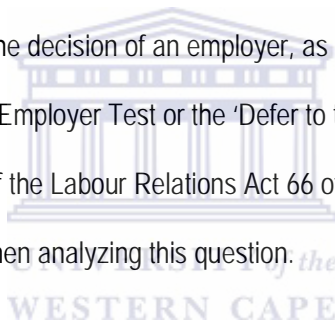
<sup>224</sup> As cited by Zondo JP, in *Engen Petroleum Ltd v CCMA & Others, supra*, at paragraph [29]

<sup>225</sup> at paragraph [56]

It is in the context of this established rule that an analysis of the power and the role of the Commissioners and Courts, in terms of the new LRA, the Labour Relations Act 66 of 1995 should be considered.

3.2.5. Roles and Powers of the Commissioner and the Court to decide on / determine the Fairness of a Dismissal in terms of the Labour Relations Act 66 of 1995 (new LRA) with reference to whether they should defer to the sanction imposed by the employer

In addressing the question as to whether a Commissioner or arbitrator in terms of the new LRA, must show deference towards the decision of an employer, as existent from the approach adopted within the Reasonable Employer Test or the 'Defer to the Employer' approach, one has to consider the language of the Labour Relations Act 66 of 1995 (herein after referred to as the new LRA or the LRA), when analyzing this question.



As re-emphasized by Zondo, JP in *Engen Petroleum Ltd, supra*, the primary rule of construction of statutes, is that the words and/or expressions used in statutes "must be interpreted according to their natural, ordinary or primary meaning unless this would lead to an absurdity."<sup>226</sup>

When determining the roles and the powers of the commissioner in terms of the LRA, one has to make reference to the provision of subsection 138(1) of the LRA. Subsection 138(1) of the LRA provides as follows :

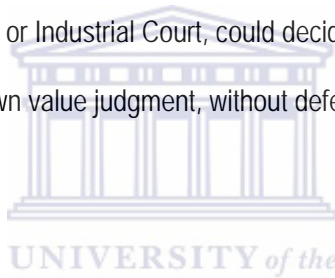
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<sup>226</sup>As held by Zondo, JP in *Engen Petroleum Ltd v CCMA & Others, supra*, at paragraph [51].

"The Commissioner may conduct the arbitration in a manner that the Commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities." [ own emphasis]

In relation to this phrase " to determine the dispute" as provided by subsection 138(1) of the LRA, Zondo, JP made important rulings as shall be illustrated hereunder.

Under the previous sub-heading : ' Powers of the Arbitrator / Industrial Court under the Labour Relations Act 28 of 1956 (old LRA) pertaining to whether the courts should adopt a deferential approach when assessing fairness of dismissals ' , it is explicitly clear that the prevailing approach was that the arbitrator or Industrial Court, could decide on the fairness of the dismissal based upon his/her own value judgment, without deferring to the decision of the employer.



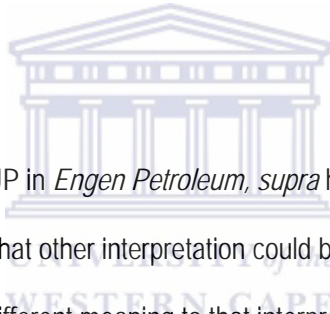
The LAC in *Engen Petroleum Ltd, supra*, asserted that when the CCMA has "to determine the dispute fairly" as provided in terms of subsection 138(1) of the LRA, it also has to ascertain whether the dismissal as a sanction was fair. The LAC held that the determination of the fairness of a dispute entails both the issue of whether the employee is guilty of misconduct as well as whether the dismissal as a sanction is fair.<sup>227</sup> Zondo, JP substantiates the approach that the CCMA Commissioner must determine the dispute without deference to the employer, by stating that where both the guilt of the employee and the fairness of a dismissal as a sanction is in issue between the parties, then it would not be a determination of the dispute to

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<sup>227</sup> As cited, *supra*, at paragraph [54]

bring it to an end<sup>228</sup>, if the CCMA found that the employee was guilty of the misconduct but did not determine whether the dismissal as a sanction was fair.<sup>229</sup>

According to the Court in *Engen Petroleum Ltd, supra*, these words as outlined in subsection 46(9) of the Old LRA, means to bring a dispute to an end. It was further held that these words as emanating in subsection 46(9) of the Old LRA, as well as the statutory provisions of the old LRA which empowered the old LAC 'to decide' an appeal on an unfair dismissal matter, including the powers of the Appellate Division / Supreme Court of Appeal "to confirm or set aside an order" was held by the AD in *Perskor, supra* to mean that the Industrial Court, the old LAC and the Appellate Division had to decide the fairness of a sanction, based upon their own opinion or judgment.<sup>230</sup>



Having said the above, Zondo, JP in *Engen Petroleum, supra* held that as mentioned above, that it would be difficult to see what other interpretation could be given to subsection 138(1) of the LRA, which would justify a different meaning to that interpreted by the Appellate Division for the same phrase in terms of subsection 46(9) of the old LRA. He therefore held, that subsection 138(1) of the LRA empowered the Commission for Conciliation Mediation and Arbitration commissioner to pass a moral or value judgment based upon his own opinion, when deciding whether dismissal as a sanction is fair.<sup>231</sup> In other words, the reading of the relevant provision of the LRA, which empowers the commissioner to determine a dispute does not prescribe that a commissioner must show deference towards the sanction of the employer.

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<sup>228</sup> *Trident Steel (Pty) Ltd v John NO & Others, supra*, at page 39 B-E, Ackerman, J held that 'to determine the dispute' under s 46(9) of the Old LRA meant to bring a dispute to an end.

<sup>229</sup> *Engen Petroleum (Pty) Ltd, supra* at paragraph [54]

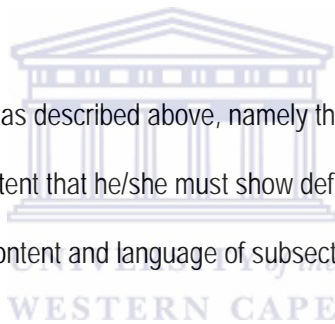
<sup>230</sup> at page 733, paragraph [55]

<sup>231</sup> *Engen Petroleum Ltd, supra* at page 733, at paragraph [56]

Despite the judgment of the Supreme Court of Appeal, in *Rustenburg Platinum Mines Ltd v CCMA & Others*<sup>232</sup> it can be asserted that based upon the above averments, the Labour Appeal Court in *Engen Petroleum (Pty) Ltd*, had quite correctly described the powers of the Commissioner or Arbitrator.

Therefore subsection 138(1) of the LRA actually empowers commissioners to pass a moral or value judgment when determining the fairness of a dismissal, based upon their own opinion. The latter had also been justifiably supported by the Labour Appeal Court, in *Engen Petroleum, supra*.<sup>233</sup>

Additional support for the views as described above, namely that commissioner's are not limited in their powers, to the extent that he/she must show deference to the employer's decision, is a reference to the content and language of subsection 138(9) of the LRA.



In terms of subsection 138(9) of the LRA, " The Commissioner may make *any* appropriate arbitration award in terms of this Act,....", ( own emphasis ) which clearly directs that the commissioner is empowered to make any appropriate arbitration award. As per Zondo, JP in *Engen Petroleum Ltd, supra*, the language of this provision is so wide that it gives the commissioner the power to make an award as he may in his opinion, which is fair and appropriate, in opposition to him

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<sup>232</sup> 2007 (1) SA 576 (SCA)

<sup>233</sup> " Accordingly, it seems fair say that section 138(1) of the Act empowers a CCMA commissioner to pass a moral or value judgment when it decides whether dismissal as a sanction is fair and that a CMMA commissioner is required to decide that issue in accordance with his own opinion or judgment of what is fair or unfair in all the circumstances of a particular case. " Dictum by Zondo, JP in *Engen Petroleum Ltd v CCMA & Others, supra*, at paragraph [56] D-E. Also held in *Perskor, supra*.

deferring to the employer or to a reasonable employer.<sup>234</sup> According to the LAC in *Engen Petroleum Ltd, supra*, these provisions appears more consistent with the own opinion approach than the defer to the employer approach.<sup>235</sup>

There is furthermore no provision in the Labour Relations Act 66 of 1995, which asserts that the commissioner must show deference to the sanction imposed by the employer, to the contrary, the plain language of the Statute, strongly indicates that the Commissioner must “*determine the dispute fairly*”<sup>236</sup>, which expressly warrants the Commissioner to determine the dispute independently and based upon his/her own value judgment.

Hence if one looks at the plain language of the provisions of subsections 138(1) and 138(9) of the LRA, the powers of the Commissioner is quite expressly described, in having to decide on the fairness of a dismissal imposed by an employer. There is no express provision, which outlines that they should show deference towards the decision of the employer.

In further justifying the correct approach as being the “own opinion approach”, which is consistent with the statutory language of subsection 138(1) of the LRA, it had been further held that hence, the reasoning behind the Labour Appeal Court’s decision in the *Toyota SA Motors (Pty) Ltd, supra*, for rejecting the reasonable employer test and by implication holding that the own opinion approach applies.<sup>237</sup>

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<sup>234</sup> *Engen Petroleum Ltd, supra*, at paragraph [59]

<sup>235</sup> *Engen Petroleum Ltd, supra*, at paragraph [61]

<sup>236</sup> Extracted from section 138(1) of the Labour Relations Act 66 of 1995

<sup>237</sup> *Engen Petroleum Ltd v CCMA & Others, supra*, at paragraph [57]

It is crucial to mention that the LRA is a creature of statute, with no further powers beyond that prescribed by the LRA. With this in mind, when seeking to ascertain the powers of the Commissioner, it is also essential to conduct an analysis of subsection 188(1)(a) of the LRA.

Subsection 188(1)(a)(i) & (ii) of the Labour Relations Act ( LRA) 66 of 1995 provides as follows:

“(1) A dismissal that is not automatically unfair is unfair if the employer fails to prove-

- (a) that the reason for dismissal is a fair reason-
  - (i) related to the employee's conduct or capacity; or
  - (ii) based on the employer's operational requirements; and
- (b) that the dismissal was effected in accordance with a fair procedure.”

An interpretation of subsection 188(1) of the LRA, is that it does not expressly subject the fairness of a dismissal upon the reasonable employer test. According to the court in *Engen Petroleum Ltd v CCMA & Others*<sup>238</sup> as per Zondo, JP, the formulation of Subsection 188(1), where it says that a dismissal that is not automatically unfair, “...is unfair if.....” ,connotes an objective determination of the fairness of a dismissal. As per Zondo, JP, if one or both of the prescribed conditions as stipulated in subsection 188(1) are met, then the dismissal is unfair.

The statute prescribes the instances of when a dismissal is unfair for example in subsection 188(1)(a) & (b) of the LRA, it does not subject the determination of the unfairness of the dismissal on the reasonable employer test neither does it explicitly outline that there should be deference towards the decision or sanction imposed by the employer.

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<sup>238</sup> at page 735, paragraph A-B

As further correctly stated by Davis AJA, in *BMD Knitting Mills (Pty) Ltd v SA Clothing & Textile Worker's Union*<sup>239</sup>, when analyzing the wording of subsection 188(1) of the LRA, namely " *the reason for the dismissal is a fair reason*", he states the word " *fair*" connotes a comparator, which in other words means that the reason must be fair to both parties, namely the employer and employee. That further strongly implies, that a determination into the fairness in this respect still needs to be made, and hence the employers decision is not immune to being overruled.

In contrast, with the 'defer to the employer' approach, there must be deference towards the decision of the employer unless it is unfair, which is determined by applying the reasonable employer test or must be so excessive so as to shock one's sense of fairness. This is further qualified with the approach that it must be remembered that reasonable people may differ, which refers to permissible alternatives in that although the decisions of reasonable employers may differ, they may both not be unreasonable. Even in such a case, our courts have ruled that if it can be regarded as reasonable to also dismiss the employee then interference with the decision of the employer to dismiss may not be interfered with.<sup>240</sup>

This formulation of the approach, as developed by the LAC in *County Fair Foods, supra*, impliedly makes the decision of the employer incapable of being overruled. Even though the aforementioned approach asserts that interference with the decision of the employer may be warranted if its unfair, the test applied in determining the fairness of the dismissal, approaches the question from the perspective of the employer.

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<sup>239</sup> (2001) 22 ILJ 2264 (LAC) at paragraph [19]

<sup>240</sup> *County Fair Foods (Pty) Lt, supra*, at paragraph 34

In addition, the further test contended by the 'defer to the employer' proponents is that the dismissal must not be so excessive, so as to shock one's sense of fairness. This contention begs one to ask the question as to when can a dismissal be regarded as excessive, so as to warrant unfairness. A further flaw with this approach, is the use of the word 'excessive'. In other words, if a dismissal in the circumstances may be unfair, it still will not pass the aforementioned test, if it not so excessive as to shock one's sense of fairness. In further responses hereto, more importantly, it should be said that a dismissal can either only be fair or unfair. To justify that it must be excessive or by allowing permissible alternatives, contradicts the concept of fairness.<sup>241</sup>

The LRA is further explicitly clear when it provides that when there are disputes in relation to the fairness of a dismissal, as in relation to subsection 188(1), then in terms subsection 191(5)(a) of the LRA, the dispute is referred either to the Commission for compulsory arbitration or bargaining council, or in terms of subsection 191(5)(b) read with subsection 191(6) referred to the Labour Court for adjudication. If an employee, proves that he/she was dismissed, then the employer must prove in terms of subsection 192(2) that the dismissal is fair. These provisions explicitly imply that the Commissioner and/or the Courts have powers to determine the dispute objectively.

Although it can be said that the proponents of the 'defer to the employer' approach, have stated, that interference should only be warranted if no reasonable employer would have dismissed the employee, or if the dismissal is so excessive as to shock ones sense of fairness,

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<sup>241</sup> the Court in *NUMSA v Vetsak Co-operative Ltd & others* (1996) 17 ILJ 455 (A) at page 589, paragraph C-D, described fairness as entailing equity and a balance between the interests of the worker and the employer. At page 800, Grosskopf, JA in *Perskor, supra*, states that the power in determining whether certain facts constitute unfair labour practice does not involve a choice between permissible alternatives.

these proponents have still maintained that commissioners should not lightly interfere with the decision of the employer per se<sup>242</sup>.

Therefore, it can be rightfully contended that contrary, to the contentions as held by the proponents of the reasonable employer approach or the 'defer to the employer' approach, the LRA is silent on the view that there should be deference towards the decision of the employer. It is respectfully held that when an arbitration takes place before a commissioner, then there is nothing in the language of the aforementioned provisions of the LRA, which indicate or imply that the Commissioner must show deference to the employer's decision.

Despite the aforementioned point, it should be indicated that the SCA in *Rustenburg Platinum Mines Ltd vs CCMA*<sup>243</sup>, re-affirmed the reasonable employer test or the 'defer to the employer' approach as respectively ruled in *Nampak Corrugated Wadeville* and *County Fair Foods (Pty) Ltd*.<sup>244</sup> The judgment of the SCA in *Rustenburg Platinum Mines Ltd*, will be discussed in greater detail in Chapter 5 of this thesis.

As indicated above, a reading of the language of the provisions of the LRA applicable, quite clearly enables the Commissioner to decide all aspects of the issue of fairness, including the fairness of the dismissal.

Hence, the assertion made by the proponents of the reasonable employer test or the 'defer to the employer' approach, that the commissioner's position, when determining the level of

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<sup>242</sup> *Nampak Corrugated Wadeville v Khoza, supra*, at paragraph [33]-[35] and *County Fair Foods (Pty) Ltd v CCMA & Others, supra*, at paragraph 34

<sup>243</sup> 2007 (1) SA 576 SCA

<sup>244</sup> at paragraph [43] the SCA held that these approaches are firmly rooted in the prescripts of the LRA

sanction imposed, is limited, is easily refutable. As contended, it is explicitly clear from a reading of the LRA, that the language of subsection 188(1)(a) of the LRA also provides no support for this approach.

### 3.3 Conclusion

It is abundantly clear from the above mentioned averments that there was great disparity between South African jurisprudence on the test in assessing fairness and the role and powers of the arbitrator, commissioner or the courts in intervening in the sanction imposed by the employer. This Chapter has reconstructed the development of the 'own opinion' approach which encapsulates that commissioner's or the courts may assess the fairness of a dismissal primarily based upon their own value or moral judgment. Based upon court rulings and the wording of the Labour Relations Act 28 of 1956 and the Labour Relations Act 66 of 1995, it has been shown that the reasonable employer test and the defer to the employer approach is not part of South African Labour Law, despite court interpretations to this effect.

This Chapter has furthermore illustrated the decision of the highest court at the time, in relation to the application of the old LRA, being the Appellate Division to enunciating that fairness must be assessed based upon a value judgment of the adjudicator. In addition, based upon the rulings of *Toyota* and *NEHAWU v UCT, supra*, with the underlying decisions of the Appellate Division under the old LRA and based upon the analysis of the relevant provisions of the Labour Relations Act 66 of 1995, it is explicitly clear that South African law had been decisive on the test for fairness and the approach that commissioners should adopt when assessing the fairness of a dismissal in terms of the Labour Relations Act 66 of 1995. It is therefore surprising

that there has been this ensuing disparity between academics, jurists and the courts on the manner in which the fairness of dismissals was to be tested.

Despite the conclusive rulings of the South African Courts and the language of the LRA, the debate had been further precipitated by the decision of the Supreme Court of Appeal in *Rustenburg Platinum Mines Ltd vs CCMA*<sup>245</sup>, which supported the reasonable employer test or the 'defer to the employer' approach. It is the latter mentioned case that led this question of law to reach the Constitutional Court, in putting an end to the uncertainty regarding the test for fairness in dismissal cases, with further pronouncements on the role and the powers of the commissioners in intervening in cases of dismissals.



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<sup>245</sup> 2007 (1) SA 576 SCA

## Chapter 4

### How can the fairness of a dismissal as defined in terms of the Labour Relations Act 66 of 1995 be tested and based upon whose judgment is the fairness assessed?

#### 4.1 Introduction

This chapter shall look at Constitutional law, Statutory legislation, International Law and Obligations in the shadow of relevant case law, which will provide an answer to the question which has been occupying South African Labour History for so many decades. The question being how should the fairness of a dismissal be assessed, namely should the reasonable employer test or the 'defer to the employer' approach be applied or can the Commissioner or court, pass its own moral and value judgment based upon the facts of the case. The answer to this question is reasonable to say can be found in the Constitution<sup>246</sup>, the Statutes ( old LRA and new LRA), International Law<sup>247</sup> and decisions of the Courts during the old LRA. The intention of applying and referring to the latter mentioned directives, is to outline the law and hence, the test for fairness of dismissals to be adopted in terms of the Labour Relations Act 66 of 1995.

It should be mentioned that in the paragraphs to follow, the analysis of the approach most consistent with the South African Constitution and the Labour Relations Act, shall be discussed without reference to the Supreme Court of Appeal ( SCA) judgment in *Rustenburg Platinum Mines Ltd v CCMA & Others*<sup>248</sup> and the Constitutional Court judgment in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*<sup>249</sup> as these judgments will be discussed in Chapter 5 of the thesis.

The intention of this Chapter is to research the law based upon jurisprudence development of the past, the provisions of the Constitution, the Labour Relations Act 66 of 1995, International

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<sup>246</sup> Act 108 of 1996

<sup>247</sup> the International Labour Organization ( ILO) Convention on Termination of Employment 158 of 1982 and Foreign Law: Canadian Law

<sup>248</sup> *Rustenburg Platinum Mines Ltd vs CCMA* 2007 (1) SA 576 SCA

<sup>249</sup> 2008 (2) SA 24 CC

Law and critically look at the courts interpretations as to the test in determining the fairness of a dismissal based upon misconduct, prior to this question reaching the Supreme Court of Appeal and the Constitutional Court.

#### 4.2 The Constitution of the Republic of South Africa, Act 108 of 1996

As correctly followed by the Constitutional Court in *National Education Health and Allied Workers Union v UCT*<sup>250</sup> (*NEHAWU v UCT*), the starting point as inferred when attempting to determine the approach most consistent with South African Labour Law is the Constitution of the Republic of South Africa Act 108 of 1996. According to Section 23(1) of the Constitution, 'everyone has the right to fair labour practices'<sup>251</sup>. As implied by the Constitutional Court<sup>252</sup>, fair labour practice as envisaged in the Constitution is not defined, with content to the meaning being provided by the Legislature and further by the interpretation to its meaning by the specialist tribunals including the Labour Appeal Court and the Labour Court.

It was accordingly held by the Constitutional Court that when the courts give content to the meaning of fair labour practice they must seek guidance from domestic experience and international experience. When referring to domestic experiences, the Constitutional Court was making reference to the equity based jurisprudence that was developed around the unfair labour practice provision of the Labour Relations Act 28 of 1956 and the codified provisions of the definition. In relation to the International experiences, the Constitutional Court was referring to the Conventions and Recommendations of the International Labour Organization (ILO).<sup>253</sup>

At the outset, in providing its meaning to fair labour practice in terms of section 23(1) of the Constitution, the Constitutional Court adopted the meaning of fairness as was iterated by the AD in *Vetsak*<sup>254</sup>, *supra*, and applied the equity based principle that fairness entails a balance between the interests of both the employer and the employee.<sup>255</sup> At the outset, it is therefore

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<sup>250</sup> 2003 (3) SA 1 CC at paragraph [33]

<sup>251</sup> The Constitution of the Republic of South Africa, Act 108 of 1996

<sup>252</sup> *NEHAWU v UCT, supra*, at paragraphs [ 33 B-C] & [34D]

<sup>253</sup> *NEHAWU v UCT, supra*, at paragraph [34D-E]

<sup>254</sup> *National Union of Metalworkers of SA v Vetsak Co-Operative Ltd, supra*, at page 589 [C-D] as per Smalberger JA and at page 593[ G-H] as per Nienaber JA

<sup>255</sup> *NEHAWU v UCT, supra*, at paragraph [38]

clear that the meaning to fair labour practice as defined in terms of section 23(1) entails having regard to the interests of both the employer and the employee, and that this should be considered, when interpreting the LRA, as the latter is enacted to give effect to section 23(1) of the Constitution.

As held by the Constitutional Court in *National Education Health and Allied Workers Union v UCT*, that when a court has to interpret the meaning of fair labour practice as defined in terms of the Constitution and the Statute, then the court must source guidance of the meaning as developed by the courts during the old LRA.<sup>256</sup>

#### 4.3 The approach prevailing during the old LRA and consistent with the Labour Relations Act 28 of 1956 critically analysed and considered for the purposes of fair labour practice as defined in terms of s 23(1) of the Constitution of the Republic of South Africa, Act 108 of 1996, together with an overview of the ILO Conventions and Foreign Law

##### 4.3.1 Jurisprudence Development of the law in testing fairness of dismissals by the Industrial Courts in relation to the definition of unfair labour practice as defined in terms of the Labour Relations Act 28 of 1956

During the old LRA and in particular in the early 1980's until the repeal of the old Labour Relations Act, the tribunal which dealt with unfair dismissal disputes in the first instance was the Industrial Courts. In order to determine the unfairness of a dismissal, the courts applied the definition of unfair labour practice, as defined in terms of the old LRA.<sup>257</sup>

It is essential to mention that until the 1<sup>st</sup> September 1988, the concept of unfair dismissal had no express statutory reference, but was developed from the broad definition of 'unfair labour practice' as was applied by the Industrial Court.<sup>258</sup> According to Alan Rycroft and Barney

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<sup>256</sup> As cited, *supra*, at paragraph [34 E]

<sup>257</sup> *Engen Petroleum Ltd v CCMA & Others, supra*, at paragraph [7]

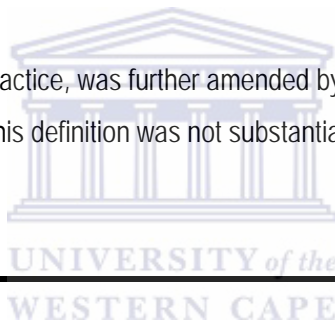
<sup>258</sup> This was the definition of unfair labour practice prior to the amendment in September 1988:

" (a) 'unfair labour practice' means any act or omission, other than a strike or lockout, which has or may have the effect that-

Jordaan [ 1992:194]<sup>259</sup> ,this broad definition caused the development of distinct jurisprudence in relation to unfair dismissals. According to Rycroft and Jordaan, it was a peremptory prerequisite when determining the fairness of the dismissal, that the dismissal be both substantively and procedurally fair. This required that there must be an enquiry whether there is a valid and fair reason for the termination of the employment. The process further entailed whether the employer had given the employee a fair and reasonable opportunity to present evidence in mitigation to the allegations in accordance with the audi alteram partem rule.<sup>260</sup>

With effect from September 1988 ( the 1988 amendments), the definition of unfair labour practice was replaced. <sup>261</sup> This definition for the first time provided a statutory recognition for the concept of unfair dismissal. What is further important to note is that the new definition was not exhaustive, with the effect that the principles as enunciated by the Industrial Court in terms of the old definition still applied. <sup>262</sup>

The definition of unfair labour practice, was further amended by the Labour Relations Amendment Act 9 of 1991.<sup>263</sup> This definition was not substantially different from the pre-1988



- (i) any employee or class of employees is or may be unfairly affected or that his or their employment opportunities or work security is or may be prejudiced or jeopardized thereby;
- (ii) the business of any employer or class of employers is or may be unfairly affected or disrupted thereby;
- (iii) labour unrest is or may be created or promoted thereby;
- (iv) the labour relationship between the employer and employee is or may be detrimentally affected thereby; or
- (b) any other labour practice or any other change in any labour practice which has or may have an effect which is similar or related to any effect mentioned in paragraph."

<sup>259</sup> Rycroft, Alan and Jordaan, Barney. (1992). " A Guide to South African Labour Law " .2<sup>nd</sup> edition. Juta & Co.at page 194

<sup>260</sup> Rycroft, Alan and Jordaan, Barney. (1992: 194). " A Guide to South African Labour Law " .2<sup>nd</sup> edition. Juta & Co.

<sup>261</sup> The relevant extract of the definition read as follows : " 'unfair labour practice' means any act or omission which in an unfair manner infringes or impairs the Labour relations between employer and employee and shall include the following:

(a) The dismissal, by reason of any disciplinary action against one or more employees, without a valid and fair reason and not in compliance with a fair procedure....."; in terms of the Labour Relations Amendment Act 83 of 1988, as cited in *Engen Petroleum Ltd v CCMA & Others, supra*, at paragraph [9] and as affirmed by Rycroft, Alan and Jordaan, Barney. ( 1992: 194), *supra*

<sup>262</sup> Rycroft, Alan and Jordaan, Barney. (1992: 194). " A Guide to South African Labour Law " .2<sup>nd</sup> edition. Juta & Co.

<sup>263</sup> "' unfair labour practice' means any act or omission, other than a strike or lockout, which has or may have the effect that-

- (i) any employees or class of employees is or may be unfairly affected or that his or their employment opportunity or work security is or may be prejudiced or jeopardized thereby;

definition of unfair labour practice, hence this refinement of the definition, also did not materially affect the industrial courts jurisprudence development on unfair dismissal.<sup>264</sup>

As indicated, as a result of the broad definition of unfair labour practice, the Courts during the old LRA, developed the concept of unfair dismissals through its judgments as ruled. This jurisprudence development established the principles to be applied when determining the fairness of dismissals based upon misconduct. Part of these principles included the rule that the court must arrive at its own decision on the facts as relied upon by the employer at the time of the disciplinary enquiry, any subsequent appeal, as well as evidence led in court.<sup>265</sup> It is on this basis that the reasonable employer approach as applied by some judgments was rejected, as it prevented the court from arriving at its own decision on the facts surrounding the dismissal.

As part of the jurisprudence developed in determining unfair dismissals under the guise of the definition of unfair labour practice, the disputed question as to the test in determining the fairness of dismissals in terms of the definition under the old LRA, eventually reached the highest court at the time, namely the Appellate Division, in *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd* ( hereinafter referred to as "Perskor")<sup>266</sup>. For the purposes of contextualizing the judgment of the AD within this part of the thesis, it is relevant to state that the court was confronted with addressing the interpretation of unfair labour practice as defined in terms of the definition as existed prior to the amendment of the definition by Act 83 of 1988.

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- (ii) the business of any employer or class of employers is or may be unfairly affected or disrupted thereby;
  - (iii) labour unrest is or may be created or promoted thereby;
  - (iv) the labour relationship between the employer and employee is or may be detrimentally affected thereby. "

<sup>264</sup> Rycroft, Alan and Jordaan, Barney. (1992: 195). " A Guide to South African Labour Law " .2<sup>nd</sup> edition. Juta & Co.

<sup>265</sup> *Govender v Sasko ( Pty) Ltd t/a Richards Bay Bakery* (1990) 11 ILJ 1282 at page 1285 ( D-F) and Rycroft, Alan and Jordaan, Barney. (1992: 198); this was furthermore implied when the Industrial Court as per *Govender v Sasko supra*, held that the facts upon which the reason is based must be established objectively by the court at page 1285 ( E-F). In contrast the reasonable employer approach asked whether a reasonable employer in the position of an employer, believed that the misconduct had been committed based upon evidence at the time. The Industrial Court as per John AM in *Food & Allied Workers Union & Another v SA Breweries Ltd ( Denver )* ( 1992 ) 13 ILJ 209 (IC) also affirmed that the court must determine the dismissal dispute based upon its own view, when it stated that, " The court has to determine the dispute between the parties. In dismissal cases the dispute is on the question whether or not the dismissal was fair. On this question the employer's belief, however reasonable, should not be decisive." at page 214 at paragraph I-J

<sup>266</sup> 1992 (4) SA 791 AD

The Appellate Division held that when it has to determine the fairness or unfairness of such practice, it entails a passing of a moral judgment on a combination of findings of fact and opinions. This indirectly implies that the reasonable employer approach or test is not compliant with the definition, and hence cannot be applied in determining the fairness of the dismissal.<sup>267</sup> This fairness test as was pronounced by the AD in *Perskor*, was subsequently followed by a number of AD judgments.<sup>268</sup>

The AD in *Numsa v Vetsak Co-operative Ltd & others, supra*, as per Nienaber JA, further exclaimed that when one refers to fairness as required in terms of the definition of unfair labour practice then it must be fairness to both the employer and the employee, with the additional comment that there are no underdogs when applying the requirement of fairness. This illustrates direct criticism towards the reasonable employer test, which determines fairness from one perspective, namely from the view of the employer.<sup>269</sup>

Therefore, when determining the test for the fairness of a dismissal, based upon past jurisprudence as required in terms of section 23(1) of the Constitution and as was pronounced in *NEHAWU v UCT, supra*, it is essential to note the focus on the principle of equity. Hence, the rulings by the AD in *Perskor* and *Vetsak, supra*, that in assessing the fairness of a dismissal, under the old LRA, the court passes a moral judgment on a combination of findings of fact and opinion. This rejected the application of the reasonable employer test, which was perceived from the perspective of an employer and therefore caused an imbalance between the interests of the worker and employer, in favour of the employer. Hence one can state that when putting meaning to the right to fair labour practice as provided in terms of section 23(1) of the Constitution, then it is justifiable to state that the 'own opinion' approach appears consistent with section 23(1).

It needs to be averred that the deference approach, as described in Chapter 2, although being discussed separately in the following sub-heading, is conceptually part of the reasonable

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<sup>267</sup> *Perskor, supra*, at page 798 [H-I]

<sup>268</sup> *National Union of Metalworkers of SA v Vetsak Co-Operative Ltd, supra*, at page 589 [C] (referred to as *Vetsak*) and as outlined by cases mentioned in Chapter 3

<sup>269</sup> (1996) 17 ILJ 455 (A) at page 59 [G-H]

employer test ( ' defer to the employer' approach). It is for structural purposes and in order to place emphasis on the defer to the employer part of the reasonable employer test ( ' defer to the employer' approach), that it has been structurally independently addressed as below. For the purposes of also putting content to the meaning of fair labour practices as provided in terms of section 23(1), that the approach to 'defer to the employer' when determining the fairness of dismissal is distinctively visited. It is to ascertain, whether past jurisprudence with application of the old LRA, held that when determining the fairness of a dismissal, there must be deference to the sanction imposed by the employer. As shall be seen, it will be through the judgments of the past jurisprudence, as shall be discussed below, that it shall be proven that the old LRA was interpreted to the effect that a court determines an unfair labour practice based upon its own view and judgment, with no deference to the employer.

#### **4.3.2 In terms of the Labour Relations Act 28 of 1956, who determines the dispute and must there be deference to the decision of the employer?**

It is quite clear and notable based upon an examination of the judgments of the past that the test in determining the fairness of a dismissal was a moral or value judgment based on a combination of findings of fact and opinions.

In addition to having addressed the test for fairness of a dismissal as conclusively decided by the Appellate Division, being the highest court at the time, it is furthermore necessary to discuss the question as to whether the court must show deference to the decision of the employer. As was substantiated and implied in the case of *National Union of Mineworkers & Another v Kloof Gold Mining Co Ltd*<sup>270</sup>, where the Industrial Court held that in examining the findings of the disciplinary committee, it had to bear in mind that :

“ The obligation to hold an enquiry and mete out discipline rests upon the employer but he must act fairly with due consideration of the employees rights. The employer is in effect primarily responsible for the administration of what might be termed industrial justice.....In scrutinizing

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<sup>270</sup> (1986) 7 ILJ 375 (IC) at paragraph 19

the actions of the employer it must be borne in mind that generally the decision to dismiss or discipline an employee does not rest in the first instance with this court. "

This view that the employer sets the standard or the rule to be maintained in the workplace and imposes the sanction if the rule has been infringed, lead many commentators and jurists to believe that the courts could not substitute their own judgment with that of the employer and should therefore show deference to the sanction imposed by an employer, unless it is unfair. This misconceived principle had led to a regurgitation of judgments ruling that there must be deference shown towards the decision of the employer.<sup>271</sup>

In *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd*, the Appellate Division made reference to the definition of unfair labour practice as was defined prior to its amendment in September 1988 and held that the court was not only to decide whether such effects have been caused by particular acts to constitute an unfair labour practice but was also to have considerations to fairness or unfairness thereof. The AD further had to ascertain whether it may pass its own moral or value judgment or must it defer to the employer when determining the fairness of a dismissal as a sanction. The AD accordingly held that its view as to what is fair is an essential determinant in ascertaining whether particular acts constitute an unfair labour practice.<sup>272</sup>

The above mentioned approach regarding the court applying its own moral or value judgment in determining whether the dismissal constituted an unfair labour practice, was furthermore supported with approval by the Appellate Division in *Atlantis Diesel Engines (Pty) Ltd v National Union of Metalworkers of SA*<sup>273</sup>, *National Union of Metalworkers of SA v Vetsak Co-*

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<sup>271</sup> *Scaw Metals Ltd v Vermeulen* (1993) 13 ILJ 672 (LAC) at 675. : " Scaw is entitled qua employer to determine the standard of conduct it demands from its employees, and the court can only intervene if that standard results in unfairness in a specific situation. Given the seriousness of Vermeulen's misdemeanour I cannot find that Scaw's dismissal of him was unfair....In my view, it is clear that Scaw regarded Vermeulen's conduct as quite unacceptable, and, as I have held, it was entitled to do so. It follows that given Scaw's view of Vermeulen's conduct in fact the relationship between them had become seriously damaged or intolerable. A further consideration, stressed by Scaws counsel, weighs with me. We live in a society wracked by violence. Where an employer seeks to combat that evil, even by harsh measures, this court ought not to be astute to find unfairness."

<sup>272</sup> *Perskor*, at page 798 [G] and at page 801[I - J]

<sup>273</sup> (1994) 15 ILJ 1247 (A) at page 1257 [A-B]

*Operative Ltd (' Vetsak')* <sup>274</sup> and *Wubbeling Engineering & Another v National Union of Metalworkers of SA* <sup>275</sup>.

The further reasoning underlying the argument that the Courts must pass its own views as value judgments on the fairness of dismissals, contrary to the theory that there must be deference to the decision of the employer to impose a sanction of dismissal, was illustrated by MSM Brassey ( Senior Counsel) in the Appellate Division case of *NUM v Free State Consolidated Gold Mines Ltd* <sup>276</sup> , who by implication noted the warning and commented, if employers were given the sole discretion to impose a sanction, and "... Were this belief true, the company could, by the way it administered the disciplinary process, decide whom to keep and whom to dismiss. It is exactly this form of arbitrariness that a proper system of discipline is designed to forestall."

Furthermore, in the absence of express provisions in the old LRA, similar to s 57(3) of the Employment Protection ( Consolidation) Act of 1978 ("the English Statute") and as further substantiated in the above mentioned paragraphs, it is expressly clear that the Industrial Court, the old LAC and the Appellate Division could determine the fairness of a dismissal based upon its own opinion, and not in application of the reasonable employer test or the 'defer to the employer ' approach. <sup>277</sup>

It is necessary that the legal position in relation to the test and approach in determining the fairness of a dismissal based upon misconduct or the test in determining an unfair labour practice, as defined under the Old LRA is reverted to, as the legal approach and jurisprudence applied by the courts during the Old Act has been bequeathed to the labour environment operating in terms of the new LRA. As per Zondo, JP in *Engen Petroleum Ltd v CCMA & Others* <sup>278</sup>, the jurisprudence as developed in terms of the old LRA, must be considered when applying the new LRA, in order to ensure " that there is no repetition of the mistakes of the past, but also to ensure that that which was good in that jurisprudence can be carried forward if

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<sup>274</sup> *Vetsak, supra* at page 592 [B-D]

<sup>275</sup> (1997) 18 ILJ 935 (SCA) at page 937 [A-J] & page 938 [C]

<sup>276</sup> 1996 (1) SA 422 AD at page 435 [I-J]

<sup>277</sup> *Perskor, supra*, at page 801 [I - J]

<sup>278</sup> As cited, *supra*, at paragraph [35]

it is not inconsistent with the current Act, its objects and the Constitution of the Republic of South Africa, 1996 ("the Constitution")."

In addition, the importance of taking cognizance of the past jurisprudence development is because it is also required, when ascertaining the definition of fair labour practice as provided in terms of section 23(1) of the Constitution, which is the source of determining the fairness of dismissals.<sup>279</sup>

It is abundantly clear that the jurisprudence at the time under the old LRA, manifested that the fairness of a dismissal for misconduct under the old LRA, is based upon a court or tribunal's own value judgment, on a combination of facts and opinions. This has been asserted in *Perskor*<sup>280</sup>, *Vetsak*<sup>281</sup>, *Wubbeling Engineering & Another*<sup>282</sup>, *Betha v BTR SARMCOL, A division of BTR Dunlop Ltd*<sup>283</sup>, *supra*. To determine the law during the time of the old LRA is relevant to analyze, as per Zondo, JP in *Engen Petroleum Ltd, supra*, as it confirms the jurisprudence approach and hence sets the scene of the transition into the new LRA, with the approach most consistent with South African Law, as dictated by the highest court at the time and leading jurists.

#### 4.3.3. Approach consistent with the Conventions of the International Labour Organization (ILO) in terms of the Constitution and the Labour Relations Act

Further provisions of the Constitution, which is relevant in ascertaining the approach consistent with our law is Section 232 of the Constitution, which provides that, "Customary International law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."

In terms of section 1 of the Labour Relations Act 66 of 1995, one of the primary objects of the Act, is "to give effect to obligations incurred by the Republic as a member state of the International Labour Organization". In terms of section 3 of the LRA, interpretations of the

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<sup>279</sup> *NEHAWU v UCT*, *supra*, at paragraph [34]

<sup>280</sup> at page 798 [G] and page 800 [F-G]

<sup>281</sup> page 589 at paragraph [C]

<sup>282</sup> As cited, *supra*, at page 937 [A-J] & page 938 [C]

<sup>283</sup> 1998 (3) SA 349 SCA at page 370 [B-C]

provisions of the Act, must be in such a manner that it gives effect to the primary objects of the Act, is in compliance with the public international law obligations of the Republic and is in compliance with the Constitution.

It is therefore integral, that one makes reference to the provisions of the ILO Convention on Termination of Employment 158 of 1982. Further essentially important is that the provisions of the Constitution must also be given effect when interpreting the provisions of the LRA, in this respect one is referred to section 233 of the Constitution<sup>284</sup>, which states that if there are two interpretations of a statutory provision, then the one which complies with international law must be adopted, on condition that it is a reasonable interpretation.

On the basis of sections 232 and 233 of the Constitution, section 1 and 3 of the Labour Relations Act 66 of 1995, it is essential to make reference to the provisions of the International Labour Organization (ILO) Convention on Termination of Employment 158 of 1982, when interpreting the LRA in order to determine the approach consistent with the LRA, and the Constitution.

It is therefore logical and significant to commence with an interpretation of Article 1<sup>285</sup> of the ILO Convention on Termination of Employment 158 of 1982, which translates to mean that countries that have ratified the Convention, their respective courts or arbitrator's, must through Court orders or arbitration awards, give effect to the provisions of the Convention. In the event that Courts and Arbitrators fail to give effect to the provisions of the Convention, then there is an expectation that legislation must be enacted to give effect to the provisions of the Convention.<sup>286</sup>In support hereof, one is referred to Article 4 of the Convention<sup>287</sup>, which

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<sup>284</sup> section 233 of the Constitution, " When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

<sup>285</sup> Article 1 of the ILO Convention on Termination of Employment 158 of 1982 reads as follows : " The provisions of this Convention shall, in so far as they are not otherwise made effective by means of collective agreements, arbitration awards or Court decisions or in such other manner as may be consistent with national practice, be given effect by laws or regulations."

<sup>286</sup> As per interpretation by Zondo, JP in *Engen Petroleum Ltd, supra*, at paragraph [98] B-C

<sup>287</sup> Article 4 of the ILO Convention on Termination of Employment 158 of 1982 reads as follows :  
" The Employment of a worker shall not be terminated unless there is a valid reason for such termination in connection with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service."

prohibits the termination of the worker's employment, unless there is a valid reason. In interpreting Article 4, the Labour Appeal Court held that a valid reason implied an objectively valid reason, and not a reason that a reasonable employer would regard as valid.<sup>288</sup>

The content of article 8(1) of the ILO Convention on Termination of Employment 158 of 1982 reads as follows :

" A worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator."

It is sustainable and justifiable to state that, based upon the language of article 9(1)<sup>289</sup>, requiring that the bodies, referred to in article 8(1), which includes a court or an arbitrator, to be "*empowered to examine the reasons given for the termination and the other circumstances relating to the case and to render a decision on whether the termination was justified*" strongly implies that the court or the arbitrator has to give his own opinion on whether the termination of the employment is justified. ( own emphasis) This insinuation had furthermore been supported by Zondo, JP in *Engen Petroleum Ltd.* <sup>290</sup>

In further substantiating the interpretation that article 9(1) of the Convention, strongly implies that a commissioner may determine the fairness of the dismissal based upon his own view, it is necessary and relevant to make reference to the opinion and interpretation of the committee of experts on the provisions of the ILO Convention, with specific reference to *Chapter 111 of the 1995 General Survey of ILO Convention 158 on Termination of Employment : 'Protection Against Unjustified Dismissal : Obligation for termination of employment to be justified by a valid reason'* . ( herein after referred to as the General Survey of 1995 )<sup>291</sup>

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<sup>288</sup> *Engen Petroleum Ltd v CCMA & Others, supra*, at paragraph [90] G

<sup>289</sup> Article 9(1) of the ILO Convention on Termination of Employment 158 of 1982 reads as follows :

" 1. The bodies referred to in Article 8 of this convention shall be *empowered to examine the reasons given for the termination and the other circumstances relating to the case and to render a decision on whether the termination was justified.*"

<sup>290</sup> As cited, *supra*, paragraph [91] B-C.

<sup>291</sup> As cited by Zondo, JP in *Engen Petroleum Ltd, supra*, at paragraph [97] G-H

In relation to Article 9(1) of the Convention, it is essential to make reference to the interpretation and opinion of a Committee of Experts<sup>292</sup> on the provisions of the ILO Convention. According to them, the content of Article 9(1) meant that " It is the responsibility of the impartial body to decide, in light of the evidence presented, whether the termination is justified."<sup>293</sup> This explicitly means that the arbitrator, court or tribunal ( as referred to in Article 8(1) of the Convention), could determine whether the dismissal was justified according to its own view or opinion of what is fair or not, taking in all of the circumstances of a case.

As per Article 9(2)(b)<sup>294</sup> of the Convention, the court or the arbitrator may reach a conclusion on the reason provided for the termination of the employment, with consideration of the evidence provided by the parties and in accordance with national law. Article 9(2)(b) explicitly indicates that the tribunal, arbitrator or court may decide on whether there was a valid reason for the dismissal, as contemplated within Article 4 of the Convention and may reach a decision on the reason, based upon national law. In the context of this thesis, this would mean that the tribunal, arbitrator or court would make the decision as to the fairness of the dismissal.

In terms of Article 10<sup>295</sup> of the ILO Convention on Termination of Employment 158 of 1982, if the court, tribunal or arbitrator as referred to in Article 8 of the Convention, finds the termination (sic:dismissal) unjustified, then they have the discretion to decide on the appropriate award.

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<sup>292</sup> As referred to by Zondo, JP in *Engen Petroleum Ltd, supra*, at paragraph [97] with regard to Chapter 111 of the *1995 General Survey of ILO Convention 158 on Termination of Employment: 'Protection Against Unjustified Dismissal: Obligation for termination of employment to be justified by a valid reason'* ". ( herein after referred to as the General Survey of 1995 )

<sup>293</sup> As cited by Zondo, JP in *Engen Petroleum Ltd, supra*, at paragraph [ 102]

<sup>294</sup> Article 9(2) of the ILO Convention on Termination of Employment 158 of 1982 reads as follows :  
"2. In order for the worker not to have to bear alone the burden of proving that the termination was not justified, the methods of implementation referred to in Article 1 of this Convention shall provide for one or the other or both of the following possibilities:

(a) the burden of proving the existence of a valid reason for the termination as defined in Article 4 of this Convention shall rest on the employer;

(b) the bodies referred to in Article 8 of this Convention *shall be empowered to reach a conclusion on the reason* for the termination having regard to the evidence provided by the parties and according to procedure provided for by national law and practice."

<sup>295</sup> Article 10 of the ILO Convention on Termination of Employment 158 of 1982 " If the bodies referred to in Article 8 of this Convention *find that termination is unjustified* and if they are not empowered or do not find it practicable, in accordance with national law and practice, to declare the termination invalid and/or order or propose reinstatement of the worker, they shall be empowered to order payment of adequate compensation or such other relief as may be deemed appropriate." ( own emphasis)

It is explicitly apparent from the content of article 10 above, that by granting this discretion to decide on an award, strongly implies further that the Convention, ratifies the independent and adjudicative role of a court or an arbitrator, thereby refuting the defer to the employer approach and impliedly the application of the reasonable employer test.

As correctly held by the Court in *Engen Petroleum Ltd*<sup>296</sup>, it is clear that any construction of the Act, which require's the bodies as referred to in article's 1 or 8(1) of the Convention, namely the courts, labour tribunals or arbitrator, to defer to the employer in deciding whether a particular act of misconduct is sufficient to justify dismissal and applying the reasonable employer test, would be inconsistent with the Convention.

According to Zondo, JP in *Engen Petroleum Ltd*<sup>297</sup>, what is inferred by the Committee of Experts, in the last sentence of paragraph [79] of Chapter 111, is that it is the prerogative of the arbitrators and courts to determine / pass judgement on whether a particular set of facts and circumstances constitute a valid reason for the termination of the employment.

Therefore it is justifiable to state, that if the Labour Relations Act (LRA),<sup>298</sup> precludes, a CCMA commissioner from substituting his opinion for that of the employer on whether dismissal as a sanction in a particular case is fair, as the reasonable employer test or the defer to the employer approach does, then it would be inconsistent with the Convention.

It is conclusively evident based upon the analogy of the Committee of Experts on the interpretation of the provisions of the Convention and case law, that the reasonable employer test or the defer to the employer approach, which precludes a Commissioner from holding that a dismissal is unfair, even when the dismissal is unfair, because he has to defer to the employer and/or has to maintain the dismissal because the employer thinks its fair, is clearly in conflict and/or inconsistent with the Convention. Therefore, any construction of the LRA which gives effect to the latter mentioned approach or the reasonable employer test, will lead to the Republic acting contrary to its obligation to the Convention as a member state, but will also be breaching section 3 of the Labour Relations Act 66 of 1995 and would furthermore be also

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<sup>296</sup> As cited, *supra*, at paragraph [95]

<sup>297</sup> As cited, *supra*, at paragraph [99]

<sup>298</sup> Labour Relations Act 66 of 1995

defeating one of the primary objects of the Labour Relations Act, namely section 1(b), which reads " the primary objects of this Act, which are (is):

"(a)..... ;

(b) to give effect to the obligations incurred by the Republic as a member state of the International Labour Organization;

(c) ....."

In terms of Section 39(2) of the Constitution, " when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights." Significantly important in this respect, is that section 23(1) of the Constitution, which ultimately dispenses that ' everyone has the right to fair labour practices', is manifested in the Labour Relations Act 66 of 1995, in section 1 read with section 3 and which has been fully discussed in the aforementioned paragraphs.<sup>299</sup>

The ILO Convention, as also interpreted by the Committee of Experts as mentioned, further justifies the motivation that an impartial tribunal or court shall have discretion to decide on the termination of the employment. There is furthermore no provision in the ILO Convention that expressly propagates the 'defer to the employer' approach or the reasonable employer test. It therefore suffices that in terms of section 233 of the Constitution, the Court must interpret the Labour Relations Act 66 of 1995 by being consistent with the intentions as emanating from the ILO Convention, as aforementioned, of which South Africa is a party.<sup>300</sup>

It therefore stands that if the reasonable employer test or the defer to the employer approach, is inconsistent with international law, such as the provisions of the Convention and the own opinion approach appears to be consistent with the Convention, then in accordance with section 233 of the Constitution, the own opinion approach should be adopted and the reasonable employer test or the 'defer to the employer' approach should be rejected.

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<sup>299</sup> In *Old Mutual Life Assurance Co SA Ltd v Gumbi* 2007 (5) SA 552 (SCA) at paragraph [5], the SCA held that for purposes of s39(2) of the Constitution it includes the right to fair labour practice as envisaged in terms of section 23(1) of the Constitution

<sup>300</sup> In *Old Mutual Life Assurance Co SA Ltd v Gumbi, supra*, at paragraph [6], the SCA confirmed that South Africa was a member of the ILO

#### 4.3.4 Foreign Law: The Canadian Perspective

In terms of section 233<sup>301</sup> of the Constitution a court interpreting legislation must prefer an interpretation which is consistent with International Law. It is in this context, that this thesis will make reference to Canadian law in relation to dismissals for misconduct.

It has been recognized by the Canadian courts, that employers must act fairly when dismissing employees, as employees have been regarded as vulnerable person's in need of the courts protection. <sup>302</sup> According to Canadian law, if there is just cause for the dismissal of an employee, then the employer may dismiss the employee. A broad description of just cause, is " If the action taken by an employee shows the employee's intention not to be bound by the terms of the employment contract or a fundamental term of it, or is guilty of a repudiatory breach of contract, then the employer may summarily dismiss the employee for "just cause".

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In order to obtain a comparative analysis of Canadian law to South African law in relation to the role of tribunals, such as Board of Arbitration in Canada and the Commission for Conciliation Mediation and Arbitration ( CCMA), it has been held that " ...the principle of judicial deference is no more than the recognition by courts that legislators have determined that members of an arbitration board with their experience and expert knowledge should be those *who resolve labour disputes* arising under a collective agreement." <sup>304</sup>[own emphasis] This implies that arbitration boards in Canada are recognized as having the underlying status in resolving disputes. It further implies that tribunals such as arbitration boards do not have to show

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<sup>301</sup>Section 233 of the Constitution of the Republic of South Africa, Act 108 of 1996 : "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

<sup>302</sup> *Marlowe v Ashland Canada Inc.* [2001] B.C.J. No. 1338 ( B.C.S.C.) & *Makarchuk v Mid-Transportation Services Ltd* ( 1985) 6 CCEL 169 (Ont. S.C.)

<sup>303</sup> Ellyn, Igor Q.C & MacNeil, Agnes E. (2000: 2): " 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 page 2. <http://www.ellynlaw.com>

<sup>304</sup> Toronto ( City) Board of Education v Ontario Secondary School Teachers' Federation, District 15 ( Toronto) [1997] 1 S.C.R. 487 at paragraph [37]

deference to the sanction imposed by the employer. This had further been re-affirmed, when the Supreme Court of Canada, expressed that the purpose of the system of grievance arbitration is to secure prompt, final and binding settlement of disputes which arises out of the disciplinary action of employers.<sup>305</sup> The decision as to whether there is just cause is primarily within the jurisdiction of the arbitration board.<sup>306</sup> Notwithstanding the latter, it is peremptory that the employer proves just cause for the employee's dismissal.<sup>307</sup> However, as stated, it is primarily the jurisdiction of the arbitration board to decide whether there is just cause.

Importantly in determining whether there is a just cause for the discipline imposed by the employer, the enquiry entails firstly, whether the employee is responsible for the misconduct alleged by the employer, secondly, does the misconduct give rise to a just cause for the discipline and thirdly, is the sanction imposed by the employer appropriate in light of the misconduct committed and other relevant circumstances.<sup>308</sup>

As had been acknowledged by academics, there is no defined threshold of what constitutes cause. It has been held that the test in determining whether there is a cause for dismissal is an objective one. Notably, the " fault must be something which a reasonable man could not be expected to overlook, regard being had to the nature and circumstances of the employment."<sup>309</sup>

With further reference to fairness and the inference made thereto by the Supreme Court of Canada in *Wallace v United Grain Growers Ltd*<sup>310</sup>, it was held that employers have a duty to be ' reasonable, honest and forthright with employees' at times of dismissals.<sup>311</sup> The underlying reason for this principle, is that it was recognized by the court that there is a power imbalance

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<sup>305</sup> *Toronto ( City) Board of Education, supra*, at paragraph [36]

<sup>306</sup> *Toronto ( City) Board of Education, supra*, at paragraph [38]

<sup>307</sup> Ellyn, Igor Q.C & MacNeil, Agnes E. (2000: 5), *supra*. see also *Butler v C.N.R* [1940] 1 D.L.R. 256 ( Sask.C.A.), at page 261 & *Matheson v Matheson International Trucks Ltd.* (1984), 4 C.C.E.L. 271 ( Ont.H.C.J.) at page 275

<sup>308</sup> *Toronto ( City) Board of Education, supra*, at paragraph [49]

<sup>309</sup> *McIntyre v Hockin*, (1889), 16 O.A.R 498 at page 501, as cited by Ellyn, Igor Q.C & MacNeil, Agnes E. (2000: 5), *supra*

<sup>310</sup> [1997] 3 S.C.R. 701

<sup>311</sup> As outlined by Flanagan, Jamie, Giesbrecht, Tina and Tetrault, McCarthy. ( 2005: 6). 'Terminating the Employment Relationship and Structuring Severance Packages" at <http://www.mccarthy.ca/pubs/TermEmployRel.pdf>

between employees and employers. With employees being the most vulnerable group, especially at times of dismissals and hence, require the protection of the court.<sup>312</sup>

From the above mentioned disposition of the Canadian perspective of the law by the courts, it is evident that it is the arbitration board and/or courts which determine whether the employer has proven just cause for the termination of the employment. Through an analysis of the principles ruled by the Canadian courts and discussed by the academics, it is explicit that the test in determining a just cause is an objective test, and requires the question as to whether fault could be determined by a reasonable man.

In line with the provisions of sections 232 and 233 of the Constitution, the law as it stands in Canada may be recognized as law in the Republic and characterizes a balance between employers and employees, with recognition of the vulnerability of employees, thereby denoting fairness as developed in terms of South African common law under the old LRA and hence, should be the preferred form of interpretation.

#### **4.4 The test and the approach consistent with the Labour Relations Act 66 of 1995 ( LRA) in determining the fairness of a dismissal**

Under the above mentioned sub-heading it is ironic to commence discussions hereof, in that it is already justified that the approach, namely that a commissioner or court must determine the fairness of the dismissal based upon its own value judgment, is at the outset compliant with the Labour Relations Acts 66 of 1995. It has been extensively substantiated that based upon the International law obligations of South Africa, ie. The ILO Convention on Termination of Employment 158 of 1982 , as outlined above, and as required to have cognizance thereto in terms of sections 1 and 3 of the LRA, that the articles of the Convention as discussed, appear to be explicitly in line with the 'own opinion' approach.

For the purposes of putting content to the meaning of the right to fair labour practice, as provided in terms of section 23(1) of the Constitution, it was held by *NEHAWU v UCT, supra*,

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<sup>312</sup> Wallace v United Grain Growers Ltd [1997] 3 S.C.R. 701

that reference should be made not only to International laws but also to domestic experiences, which refers to past jurisprudence development in relation to the test in determining the fairness of a dismissal. It is not necessary to regurgitate the stance of the majority of the court judgments as to their interpretations of the provisions of the old LRA which lead them to conclude that fairness entails the requirements of equity, which means that there must be a balance between the interests of the employee and the employer when determining the fairness of a dismissal.

As had been illustrated, extensive convincing justifications have been outlined which indicates that an objective test, applied by the courts must be made, which entails a value judgment based upon the facts of a particular case, when determining the fairness of a dismissal. This meaning to section 23 (1) of the Constitution, can furthermore be recognized as an object of the Bills of Rights, as envisaged in terms of section 39(2) of the Constitution of the Republic of South Africa, Act 108 of 1996.<sup>313</sup> Hence for the purposes of interpreting the LRA, the meaning attributed to section 23(1) of the Constitution, as expressed through the past judgments as outlined above, the 'own opinion' approach or the value judgment by the arbitrator / commissioner in testing the fairness of a dismissal for misconduct, appears to be consistent with the LRA.

The value judgment or own opinion approach had long been proposed and enunciated by the Appellate Division<sup>314</sup>, the Supreme Court of Appeal<sup>315</sup>, the Labour Court, the Labour Appeal Court<sup>316</sup> and the Constitutional Court<sup>317</sup> respectively during the old Labour Relations Act 28 of 1956 and / or the new Labour Relations Act 66 of 1995 ( herein after referred to as the new LRA or the LRA ). For the sake of avoiding repetition, it is not necessary to revisit the cases,

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<sup>313</sup> See *Old Mutual Life Assurance Co SA Ltd v Gumbi*, supra, at paragraph [5], where the SCA held that for purposes of s39(2) of the Constitution this includes the right to fair labour practice as envisaged in terms of section 23(1) of the Constitution

<sup>314</sup> *MWASA & Others v Perskor*, supra; *NUMSA v Vetsak Co-operative Ltd & others*, supra, at page 589, paragraph C-D;

<sup>315</sup> *Wubbeling Engineering & Another v NUMSA*, supra; *NUM v Black Mountain Mineral Development Co (Pty) Ltd* 1997 (4) SA 51 (SCA); *Dube & Others v Nasionale Sweisware (Pty) Ltd* 1998 (3) SA 956 SCA;

<sup>316</sup> *BMD Knitting Mills (Pty) Ltd v SACTWU* (2001) 22 ILJ 2264 (LAC) ; *Chemical Workers Industrial Union & Others v Algorax (Pty) Ltd* (2003) 24 ILJ 1917 (LAC); *Enterprise Foods (Pty) Ltd v Allen & Others* (2004) 25 ILJ 1251 (LAC).

<sup>317</sup> *National Education Health and Allied Workers Union v UCT* 2003 (3) SA 1 CC at paragraph [33]; with application of the Constitution of the Republic of South Africa Act 106 of 1996

which have interpreted fairness to be determined by way of a value judgment. In this respect, a detailed discussion in relation to jurisprudence development under the Labour Relations Act 66 of 1995 is discussed extensively in Chapter 3 of this thesis. It can thus be stated that the LRA should be interpreted to the extent as had been ruled in the judgments of Perskor and Vetsak, supra and others, which manifested fairness to mean a balance between the interests of the employer and the worker, with fairness of a dismissal being tested in this context, objectively and based upon the value judgment of the court, arbitrator or the commissioner.

An analysis of Canadian Labour Law in relation to scrutinizing fairness or just cause of a dismissal, as inferred in Canada has been outlined above. For the purposes of sections 232 and 233 of the Constitution, which respectively, provides that International Law is law in the Republic and that when interpreting legislation, a court must interpret that legislation which is consistent with International Law, that a comparative of Canadian law was discussed. Based upon the above mentioned Canadian rulings, it is clear, that employers must act fairly when dismissing employees. It had furthermore been recognized by the Canadian courts, that the arbitration boards ( similar to the CCMA in South Africa) should resolve disputes, which impliedly infers that deference to the sanction of the employer is not required and that the arbitration board is required to determine whether there is just cause for the dismissal. The Canadian courts furthermore recognized the power imbalances between employers and employees, thereby condoning the test for fairness or cause for dismissal to be an objective one. It is apparent that Canadian law appears to be consistent with the 'own opinion' approach and based upon the principles emanating from Canadian law, that it does not characterize the reasonable employer test ( 'defer to the employer' approach).

The reasonable employer test ( ' defer to the employer' approach) is characterized by showing deference towards the sanction imposed by an employer, however interference by a commissioner or court is only justified in the case of unfairness and that is if no reasonable employer would dismiss the employee, or if the dismissal is so excessive that it shock's one's sense of fairness, then interference by a court or commissioner is warranted. This approach, on the face of it appears unfair as it determines the fairness of the sanction from the employer's perspective and furthermore makes it difficult for a commissioner or court to intervene, as the reasonable employer test ( ' defer to the employer' approach) maintains that there should be deference towards the sanction imposed by the employer. Based upon the latter mentioned description of the reasonable employer test or 'defer to the employer approach, it clear that the

test or approach is not consistent and not in line with International law, the ILO convention and the past jurisprudence developed under the old LRA. This stance, has furthermore been questioned in relation to the fairness of evaluating facts based upon the employers perception and then to determine whether it was reasonable. This was furthermore construed as limiting the ability of the court to adjudicate the fairness of the action and was viewed as abdicating the responsibility of the court to determine an unfair labour practice dispute.<sup>318</sup> It is explicitly clear that the reasonable employer test or the 'defer to the employer' approach is not consistent with section 23(1) of the Constitution, ILO obligations of South Africa and foreign law.

#### 4.5. Conclusion

In terms of section 23(1) of the Constitution, " Everyone has the right to fair labour practices". According to the Constitutional Court in *NEHAWU V UCT*<sup>319</sup>, as indicated above, that section 23(1) has not been given a definitive meaning but must be developed and given effect by the Legislature through the LRA and by the Courts. As outlined, when giving meaning to section 23(1), the courts must seek guidance from domestic jurisprudence development and the ILO Convention. As deduced from the above, the jurisprudence during the old LRA and new LRA, manifests that fairness of a dismissal for misconduct must be determined by a court on the basis of its own value or moral judgment, taking into consideration all relevant circumstances. As further substantiated above, the ILO Convention on Termination of Employment 158 of 1982 and Canadian Law as outlined above, clearly directs that the fairness of a dismissal must be determined objectively and that the court or ' tribunal' makes the determination in relation to the fairness of the dismissal. In accordance with section 3 of the LRA read with sections 232 and 233 of the Constitution, it is expressly clear that fairness is determined objectively and that the fairness of a dismissal is determined by a court or tribunal, thereby making the reasonable

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<sup>318</sup> Raised in *Food & Allied Workers Union & Another v SA Breweries Ltd (Denver)* ( 1992 ) 13 ILJ 209 (IC) at page 214 at paragraph C-D; The Industrial Court cited with approval the Labour Law Briefs: Vol. 4 no. 5 of 15 December 1990, which averred : " If the Industrial court has been given the task of determining unfair labour practice disputes, surely it should do so on the basis of its own evaluation of the facts? Can it really be regarded as fair for the court simply to rely on the employer's evaluation of the facts and to ask whether this was reasonable? In doing so the court is, in effect, severely limiting its ability to decide whether an action was fair or not and abdicating its responsibility in this regard."

<sup>319</sup> 2003 (3) SA 1 CC

employer test and the defer to the employer approach inconsistent with International Law and hence, inconsistent with South African law.



## Chapter 5

### Clash of the Titans ! The Supreme Court of Appeal and the Constitutional Court Judgments on the test for fairness of dismissals based upon misconduct and according to whose perception is fairness measured ?

#### 5.1 Introduction

With consideration of the aforementioned Chapters, it is explicitly apparent that there are two schools of thought in relation to the applicable approach to be adopted in determining the fairness of a dismissal. The one school of thought, basis the test upon the reasonable employer test or the 'defer to the employer' approach, as extensively explained above, whilst the other is regarded as the 'own opinion' approach, which asserts that fairness is determined upon moral or value judgments and that Commissioners are in terms of the law empowered to decide on the appropriate sanction.



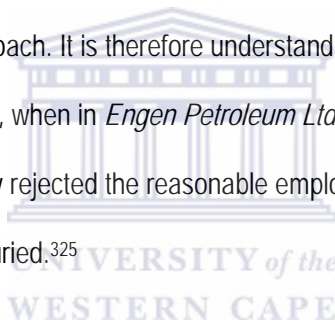
Although these differing approaches is evidence of the two schools of thought, the significant question which requires address is which approach, is consistent with the Constitution and the LRA. As had been indicated in previous Chapters, South African Labour Law has been marred by a jurisprudence trail of inconsistency, confusion and uncertainty, in relation to the test in determining the fairness of a dismissal and the application of the deferential approach which impacted upon the role of the commissioner when determining the fairness of a dismissal. Notwithstanding the test for fairness as pronounced by the AD<sup>320</sup> during the application of the old LRA, and its significance and relevance in terms of section 23(1) of the Constitution, when defining the right to fair labour practice, the LAC as denoted within Chapter 2 and the SCA, as

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<sup>320</sup> The Appellate Division decisions as iterated within Chapter 3 of the thesis, which applied the approach that the fairness of a dismissal is based upon a courts own value and moral judgment

shall be discussed herein below continued to assert the application of the reasonable employer test or the deferential approach.

It could be justifiable in stating that after the judgments of the LAC in *Toyota South Africa Motors [Pty] LTD v Radebe & Others*<sup>321</sup> amongst other LAC judgments<sup>322</sup>, together with the decision of the Constitutional Court in *National Education Health and Allied Workers Union v UCT*<sup>323</sup>, and with cognizance of the jurisprudence during the old LRA, that the law had been settled on the test for fairness of dismissals. However, this jurisprudence standpoint had been distorted when the SCA in *Rustenburg Platinum Mines Ltd vs Commission for Conciliation, Mediation and Arbitration*<sup>324</sup>, ruled towards the application of the reasonable employer test or the 'defer to the employer' approach. It is therefore understandable and justifiable, for Zondo, JP's inferred tone of uncertainty, when in *Engen Petroleum Ltd*, he asserted that he thought that our courts had so decisively rejected the reasonable employer test during the 1980's, that he was sure it had then been buried.<sup>325</sup>



The decision of the SCA in *Rustenburg Platinum Mines Ltd*, led to this question of the law relating to the test for fairness of dismissal and the role of the commissioner in determining fairness reaching the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*.<sup>326</sup> The discussions hereunder will therefore focus on the rulings as emanating from the SCA, with its underlying reasons and a critical analysis on its ruling on the applicable questions of law relating to the test for fairness of dismissals and the role of the commissioner

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<sup>321</sup> As cited, *supra*, at page 257

<sup>322</sup> *Enterprise Foods (Pty) Ltd v Allen & Others* (2004) 25 ILJ 1251 (LAC) and *BMD Knitting Mills (Pty) Ltd v SA Clothing & Textile Worker's Union* (2001) 22 ILJ 2264 (LAC) at paragraph [19]

<sup>323</sup> As cited, *supra*, at paragraph [33]

<sup>324</sup> 2007 (1) SA 576 (SCA)

<sup>325</sup> *Engen Petroleum Ltd*, *supra*, at paragraph 2[D]

<sup>326</sup> *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 CC

and the court in the determination of the sanction imposed by the employer. This Chapter will therefore look at the arguments and principles relating to the deferential approach and the test for fairness as ruled by the SCA and the Constitutional Court, respectively. Towards the culmination of this Chapter, focus shall be directed towards the application of the law as held by the Constitutional Court.

## 5.2 Deference to the Employer

The pinnacle of the SCA's decision is that " the statute requires only that the employer establish it is a fair sanction. The fact that the commissioner may think that a different sanction would be fair, or fairer, or even more than fair, does not justify setting aside the employer's sanction."<sup>327</sup>

In the case of *Rustenburg Platinum Mines Ltd vs CCMA*, Cameron JA, asserted in this regard that " .....a CCMA commissioner is not vested with a discretion to impose a sanction in the case of workplace incapacity or misconduct. That discretion belongs in the first instance to the employer. The commissioner enjoys no discretion in relation to sanction, but bears the duty of determining whether the employer's sanction is fair."

<sup>328</sup>The SCA therefore held and iterated that there should be deference to the decisions of employers in relation to an appropriate sanction, because the discretion of imposing an appropriate sanction primarily lies with the employer.<sup>329</sup>

In this respect, the Supreme Court of Appeal ( SCA) with approval followed the dictum enunciated by Ngcobo JA in the Labour Appeal Court ( LAC) case of *Nampak Corrugated*

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<sup>327</sup> *Rustenburg Platinum Mines Ltd vs CCMA, supra*, at paragraph [46]

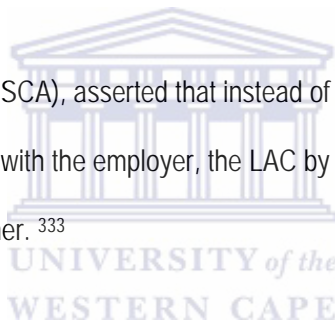
<sup>328</sup> *Rustenburg Platinum Mines Ltd vs CCMA, supra*, at paragraph [40]

<sup>329</sup> *Rustenburg Platinum Mines Ltd vs CCMA, supra*, at paragraph [40]

*Wadeville v Khoza*<sup>330</sup>, namely that : “ The determination of an appropriate sanction is a matter which is largely within the discretion of the employer. However, this discretion must be exercised fairly. A Court should, therefore, not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction.”

The SCA<sup>331</sup>, however, criticized the Labour Appeal Court, for its inconsistency in not applying the above mentioned legal requirement. This practice, the SCA stated reflected a form of uncertainty and hence, confusion about the applicable principle of law. The SCA criticized the LAC, for failing to enforce the provision of the LRA, namely, that ‘ the discretion to impose the sanction lies primarily with the employer’.<sup>332</sup>

The Supreme Court of Appeal ( SCA), asserted that instead of affirming that the discretion to impose a sanction primarily lies with the employer, the LAC by its ruling conferred this discretion upon the Commissioner.<sup>333</sup>



It is quite ironical that the SCA subjects the LAC to criticism for applying a principle which is manifested in the LRA and the Constitution, whereas SCA is itself committing inconsistency, when the then AD<sup>334</sup> conclusively decided and held that when determining whether a dismissal constituted an unfair labour practice the court must apply its own moral and value judgment.

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<sup>330</sup> As cited, *supra*, at paragraph [33]

<sup>331</sup> *Rustenburg Platinum Mines Ltd vs CCMA, supra*, at paragraph [43]

<sup>332</sup> *Rustenburg Platinum Mines Ltd vs CCMA, supra*, at paragraph [43]

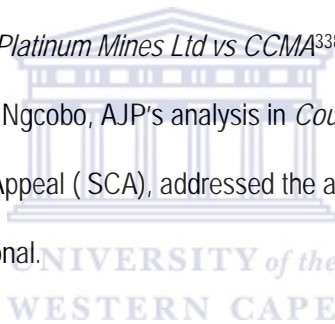
<sup>333</sup> *Rustenburg Platinum Mines Ltd vs CCMA, supra*, at paragraph [43]

<sup>334</sup> In *Atlantis Diesel Engines ( Pty) Ltd v National Union of Metalworkers of SA* (1994) 15 ILJ 1247 (A) at page 1257, paragraph [A-B], *National Union of Metalworkers of SA v Vetsak Co-Operative Ltd* ( ‘ Vetsak’) 1996 (4) SA 577(AD) at page 592, paragraph [B-D], *Wubbeling Engineering & Another National Union of Metalworkers of SA* (1997) 18 ILJ 935 (SCA) at page 937 [A-J] & page 938, at paragraph [C]; *Betha v BTR SARMCOL, A division of BTR Dunlop Ltd* 1998 (3) SA 349 SCA at page 370, paragraph [A-B] and *Perskor, supra*, at page 801, at paragraph [I - J]

Notwithstanding that the definition of fair labour practice as entailed in section 23(1) of the Constitution required application and reference to jurisprudence under the old LRA<sup>335</sup>, which entailed fair and equitable jurisprudence, the SCA still maintained its stance that there should be deference to the sanction imposed by the employer thereby unfairly tilting the scale of the balance of interests between the employer and the employee, to the employer.

This stance of the Supreme Court of Appeal<sup>336</sup>, was further eminent when the SCA cited with approval the decision in *County Fair Foods (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & Others*<sup>337</sup>.

Judge Cameron in *Rustenburg Platinum Mines Ltd vs CCMA*<sup>338</sup>, regarded it necessary to study some of the reasons underlying Ngcobo, AJP's analysis in *County Fair Foods (Pty) Ltd v CCMA*. The Supreme Court of Appeal (SCA), addressed the analysis under three headings: textual, conceptual and institutional.



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<sup>335</sup> *National Education Health and Allied Workers Union v UCT, supra*, at paragraph [33] and [34]

<sup>336</sup> *Rustenburg Platinum Mines Ltd vs CCMA, supra*, at paragraphs [42] & [43]

<sup>337</sup> " Given the finality of the awards and the limited power of the Labour Court to interfere with the awards, commissioners must approach their functions with caution. They must be bear in mind that their awards are final- there is no appeal against their awards. In particular, commissioners must exercise greater caution when they consider the fairness of the sanction imposed by the employer. They should not interfere with the sanction merely because they do not like it. There must be a measure of deference to the sanction imposed by the employer subject to the requirement that the sanction imposed by the employer must be fair. The rationale for this is that it is primarily the function of the employer to decide upon the proper sanction.

....

The mere fact that the commissioner may have imposed a somewhat different sanction or a somewhat more severe sanction than the employer would have, is no justification for interference by the commissioner.

.....

..In my view, interference with the sanction imposed by the employer is only justified where the sanction is unfair or where the employer acted unfairly in imposing the sanction. This would be the case, for example, where the sanction is so excessive as to shock one's sense of fairness. In such a case, the commissioner has a duty to interfere." (1999) 11BLLR 1117 (LAC) paragraphs [28], [29] & [30]

<sup>338</sup> As cited, *supra*, at paragraph [ 44]

Under the header of Textual: the SCA, held that in terms of Section 188(2) of the LRA, any person considering whether or not the reason for the dismissal is a fair reason, must take into account the Code of Good Practice (Schedule 8 : Dismissal of the LRA). According to Judge Cameron,<sup>339</sup> the Code place's the responsibility for workplace discipline and sanction, with the employer, and the SCA presented three reasons on which this principle is based.

Firstly, Judge Cameron asserts that according to Item 7(b)(iv) of the Code, the commissioner is required to consider as to whether dismissal was 'an' appropriate sanction for the contravention, and not to consider whether it was 'the' appropriate sanction. The latter reflects the legislature's awareness that more than one sanction could be considered to be fair for the contravention of the rule.

Secondly, in relation to the use of the word 'appropriate', it indicates that the sanction must be proper or suitable. According to Judge Cameron, the use of the word appropriate, asserts that there can be a range of responses.

In this respect, the Constitutional Court asserted that such propositions as stated by the SCA is indecisive.<sup>340</sup> It would be justifiable to state that the distinctions made by the SCA in the choice of words between " an" and " the" and the interpretation of the word "appropriate", does not provide any substantial ground for relying on the 'reasonable employer' test.

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<sup>339</sup> Rustenburg Platinum Mines Ltd vs CCMA, supra, ,at paragraph [45]

<sup>340</sup> Sidumo and Another v Rustenburg Platinum Mines Ltd and Others, supra, at paragraph [ 60]

Thirdly, it was averred that according to the Code, it is not appropriate to dismiss for a first offence, unless the misconduct is so serious and of such gravity, that it makes continued employment relationship intolerable’.

Referring to the definition of intolerable as defined within the Concise Oxford Dictionary, the court described the word as being defined as ‘unable to be endured’. According to the SCA, this necessarily entails a subjective perception, and as per the Court’s interpretation and view, this capacity to endure a continued employment relationship belongs to the employer.

According to the SCA, it therefore follows “ that the primary assessment of intolerability unavoidably belongs to the employer.”<sup>341</sup>

The Constitutional Court in *Sidumo & Another v Rustenburg Platinum Mines Ltd*<sup>342</sup> held, that the Supreme Court of Appeal, placed ‘ undue reliance’ on item 7(b)(iv) of the Code, which requires the commissioner, to determine whether dismissal was an appropriate sanction for the breach of the rule or standard.

According to the Constitutional Court, there is no decisiveness in the use of the indefinite “ an” as opposed to “ the” in the consideration expected of a commissioner in determining whether dismissal was “an” appropriate sanction for the breach of the rule. It had furthermore been contended that the Code was derived from NEDLAC and is a guide. The Constitutional Court further iterated the significance of the LRA and the Constitution versus the Code, when it stated

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<sup>341</sup> *Rustenburg Platinum Mines Ltd vs CCMA*, supra, at paragraph [45]

<sup>342</sup> *Sidumo & Another v Rustenburg Platinum Mines Ltd*, supra, at paragraph [60]

that the Code can hardly be expected to take precedence over the Constitution and the clear provisions of the LRA.<sup>343</sup>

Within the Conceptual analysis of Ngcobo, AJP's judgement in *County Fair Foods (Pty) Ltd v CCMA*, Judge Cameron asserted that fairness is not an absolute concept, but may have a range of possible responses, which may all be described as fair. Judge Cameron, then continues to list a few expressions of the every day usage of fair, such as when we describe a decision as 'very fair' (when we mean that it was generous to the offender); or 'more than fair' (when we mean that it was lenient); or we may say that it was 'tough, but fair', or even 'severe, but fair' (meaning that while one's own decisional response might have been different, it is not possible to brand the actual response unfair). As per Judge Cameron, it is in these latter mentioned category that Commissioners must exercise caution, when determining decisions of dismissal. According to Judge Cameron, Commissioners must understand that fairness is a relative concept and "that employers should be permitted leeway in determining a fair sanction."<sup>344</sup>

The SCA further elaborated this approach by ruling that the employer need not persuade a commissioner that dismissal was the only fair sanction, all what is required of them is to establish that dismissal was a fair sanction.<sup>345</sup> As shall be further elaborated hereupon, under the sub-heading of test for fairness, the Constitutional Court expressed its regret that the LAC<sup>346</sup> and impliedly the SCA<sup>347</sup> adopted this approach. By applying this approach, it was

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<sup>343</sup> *Sidumo & Another v Rustenburg Platinum Mines Ltd, supra*, at paragraph [60]

<sup>344</sup> *Rustenburg Platinum Mines Ltd vs CCMA, supra*, paragraph [46]

<sup>345</sup> *Rustenburg Platinum Mines Ltd vs CCMA, supra*, at paragraph [46]

<sup>346</sup> With reference to *Nampak Corrugated Wadeville v Khoza, supra*, at paragraph [33] and *County Fair Foods (Pty) Ltd v CCMA & Others, supra*, paragraph [28]

stated that the LAC, as well as the SCA resorted to the reasonable employer test, to which further discussions herein shall follow in the paragraphs to follow.<sup>348</sup>

The SCA, in support of its approach quotes Myburgh and van Niekerk, who state that, " The first step in the reasoning process of the commissioner should be to recognize that, within limits, the employer is entitled to set its own standards of conduct in the workplace having regard to the exigencies of the business. That much is trite. The employer is entitled to set the standard and to determine the sanction with which non-compliance with the standard will be visited." <sup>349</sup>

It is quite ironic and justifiable to state that the aforementioned principle enunciated by the SCA, has interpreted the related provision of Item 7 of Schedule 8 : Code of Good Practice : Dismissal, so literally that there was an oversight by the SCA in relation to the entire principle of fairness, as is deeming in the provision(s) of the LRA and the Constitution.

In addition the SCA appears to have failed to consider the judgment of the highest court, the Constitutional Court in *National Education Health and Allied Workers Union v UCT*<sup>350</sup>, where the Constitutional Court ruled and quite expressly that the definition of fair labour practice as provided in terms of section 23(1) of the Constitution<sup>351</sup>, involved a balance between the interests of the employee and employer. It would therefore be justifiable to state that by supporting the 'defer to the employer' approach<sup>352</sup>, the SCA had respectfully failed to apply the law as it had been decided. This is so because the 'defer to the employer' approach, when

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<sup>347</sup> With reference to paragraph's [40], [41] & [42] in *Rustenburg Platinum Mines Ltd vs CCMA* 2007 (1) SA 576 SCA

<sup>348</sup> *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 CC, at paragraphs [68]-[69]

<sup>349</sup> *Rustenburg Platinum Mines Ltd vs CCMA*, *supra*, at paragraph [46]

<sup>350</sup> 2003 (3) SA 1 at paragraph [40]

<sup>351</sup> The Constitution of the Republic of South Africa, Act 108 of 1996

<sup>352</sup> As implied in paragraphs [40],[41] & [42] of *Rustenburg Platinum Mines Ltd v CCMA*, *supra*; judgment of the SCA

determining the fairness of a dismissal, approaches the process by insulating the sanction imposed by the employer, thereby further refraining or limiting the courts and commissioners from exercising their duty in terms of the LRA.<sup>353</sup>

In contrast, the Constitutional Court in *NEHAWU v UCT*<sup>354</sup>, had expressly outlined that there must be a balance between the interests of the employer and the employee, when determining fairness, which refutes the theory and belief propagated by supporters of the deferential approach. It is furthermore essential to mention that the decision of the Constitutional Court was ruled prior to the SCA <sup>355</sup>decision in *Rustenburg Platinum Mines Ltd*, which makes it more intriguing that the SCA did not adopt an approach which was consistent with the ruling of the Constitutional Court.



The Constitutional Court said the following in relation to the question of fairness, as emanating from Section 23(1) of the Constitution, “(T) he focus of s 23(1) is, broadly speaking, the relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both. In giving content to that right, it is important to bear in mind the tension between the interests of the workers and the interests of the employers which is inherent in labour relations. Care must therefore be taken to accommodate, where possible, these interests so as to arrive at the balance required by the concept of fair labour practices. It is in this context that the LRA must be construed.” It is clear that the essence of this ruling, is in clear contrast to the perception as denoted from the ‘defer to the employer’ approach, which places more focus on the interest of the employer than maintaining an equilibrium between the employer and the employee.

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<sup>353</sup> in terms of sections 138(1) and section 138(9) of the LRA.

<sup>354</sup> 2003 (3) SA 1 CC, at paragraph [40]

<sup>355</sup> *Rustenburg Platinum Mines Ltd v CCMA* 2007 (1) SA 576 SCA

Within the discourse of analyzing Ngcobo, AJP's judgment under the header of Institutional analysis, the Supreme Court of Appeal (SCA) concluded that Ngcobo AJP's<sup>356</sup> approach of constricting the grounds of review in attempting to solve the flood of cases to the Labour Appeal Court, should be rather focused in directing commissioners to the limits the statute imposes on them in intervening. According to the Supreme Court of Appeal :“ If commissioners could substitute their judgment and discretion for the judgment and discretion fairly exercised by the employers, then the function of management would have been abdicated – employees would take every case to CCMA. This result would not be fair to employers.”<sup>357</sup>

By holding the above mentioned stance it can be implied that Cameron JA<sup>358</sup> supports the deferential approach, because same will shield the labour courts from the flood of litigation, which according to him, is as a result of the ineffectiveness of the alternate tests. In insinuating that by applying the deference approach, same will prevent the stream of cases to the Labour Court. This type of approach, creates the impression that the actual facts of the case may sometimes be neglected, for the sake of minimizing litigation pursued to the Labour Court.

It is apparent from these judgments, that the further underlying principle of supporting the ' reasonable employer ' test or the ' defer to the employer' approach is in order to limit the stream of cases to follow suit to the CCMA, the Labour Courts and the appeal processes thereafter. This line of argument, literally frustrates the actual *purpose and primary objects of*

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<sup>356</sup> *County Fair Foods (Pty) Ltd v CCMA & Others, supra*, at paragraph [30]

<sup>357</sup> *Rustenburg Platinum Mines Ltd vs CCMA, supra*, paragraph [47]

<sup>358</sup> *Rustenburg Platinum Mines Ltd vs CCMA 2007 (1) SA 576 SCA*

*the Labour Relations Act*<sup>359</sup>, in addition to the fundamental rights as emanating from the Constitution<sup>360</sup>.

In direct response that by imposing the “defer to the employer” approach, the stream of cases to the Courts will be limited, Zondo, JP, in *Engen Petroleum (Pty) Ltd, supra*, quite correctly held that this view fails to appreciate the rationale for the creation of the CCMA. The Court held that it is right and proper that disputes that have not been resolved at the workplace is referred to the CCMA for conciliation, and arbitration, if necessary, irrespective of the merits or demerits of the case. The Court furthermore held that it is further right and proper, that unions be encouraged and not discouraged to refer disputes about the fairness of a dismissal to the CCMA, so that in this way, it provides them with an opportunity to have their grievance settled by a neutral third party, such as the CCMA, who would apply the audi alteram partem rule of hearing all sides, and decide on the fairness or unfairness of the dismissal, based upon his /her own sense of what is fair or unfair. The role of adjudication by a third party such as the CCMA, would further deter industrial action in relation to disputes involving dismissals.<sup>361</sup>

The Constitutional Court in relation to the Institutional aspect noted that according to the Supreme Court of Appeal ( SCA), Commissioner’s should be firmly directed to the ambit and limits of the Statute, in order to solve the problem of the flood of challenges to awards. According to the Constitutional Court, the Supreme Court of Appeal reasoned, “ that if

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<sup>359</sup> section 1 and 3 of the Labour Relations Act 66 of 1995

<sup>360</sup> s23(1) and s39(1) & (2) of the Constitution, Act 108 of 1996

<sup>361</sup> *Engen Petroleum Ltd v CCMA & Others, supra*, at paragraph [117]

commissioners could freely substitute their judgment and discretion for the judgment and discretion of the employer, employee would take every case to the CCMA."<sup>362</sup>

The Constitutional Court held that the view transpiring that no deference to the employer's sanction will lead to a flood of cases to the CCMA, is merely an assumption. In relation to this debacle, of attempting to restrict and/or frustrate worker's rights to fair labour practice's & arbitration by an impartial third party, for the sake of streamlining the 'flood of cases' to the CCMA and the Labour Courts. The Constitutional Court, held that employee's are entitled to enforce their rights, and if that necessarily means more work is created for the CCMA, then the State is obliged to ensure that the constitutional and labour law rights are protected and able to be enforced.<sup>363</sup>

The Constitutional Court conceded that the employer imposes and decides on the sanction. However in the context of the primary objects of the LRA, the ILO Convention and the common law definition of fairness, it is surprising that the SCA adopted the deference approach and the reasonable employer test. In addition, contrary to the long standing history of the belief amongst supporters of the defer to the employer approach, that this theory is prescribed in the LRA, the Constitutional Court put to rest this uncertainty in South African Labour Law that there must deference to the sanction imposed by the employer by ruling that:" Any suggestion by the Supreme Court of Appeal that the deferential approach is rooted in the prescripts of the LRA cannot be sustained."<sup>364</sup>

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<sup>362</sup> *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others, supra*, at paragraph [35]

<sup>363</sup> *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others, supra*, at paragraph [77]

<sup>364</sup> *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others, supra*, at paragraph [61]

According to the Constitutional Court : " There is nothing in the constitutional and statutory scheme that suggests that, in determining the fairness of a dismissal, a commissioner must approach the matter from the perspective of the employer. All indications are to the contrary. A plain reading of all the relevant provisions compels the conclusion that the commissioner is to determine the dismissal dispute as an impartial adjudicator." <sup>365</sup>

### 5.3 Test for Fairness

Majority of the Constitutional Court in *Sidumo and Another, supra*, expressly averred that the approach in which fairness must be assessed is not uncommon to South African labour law, in that when the LRA came into force, there was already an established jurisprudence in this respect. In substantiating this statement, the Constitutional Court cited the AD judgments of *Perskor*<sup>366</sup> and *Vetsak*<sup>367</sup>, which enunciated 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. <sup>368</sup>

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<sup>365</sup> *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others, supra*, at paragraph [61]

<sup>366</sup> " Clearly, the Court's view as to what is fair in the circumstances is the essential determinant in deciding the ultimate question. See *Marievale Consolidated Mines Ltd v President of the Industrial Court and Others* 1986 (2) SA 485 (T) at 408 J-490I; *Brassey and Others The New Labour Law* at 12-13, 58-9; *Van Jaarsveld and Coetzee Suid Afrikaanse Arbeidsreg* vol 1 at 328.....In my view a decision of the Court .....is not decision on a question of law in the strict sense of the term. It is the passing of a moral judgment of a combination of findings of fact and opinions. " as cited by the AD in *Media Workers Association of SA v Press Corporation of SA Ltd* 1992 (4) SA 791 AD at page 798, paragraph [G] – [ I ]

<sup>367</sup> " Fairness comprehends that regard must be had not only to the position and interests of the worker, but also those of the employer, in order to make a balanced and equitable assessment. In judging fairness, a court applies a moral or value judgment to established facts and circumstances ( *NUM v Free State Cons* at 446i) And in doing so it must have due and proper regard to the objectives sought to be achieved by the Act. In my view, it would be unwise and undesirable to lay down, or to attempt to lay down, any universally applicable test for deciding what is fair." As cited by the AD in *National Union of Metalworkers of SA v Vetsak Co-operative Ltd* 1996 (4) SA 577, at page 589, paragraph [C] – [D].

<sup>368</sup> *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others, supra*, at paragraphs [63]-[64]

The Constitutional Court in further elaborating on the concept of fairness, notably made reference to definition of section 23(1) of the Constitution as expounded by the Constitutional Court in *NEHAWU v UCT*<sup>369</sup>, which held that section 23(1) inferred a balance between the interests of both the employer and the employee, when determining the fairness of a dismissal. It is in this context that the LRA must be analyzed and construed.<sup>370</sup>

In contrast the SCA<sup>371</sup> inferred that the test for fairness is the reasonable employer test when it with concurrence referred to Todd and Damant<sup>372</sup> who stated that : " The court's duty is to determine whether the decision that the employer took falls within the range of decisions that may properly be described as being fair." <sup>373</sup> It further implied support for the application of the reasonable employer test, when it cited with approval Ngcobo, JA in *Nampak Corrugated Wadeville v Khoza*.<sup>374</sup> In having said the latter mentioned and by implication implying that the test for fairness is the reasonable employer test, the judgment of the SCA when read further quotes the ruling of Ngcobo, AJP in *County Fair Foods (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration and Others*<sup>375</sup>, whereby a further test was implied, in that if the sanction imposed by the employer is so excessive so as to shock one's sense of fairness, then the dismissal is unfair.

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369 2003 (3) SA 1 CC, at paragraph [40]

370 As per majority of the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*, supra, at paragraph [65]

371 *Rustenburg Platinum Mines Ltd v CCMA* 2007 (1) SA 576 SCA, at paragraph [46]

372 Chris Todd and Graham Damant ' Unfair Dismissal – operational requirements' (2004) 25 ILJ 896 at 907

373 This was reaffirmed by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 CC at page 49, paragraph's [68] & [69] reaffirmed

374 *Rustenburg Platinum Mines Ltd v CCMA* 2007 (1) SA 576 SCA, at paragraph [40: ] 'The determination of an appropriate sanction is a matter which is largely within the discretion of the employer. However, this discretion must be exercised fairly. A court should, therefore, not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether the court would have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable' *Nampak Corrugated Wadeville v Khoza* ( 1999) 20 ILJ 578 (LAC) at paragraph [33]

375 *Rustenburg Platinum Mines Ltd v CCMA*, supra, at paragraph [ 42] and paragraphs [28], [29] & [30] in *County Fair Foods (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration and Others* (1999) 11 BLLR 1117 (LAC)

According to Paul Benjamin (2007: 26-27), several criticisms can be leveled against the judgment of the SCA in *Rustenburg Platinum Mines Ltd, supra*, in that amongst others, the SCA failed to consider the interpretation of unfair labour practice and the LRA's unfair dismissal provision as pronounced by the Constitutional Court in *NEHAWU v UCT*, it furthermore failed to take into account ILO Convention 158, and its inappropriate use of the concept of deference, especially in light of the statutory requirement that the dismissal must be for a fair reason.<sup>376</sup>

Some commentators have indicated that the dictum of the SCA, expresses two variations of the reasonable employer test, one which permits interference if the dismissal is so excessive so as to shock one's sense of fairness or if no reasonable employer would have dismissed the employee in all of the circumstances.<sup>377</sup>

To the contrary, academics such as Paul Benjamin (2007:26)<sup>378</sup>, state that it has never been suggested that it is a requirement that an arbitrator must only intervene if the sanction imposed by the employer is so severe as 'to shock one's sense of fairness'. Paul Benjamin's reasoning behind the latter mentioned viewpoint is because this term that had been used by Ngcobo, AJP in *County Fair Foods (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration and Others, supra*, had never been endorsed by the majority of the LAC and furthermore, that this exposition was merely an illustration of a situation where an arbitrator could intervene and set aside the sanction imposed by the employer, and was not ruled as a statement of the test.

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<sup>376</sup> 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

<sup>377</sup> *Engen Petroleum Ltd v CCMA & Others, supra*, at paragraph [ 166]

<sup>378</sup> 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 page 26

With respect, it needs to be stated that Ngcobo, AJP in *County Fair Foods (Pty) Ltd, supra*, makes it clear that interference with the decision of the employer is only justified where it is unfair and indicates, that this would be the case where for example 'the sanction is so excessive as to shock one's sense of fairness.'<sup>379</sup> This clearly demonstrates an approach which would result in unfairness and therefore interference, if it shocks one's sense of fairness.

In contrast, through a reading of the judgment of the SCA, it can also be asserted that by quoting distinctive citations from *Nampak*<sup>380</sup> and *County Fair Foods (Pty) Ltd*<sup>381</sup> respectively, the SCA created confusion, by not being decisive and clearly expressive in the criteria or test to be applied in determining the fairness of a dismissal.

It is interesting to note that Ngcobo, J in a minority judgment as a Constitutional Court judge in *Sidumo and Another v Rustenburg Platinum Mines Ltd & Others*<sup>382</sup> still by implication condoned the application of the reasonable employer test.<sup>383</sup> This viewpoint had been propagated, despite the established principle of equity in South African jurisprudence during the old LRA, as well as the primary objects of the LRA and the applicable provisions of the Constitution as discussed above and in Chapter 4 of this thesis. This differing judgment of Ngcobo, J to the majority of the Constitutional Court, was further supported by three judges of the Constitutional Court<sup>384</sup> This standpoint in relation to the test for fairness of a dismissal and the respective roles of the commissioner and the employer in relation to the question of a fair sanction,

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<sup>379</sup> As cited supra, at paragraph [30]

<sup>380</sup> (1999) 2 BLLR 108 (LAC) in paragraph [33]

<sup>381</sup> (1999) 11 BLLR 1117 (LAC) in paragraph [28]-[30]

<sup>382</sup> 2008 (2) SA 24 CC

<sup>383</sup> *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 CC at paragraphs [169 B-C], [170 D], [177E-F]

<sup>384</sup> Mokgoro J, Nkabinde J, and Skweyiya, J concurred with Ngcobo, J in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 CC at paragraph [289]

illustrates and is indicative of the distinctive schools of thought amongst the South African judiciary. To the extent, that this difference was evident at the two highest courts in South Africa.<sup>385</sup>

In relation to the application of the reasonable employer test as supported by proponents as mentioned above, the Constitutional Court<sup>386</sup> expressed its regret in the decisions of *Nampak and County Fair Foods* judgments, which resorted to the reasonable employer test, as used in England in its assessment of determining the fairness of a dismissal. This test has its origin in section 57(3) of the English Statute Employment Protection ( Consolidation ) Act of 1978. According to the Constitutional Court, the English Courts resorted to the application of the 'band of reasonableness' test when applying this section, which was as afore mentioned supported and applied by the SCA in *Rustenburg Platinum Mines Ltd*<sup>387</sup>.

The Constitutional Court was quite explicit and critical in its view that this approach of the SCA tilts, the balance of interests between the employer and the employee, against the employee.<sup>388</sup>

In asserting the aforementioned, the Constitutional Court cited the view as expressed by Zondo, JP in *Engen Petroleum Ltd*, wherein the LAC gave a descriptive view of the Reasonable Employer Test, where it stated that:

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<sup>385</sup> As per SCA judgment of Cameron, JA in *Rustenburg Platinum Mines Ltd v CCMA 2007 (1) SA 576 SCA* and the majority judgment of the Constitutional Court as per Navsa, JA in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others 2008 (2) SA 24 CC*

<sup>386</sup> majority of the Constitutional court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others 2008 (2) SA 24 CC* at paragraph [68]

<sup>387</sup> *Rustenburg Platinum Mines Ltd v CCMA 2007 (1) SA 576 SCA*

<sup>388</sup> *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others 2008 (2) SA 24 CC* at paragraph [74]

" Such a test is based on the perceptions and values of the employer side to these disputes. It emphasizes the interests of employers more than those of workers. Such a test is, probably, as objectionable to workers as 'a reasonable employee test' would be to employers." <sup>389</sup>

In further elaboration that fairness requires a balance between the employer and the employee the Constitutional Court cited with approval the decision of the LAC in *BMD Knitting Mills (Pty) v SA Clothing & Textile Workers Union*<sup>390</sup> and the famous dictum of Otto Kahn-Freund<sup>391</sup> which generally or impliedly motivated for a test which respected that there must be a balance in the interests between the employer and the employee. On the basis of the latter mentioned, the Constitutional Court ruled that " Neither the Constitution nor the LRA affords any preferential status to the employer's view on the fairness of a dismissal. It is against constitutional norms and against the right to fair labour practices to give pre-eminence to the views of either party to a dispute." <sup>392</sup> Metaphorically the Constitutional Court recited the last rites to the reasonable employer test and the 'defer to the employer' approach, by holding that it is ultimately the Commissioner's sense of fairness which must prevail, and not that of the employer.<sup>393</sup>

The approach to be followed by Commissioner's in determining dismissal disputes impartially was outlined by the Constitutional Court as follows : ".....a commissioner must of course consider the

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<sup>389</sup> *Engen Petroleum Ltd v CCMA & Others* [2007] 8 BLLR 707 (LAC) at page 755, paragraph 111

<sup>390</sup> (2001) 22 ILJ 2264 (LAC) at page 2269, paragraph [19]

<sup>391</sup> as cited by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 CC at page 50, paragraph [72] from 'Davis & Freedland Kahn-Freund's Labour and the Law' 3 ed (Stevens & Son, London 1983) at page 18, where Otto Kahn-Freund state that "[T]he relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one is not a bearer of power.....The main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship"

<sup>392</sup> *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 CC at page 51, paragraph [75]

<sup>393</sup> *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 CC at paragraph [74]

reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list." <sup>394</sup>

#### 5.4 Application of the Constitutional Court Judgment of Sidumo and Another v Rustenburg Platinum Mines Ltd and Others in relation to Fairness

After the judgment of Constitutional Court in the *Sidumo* case, it was finally settled law that the determination of the fairness a dismissal was a moral or value judgment made by a court or commissioner, based upon the facts and a totality of the circumstances of the case. It was furthermore apparently clear that the deferential approach was not part of South African law, as in contrast the right to fair labour practice as eminent in section 23(1) of the Constitution required a balance of the interests of both the employee and the employer. In addition, the Constitution required that reference be made to International law, when determining the test for fairness of a dismissal. In this instance, ILO Conventions as outlined in Chapter 4 did not invoke the deferential approach but to the contrary it expressly required a tribunal such as the CCMA to determine the fairness of a dismissal.

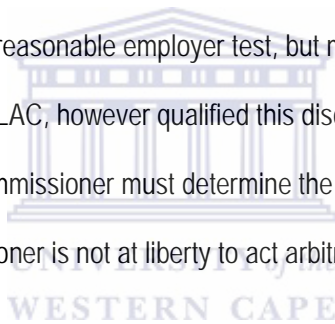
After decades of uncertainty and inconsistency in the approach related to the test for fairness of a dismissal, and the role of the commissioner in determining the fairness of a dismissal based upon misconduct, the law had been clearly outlined by the Constitutional Court in the *Sidumo* case. Based upon the decisive ruling of the Constitutional Court, it shall be apparent from the

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<sup>394</sup> As cited, supra, at paragraph [78]

below mentioned cases that the principles as enunciated by the Constitutional Court in *Sidumo* is being consistently applied in relation to the test to determine substantive fairness together with its requirements. Herein below is a discussion of various judgments, including the Supreme Court of Appeal, which is indicative of the LAC and the SCA being consistent on a question of law, where in the past there had been differing viewpoints between these two courts.

In the case of *Fidelity Cash Management Service v CCMA & Others*<sup>395</sup> the LAC considered the judgment of the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*<sup>396</sup> and iterated that when a commissioner has to determine the fairness of a dismissal, it must not apply the reasonable employer test, but must decide the issue on his or her own sense of fairness. The LAC, however qualified this discretion of the commissioner by stating that even though the commissioner must determine the fairness based upon its own sense of fairness, the commissioner is not at liberty to act arbitrarily.<sup>397</sup>



In *Ellerine Holdings Ltd v Commission for Conciliation Mediation & Arbitration & Others*<sup>398</sup>, the LAC cited the decision of the CCMA which held that the dismissal of the employee was an appropriate sanction in light of the offence committed, which makes it substantively fair. It is implicit that the CCMA made reference to the nature of the offence, the guilt of the employee and the personal circumstances of the employee, however the nature of the offence

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<sup>395</sup> (2008 ) 29 ILJ 964 (LAC); [2008] 3 BLLR 197 (LAC) at paragraph 92

<sup>396</sup> 2008 (2) SA 24 CC

<sup>397</sup> Nicola Smit : " 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 page 1644, *Industrial Law Journal*, Vol 29, July 2008.

<sup>398</sup> (2008) 29 ILJ 2899 ( LAC)

outweighed the employee's personal circumstances.<sup>399</sup> On review, the Labour Court, confirmed the substantive fairness of the commissioner. Notwithstanding that the Labour Court's confirmation of the substantive fairness of the dismissal as an appropriate sanction had not been the grounds of the appeal, it is implicitly evident from the judgment of the LAC, that the CCMA looked at a totality of facts and circumstances before making its own value judgment. It furthermore acknowledged that when determining fairness, one must ascertain what fairness demands, with a consideration of the interest of the employer and the employee.<sup>400</sup> This clearly implies that the commissioner must in its own discretion determine what fairness requires, in the context of the facts and circumstances of the case.

In *Edcon Ltd v Pillemer No & Others*<sup>401</sup>, the CCMA held that the dismissal of the employee was substantively unfair, in that the misconduct was not so gross that it could be said that the trusted relationship between herself and the employer was broken. The commissioner noted that no evidence was provided that proved that the trust relationship between the employer and the employee had broken. The commissioner furthermore took into account the employees unblemished record of 17 years of service and the fact that she was two years away from retirement. The Labour Court on review asserted that it could not disagree with the decision of the commissioner on the basis that she had taken into account all the circumstances of the case.<sup>402</sup> The LAC reaffirmed the Constitutional Court's decision in *Sidumo & Another* as mentioned above, that fairness entailed that regard must be had to the interests of both,

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<sup>399</sup> (2008) 29 ILJ 2899 ( LAC) at paragraph [5]

<sup>400</sup> At page 2902, paragraphs [7] – [8] and as asserted by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 CC at paragraph [74]

<sup>401</sup> (2008) 29 ILJ 614 ( LAC)

<sup>402</sup> *Edcon Ltd v Pillemer No & Others* (2008) 29 ILJ 614 ( LAC) at page 618, paragraph [9]; this had also been asserted by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 CC at page 52, paragraph [78]

employees and employers.<sup>403</sup> The LAC furthermore by implication rejected the reasonable employer test because it did not maintain a balance between the interests of the worker and the employer. This stance is furthermore in line with the ruling or dictum of the Constitutional Court in *Sidumo & Another v Rustenburg Platinum Mines Ltd and Others*.<sup>404</sup> It is essential to further mention that *Edcon Ltd v Pillemer*, reached the SCA.<sup>405</sup> In the SCA judgment, Mlambo JA held that the commissioner was 'entitled and in fact expected' to determine whether dismissal was an appropriate sanction in light of all the evidence.<sup>406</sup> The commissioner held that there was no evidence which supported the employer's claim that the trusted relationship had irretrievably broken down and therefore dismissal was not an appropriate sanction. In addition, the commissioner took into account the employees unblemished and long track record, when making her award.<sup>407</sup> The SCA agreed with the commissioner's finding that dismissal was unfair.<sup>408</sup> This case, further implies the acceptance by our courts of the burial of the deferential approach after the Constitutional Court judgment in *Sidumo and Another*. Furthermore the SCA's recognition that the commissioner was entitled and expected to determine whether dismissal was an appropriate sanction, furthermore implies our courts acceptance that a commissioner may determine the fairness of a dismissal, which was not so long ago, a debatable issue.

In *Shoprite Checkers (Pty) Ltd v CCMA & Others*<sup>409</sup>, the SCA endorsed the approach ruled by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and*

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<sup>403</sup> (2008) 29 ILJ 614 ( LAC) at page 621, paragraph [19]

<sup>404</sup> *Edcon Ltd v Pillemer No & Others* (2008) 29 ILJ 614 ( LAC) at page 621, paragraph [19]

<sup>405</sup> Neutral citation *Edcon v Pillemer* (191/2008) [2009] ZASCA 135 (5 October 2009)

<sup>406</sup> As cited, supra, at paragraph [22]

<sup>407</sup> As cited, supra, at paragraph [22]

<sup>408</sup> As cited, supra, at paragraph [23]

<sup>409</sup> 2009 (3) SA 493 ( SCA)

*Others*<sup>410</sup>, by concurring with the Constitutional Court that the starting point in any enquiry on the fairness of a dismissal is the Constitution<sup>411</sup>. 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.<sup>412</sup>

## 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 prescribed 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.

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<sup>410</sup> at page 46, paragraph [55]

<sup>411</sup> Constitution of the Republic of South Africa, Act 108 of 1996

<sup>412</sup> 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*<sup>413</sup>, 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).

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

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<sup>413</sup> 2008 (2) SA 24 at paragraph [68]

Appellate Division<sup>414</sup>, 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*<sup>415</sup> and *County Fair Foods (Pty) Ltd v CCMA*<sup>416</sup> 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*<sup>417</sup> 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*<sup>418</sup>, 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.

Despite the Constitutional Court rulings in *NEHAWU v UCT, supra*, the SCA in *Rustenburg Platinum Mines Ltd vs Commission for Conciliation, Mediation and Arbitration*<sup>419</sup>, 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*<sup>420</sup> to put to rest this history of disparity.

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<sup>414</sup> Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ( hereinafter referred to as 'Pekor') 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

<sup>415</sup> (1999) 20 ILJ 578 ( LAC) at paragraphs [33] –[35]

<sup>416</sup> (1999) 11 BLLR 1117 (LAC) at paragraph [28]-[31]

<sup>417</sup> (2000) 21 ILJ 340 (LAC) at paragraph [50]

<sup>418</sup> National Education Health and Allied Workers Union v UCT 2003 (3) SA 1 CC

<sup>419</sup> 2007 (1) SA 576 (SCA)

<sup>420</sup> 2008 (2) SA 24

At the outset, the Constitutional Court held that the deferential approach as suggested by the SCA is not prescribed 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.<sup>421</sup> In relation to the principle of fairness, the Constitutional Court held that fairness entailed fairness to both the employee and the employer.<sup>422</sup> 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.<sup>423</sup> 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).<sup>424</sup>

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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<sup>421</sup> At paragraph [63]

<sup>422</sup> At paragraph [64]-[65]

<sup>423</sup> At paragraph [68]

<sup>424</sup> At paragraph [74]

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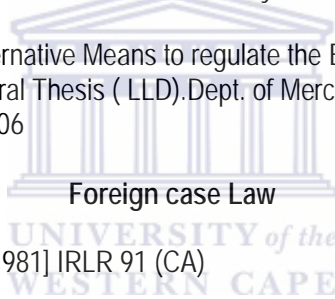
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