Sidumo and labour law are better off

Kimani Ndungu's previous article gives some useful background and reflections on the Sidumo case. **Paul Benjamin**, discussing the same case, highlights other significant features and provides some interesting detail.

The recent judgement of the Constitutional Court (CC) in the matter of *Sidumo and Cosatu v Rustenberg Platinum* has produced a number of winners.

Firstly, South Africa labour law is better off. There is now greater clarity on two key issues in unfair dismissal cases: the approach that the Commission for Conciliation, Mediation and Arbitration (CCMA) arbitrators should take to decisions by employers to dismiss workers and the approach that the Labour Court should take when reviewing CCMA arbitrations awards.

On the first issue, the arbitrator must decide if the employer's decision to dismiss was fair. This decision must be made on the basis of the evidence presented at the arbitration hearing. There will be further debates on precisely what this means. However, we do know that the arbitrator is not obliged to 'defer' to the decision of the employer. The arbitrator must be impartial. And we also now know that an arbitrator's award can be set aside on review if the Labour Court is convinced that the arbitrator's decision was not reasonable.

The Constitutional Court carefully analysed the arguments presented by all three sides (employer, labour and CCMA) and the underlying policy considerations in the Labour Relations Act (LRA). In contrast, the Supreme Court of Appeal (SCA) tried to resolve the highly contentious issue of whether an arbitrator's decision is an administrative action. On this issue, even the Constitutional Court was divided with five judges saying it is administrative and four saying it is judicial. This lack of agreement however does not prevent clear principles for future practice emerging from the judgment.

Our labour law is also better off as a result of the considered tone of the Constitutional Court's judgment. The Constitutional Court decision takes the CCMA seriously as the first line in a chain of adjudication and appreciates the scale of the issues it is dealing with: the CCMA deals with some 80 000 dismissal cases each year. This contrasts markedly with the declamatory nature of many recent judgments of the SCA in labour matters. The SCA has taken to treating the Labour Appeal Court (LAC) rather like a naughty school-child for not sharing its understanding of labour law. This tone was taken up in press reports on the SCA judgment in which this court was portrayed as a valiant knight rescuing labour law and the economy from an overly pro-employee CCMA.

Importantly, the Constitutional Court accepted that a well-functioning and well-resourced CCMA is required for the successful regulation of the labour market.

In contrast, the SCA appeared to be influenced by the view, often found in the business press, that the problem with South African labour law is that too many dismissed workers refer their cases to the CCMA. The SCA therefore tried to load the dice in favour of employers to discourage all these referrals. The Constitutional Court has now made it clear that this is not the job of the courts. The LRA provides accessible and speedy dispute resolution to ensure that dismissal disputes do not lead to strikes. That was the policy when the LRA was enacted and that remains its policy. The state must ensure that the CCMA is adequately resourced to conciliate and arbitrate the disputes referred to it. All parties, and the economy as a whole, benefit if disputes are resolved quickly. Hopefully, the Minister of Finance will factor the CCMA's needs into budgets in the years to come.

The CCMA is a significant winner. It overcame its reluctance to participate in review proceedings and the outcome certainly justifies its decision to do so. Its arguments were heard by the Constitutional

At the CCMA the arbitrator is not obliged to defer to the employer

Court and our labour law is the better for that. The CCMA has a duty to make its views known in cases that impact on its operation and hopefully it will continue to do so in appropriate cases. There is no doubt that some of the uncertainty now found in our labour case-law is because most review applications are determined without the participation of the CCMA.

And of course, Mr Sidumo is a winner. He goes back to the job he last performed in 2002 (with a tidy sum of back-pay) thanks to the intervention of Cosatu, an organisation of which he is not a member. Perhaps this will persuade him (and other workers) of the advantages of trade union membership. Mr Sidumo is the first worker to benefit from the Constitutional Court decision; in the years to come many more will do so. CCMA statistics show that its arbitrators only order the reinstatement of 10% of workers who are found to be unfairly dismissed. Sidumo is the first whose reinstatement has been confirmed by the highest court in the land.

Cosatu deserves great credit for intervening in this matter after the SCA's potentially disastrous judgment. This is the first labour law matter in which a major stakeholder that was not a party to the initial proceedings has intervened to take an issue on appeal to the Constitutional Court. The CC recognises that organisations whose members are affected by a decision should be able to do so. This gives Cosatu and the other trade union federations an important point of access to ensure that 'test' cases are brought before the country's highest court.

While the CC deserves full credit for its judgment, one final note is to point out that there is a black mark against its record on labour law matters.

Several years ago, it refused leave to appeal against the judgment of the SCA in the crucial case of *Numsa v Fry's Metals*. This case dealt with the central issue in collective labour law: the intersection between the right to strike and operational requirement dismissals. The effect of that decision is that employers who are unable to get their employees to agree to changes in their terms and conditions of employment through collective bargaining can 'convert' the interest dispute into an operational requirements issue and after consultation dismiss the workers. This seriously undermines the constitutional and statutory right to strike over unresolved collective bargaining disputes and tilts collective bargaining in favour of employers.

The Constitutional Court refused to hear the matter without giving reasons for its decision despite the case raising crucial constitutional issues concerning the ambit of the protected right to strike which merits the attention of the country's highest court. When the opportunity comes up, we hope the CC will be open to reconsidering its views, after it has heard full argument on the matter. LB

Paul Benjamin is an attorney at Cheadle Thompson & Haysom Inc and a professor of law at the University of Cape Town. He was one of the attorneys who represented Cosatu in the Consitutional Court in this case.

Garage workers Rates old and new

The 1980 Volkswagen workers' living wage calculation resulting in a R2 per hour demand based on a 40 hour week.

Rent	R25
Food	R150
Clothing	R200
Furniture (Hire purchase payments)	R60
Electricity/Energy	R20
Insurance (life cover for family)	R20
Education	R30
Entertainment	R20
Vacation	None
Total	**R345 pm**

(R4 140 per annum – 52 weeks @ R2 per hour = R4 160)

New rates for petrol attendants

- Minimum wage: R509 for a 45 hour week (R11.31 per hour) across South Africa.
- Those earning above R509 for a 45 hour week: R1.02 per hour or R45.81 increase per week.
- Diesel-only fuel outlets: R330.11 per week or R7.34 per hour in Area A (big cities) and R288.71 per week or R6.42 per hour in other areas. If earning above this, a guaranteed increase of R27.26 per week.
- Overtime = one and a half times normal pay.
- If working on a Sunday as part of normal shift the rate = one and a half times normal pay.
- If working overtime on a Sunday, rate = double normal pay.