Unfair dismissal

CCMA, not the employer, rules

In October the Constitutional Court gave an important judgement on who can determine unfair dismissals. **Simon Kimani Ndungu** outlines the circumstances, but regrets that the court did not clarify the contest for jurisdiction between the Labour Appeal Court and the Supreme Court of Appeal.

On 5 October 2007, the Constitutional Court (CC) delivered its majority judgment in the case of *Sidumo & Another v Rustenburg Platinum Mines Ltd and Others*. In this judgment, the CC overturned an earlier decision of the Supreme Court of Appeal which had found that in matters of unfair dismissal, commissioners of the Commission for Conciliation, Mediation and Arbitration (CCMA) must 'show a measure of deference to employers'. It is a judgment which, so to speak, has authoritatively reclaimed the power to determine the fairness of a dismissal from employers, and restored it back to the CCMA.

SIDUMO'S MISCONDUCT

Zingisile Sidumo's case has a long and protracted history. It began in June 2000 when Sidumo was dismissed from his employment by Rustenburg Platinum Mines on grounds of misconduct. At the time of his dismissal, Sidumo was a grade II patrolman at the company's Waterval Redressing Section, a high security facility for separating high grade precious metals such as platinum, rhodium and gold from lower grade metals.

Sidumo first appealed internally but his appeal failed on the ground that although he had had an almost 15 years unblemished record of clean service with the company, his failure to follow the established search procedures on people leaving the facility may have brought sustained losses, and impacted on the financial viability of the company.

The company's presiding officer argued that Sidumo had been employed 'in a position of trust' and his negligence in carrying out his duties had gone to the heart of the relationship with his employer. This, in the presiding officer's view, had rendered 'a future employment relationship intolerable'. In the circumstances, the officer considered that there was no other appropriate sanction except dismissal.

DISMISSAL 'AN INAPPROPRIATE SANCTION'?

Sidumo then referred his dismissal to the CCMA under the mandatory arbitration procedures of the Labour Relations Act. The CCMA commissioner found that whereas the company had followed a fair procedure in dismissing him, dismissal was an inappropriate sanction. This was because firstly, the mine had suffered no losses or at least no losses through theft had been proven during Sidumo's watch. Secondly, that Sidumo, though negligent, had committed an 'unintentional mistake', and thirdly, that he had been honest throughout his employment and the type of offence he had committed did not go to the heart of the relationship with his employer.

The commissioner then argued that the correct approach by the company should have been to take corrective or progressive discipline against Sidumo rather than dismissal. Consequently, the commissioner ordered that Sidumo be reinstated to his job with three months compensation, but that he get a written warning valid for six months.

Dissatisfied with this ruling, the mine applied to the Labour Court for a review of the Commissioner's decision. The Court upheld the CCMA's award and dismissed the mine's application pointing out instead that Sidumo's conduct was a matter of 'poor performance' rather than misconduct. Thereafter, the mine appealed to the Labour Appeal Court (LAC) which again dismissed its application on the grounds that

Supreme Court of Appeal judge, Edwin Cameron

while some of the reasons given by the commissioner for his award were not sustainable, "Sidumo's clean lengthy service record was 'capable of sustaining the finding' that the sanction of dismissal was too harsh".

The Labour Appeal Court also took into account the Code of Good Practice: Dismissal (Schedule 8 to the LRA) which provides that "generally, it is not appropriate to dismiss an employee for a first offence unless the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable." (The 'Dismissals for Misconduct' section of the LRA gives examples of serious misconduct which on first offence warrant dismissal. These include gross dishonesty, willful damage to employer's property, willful endangering of others' safety, physical assault on the employer, a fellow employee, a client or customer, and gross insubordination.) In the court's view Sidumo's misconduct was not so grave as to render the relationship with his employer 'intolerable'.

MEASURE OF DEFERENCE TO EMPLOYER

Having lost at all three forums, the company then appealed to the Supreme Court of Appeal (SCA). At the SCA, Judge Edwin Cameron, with whom judges Harms, Cloete, Lewis and Maya concurred, ruled in favour of the mine, set aside the decisions of the Labour Appeal Court, the Labour Court and the CCMA and upheld the decision of the company to dismiss Sidumo.

In the court's view, Sidumo's failure to search those leaving as required by company procedures went to the heart of the trust that had been bestowed upon him by his employer. This made a further employment relationship with the company intolerable.

In arriving at its decision, the SCA made two significant and far reaching findings in regard to industrial relations broadly, and dismissals in particular.

Firstly, the court pointed out that commissioners of the CCMA must approach a dismissal with 'a measure of deference' to the employer because the discretion to dismiss lies with the employer. Secondly, the court stated that the standards to be applied by an arbitrator when determining whether a dismissal is fair or not are those broadly set out under the Promotion of Administrative Justice Act (PAJA) rather than those established under section 145 of the LRA.

Sidumo then appealed to the Constitutional Court joined by Cosatu (Congress of South African Trade Unions) as an interested party.

DECISION RESTS WITH CCMA COMMISSIONER

At the CC, the two main questions for consideration were whether (1), the SCA was correct in arguing that commissioners must 'approach a dismissal with a measure of deference to the employer' and (2), whether the action of the CCMA commissioner during arbitration proceedings constitutes administrative action as defined by PAJA and therefore subject to the standards of review set by PAJA rather than those set by the LRA.

In a majority judgment written by Acting Judge Navsa, the court overturned the decision of the SCA and stated that on the first question, 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 an employer. All the indications are to the contrary".

The court then criticised the notion that the differential approach, as proposed by the SCA, was rooted in the LRA. It argued instead that a reading of the Constitution, the LRA and its Code of Good Practice, and other relevant provisions such as Article 8 of the International Labour Organisation Convention on Termination of Employment points strongly to the conclusion that a commissioner "is to determine the dismissal dispute as an impartial adjudicator". As Judge Navsa emphasised, "Neither the Constitution nor the LRA affords any preferential status to the employer's view on the fairness of a dismissal... the Supreme Court of Appeal tilts the balance against employees".

On this basis, the court argued that arbitrators must strive for a balanced approach in employer-employee tensions in order to deal fairly with labour disputes. The court criticised as "no more than supposition", the view expressed by the SCA that unless deference was given to the employer's decision, there would be a flood of cases to the CCMA. On the contrary, Navsa stated that employees are entitled to assert their rights and that if by so doing there is a large volume of work for the CCMA, then the state

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has an obligation to provide the means to deal with such challenge in order "to ensure that constitutional and labour rights are protected and vindicated."

To a lesser extent, Judge Navsa also dealt with the standards that the Labour Court should apply when considering a review of the commissioner's decision. After agreeing with the SCA that the arbitration action of a commissioner is administrative, the CC however differed with the appeal court on the correct standards to apply. The CC observed that section 145 "was purposively designed as was the entire dispute resolution framework of the LRA" to deal specifically with labour disputes and therefore the SCA was wrong in holding that PAJA applied to arbitration awards in terms of the LRA.

The court went on to argue that the LRA is a special statute which has established specialised dispute resolution mechanisms and institutions. In this regard, a general statute such as PAJA cannot detract from the mechanisms and standards set up by the LRA.

CONCLUSION

Without a doubt, the Constitutional Court made a clear pronouncement on parliament's intention that CCMA commissioners have the discretion to decide whether a dismissal is fair or not. The CC should be commended for restoring this power where it rightly belongs; with the CCMA and not employers.

It is a pity however that the CC did not deal with the matter of the contest for jurisdiction between the LAC and the SCA. The Constitution, which is the highest law of the land, provides that the SCA "is the highest court of appeal except in constitutional matters". On the other hand, the LRA states that the LAC "is the final court of appeal in respect of all judgments and orders made by the Labour Court and in respect of the matters within its exclusive jurisdiction." Relying on the Constitution, the SCA argued in the case of Numsa & Others versus Fry's Metals (Pty) Ltd that it has the power to hear appeals from the LAC.

Consequently, the SCA's ruling in the Fry's Metals case has given employers wide scope to dismiss employees unfairly if they refuse to accept an employer's demand. In the LRA, a dismissal is automatically unfair if the reason for it is "to compel the employee to accept a demand in respect of any matter of mutual interest between the employer and employee". In the Fry's case, judges Cameron and Mpati interpreted this to argue that as long as the dismissal by the employer is intended to be final, it cannot be aimed at 'compelling the employee to accept the employer's demand'.

In other words, as long as an employer can argue that in dismissing an employee he or she intended it to be permanent, it no longer matters if the intention of the employer was to compel the employee to accept a particular demand in a matter of mutual interest.

As both the SCA and the CC have agreed, the LAC is a specialist tribunal with experience and knowledge of labour matters. It is therefore appropriate that appeals in labour disputes should, except in constitutional matters, end with the LAC rather than the SCA. Unfortunately, the current constitutional framework allows the SCA to assert its authority over the LAC and as both the Sidumo and Fry's Metals cases show, this has been with grave consequences for workers. Only a constitutional amendment can bring relief to workers.

Yet, the final word must go to the CC, which has left no doubt where the power of determination in unfair dismissals lies, "In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances." LB

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