

## **RE(VIEWING) THE CONSTITUTIONAL COURT'S DECISION IN *SIDUMO***

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### **SUMMARY**

In *Sidumo v Rustenburg Platinum Ltd* (2007 12 BLLR 1097 (CC); 2007 28 ILJ 2405 (CC); 2008 2 SA 24 (CC)) the Constitutional Court made two findings of immense significance for dismissed employees: firstly, the court rejected the use of the so-called "reasonable employer" test in our law, which required arbitrators and courts evaluating the fairness of a dismissal for proven misconduct to treat the employer's decision on sanction with a measure of deference; and secondly, on scrutiny of the more controversial issue before the court, to wit the basis, if any, upon which arbitrators are obliged to make reasonable decisions, the court (in confirming that arbitrators remain so obliged) held that the obligation to do so suffuses section 145 of the LRA, and the extended review grounds of PAJA do not apply.

In the present article these conclusions are critically analysed and evaluated, and a number of submissions are made, *inter alia*: it is submitted that the Constitutional Court's rejection of the "reasonable employer" test was premised on a fundamental misinterpretation of what the test postulates; it is submitted that while the court's attempt to locate the reasonableness standard within the LRA was perhaps justifiable, the court failed to consider properly, or indeed at all, the wording of section 145 and its history, with the consequence that the court failed to appreciate that section 145 (save on an unduly strained interpretation) could not conceivably be construed to cater, in itself and without more, for the scope of the constitutional right to just administrative action; and further, that the labour landscape post-*Sidumo* is one bathed in greater uncertainty. In conclusion, the authors pose the question whether, on a review of *Sidumo*, the Constitutional Court should not be considered to have fallen short of fulfilling its constitutional obligations under the rule of law.

## 1 INTRODUCTION

The Constitutional Court recently delivered its judgment in the first labour matter to have passed through all the forums in which labour matters can now be considered – the CCMA,<sup>1</sup> the Labour Court, the Labour Appeal Court, the Supreme Court of Appeal and, ultimately, the Constitutional Court itself. Having passed through five forums, nineteen judges and a commissioner, with the issues constantly evolving, the judgment in *Sidumo v Rustenburg Platinum Ltd*<sup>2</sup> promised to be a comprehensively considered one, as well as a testament to the legal engine and the rule of law.<sup>3</sup>

In *Sidumo*, two controversial findings by the Supreme Court of Appeal were at issue before the Constitutional Court. These findings were, in summary, as follows:

- In deciding dismissal disputes in terms of the compulsory arbitration provisions of the Labour Relations Act 66 of 1995,<sup>4</sup> commissioners acting under the auspices of the CCMA should approach the issue of sanction with “a measure of deference” because “it is primarily the function of the employer” to decide on proper sanction. In deciding whether a dismissal is fair a commissioner need not be persuaded that dismissal is “the only” fair sanction – it is sufficient that the employer establishes that it is a fair sanction;
- CCMA arbitrations undertaken in terms of the LRA constitute administrative action as defined in section 1 of the Promotion of Administrative Justice Act 3 of 2000<sup>5</sup>, and as such are subject to the extended review standard set under PAJA – the review criterion is

<sup>1</sup> The Commission for Conciliation, Mediation and Arbitration.

<sup>2</sup> 2007 12 BLLR 1097 (CC); 2007 28 ILJ 2405 (CC); 2008 2 SA 24 (CC). The Constitutional Court’s decision comprised four separate judgments. Two justices, Navsa AJ and Ngcobo J, wrote lengthy judgments. Four justices agreed without reservation with Navsa AJ. Three justices agreed without reservation with Judge Ngcobo. Judge O’Regan wrote a judgment giving her views on why she considered Ngcobo J wrong on one point, and Navsa J right. Judge Sachs found himself able to agree with both O’Regan J and Ngcobo J. Navsa AJ’s judgment was the majority judgment, and hence binding judgment of the court. Accordingly, references to the court’s findings herein are to be construed as references to the findings made by Navsa AJ.

<sup>3</sup> The rule of law is one of the founding values of any constitutional state, and the judiciary is bound by it. The doctrine *inter alia* requires the judiciary to be accountable for its decisions. The manner in which the judiciary accounts for its decisions is by furnishing reasons supported by the application of known and general principles of law. This serves a number of purposes: it explains to the parties, and to the public at large, why a case is decided as it is; it is a discipline which ultimately provides guidance to the public in respect of similar matters; and it underscores the notion that a constitutional state should operate in an environment of legal certainty, where its subjects are in a position to know the bounds of the law *before* those bounds have been crossed, so as to be able to act in a legally acceptable and legitimate manner. The rule of law is therefore an important strut maintaining public confidence in the courts and in the legal system. It is submitted that the Constitutional Court’s obligation in advancing and upholding the rule of law, as our apex court, is an unremitting one.

<sup>4</sup> Hereinafter “the LRA”.

<sup>5</sup> Hereinafter “PAJA”. S 1 of PAJA.

whether the decision is rationally connected with the information before the commissioner and the reasons for it.

In its evaluation of these findings, the Constitutional Court unanimously rejected the Supreme Court of Appeal's approval of the "reasonable employer" test, a test which traditionally required arbitrators and courts evaluating the fairness of a dismissal for proven misconduct to regard the employer's decision to dismiss with a measure of deference. On the more controversial and second issue in *Sidumo*, the Constitutional Court held that commissioners (and by parity of reasoning, bargaining council arbitrators) remain obliged to make rational decisions. However, the court's view was that the obligation to do so suffuses section 145 of the LRA,<sup>6</sup> and that PAJA does not apply.

While the court's findings in *Sidumo* may appear at first glance to be uncontroversial, already legal practitioners can be heard to say things such as: "If only this case was heard before *Sidumo* ..."; and "This is a post-*Sidumo* casualty", and so on. In fact, *Sidumo* has become an everyday name in legal circles, with connotations ranging from the rational to the ridiculous. In the authors' view, the danger of the judgment lies not only in what was not considered, but also its practical ramifications (assuming the *ratio decidendi* of the decision is strictly implemented). One apparent implication of the judgment is that employers, who must of necessity take the initial decision on whether dismissal is an appropriate penalty for proven misconduct, are now faced with uncertainty as to whether their decisions to dismiss will survive the scrutiny of a commissioner's "undiluted" sense of fairness. To what extent sympathetic commissioners will interfere in dismissals purportedly relying on *Sidumo*, with the security of knowing that the decision to interfere will not be set aside because at least "one" other commissioner could have been capable of interfering in the dismissal for some reason, cannot be measured. What is certain, however, is that *Sidumo* has already had, and will for the foreseeable future continue to have, real implications for employers and employees alike.

The purpose of this critique then "simpliciter" is to examine what is the most extensively considered case in our labour jurisprudence to determine whether the judgment fulfils expectation and lives up to its constitutional

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<sup>6</sup> S 145 provides:

- "(1) Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award –
- (a) within six weeks of the date that the award was served on the applicant ...
- ...
- (2) A defect referred to in sub-section (1) means –
- (a) that the Commissioner –
- (i) committed misconduct in relation to the duties of the Commissioner as an arbitrator;
- (ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
- (iii) exceeded the Commissioner's powers; or
- (b) that an award had been improperly obtained.
- ..."

promise. In a society where work is the lifeblood of the economy, and often the only means to a meaningful existence for its citizens and residents, the ramifications of creating uncertainty in this field of law often extend far beyond the workplace.

## **2 BACKGROUND**

### **2.1 The facts, the charge, the disciplinary hearing and internal appeal**

Rustenburg Platinum had a high security facility near Rustenburg that provided beneficiation services, separating high-grade precious metals from lower-grade concentrate. These metals were the livelihood and core business of the Mine. The Mine's production had been declining and it was suspected that one reason for the decline was the theft of precious metals by employees. Detailed compulsory search procedures for all people leaving the facility were introduced with a view to redressing the problem, to no avail.

Mr Sidumo was one of the Mine's long-standing security personnel. As of 20 January 2000, he was stationed at the Rustenburg facility, where he was responsible for access control. This entailed carrying out the Mine's stringent search procedures, which had been put in writing and explained to him.

With a view to redressing the suspected theft problem, over three days in April 2000 the Mine resorted to video surveillance of security staff at various points, including the point where Mr Sidumo was stationed. The video surveillance revealed that of twenty-four specifically monitored instances involving Mr Sidumo, he conducted only one proper search. On eight occasions he conducted no search at all. Fifteen other searches did not conform to required procedures. The surveillance further revealed that Mr Sidumo allowed employees to sign a search register without ever having been searched. During the surveillance period, one employee was apprehended with R44 000 worth of precious metals (hidden between his legs) by a guard who had performed his duties properly.

The Mine charged Mr Sidumo with negligence and a failure to follow company procedures, and dismissed him. In mitigation of sanction, the chairperson of the enquiry, a senior superintendent, accepted and took into account that no theft or loss could be proven to have resulted from Mr Sidumo's misconduct, and further Mr Sidumo's clean disciplinary record spanning fifteen years. Notwithstanding these considerations, the chairperson found that the misconduct went to the heart of Mr Sidumo's duties, making a future employment relationship intolerable.

Mr Sidumo lodged an internal appeal against his dismissal, which failed. The chairperson hearing the appeal considered it significant that although Mr Sidumo's misconduct was not known to have caused any losses to the Mine, such losses could indeed have been suffered.

## 2 2 The CCMA

The dispute was referred for arbitration under the auspices of the CCMA. In the arbitration hearing, Mr Sidumo claimed that he had not been adequately trained in the Mine's search procedures. The Commissioner rejected this claim, firstly, on account of Mr Sidumo's experience, and secondly, on account of the fact that, in August 1999, Mr Sidumo had signed a document acknowledging that the Mine's search procedures had been read and explained to him.

On the issue of sanction, however, the Commissioner came to Mr Sidumo's rescue. Swayed by the Labour Relations Act's endorsement of the principle of progressive discipline,<sup>7</sup> the Commissioner took the view that Mr Sidumo's dismissal was too harsh as there had been no "proven" losses suffered by the Mine, the violation by Mr Sidumo had been unintentional and a mistake, and Mr Sidumo had not been dishonest. Mr Sidumo's unblemished service record also weighed in significantly with the Commissioner's decision that Mr Sidumo's dismissal was unfair.

## 2 3 The Labour Court and Labour Appeal Court

In its application to the Labour Court to review the Commissioner's award, the Mine contended that the Commissioner had erred in concluding that no losses had been suffered, that the misconduct had been unintentional or a mistake, and that honesty was a factor to be considered in Mr Sidumo's favour. It was argued for the Mine that there had been evidence in the arbitration proceedings showing that, for the period February to May 2000, there had been revenue loss of approximately R500,000 per day, and that precious metals had been found on employees during the period. It was further argued that it was significant that Mr Sidumo's core duties included the prevention of theft, and the video footage proved that he had conducted only one proper search over the surveillance period.

Bearing in mind the aforementioned argument, the Labour Court turned to consider the classical test on review, expounded by the Labour Appeal Court in *Carephone (Pty) Ltd v Marcus NO*<sup>8</sup> as follows:

"It seems ... one will never be able to formulate a more specific test other than, in one way or another, asking the question: is there a rational objective basis justifying the connection made by the administrative decision maker between the material properly available to him and the conclusion he or she eventually arrived at?"<sup>9</sup>

<sup>7</sup> S 188(2) of the LRA requires commissioners to take into account the Code of Good Practice: Dismissal [contained in Schedule 8 to the LRA] when determining the fairness of a dismissal. The Code endorses the principle of progressive discipline in the application of sanction.

<sup>8</sup> 1999 3 SA 304 (LAC); 1998 11 BLLR 1093 (LAC); 1998 19 ILJ 1425 (LAC).

<sup>9</sup> *Carephone (Pty) Ltd v Marcus NO supra* par 37. Hereinafter "the rationality test". *Carephone* was the first Labour Appeal Court case to broach the issue of whether commissioners are obliged to make rational decisions. The court in *Carephone* was of the view that the then constitutional standard of rationality suffused s 145(2)(iii) of the LRA, and that the rationality standard could not be located under the broader review grounds of s 158(1)(g) of the LRA

The Labour Court concluded, with reference to the grounds of review set out in section 145 of the LRA and the test in *Carephone*, that it could find no reason to interfere with the Commissioner's application of the principle of progressive discipline. The court considered Mr Sidumo's service record an overwhelming factor in his favour, noting that honest employees should not automatically face dismissal. In the Labour Court's view, there was not an iota of evidence that theft had occurred during Mr Sidumo's shift.

On appeal,<sup>10</sup> the Labour Appeal Court was critical of the Commissioner's findings and rejected the notion that no losses had been suffered by the Mine. The court held that the possibility that precious metals had been stolen on Mr Sidumo's watch was a possibility that could not be discounted. The court also had the following to say:

"It is not clear what the [Commissioner] meant when he said that the violation of the rule by [Mr Sidumo] was unintentional or a 'mistake'. He might have been referring to the fact that one of the offences that [Mr Sidumo] was found guilty of was based on negligent conduct as opposed to intentional conduct. He did not elaborate on this but, even if that were the position, that would have to be taken into account in light of all the circumstances. Quite frankly, how the third factor, namely, honesty, came into the picture in this case, is baffling. No dishonesty by [Mr Sidumo] was alleged."<sup>11</sup>

Notwithstanding its scathing criticism of the Commissioner's findings, the Labour Appeal Court dismissed the Mine's appeal. Since the Mine had not attacked the Commissioner's finding that Mr Sidumo's service record was a significant consideration on sanction, in the court's view, the Commissioner's award could not be set aside because the unchallenged finding was in itself capable of sustaining the Commissioner's award.

## 2 4 The Supreme Court of Appeal<sup>12</sup>

It was before the Supreme Court of Appeal that the controversy and intrigue of this seemingly banal dispute emerged. In the Supreme Court of Appeal's analysis of the correct approach to be adopted by commissioners when assessing the fairness of a dismissal under the LRA, and of the proper test to be applied on review, two immensely contentious findings were made.

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because the application of s 158, in the court's view, would have rendered s 145 redundant, something the legislature could not have intended. The court accordingly read the word "*despite*" in s 158(1)(g) to mean "*subject to*", a reading down which was given effect to by a subsequent amendment to the section in 2002.

S 158(1)(g) now reads as follows:

"The Labour Court may –

(g) subject to section 145, review the performance or purported performance of any function provided for in this Act on any grounds that are permissible in law."

<sup>10</sup> The Labour Appeal Court's judgment is reported as *Rustenburg Platinum Mines Ltd v CCMA* 2004 1 BLLR 34 (LAC).

<sup>11</sup> *Rustenburg Platinum Mines Ltd v CCMA (LAC) supra* par 12.

<sup>12</sup> The Supreme Court of Appeal's judgment is reported as *Rustenburg Platinum Mines Ltd v CCMA* 2006 11 BLLR 1021 (SCA).

### 2 4 1 *The first finding – deference to the employer's choice of sanction*

In formulating what it considered to be the correct approach to a commissioner's duties under the LRA, the Supreme Court of Appeal cited with approval the following *dictum* of the Labour Appeal Court in *Nampak Corrugated Wadeville v Khoza*:<sup>13</sup>

"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,<sup>14</sup> but whether in the circumstances of the case, the sanction was reasonable."<sup>14</sup>

The court also cited with approval the following *dictum* of Ngcobo AJP (as he then was) in *County Fair Foods (Pty) Ltd v CCMA*:<sup>15</sup>

"[C]ommissioners must approach their functions with caution. They must 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 an 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 somewhat more severe sanction than the employer would have, is no justification for interference by the commissioner. The minds of equally reasonable people differ.*

...

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"<sup>16</sup> (own emphasis).

With these *dicta* in mind, the Supreme Court of Appeal posited that commissioners should show "a measure of deference" to the sanction imposed by an employer – so long as it is fair – because "it is primarily the function of the employer to decide on a proper sanction". In support of its finding, the court reasoned that the use of the indefinite article in Item 7(b)(iv) of the Code of Good Practice (which prescribes that commissioners must consider whether dismissal is "an" appropriate sanction) supported a deferential approach, and apparently indicative that the legislature was both aware and mindful of the fact that there could be a range of fair responses to a given instance of misconduct. The court concluded:

<sup>13</sup> 1999 2 BLLR 108 (LAC); 1999 2 ILJ 578 (LAC).

<sup>14</sup> *Nampak Corrugated Wadeville v Khoza supra* par 33.

<sup>15</sup> 1999 11 BLLR 1117 (LAC); 1999 20 ILJ 1701 (LAC).

<sup>16</sup> *County Fair Foods (Pty) Ltd v CCMA supra* par 28-30.

“The fact that the commissioner may think that a different sanction would also be fair, or fairer, or even more than fair, does not justify setting aside the employer’s sanction.”<sup>17</sup>

### 2 4 2 *The second finding – PAJA supersedes the LRA*

The Supreme Court of Appeal then turned to consider the proper test on review and its legal basis. It referred with approval to *Carephone*, but given that *Carephone* was decided before the advent of PAJA, the court went on to consider the effect of the enactment of PAJA on the review of CCMA awards.

After comparing the grounds of review under section 145 of the LRA with the more extensive grounds of section 6(2) of PAJA,<sup>18</sup> the court held that PAJA, by necessary implication, had extended the grounds of review of CCMA awards because PAJA was the legislation enacted to give effect to the constitutional right to lawful, reasonable and procedurally fair administrative action.<sup>19</sup> In the court’s view, PAJA was required to “cover the

<sup>17</sup> *Sidumo v Rustenburg Platinum Ltd (SCA) supra* par 46.

<sup>18</sup> S 6(2) of PAJA provides:

- “A court or tribunal has the power to judicially review an administrative action if –
- (a) the administrator who took it –
    - (i) was not authorised to do so by the empowering provision;
    - (ii) acted under a delegation of power which was not authorised by the empowering provision; or
    - (iii) was biased or reasonably suspected of bias;
  - (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
  - (c) the action was procedurally unfair;
  - (d) the action was materially influenced by an error of law;
  - (e) the action was taken –
    - (i) for a reason not authorized by the empowering provision;
    - (ii) for an ulterior purpose or motive;
    - (iii) because irrelevant considerations were taken into account or relevant considerations were not considered;
    - (iv) because of the unauthorized or unwarranted dictates of another person or body;
    - (v) in bad faith; or
    - (vi) arbitrarily or capriciously;
  - (f) the action itself –
    - (i) contravenes a law or is not authorized by the empowering provision; or
    - (ii) is not rationally connected to –
      - (aa) the purpose for which it was taken;
      - (bb) the purpose of the empowering provision;
      - (cc) the information before the administrator; or
      - (dd) the reasons given for it by the administrator;
  - (g) the action concerned consists of a failure to take a decision;
  - (h) the exercise of the power or the performance of the function authorized by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or
  - (i) the action is otherwise unconstitutional or unlawful.”

<sup>19</sup> S 33 of the Constitution provides:

- “(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.  
 (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.



field”, it purported to do so, and accordingly had to apply to all administrative action, including the rendering of CCMA awards.<sup>20</sup> Put differently, in the court’s view, PAJA’s constitutional purpose meant its broader review grounds had to supersede section 145’s more constricted formulation. In reaching this conclusion, the court considered it significant that the constitutional instruction to the legislature to enact legislation giving effect to the right to administrative justice failed to exclude from its ambit previous parliamentary enactments conferring rights of administrative review (in this case, the LRA).

In relation to the tension caused by the different time limits for bringing reviews in terms of the LRA and PAJA, the Supreme Court of Appeal reasoned that it could be expected that the legislature would legislate different time periods in different fields; and that because CCMA reviews were quintessentially labour disputes, the time periods in the LRA would apply.

On applying the rationality test (as expounded in *Carephone*) to the facts before it,<sup>21</sup> the Supreme Court of Appeal noted and endorsed the Labour Appeal Court’s criticism of the Commissioner’s findings. The court, however, considered Mr Sidumo’s misconduct to be a “profound failure at the very core of the employee’s functions” going to the heart of the employment relationship. In its view, the bad reasons considered by the Commissioner in deciding that the dismissal was too harsh played too much of an appreciable or significant role in the outcome of the decision for it to be considered a rational one. In the result, the Supreme Court of Appeal upheld Mr Sidumo’s dismissal and set aside the decisions of the Labour Appeal Court, the Labour Court and the Commissioner.

## 2.5 The evolution of the issues

The fight to the Constitutional Court consumed seven years. The issues evolved throughout the arduous process. The background illustrates this: in the disciplinary and internal appeal hearings, the issue was whether Mr Sidumo’s failure to discharge his duties rendered the employment relationship intolerable; before the CCMA, the dispute focused on whether the dismissal was for a fair reason, and in particular whether dismissal was

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- (3) National legislation must be enacted to give effect to these rights, and must –
- (a) provide for the review of administrative action by a court or where appropriate, an independent and impartial tribunal;
  - (b) impose a duty on the State to give effect to the rights in sub-sections (1) and (2); and
  - (c) promote an efficient administration.”

<sup>20</sup> *Rustenburg Platinum Mines Ltd v CCMA (SCA) supra* par 25. In making this finding, the court relied on the Constitutional Court’s decisions in *Minister of Health NO v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign as Amici Curiae)* 2006 2 SA 311 (CC) and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC). In the latter decision the Constitutional Court held that s 6 of PAJA revealed a clear purpose to codify the grounds of judicial review of administrative action.

<sup>21</sup> The court postulated that the review test enunciated in *Carephone* was in line with PAJA because *Carephone* was decided on the basis of the same constitutional principles given effect to by PAJA.

an appropriate sanction; on review, the issue was whether there was a rational objective basis justifying the Commissioner's finding that Mr Sidumo's dismissal was too harsh; on appeal to the Labour Appeal Court, the issue was whether the Labour Court was correct in contending that there was no basis for interfering with the Commissioner's award; before the Supreme Court of Appeal, contentious new issues came to the fore. These issues were: firstly, whether a commissioner is free to exercise his or her own judgment on sanction without having to defer to the employer's choice of sanction; and secondly, the proper test to be applied on review, the legal basis for that test, and the manner in which the test should have been applied to the Commissioner's decision. The Supreme Court of Appeal's answers to these questions entailed findings of law significant for all dismissed employees, not merely for Mr Sidumo. COSATU<sup>22</sup> therefore applied to intervene to challenge the findings before the Constitutional Court. COSATU's contention was that, on a proper interpretation of the LRA, the Commissioner was free to decide the fairness of Mr Sidumo's dismissal without deference to either side in the dispute and, further, that CCMA arbitrations are judicial proceedings not subject to administrative review under the Constitution, the LRA or PAJA.

### **3 AN ANALYSIS OF THE CC'S DECISION IN RESPECT OF THE SCA'S FIRST FINDING: THE ISSUE OF DEFERENCE**

#### **3.1 The CC's findings**

The Constitutional Court began its assessment on the issue of deference with an overview of the applicable statutory scheme. The court observed that:

- section 23(1) of the Constitution provides that everyone has the right to fair labour practices, including employees;
- for employees, the right to fair labour practices promises security of employment;<sup>23</sup>
- one of the primary purposes of the LRA is to give effect to the right to fair labour practices;<sup>24</sup>

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<sup>22</sup> The Congress of South African Trade Unions is a trade union federation, founded in 1895. Today, the federation is one of the fastest growing trade union movements on the globe, representing more than two million workers. For information on the federation see [www.cosatu.org.za](http://www.cosatu.org.za).

<sup>23</sup> Previously confirmed in *National Health & Allied Workers Union v University of Cape Town* 2003 2 BCLR 154 (CC) par 42.

<sup>24</sup> S 1 of the LRA reads as follows:

"The purpose of this Act is to advance economic development, social justice, labour peace and a democratisation of the workplace by fulfilling the primary objects of this Act, which are –

(a) to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution;

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

- section 3 of the LRA, which binds commissioners, provides that persons applying the provisions of the Act must interpret its provisions to give effect to its primary objects, in compliance with the Constitution, and in compliance with the public international law obligations of the Republic;
- section 185 of the LRA provides that every employee has the right not to be unfairly dismissed or subjected to unfair labour practices;
- section 192 of the LRA provides that once an employee establishes the existence of the dismissal, the employer must prove the dismissal is fair;
- section 138 of the LRA requires commissioners to determine the fairness of dismissals fairly and quickly; and
- Article 8 of the International Labour Organisation Convention on Termination of Employment 158 of 1982 requires commissioners to determine dismissal disputes as impartial adjudicators.<sup>25</sup>

A plain consideration of these provisions compelled the court's conclusion that commissioners should determine the fairness of dismissals as impartial adjudicators, holding the scales between the competing interests of employers and employees evenly in the balance. This finding, in the court's view, meant that the Supreme Court of Appeal had erred, firstly, in its reliance on the use of the indefinite article in item 7(b)(iv) of the Code of Good Practice, and secondly, in its support for the deferential (or "reasonable employer") approach to the enquiry on sanction. The Constitutional Court accordingly expressed misgivings about the Labour Appeal Court's decisions in *Nampak* and *County Fair*, as well as the Supreme Court of Appeal's reliance on those decisions. The court reasoned that the "reasonable employer" approach, having its origins in section 57(3) of England's Employment Protection (Consolidation) Act of 1978,<sup>26</sup> was without statutory basis in South African law. The court stressed that, in terms of our statutory scheme, fairness was something to be assessed objectively, in the process it being important to hold the scales between the competing interests of employers and employees evenly in the balance. In this regard, the court quoted with approval the following excerpt from *National Union of Metal Workers of SA v Vetsak Co-operative Ltd*:<sup>27</sup>

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International Labour Organisation;

...

(d) to promote –

...

(iv) the effective resolution of labour disputes" (own emphasis).

<sup>25</sup> Article 8 of the Convention requires that an employee whose employment has been unjustifiably terminated be afforded recourse to "an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator".

<sup>26</sup> S 57(3), which now re-appears in s 98(4) of the Employment Rights Act 1996 (UK), provided:

"[T]he determination of the question of whether the dismissal was fair or unfair, having regard to the reasons shown by the employer, shall depend on whether the employer can satisfy the tribunal that in the circumstances (having regard to equity and the substantial merits of the case) he acted reasonably in treating it as a sufficient reason for dismissing the employee."

<sup>27</sup> 1996 4 SA 577 (A); 1996 17 ILJ 455 (A).

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“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. 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.”<sup>28</sup>

Whilst the court accepted that there could be no universally applicable test for deciding whether the employer acted fairly, the court nevertheless accepted that the commissioner should at the very least, on the issue of sanction, consider the importance of the rule breached; the reason the employer imposed dismissal; the harm caused by the employee’s misconduct; whether additional training or instruction may have provided a viable solution to the problem; the effect of the dismissal on the employee; and the employee’s service record.<sup>29</sup>

In the result, the Constitutional Court held that it is the task of the commissioner to determine whether a dismissal is fair or not, without competing discretions, and without being required to defer to the decision of the employer, taking into account, at the very least, the factors enumerated in the preceding paragraph.

## 3 2 Analysis

### 3 2 1 Introduction

The long-standing issue concerning the correct approach which commissioners should take in assessing the fairness of the employer’s decision to dismiss an employee has finally been broached by the Constitutional Court. To put the judgment in perspective, it must be emphasised that it did not concern the role of arbitrating commissioners in general, but was concerned only with the scope of commissioners’ powers when deciding whether the sanction of dismissal for “proven” misconduct is fair. The distinction is important because commissioners are required in terms of the LRA to conduct a series of enquiries when determining the fairness of a dismissal. The first enquiry is to determine whether the employee committed the misconduct for which he or she is charged. The second enquiry is to determine whether the rule or standard being enforced by the employer has been consistently applied in the past. The third enquiry is to determine whether dismissal is an appropriate sanction for the misconduct. Though not spelled out in the decision, *Sidumo* concerns only the manner in which commissioners perform the third enquiry. The dispute surrounding the enquiry has in years gone by (as in *Sidumo*) inevitably pertained to the adoption and application of the “reasonable employer” test and the notion that there should be “a measure of deference” displayed by commissioners towards the employer’s decision to dismiss. The

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<sup>28</sup> *National Union of Metal Workers of SA v Vetsak Co-operative Ltd supra* 589B-D; 476D-E.

<sup>29</sup> *Sidumo v Rustenburg Platinum (CC) supra* par 78.

Constitutional Court has now resoundingly rejected any such approach, essentially on the basis that it is without statutory foundation and fails to adequately cater for and take into account the interests of employees, thereby preventing commissioners from adopting the impartial stance expected of them.

While the demise of the test may not be viewed with any disdain through the eyes of a purist, the question which the authors pose is whether a proper interpretation and application of the test in the context of the LRA has ever resulted in bias, partiality or prejudice in favour of the employer. If not, the rationale for its exclusion lies in doubt. This is important because its demise may have practical ramifications not properly explored or considered by the Constitutional Court.

### 3.2.2 *The history of the “reasonable employer” test*<sup>30</sup>

The Constitutional Court correctly pointed out that the “reasonable employer” test as used in South Africa had its origins in section 57(3) of the England’s Employment Protection (Consolidation) Act. In that jurisdiction, the test is now contained in section 98(4) of the Employment Rights Act, 1996. The relevant section in the 1996 Act reads:

“[T]he determination of the question whether the dismissal was fair or unfair, having regard to the reasons shown by the employer:

- (a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
- (b) shall be determined in accordance with equity and the substantial merits of the case.”

While attempts to give meaning to the formulation contained in both Acts have been extensively debated and criticised in the United Kingdom, *inter alia* on the basis that the attempts to do so have not allowed for a proper balancing of the interests of employer and employee,<sup>31</sup> the orthodoxy that has prevailed in the United Kingdom over the last two decades is that

<sup>30</sup> See Myburgh and Van Niekerk “Dismissal as a Penalty for Misconduct: The Reasonable Employer and Other Approaches” 2000 21 *ILJ* 2144 for a very useful exposition of the test and its history.

<sup>31</sup> The criticism has been largely levelled at Lord Denning’s view that there exists a “band of reasonableness” within which employers may act fairly. In *British Leyland UK Ltd v Swift* 1981 IRLR 91 par 11 (quoted with approval in *Nampak*), the Judge stated:

“[T]here is a band of reasonableness, within which one employer may reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man, another quite reasonably keep him on ... If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair: even though some other employers may not have dismissed him.”

This view was criticized in: *Haddon v Van den Bergh Foods Ltd* 1999 ICR 1150 EAT, which was overruled by the Court of Appeals in *Foley v Post Office; HSBC Bank Plc (formerly Midland Bank Plc) v Madden* 2000 ICR 1283 CA. See also Collins *et al Labour Law: Text and Materials* 2ed (2005) 522 and 526; Deakin and Morris *Labour Law* 4ed (2005) 492; Barnard *et al The Future of Labour Law* (2004) 126-127; and Collins *Employment Law* (2003) 176.

expressed by Browne-Wilkinson P:<sup>32</sup>

“[T]he correct approach for the Industrial Tribunal to adopt in answering the question posed by section 57(3) of the 1978 Act is as follows: (1) the starting point should always be the words of section 57(3) themselves; (2) in applying the section an Industrial Tribunal must consider the reasonableness of the employer’s conduct, not simply whether they (the members of the Industrial Tribunal) consider the dismissal to be fair; (3) in judging the reasonableness of the employer’s conduct an Industrial Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer; (4) in many (though not all) cases there is a band of reasonable responses to the employee’s conduct within which an employer might reasonably take one view, another quite reasonably take another; (5) the function of the Industrial Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair; if the dismissal falls outside the band, it is unfair.”

After a chequered history of use in the days of the Industrial Court in South Africa,<sup>33</sup> the “reasonable employer” approach in South Africa was revisited by Brassey AJ in *Computicket v Marcus NO*,<sup>34</sup> in which decision the acting judge had the following to say:

“In approaching this question I must ask myself whether a reasonable person sitting in the position of the [employer] might have come to the conclusion that he did. In my view I consider that he could have come to such a conclusion as a reasonable person. The question of sanction for misconduct is one on which reasonable people can readily differ. One person may consider that dismissal is the appropriate sanction for an offence, another that something less, such as a warning, could be appropriate. There are obviously circumstances in which a reasonable person would naturally conclude that dismissal was the appropriate sanction, for example if there had been theft of a significant amount of money, fraud or other untrustworthy conduct on the part of the [employee]. The examples can be multiplied but there is no purpose in doing so here. There are obviously circumstances in which dismissal would not be warranted. I take for instance the circumstances of an employee who is 5 minutes late for work in circumstances in which such misconduct has no prejudicial consequences for the employee. Between those two poles there is a range of possible circumstances in which one person might take a view different from another without either of them properly being castigated as unreasonable.”<sup>35</sup>

Subsequent to the *Computicket* decision, the Labour Appeal Court was called upon to consider the attitude that commissioners should adopt when determining the fairness of the employer’s decision to dismiss. The court’s decisions were inconsistent: in both *Nampak* and *County Fair*, the “reasonable employer” test was endorsed; however, in *Toyota SA Motors (Pty) Ltd v Radebe*,<sup>36</sup> decided after *Nampak* and *County Fair*, Nicholson JA, noting that the LRA was differently worded from the English statute, regarded the use of the “reasonable employer” test in our law as “a palpable

<sup>32</sup> Quoted from Myburgh and Van Niekerk 2000 21 *ILJ* 2144.

<sup>33</sup> See *Tubecon (Pty) Ltd and National Union of Metalworkers of SA* 1991 12 *ILJ* 437 (ARB); *Brassey et al The New Labour Law* (1987) 72; Le Roux *Labour Law Briefs* Vol 14(5) (1990).

<sup>34</sup> 1999 20 *ILJ* 342 (LC).

<sup>35</sup> *Computicket v Marcus NO supra* 346E-H.

<sup>36</sup> 2000 3 *BLLR* 243 (LAC); 2000 21 *ILJ* 340 (LAC).

mistake". These decisions, amongst others, left the confusion which ultimately Mr Sidumo's case called upon the Supreme Court of Appeal and the Constitutional Court to consider.

### 3 2 3 *No place for the "reasonable employer" test?*

In formulating what it considered to be the correct approach for commissioners to adopt, the Supreme Court of Appeal approved the decisions in *Nampak* and *County Fair*, essentially, in the authors' view, surmising that commissioners should bear in mind the following when considering the appropriateness of a dismissal:

- the decision to dismiss lies with the employer;
- dismissals should be fair;
- the determination of fairness belongs to the commissioner;
- fairness implies reasonableness, in the sense that the sanction of dismissal must be a reasonable one in the circumstances;
- fairness is not an absolute concept – there may be a range of fair responses to a given instance of misconduct;
- should a dismissal fall within that range of fair responses, the commissioner should defer to the employer's choice of sanction.<sup>37</sup>

The Constitutional Court's rejection of these findings was constructed on two pillars: firstly, that the "reasonable employer" approach, with its concomitant premises of a range of reasonableness and the exercise of deference, is without statutory basis in South African law; and secondly, that, as interpreted and applied by the Supreme Court of Appeal, the approach precludes commissioners from adopting the neutral stance expected of them.

It must at the outset be conceded that the Constitutional Court was rightly concerned to ensure that commissioners approach their tasks impartially. A plain reading of all the relevant provisions of the LRA and the Constitution requires as much. In particular, section 138(1) of the LRA requires commissioners to resolve dismissal disputes "fairly". Section 23(1) of the Constitution guarantees "fair labour practices". The right to a "fair hearing" in section 34 of the Constitution requires no less.<sup>38</sup> It is therefore, in the authors' view, correct to say that commissioners are required to act impartially in determining the fairness of an employer's decision to dismiss. But surely fairness requires reasonableness, which in turn requires a consideration of the totality of relevant circumstances informing the

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<sup>37</sup> *Cf Rustenburg Platinum Mines Ltd v CCMA (SCA) supra* par 36-48.

<sup>38</sup> S 34 provides:

"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or where appropriate, another independent and impartial tribunal or forum."

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employer's decision to dismiss? The Oxford Advanced Learner's Dictionary<sup>39</sup> contains the following definition of fair:

**“fair** (1) adj **1 (a)** ~ treating each person, side, etc equally and according to the rules or law: ... **(b)** *reasonable and just or appropriate in the circumstances: ...*” (own emphasis).

The notion that fairness implies an approach based on reasonableness, which in turn requires a consideration of all relevant circumstances, is hence not a novel one. As long ago as 1987, in *National Union of Mineworkers v Vaal Reefs Exploration & Mining Co Ltd*,<sup>40</sup> Fabricius AM recognised that there was little point in making abstract enquiries as to whether an employer had acted “fairly”, as opposed to “reasonably”, in deciding to dismiss. The real issue is whether the employer acted “in light of prevailing circumstances and social conditions, plus the good judgement of the market place (the *boni mores*)”.

Accordingly, it is the authors' respectful contention that the Constitutional Court's declaration that a “reasonable employer” approach has no basis in our statutory law is not accurate. Fairness calls for an approach based on reasonableness. The concepts are mutually self-supporting. This is not to say that the “reasonable employer” approach and the manner in which it has been interpreted and applied in the United Kingdom should toe to heel be followed in South Africa,<sup>41</sup> but it indeed makes a lot of sense that commissioners be able to acknowledge that fairness, like reasonableness, is not an absolute concept.

It is within the above context that the Supreme Court of Appeal's support for the view that commissioners should display “caution” and a “measure of deference” to the employer's decision to dismiss should be understood. In the authors' view, the Supreme Court of Appeal did not purport to say that deference should be exercised by commissioners in all instances, or that a cautionary attitude should pervade the entire enquiry. It was merely contended that deference be exercised towards the employer's decision to dismiss “as long as it is a fair one”. Put differently, the Supreme Court of Appeal's contention was that deference should be exercised by commissioners only where the sanction of dismissal is one falling within the range of reasonable or fair responses to an employee's misconduct. In the authors' view, once the commissioner determines that the dismissal falls within that range, it is fair, the commissioner's duties are at end, and it follows that no real deference affecting objectivity ever really arises. The use of the word “deference” in the context of the “reasonable employer” approach is therefore, it is submitted, really an unfortunate misnomer, the rationale behind which, though not always properly applied or understood, is a safeguard ensuring commissioners do not interfere with the sanction of

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<sup>39</sup> Oxford Advanced Learner's Dictionary 5ed (Oxford University Press).

<sup>40</sup> 1987 8 ILJ 776 (IC).

<sup>41</sup> Though, on occasion, where hard facts and opportunity are present, references to English law would not, in the authors' view, be misplaced. After all, it is the jurisdiction from which our concept of unfair dismissal was derived.



dismissal simply because it is not the sanction the commissioner would have favoured in the circumstances. Judge Ngcobo, though somewhat obliquely, picked up on this sentiment with the following remarks:

“Equally true is that when an employer determines what is an appropriate sanction in a particular case, the employer may have to choose among possible sanctions ranging from a warning to dismissal ... . It is in this sense that the employer may be said to have discretion.

...

But recognising that the employer has such discretion does not mean that in determining whether the sanction imposed by the employer is fair, the commissioner must defer to the employer. Nor does it mean that the commissioner must start with bias in favour of the employer. What this means is that the commissioner, as the CCMA submitted, does not start with a blank page and determine afresh what the appropriate sanction is. The commissioner's starting point is the employer's decision to dismiss. The commissioner's task is not to ask what the appropriate sanction is but whether the employer's decision to dismiss is fair.

In answering this question, which will not always be easy, the commissioner must pass a value judgement. However objective the determination of the fairness of a dismissal might be, it is a determination based upon a value judgement. Indeed the exercise of a value judgement is something about which reasonable people may readily differ.

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These considerations imply certain constraints on commissioners. However, what must be stressed is that having regard to these considerations does not amount to deference to the employer's decision in imposing a particular sanction ... Where an employer has developed and implemented a disciplinary system, it is not for the commissioner to set aside the system merely because the commissioner prefers different standards.<sup>42</sup>

Ultimately then, it is submitted that the real gripe with the “reasonable employer” test, as used in our law, boils down to a fundamental misinterpretation and misapplication of the test. The test is, and always has been, one focusing simply on the reasonableness of an employer's decision to dismiss, having due consideration for the fact that the facts may provide the employer with more than one reasonable or fair option on sanction. There is, in the authors' view, nothing impartial, biased or prejudiced in such a test. Its demise may well have practical ramifications not contemplated or intended by the Constitutional Court. This is because the upshot of the Constitutional Court's decision is that, in the determination of an appropriate penalty, the commissioner's “undiluted” sense of fairness should prevail. The problem with this approach, on the authors understanding of *Sidumo*, is that there is no leeway available to the commissioner: he or she is seemingly required to take the view that fairness is an absolute concept. The perversity of this position is that, if Mr Sidumo's case does nothing else, it illustrates the point that reasonable people will differ reasonably in their views, and that reasonableness, like fairness, is not an absolute concept. Surely then, on this score, *Sidumo* overstepped the mark.

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<sup>42</sup> *Sidumo v Rustenburg Platinum Ltd (CC)* supra par 50.

## 4 AN ANALYSIS OF THE CC'S DECISION IN RESPECT OF THE SCA'S SECOND FINDING: PAJA SUPERSEDES THE LRA

### 4 1 The CC's Assessment

#### 4 1 1 PAJA or the LRA?

The Constitutional Court unanimously agreed with the Supreme Court of Appeal's finding that CCMA commissioners exercise administrative action in conducting arbitration proceedings under the LRA: the court held that the CCMA is not a court of law, and should not be treated as one for *inter alia* the following reasons:

- A commissioner is empowered in terms of section 138(1) of the LRA to conduct an arbitration in any manner that he or she considers appropriate to determine the dispute fairly and quickly, with the minimum legal formalities;
- there is no blanket right to legal representation before the CCMA;
- the CCMA does not follow a system of binding precedents; and
- commissioners do not have the same security of tenure as judicial officers.

The court reasoned that CCMA commissioners, when adjudicating dismissal disputes in terms of the LRA, exercise public power impacting on the parties to an arbitration, and the CCMA could therefore properly be described as an administrative body exercising a quasi-judicial function. On this score, the court held:

"In form, characteristics and functions, administrative tribunals straddle a wide spectrum. At the one end they implement or give effect to policy or to legislation. At the other, some tribunals resemble courts of law."<sup>43</sup>

However, the finding that CCMA commissioners exercise administrative action was the only finding on which the Constitutional Court managed to agree with the Supreme Court of Appeal. In its analysis of the Supreme Court of Appeal's findings, the Constitutional Court was critical of the fact that the Supreme Court of Appeal had failed to explore in any depth whether PAJA purported to provide an exclusive statutory basis for the review of administrative decisions. In the court's view, the answer to this question required looking at the scheme of the LRA and PAJA, as well as the legislature's intention in making the enactments.

After some consideration, the court resolved that PAJA is general legislation regulating the right to administrative action, designed to operate alongside other specialised legislative regulation of administrative action, such as the LRA. The Constitutional Court accordingly found that, although

<sup>43</sup> *Sidumo v Rustenburg platinum Mines (CC)* supra par 82.

PAJA codified the common law grounds of review of administrative action, PAJA could not be regarded as the exclusive statutory basis for administrative review. The court found it important in this regard that section 145 of the LRA was purposefully designed, as was the entire dispute resolution framework of the LRA. The legislature, in the court's view, clearly intended (in particular when enacting section 157(1) of the LRA<sup>44</sup>) that the Labour Court should, subject to the Constitution, have exclusive jurisdiction in respect of labour matters. The court determined that if PAJA were to apply to the review of CCMA decisions, section 6 of PAJA<sup>45</sup> would not allow for the intended exclusivity of the Labour Court, thus enabling the High Courts to review CCMA arbitrations – in the process providing litigants with an unacceptable platform for forum-shopping.

The second reason the court held PAJA could not apply was because the grounds for the review of CCMA awards had been expressly set out by the legislature in section 145 of the LRA. In the court's view, this fact meant that the narrower review grounds contained in section 145 of the LRA had to take precedence over the *prima facie* wider grounds contained in PAJA, specifically because of section 210 of the LRA, which states:

"If any conflict, relating to the matters dealt with in this Act, arise between this Act and the provisions of any other law save the Constitution or any Act expressly amending this Act, the provisions of this Act will prevail" (own emphasis).

The court considered that the legislature had knowledge of section 210 when enacting PAJA and deliberately decided not to repeal the section or section 145 when enacting PAJA. Moreover, the court considered it significant that section 210 resulted from intensive negotiations that led to the enactment of the LRA, and that the protagonists in those negotiations clearly did not wish to countenance any intrusions on the Labour Court's jurisdiction not expressly agreed upon.

In the premises, the Constitutional Court concluded that the issue was an appropriate instance for the application of the principle that specialised provisions trump general provisions.<sup>46</sup> The court cited with approval the following extract from *Maxwell on the Interpretation of Statutes*,<sup>47</sup> referred to

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<sup>44</sup> S 157(1) provides:

"Subject to the Constitution and section 173, and except where *this Act* provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of *this Act* or in terms of any other law are to be determined by the Labour Court."

<sup>45</sup> S 6(1) of PAJA provides that "[a]ny person may institute proceedings in a court or tribunal for the judicial review of an administrative action". S 1 of PAJA defines a court to include "a high court or another court of similar status" within whose area of jurisdiction the administrative action occurred. Accordingly, if PAJA were to apply, it was deduced that s 6 of PAJA would permit the judicial review of administrative action in both the High Courts and the Labour Court.

<sup>46</sup> This principle is expressed in the Latin maxim "*generalis specialibus non derogant*".

<sup>47</sup> Bridgman *Maxwell on the Interpretation of Statutes* 7ed (1929) 153; see also *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC); 2006 12 BCLR (CC) 1399 par 49 and 1420H-1421B; *Sasol Synthetic Fuels (Pty) Ltd v Lambert* 2002 2 SA 21 (SCA) par 17; *Consolidated Employers Medical Aid Society v Leveton* 1999 2 SA 32 (SCA)

with approval in *R v Gwantshu*.<sup>48</sup>

“Where general words in a later Act are capable of reasonable and sensible application without extending to subjects specially dealt with by earlier legislation, the earlier and special legislation is not to be held indirectly ... altered ... merely by flaws of such general words, without any indication or particular intention to do so.”<sup>49</sup>

The Supreme Court of Appeal, in the Constitutional Court’s view, had accordingly erred in holding that PAJA was applicable to the review of CCMA awards.

#### 4 1 2 *The standard of review*

That, however, was not the end of the enquiry since the Constitutional Court had to determine the proper standard of review to be applied under the LRA. The court held that section 145 must be read to ensure that administrative action by the CCMA is lawful, reasonable and procedurally fair, because the Constitution required as much. The correct standard to be applied, in its view, was the reasonableness standard used in *Bato Star* (a decision made in the context of section 6 of PAJA), expounded by O’Regan J in that decision as follows:

“[A]n administrative decision will be reviewable if, ... it is one that a reasonable decision-maker could not reach.”<sup>50</sup>

In summation, the court concluded that while *Carephone* held that section 145 of the LRA was suffused by the then constitutional standard that the outcome of an administration decision should be justifiable in relation to the reasons given for it, the better approach now is that section 145 is suffused by the constitutional standard of reasonableness. On review, that standard translates into the following enquiry: Was the decision reached by the commissioner one that a reasonable decision-maker could not reach? In the court’s view, applying this standard would give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair. The Supreme Court of Appeal, in the court’s view, was merely wrong in sourcing the standard in PAJA, instead of the LRA.

## 4 2 **Analysis**

It is apparent that with such different reasoning as the Constitutional Court and the Supreme Court of Appeal adopted in relation to the where to locate the constitutional standard of review, both courts were in agreement that CCMA decisions constitute administrative action, and, in the authors’ view,

40I-41B; and *Khumalo v Director-General of Co-operation and Development* 1991 1 SA 158 (A) 164C-165D.

<sup>48</sup> 1931 EDL 29 31.

<sup>49</sup> *R v Gwantshu supra* 153.

<sup>50</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs supra* par 44.

rightly so.

While opposing views had previously emerged in case law as to whether the CCMA exercises public power (and as such is subject to the constitutional principles that govern administrative action), those views, in the authors' view, have emanated from a slavish adherence to the doctrine of separation of powers, which in turn entails a naive insistence that functions of a judicial nature cannot be performed by an organ of state. In practice, however, administrative functions involve the adjudication of disputes. It is a social and political reality of any modern state and is unavoidable. Ultimately, however reluctantly, one must concede, as both the Supreme Court of Appeal and Constitutional Court implicitly conceded, that there is artificiality in any notion of a complete separation of powers. Just as law-making is not the sole preserve of the legislature, so the resolution of disputes is by no means the sole preserve of the judiciary. Administrative tribunals, including the CCMA, have been created and necessitated by a desire to relieve the pressure on the ordinary courts and improve access to justice. These tribunals remain administrative bodies exercising public power, notwithstanding that the exercise of their power entails quasi-judicial functions.

That, however, is the extent to which the authors agree with the Constitutional Court's findings. While it may be so that where there exists two pieces of legislation potentially regulating the same matter (such as PAJA and the LRA in the context of CCMA reviews), the principle is that the specialised legislation (such as the LRA) trumps, it is important to bear in mind that this interpretative principle emanates from English law and is designed to give effect to the intention of the legislature. The snag with applying the principle blindly, in the South African context, is that our legislature's intention is always subject to the Constitution, and should therefore always be constitutionally aligned.<sup>51</sup> In the authors' opinion, the Constitutional Court's approach brushed aside this fact, in the process ignoring that the legislature, in enacting section 145 of the LRA, by no means actually intended to cater for the right to administrative justice as it should have done. Had the legislature done so, the broader grounds of review now contained in section 6 of PAJA would surely have in substance found their way into section 145 of the LRA, yet they never did.<sup>52</sup>

There is a good explanation for the *lacuna*. Section 145 of the LRA was taken almost *verbatim* from section 33 of the Arbitration Act 42 of 1965.<sup>53</sup> The problem with the transfigured version in the LRA is therefore its historical context: the grounds of review were designed for private arbitration in an era of parliamentary sovereignty, with jurisdiction to arbitrate based on an agreement of the parties (containing the arbitrator's terms of reference).

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<sup>51</sup> The United Kingdom operates under a doctrine of parliamentary sovereignty. The application of the principle presents little problem in a jurisdiction where the legislature's intention reigns supreme.

<sup>52</sup> This is understandable, as the concern of the drafters would naturally not have been focused on the administrative law implications of a compulsory statutory labour tribunal in a new era of constitutional supremacy.

<sup>53</sup> Hereinafter "the Arbitration Act".

The CCMA, however, acquires its jurisdiction to arbitrate and powers from the LRA itself, and not from an arbitration agreement containing its terms of reference. The significance of these differences is material in the result: CCMA awards fall within the purview of administrative law, a concern that the drafters of the Arbitration Act did not have to address.<sup>54</sup>

The truth of the matter is then, because section 145 of the LRA had this void, on a plain reading of the LRA it was deficient.<sup>55</sup> In which portion of section 145 the Constitutional Court consequently purported to suffuse the constitutional standard of reasonableness, it did not say. If it suffuses all four grounds – that is, misconduct, gross irregularity, exceeding the commissioner’s powers, and an award improperly obtained – then the question which must be asked is on which ground a disgruntled party should bring the review, and on which ground should it succeed, for it is not an independent review ground under section 145? Alternatively, given that the Constitutional Court partially aligned itself with *Carephone*, it could be argued that the reasonableness standard suffuses section 145(2)(iii) of the LRA, that is to say, that the commissioner exceeds his or her powers when making an award that another commissioner, acting reasonably, could not have made. But this reasoning is surely too contrived. Under the Arbitration Act, the provision demanding that arbitrators not exceed their powers was a provision inserted to ensure that arbitrators act within their terms of reference.<sup>56</sup> Under the LRA, however, commissioners’ terms of reference and powers are not contained in an agreement, but rather the Act itself. The problem is that nowhere does the LRA expressly prescribe that commissioners only have the competency to render reasonable awards. That prescription, as the Constitutional Court correctly acknowledged, derives from section 33 of the Constitution. But that acknowledgement, in the authors’ view, could not solve the LRA’s problem – even on a constitutional interpretation of section 145 – because it was “other” provisions of the LRA that sought and had to provide for commissioners’ powers or terms of reference, not section 145(2)(iii) itself. In the authors’

<sup>54</sup> The authors do not purport to say that section 33 of the Arbitration Act is sufficient in the wake of constitutional supremacy. It should be borne in mind that our courts have imposed common law principles of administrative law on private actors in certain instances (irrespective of the fact that they do not exercise public power), and may continue to do so, except now the validity to do so will derive from the Constitution. Further, it is arguable that the right to a “fair” hearing of a dispute, guaranteed by section 34 of the Constitution, demands a “reasonable” decision. An exploration of these arguments falls outside the scope of this work.

<sup>55</sup> When a statute undertakes to foresee and provide for certain contingencies and, through mistake, or some other cause, a case remains to be provided for, it is said to be *casus omissus*. The general rule is that the legislature must be presumed to have exhaustively enacted everything it intended to cater for and it is therefore not for the courts to furnish what has been omitted in the language of the statute. See in this regard De Ville *Constitutional and Statutory Interpretation* (2000) 135; and Devenish *Interpretation of Statutes* (1992) 77.

<sup>56</sup> In a private arbitration the arbitrator’s authority and power are derived from the terms of reference that the parties to the dispute agree upon. This means that the arbitrator is limited to arbitrate only the issues agreed upon and is likewise limited with regard to granting relief. In the event that the arbitrator exceeds his or her agreed powers, only then may the award may be reviewed. The non-exercise of a power by an arbitrator when there is an obligation to act could also constitute the exceeding of powers.

view, the Constitutional Court, by stating that commissioners only possess the power to render reasonable awards, and then purporting to locate that power in section 145(2)(iii) of the LRA, *de facto* located powers within a section that itself simply never sought to do so. Even if it is the case that the injunction contained in section 33(3) of the Constitution could properly be viewed as excluding from its ambit previous parliamentary enactments conferring rights of administrative review, or that the injunction envisaged only the need for a generalised enactment (such as PAJA), not intended to usurp or derogate from a specialised enactment (such as the LRA), the point nevertheless remains that section 145 itself was not intended to, and its wording did not therefore reflect a capability, on any “reasonable” interpretation, of containing the constitutional standard of review.<sup>57</sup> Yacoob J, in the decision of *De Beer NO v North-Central Local Council and South-Central Local Council (Umhlatuzana Civic Association Intervening)*,<sup>58</sup> stated the following with regard to the constitutional interpretation of statutory provisions:

“Where a statutory provision is capable of more than one *reasonable* construction, one which would lead to constitutional invalidity and the other not, a court ought to favour the construction which avoids constitutional invalidity, *provided such interpretation is not unduly strained*”<sup>59</sup> (own emphasis).

The Constitutional Court’s line of reasoning in *Sidumo* was, with respect, in the authors’ view, just that: unduly strained. *Carephone* was *in pari materia* and contained the same stumbling block. The court was therefore, in the authors’ view, bound to declare section 145 unconstitutional and read in the reasonableness standard, alternatively it was obliged to attempt to locate the reasonableness standard somewhere else in the LRA (something the court never sought to do, but could perhaps have been done by interpreting section 138(1), which requires commissioners to act “fairly”, to mean that commissioners are required to act reasonably).

It bears mentioning that both *Carephone* and *Sidumo* failed to meaningfully consider a further possibility, *viz* that it was not necessary to resort to a constitutional interpretation because the constitutional grounds for review fell within the purview of section 158(1)(g) already on a plain reading of that section. Unfortunately, the Constitutional Court did not pause to meaningfully consider the possibility of section 158(1)(g) providing “residual” grounds for the review of CCMA awards. Had the court considered the possibility, it could have avoided the argument that the application of section 158(1)(g) would render section 145 superfluous by simply reading the LRA as it stood: section 158(1)(g) was “subject to” section 145 and therefore provided “residual” grounds of review. This reasoning would also have accorded with the interpretative principle that norms of greater specificity (as contained in section 145) take precedence over norms of greater abstraction

<sup>57</sup> See, *eg*, the doubts expressed by Nicholson JA in *Toyota South Africa Motors (Pty) Ltd v Radebe* 2000 3 BLLR 243 (LAC).

<sup>58</sup> 2002 1 SA 429 (CC); 2001 11 BCLR 1109 (CC).

<sup>59</sup> *De Beer NO v North-Central Local Council and South-Central Local Council (Umhlatuzana Civic Association Intervening)* *supra* par 24.

(as contained in section 158(1)(g)). The next question would have been to decide what effect PAJA purported to have on the review of CCMA awards, if anything. It would have been theoretically possible to reason in this regard that from the time PAJA took effect its review grounds informed the grounds “permissible in law” under section 158(1)(g). It bears mention that this indirect application of PAJA could not have resulted in the Labour Court’s intended exclusive jurisdiction over CCMA reviews being compromised since the Labour Court is a competent court in terms of PAJA and the LRA’s provisions, to the extent of any inconsistency, usurp PAJA, thereby excluding both the possibility of the High Courts reviewing CCMA awards and the problem of which procedure to apply. Further, section 158(1)(g) reviews, irrespective of where one chooses to locate the grounds “permissible in law”, in the Constitution or PAJA, would have remained reviews undertaken in terms of a section of the LRA, and as such only the Labour Court would have had jurisdiction.

Ultimately then, it is submitted that the Constitutional Court’s decision inappropriately forced constitutional review into section 145 of the LRA. Should the court have considered that section 145 was indeed the only section of the LRA which could legitimately cater for the review of CCMA awards, the court was, in the authors’ view, bound to declare the section unconstitutional and read in the reasonableness standard (in the form in which section 6(2) of PAJA presents itself), instead of adopting a constitutional interpretation of a section that had to be strained in the application of the remedy. Further, the court failed to consider the possibility that the reasonableness standard was quite capable of being included in section 158 as a residual ground for reviewing CCMA awards without having to resort to a constitutional interpretation of section 145 – but let’s discount this possibility, on the good assumption that the legislature was attempting to regulate the review of CCMA awards within section 145 “exclusively”. Either way, it is submitted that a constitutional interpretation of section 145 was wrong. However, because of the jaundiced manner in which the Constitutional Court approached the entire enquiry, in essence trying to maintain some form of contrived cohesion to section 145 of the LRA, the court opted to interpret section 145 in a manner in which, in the authors’ view, it plainly cannot and was never intended to be interpreted.

## **5 THE APPLICATION OF THE CC’S FINDINGS TO THE FACTS**

### **5 1 Was Mr Sidumo’s dismissal fair?**

The only issue which remained to be determined by the Constitutional Court was whether Mr Sidumo’s dismissal was fair. If the court’s judgment is read only in so far as its ruling on the first finding – that the commissioner’s sense of fairness should prevail – the answer would have been that Mr Sidumo’s dismissal was unfair because that is what the Commissioner found. However, if one has regard to the second finding – that a commissioner should not reach a decision which a reasonable decision-maker could not



reach – it is clear that the court, theoretically speaking, did not intend to suggest that a commissioner's findings should present an insurmountable wall to legal challenge. The real question however, theoretically and practically speaking, was how high the wall would turn out to be.

In its analysis of the Commissioner's award, the court found it true that losses could have been sustained as a consequence of Mr Sidumo's neglect to perform his duties, but equally true that no losses were proved to have resulted from his misconduct. The court also found it true that Mr Sidumo had failed to conduct individual searches, which was his main duty, and that the characterisation of his neglect as a mistake was patently misguided. However, in the court's view, the Commissioner could not be faulted for considering the absence of dishonesty a relevant factor in relation to Mr Sidumo's misconduct, and a significant factor in favour of the application of the principle of progressive discipline. So, too, it was significant that no losses were suffered. Mr Sidumo's years of clean and lengthy service also weighed with the court in this regard. Having regard to all these factors, the court concluded that the Commissioner had carefully and thoroughly considered the different elements of the Code of Good Practice, and had properly applied his mind to the question of the appropriateness of the dismissal, notwithstanding that the Commissioner was wrong to conclude that the relationship of trust had not been breached. This last factor, the breakdown of trust, did not weigh heavily with the court because, in its view, the breakdown of trust had to be weighed in light of all the relevant factors, including the seriousness of the misconduct. The court concluded that the Commissioner's decision was one that a reasonable decision-maker could reach.

## **5 2 A disconcerting precedent**

The court must be criticised for overturning the Supreme Court of Appeal's decision, in the process finding that it was reasonable to conclude that Mr Sidumo's dismissal was fair. Exactly how the court made the leap from its findings on the law to setting aside the decision of the Supreme Court of Appeal is vexing.

To recount, Mr Sidumo was charged with and found guilty of failing to follow the Mine's compulsory search procedures. How the Constitutional Court managed to consider that Mr Sidumo had been honest in his misconduct, and then consider that a significant factor in the circumstances, is beyond the authors' conception. Mr Sidumo had permitted employees to sign a search register in the full knowledge that they had not been searched. Certainly this fact lent itself to the suspicion that he was complicit in the theft of the Mine's precious metals. Further, the court seems to have ignored the fact that Mr Sidumo had blatantly lied when he asserted that he had not been trained in the Mine's search procedures. This fact could surely not be ascribed to mere negligence or memory loss, not that the court actually considered either possibility; it baldly supported the Commissioner's finding on the issue of honesty. Turning to the issue of loss, to argue, as the court by implication did, that an omission to act is any less deplorable because the

potentially harmful consequences of that act cannot be proved to have eventuated, loses sight of the fact that because of the omission to act the Mine could never have been in a position to know what the consequences of Mr Sidumo's neglect were. Put differently, the omission to search the employees leaving on Mr Sidumo's watch precluded any possibility of proving that those employees had stolen precious metals "precisely because they were not searched". By analogy, to argue that a policeman who lets an arrested person walk out of jail during his shift is any less irresponsible because at the time the suspected criminal had not yet been found guilty and/or because it is not known whether the suspected criminal subsequently perpetrated further criminal acts, is flawed reasoning. It is the potential for harm, and the fact that the employee created it, which is the subject of the enquiry. Further, in light of the fact that Mr Sidumo had failed to admit his wrongdoing after many years of service and further in light of the fact that he was a senior employee, the truth of the matter is that his years of clean and lengthy service should at best have been regarded as a neutral factor.<sup>60</sup>

It seems fair to say that the Constitutional Court's decision is far from convincing. According to all long-established principles of labour law, the company was entitled to dismiss Mr Sidumo. On the probabilities he was grossly negligent, if not dishonest. Even assuming that he was not dishonest, which certainly appears not to have been the case, it is significant that the court found that his misconduct destroyed the relationship of trust. The courts have always held that this is the ultimate justification for a dismissal.<sup>61</sup> What is more, both the Supreme Court of Appeal and Constitutional Court agreed that Mr Sidumo's misconduct was serious. This factor too has been held to warrant dismissal, without so much as a consideration of the other factors which may exist in a particular case.<sup>62</sup>

Despite all the defects highlighted above, the Commissioner's decision managed to withstand muster because, in the court's view, another commissioner may have also found Mr Sidumo's dismissal to be fair. With all due respect, it would, in the authors' view, be a stretch of imagination to consider that such a commissioner would have been acting reasonably.

Practically speaking then, it does seem as if *Sidumo* has created a precedent which will make it inordinately difficult to invalidate the award of a commissioner. This is so because, in effect, post-*Sidumo* a reviewing court will seemingly only be able to interfere if, having regard to any one or more of the commissioner's valid findings, no other commissioner, acting with any sense of reasonableness, could potentially have reached the same conclusion. The fact that an award is tainted by bad considerations is therefore simply not enough, irrespective of the fact that the commissioner, with prior knowledge of his or her bad considerations, may well have reached a different conclusion. On this score, Grogan has recently

<sup>60</sup> See *inter alia* *De Beers Consolidated Mines Ltd v CCMA* 2000 9 BLLR 995 (LAC).

<sup>61</sup> See *inter alia* *Council for Scientific and Industrial Research v Fijen* 1996 6 BLLR 685 (AD); and *Lahee Park Club v Garratt* 1997 9 BLLR 1137 (LAC).

<sup>62</sup> *Toyota South Africa Motors (Pty) Ltd v Radebe supra*.

remarked:<sup>63</sup>

"[T]he fact remains that, at its narrowest, the *Sidumo* judgment seems to create a precedent that, in any future case in which an employee with 14 years' or more service and a clean disciplinary record is dismissed for failing to perform a key function, commissioners must rule the dismissal unfair, unless, perhaps, the employee was expressly charged with "dishonesty" and the employer provides conclusive proof at the arbitration hearing that the employee was dishonest. What commissioners will make of [the] precedent in future cases remains to be seen. But one thing can be said with reasonable confidence at this stage: *Sidumo* will make it far more difficult for employers to persuade commissioners that the penalty of dismissal for proven misconduct is "appropriate" if the commissioner's heart persuades him or her to think otherwise. The only consolation for employers is that, if commissioners are persuaded that a dismissal for proven misconduct is fair, the employee will in the light of *Sidumo* find it difficult to persuade a reviewing court to intervene. *Sidumo* may therefore prove a two-edged sword."<sup>64</sup>

## **6 THE DECISION IN *EDCON LTD v B PILLEMER NO ((2008) 5 BLLR 391 (LAC))***<sup>65</sup>

The decision by the Constitutional Court in *Sidumo* has raised the question as to how dishonest an employee must be to deserve dismissal. The first decision post-*Sidumo* to deal with this question was recently handed down by the Labour Appeal Court in *Edcon Ltd v B Pillemer NO* (Labour Appeal Court case number DA4/06, undated and unreported; *SILCS* 2008: 03).

The facts which led to the decision in *Edcon* began this way: the employee concerned failed to report that her company car had been involved in an accident, which company policy required. The reason that the employee failed to report the accident was because at the time her son was behind the wheel of the car, which she incorrectly assumed was for her use only. Unfortunately for the employee, management found out about the accident and she tried to hide her dilemma by denying that the accident had occurred. She was charged with failing to report the accident, but at the disciplinary hearing decided to divulge the reason behind her deceit. Even so, this was not enough to save her job.

In the CCMA, the presiding commissioner found that the dismissal was too harsh because the company had not proved that the employment relationship had broken down, and further because the employee had seventeen years unblemished service. The Labour Court, on review, held that the commissioner had properly considered the evidence, and the decision had to stand.

Eventually on appeal before the Labour Appeal Court, *Edcon* argued that the Labour Court, instead of dismissing its review application, should have found that the commissioner had not properly applied her mind to the facts *inter alia* when considering the seriousness of the employee's misconduct.

<sup>63</sup> Grogan *Two-edged Sword: The CC's Ruling in Rustplats* Employment Law Vol 23 Part 6.

<sup>64</sup> *Ibid.*

<sup>65</sup> This summary is extracted from a case note by Grogan appearing in *Labour Law Sibergramme* 4/2008.

In deciding the appeal, the court found, on the basis of *Sidumo*, that an award only stands to be set aside if it so unreasonable that no reasonable commissioner would have reached the conclusion in question. Willis JA, in a separate judgment, agreed with the court's conclusion, but noted, without explanation, that he was "less sanguine" about the implications of the Constitutional Court's decision in *Sidumo*. Be that as it may, all the judges agreed that the appeal had to fail because the company had changed its tack on appeal. The employee had initially been charged with failing to report the accident, yet the company sought on appeal to rely on a subsequent "lack of candour". This suggested to the court that had the employee confessed to the accident at the outset, she would not have been dismissed.

The court also pointed out that the effect of *Sidumo* was "to refocus attention on the supposed impartiality of the commission as a decision-maker at the arbitration whose function it is to weigh all the relevant factors and circumstances of each case in order to come up with a reasonable decision. It is, in fact, the relevant factors and the circumstances of each case, objectively viewed, that should inform the reasonableness or lack thereof.

The *Edcon* decision reinforces two points: the first is that before employees are dismissed they should be informed of the misconduct to which the employer takes exception; the second is that post-*Sidumo* CCMA awards will be much more difficult to set aside on review.

## 7 CONCLUSION

The decision in *Sidumo (supra)* is the most important decision of the Constitutional Court on the proper approach on how commissioners should interpret the LRA, the Code of Good Practice: Dismissal and on how to exercise their discretion when they have to determine if a dismissal was fair.

Navsa J, who wrote the majority judgment, held that a commissioner must accept that the employer's decision to dismiss need not be a last resort in order to be fair. The commissioner must establish whether the employee infringed a valid and reasonable workplace rule of which the employee was aware of ought to have been aware and was the rule consistently applied. As CCMA arbitration is a hearing de novo, commissioners must hear fresh evidence, and decide whether the employee had committed misconduct and then if dismissal was fair. At this stage the commissioner must consider although the LRA is designed to correct the power imbalance between employees and employers, then must act impartially. The Constitutional Court rejected the view – expressed by the SCA – that a commissioner must defer to the employer's decision. The Constitutional Court departed from the LAC approach in *Nampak Corrugated Wadeville v Khoza*<sup>66</sup> and *County Fair (Pty) Ltd v CCMA*.<sup>67</sup> Ngcobo J who wrote a concurring judgment considered that commissioners must self-evidently "take seriously" the reason why the

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<sup>66</sup> [1999] 2 BLLR 108 (LAC).

<sup>67</sup> [1999] 11 BLLR 1117 (LAC).

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employer established the rule and prescribed the penalty for its breach. This does not mean that commissioners must be subservient to employers. Commissioners must consider all relevant factors, including the reasons given by the employer, when determining whether the sanction of dismissal was fair. What is fair is determined ultimately, by the commissioner, not the employer.

The Constitutional Court held that the decision of a commissioner must stand if the decision is one which a reasonable decision-maker could reach but the commissioner's sense of fairness is still open to review. The reasoning of the judges in *Sidumo* is very wide but it does appear that commissioners are now required to consider length of service and the presence or otherwise of dishonesty in determining if the conduct of the employee made a continued employment relationship intolerable or whether with future training the conduct which led to the dismissal would be avoided.

Accordingly, there is in our view still a requirement of rationality. We indicated that the element of rationality is to be found in section 145(2)(a)(iii) and we submit that section 145 which limits the constitutional right to fair administrative action will, as a result, withstand a constitutional challenge.