

UNIVERSITY OF THE WESTERN CAPE  
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**'WHEN IS DISMISSAL AN APPROPRIATE SANCTION FOR MISCONDUCT?  
AND WHO HAS THE LAST SAY?'**

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## Key Words

**'WHEN IS DISMISSAL AN APPROPRIATE SANCTION FOR MISCONDUCT? AND WHO HAS THE LAST SAY?'**

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## ABSTRACT

### 'WHEN IS DISMISSAL AN APPROPRIATE SANCTION FOR MISCONDUCT? AND WHO HAS THE LAST SAY?'

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LLM mini-thesis, Faculty of Law, University of the Western Cape

In this mini-thesis, I will present a historical development of the manner in which South African courts have tested the fairness of dismissals, for misconduct. South African Labour history has been marred by confusion and inconsistency in relation to the test to be adopted in determining the fairness of dismissals. This has been so, because there have been two dominant schools of thought, one referred to as the 'own opinion' approach, whereby the commissioner/court has the discretion to express his/her own view based upon value judgments on the fairness of the dismissal. The other approach is known as the reasonable employer test ('defer to the employer' approach), whereby the commissioner had to defer to the decision of the employer, unless the dismissal is one that no reasonable employer would impose, or is so excessive that it would shock one's sense of fairness, then the commissioner may interfere.

This thesis will reveal the inconsistency that has been caused, by these two approaches, and the South African courts dissent as to the approach consistent with our law. This dissent, as shall be shown in this thesis, has led to our courts contradicting themselves as to the test consistent with the law.

There will be a critical discussion on the source of the reasonable employer test and its application in South Africa during the Labour Relations Act 28 of 1956 (old LRA) and the Labour Relations Act 66 of 1995 (new LRA). With a further discourse on the development of the 'own opinion' approach during the periods of both the old LRA and the new LRA.

This will lead to me looking at the provisions of the South African Constitution, together with the meaning of the right to fair labour practice as provided in the Constitution. Based upon a critical

analysis of past jurisprudence, the provisions of the ILO Convention, the provisions of the old LRA and new LRA, foreign law and the Constitutional imperatives, I will attempt to illustrate the approach most consistent with our law.

This thesis will culminate with a critical analysis of the Supreme Court of Appeal's judgment, in the case of *Rustenburg Platinum Mines Ltd vs Commission for Conciliation, Mediation and Arbitration* and the ruling of the Constitutional court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*.

The purpose of providing this historical journey, is to further highlight the rulings of past judgments, that have developed the concept of fairness, as was consistent with the Constitution. It is envisaged that the body of judgments cited in this thesis, may be used as authority, whenever the issue of determining the fairness of dismissal for misconduct arises, before a court or tribunal, such as the Commission for Conciliation Mediation and Arbitration (CCMA). It is may further be used by employers and employees, in obtaining clarity of the law in relation to the test for fairness of dismissals for misconduct.

November 2009



## DECLARATION

I declare that 'When is dismissal an appropriate sanction for misconduct and Who has the last say?' is my own work, that it has not been submitted before for any degree or examination in any other university, and that the sources that I have used or quoted have been indicated and acknowledged as complete references.

Kamal Makan

13<sup>th</sup> November 2009

Signed : .....



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**Kamal Makan**

November 2009



## CONTENTS

Title  
Key Words  
Abstract  
Declaration

**Chapter 1** Introduction

**Chapter 2** Historical Development of the Reasonable Employer Test

2.1 Introduction

2.2 Source of the Reasonable Employer Test

2.3 Early considerations of determining Fairness based upon the Reasonable Employer Test in South Africa

2.3.1 Statutory Framework of Determining Dismissal under Old LRA

2.3.2. Reasoning behind the Application of the Reasonable Employer Test

2.3.3. Application and Development of the Reasonable Employer Test by the Industrial Courts

2.3.4 The Application of the Reasonable Employer Test by the Labour Appeal Court and the Appellate Division under the old LRA

2.4 Application of the Reasonable Employer Test under the Labour Relations Act 66 of 1995

2.5 Conclusion

**Chapter 3** Rise of the own opinion approach and determining of fairness based upon value judgment

3.1 Introduction

3.2 Rise of the Own Opinion Approach and its determination of fairness of dismissals

3.2.1. Judgments and Academic Viewpoints in support of the ' Own Opinion' Approach under the Labour Relations Act 28 of 1956

- 3.2.2. *Perskor* : the decision of the Appellate Division in determining fairness under the Labour Relations Act 28 of 1956 and subsequent judgments of the Appellate Division and the Supreme Court of Appeal
- 3.2.3 The Approach of the Labour Appeal Court under the old and the new Labour Relations Act.
- 3.2.4 Powers of the Arbitrator / Industrial Court under the Labour Relations Act 28 of 1956 ( Old LRA) pertaining to whether the courts should adopt a deferential approach when assessing fairness of dismissals
- 3.2.5 Roles and Powers of the Commissioner and the Court to decide on / determine the Fairness of a Dismissal in terms of the Labour Relations Act 66 of 1995 ( new LRA) with reference to whether they should defer to the sanction imposed by the employer
- 3.3 Conclusion



- Chapter 4** How can the fairness of a dismissal as defined in terms of the Labour Relations Act 66 of 1995 be tested and based upon whose judgment is the fairness assessed?
  - 4.1 Introduction
  - 4.2 The Constitution of the Republic of South Africa, Act 108 of 1996
  - 4.3 The approach prevailing during the old LRA and consistent with the Labour Relations Act 28 of 1956 critically analysed and considered for the purposes of fair labour practice as defined in terms of s 23(1) of the Constitution of the Republic of South Africa, Act 108 of 1996, together with an overview of the ILO Conventions and Foreign Law
    - 4.3.1 Jurisprudence Development of the law in testing fairness of dismissals by the Industrial Courts in relation to the definition of unfair labour practice as defined in terms of the Labour Relations Act 28 of 1956
    - 4.3.2 In terms of the Labour Relations Act 28 of 1956, who determines the dispute and must there be deference to the decision of the employer?



- 4.3.3 Approach consistent with the Conventions of the International Labour Organization (ILO) in terms of the Constitution and the Labour Relations Act
- 4.3.4 Foreign Law: The Canadian Perspective
- 4.4 The test and the approach consistent with the Labour Relations Act 66 of 1995 ( LRA) in determining the fairness of a dismissal
- 4.5. Conclusion

**Chapter 5** Clash of the Titans ! The Supreme Court of Appeal and the Constitutional Court Judgments on the test for fairness of dismissals based upon misconduct and according to whose perception is fairness measured?

- 5.1 Introduction
- 5.2 Deference to the Employer
- 5.3 Test for Fairness
- 5.4 Application of the Constitutional Court Judgment of Sidumo and Another v Rustenburg Platinum Mines Ltd and Others in relation to Fairness
- 5.5 Conclusion

**Chapter 6** Conclusion

**Bibliography**



## Chapter 1 : Introduction

At the outset it needs to be stated that the question as phrased within the heading of this thesis, refers to the test which is applicable in testing the fairness of a dismissal based upon misconduct, with further reference as to whether the courts must defer to the sanction imposed by the employer or may the court, commissioner or arbitrator express their own view in relation to the fairness of the dismissal. A historical analysis of approaches in determining the fairness of a dismissal, will reveal deep dissent between the various schools of thought regarding the applicable test or approach in determining the substantive fairness of a dismissal imposed by an employer for misconduct.

This paper will attempt to provide a critical overview of the approaches that have been contended in assessing fairness and how the fairness of a sanction imposed by the employer should be determined by the Commission for Conciliation Mediation and Arbitration ( herein after referred to as the CCMA ) commissioner and the courts. As shall be outlined within this paper, the debate pertaining to this question, has more dominantly been between the reasonable employer test ( 'defer to the employer' approach) and the approach termed the 'own opinion approach'.<sup>1</sup> In terms of the latter approach the commissioner/court has the discretion to express his/her own view based upon value judgments on the fairness of the dismissal.

However, in terms of the reasonable employer test ( 'defer to the employer' approach), the commissioner had to defer to the decision of the employer, unless the dismissal is one that no reasonable employer would impose, or is so excessive that it would shock one's sense of fairness, then the commissioner may interfere. This thesis shall therefore focus on the reasonable employer test, as associated by the South African courts with the deferential approach towards the sanction imposed by the employer.

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<sup>1</sup> *Engen Petroleum Ltd v CCMA & Others* [2007] 8 BLLR 707 ( LAC) at page 713, at paragraph [1]

There is no express provision within the old<sup>2</sup> and in the new<sup>3</sup> Labour Relations Act, which justified the application of the reasonable employer test ('defer to the employer' approach).<sup>4</sup> Despite the latter mentioned statement, together with the substantiation, as shall be illustrated within the course of this thesis, that the reasonable employer test ('defer to the employer' approach) is inconsistent with the Constitution and South Africa's International Law Obligation (ILO Convention on Termination of Employment), our courts had been applying the test or the approach. The high point being the Supreme Court of Appeal (herein after referred to as the SCA) in the case of *Rustenburg Platinum Mines Ltd vs CCMA*<sup>5</sup> impliedly condoning the reasonable employer test / 'defer to the employer' approach as being the correct approach and as consistent with the LRA.

It is therefore necessary to examine the reasonable employer test or the 'defer to the employer' approach, with Chapter 2 of the thesis, presenting a fully comprehensive discussion essentially attempting to understand the basis for the adoption of the test by our courts, its source, the justification and manner of its application by the various courts, under the old and the new LRA.

The approach known by some jurists as the own opinion approach, was adopted by the highest court at the time<sup>6</sup>, namely the Appellate Division (herein after referred to as the AD) which stated that when determining the fairness of a dismissal, under the Old LRA, a court makes its view as to what is fair in the circumstances and that this entails a passing of a moral judgment on a combinations of findings of fact and opinions.<sup>7</sup> Under Chapter 3, there is a discussion of the decisions of the Industrial Courts under the old LRA, which contributed to the development of the definition of unfair labour practice as amended and provided in terms of the old LRA.

Due to the disparity in conclusively deciding on the test in determining the fairness of a dismissal based upon misconduct, the question relating to the manner of assessing the fairness of a dismissal, reached the Appellate Division in *Media Workers Association of SA v*

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<sup>2</sup> Repealed Labour Relations Act 28 of 1956

<sup>3</sup> Labour Relations Act 66 of 1995

<sup>4</sup> *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 CC at paragraph [60] and as implied at paragraph [74]

<sup>5</sup> 2007 (1) SA 576 SCA at paragraph [40],[41],[42] and [46].

<sup>6</sup> *Media Workers Association of SA v Press Corporation of SA Ltd* 1992 (4) SA 791 (A) & Others

<sup>7</sup> See footnote 6 for citation, at page 798

*Press Corporation of SA Ltd*<sup>8</sup> (herein after referred to *Perskor*). The AD held, as indicated above, that the determination of an unfair labour practice, entailed the passing of a moral judgment on a combination of findings of facts and opinions. This definition and provision applied to unfair dismissal cases or disputes under the old LRA. In Chapter 3, there is further discussions relating to the rulings as emanating from the *Perskor* judgment, in addition to subsequent AD and SCA judgments, which applied the approach as was pronounced by the AD in *Perskor*.

Within Chapter 3, the thesis shall furthermore focus on the decisions of the Labour Appeal Court (herein after referred to as LAC) under the Old and new LRA, which shall furthermore illustrate the inconsistency of the LAC in applying the approach as was ruled by the AD and SCA under the old LRA. These contradictions in the approach ruled by the LAC<sup>9</sup>, as well as by the AD<sup>10</sup> subsequent to *Perskor*, indicated the disparity between our jurists, but more importantly, showed our courts endorsing an approach contrary to the long standing line of authority, ruling for the application of a value judgment approach.

Chapter 3 furthermore focuses on the powers of the Arbitrator and Industrial Court in terms of the old LRA, as well as the role and powers of the commissioner and the courts to decide on the fairness of a dismissal in terms of the new LRA. The latter mentioned issues require redress, especially in light of the adjudications by some of the courts<sup>11</sup> under the old LRA<sup>12</sup>, as

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<sup>8</sup> 1992 (4) SA 791 (A) at page 798 where the AD stated that " The position then is that the definition of an unfair labour practice entails a determination of the effects or possible effects of certain practices, and of the fairness of such effects. In my view a decision of the Court pursuant to these provisions is not a decision on a question of law in the strict sense of the term. It is the passing of a moral judgment on a combination of findings of fact and opinions."

<sup>9</sup>The reasonable employer test or the defer to the employer approach as implied by the LAC in *Scaw Metals Ltd v Vermeulen* ( 1993) 13 ILJ 672 (LAC)at page 675; *Coin Security Group ( Pty) Ltd v TGWU & Others* (1997) 10 BLLR 1261 (LAC) at page 1280; *Nampak Corrugated Wadeville v Khoza* (1999) 20 ILJ 578 (LAC) at paragraphs [33]-[35] and as dictated by Ngcobo, AJP in *County Fair Foods ( Pty) Ltd v CCMA & Others* (1999) 11 BLLR 1117 (LAC) paragraphs [28] – [30] versus the approach by the LAC which applied or supported the value judgment approach or refuted the reasonable employer test or the defer to the employer approach, like, *Metro Cash & Carry Ltd v Tshela* (1996) 17 ILJ 1126 (LAC) at page 1129, *Chemical Workers Industrial Union & Others v Algorax ( Pty) Ltd* (2003) 24 ILJ 1917 (LAC) at paragraph [69]; *Toyota South Africa Motors [Pty] LTD v Radebe & Others*[ 2000] 3 BLLR 243 (LAC), at paragraph [50]

<sup>10</sup> *Performing Arts Council of the Transvaal v PPWAWU & Others* 1994 (2) SA 204 (A); *NUMSA & Others v Henred Fruehauf Trailers ( Pty) Ltd* 1995 (4) SA 456 (A)

<sup>11</sup> the following judgments implied and/or expressly proposed the deferential approach : *Empangeni Transport (Pty) Ltd v Zulu* (1992) 13 ILJ 352 (LAC) at pages 356 - 357, *Coin Security Group ( Pty) Ltd v TGWU & Others* [1997] 10 BLLR 1261 (LAC) at page 1280, *Nampak Corrugated Wadeville v Khoza* (1999) 20 ILJ 578 (LAC) at paragraphs [33] –[35];

outlined in Chapter 2 of this thesis, that there should be deference towards the decision of the employer in the imposition of a sanction. It is furthermore necessary to give attention to this topic, as these decisions were contrary to the rulings of the Appellate Division and the Supreme Court of Appeal. The AD and SCA ultimately expressed the stance that the courts and the arbitrator must determine the fairness of the dismissal dispute imposed by the employer, thereby refuting the deferential approach.<sup>13</sup>

The Constitutional Court<sup>14</sup> has ruled that in order to give content to the definition of fair labour practice, as provided in terms of section 23(1) of the Constitution, one must take cognizance of past jurisprudence, when adding meaning and content to the right that "Everyone has the right to fair labour practice"<sup>15</sup>. Therefore past judgments on the interpretation of section 46(9) of the old LRA to the effect that the Industrial Court could determine the dispute, further served the basis for subsection 138(1) of the new LRA being interpreted to mean that the Commissioner could determine a dismissal dispute, without deference.<sup>16</sup>

With further reference to the language and inferences from subsections 188(1), 191(5)(a), 191(5)(b) read with 191(6) and 192(2) of the new LRA, it is implicit that the Commissioner and/or the Courts have powers to determine the dispute objectively and without deference. In addition, it is furthermore important to state that the Labour Relations Act 66 of 1995 is silent on the point of deferring to the employer in relation to the sanction imposed.<sup>17</sup> In other words, there is no express provision in the new LRA that a commissioner must show deference towards the sanction imposed by the employer. It is significant that consideration be given to the contents of Chapter 3 as described above, as it provides the dominant and ruling view pertaining to the test for the fairness of a dismissal and our law in relation to the theory that there should be deference by the arbitrator, courts and / or commissioner towards the sanction imposed by the employer.

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<sup>12</sup> section 46(9) of the Labour Relations Act 28 of 1956

<sup>13</sup> *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd* ('Perskor') 1992 (4) SA 791(A) at page 798, at paragraph [G], at page 801, paragraph [I - J] and at page 798 at paragraph G; *Betha v BTR SARMCOL, A division of BTR Dunlop Ltd* 1998 (3) SA 349 SCA at page 370, paragraph [A-B] and *Performing Arts Council v Paper Printing Wood & Allied Workers* 1994 (2) SA 204 AD at page 218, paragraph [E]

<sup>14</sup> *NEHAWU v UCT* 2003 (3) SA 1 CC at paragraph [34]

<sup>15</sup> section 23(1) of the Constitution of the Republic of South Africa, Act 108 of 1996

<sup>16</sup> *Engen Petroleum Ltd v CCMA & Others* [2007] 8 BLLR 707 (LAC) at paragraph [54]

<sup>17</sup> *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 CC, at paragraph [61]

Within Chapter 4, the question of how should the fairness of a dismissal be assessed, should the reasonable employer test (‘defer to the employer’ approach) be applied or can the Commissioner or court, pass its own moral and value judgment based upon the facts of the case. In addressing this question, reference shall be made to the Constitution<sup>18</sup>, the Statutes (old LRA and new LRA), International Law<sup>19</sup>, decisions of the Courts during the old LRA and new LRA, respectively, and the Code of Good Practice : Schedule 8 : Dismissal.

It is furthermore necessary to mention that the approach consistent with the Constitution and the Labour Relations Act 66 of 1995, shall be deduced through a discussion and application of the tenets as provided in terms of the South African Constitution, read with the Labour Relations Act 66 of 1995 and International Law. The content of Chapter 4 is discussed without taking consideration of the SCA<sup>20</sup> and Constitutional Court<sup>21</sup> judgments in relation hereto. The purpose is to determine and illustrate that despite opposing views and rulings, South African Labour Law was decisive that the court could make its own determination on the fairness of the dismissal based upon its own value and moral judgment taking into account the facts and opinions within the circumstances of the case. This interpretation of the law has been dominating the arena of this debate, even before the Constitutional Court confirmed the approach.

It had been believed that the reasonable employer test or the ‘defer to the employer’ approach had long been rejected as not being part of South African Labour law and that the latter mentioned was not consistent with the law. This emanated from the history of judgments as shall be presented within this thesis, and as had also been ruled by the LAC in *Toyota South Africa Motors [Pty] LTD v Radebe & Others*<sup>22</sup>, together with the decision of the Constitutional Court in *National Education Health and Allied Workers Union v UCT*<sup>23</sup>. Despite these rulings, the SCA in *Rustenburg Platinum Mines Ltd vs Commission for Conciliation, Mediation and*

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<sup>18</sup> Sections 23(1), 232 and 233 of The Constitution of the Republic of South Africa, Act 108 of 1996

<sup>19</sup> the International Labour Organization (ILO) Convention on Termination of Employment 158 of 1982 and Foreign Laws, see for example Canadian case law as cited in Chapter 4

<sup>20</sup> *Rustenburg Platinum Mines Ltd vs Commission for Conciliation, Mediation and Arbitration* 2007 (1) SA 576 (SCA)

<sup>21</sup> *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 CC

<sup>22</sup> [ 2000] 3 BLLR 243 (LAC) at page 237, at paragraph [50]

<sup>23</sup> 2003 (3) SA 1 CC at paragraph [33]

*Arbitration*<sup>24</sup>, ruled towards the application of the reasonable employer test or the 'defer to the employer' approach.

This decision of the SCA fortunately led to this question of the law relating to the test for fairness of dismissal and the role of the commissioner in determining fairness reaching the Constitutional Court.<sup>25</sup>

Therefore within Chapter 5, the arguments and principles relating to the deferential approach and the test for fairness as ruled by the SCA and the Constitutional Court, respectively, will be critically analyzed. This discussion will lead to Chapter 6, which will set out the approach or test which is consistent with the Constitution, as ruled by the Constitutional Court in relation to determining the fairness of a dismissal based upon misconduct and its ruling pertaining to the deferential approach.



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<sup>24</sup> 2007 (1) SA 576 (SCA)

<sup>25</sup> *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 CC

## Chapter 2

### Historical Development of the Reasonable Employer Test

#### 2.1 Introduction

When focusing on the test acquired for determining the substantive fairness of a dismissal for misconduct, it is necessary that we conduct a historical analysis of the reasonable employer test, as this test had been adopted by some South African courts in determining fairness of a dismissal in cases of misconduct. An overview of the test is important, as this test versus the 'own opinion' approach, which outlined testing fairness based upon the courts own moral judgment, has always created inconsistency amongst the South African courts.

Conducting a historical study of the reasonable employer test will enable us to analyze the underlying reasons for the adoption of the test and thereby develop a more constructive and substantive critique of the application of the test.

Despite there being no specific and explicit wording in either the old LRA<sup>26</sup> nor the new LRA<sup>27</sup> which justified the application of the reasonable employer test, as adopted in English Law, the South African jurisprudence still applied the test in determining the fairness of dismissals, for misconduct.

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<sup>26</sup> Labour Relations Act 28 of 1956; as stated by Zondo, JP in *Engen Petroleum Ltd v CCMA & Others* [2007] 8 BLLR 707 (LAC) at paragraph [16] with reference to the Labour Relations Act 28 of 1956; Although Engen Petroleum Ltd was bound by the decision of the SCA in *Rustenburg Platinum Mines Ltd v CCMA* 2007 91 SA 576 SCA, the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 CC also implied this when it approvingly referred to the *Perskor* judgment's test for fairness of a dismissal, as ruled in terms of the Labour Relations Act 28 of 1956, at paragraph [63]

<sup>27</sup> Labour Relations Act 66 of 1995; with reference to the Labour Relations Act 66 of 1995, the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 CC, also held that there was nothing in the constitutional and statutory scheme, which require that when determining the fairness of a dismissal, the commissioner must approach it from the perspective of the employer. Hereafter it impliedly held that the deferential approach is not found in the prescripts of the LRA, at paragraph [61]; when under the header of 'Fairness of the dismissal' and discussing the reasonable employer test, the Constitutional Court held that neither the Constitution nor the LRA affords any preferential status to the employers view on the fairness of the dismissal. Thereby implying that the reasonable employer test is also not prescribed in the Labour Relations Act 66 of 1995



The Reasonable Employer Test or the "Defer to the Employer" approach, as was applied in South Africa, is best described by, Judge Zondo as the belief that,

"the commissioner has no power to decide this question according to his own opinion or judgment but he is required to 'defer to the employer' and hold the dismissal as a sanction fair, unless it is so unfair that it makes him whistle or unless it is so excessive as to shock one's sense of fairness or it is so unfair that no reasonable employer would have regarded it as a fair sanction, in which case the commissioner can then interfere with the employer's decision to impose dismissal as a sanction and hold the dismissal to be unfair."<sup>28</sup>

This test and approach as described above, has been developed over time based upon various court rulings expanding the original reasonable employer test originating and adopted by English Law. The reasonable employer test as shall be discussed within this thesis, embodies the deferential approach, as described above and is part of the reasonable employer test, as had been developed and applied in South Africa. Hence for purposes of this thesis, this test shall be referred to as the reasonable employer test or 'defer to the employer' approach.

In terms of the reasonable employer test ('defer to the employer' approach), the commissioner had to defer to the decision of the employer, unless the dismissal is one that no reasonable employer would impose, or is so excessive that it would shock one's sense of fairness, then the commissioner may interfere. Hence, according to the reasonable employer test ('defer to the employer' approach) there must be deference by the commissioner, arbitrator or the court, towards the sanction of dismissal imposed by the employer, unless the dismissal is unfair. In this case the fairness of the sanction is tested by asking if no reasonable employer would impose dismissal, then it is unfair. In this event, it is only when the dismissal is held unfair, may the commissioner, arbitrator or the court interfere with the sanction imposed by the employer.

This approach is furthermore based upon the rationale that different reasonable employers may react differently to the same misconduct of an employee, however they must all fall within a range of possible reasonable responses.<sup>29</sup> Hence, if one employer would impose a sanction of

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<sup>28</sup> *Engen Petroleum Ltd v CCMA & Others* [2007] 8 BLLR 707 (LAC) at paragraph [1];

<sup>29</sup> *County Fair Foods (Pty) Ltd v CCMA & Others* [1999] 11 BLLR 1117 (LAC) at paragraph's [29] & [34];

dismissal, and another would not, but if both are still reasonable then in such case, a commissioner cannot interfere, with the sanction of dismissal imposed by the employer.<sup>30</sup>

This chapter will analyze the development of the reasonable employer test from initial cases that applied it. It must be borne in mind that over the time that the South African courts had regurgitated the common principle associated with the reasonable employer test, there had been qualifications introduced on the original reasonable employer test as was set out in *British Leyland UK Ltd v Swift*<sup>31</sup>. The latter being an English Court which applied the reasonable employer test based upon the provisions of English Statute.

## 2.2 Source of the Reasonable Employer Test

The source of the reasonable employer test was English law. In terms of subsection 57(3) of the Employment Protection (Consolidation) Act of 1978 :

" [T]he determination of the question whether the dismissal was fair or unfair, having regard to the reasons shown by the employer, shall depend on whether in the circumstances ( including size and administrative resources of the employer's undertaking) the employer acted reasonable or unreasonably in treating it as a sufficient reason for dismissing the employee; and that question shall be determined in accordance with equity and the substantial merits of the case." <sup>32</sup>

In *British Leyland UK Ltd v Swift*<sup>33</sup>, the English court provided the following test, in assessing the fairness of a dismissal in terms of subsection 57(3):

"The correct test is : Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view : another quite reasonably take a different view.... Both

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<sup>30</sup> As held in *Nampak Corrugated Wadeville v Khoza* [1999] 2 BLLR 108 (LAC) at paragraph [33] & [34] & *County Fair Foods ( Pty) Ltd*, supra at paragraph's [29] & [34];

<sup>31</sup> [1981] IRLR 91 (CA)

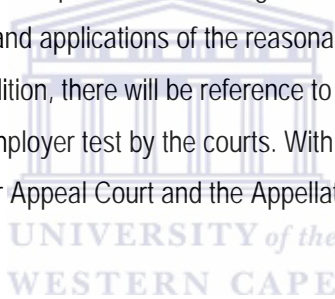
<sup>32</sup> As also cited in *Engen Petroleum Ltd*, supra at paragraph [5] and as provided in terms of Section 98(4) of the Employment Rights Act of 1996 of the United Kingdom ;

<sup>33</sup> [1981] IRLR 91 (CA)

views may be quite reasonable. 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."<sup>34</sup>

Based upon the judgment of Lord Denning above, it means that if the decision of an employer to dismiss is reasonable, whilst another employer's decision not to dismiss, may also be reasonable, then the decision to dismiss must prevail. The application of such a rationale is explicitly bias, in that an employer's decision, may always prevail, thereby impairing the fairness of the test.

As will be illustrated, this test had been adopted by the South African courts juxtaposed with the other predominant test of determining the fairness of a dismissal. This Chapter will look at the application of the definition of unfair labour practice as defined in terms of the Old LRA<sup>35</sup>, which was applied in determining the fairness of dismissals as a sanction for misconduct. In relation to the test that the courts adopted in determining this fairness, there will be discussions on the historical developments and applications of the reasonable employer test, during the Old LRA and the new LRA<sup>36</sup>. In addition, there will be reference to the reasoning behind the application of the reasonable employer test by the courts. With a rational look at the rulings of the Industrial Courts, the Labour Appeal Court and the Appellate Division, which applied the reasonable employer test.



## 2.3 Early considerations of determining Fairness based upon the Reasonable Employer Test in South Africa

### 2.3.1 Statutory Framework of Determining Dismissal under Old LRA

Despite there being a blatant absence of a statutory provision similar to section 57(3) of the English Statute in the Old LRA<sup>37</sup>, the Industrial Court applied the reasonable employer test, as applied in English Law, thereby introducing the reasonable employer test into South Africa.<sup>38</sup>

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<sup>34</sup> at paragraph [11] in *British Leyland UK Ltd, supra*; and also cited in *Engen Petroleum Ltd, supra*, at paragraph [6].

<sup>35</sup> 28 of 1956

<sup>36</sup> 66 of 1995

<sup>37</sup> Labour Relations Act 28 of 1956

<sup>38</sup> *Engen Petroleum Ltd, supra*, at paragraph [3]

When referring to the past considerations of the reasonable employer test ( 'defer to the employer' approach), it is important to analyze it within the respective statutory context, in order to critically analyze the application and interpretation of our law. During the 1980's in South Africa, the Industrial Court applied the definition of 'unfair labour practice' as contained within the old LRA, when determining whether a dismissal was unfair. In other words, a finding by the Industrial Court that a dismissal constituted an unfair labour practice, meant that the dismissal was unfair.

It is important when examining the application of the reasonable employer test by the Industrial Court, that one therefore studies it within the background of the definition of ' unfair labour practice' as was defined within the Old LRA. It is important to mention, that the definition of ' unfair labour practice' in terms of the Old LRA underwent two amendments, in 1988 and 1991, respectively. The definition of ' unfair labour practice' prior to September 1988, was defined as follows :

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

- (i) any employee or class of employees is or may be unfairly affected or that his or their employment opportunities or work security is or may be prejudiced or jeopardized thereby;
- (ii) the business of ay employer or class of employers is or may be unfairly affected or disrupted thereby;
- (iii) labour unrest is or may be created or promoted thereby;
- (iv) the labour relationship between the employer and employee is or may be detrimentally affected thereby; or

(b) any other labour practice or any other change in any labour practice which has or may have an effect which is similar or related to any effect mentioned in paragraph."

With effect from September 1988, the above mentioned definition of 'unfair labour practice' was replaced. The following is the relevant extract of the definition, subsequent to the amendments. It reads as follows :

" 'unfair labour practice' means any act or omission which in an unfair manner infringes or impairs the Labour relations between employer and employee and shall include the following: (a) The dismissal, by reason of any disciplinary action against one or more employees, without a valid and fair reason and not in compliance with a fair procedure....."

As mentioned above, the definition of 'unfair labour practice', was further amended by the Labour Relations Amendment Act 9 of 1991, which defined unfair labour practice as follows :

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

- (i) any employees or class of employees is or may be unfairly affected or that his or their employment opportunity or work security is or may be prejudiced or jeopardized thereby;
- (ii) the business of any employer or class of employers is or may be unfairly affected or disrupted thereby;
- (iii) labour unrest is or may be created or promoted thereby;
- (iv) the labour relationship between the employer and employee is or may be detrimentally affected thereby. "

### 2.3.2 Reasoning behind the Application of the Reasonable Employer Test

As can be noted, there is no express provision within the definition of 'unfair labour practice' in terms of the Old LRA, which justifies the application of the reasonable employer test by the Industrial Court. This leads to the question, as to why was the English test adopted in South Africa during the 1980's in assessing the fairness of a dismissal. The basis for the adoption of the approach, appears to be because it is primarily the responsibility and discretion of the employer to set the standard or code of conduct to be conformed with within the work place, and to impose the sanction if the code has been transgressed. This stance was re-affirmed in the case of *National Union of Mineworkers & Another v Kloof Gold Mining Co Ltd*<sup>39</sup>, where the Industrial Court held that in examining the findings of the disciplinary committee, it had to bear in mind that :

" The obligation to hold an enquiry and mete out discipline rests upon the employer but he must act fairly with due consideration of the employees rights. The employer is in effect primarily responsible for the administration of what might be termed industrial justice. Where the employer has held a fair and honest enquiry and come to a decision which is fair and reasonable, it is a factor which this court must take into account in deciding whether to grant or refuse an application to reverse the unilateral action taken by an employer. In scrutinizing the actions of the

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<sup>39</sup> (1986) 7 ILJ 375 (IC)

employer it must be borne in mind that generally the decision to dismiss or discipline an employee does not rest in the first instance with this court. ”<sup>40</sup>

### 2.3.3 Application and Development of the Reasonable Employer Test by the Industrial Courts

It appears that one of the first cases where the Industrial Court applied the reasonable employer test was in the case of *Building Construction and Allied Workers Union of SA & Another v West Rand Brick Works( Pty) Ltd.*<sup>41</sup> The Industrial Court applied the ‘test of unreasonableness’ as it termed it. In applying this test in determining the fairness and reasonableness of the dismissal, the Industrial Court held, that one had to address the question, as to “ ...whether in dismissing the second applicant, the respondent acted reasonably.” By applying the latter mentioned test to the specific actions of the employer in the case, the court reached the conclusion that the dismissal of the employee was not unfair.<sup>42</sup>

A great amount of criticism has been leveled against the biasness of the reasonable employer test, and its application by the Industrial Court, as shall be illustrated and argued in the Chapters to follow within this thesis. However, intriguingly even though the Industrial Court in *NUM v Kloof Gold Mining Co Ltd*, had affirmed the application of the reasonable employer test<sup>43</sup>, it found that the employer had acted unfairly in dismissing the employee. In determining the fairness of the decision of the employer to dismiss the employee, the Industrial Court, quite correctly noted that all the charges against the employee had not been fully disclosed, in allowing him an opportunity to defend all the allegations against him. Furthermore, the Industrial Court took a very fair stance, when it scrutinized the failure of the employer to allow the employee to have the assistance of a representative at the disciplinary enquiry. In this respect the Court held:

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<sup>40</sup> *National Union of Mineworkers & Another v Kloof Gold Mining Co Ltd (IC)* , *supra*, at paragraph [19]; This approach was cited from the case of *National Union of Mineworkers & Another v Western Areas Gold Mining Co Ltd* (1985) 6 ILJ 380 (IC) at page 386 B-F

<sup>41</sup> (1984) 5 ILJ 69 ( IC) at page 78. This first occurred around 1984. See also comments of Zondo, JP in *Engen Petroleum Ltd v CCMA & Others, supra*, at paragraph [17].

<sup>42</sup> *Building Construction and Allied Workers Union of SA & Another (IC)*, *supra*, at page 79

<sup>43</sup> *NUM v Kloof Gold Mining Co Ltd, supra*, at paragraph [19]D -E

"The need for a representative ( but not a legal representative such as an advocate or an attorney ) to assist an accused at a disciplinary enquiry would appear to be an elementary requirement of justice and more so at the respondent's mine where the vast majority of workers are said to be illiterate or uneducated."<sup>44</sup>

The Industrial Court further reached its conclusion that the dismissal of the employee was unfair because the employer had inconsistently and unequally applied its disciplinary code, in that it had dismissed one employee for the transgression of unsatisfactory behavior but had not imposed an equal punishment on another employee who had committed a similar form of transgression.<sup>45</sup> The Industrial Court furthermore held the view based upon the evidence presented that the manager, who confirmed the dismissal, had only taken into account factors that counted against the employee, whilst there were many factors that favored the employee. On the basis of the above mentioned the Industrial Court concluded and held :

" When one takes into consideration the above basket of factors, one is led to the irresistible conclusion that the respondent's decision in this case ' went beyond the range of response which a reasonable employer may have made having regard to the circumstances of the case' and consequently the employee's dismissal was unfair."<sup>46</sup>

It is interesting to note that although the Industrial Court in *NUM v Kloof Gold Mining Co Ltd*, applied the reasonable employer test, it affirmed that the principles of fairness had to be applied, when determining the fairness of the dismissal. It held that fairness entailed,

" ...nothing other than the duty to observe the principles of natural justice expressed in more fundamental terms. Natural Justice has always been recognized to be no more than the ' fundamental principles of fairness' required by law. And so, subliminally, the duty to act fairly has always been a part of our law."<sup>47</sup>

Ironically, in elaborating further on the concept of fairness, the Industrial Court, defined equity, as a word that denotes equality and impartial justice, between two persons whose rights or claims are in conflict.<sup>48</sup> Whilst, in contradistinction it generally applied a test for fairness, which assessed fairness from one perspective.

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<sup>44</sup> *NUM v Kloof Gold Mining Co Ltd, supra*, at paragraph [21.1(d)]

<sup>45</sup> at paragraph [21.4 (b) H-I]

<sup>46</sup> at paragraph [21.4(f)]

<sup>47</sup> at paragraph [25]

<sup>48</sup> at paragraph [ 24];

The case of *SA Chemical Workers Union & Others v CE Industrial ( Pty) Ltd t/a Panvet*<sup>49</sup>, was another case where the Industrial Court applied the reasonable employer test in determining the fairness of the dismissal, but held that the dismissal of the employees was unfair. In applying the latter mentioned test, it adopted the approach enunciated by Anderman, The Law of Unfair Dismissal, who stated that the question was not whether a lesser penalty would be appropriate or whether a reasonable employer might have imposed a lesser penalty, but whether in the circumstances 'it was within the range of reasonable responses for the employer to dismiss the employee'.<sup>50</sup> In further amplification of the test, the Industrial Court recognized that one must look at both the reason and the dismissal itself, when determining the fairness of the dismissal. The Industrial Court with approval cited Anderman, The Law of Unfair Dismissal, who commented :

" Thus even where an employer has contractual authority to order an employee to do a particular kind of work at a particular place or at a particular time, an employer's decision to dismiss may be unreasonable in the circumstances....."<sup>51</sup>

The Industrial Court in *SA Chemical Workers Union & Others*, further elaborated this approach by stating that even though a ground for dismissal may be lawful, the dismissal may be unreasonable and unfair. This stance had further been amplified, when the Court stated that :

" Fairness however is of a subjective nature in regard to which reason is not necessarily applicable. Fairness must take into account of human fallibility and of the fact that reason is seldom the sole guide of human behaviour." <sup>52</sup>

The Court in *SA Chemical Workers Union & Others*, hence indicated the distinctive versions of the test that existed within the domain of the reasonable employer approach. It is furthermore clearly apparent, from the latter mentioned case that the provisions of subsection 57(3) of the

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<sup>49</sup> (1988) 9 ILJ 639 (IC)

<sup>50</sup> *SA Chemical Workers Union & Others v CE Industrial ( Pty) Ltd t/a Panvet* (1988) 9 ILJ 639 (IC) at page 648

<sup>51</sup> *SA Chemical Workers Union & Others v CE Industrial ( Pty) Ltd t/a Panvet* (1988) 9 ILJ 639 (IC) at page 649

<sup>52</sup> *SA Chemical Workers Union & Others v CE Industrial ( Pty) Ltd t/a Panvet* (1988) 9 ILJ 639 (IC) at page 649



English Statute<sup>53</sup>, was applied by the Industrial Courts at the time in determining the fairness of dismissals as provided in terms of the Old LRA.<sup>54</sup>

The above mentioned case's clearly illustrates the development of the reasonable employer test by the Industrial Courts. What is furthermore interesting to note is the viewpoints expressed on the definition of fairness.<sup>55</sup> When applying the reasonable employer test, the Courts scrutinized the fairness of the dismissal based upon the principles of natural justice, equity and with due consideration of recognizing human fallibility and not always reason. Hence it being ruled that the ground for dismissal may be lawful, however the dismissal can be unfair. It is this ruling, which was further re-affirmed by the Industrial Court in *Food & Allied Workers Union & Others v CG Smith Sugar Ltd, Noodsberg*, when De Kock M, held that :  
" The dismissal of an employee comprises two acts, namely a decision to dismiss and the carrying into effect of that decision by the act of dismissal. It would be fruitless to draw a distinction between the two."<sup>56</sup>

In other words when adjudicating the fairness of a dismissal, one must look at both the fairness of the reasoning for the dismissal and the dismissal itself. Like said by the Industrial Court in *Food & Allied Workers Union & Others v CG Smith Sugar Ltd, Noodsberg*, that one must not look at the dismissal to determine whether it was fair or not, but one has to consider both the decision and the reason for that decision.<sup>57</sup>

In illustrating further developments of the reasonable employer test, it is furthermore essential to refer to the stance held by the Industrial Court in *Food & Allied Workers Union & Others v CG Smith Sugar Ltd, Noodsberg*, in relation to the approach to be adopted when determining the fairness of the reasons for the dismissal. The Court held that " the employer should at the time of the dismissal have had reasonable grounds for believing that the offence had been committed."<sup>58</sup>

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<sup>53</sup> Employment Protection ( Consolidation) Act of 1978.

<sup>54</sup> *SA Chemical Workers Union & Others v CE Industrial ( Pty) Ltd t/a Panvet* (1988) 9 ILJ 639 (IC) at page 648

<sup>55</sup> *NUM v Kloof Gold Mining Co Ltd, supra*, paragraph 25 and *SA Chemical Workers Union & Others, supra*, page 649, paragraph F-G;

<sup>56</sup> ( 1989) 10 ILJ 907 IC at page 918

<sup>57</sup> *Food & Allied Workers Union & Others v CG Smith Sugar Ltd, Noodsberg* ( 1989) 10 ILJ 907 (IC) at page 919

<sup>58</sup> *Food & Allied Workers Union & Others v CG Smith Sugar Ltd, Noodsberg* ( 1989) 10 ILJ 907 (IC) at page 919; Cited in the case of *Lefu & Others v Western Areas Gold Mining Co Ltd* ( 1985) 6 ILJ 307 (IC);

The overall reasonable employer test adopted by the Industrial Court in *Food & Allied Workers Union & Others v CG Smith Sugar Ltd, Noodsberg*, therefore entailed asking " whether a fair employer would have been satisfied that the person concerned committed the offence charged and that in dismissal cases dismissal was a fair sanction." <sup>59</sup>

It is apparent from the above that the Industrial Courts that applied the reasonable employer test, adopted the test from English Law, however amplified thereupon as illustrated above, by stressing that the decision of the employer to dismiss must be adjudicated using the principles of natural justice, which encompasses the fundamental concept of fairness. This approach further tends to refute the strong criticism against the application of the reasonable employer test, which is said to flout in the face of equity between the employer and the employee.

It must be mentioned that even though the reasonable employer test was adopted by the above mentioned Industrial Courts and others, there was a rising trend of judgments and authority dissenting and doubting the applicability of the reasonable employer test. This was expressly indicated by John, AM in *SA Chemical Workers Union & Others v CE Industrial ( Pty) Ltd t/a Panvet*,<sup>60</sup> and by the Industrial Court in *Twala v ABC Shoe Store*<sup>61</sup>, where the Court held that fairness entails observing the principles of natural justice. Having said the latter, it appears that Fabricius, AM, reluctantly applied the reasonable employer test, which is implied from the following averment made by him, and which further illustrated the questioning of the correctness of applying the reasonable employer test:

" ....I have serious doubts whether the ' reasonable employer' test in this context is the correct one in our law of labour relations, see *National Union of Mineworkers v East Rand Gold & Uranium Co Ltd* (1986) 7 ILJ 739 (IC), but under the circumstances I need not decide that now." <sup>62</sup>

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<sup>59</sup> *Food & Allied Workers Union & Others v CG Smith Sugar Ltd, Noodsberg*, (IC) *supra*, at page 922

<sup>60</sup> *supra*, at page 649

<sup>61</sup> (1987) 8 ILJ 714 (IC), at page 717

<sup>62</sup> *Twala v ABC Shoe Store, supra*, at page 717

### 2.3.4 The Application of the Reasonable Employer Test by the Labour Appeal Court and the Appellate Division under the old LRA

As will be illustrated below, under the Old LRA, the Labour Appeal Courts (LAC) and the Appellate Division (AD) applied the reasonable employer test in determining the fairness of a dismissal. It is crucial to mention, that the application of the reasonable employer test, was persistent, despite the decision of the Appellate Division in *Media Workers Association of SA & Others v Press Corporation of SA Ltd*<sup>63</sup> ( hereinafter referred to as the 'Perskor case').

The AD in *Perskor*, held that the approach to be adopted in determining the fairness of dismissal, entailed the passing of a moral judgment in the following terms:

" The position then is that the definition of an unfair labour practice entails a determination of the effects or possible effects of certain practices, and of the fairness of such effects. In my view a decision of the Court pursuant to these provisions is not a decision on a question of law in the strict sense of the term. It is the passing of a moral judgment on a combination of findings of fact and opinions." <sup>64</sup>

The purpose of making reference to the Appellate Division judgments of the "*Perskor*" case above, as well as the case of *National Union of Metalworkers of SA v Vetsak Co-Operative Ltd*<sup>65</sup> (herein after referred to as 'Vetsak' ) below , is to also show as shall be reflected, that although the AD had ruled that fairness is determined based upon moral precepts and value judgments, with fairness constituting an equitable balance between the interests of the employee and employer, the LAC and the AD, respectively continued to apply the reasonable employer test.

Impliedly through the following statement of describing fairness, the Appellate Division in *Vetsak*, adopted a different approach to the reasonable employer test, in determining the fairness of a dismissal, it stated:

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<sup>63</sup> ( 1992) 13 ILJ 1391 ( A)

<sup>64</sup> *Perskor* , *supra*, at Page 1400

<sup>65</sup> 1996 (4) SA 577 AD

" 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.....In my view, it would be unwise and undesirable to lay down, or attempt to lay down any universally applicable test for deciding what is fair." <sup>66</sup>

It was further implied in *Perskor*, when as per Grosskopf JA, the AD held that the power to determine whether certain facts constitute an unfair labour practice is not discretionary. The AD continued by stating : " Such a determination is a judgment made by a Court *in light of all relevant considerations. It does not involve a choice between permissible alternatives.*"<sup>67</sup> ( own emphasis) The latter could be implied towards and against the approach adopted within the reasonable employer test, of determining the fairness of a dismissal, by asking whether it fell within the range of responses of a reasonable employer.

Despite the decisions of the Appellate Division in '*Perskor*' and '*Vetsak*', as aforementioned, the Labour Appeal Court<sup>68</sup> and the Appellate Division<sup>69</sup> continued to align itself with the principles associated with the reasonable employer test.

This stance of the Labour Appeal Court was evident in the dictum of Goldstein JA, in the case of *Scaw Metals Ltd v Vermeulen*<sup>70</sup>, where he held:

" Scaw is entitled qua employer to determine the standard of conduct it demands from its employees, and the court can only intervene if that standard results in unfairness in a specific situation. Given the seriousness of Vermeulen's misdemeanour I cannot find that Scaw's dismissal of him was unfair....In my view, it is clear that Scaw regarded Vermeulen's conduct as quite unacceptable, and, as I have held, it was entitled to do so. It follows that given Scaw's view of Vermeulen's conduct in fact the relationship between them had become seriously damaged or intolerable.

A further consideration, stressed by Scaw's counsel, weighs with me. We live in a society wracked by violence. Where an employer seeks to combat that evil, even by harsh measures, this court ought not to be astute to find unfairness."

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<sup>66</sup> *Vetsak, supra*, at page 589

<sup>67</sup> *Perskor, supra*, at page 800

<sup>68</sup> *Scaw Metals Ltd v Vermeulen* (1993) 13 ILJ 672 (LAC) at page 675; *Metro Cash & Carry Ltd v Tshela* (1996) 17 ILJ 1126 (LAC) at page 1133

<sup>69</sup> *NUMSA & Others v Henred Fruehauf Trailers (Pty) Ltd* 1995 (4) SA 456 (A) at paragraphs [31]-[32]

<sup>70</sup> (1993) 13 ILJ 672 (LAC) at 675.

The above mentioned judgment of the Labour Appeal Court, had subsequently led Prof. P.A.K le Roux [1993:13] <sup>71</sup> to state:

“ It is submitted that it is time that the members of the courts give explicit recognition to this undeniable fact and that, in those difficult ‘value judgment areas’, it gives managers leeway in making decisions. It should be recognized that in certain circumstances options as to a suitable sanction to be imposed may differ. If this is the case, the court should be reluctant to replace the employer’s value judgment with that of its own, simply because it does not agree with the decision. ....It is therefore interesting to note that in recent decisions both the Industrial Court and the LAC (*sic* Labour Appeal Court) have apparently been prepared to adopt this approach.”

The principle as reflected in the English case of *British Leyland UK Ltd v Swift*, relating to the band of reasonableness and the differing reasonable responses of employers, is apparent in the approaches suggested by some authors. It was further held in *British Leyland UK Ltd, supra*, that if it was quite reasonable to dismiss the employee, even though another employer might think differently then the dismissal must be upheld. For illustrating the similarities, it is essential to quote Lord Denning in *British Leyland UK Ltd*, where he states:

“ It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view : another quite reasonably take a different view.... Both views may be quite reasonable. 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.”<sup>72</sup>

The stance, as commonly associated with the reasonable employer test, was furthermore during this period reiterated by Le Roux and Van Niekerk [ 1994: 118] <sup>73</sup>, where the authors stated:

“Nevertheless, it is suggested that the courts and the arbitrators should incline less towards intervention when assessing the appropriateness of the disciplinary sanction imposed. In many cases, the arbitrator or members of the court may have good grounds for their opinion that the disciplinary sanction imposed was unfair and therefore impose their own view in this regard on the parties. But there will be a minority of cases where, in all honesty, they

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<sup>71</sup> Halton Cheadle, PAK Le Roux, Clive Thompson and Andre Van Niekerk. *Current Labour Law*. Juta & Co Ltd. 1993: at page13.

<sup>72</sup> *British Leyland UK Ltd, supra*, at page 93; also cited in *Engen Petroleum Ltd v CCMA & Others* [2007] 8 BLLR 707 (LAC) at page 715.

<sup>73</sup> PAK Le Roux and Andre Van Niekerk. *The South African Law of Unfair Dismissal*. Juta & Co Ltd.1994: at page 118

will realize that the matter is not that clear cut and that the manager's decision may be justified even though the arbitrator or member does not necessarily agree with it. In these circumstances, it is submitted, they should not intervene, provided that the manager's decision is well reasoned and not the result of improper motivation. "

As the applicability of the Labour Relations Act 28 of 1956 ( as amended) was coming to a close, the Labour Appeal Court, once again applied a test which typifies the reasonable employer test, when in the case of *Metro Cash & Carry Ltd v Tshela*<sup>74</sup>, the Court held:

" In our view, an employer is entitled to introduce rules to protect its commercial integrity and to expect compliance therewith. It is further entitled, in appropriate cases, to treat disregard or non-compliance with such rules with severity. This is such a case. It is not unfair for the employer, as happened in this case, to introduce rules for the protection of its commercial integrity, to expect strict compliance with such rules and to exact severe penalties such as dismissal for failure to comply therewith. "

In the case of *NUMSA & Others v Henred Fruehauf Trailers ( Pty) Ltd*<sup>75</sup>, the Appellate Division, in terms of the Labour Relations Act 28 of 1956, equated fairness with reasonableness, by stating the following:

" It seems to be clear that the respondent had indeed decided to abide by its previous decision to dismiss the employees but it does not follow that the respondent acted unfairly in not re-employing or re-instating them. The question of unfairness would arise only if the facts established that the adherence to its decision was irrational or was not based on reasonable grounds...The respondent might perhaps have adopted a more flexible stance. When the dismissed employees tendered their services on 31 August and thereafter the respondent's workforce was still considerably depleted. It had engaged only a handful of workers to replace those who had been dismissed. However, the test in these circumstances is not whether the respondent chose the better option but whether the choice it made was irrational or unreasonable. Given the facts mentioned earlier, the respondent's approach to the matter was both rational and reasonable."<sup>76</sup>

It is abundantly clear that the Appellate Division applied the reasonable employer approach when assessing the fairness of the employer's decision not to re-engage the dismissed employees. The dichotomy of the Appellate Division judgments, in not being consistent with

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<sup>74</sup> ( 1996) 17 ILJ 1126 (LAC) at page 1133;

<sup>75</sup> 1995 (4) SA 456 (A) ;

<sup>76</sup> at paragraphs [31]-[32];

the application of a uniform test in determining fairness in dismissals, was further evident from the ruling of Goldstone JA in *Performing Arts Council of the Transvaal v PPWAWU & Others*<sup>77</sup>:

" In considering the issues in this case I have attempted to *eschew an armchair approach*. .....I am of the opinion, however, that in requiring that PACT should have given a fair ultimatum to the employees, and in finding that it failed to do so, I have not judged it unfairly. *Any reasonable employer would and should* have taken into consideration the factors to which I have made reference and in consequence have acted in the manner suggested.

It follows, in my opinion, that the industrial court and the Court a quo correctly decided that in dismissing the employees, PACT committed an unfair labour practice." ( own emphasis)

Even during the transitional provisions,<sup>78</sup> contained under the new Labour Relations Act 66 of 1995, the new Labour Appeal Court ( established in terms of section 167(1) of the LRA 66 of 1995) which was mandated to hear appeals against the judgments of the Industrial Court under the old LRA after the new LRA came into operation on the 11<sup>th</sup> November 1996<sup>79</sup>, applied the reasonable employer test.

An illustration hereof was the case of *Coin Security Group ( Pty) Ltd v TGWU & Others*<sup>80</sup>, where Kroon AJA ( with Myburgh JP and Froneman DJP concurring) held:

" What of the dismissal of the fifth respondent? It is so that it is a principle of our labour law that an employer is entitled to set the standard of conduct it requires of its employees and to prescribe the sanction to be meted out if that standard is not met and *this Court will only interfere in the case of unreasonableness on the part of the employer.*" ( own emphasis)

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<sup>77</sup> 1994 (2) SA 204 (A) at page 217;

<sup>78</sup> Item 22 (3) of Schedule 7 of the new LRA 66 of 1995: "Any pending appeal before the Labour Appeal Court established by section 17A of the Labour Relations Act must be dealt with by the Labour Appeal Court as if the labour relations laws had not been repealed." And in terms of Item 22 (5) of Schedule 7 of the new LRA 66 of 1995 : " Any appeal from a decision of the industrial court.....must be made to the Labour Appeal Court established by section 167 of this Act, and that the Labour Appeal Court must deal with the appeal as if the labour relations laws had not been repealed."

<sup>79</sup> Preamble to the Labour Relations Act 66 of 1995 ( new LRA) and in terms of item 22(5) of Schedule 7 of the Labour Relations Act 66 of 1995;

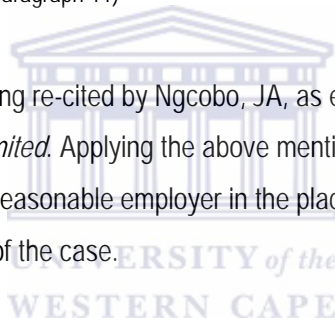
<sup>80</sup> [1997] 10 BLLR 1261 (LAC) at page 1280.

This stance of the Labour Appeal Court was furthermore evident in the judgment of Ngcobo JA ( with Myburgh JP and Froneman DJP concurring) in *Nampak Corrugated Wadeville v Khoza*<sup>81</sup> where it was held that

" The determination of an appropriate sanction is a matter which is largely within the discretion of the employer. However, this discretion must be exercised fairly. A court should, therefore, not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether the court would have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable. In judging the reasonableness of the sanction imposed, courts must remember that:

' There 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. The other would quite reasonably keep him on. Both views may be quite reasonable. 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.' ( *British Leyland UK Limited v Swift* [ 1981] IRLR 91 at 93 paragraph 11) "

The latter mentioned extract being re-cited by Ngcobo, JA, as emanating from Lord Denning's dictum in *British Leyland UK Limited*. Applying the above mentioned approach, the Labour Appeal Court held that many a reasonable employer in the place of *Nampak* would agree with dismissal in the circumstances of the case.



According to Ngcobo, JA in *Nampak Corrugated Wadeville v Khoza*, the correct test to be applied when determining the fairness of a dismissal, was that as ruled by Lord Denning MR in *British Leyland UK Ltd v Swift*<sup>82</sup>, which is:

" ' Was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might have reasonably dismissed him, then the dismissal was fair.'

Applying the above test, I cannot hold that it was not reasonable for Nampak to dismiss Khoza." <sup>83</sup>

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<sup>81</sup> (1999) 20 ILJ 578 ( LAC) at paragraphs [33] –[35]

<sup>82</sup> *British Leyland UK Ltd, supra*, at page 93

<sup>83</sup> *Nampak Corrugated Wadeville v Khoza, supra*, at paragraph [34]



It is eminently clear from the above, despite some judgments of the Appellate Division under the old LRA and judgments of the Industrial Court which applied a different test, as opposed to the reasonable employer test, as shall be indicated in the course of this thesis, that these distinctive approaches of our Courts has lead to a major uncertainty in our law.

By the time of the repeal of the old LRA, the reasonable employer test was being regularly applied. As indicated above, it was applied by the LAC, acting in terms of its jurisdiction to hear the outstanding appeals from the Industrial Court, for instance in *Nampak Corrugated (Wadeville) v Khoza*<sup>84</sup>.

#### 2.4 Application of the Reasonable Employer Test under the Labour Relations Act 66 of 1995

In the case of *County Fair Foods (Pty) Ltd v CCMA & Others*<sup>85</sup>, which was the first judgment under the new Labour Relations Act 66 of 1995 to apply the reasonable employer test, Ngcobo AJP reaffirmed the dictum, as applied in the *Nampak Corrugated Wadeville* supra. In addition, according to the SCA<sup>86</sup>, the Labour Appeal Court, emphasized,

".. that commissioners should use their powers to intervene with 'caution', and ..that they must afford the sanction imposed by the employer a 'measure of deference'."<sup>87</sup>

The basis of this stance, is that the discretion to impose the appropriate sanction primarily lies with the employer. The following extract from the judgment of Ngcobo, AJP elaborates the basis of the approach and the test as had been enunciated by the LAC:

" In particular, commissioners must exercise greater caution when they consider the fairness of the sanction imposed by the employer. They should not interfere with the sanction merely because they do not like it. There must be a measure of deference to the sanction imposed by the employer subject to the requirement that the sanction imposed by the employer must be fair. The rationale for this is that it is primarily the function of the employer to decide upon the proper sanction.

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<sup>84</sup> (1999) 20 ILJ 578 (LAC)

<sup>85</sup> (1999) 11 BLLR 1117 (LAC) at paragraph [28]

<sup>86</sup> *Rustenburg Platinum Mines Ltd vs CCMA* 2007 (1) SA 576 SCA

<sup>87</sup> *Rustenburg Platinum Mines Ltd vs CCMA, supra*, at paragraph 42

....

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

.....

..In my view, interference with the sanction imposed by the employer is only justified where the sanction is unfair or where the employer acted unfairly in imposing the sanction. This would be the case, for example, where the sanction is so excessive as to shock one's sense of fairness. In such a case, the commissioner has a duty to interfere."<sup>88</sup>

It appears from Ngcobo, AJP's judgment, that the test in determining the fairness of a dismissal, is based upon reasonableness<sup>89</sup>, with the qualification that if fairness is proven then interference with the decision of the employer is not justified. Ngcobo, AJP, further emulated the deference to the employer approach, by ruling that ".....where a reasonable person will naturally conclude that the dismissal was the appropriate sanction or a case where one person might take a view different from another without either of them being castigated as unreasonable. ( sic: then) In either case, interference with the sanction imposed by the employer was not justified."<sup>90</sup>

The above mentioned quotation raises doubt as to the actual fairness in applying the approach in *County Fair Foods ( Pty) Ltd* because interference is precluded from the outset unless, the dismissal is unfair. According to the LAC in determining fairness, it must be considered by the Commissioner that the minds of reasonable persons may differ. Hence for example if the employer holds that the dismissal is fair, whereas the commissioner would say that it is unfair, but both maybe reasonable then the LAC has held that interference is not justified.

This approach pronounced by the LAC, when critically analyzed, transgresses the principle of fairness, because it asserts that fairness, is determined based upon reasonableness, with the qualification that, reasonable persons may differ, one reasonable person may conclude that dismissal was the appropriate sanction whereas another may think differently. They may both

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<sup>88</sup> *County Fair Foods ( Pty) Ltd, supra*, at paragraphs [ 28], [29] and [30]

<sup>89</sup> *County Fair Foods ( Pty) Ltd, supra*, where Ngcobo, AJP at paragraph [28] with concurrence quotes *Nampak Corrugated Wadeville v Khoza, supra*, paragraph [33], where it was stated : "The determination of an appropriate sanction is a matter which is largely within the discretion of the employer. However, this discretion must be exercised fairly. A court should, therefore, not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether the court would have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable."( own emphasis)

<sup>90</sup> *County Fair Foods ( Pty) Ltd v CCMA & Others, supra*, paragraph [34]

not be unreasonable, however in either case interference with the decision of the employer is not justified.<sup>91</sup>

Respectfully, this rationale does not make sense in that a dismissal can either only be fair or unfair. As stated above, there cannot be permissible alternatives.<sup>92</sup> Applying fairness in the manner as described by the LAC in *County Fair Foods ( Pty) Ltd*, supra, insulates the decision of the employer, even though the Commissioner may find the sanction unreasonable. It furthermore imposes limitations in challenging unfair dismissals. The test adopted by Ngcobo AJP does not leave room for unfairly dismissed employees to enforce their rights as provided within the Labour Relations Act 66 of 1995<sup>93</sup>, because firstly, there must be deference and secondly, interference with the employer's decision may be precluded because it maybe reasonable within the range of acceptable and reasonable responses to an employee's misconduct.

This principle appears to contradict the principle of fairness per se and goes against what the Appellate division for example had been saying in respect of fairness in the case of *Numsa v Vetsak Co-operative Ltd & Others*<sup>94</sup>, where Nienaber JA held :

" The fairness required in the determination of an unfair labour practice must be fairness towards both employer and employee. Fairness to both means the absence of bias in favour of either. In the eyes of the LRA of 1956, contrary to what counsel for the appellant suggested, there are no underdogs."

The LAC<sup>95</sup> in *County Fair Foods ( Pty) Ltd*, had furthermore held that interference is only justified when the dismissal is unfair, and this being that the dismissal must be 'so excessive as to shock one's sense fairness'. This test introduced by the LAC, does not provide a rationale approach in determining fairness. Within this line of thought, there is no clear indication as to when a sanction of dismissal would be considered so excessive as to shock one's sense of

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<sup>91</sup> *County Fair Foods ( Pty) Ltd v CCMA & Others*, supra paragraph [34]

<sup>92</sup> *Perskor*, supra, at page 800

<sup>93</sup> sections 185, 188, the Code of Good Practice: Dismissal : Schedule 8 – s2 and s7 of the Labour Relations Act 66 of 1995

<sup>94</sup> 1996 (4) SA 577 (A), at page 593

<sup>95</sup> As cited above, at paragraph [30]

fairness. It further means that any dismissal which is not so excessive in the circumstances would be fair.

In *County Fair Foods (Pty) Ltd v CCMA*<sup>96</sup>, Ngcobo, AJP in substantiation of the above mentioned principle, stated that " If Commissioners could substitute their judgment and discretion for the judgment and discretion fairly exercised by the employer, then the function of management would have been abdicated – employees would take every case to the CCMA . *This result would not be fair to employers.*" ( own emphasis) This ruling is subject to criticism on the basis that it precludes the discretion of the commissioner to determine a dispute, even though they may find it unreasonable, as this approach furthermore believes that reasonable persons may differ. It further implies the discouragement of taking a matter to the CCMA, which has as its objective to resolve unfair labour disputes.

At this juncture, even though in the course of the Chapters to follow, the opposing views to the reasonable employer test and its application in South Africa will be outlined in greater detail, it is relevant and significant to make reference to the precedent decision of Nicholson, JA in *Toyota South Africa Motors [Pty] LTD v Radebe & Others*<sup>97</sup>.

As indicated, the debate relating to the correct approach in determining the fairness of a dismissal, reached a critical point when the Labour Appeal Court overturned its own decision in the application of the reasonable employer test, when Nicholson, JA in *Toyota South Africa Motors [Pty] LTD v Radebe & Others*<sup>98</sup> asserted in his judgment, that the reasonable employer test is not part of our law. By its own admission, the Court concede's that it may have made a palpable mistake by applying the reasonable employer test, which allows the Court to overrule it. Nicholson, JA, stated the following, in this respect: " I believe that the application of the reasonable employer test was such a palpable mistake which permits us to overrule it." <sup>99</sup>

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<sup>96</sup> (1999) 11 BLLR1117 (LAC) at paragraph [30].

<sup>97</sup> [ 2000] 3 BLLR 243 (LAC).

<sup>98</sup> [ 2000] 3 BLLR 243 (LAC), at paragraph [50]

<sup>99</sup> *Toyota South Africa Motors [Pty] LTD v Radebe & Others, supra*, at paragraph [50]

Despite Nicholson, JA 's rejection of the reasonable employer test in *Toyota South Africa Motors [Pty] Ltd*, it is the writer's viewpoint that the Court did not expressly elaborate on the test to be adopted in determining the fairness of a dismissal. What is clear is that the Court confirmed that a statutory arbitrator is required to determine whether a sanction is fair.<sup>100</sup> The court further dismissed the reasonable employer test by stating, that the statutory arbitrator is not there to determine whether a reasonable employer would arrive at the same sanction. In addition to the rejection of the reasonable employer test, the decision further by implication refuted the deferential approach, which is part of the reasonable employer test.

In identifying the approach proposed by the court in *Toyota South Africa Motors [Pty] Ltd*, in testing the fairness of a dismissal, one can state that the court's stance in this respect, is one as adopted in *Tubecon ( Pty) Ltd and National Union of Metalworkers of SA*<sup>101</sup>, the relevant portion thereof being as expressed by the Arbitrator, that the : "The correct approach it seems to me is to consider whether the sanction is fair having regard to existing industrial relations common law and norms."<sup>102</sup> It is regrettable that Nicholson, JA did not elaborate what these industrial relations common law and norms entail, in order to provide guidance in testing the fairness of dismissals.

Despite the judgments as dictated by the LAC in *Nampak* and *County Fair Food, supra*, it appears that the Labour Appeal Court in *Toyota SA Motors ( Pty) Ltd v Radebe & Others*<sup>103</sup> eventually expressly addressed the question which most of the other courts that applied the reasonable employer test ( ' defer to the employer' approach) resisted. That being that the reasonable employer test ( ' defer to the employer' approach) is not specifically expressed within the Labour Relations Act 66 of 1995, as specifically provided within subsection 57(3) of the Employment Protection ( Consolidation) Act of 1978.

Criticism can be leveled against the decision of Nicholson, JA in *Toyota SA Motors ( Pty) Ltd, supra*, in that it can be contended that Nicholson, JA failed to consider the body of law that had developed under the Labour Relations Act 28 of 1956, as mentioned above and the explicit

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<sup>100</sup> *Toyota South Africa Motors [Pty] LTD v Radebe & Others, supra*, paragraph [50] E;

<sup>101</sup> (1991) 12 ILJ 437 (ARB)

<sup>102</sup> at page 445 and as cited by Nicholson, JA in *Toyota South Africa Motors [Pty] Ltd v Radebe & Others, supra*, at paragraph [49]

<sup>103</sup> *Toyota South Africa Motors [Pty] Ltd v Radebe & Others, supra*, at paragraphs [48]-[49]

judgment of *County Fair Foods* case, in terms of the Labour Relations Act 66 of 1995, where the reasonable employer test ( ' defer to the employer' approach) had been ratified. To this extent it can be contended that Nicholson, JA instead placed reliance upon *Tubecon ( Pty) Ltd and National Union of Metal Workers of SA* <sup>104</sup>, which was based upon an IMSSA private arbitration award.

Despite this criticism that may be leveled against Nicholson, JA's judgment in *Toyota SA Motors ( Pty) Ltd*, it needs to be mentioned, that previous judgments of the Industrial Courts and the Appellate Division, where the reasonable employer test ( ' defer to the employer' approach) had not been applied and hence, not recognized as part of our law, comparatively outweighs decisions that had supported the reasonable employer test ( ' defer to the employer' approach). These will be outlined in Chapters 3 and 4 of this thesis, although it can be stated that Nicholson, JA should in essence have made reference thereto. Some of these cases include, *Govender v SASKO (Pty) Ltd t/a Richards Bay Bakery*<sup>105</sup>, *Chemical Workers Industrial Union v Reckitt & Coleman* <sup>106</sup>, *MWASA & Others v Perskor*<sup>107</sup> and *NUMSA v Vetsak Co-operative Ltd & others*<sup>108</sup>, as shall be discussed in greater detail in Chapters 3 and 4 within the content of this thesis.

It is further necessary to mention that Nicholson, JA, in *Toyota SA Motor ( Pty) Ltd, supra*, further recognized that the Labour Appeal Court is bound by its previous decisions, unless these decisions were arrived at based upon an oversight or misunderstanding, '*something in the nature of a palpable mistake*'<sup>109</sup> then a subsequent court does not have the right to substitute its own reasoning. However, it is at this juncture that Nicholson, JA explicitly mentions, that:

" I believe that the application of the reasonable employer test was such a palpable mistake which permits us to overrule it. The failure to take it into account is therefore not a gross irregularity."<sup>110</sup>

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<sup>104</sup> (1991) 12 ILJ 437 ( ARB)

<sup>105</sup> ( 1990) 11 ILJ 1282 (IC)

<sup>106</sup> (1990) 11 ILJ 1319 (IC)

<sup>107</sup> ( 1992) 13 ILJ 1391 ( A)

<sup>108</sup> (1996) 17 ILJ 455 (A)

<sup>109</sup> *Toyota South Africa Motors [Pty] LTD v Radebe & Others* [ 2000] 3 BLLR 243 (LAC), paragraph [50]

<sup>110</sup> *Toyota South Africa Motors [Pty]LTD v Radebe & Others* [ 2000] 3 BLLR 243 (LAC), paragraph [50]

It should furthermore be stated that although Nicholson, JA in *Toyota SA Motors (Pty) Ltd, supra*, did not make reference to the decision in *County Fair Foods (Pty) Ltd, supra*, it was reported four months before the *Toyota SA Motors (Pty) Ltd* judgment was delivered. According to John Myburgh and Andre Van Niekerk (2000: 2151)<sup>111</sup>, whom after quoting parts of Kroon, JA's judgment<sup>112</sup> and whole and parts of Ngcobo, AJP's judgment<sup>113</sup> in *County Fair Foods (Pty)*, stated that Nicholson, JA endorsed the rejection of the reasonable employer test and "considered the application of the reasonable employer test in *County Fair* as 'palpably wrong'".<sup>114</sup> It is therefore implied by Myburgh and Van Niekerk that the rulings as cited and pronounced by Kroon, JA and Ngcobo, AJP in *County Fair Foods (Pty) Ltd, supra*, ratified the reasonable employer test ('defer to the employer' approach), however the reasonable employer test ('defer to the employer' approach) had been rejected by Nicholson, JA in the *Toyota SA (Pty) Ltd*<sup>115</sup> case.

The contention between the judges of the Labour Appeal Court regarding the application and approach of the test for fairness of a dismissal was resurrected in the case of *De Beers Consolidated Mines Ltd v CCMA & Others*<sup>116</sup>, after the decision as adopted in *Toyota SA Motors, supra*, by Nicholson, JA.

In *De Beers, supra*, Willis, JA, re-asserted, the principle that there should be deference to the decision of an employer. He insists that this does not resurrect the reasonable employer test. He states that the arbitrator must take into account the prevailing norms and values of our society, with particular regard to the norms and values of the industrial relations community at large. After having applied these norms and values, the arbitrator "... may only interfere with the employer's decision to dismiss if satisfied that *the decision was unfair*."<sup>117</sup> (own emphasis)

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<sup>111</sup> Myburgh, John and Van Niekerk, Andre (2000:2151). Dismissal as a Penalty for Misconduct : The Reasonable Employer and Other Approaches. 21 Industrial Law Journal 2145.

<sup>112</sup> Myburgh, John and Van Niekerk, Andre, *supra*, citing a part of paragraph [11] of Kroon, JA's judgment in *County Fair Foods (Pty) Ltd, supra*.

<sup>113</sup> Myburgh, John and Van Niekerk, Andre, *supra*, citing parts of paragraphs [28] & [29] and whole of paragraphs [30] and [31] of Ngcobo, AJP's judgment in *County Fair Foods (Pty) Ltd, supra*.

<sup>114</sup> Myburgh, John and Van Niekerk, Andre, *supra* at page 2151

<sup>115</sup> Citation as above, at paragraph [50]

<sup>116</sup> (2000) 9 BLLR 995 (LAC)

<sup>117</sup> *De Beers Consolidated Mines Ltd, supra*, at paragraph [51]

It is furthermore essential to state that Willis, JA<sup>118</sup> ratified the views of Kroon, AJ<sup>119</sup> and Ngcobo, AJP<sup>120</sup> as was ruled in the *County Fair Foods (Pty) Ltd*<sup>121</sup>, *supra*, thereby impliedly and/or expressly affirming the principle that there is a band of reasonableness, where reasonable persons may differ, and even when the two views might not be castigated as unreasonable, interference with the decision of the employer may not be justified.

In essence, despite Willis, JA's stance that he does not intend resurrecting the reasonable employer test. It is contended that even though he states that an arbitrator must have consideration of the norms and values of society and in particular the norms and value of the industrial relations community as a whole, his approach still results in asking the question as to whether the employer's decision was reasonable, within the context of the norms and values of the industrial relations community. Its further necessary to mention, that even though Willis, JA states that he is not attempting to resurrect the reasonable employer test, his concurrence with the decisions of *Nampak* and *County Fair Foods, supra*, and endorsement of the deferential approach ratifies the reasonable employer test ('defer to the employer approach'). This has furthermore been inferred by John Grogan (2000: 6), when he comments,

"...that explains why Willis,, JA takes issue with the view expressed by Nicholson, JA in *Toyota SA Motors (Pty) Ltd v Radebe & Others* [2000] 3 BLLR 243 (LAC) that a statutory arbitrator is required to decide whether a sanction imposed by an employer is fair – not whether the sanction that was imposed 'was one which a reasonable employer would have arrived at.' " <sup>122</sup>

One further questions the views of Willis, JA especially when the debate revolves around fairness, but in direct contradiction, he asserts:

" (i) Although the principle of control has long been accepted, the best of our legal tradition is averse to the second guessing by outsiders of decisions of those who have been entrusted to make them.....

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<sup>118</sup> *De Beers Consolidated Mines Ltd*, *supra*, at paragraph [52]

<sup>119</sup> *County Fair Foods (Pty) Ltd, supra*, page 1707, paragraph [11] G-I

<sup>120</sup> *County Fair Foods (Pty) Ltd, supra*, page 1713 [30] J– 1714 [31] B

<sup>121</sup> At paragraph 34

<sup>122</sup> Grogan, John (2000:6). 'Who is the fairest? Fitting punishments'. *Employment Law*. Vol. 16. No. 5. Butterworths



(iii) The resources of the State are limited. They are, moreover, not abundant. It seems that too much time and too much of the state's financial resources are being taken up at the CCMA with disputes over allegedly unfair dismissal. It seems to be fair to take judicial notice of the fact that the CCMA risks drowning in a sea of such disputes. Overwhelmingly, these relate to dismissals for misconduct....

(iv) A more relaxed approach by the CCMA to employer's disciplinary decisions will encourage employers themselves to become more relaxed. I am convinced that fears of being overturned and fears that they will be accused of 'inconsistency' encourage a great many employers to 'do it by the book' when it comes to discipline.'

By asserting the above, Willis, JA in actual fact is limiting the Constitutional right of workers in terms of section 23(1)<sup>123</sup>, which provides that "Everyone has the right to fair labour practices". In *National Education Health and Allied Workers Union v UCT*<sup>124</sup>, the Constitutional Court when discussing section 23(1) of the Constitution, stated that:

"In giving content to that right, it is important to bear in mind the tension between the interests of the workers and the interests of the employers which is inherent in labour relations. Care must therefore be taken to accommodate, where possible, these interests so as to arrive at the balance required by the concept of fair labour practices. It is in this context that the LRA must be construed."

The above mentioned ruling by the Constitutional Court, together with its further elaborated meaning of fairness<sup>125</sup>, implies that the reasonable employer test ('defer to the employer' approach) transgressed section 23 (1) of the Constitution.

In addition, it must be said, that there is no express provision in the LRA where it is indicated that there must be deference towards the decision of the employer. In essence, in terms of subsection 188(1) of the Labour Relations Act 66 of 1995, it is for the employer to prove that the reason for the dismissal and the procedure adopted is fair. Whereas, if one follows the 'deference approach' the effect is to reverse the onus that the legislation places on the employer or at least to create what amounts to a presumption in favour of the fairness of the employer's decision.

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<sup>123</sup> The Constitution of the Republic of South Africa, Act 108 of 1996.

<sup>124</sup> 2003 (3) SA 1 CC at paragraph [40]

<sup>125</sup> *NEHAWU v UCT, supra*, at paragraph [38], where Ngcobo, J with approval cited Nienaber, JA in *Vetsak, supra*, by reciting that "The fairness required in the determination of an unfair labour practice must be fairness towards both the employer and the employee. Fairness to both means the absence of bias in favour of either. In the eyes of the LRA of 1956, contrary to what counsel for the applicant suggested, there are no underdogs."

In terms of section 191 of the Labour Relations Act 66 of 1995, the jurisdiction given to CCMA Commissioners is a jurisdiction to determine both unfair dismissals and unfair labour practices. It is averred that it is highly improbable that in enacting the new LRA, which is to give effect to the constitutionally protected rights, that the legislature intended to give the Commissioner lesser powers than that which was conferred upon the Industrial Court, to the effect that the Commissioner would not be allowed to decide what he or she regarded as fair.

The premis of the approaches adopted by the aforementioned courts is primarily based upon their standpoint that because it is the function of the employer to set the standards at the workplace and because it is within the discretion of the employer to decide the appropriate sanction, there must be deference to the decision of the employer, unless it is unreasonable.

In the context of the rulings that it is primary the responsibilities of the employer in setting the standards of the workplace and in deciding on the sanction, the Courts have created the setting for the explicit question as to whether the employer had behaved reasonably, despite the Courts use of the words such as 'reasonable persons', objectivity, and the determination of fairness within the norms and values of the industrial community. The above mentioned approaches still personify a reasonable employer approach, as emulating from the decision of Lord Denning in *British Leyland UK Ltd*, although in variant forms.

Based upon the above mentioned approaches of the 'defer to the employer' stance, it can reasonably be stated that it further encapsulates the employers decision as fair, even before the fairness of the employer's decision is scrutinized.

In addition the deference approach, was furthermore impliedly rejected in *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd*<sup>126</sup> ( more commonly known as 'Perskor'), where the Appellate Division held that where the legislature gave the former Industrial Court jurisdiction to determine unfair labour practices, it is " the Court's view as to what is fair in the circumstances [ that] is the essential determinant in deciding the ultimate question."<sup>127</sup> In the same light, it is highly probable that the legislature

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<sup>126</sup> 1992 (4) SA 791 (A)

<sup>127</sup> at page 798

had the same intention when enacting subsection and section 138(1) and 191 of the LRA 66 of 1995, which respectively, required the commissioner to determine the dispute. It furthermore provided for the jurisdiction of the Commissioner to determine both unfair dismissals and unfair labour practices, which further refutes the deference to the employer approach.

Based upon an analysis of the Statutory power's of the respective Courts during the 1980's, namely the Industrial Court, the old LAC and the Appellate Division, Zondo, JP, in *Engen Petroleum Ltd, supra*, went on to assert that there was nothing in the Statutory framework at the time, with reference to the old LRA, that would have justified the adoption of the reasonable employer test , or the "defer to the employer " approach. <sup>128</sup> In the same light, the Constitutional court in *NEHAWU v UCT*, when putting meaning to section 23(1) of the Constitution stated that:

" ...the focus of s23(1) is, broadly speaking, the relationship between the worker and the employer and the continuation of that relationship on terms that are *fair to both*." (own emphasis )

The Constitutional Court continued by stating that when giving content to section 23(1) of the Constitution<sup>129</sup>, one must be careful not to accommodate any one of the interests of workers and employers, to the effect that one should arrive to a balance as required by the concept of fair labour practices. The Constitutional Court, therefore held that the Labour Relations Act 66 of 1995 must also be construed in this context.<sup>130</sup>

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<sup>128</sup>as cited above, at paragraph [16]; Although Engen Petroleum Ltd was bound by the decision of the SCA in *Rustenburg Platinum Mines Ltd v CCMA* 2007 91 SA 576 SCA, the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 CC also implied this when it approvingly referred to the *Perskor* judgment's test for fairness of a dismissal, as ruled in terms of the Labour Relations Act 28 of 1956, at paragraph [63]

<sup>129</sup> The Constitution of the Republic of South Africa, Act 108 of 1996

<sup>130</sup> *implied by the Constitutional Court in NEHAWU v UCT, supra*, at paragraph [40]; In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 CC, the Constitutional Court also held that there was nothing in the constitutional and statutory scheme, which require that when determining the fairness of a dismissal, the commissioner must approach it from the perspective of the employer. Hereafter it impliedly held that the deferential approach is not found in the prescripts of the LRA, at paragraph [61]; when under the header of 'Fairness of the dismissal' and discussing the reasonable employer test, the Constitutional Court held that neither the Constitution nor the LRA affords any preferential status to the employers view on the fairness of the dismissal. Thereby implying that the reasonable employer test is also not prescribed in the Labour Relations Act 66 of 1995

It is relevant, in this respect, to refer to the comments asserted by Maria-Stella Vettori [ 2005: 306] in her LLD dissertation.<sup>131</sup> Where she quite correctly stated, in reference to the South African Courts' application of the reasonable employer test in determining ' unfair labour practice' under the Old Act, that this should be read in context, and with serious consideration of the intention of the legislature and the Act as a whole.

She continues by quite correctly stating that reliance placed on other legal systems, such as the promulgations of English Law and its application in the South African context, in determining fairness of dismissals, is not always appropriate. This was amplified, by the reasoning as mentioned by Maria-Stella Vettori that " Different legislation, different socio-economic circumstances and the like can render comparisons inappropriate."<sup>132</sup>

## 2.5 Conclusion

It is conclusively clear that the old LRA and the new LRA did not or does not contain provisions which ratifies the reasonable employer test ( ' defer to the employer' approach) , despite this, the South African Courts have consistently caused confusion amongst ordinary laymen and jurists as to the correct test in determining fairness of a dismissal. It is reasonable to state that the proponents of the reasonable employer test ( ' defer to the employer' approach) adopted this stance because they based this upon the standing that it is the prerogative of employers to set standards within the workplace and it is for the employer to decide on the sanction to be meted out if these standards are transgressed, hence there should be deference towards the decision of the employer. This has caused divisiveness between the various jurists of our Courts and as can be seen had led to our Courts contradicting themselves at every level of the structure of the Court process. It was therefore necessary that the question of the correct test and approach in determining the fairness of a dismissal demanded critical redress, in order to obtain certainty within our jurisprudence.

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<sup>131</sup> Vettori, Maria-Stella, (2005). *Alternative Means to regulate the Employment Relationship in the Changing World of Work*. Doctoral Thesis ( LLD).Dept. of Mercantile Law: Faculty of Law, University of Pretoria : at page 306;

<sup>132</sup>Vettori, Maria-Stella, (2005), supra, at page 306

## Chapter 3

### Rise of the own opinion approach and determining of fairness based upon value judgment

#### 3.1 Introduction

The South African statutory framework during the 1980's and early 1990's, did not contain any provision which justified the application of the reasonable employer test,<sup>133</sup> however as can be noted in Chapter 2 within this thesis, the South African Courts had regularly applied the reasonable employer test. This is evident from some of the cases quoted, such as *Empangeni Transport (Pty) Ltd v Zulu*<sup>134</sup>, *Performing Arts Council of the Transvaal v PPWAWU & Others*<sup>135</sup> and *NUMSA & Others v Henred Fruehauf Trailers (Pty) Ltd*<sup>136</sup>, where the Appellate Division, in terms of the Labour Relations Act 28 of 1956 (old LRA), equated fairness with reasonableness.

Based upon an analytical study of the judgments of the courts regarding the determination of fairness in dismissal cases and in particular, transgressions related to misconduct under the old LRA, it is crucial to indicate that the courts were inconsistent and contradictory in their approach. Therefore a historical chronological approach of the courts consistent with one approach or test is difficult.

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<sup>133</sup> *Engen Petroleum Ltd, supra*, at 719

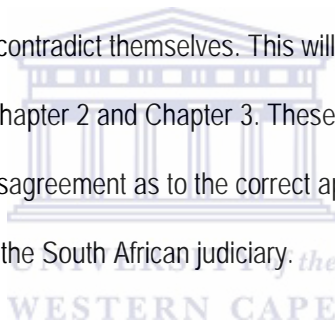
<sup>134</sup> (1992) 13 ILJ 352 (LAC) at 357

<sup>135</sup> 1994 (2) SA 204 (A) at 217

<sup>136</sup> 1995 (4) SA 456 (A)

The introduction of the own opinion approach, is not a new phenomenon, but had long been proposed and enunciated by the Appellate Division<sup>137</sup>, the Supreme Court of Appeal<sup>138</sup>, the Labour Court, the Labour Appeal Court<sup>139</sup> and the Constitutional Court<sup>140</sup>. This will be more evident through a reading of the content of this Chapter of the thesis, which will illustrate the previous and recent decisions of our Courts, which are aligned with the own opinion approach and based upon a value judgment.

As shall be discussed hereunder, based upon the past judgments most of the higher courts ruled in favor of dismissals being assessed as a value judgment. Despite these decisions of the highest courts, various courts, including the very same courts that ruled in favor of the own opinion approach, continued to contradict themselves. This will be apparent through a comparison of the contents of Chapter 2 and Chapter 3. These contradictions clearly indicated that there was an entrenched disagreement as to the correct approach in determining fairness of a dismissal for misconduct in the South African judiciary.



This tension in the judiciary became explicit in the case of *Engen Petroleum Ltd v CCMA & Others*<sup>141</sup>, where the Labour Appeal Court was critical of the SCA judgment in *Rustenburg*

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<sup>137</sup> *MWASA & Others v Perskor* (1992) 13 ILJ 1391 (A); *NUMSA v Vetsak Co-operative Ltd & others* (1996) 17 ILJ 455 (A) at page 589, paragraph C-D

<sup>138</sup> *Wubbeling Engineering & Another v NUMSA*(1997) 18 ILJ 935 (SCA); *NUM v Black Mountain Mineral Development Co (Pty) Ltd* 1997 (4) SA 51 (SCA); *Dube & Others v Nasionale Sweisware (Pty) Ltd* 1998 (3) SA 956 SCA;

<sup>139</sup> *BMD Knitting Mills (Pty) Ltd v SACTWU*(2001) 22 ILJ 2264 (LAC) ; *Chemical Workers Industrial Union & Others v Algorax (Pty) Ltd* (2003) 24 ILJ 1917 (LAC); *Enterprise Foods (Pty) Ltd v Allen & Others* (2004) 25 ILJ 1251 (LAC)

<sup>140</sup> *National Education Health and Allied Workers Union v UCT* 2003 (3) SA 1 CC at paragraph [33] and as impliedly refuting the reasonable employer test ( ' defer to the employer' approach) in paragraphs [38] and [40] ; with application of the Constitution of the Republic of South Africa Act 106 of 1996

<sup>141</sup> 2007 8BLLR 707 (LAC)

*Platinum Mines Ltd v CCMA*<sup>142</sup>. Zondo JP, illustrated the unfairness and frustration of being precluded from interfering with the sanction, by stating the following :

" While I definitely do think that dismissal was excessive as a sanction in the circumstances of this case, and very unfair, I am not able to say that it is so excessive that it shocks my sense of fairness, or that no reasonable employer would have dismissed the employee in all the circumstances of this case. Because I am unable to say that, then, in terms of the SCA's decision in *Rustenburg*, I must not interfere with the employer's decision to impose the sanction of dismissal. "<sup>143</sup> (own emphasis)

The insistence of certain sectors of the judiciary in applying the reasonable employer test or the defer to the employer approach, despite the Appellate Division's ruling that fairness must be determined based upon a value judgment in *Perskor*, was further prevalent in the judgment of the LAC in *Nampak Corrugated Wadeville v Khoza*<sup>144</sup>. The Labour Appeal Court applied the reasonable employer test ('defer to the employer' approach) in terms of the old LRA, even though the Appellate Division had ruled that fairness must be assessed on the basis of a value judgement. That caused further confusion in the labour sector, as to the correct test.

In this Chapter, we shall therefore focus on the rise of the alternative approach, more commonly known as the 'own opinion' approach, which was pronounced and applied by South African courts, under the old LRA and the new LRA. It is a necessity to analyze this approach, in order to determine the approach more consistent with the Labour Relations Act and the South African Constitution.

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<sup>142</sup> 2007 (1) SA 576 SCA

<sup>143</sup> *Engen Petroleum Ltd, supra*, at paragraph [188]

<sup>144</sup> [1999] 2 BLLR 108 (LAC)

### 3.2 Rise of the Own Opinion Approach and its determination of fairness of dismissals

The alternative approach to the reasonable employer test or the defer to the employer approach as emanating from various judgments of the South African courts under the old LRA and as applied under the new LRA, will be referred to herein as 'the own opinion approach.' Zondo, JP in *Engen Petroleum Ltd, supra*, described the 'own opinion' approach as the commissioner being able to decide the issue according to his own opinion or judgment of what is fair or unfair, and not deferring to anybody when making such a determination.<sup>145</sup>

It was conceded, by the Labour Appeal Court in *Engen Petroleum Ltd, supra*, that the Industrial Court did apply the reasonable employer test in its decisions between 1984 and the early 1990's, however, according to the Court majority of the decisions of the Industrial Court rejected the reasonable employer test and applied the "own opinion" approach. It has also been reported that in most cases the old Labour Appeal Court<sup>146</sup> also applied the "own opinion " approach.<sup>147</sup>

#### 3.2.1 Judgments and Academic Viewpoints in support of the ' Own Opinion' Approach under the Labour Relations Act 28 of 1956

As a starting point it is interesting to mention, that one of the proponents of the reasonable employer test, namely Arthur De Kock, who was a member of the Industrial Court and whom

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<sup>145</sup> *Engen Petroleum Ltd v CCMA & Others* [2007] 8 BLLR 707 (LAC) at page 713

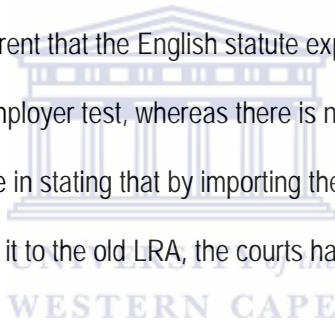
<sup>146</sup> *Metro Cash & Carry Ltd v Tshela*(1996) 17 ILJ 1126 (LAC) at page 1132; *BMD Knitting Mills ( Pty) Ltd v SACTWU* (2001) 22 ILJ 2264 ( LAC) at paragraph [19] and *Chemical Workers Industrial Union & Others v Algorax ( Pty) Ltd*(2003) 24 ILJ 1917 (LAC) at paragraph [69]

<sup>147</sup> *Engen Petroleum Ltd v CCMA & Others* [2007] 8 BLLR 707 (LAC)



had handed down decisions supporting the reasonable employer test / approach, eventually turned his back on the approach, in the case of *Govender v SASKO (Pty) Ltd t/a Richards Bay Bakery*<sup>148</sup>, maintaining that the 1988 amendments of the definition of unfair labour practice, precluded the application of the reasonable employer test.<sup>149</sup>

Further decisions of the Industrial Court, that rejected the reasonable employer test was in the case of *Chemical Workers Industrial Union v Reckitt & Coleman*<sup>150</sup>, where Dr. John, AM, stressed that the English Statute, on which the reasonable employer test was based, expressly directed that the question whether a dismissal was fair or unfair was required to depend on whether the employer had acted reasonably in treating his reason for dismissing the employee as a sufficient reason. It is apparent that the English statute expressly provided for the application of the reasonable employer test, whereas there is no such express provision in the old LRA. It is therefore justifiable in stating that by importing the English approach into South African law and directly to apply it to the old LRA, the courts had committed a palpable mistake.



The Industrial Court after expressly rejecting the reasonable employer test in *Chemical Workers Industrial Union v Reckitt & Coleman SA (Pty) Ltd*<sup>151</sup>, held that the approach to be adopted is dictated by the opening words of the definition of unfair labour practice in terms of section 1 of the old Labour Relations Act, the relevant part which reads, " any act or omission which in an unfair manner infringes or impairs the labour relations between an employer and employee....." and that

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<sup>148</sup> (1990) 11 ILJ 1282 (IC)

<sup>149</sup> Zondo, JP referred to the case of *Govender v SASKO (Pty) Ltd t/a Richards Bay Bakery* (1990) 11 ILJ 1282 (IC), in *Engen Petroleum Ltd v CCMA & Others* [2007] 8 BLLR 707 (LAC); paragraph [18 F-G]

<sup>150</sup> (1990) 11 ILJ 1319 (IC) at page 1328

<sup>151</sup> (1990) 11 ILJ 319 IC at page 1328 (D-F)

this implies a factual, objective test, which does not depend on the state of mind or knowledge of the employer.

The viewpoint expressed by Brassey [ 1987: 71-78] <sup>152</sup> notably one of the leading authorities on South African Labour law, asserts that the South African Legislature had made a policy choice to have fairness proper and not the reasonable employer approach in determining the fairness of dismissals. Thereby rejecting the reasonable employer test and condoning the alternative approach in determining fairness in cases of dismissal.

In *Tubecon ( Pty) Ltd and National Union of Metalworkers of SA*<sup>153</sup>, the Arbitrator expressly rejected the reasonable employer test, by asserting the following :

" In my view the reasonable employer approach is not what is required by the standard IMSSA terms of reference which require me to determine whether the discipline meted out by the company was fair.....Unless one's terms of reference specifically state otherwise there does not seem to be any justification in equity why a sanction should be looked at exclusively through the eyes of an employer. The correct approach it seems to me is to consider whether the sanction is fair having regard to existing industrial relations common law and norms."<sup>154</sup>

The recognition that fairness cannot only be assessed through the eyes of the employer was furthermore identified in the case of *Mambalu v AECI Explosives Ltd ( Zomerveld)*<sup>155</sup>, where the Industrial Court re-affirmed that it is established law that the substantive fairness of a dismissal is dependent on whether the continued relationship between the employer and the employee is tolerable, with due consideration of the interests of both the employee and the employer, and the equities of the case.

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<sup>152</sup> Brassey, *The New Labour Law*. Juta & Co. 1987 : at pages 71 – 78

<sup>153</sup> (1991) 12 ILJ 437 (ARB), at pages 445B – 445D;

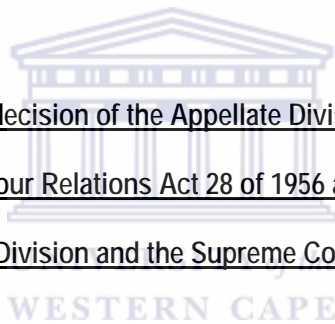
<sup>154</sup> Cited by Nicholson, JA in *Toyota South Africa Motors [Pty] LTD v Radebe & Others* [ 2000] 3 BLLR 243 (LAC) at page 257, paragraph [49]

<sup>155</sup> (1995) 16 ILJ 960 (IC) at page 965

It is evident that the Industrial Court's reasoning is characteristic of a moral or value judgment, taking into consideration the existing industrial relations laws and norms. This approach is further manifested through the standpoint that fairness requires balancing the interests of both the employer and the employee, when determining the dispute, which cannot be maintained through the reasonable employer test, but impliedly through a moral or value judgment.

A similar viewpoint was expressed by Du Toit et al [ 2006: 399]<sup>156</sup>, when it was stated that the " validity of employment rules and standards must be tested against the objective criteria of law and public policy rather than the reasonableness of the individual employer."

3.2.2 **Perskor : the decision of the Appellate Division in determining fairness under the Labour Relations Act 28 of 1956 and subsequent judgments of the Appellate Division and the Supreme Court of Appeal**



The grounds upon which fairness had to be determined, had finally reached the Appellate Division in the case of *MWASA & Others v Perskor*<sup>157</sup> hereinafter referred to as the 'Perskor case'. The Appellate Division was finally confronted with the critical question, where there had been consistent disagreement regarding the correct approach in determining the fairness of a dismissal.

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<sup>156</sup> Du Toit et al. (2006). Labour Relations Law ' A Comprehensive Guide ' . ( 5<sup>th</sup> ed). Lexis Nexis Butterworths. at page 399

<sup>157</sup> ( 1992) 13 ILJ 1391 ( A)

It held that the approach to be adopted in determining the fairness of dismissal, entailed the passing of a moral judgment. The Appellate Division, substantiated its decision on the following basis:

“ The position then is that the definition of an unfair labour practice entails a determination of the effects or possible effects of certain practices, and of the fairness of such effects. In my view a decision of the Court pursuant to these provisions is not a decision on a question of law in the strict sense of the term. It is the passing of a moral judgment on a combination of findings of fact and opinions.”<sup>158</sup>

It is important to indicate that this decision was binding on the Appellate Division itself, the old Labour Appeal Court and the Industrial Court. Subsequent to the *Perskor* decision, a number of the decisions of the Appellate Division followed the judgment as decided in the *Perskor* case.

Grosskopf, JA, narrowed down the questions placed before the Appellate Division, one of which, included, “ Was the dismissal of the individual appellants an unfair labour practice?”<sup>159</sup> When determining such a question, the Court ruled that:

*“.....disputes concerning alleged unfair labour practices must be decided in accordance with moral precepts, Salmonds analysis appears to be particularly relevant.”*<sup>160</sup>

According to the AD, the learned author Salmond [ 1966: 70]<sup>161</sup> wrote that :

“ Matters and questions which come before a court of justice, therefore , are of three classes:

- (1) matters and questions of law – that is to say, all that are determined by authoritative legal principles;
- (2) matters and questions of judicial discretion – that is to say, all matters and questions as to what is right, just, equitable, or reasonable, except so far as determined by law;

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<sup>158</sup> *MWASA & Others v Perskor, supra*, at Page 1400

<sup>159</sup> *Media Workers Association of South Africa v Press Corporation of SA Ltd* 1992 (4) SA 791 AD, Page 792 H-I

<sup>160</sup> *Media Workers Association of South Africa v Press Corporation of SA Ltd* 1992 (4) SA 791 AD, Page 797, paragraph C-D

<sup>161</sup> Fitzgerald PJ. [1966]. Salmond on Jurisprudence. 12<sup>th</sup> Edition. Sweet & Maxwell Ltd. London. At page 70

.....In matters of the second kind, its ( sic: court's) duty is to exercise its moral judgment in order to ascertain the right and justice of the case."<sup>162</sup>

As indicated, the AD in *Perskor*, applied the view of Salmond, as described in the second kind, which involved the exercise of moral judgment when deciding an unfair labour practice.

The Appellate Division in *Perskor, supra*, had to determine whether the dismissal of the individual Appellants fell within the definition of unfair labour practice, as defined in terms of the Labour Relations Act 28 of 1956 ( Old Act), before the amendment of the Act by Act 83 of 1988. The definition of Unfair Labour Practice, as it was then, read as follows :

" *(U)nfair labour practice ' means –*

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

In the *Perskor* case it was held that it was the court's opinion of what was fair or unfair, when passing a moral judgment in unfair labour practice involving dismissal disputes under the old Act. In *Perskor*<sup>163</sup>, the court clearly expressed what this passing of moral or value judgment entailed by stating the following : " Clearly the court's view as to what is fair in the circumstances is the essential determinant in deciding the ultimate question." The ultimate question that Grosskopf JA was referring to in this extract, was whether particular facts constitute an unfair labour practice.

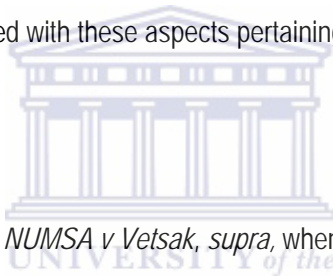
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<sup>162</sup> Media Workers Association of South Africa ( *Perskor*), *supra*, at page 796

<sup>163</sup> at pages 1399 H – 1400B

In *NUMSA v Vetsak Co-operative Ltd & others*<sup>164</sup>, applying the definition of 'unfair labour practice' as per section 1 of the old Labour Relations Act 28 of 1956, prior to its amendment by Act 83 of 1988 and Act 9 of 1991, the court per Smalberger, JA, held that the underlying concept within the definition of unfair labour practice is that of fairness. In addressing the question of fairness, the court indicated that fairness entails equity and a balance between the interests of the worker and the employer. As per Smalberger, JA, "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."<sup>165</sup>

Although Smalberger, JA's judgment was part of the minority judgment, the majority of the court as per Nienaber, JA agreed with these aspects pertaining to the determination of fairness in dismissals.<sup>166</sup>



According to Smalberger, JA, in *NUMSA v Vetsak*, *supra*, when determining fairness, one applies a moral or value judgment to the facts and the circumstances. When applying this moral or value judgment, a court must have due regard to the objectives to be achieved by the Act. In the view of Smalberger, JA, in the context of judging fairness, it would be unwise to formulate an universally applicable test when determining fairness.<sup>167</sup> This viewpoint had furthermore been concurred with and substantiated by Nienaber, JA, in his majority judgment of *NUMSA v Vetsak* case as cited, where he states, in relation to the application of a moral and value judgment in determining unfair labour practice, that:

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<sup>164</sup> (1996) 17 ILJ 455 (A)

<sup>165</sup> *NUMSA v Vetsak Co-operative Ltd & others* (1996) 17 ILJ 455 (A) at page 589, [C]-[D]

<sup>166</sup> As per Nienaber, JA in *NUMSA v Vetsak Co-operative Ltd & others* 1996 (4) SA 577 (AD) at page 591[!]

<sup>167</sup> *NUMSA v Vetsak Co-operative Ltd & others* 1996 (4) SA 577 (AD) at page 589 [D]

" The test is too flexible to be reduced to a fixed set of sub-rules; which is why one is somewhat skeptical of recent attempts by the Labour Appeal Court ( " LAC") and academic writers to typify and rank the considerations which are to be factored into a finding of fairness."<sup>168</sup>

Ratifying Smalberger, JA's assertion that fairness in the determination of an unfair labour practice, requires a balance between the interests of both the employer and the employee, Nienaber, JA, expressly averred that in order to attain fairness to both, " means the absence of bias in favour of either."

It is clear that fairness is to be assessed based upon a moral judgment and the opinion of the Court, as to the fairness of the dismissal, hence it involves an objective opinion of the court, with an assessment of fairness taking into consideration all relevant factors, which ensures equity. It can be respectfully argued that such a test, which cannot be regulated by a fixed set of rules, is objective and unbiased, having due consideration of the interests of both the employer and the employee, as opposed to the partiality of the reasonable employer test / approach.

Further decisions which expressed the same point of view, as to what this moral judgment entailed, is further pronounced, in the case of *Wubbeling Engineering & Another v NUMSA*<sup>169</sup>, where the SCA held that: " it is the task of the court to have regard to the interests of not only the worker but also those of the employer ' in order to make a balanced and equitable assessment ' of what is fair in all the circumstances." <sup>170</sup>

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<sup>168</sup> *NUMSA v Vetsak Co-operative Ltd & others* 1996 (4) SA 577 (AD) at page 592, [D]-[E]

<sup>169</sup> (1997) 18 ILJ 935 (SCA)

<sup>170</sup> As stated by Zondo, JP in the case of *Engen Petroleum Ltd v CCMA & Others* [2007] 8 BLLR 707 (LAC) at page 724, paragraph [31]

In the case of *Dube & Others v Nasionale Sweisware (Pty) Ltd*<sup>171</sup>, Zulman, JA, re-affirmed Nienaber, JA's, assertion in *NUMSA v Vetsak, supra*, when determining an unfair labour practice, by asserting that the ultimate determinant is

"... fairness and not the lawfulness of either the dismissal or the strike. That does not mean that the lawfulness or otherwise of the conduct of either party or of the strike is irrelevant. These can be very real factors in the determination of what is fair in the circumstances."<sup>172</sup> Zulman, JA at page 960, further held that when applying the definition of Unfair Labour Practice, the Labour Appeal Court and the SCA is expected to have regard "...not only to law but also to fairness. Consequently the enquiry involves a moral or value judgment on a combination of findings of fact and opinion."

In addition to the above mentioned Appellate Division or SCA decisions, several of the following courts, amongst others, *Atlantis Diesel Engines (Pty) Ltd v NUMSA*<sup>173</sup>, Olivier JA's judgment in *Betha & Others v BTR Sarmcol, A Division of BTR Dunlop Ltd*<sup>174</sup>, Streicher JA's judgment in *Betha & Others v BTR Sarmcol*, Smalberger JA's judgment in *Betha v BTR Sarmcol*<sup>175</sup>, Scott JA's judgment in *Betha v BTR Sarmcol*<sup>176</sup>, *Benicon Group v NUMSA & Others*<sup>177</sup> and *Boardman Brothers (Natal) v Chemical Workers Industrial Union*<sup>178</sup> followed the ruling as adopted by the Appellate Division in *Perskor*.<sup>179</sup>

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<sup>171</sup> 1998 (3) SA 956 SCA at page 960, paragraph [D]-[E]

<sup>172</sup> *NUMSA v Vetsak Co-operative Ltd & others*, supra, at page 593

<sup>173</sup> 1994 (15) ILJ 1257 (A)

<sup>174</sup> 1998 (3) SA 349 (SCA) at page 369 [I]-[E]

<sup>175</sup> As cited, supra, at pages 386H-388B

<sup>176</sup> As cited, supra, at page 402 [I]-[J]

<sup>177</sup> 1999 (20) ILJ 2777 (SCA) at page 2779 [H]-[J]

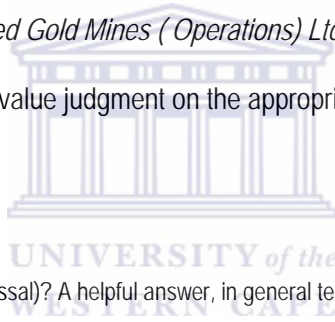
<sup>178</sup> 1998 (3) SA 53 (SCA) at page 58 [B]-[C]

<sup>179</sup> As cited by Zondo, JP in the case of *Engen Petroleum Ltd v CCMA & Others*, supra, at page 722, paragraph [29]



It has been argued by proponents of the reasonable employer test or the 'defer to the employer' approach that when assessing fairness that it must be borne in mind that reasonable persons may differ, hence one may regard the dismissal as fair and the other as unfair, although both decisions may not be unreasonable. Then in such event a commissioner should not interfere with the decision of the employer. To this contention, Grosskopf, JA<sup>180</sup> in *Perskor, supra*, made the following ruling: " I do not think the power to determine that certain facts constitute an unfair labour practice is discretionary in that sense. Such a determination is a judgment made by a Court in the light of all relevant considerations. It does not involve a choice between permissible alternatives."

This stance in adjudicating fairness was re-affirmed in *National Union of Mineworkers and Others v Free State Consolidated Gold Mines ( Operations) Ltd*<sup>181</sup>, with further elaboration of the implications of this moral or value judgment on the appropriate sanction for the misconduct. It said the following:



" But what is a fair reason ( for a dismissal)? A helpful answer, in general terms, is that given by Cameron, Cheadle and Thompson *The New Labour Relations Act : The Law after the 1988 Amendments* at 144-5 . It is said: ' A fair reason in the context of disciplinary action is an act of misconduct sufficiently grave a to justify the permanent termination of the relationship....Fairness is a broad concept in any context, and especially in the present. It means that the dismissal must be justified according to the requirements of equity when all the relevant features of the case-including the action with which the employee is charged-are considered.' Ultimately the task of the court is to pass a moral or value judgment. ( *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ('Perskor')* 1992 (4) SA 791 (A) at 798I and 802A)."

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<sup>180</sup> As cited, *supra*, at page 800

<sup>181</sup> 1996 (1) SA 422 (A) at page 446 G-I

It is therefore abundantly clear from the above that many of the judges of the Appellate Division and the Supreme Court of Appeal had under the old LRA supported the interpretation of the law that the test for determining fairness of a dismissal entailed a value/moral judgment based upon a finding of facts and opinions. This dominant view of the test in determining fairness, had led Zondo, JP in *Engen, supra* to state that these above judgments and as those quoted by the LAC, were authority for the approach that the test for determining the fairness of a dismissal was based upon a value / moral judgment on a combination of facts and opinions.<sup>182</sup>

### 3.2.3 The approach of the Labour Appeal Court, under the old and the new Labour Relations Act

Although there were LAC judgments<sup>183</sup> which applied the reasonable employer and the defer to the employer approach, the discussion under this sub heading will in order to avoid repetition, primarily focus on Labour Appeal Court judgments, that confirmed the 'own opinion' approach of assessing fairness based upon a value judgment.

In *Metro Cash & Carry Ltd v Tshela*<sup>184</sup>, Goldstein, J indicated that the question he needs to address is whether dismissal in the matter was called for and whether the dismissal was fair or unfair. The Labour Appeal Court ( LAC) recognized and held as per Goldstein, J, that this question must be addressed by making a moral or value judgment as to what is fair in the circumstances. The LAC made specific reference to the judgment of the AD in *NUMSA v*

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<sup>182</sup> *Engen Petroleum Ltd v CCMA & Others, supra*, at paragraph 29

<sup>183</sup> *Nampak Corrugated Wadeville v Khoza* [1999] 2 BLLR 108 (LAC) & *County Fair Foods ( Pty) Ltd v CCMA, supra*, at paragraph 28

<sup>184</sup> (1996) 17 ILJ 1126 (LAC);

*Vetsak*, when outlining the manner in which it was to test the fairness of the dismissal.<sup>185</sup> It should be stated that although the assessors in majority held that the dismissal was fair, in contrast to Goldstein, J, they recognized that they had to make a moral or value judgment of what was fair, as per the judgment of *Vetsak*.<sup>186</sup>

In *BMD Knitting Mills ( Pty) Ltd v SACTWU*<sup>187</sup>, although the LAC was applying its ruling in the case of dismissal based upon operational requirements, the Court held that the fairness of the dismissal as envisaged in subsection 188(1) of the LRA, namely that the reason for the dismissal must be a fair reason, introduces a comparator, in that the reason for the dismissal must be fair to both parties. The court held that it had to examine and enquire whether a reasonable basis existed for the dismissal of the employees. This implies that the Court affirmed that it had to make a value or moral judgment on the fairness of the dismissal. The deferential approach was therefore being renounced by the LAC. In the words of Davis, AJA :  
" Viewed accordingly, the test becomes less deferential and the court is entitled to examine the content of the reasons given by the employer, albeit that the enquiry is not directed as to whether the reason offered is the one which would have been chosen in the court. Fairness not correctness is the mandated test." <sup>188</sup> Although *BMD Knitting Mills ( Pty) v SACTWU*, as referred to above, related to a case of dismissal on the basis of operational requirements, the court made important rulings, which is applicable to dismissal for a fair reason. It furthermore characterizes the manner in which fairness per se must be applied, which can equally apply to dismissals for misconduct, as was applied by the AD in *Perskor* and *Vetsak* cases.

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<sup>185</sup> *Metro Cash & Carry Ltd v Tshela* (1996) 17 ILJ 1126 (LAC) at page 1129

<sup>186</sup> *Metro Cash & Carry Ltd v Tshela* (1996)17 ILJ 1126 (LAC) at page 1132

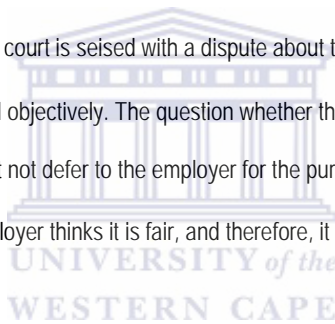
<sup>187</sup> (2001) 22 ILJ 2264 ( LAC)

<sup>188</sup> *BMD Knitting Mills ( Pty) Ltd, supra*, at paragraph [19]

It can be implied from the aforementioned ruling that the test does not entail whether the court would have provided the same reason for the dismissal in assessing the fairness of the dismissal, but entailed whether in the opinion of the court, based upon a moral or value judgment the dismissal was fair or not.

Further confirmations of the own opinion approach was provided in the judgment of *Chemical Workers Industrial Union & Others v Algorax (Pty) Ltd*<sup>189</sup>, where Zondo JP, explicitly refuted the application of the reasonable employer test and the defer to the employer approach, by stating :

“ When either the Labour Court or this court is seised with a dispute about the fairness of a dismissal, it has to determine the fairness of the dismissal objectively. The question whether the dismissal was fair or not must be answered by the court. The court must not defer to the employer for the purpose of answering that question. In other words it cannot say that the employer thinks it is fair, and therefore, it is or should be fair.”<sup>190</sup>



In the aforementioned case, although the LAC was assessing the fairness of a dismissal based upon operational requirements, the court provided a general principle of the manner in which fairness had to be determined.

It is also essential to refer to the judgment of *Toyota South Africa Motors [Pty] LTD v Radebe & Others*<sup>191</sup> where the LAC overturned its own decision in the application of the reasonable employer test, by Nicholson, JA in *Toyota South Africa Motors [Pty] LTD v Radebe & Others*<sup>192</sup> asserting in his judgment that the reasonable employer test, is not part of our law. By its own

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<sup>189</sup> (2003) 24 ILJ 1917 (LAC)

<sup>190</sup> *Chemical Workers Industrial Union & Others, supra*, at paragraph [69] and *Enterprise Foods (Pty) Ltd v Allen and Others* (2004) 25 ILJ 1251 (LAC), paragraph [17]

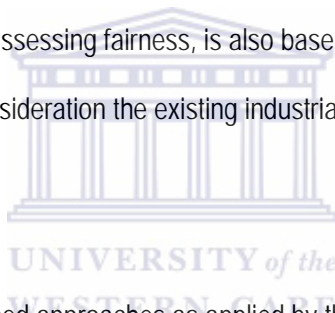
<sup>191</sup> [ 2000] 3 BLLR 243 (LAC)

<sup>192</sup> [ 2000] 3 BLLR 243 (LAC), at paragraph [50]

admission, the Court concedes that it may have made a palpable mistake by applying the reasonable employer test, which allows the Court to overrule it. Nicholson, JA, stated the following, in this respect: " I believe that the application of the reasonable employer test was such a palpable mistake which permits us to overrule it." <sup>193</sup>

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

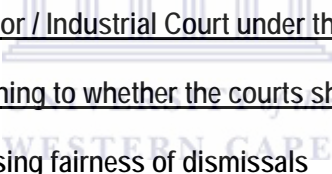
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<sup>203</sup> Item 3(4) of Schedule 8 to the LRA.

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



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



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

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

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

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

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

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

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

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

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

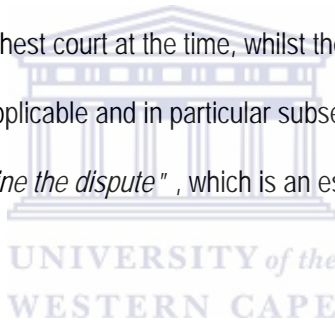
<sup>209</sup> [1997] 10 BLLR 1261 (LAC) at page 1280

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

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

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

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



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

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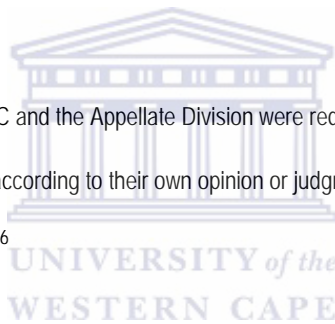
<sup>212</sup> Cheadle, Halton, Le Roux, PAK, Thompson, Clive, Van Niekerk, Andre. [1993] Current Labour Law. Juta & Co Ltd. at page13

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

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

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

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



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

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

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

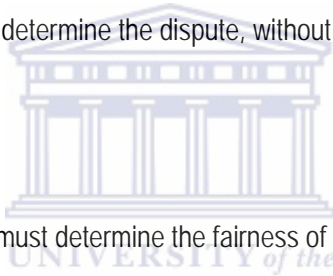
<sup>216</sup> *Engen Petroleum Ltd v CCMA & Others, supra*, paragraph [55] B-C

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

The Court stated that :

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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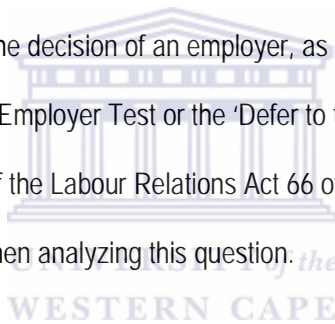
<sup>224</sup> As cited by Zondo JP, in *Engen Petroleum Ltd v CCMA & Others, supra*, at paragraph [29]

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

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

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

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



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

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

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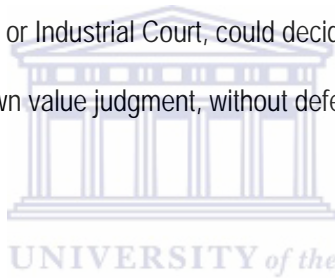
<sup>226</sup>As held by Zondo, JP in *Engen Petroleum Ltd v CCMA & Others, supra*, at paragraph [51].



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

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

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



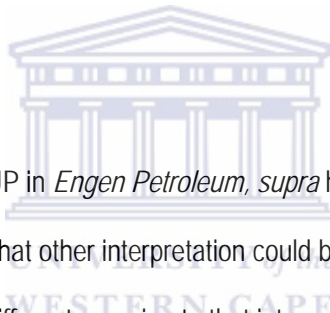
The LAC in *Engen Petroleum Ltd, supra*, asserted that when the CCMA has "to determine the dispute fairly" as provided in terms of subsection 138(1) of the LRA, it also has to ascertain whether the dismissal as a sanction was fair. The LAC held that the determination of the fairness of a dispute entails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

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

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

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



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

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

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

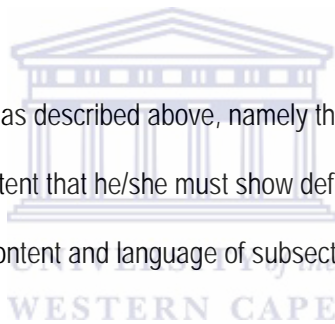
<sup>230</sup> at page 733, paragraph [55]

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

### 3.3 Conclusion

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

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

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

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



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

## Chapter 4

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

#### 4.1 Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

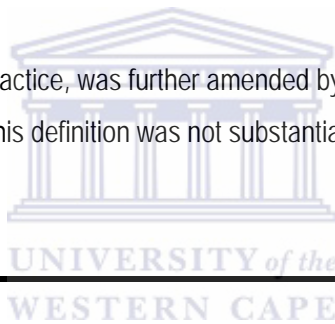
<sup>258</sup> This was the definition of unfair labour practice prior to the amendment in September 1988:

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

"(a)..... ;

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

(c) ....."

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

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

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

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

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

#### 4.3.4 Foreign Law: The Canadian Perspective

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

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

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

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

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

<sup>303</sup> Ellyn, Igor Q.C & MacNeil, Agnes E. (2000: 2): " Proving Just Cause as Employer's Counsel : Warnings, fairness, condonation, standard of proof and onus" as presented at a continuing legal education seminar for lawyers, Toronto, May 21, 2002. at page 2. <http://www.ellynlaw.com>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### 4.5.Conclusion

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

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

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

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





## Chapter 5

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

#### 5.1 Introduction

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



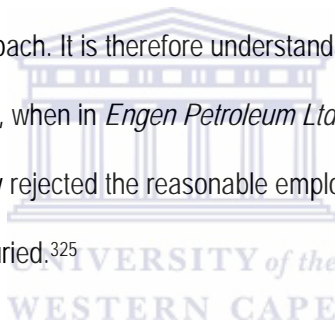
Although these differing approaches is evidence of the two schools of thought, the significant question which requires address is which approach, is consistent with the Constitution and the LRA. As had been indicated in previous Chapters, South African Labour Law has been marred by a jurisprudence trail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

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

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

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



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

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

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

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

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

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

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

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

## 5.2 Deference to the Employer

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

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

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

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

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

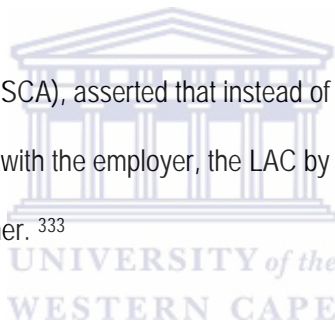
<sup>328</sup> *Rustenburg Platinum Mines Ltd vs CCMA, supra*, at paragraph [40]

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

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

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

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



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

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

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

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

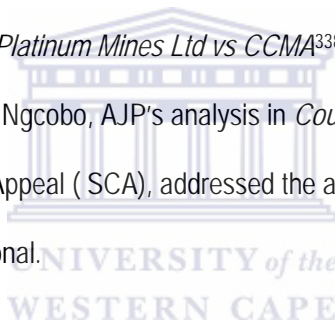
<sup>333</sup> *Rustenburg Platinum Mines Ltd vs CCMA, supra*, at paragraph [43]

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

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

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

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



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

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

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

....

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

.....

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

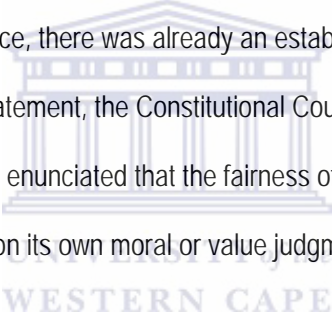
<sup>363</sup> *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others, supra*, at paragraph [77]

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

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

### 5.3 Test for Fairness

Majority of the Constitutional Court in *Sidumo and Another, supra*, expressly averred that the approach in which fairness must be assessed is not uncommon to South African labour law, in that when the LRA came into force, there was already an established jurisprudence in this respect. In substantiating this statement, the Constitutional Court cited the AD judgments of *Perskor*<sup>366</sup> and *Vetsak*<sup>367</sup>, which enunciated that the fairness of a dismissal must be determined by a court based upon its own moral or value judgment on a combination of findings of fact and opinion. <sup>368</sup>



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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<sup>376</sup> Benjamin, Paul (2007). "Friend or Foe? The Impact of Judicial Decisions on the Operation of the CCMA " *Industrial Law Journal*, Volume 28, January 2007 at pages 26 -27

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

<sup>378</sup> Benjamin, Paul (2007) " Friend or Foe? The Impact of Judicial Decisions on the Operation of the CCMA" *Industrial Law Journal*, Volume 28, January 2007 at page 26



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

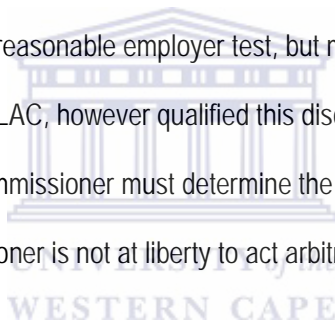
After decades of uncertainty and inconsistency in the approach related to the test for fairness of a dismissal, and the role of the commissioner in determining the fairness of a dismissal based upon misconduct, the law had been clearly outlined by the Constitutional Court in the *Sidumo* case. Based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

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

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

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



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

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

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

<sup>397</sup> Nicola Smit : " When is Dismissal an appropriate sanction and when should a court set aside an arbitration award? *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* (2007) 28 ILJ 2405 at page 1644, Industrial Law Journal, Vol 29, July 2008.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## 5.5 Conclusion

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

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

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

<sup>412</sup> 2009 (3) SA 493 ( SCA) at paragraphs [24] & [25]



## Chapter 6

### Conclusion

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

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

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

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

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

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

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

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

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<sup>414</sup> Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ( hereinafter referred to as 'Pekor') 1992 (4) SA 791 AD at page 798 & 800; Numsa v Vetsak Co-operative Ltd & others ( herein after referred to as Vetsak) (1996) 17 ILJ 455 (A) at page 589

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

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

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

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

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

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

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

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

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

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

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

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

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