



# Newsletter

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Hot off the press is the Constitutional Court's judgment handed down on Friday 5th October 2007 in the matter Sidumo & Others vs Rustenburg Platinum Mines Limited & Others.

This judgment has significant and important consequences for employers when dealing with disciplinary issues and especially when dismissing an employee.

The three areas of importance dealt with in the judgment are:-

- When determining whether the sanction of dismissal is appropriate what test must a CCMA arbitrator apply.
- What is the standard of review that a Labour Court has to apply when reviewing an arbitration award.
- Is the function of an arbitrator administrative or judicial in nature so as to determine whether the wider provisions of PAJA or the narrow ambit of review under section 145 of the LRA apply.

The esteemed Court held that:-

- In determining with dismissal is the appropriate sanction the commissioner must determine whether it is fair or not. In doing so the commissioner is not to consider what he or she would do, but simply to decide whether what the employer did was fair. The commissioner must not defer to what the employer has done as was suggested by the SCA but to determine what is fair given all the relevant circumstances.
- Judge Ngcobo's views regarding the relevancy of the Code contained in Schedule 8 to the LRA are most instructive and practical. As you may be aware Item 7 of the Code states:-  
Any person in determining whether a dismissal for misconduct is unfair should consider:-
  - (1) whether or not the employee contravened a rule or standard regulating conduct in or of relevance to the workplace: and
  - (b) if a rule or standard was contravened, whether or not:
    - (i) the rule was a valid or reasonable rule or standard

- (ii) the employee was aware or could reasonably be expected to be aware of the rule or standard.
- (iii) the rule or standard has been consistently applied by the employer.
- (iv) dismissal was an appropriate sanction for the contravention of the rule or standard.

- the standard of review for arbitration awards is found in answering the following question: Is the decision reached by the commissioner one that a reasonable decision-maker could not reach? Gone is the test stated in the Carephone judgment namely that an award must be justifiable in relation to the reasons given for it.

- The Judges of the Constitutional Court were divided on the issue of whether the CCMA arbitration constitutes administrative or judicial action. Whereas this issue is more relevant for legal practitioners to fret over, it is safe to say that the net result of the judgment is that the narrow provisions of section 145 of the LRA are to apply.

One may ask what the practical effect of this judgment is. Well you may be aware that there has been a trend in labour law / industrial relations circles to advise clients when conducting their disciplinary hearings to adopt a more flexible and simpler procedure.

Firstly it must be stated that whilst it may be accepted that the Code of Conduct contained in Schedule 8 does not prescribe a formalistic mini court hearing, employers are cautioned that they may not simply jettison an established disciplinary code that may have provided for that type of procedure.

In instances where a code was the product of collective bargaining or a recognition agreement, I am of the view that an employer would be enjoined to consult with employees / employee representatives or bargaining agents with a view to bringing about any change.

Notwithstanding this, the import of the judgment is that if a commissioner is obliged to measure an employer's conduct against item 7 to establish fairness employers will have to ensure that:-

- (a) they have a disciplinary code in place;
- (b) their code is reasonable as to the rule or standard and the sanction; that proper induction,
- (c) familiarization and training in connection with bringing the fact of the code's existence and its import to the knowledge of employee are in place and are properly documented and recorded.
- (d) that the code is applied consistently.
- (e) that the sanction of dismissal is fair given all the relevant circumstances, which would include:-
  - The purpose and relevancy of the rule or standard.
  - The importance of that rule for the employer and its business.
  - The existence of aggravating factors.
  - The existence of mitigating factors.
- (f) In conducting a disciplinary hearing where the misconduct complained of is serious and could lead to dismissal it would still be advisable that:-
  - A proper investigation and collection of relevant evidence be conducted including the taking of statements from witnesses and the obtaining of physical evidence when available.
  - The conducting of a structured hearing with an independent chairperson.