

AN ANALYSIS OF THE SUBSTANTIVE FAIRNESS IN CASES OF DISMISSAL FOR MISCONDUCT IN SOUTH AFRICA – THE NEED FOR CONSTITUTIONAL VALUE OF DIGNITY IN DETERMINING SUBSTANTIVE FAIRNESS

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DECLARATION

I hereby declare that this thesis is my own unaided work and that all my sources of information have been acknowledged. To my best knowledge, neither the substance of this dissertation, nor any part thereof, is being submitted for a degree in any other University

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DEDICATION

I dedicate this Master's Degree in Law to my late grandfather Zwelinjani Mthlane, u Skigi uyadela ngoba uzibona zombili izimbobo. I am a better person today because of your instructive teachings. May your soul rest in peace knowing that I shall never betray the humane virtues you imbued in me.

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ABSTRACT

The development of labour laws in South Africa has registered major strides in regulating the employment relations. These developments have been in tandem with the political and socio-economic development of South African society. Amongst the major progressive developments in the realm of labour law is the notion of substantive fairness in cases of dismissal for misconduct.

Prior to the Industrial Conciliation Amendment Act 94 of 1994, the notion of substantive fairness was virtually absent from the labour law jurisprudence. Influenced by the socio-economic developments in South Africa as well as the International Labour Organisations recommendations, South African courts introduced the notion of substantive fairness in cases of dismissal for misconduct.

The application of the novel notion of substantive fairness was first premised on the employer deference approach which was borrowed from s57(3) of the Employment Protection (Consolidation) Act of 1978 (the English Statute). The employer deference approach demanded that presiding officers must accord respect to the interest of the employers in determining substantive fairness in cases of dismissal. This approach was followed by contradictory judgements by South African courts – with some embracing the approach whilst other rejecting it.

The South African approach to the notion of substantive fairness was eventually decided by the Constitutional Court in the case of *Sidumo and Another v Rustenburg*

*Platinum Mines and Others*¹. The Constitutional Court rejected the employer deference approach and replaced it with the exercise of value judgement by presiding officers which demands balancing the interests of employers and employees in determining the substantive fairness. The court further, without being exhaustive, enumerated factors which must be taken into account in the process of establishing substantive fairness and these included the importance of the rule breached; the reason the employer imposed the sanction; the basis of the employee's challenge of dismissal; the harm caused by the employee's conduct; whether additional training may avoid repeat of the offence; the effect of dismissal on the employee and his or her record of long service.²

Notwithstanding the Constitutional Court judgment, the exercise of value judgment remains vulnerable to arbitrary application if it is not anchored on a specified value to be protected. This vulnerability has been apparent in certain cases that followed the *Sidumo* case such as that of *Theewaterskloof Municipality v South African Local Government Bargaining Council (Western Cape Division and Other)*³ and *Miyambo v Commission for Conciliation, Mediation and Arbitration*.⁴ In both cases, the employees were dismissed for what may be argued as inconsequential acts of misconduct. This was palpably against the spirit and purport of the precedent-setting decision in the *Sidumo* case.

¹ (2007) 28 ILJ 2405 (CC)

² *Supra*, note 1, para 78

³ (2010) 31 ILJ 2475 (LC)

⁴ (2010) 31 ILJ 2031 (LAC)

This study proposes that the exercise of value judgment should be anchored on the constitutional value of dignity which is intrinsically interwoven with the right to work security.

Recognizing the importance of dignity as the right was aptly articulated by Justice O'Regan in the case of *S v Makwanyane*⁵ that:

“recognizing the right to dignity is an acknowledgment of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in the Bill of Rights.”⁶

If the right to dignity is the foundation of many rights, it stands to reason, therefore, that it should also anchor the exercise of value judgment in order to avoid arbitrary application.

⁵ 1995 (3) SA 391 (CC)

⁶ *Supra*, para 328

CHAPTER ONE

1. Introduction

The principle that there must be substantive fairness in cases of dismissal for misconduct is an intrinsic part of the right to fair labour practices enshrined in the Constitution of the Republic of South Africa. There have been numerous efforts to identify the precise content of the notion of substantive fairness over time as the rights and obligations of both the employers and employees have been developed. However, the development of the notion of substantive fairness and its application by courts of law has neither been consistent nor uniformed. The notion of substantive fairness has been a subject of debate from the Labour Court right up to the Constitutional Court.

Prior to the Constitutional Court case of *Sidumo and Another v Rustenburg Platinum Mines and Others*⁷, hereinafter referred to as *Sidumo* case, various contradictory decisions by the Labour Court and Labour Appeal Court were arrived at in so far as the interpretation and application of the notion of substantive fairness is concerned. These contradictory decisions will be outlined in detail in chapter two of this study. In the *Sidumo* Case, the Constitutional Court sought to put the issue at rest by expressing what is entailed in the content of the notion of substantive fairness and how it should be applied. In essence, the Constitutional Court found that the application of the notion of substantive fairness is premised on a value judgment to be exercised by a presiding officer.

⁷ (2007) 28 ILJ 2405 (CC)

Notwithstanding this Constitutional Court judgement, the application of this principle is still susceptible to arbitrary application if the exercise of value judgement is not premised on clearly identified value such as the constitutional value of dignity. There is also a “band of reasonableness”⁸ in the determination of substantive fairness within which one presiding officer’s conclusion may differ with the other in the course of exercising a value judgment. In this “band of reasonableness” one presiding officer may find it reasonably fair to dismiss while the other may find it reasonably unfair to dismiss. In both instances, it may still happen that these positions both fall within the “band of reasonableness” It is this possibility of arbitrary application that this study is concerned about.

This chapter will set the scene for a critical analysis of the application of the notion of substantive fairness in dismissals for misconduct and will identify what this study seeks to achieve.

2. Background of the study

There is an inherent conflict of interests embedded in the employment relationship between employers and employees. In the course of this conflict, each party exercises powers vested in it to protect and advance its own interests. It is generally accepted that in the employment relationship employers wield more power than employees, which can result in unscrupulous employers treating employees as commodities to be dispensed with at the will of such employers.

⁸ British Leyland UK Ltd v Swift (1981) IRLR 91 (CA) para 11, page 93

The advent of democracy in South Africa heralded a new era in the employment relationship. The Constitution of the Republic of South Africa⁹, which is the supreme law of the land, and other legislation have codified rights, obligations and recourse of all parties involved in the employment relationship. The foundation of these rights is s23(1) of the Constitution which provides that ‘everyone has a right to fair labour practice.’ In the case of *Nehawu v University of Cape Town*¹⁰ the court, in interpreting the essence of s23(1), said:

“the focus of s23 (1) of the Constitution 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 to 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”

The letter and spirit of s23 (1) of the Constitution has been further carried forward and elaborated on by the provisions of the Labour Relations Act (LRA) 66 of 1995, as amended. Section 1 of the LRA provides that the purpose of the Act is to:

“Advance economic development, social justice, labour peace and the democratization of the workplace by fulfilling the primary objects of the Act which are –

- (a) To give effect to and regulate the fundamental rights conferred by the section 27 of the Constitution¹¹;
- (b) To give effect to obligations incurred by the Republic as a member state of the International Labour Organisation;
- (c) ...”

Section 3 of the LRA provides further that any person applying the Act must interpret its provisions –

- (a) “To give effect to its primary objects;

⁹ Act 108 of 1996

¹⁰ (2003) 24 *ILJ* 95 (CC), para 40

¹¹ Section 27 of the interim constitution. In the current Constitution, rights on labour relations are provided for in section 23.

- (b) In compliance with the Constitution ; and
- (c) In compliance with the public international law obligations of the Republic.”

The Constitution of the Republic of South Africa and the LRA, therefore, constitute a much needed base for balancing the power relations between employers and employees. Notwithstanding these progressive developments of law and jurisprudence, the content and application of the notion of substantive fairness in cases of dismissal has remained elusive. There has been a lacuna in the application of law in determining substantive fairness in cases of dismissal for misconduct. Andre Van Niekerk in his article titled ‘Dismissal for misconduct – Ghost of justice, past, present and future’¹² makes a point that:

“The Labour Relations Act 66 of 1995 fails to articulate a normative foundation from which the right not to be unfairly deprived of work security might be derived. While the courts have established [that] the determination of a fair sanction for workplace misconduct necessarily entails a value judgment, they have failed to recognize that the principled decision-making requires a coherent conception of justice...a conception of justice more closely aligned with constitutional values of dignity and autonomy requires that the sanction of dismissal is a rational response to employer goals of economic efficiency, and that a relationship of reasonable proportionality exists between the sanction and those goals.”¹³

In common law, the notion of substantive fairness did not feature at all and the decision to dismiss purely rested on the contractual agreement between an employer and employee. This meant that for an employee to challenge dismissal, the employee had to prove breach of a material term of the contract of employment. The common law application continued until the Industrial Conciliation Amendment Act 94 of 1979, hereinafter referred to as the 1979 Amendment Act, which introduced the concept of fair labour practice. Nonetheless, the 1979 Amendment Act made no

¹² A Van Niekerk ‘Dismissal for misconduct – Ghosts of justice, past, present and future’, (2012) *Acta Juridica: Reinventing Labour Law: reflecting on the first 15 years of Labour Relations Act and future challenges* 102 - 119

¹³ Supra, page 102

mention of the notion of substantive fairness. The historical development of this aspect of law will be dealt with in detail in chapter two of this study.

The concept of fair labour practice now finds expression in the Bill of Rights set out in the Constitution. It has been further elaborated in the Labour Relations Act 66 of 1995, item 7 of Code of Good Practice: Dismissal as well as the CCMA Guidelines: Misconduct Arbitration¹⁴ which stipulates factors that need to be taken into account by commissioners in the process of balancing the interests of employers and employees when determining substantive fairness of the sanction for misconduct. The law that is in application will be discussed in detail in chapter three of this study.

When the courts were faced with the predicament of interpretation and application of the novel right to fair labour practice as introduced by the Industrial Conciliation Act 94 of 1979, they borrowed from the English Law jurisprudence where commissioners were expected to defer to the interests of the employer when determining substantive fairness in cases of dismissal for misconduct. This jurisprudence found prominence after the Labour Appeals Court case of *Nampak Corrugated Wadeville v Khoza*¹⁵ where the court found as follows:

“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.”¹⁶

¹⁴ The Code of Good Practice: Dismissal, Schedule 8 of the LRA and CCMA Guidelines: Misconduct Arbitrations contained in the Labour Relations Act 66 of 1995

¹⁵ [1999] 2 BLLR 108 (LAC)

¹⁶ Supra, para 33

In the case of *County Fair Foods (Pty) Ltd v CCMA and Others*¹⁷ Ngcobo AJP (as he then was) delivered the following dictum:

“Commissioners must approach their functions with caution. They must bear in mind that their awards are final – there is no appeal against their awards. In particular, commissioners must exercise greater caution when they consider the fairness of the sanction imposed by an employer. They should not interfere with the sanction merely because they do not like it. There must be a measure of deference to the sanction imposed by the employer subject to the requirements 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.”¹⁸

The two above-mentioned dicta from the case of *County Fair Foods* and *Nampak* were cited with approval in the Supreme Court of Appeal case of *Rustenburg Platinum Mines Ltd v Commission for Conciliation, Mediation and Arbitration and Others*.¹⁹ The Supreme Court of Appeal dealt with the appeal of the decision from the Labour Appeal Court which had, confirming the decision of the Labour Court, effectively jettisoned the approach of affording a measure of deference to the sanction imposed by the employer.

The Supreme Court of Appeal overturned the decision of the Labour Appeal Court and reaffirmed that commissioners should exercise a measure of deference to the employer’s decision. Cameron JA said:

“It is in my view regrettable that the Labour Appeal Court has not consistently affirmed and applied the analysis. Although some panels have affirmed Ngcobo AJP’s approach, this case indicates how far the practice of the Labour Appeal Court has on occasion strayed from it...instead of exhorting commissioners to exercise greater caution when intervening, and to show a measure of deference to the employer’s sanction so long as it is fair, it has insulated commissioners’ decisions from intervention by importing unduly constrictive criteria into review process.”²⁰

¹⁷ [1999] 11 BLLR 1117 (LAC)

¹⁸ Supra, note 10, para 28

¹⁹ (2006) 27 ILJ 2076 (SCA), para 41 - 42

²⁰ (2006) 27 ILJ 2076 (SCA) at para 41

The decision of the Supreme Court of Appeal was taken to the Constitutional Court as the case of *Sidumo and Another v Rustenburg Platinum Mines and Others*²¹ (the *Sidumo Case*). The Constitutional Court overturned the decision of the Supreme Court of Appeal and re-affirmed the decision of the Labour Appeal Court – thereby by effectively rejecting the approach of deferring to the decision of the employer. The Constitutional Court replaced the approach of deferring to the sanction by the employer with one in terms of which the interests of both the employer and the employees are balanced in an objective manner. The full impact of this case and the jurisprudence it established will be discussed in great detail in chapter three.

An important finding in the *Sidumo Case* is that the content of the right to substantive fairness in cases of dismissal for misconduct entails the exercise of value judgment by the presiding officers. However, the exercise of the value judgment not premised on the constitutional values of dignity may still be open to arbitrary application. This possibility was acknowledged in the *Sidumo Case*, where Ngcobo J held that “*however objective determination of fairness of dismissal might be, it is a determination based upon a value judgement. Indeed the exercise of a value judgment is something about which reasonable people may readily differ*”²²

Ngcobo J further held that:

“... it could not have been the intention of the law-maker to leave the determination of fairness to the unconstrained value judgement of the commissioner. Were that to have been the case the outcome of a dispute could be determined by the background and perspective of the commissioner...yet fairness requires that regards must be had to the interests both of the workers and those of the employer”²³

²¹ (2007) 28 ILJ 2405 (CC)

²² (2007) 28 ILJ 2405 (CC), page 91, para 179

²³ Supra, para 91

In spite of the progressive development of law relating to the notion of substantive fairness as articulated above, the prevailing jurisprudence still has a lacuna which, if not remedied, has a potential of defeating the intention of the exercise of value judgment.

3. Aims and Objectives

As it has been noted above, the approach of balancing the interests of the employer and the employee, and taken together with the exercise of value judgement does not essentially provide the “normative foundation for a coherent conception of justice”²⁴ in determining fairness. The guidelines as enunciated in the Code of Good Practice: Dismissals and CCMA Guidelines: Misconduct Arbitration²⁵ remains, arguably, nothing more than guidelines whose weight is heavily subjected, in essence, to the whims of the exercise of the value judgement. Equally, value judgement itself, whilst now constrained by the factors that must be taken into account in determining substantive fairness, is, as correctly noted by Ngcobo J in the *Sidumo Case*, susceptible to producing arbitrary decisions based on the background and perspective of the commissioner concerned.

The purpose of this study is to propose the application of the constitutional value of dignity to underpin the exercise of value judgement in determining substantive fairness in cases of dismissal for misconduct. It will start by giving a brief account on

²⁴ A Van Niekerk ‘Dismissal for misconduct – Ghosts of justice, past, present and future’, (2012) *Acta Juridica: Reinventing Labour Law: reflecting on the first 15 years of Labour Relations Act and future challenges* 102 - 119

²⁵ Labour Relations Act 66 of 1995

the development of law governing determination of the notion of substantive fairness in cases of dismissal for misconduct and subsequently provide a critical analysis of the existing law governing substantive fairness in dismissal of employees for misconduct. The current law which is based on the exercise of value judgement in balancing the interests of the employer and employees was developed by the Constitutional Court Case of *Sidumo and Another v Rustenburg Platinum Mines and Others*²⁶ (the *Sidumo Case*).

The study is concerned only with dismissal in the form of the termination of a contract of employment, with or without notice, by an employer for reasons of misconduct excluding misconduct in the form of engaging in unprotected strike action. It is further limited to considering the determination of substantive fairness and does not extend to procedural fairness.

4. Methodology

This is a desktop study and its methodology will be based on the review of primary and secondary sources. The sources that will be consulted include legislation, case law, books, academic articles and/or journals.

²⁶ (2007) 28 ILJ 2405 (CC)

5. Structure of dissertation

Chapter One provides an introduction and aims and objective of the study. The introduction sets the scene for the critical analysis of law relating to substantive fairness in dismissal for misconduct. The aims and objectives set out what the study seeks to achieve.

Chapter Two of this study will focus of providing background and historical development of the law governing substantive fairness in dismissal for misconduct. The chapter will also contain the literature review.

Chapter Three will discuss the current law governing the determining of substantive fairness in cases of dismissal for misconduct as an appropriate sanction. This chapter will, therefore, deal in detail with the Labour Relations Act 66 of 1995, the provisions of the Code of Good Practice: Dismissal, the CCMA Guidelines: Misconduct Arbitrations, as well as the jurisprudence established by the *Sidumo Case*.

Chapter Four will discuss the shortcomings in the current approach to determining the substantive fairness in dismissal for misconduct. It will further discuss the suggested alternative to the current approach which is based on the importance of the right to dignity in the context of determining substantive fairness in dismissal as a sanction as well as provide a conclusion

CHAPTER TWO

2.1 INTRODUCTION

South African labour law has evolved as both political and socio-economic conditions in the country have changed over the successive decades. From the common law position on employment relations, statutes were introduced and amendments effected in order to meet the demands of each particular epoch. South African labour law was, before the democratic breakthrough, reflective of the South African system of government that discriminated against people on the basis of colour. The development of common law through the labour law statutes and their subsequent amendments were in the main informed by the economic demands of the employers as opposed to the need of protecting workers irrespective of their colour.

As labour law developed, two contending schools of thoughts emerged in the course of determining substantive fairness in cases of dismissal for misconduct. The first school of thought was that of a reasonable employer and/or deferring to the interests of the employer when determining substantive fairness. This school of thought, as will be shown below emerged from s57(3) of the Employment Protection (Consolidation) Act of 1978, hereinafter referred to as the English statute, and the case of *British Leyland UK Ltd v Swift*²⁷

In South Africa, the reasonable employer test was also heavily influenced by the nature of the system of government at the time. It is common knowledge that the employers were mainly of white origin and the system of apartheid was designed to

²⁷ [1981] IRLR 91 (CA)

protect their interests. With the law at the time designed to protect the interest of people of white origin who were mainly the employers and exploiters of cheap labour from people of colour, the Africans, it only followed that the judiciary would defer to the interests of employers when interpreting and applying the notion of substantive fairness in cases of dismissal.

The second school of thought is one referred to as the “own opinion” approach which emerged in the case of *Engen Petroleum Ltd v CCMA & Others*.²⁸ According to this approach, an arbitrator is empowered to decide substantive fairness in a case of dismissal for misconduct according to his/her opinion and/or judgment of what is fair or unfair without deferring to the employer.²⁹

This chapter will briefly trace the historical developments of the South African labour law in relation to the notion of substantive fairness. It will further deal with the case law that has dealt with the interpretation and application of the notion of substantive fairness in terms of the current law. This study will deal both with the cases that favoured the employer deference approach in establishing substantive fairness as well as those that favoured the “own opinion” approach.

²⁸ [2007] 8 BLLR 707 (LAC)

²⁹ *Supra*, at page 73

2.2 Historical Development

2.2.1 Common Law

In common law, the principles underpinning work security, as now enunciated by the Constitution and LRA, did not obtain. Employees rights were confined to those provided for in the contract of employment. The common law position resulted in employment being “employment at will”, where either party in the contract, employer or employee, could terminate employment provided such termination met the contractual provisions.³⁰ In essence, the relationship between the employer and employee was purely regulated by the provisions of the employment contract entered into by parties concerned.

In an instance where an employer terminated the contract by way of dismissing an employee, the employer was under no obligation to reveal reasons for dismissal to the employee nor to justify the dismissal, provided such dismissal was in accordance with the general law of contract. The decision to dismiss was a managerial decision – a decision that could not be tampered with to the extent that it complied with the contractual terms between an employer and employee. Where an employer dismissed an employee, with or without notice or with inadequate contractual notice, the employee could only claim damages based on the breach of contract. However, the courts generally refused to order specific performance where breach was established.³¹

³⁰N Cassim ‘Unfair Dismissal’ (1984) 5 *Industrial Law Journal* 276

³¹*National Union of Textile Workers v Stag Packings* 1982 (4) SA 151 (T), (1982) 3 *ILJ* at 285

The common law position had a glaring weakness which rendered employees vulnerable and reliant on the whims of unscrupulous employers. It failed to appreciate and fairly regulate the power struggle between the employers and employees. As noted by Nazeer Cassim:

“The common law views the employer and the employee as free and equal contracting parties, ignoring the obvious discrepancy in their bargaining power and the fact that the employment relationship provides income to a family unit for the employee and constitute a cost of production or service for the employer.”³²

In essence, the major deficiency of the common law was that it could not intervene to protect the interests of employees beyond the terms of the employment contract. Employers were left with unconstrained power over the employees to the extent that job security for employees was never protected by law but depended on the wishes of the employer at that point in time.

2.1.2 The Industrial Conciliation Amendment Act 94 of 1979

On the recommendation of the Wiehahn Commission³³, the government passed the Industrial Conciliation Amendment Act 94 of 1979, hereinafter referred to as the 1979 Act. The 1979 Act established the Industrial Court and introduced the concept of unfair labour practice. However, the definition of unfair labour practice made no mention of termination of employment or of any right or recourse against an

³² N Cassim ‘Unfair Dismissal’ (1984) 5 *Industrial Law Journal* 276

³³ The Wiehahn Commission was set up by the government after the Durban strikes of 1973 and the Soweto uprisings of 1976 to look at industrial relations system in South Africa. - See more at: <http://www.sahistory.org.za/dated-event/wiehahn-commission-report-tabled-parliament#sthash.YhJQZAEEd.dpuf> (accessed on 16 July 2016)

employer when employment had been terminated in circumstances that could be regarded as unfair. Brassey M further makes a point that:

“the legislation gave no direct indication of the principles required to inform this fundamental shift from the common law market-based paradigm which acknowledged different precepts for the regulation of the security of employment...there was no clear articulation of the far-reaching limitation that was to be placed on a power that had long been sacrosanct – the almost unbridled power of an employer to dismiss”³⁴.

In spite of the absence from the 1979 Act of clear articulation on fairness in dismissal, the Industrial Court, with the influence of the international labour standards, particularly the International Labour Organisation Recommendation 119³⁵ developed a jurisprudence which gave rise to the concept of unfair labour practice as including a requirement that dismissal needed to be substantively and procedurally fair.

The articulation of the concept of fairness in dismissal by the Industrial Court marked a departure from the common law paradigm as described above. It provided that an employer was required to justify a decision to terminate an employee’s employment and that the employer’s reason had to be fair and taken after the employer had followed a fair procedure.³⁶

³⁴ M Brassey et al. *The New Labour Law: Strike, Dismissals and the Unfair Labour Practice in South African Law* [1987] 98

³⁵ http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:15601953883899::NO::P12100_SHOW_TEXT:Y (accessed on the 16 July 2016)

³⁶ A Van Niekerk ‘Dismissal for misconduct – Ghosts of justice, past, present and future’, 2012 *Acta Juridica: Reinventing labour law: reflecting on the first 15 years of the Labour Relations Act and future challenges* 104

2.1.3 International Labour Organisation Recommendation 119

The development of the law in relation to substantive fairness in cases of dismissal was further heavily influenced by the Recommendation 119³⁷ of the International Labour Organisation, hereinafter referred to as the ILO, which South Africa is a member of. The ILO emerged after the Second World War to give expression to the reforms that grew with the industrial revolution and the need to deal with labour standards at an international level. South Africa was re-admitted to the ILO in 1994 after it withdrew in 1964 as a result of political pressure associated with the demand to abolish the Apartheid system.

The ILO is a very crucial and credible source of international labour standards. Its recommendations and conventions have laid a monumental foundation for significant development of international labour standard and codes across the globe. In 1963 the ILO met in Geneva and adopted Recommendation 119 which proved to have wide positive effect in South African employment relations and had a great impact on South African courts' interpretation of fairness or lack of in cases of dismissals. The Recommendation provided, amongst other things, that the termination of employment should be founded on valid reasons connected to the capacity or conduct of the worker or based on the operational requirements of the business.³⁸

The Recommendation 119 further provided that if a worker is of the view that the termination of his employment was unjustifiable, that worker was entitled to appeal,

³⁷ http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:15601953883899::NO::P12100_SHOW_TEXT:Y
(accessed on the 16 July 2016)

³⁸ *supra*

within a reasonable time, against such termination to a body established under a collective agreement or a neutral body such as a court or an arbitration committee.³⁹

These bodies are empowered to examine the reasons advanced for termination of employment and any other necessary circumstances pertinent to the case and make a determination on the justification or lack thereof for the termination of employment.

2.1.4 Evolution of the reasonable employer test

The absence of a clear articulation of substantive fairness in common law and earlier statutes led our courts to borrow from the English Law regarding determination of substantive fairness. The Employment Protection (Consolidation) Act 1978, hereinafter referred to as the English Statute, had established a principle of the reasonable employer test in determining fairness or otherwise of the sanction of dismissal. The test is premised on the notion that if an employer imposes a sanction on an employee that falls within the 'band of reasonable' sanctions that can be imposed, a tribunal is prevented from interfering with that decision.⁴⁰

Section 57(3) of the English Statute provided as follows:

“The 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 the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and that question shall be determined in accordance with equity and the substantive merits of the case.”

³⁹ Supra

⁴⁰ T Cohen “The Reasonable Employer Test – Creeping in Through the Back Door?” *SA Mercantile Law Journal*, 2003, Vol 15, Issue 2, page 192

In the case of *British Leyland UK Ltd v Swift*⁴¹ Lord Denning in his judgment expounded on the inquiry into fairness as provided for by the provisions of the English Statute. His explanation has been frequently quoted in support of the reasonable employer test and reads as follows:

“The first question that arises is whether the Industrial Tribunal applied the wrong test. We have had considerable argument about it. They said: ‘...a reasonable employer would, in our opinion, have considered that a lesser penalty was appropriate’. I do not think that this is right test. 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. 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”

In essence the reasonable employer test demanded that commissioners must use their powers to intervene with caution because the discretion to dismiss lay with the employer. To the extent that such discretion is exercised fairly, commissioners had to afford the sanction of dismissal a measure of deference.

2.2 CASE LAW

2.2.1 Cases in favour of the reasonable employer test

The early cases that were decided by courts were in favour of the reasonable employer test as a determinant factor in establishing substantive fairness in cases of dismissal. The two leading cases in favour of the reasonable employer test were the

⁴¹ (1981) IRLR 91 (CA) para 11, page 93

case of *Nampak Corrugated Wadeville v Khoza*⁴² and the case of *County Fair Foods v CCMA and Others*.⁴³

Nampak Corrugated Wadeville v Khoza⁴⁴

This is a Labour Appeal Court case where the respondent had been employed by the appellant as a boiler attendant for some 15 years. The respondent was described in evidence as very experienced boiler attendant and he had received proper training as a boiler attendant. The respondent was charged with gross negligence as a result of damage caused to the boiler. At the conclusion of the disciplinary hearing, the chairperson found that the damage to the boiler had been caused by the exposure of the grate to too high temperature for a prolonged period. He further found that had the correct procedure been followed, the damage would not have been caused. The respondent was accordingly found guilty of gross negligence of the highest degree and, having found no mitigating circumstances, the chairperson recommended a dismissal.

The respondent challenged his dismissal and referred the dispute to the Industrial Court for a determination in terms of section 46(9) of the Labour Relations Act 28 of 1956. Before the court, the respondent put in issue the substantive fairness of his dismissal. The court concluded that, from the facts, the respondent was negligent. However, it could not find that he was grossly negligent due to the circumstantial nature of evidence as to the cause of negligence.

⁴² [1999] 2 BLLR 108 (LAC)

⁴³ [1999] 11 BLLR 1117 (LAC)

⁴⁴ Supra, note 35

The court found that, having regard to the facts and circumstances of the case, the sanction of dismissal was too harsh and constituted an unfair labour practice. It ordered that the respondent be reinstated in his employment.

On appeal, the court 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.”⁴⁵

The court further held that the correct test to apply in determining whether or not a dismissal was fair was enunciated by Lord Denning in the case of *British UK Limited v Swift*⁴⁶ as discussed above. Influenced by the test articulated by Lord Denning, the Labour Appeal Court held that it was not unreasonable for the appellant to dismiss the respondent. The trust which is fundamental in an employer/employee relationship was broken.

County Fair Foods (Pty) Ltd v CCMA and Others⁴⁷

The respondent employee and Ms Smit, a fellow employee, had been involved in a relationship. Ms Smit ended the relationship. The respondent employee was unhappy and, during the late night shift at work, tried to speak to her in an attempt to revive the relationship. Ms Smit refused to speak to him and, in order to avoid him,

⁴⁵ Supra, para 33

⁴⁶ (1981) IRLR 91 (CA)

⁴⁷ [1999] 11 BLLR 1117 (LAC)

went into the ladies' cloakroom. He followed her and tried to force her to sit on his lap. Ms Smit swore at him and he then hit her twice with a broomstick, hard enough to leave marks. Other female employees witnessed the incident.

Pursuant to a disciplinary enquiry, the employee was dismissed for assaulting Ms Smit. At arbitration proceedings, the CCMA confirmed the finding of assault, but considered the sanction of dismissal too harsh. The commissioner characterized the assault as a private matter and considered the history of the romantic relationship to be a mitigating factor. The commissioner ordered the re-employment of the employee on a final written warning valid for one year. On review, the Labour Court confirmed the award, save for substituting the work 'reinstatement' for 're-employment'.

The Labour Appeal Court overturned the decision of the Labour Court and the award by the commissioner. Kroon JA held as follows:

"it was not for the arbitrator to determine de novo what would be a fair sanction, but rather to determine whether the sanction imposed by the employer was fair. It remains part of our law that it lies in the first place within the province of the employer to set the standard of conduct to be observed by its employees and to determine the sanction with which non-compliance with the standard will be visited. Interference therewith is only justified in the case of unreasonableness or unfairness."⁴⁸

In light of the facts set out above and the legal position observed in the preceding paragraph, Kroon JA came to a conclusion that there was no rational objective basis that existed in terms of which the arbitrator's decision not to endorse the employer's

⁴⁸ Supra, page 1703, para E

decision that the third respondent be dismissed was justifiable. The judge further held that

“even if the correct approach was that the arbitrator could decide de novo on what would constitute a fair sanction, his decision that fairness demanded a lesser sanction than dismissal was not justifiable on any rational objective basis. The absence of that basis results in the arbitrator’s award being vitiated by gross irregularity; as a result it stood to be overturned”⁴⁹.

In the concurring judgment, Ngcobo AJP observed as follows:

“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 bear in mind that their awards are final – there is no appeal against their awards. In particular, commissioners must exercise greater caution when they consider the fairness of the sanction imposed by an employer. They should not interfere with the sanction merely because they do not like it. There must be a measure of deference to the sanction imposed by the employer subject to the requirements 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.”⁵⁰

Ngcobo AJP further cited with approval the dictum of Brassey AJ in the case of *Computicket v Marcus NO and Others*⁵¹ where he held as follows:

“The question of sanction for misconduct is one on which reasonable people can readily differ. One person may consider that dismissal is the appropriate sanction for an offence, another that something less, such as a warning, would be appropriate. There are obviously circumstances in which a reasonable person would naturally conclude that dismissal was the appropriate sanction, for example if there had been theft of a significant amount of money, fraud or other untrustworthy conduct on the part of the respondent.”⁵²

The 1979 Act and its subsequent amendments made no provision within the definition of ‘unfair labour practice’ for deferring to the employer when determining substantive fairness. It appears that the basis for this approach is informed by the

⁴⁹ Supra, page 1708, para C

⁵⁰ Supra, page 1713, para 28 J

⁵¹ (1999) 20 *ILJ* 342 (LC)

⁵² Supra, page ???

stance that the decision to dismiss, presumably just like a decision to employ and set codes of conduct at the work place, is within the province of the employer. The employer may decide, as long as his decision falls within a “band of reasonableness”, to impose any sanction he deems fit. The approach of deferring to the employer places prime value to the interests of the employer. The inquiry seems to be from the standpoint not of the interest of the employee as a victim but of the employer who has powers to determine the conduct at the work place and sanctions of non-compliance with the set standards of conduct.

The test involved in this approach was aptly articulated in the English case of *British Leyland UK Ltd v Swift*⁵³ where the court held that “the correct test is: was it reasonable for the employer to dismiss? In no reasonable employer would have dismissed, then the dismissal was unfair.”⁵⁴ In terms of this test, the decision of the employer to dismiss the employee may only be interfered with to the extent that “*it is so unfair that it makes him whistle or unless it is so excessive as to shock one’s sense of fairness or is it unfair that no reasonable employer would have regarded it as a fair sanction.*”⁵⁵

The thesis advanced in the cases above does not strike a proper balance between the interests of the parties in the employment contract. An appropriate balancing act requires that while taking into consideration employers interests which are about right to the economic activity and protection of business interests, due regard must be given to the fact that in the employment relationship, employers command more

⁵³ [1981] IRLR 91

⁵⁴ [1981] IRLR 91 (CA) at para 11

⁵⁵ *Engen Petroleum Ltd v CCMA & Others* [2007] 8 BLLR 707 (LAC) para 1

power than employees because they own the means of production and are driven by the need for profit maximization. On the other hand, employees depend on selling their labour for them to survive. As such, a decision to dismiss an employee will have dire consequences on the dignity and continued survival of the affected employee.

2.2.2 Cases in favour the “own opinion” approach

The need to afford more protection to workers and to attempt to strike equilibrium between the interests of the parties in the employment relationship could no longer be ignored by some courts who jettisoned the employer deference approach in favour of a more balanced approach. The alternative to the employer deference approach came to be known as the “own opinion” approach and was defined by Zondo JP as meaning that the arbitrator is required to determine fairness or lack of in case of dismissal for misconduct according to his own opinion of what is fair given the totality of the circumstances of the case.⁵⁶

Amongst the leading cases that ruled in favour of the “own opinion” approach include *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd (Perskor)*,⁵⁷ which ruled in favour of courts applying moral judgement in deciding substantive fairness and *Engen Petroleum Ltd v CCM & Others*⁵⁸, which enunciated in clear terms the concept of the “own opinion” approach.

⁵⁶ *Engen Petroleum Ltd v CCM & Others* [2007] 8 BLLR 707 (LAC) at para 1

⁵⁷ 1992 (4) SA 791 (A)

⁵⁸ [2007] 8 BLLR 707 (LAC)

Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd (Perskor)⁵⁹

This was an appeal case which dealt with two questions that were put to issue by the Appeal Court. The first question, which is relevant in this study, was whether the Judge in the Labour Appeal Court was correct in finding that the assessors had no part to play in deciding the question as to whether or not the facts found constituted an unfair labour practice. The Labour Appeal Court had found that the assessors had no part in deciding the question of unfair labour practice and it based its decision on the ground that this decision is a decision on the question of law which is an exclusive domain of the Chairman in terms of Section 17A (3)(e)(ii) of the 1958 Act.

The Appellate Division came to a different conclusion and heavily based its reasoning on the writing of *Salmond on Jurisprudence*⁶⁰. According to Salmond, as quoted in the judgement, matters and questions that come before the court fall under three categories and these are:

- i) “Matters and questions of law – all that are determined by authoritative legal principles;
- ii) Questions of fact – which includes all questions that are not questions of law.
- iii) Matters and questions of judicial discretion – all matters and question as to what is right, just, equitable or reasonable except those determined by the law. In such matters, it is the duty of the court to exercise its moral judgment in order to ascertain the right and justice of the case”⁶¹.

The Appellate Division felt that the issue of what constitute fairness falls under questions of judicial discretion where the court must exercise its moral judgement.

Considering the provisions of the 1958 Act, the Appellate Division further held that

⁵⁹ Supra, note 49

⁶⁰ J Salmond 'Jurisprudence or The theory of the Law' 12th ed, page 65 – 75 <http://musicians4freedom.com/wp-content/uploads/2012/11/Jurisprudence-Sir-John-William-Salmond.pdf> (accessed on the 27 September 2017)

⁶¹ 1992 (4) SA 791 (A) at 976-G

“the Legislature clearly intended that assessors would play a useful role in the determination of disputes concerning unfair practices. It seems most unlikely that the Legislature would have intended this role would have been limited to the determination of what the facts are as distinct from the ultimate decision whether such facts constitute unfair labour practice”⁶²

Engen Petroleum v CCMA and Others⁶³

The third respondent, one of the truck drivers of the appellant, was dismissed at the disciplinary hearing after being found guilty of making unauthorized stops and tampering with the tachograph fitted in his truck which records the movement of the truck. During the arbitration, although the third respondent continued to deny that he had tampered with the tachograph, the second respondent, based on evidence presented by the tachograph analyst, concluded that the third respondent had tampered with the tachograph. However, the second respondent came to the conclusion that the dismissal as a sanction was in the circumstances too severe and that the appellant should have given the third respondent a final written warning instead of dismissal.

Aggrieved with the award, the appellant brought an application to the Labour Court to have the award reviewed and set aside on the ground that the second respondent had committed gross irregularity in the conduct of the arbitration proceedings and that he had exceeded his powers. The Labour Court dismissed the application.

While the Labour Appeal Court followed the precedent of the Supreme Court of Appeal in the case of *Rustenburg Platinum Mines Ltd v CCMA*⁶⁴ the court found that

⁶² 1992 (4) SA 791 (A) at 974 - J

⁶³ [2007] 8 BLLR 707 (LAC)

it was never a legal position of the 1979 Act that arbitrators had to defer to the employer in determining substantive fairness. The 1979 Act required the Industrial court to “determine” a dispute, the Labour Appeal Court to “decide” an appeal and the Appellate Division to “confirm, amend or set aside” a decision of the Labour Appeal Court concerning fairness of dismissal⁶⁵. Flowing from this, the Labour Appeal Court came to the conclusion that it was inescapable to concluded that the 1979 Act envisaged passing a moral or value judgment (“own opinion”) in determining whether or not the dismissal as sanction was unfair and that the arbitrator was required to decide with his own opinion or judgment of what is fair or unfair given the totality of the circumstances of each case.⁶⁶

The rejection of the employer deference approach was confirmed in numerous cases in various levels of courts. In the case of *Toyota South Africa v Radebe and Others*⁶⁷ Nicholson JA remarked that:

“I do not believe that the reasonable employer test is part of our law... 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.”⁶⁸

It is apparent from the above case law that the South African courts, for a very long period of time, failed to settle the inconsistencies in the determination of the notion of substantive fairness in case of dismissal for misconduct. The conflicting judgements passed by the South African courts were evident of the absence of clear articulation

⁶⁴ 2007 (1) SA 576 (A)

⁶⁵ Supra, note 56, Page 25

⁶⁶ Supra, note 56, Page 43

⁶⁷ (2000) 21 ILJ 340 (LAC)

⁶⁸ Supra, note 59, para 51.

of the right to substantive fairness by statutes of the time. The absence of this clear articulation led to some courts borrowing from the English Law which resulted in the adoption of the employer deference approach. On the other hand, some courts reject the adoption of the employer deference approach and adopted the route of passing moral or value judgment in determining what is fair and what was not fair.

CHAPTER THREE

3.1 Introduction

The notion of substantive fairness is now embedded in the provisions of the Constitution of the Republic of South Africa, the Labour Relations Act and the jurisprudence as developed in the case of *Sidumo and Another v Restenburg Platinum Mines*⁶⁹ (*Sidumo Case*). The Code of Good Practice: Dismissals⁷⁰ as well as the Guidelines for Commissioners⁷¹ further seek to provide clarity on how presiding officers should go about ascertaining the notion of substantive fairness in cases of dismissal for misconduct. This chapter will deal in detail with the notion of substantive fairness as enunciated by the above-mentioned Acts, Guidelines and in the *Sidumo Case*.

3.2 Constitution of the Republic of South African

South Africa has a constitutional democracy system of governance and the Constitution is the supreme law of the land. Any law that is inconsistent with the Constitution shall be declared invalid. The Constitution further requires that any law should be interpreted and developed in line with the letter, spirit and purport of the constitution.

Section 23(1) of the Constitution provides that everyone has a right to fair labour practice. The essence of this provision was well articulated in the Constitutional

⁶⁹ [2007] 28 ILJ 22405 [CC]

⁷⁰ Labour Relations Act 66 of 1995, Schedule 8

⁷¹ Labour Relations Act 66 of 1995, CCMA Guidelines: Misconduct Arbitrations

Court case of *Nehawu v University of Cape Town*⁷² where the court held that section 23(1) was mainly about striking the balance between the contracting parties as well as fairness in the continued employment relationship between the employer and the employee.

Again in the *Sidumo Case*, the Constitutional Court found that

“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.”⁷³

Flowing from the two Constitutional Court cases cited above, it is apparent that the court has been consistent in rejecting the ‘defer to the employer’ approach and finding it to be inconsistent with the Constitution. According to the Constitutional Court, the principle of fairness, as required by the Constitution, demands that due regard be given to balancing the interests of both the employer and the employee.

3.3 Labour Relations Act 66 Of 1995

The letter and spirit of section 23(1) of the Constitution has been carried forward by the provisions of the LRA. The LRA has as its purpose the advancement of economic development, social justice, labour peace and democratization of the workplace. It further aims to give effect to the provisions of the Constitution and give effect to the obligations of the International Labour Organisation in which South Africa is a member.⁷⁴

⁷² 2003 (3) SA 1 CC at para 40

⁷³ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 CC at para 61

⁷⁴ Labour Relations Act 66 of 1995, s1(b)

In terms of s85 of the LRA every employee has the right not to be-

- (a) Unfairly dismissed; and
- (b) ...

Section 188 of the LRA requires that a dismissal, if it is not automatically unfair, must be for a fair reason and anyone who is to determine whether the dismissal was fair or not must have due regard to the Code of Good Practice: Dismissal.

As noted above, amongst the objects of the LRA is to give effect to the obligations of the International Labour Organisation (ILO). In terms of Article 8(1) of the ILO Conventions on Termination of Employment 158 of 1982⁷⁵, an employee who deems termination of employment to be unjustifiable is entitled to appeal to an impartial body. Article 9 (1) of the same convention provides that an impartial body referred in Article 8 (1) is empowered to interrogate the reasons for termination and further determine whether the termination was justified. Furthermore, Article 10 provides that if the impartial body arrives at a determination, having considered the reasons and circumstances relating to the case, then it has discretion to decide on the appropriate award.

Emanating from the succinct provisions of the ILO Convention on Termination of Employment 158 of 1982 which rejects the 'defer to the employer' approach and empowers an impartial body to decide on the appropriate award should it find that the termination of employment was unfair, the objects of the LRA compels that the

⁷⁵ http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C158 (accessed on the 10 October 2017)

Act be interpreted in line with this Convention as well as the Constitution as explained above.

3.4 Code of Good Practice: dismissal and CCMA guidelines: misconduct arbitrations

Schedule 8 of the Labour Relations Act 66 of 1995 contains the code of good practice which spells out guidelines to be followed in misconduct arbitrations. These guidelines have, however, been crafted in broad and general terms in order to allow special circumstances of each case and to further give room for departure on the guidelines if such is justified given the peculiarity of the circumstances.

Item 7 of the Code of Good Practice provides that a presiding officer who seeks to ascertain fairness in the case of dismissal for misconduct should consider the following:

- (a) *Whether or not the employee contravened a rule or standard regulating conduct at the workplace;*

The factual inquiry at the stage involves two dimensions which are determining the existence of the rule and whether the rule has been contravened. It is common practice that a rule will be contained in the employer's code of conduct. However, employers are not obliged to pronounce in detail every workplace rule; it is sufficient that employees are made aware that certain forms of misconduct are proscribed and of the consequences of committing that misconduct.⁷⁶

⁷⁶*Motswenyane v Rokfall Promotions* [1997] 2 BLLR 217 (CCMA)

Rules of workplace may also be inferred from the common law duties in relation to the workplace. Rules emanating from common law include acting in good faith towards the employer, performance, obeying reasonable and lawful instructions and to work with due diligence and skills. In the case of breach of common law rule(s), the employer is not required to prove the existence of an express provision either in the employment contract or the code of conduct. In the case of *Hoechst (Pty) Ltd v CWIU & Another*⁷⁷, Joffe JA (as he then was) held that:

“Where misconduct does not fall within the express terms of a disciplinary code, the misconduct may still be of such a nature that the employer may nonetheless be entitled to discipline the employee...In our view the competence of an employer to discipline an employee for misconduct not covered in a disciplinary code depends on a multi-faceted factual enquiry. This enquiry includes but is not limited to the nature of the misconduct, the nature of the work performed by the employee, the employer’s size, the nature and size of the employer’s work-force, the position which the employer occupies in the market and its profile therein, the nature of the work or services performed by the employer, the relationship between the employee and the victim, the impact of the misconduct on the work-force as a whole, as well as on the relationship between employer and employee and the capacity of the employee to perform his job. At the end of the enquiry what would have to be determined is if the employees’ misconduct had the effect of destroying, or of seriously damaging, the relationship of employer and employee.”⁷⁸

If the rule is neither contained in the employer’s disciplinary code of conduct nor can be inferred from the common law practice, the rule can still be inferred from the written contract of employment, legislation(s), or practice in the sector. For example, there are rules that will arise from duties imposed by the legislation such as the Occupational Health and Safety Act 85 of 1993. Special rules may also emanate from sector such as stricter standards of compliance in sectors with high risk of safety and security.

⁷⁷ (1993) 14 *ILJ* 1449 [LAC]

⁷⁸ *Supra*, note 69, at 1459B-I

The second dimension entails a determination whether the employees conduct complained about contravened the rule. This involves proving the facts of the employee's conduct and applying the rule to such proven facts to establish whether such conduct is covered by the rule. The standard of proof is on the balance of probabilities.

Flowing from the above, it is apparent that an employee may not always succeed in arguing unfairness on the basis that the rule was not included in the disciplinary code of conduct.

(b) If a rule or standard was contravened, whether or not-

(i) The rule was valid or reasonable rule or standard

Once the existence of the rule has been established and that the employee has actually contravened it, the next factual inquiry is whether the rule was valid or reasonable. The rule will be regarded as invalid if it is unlawful and/or contrary to public policy. If the rule compels an employee to undertake an unlawful act, such as that prohibited by legislation, the employee is free to disregard it.

Another aspect of this inquiry is whether the rule is reasonable. Grogan points out that:

“generally, a rule is deemed unreasonable if it is not relevant to the workplace or to the employee's work, if the rule requires an employee to perform tasks that are morally repugnant or which employees cannot reasonably be expected to do given their skills levels or status.”⁷⁹

⁷⁹ Grogan, J *Dismissal 2nd ed* Cape Town: Juta & Co. Ltd (2014) Page 181

Therefore it should be accepted that if the rule departs in material terms from the standard of employees in that particular workplace as well as the standard of the workplace itself, that rule will fall to be declared unreasonable. In the final analysis, the conduct of an employer to dismiss an employee may be found substantively unfair if the rule breached is found to be unlawful and unreasonable. Put differently, an employee will be justified to disregard a rule that is unlawful and unreasonable.

- (ii) *The employee was aware or could reasonably be expected to have been aware of the rule or standard;*

An employee cannot be dismissed for contravention of the rule he was not aware of or could not be reasonably said to be aware of. The principle that ignorance of law cannot be an excuse does not apply in this case.⁸⁰ It is primarily the duty of an employer to ensure that employees are aware of what conduct is proscribed in that particular workplace. It is normal practice that the employer will make the disciplinary code of conduct available and understood by the employees.

However, as noted above not all rules will and can be contained in the disciplinary code of conduct as some will flow from legislation(s) specific to a particular sector, previous practice as well as common law. If an employee disputes that the rule contravened was contained in the disciplinary code of conduct and thus argues that he/she was not aware of it, the employer may adduce evidence concerning the past

⁸⁰ Supra, Note 71, page 186

practice which the employee was aware of, a legislation or common law. If it can be found that the employee ought to have reasonably known the rule, and indeed that the actions in question was in contravention of that rule, the employee may not rely on the fact that the rule was not contained in the disciplinary code of conduct.

(iii) *The rule or standard has been consistently applied by the employer*

Consistency in the application of the rule and standard is another important determining factor in the notion of substantive fairness. The jurisprudence as well as guidelines recognizes two types of consistency required of an employer in applying the rule and sanction *viz* consistency over time and consistency between the employees charged with the same contravention.

Inconsistency over time occurs when the employer has not, over the past period, applied the rule to employees who had committed similar conduct. An employee may argue that the rule has been rendered inconsistency and therefore not applicable because it has been disused for a period of time. In the case of *Matshoba v Fry's Metals*⁸¹, the employees were dismissed for failing to work overtime. Their dismissal was ruled unfair because the employer had never before dismissed employees for this reason.

Inconsistency between the employees occurs when the employer treats differently employees who have committed same contravention of the rule.

⁸¹ (1983) 4 ILJ 107 (IC)

However, inconsistency over time will not always absolve an employee if the employer can prove that he had since alerted employees of a stricter adherence to the application of the rule compared to the past period. Equally, inconsistency between employees may not always absolve the employee as it is also influenced by the aggravating and mitigating factors. For example, employees may be charged with same misconduct but with different aggravating and mitigating factors. For example, in the case of *SACCAWU v Irvin & Johnson (Pty) Ltd*⁸² the Industrial Court upheld dismissal of those employees who had been given final warnings for their involvement in the earlier unlawful demonstration, but held that the employees who had not yet been given warnings should only have been given final warnings for their involvement in the ultimate demonstration.

(iv) *Dismissal was an appropriate sanction for the contravention of the rule or standard.*

A decision to dismiss an employee charged with misconduct must be proportionate to that misconduct for it to be regarded as fair. The test is whether the misconduct rendered the continued employment intolerable or whether the cumulative effect of misconducts made dismissal the only appropriate sanction. In determining the appropriateness of the sanction, a presiding officer is called to exercise value judgement.⁸³ In exercising the value judgement, the Code of Good Practice: Dismissal requires that a presiding officer takes into account the following factors:

⁸² (1999) 20 ILJ 2302 (LAC)

⁸³ *Sidumo and Another v Rustenburg Platinum Mine Ltd and Others* 2008 (2) SA 24 (CC)

(a) Gravity of the misconduct

Ascertaining gravity of misconduct entails two enquiries viz an “inquiry into the sanction as a response to the contravention of the rule and an inquiry into the circumstances of that contravention”⁸⁴ If the misconduct is regarded as more serious, it is most likely that dismissal will be considered an appropriate response to the contravention. The Code further, without being exhaustive, identifies single acts of misconduct that may justify dismissal. These acts of misconduct include gross dishonesty, will damage of property, endangering the safety of other people, assault and gross insubordination.

(b) The circumstances of the infringement itself

The seriousness of misconduct alone may not always justify dismissal as a sanction. The decision on the nature of the sanction to be imposed is also influenced by both aggravating and mitigating factors. Aggravating factors carry with themselves a possibility of even imposing a harsher sentence than a prescribed one. Aggravating circumstances and/or factors may include lack of remorse, wilfulness, previous disciplinary record, dishonesty and the nature of damaged caused by misconduct.

On the opposite side of aggravating circumstances are mitigating factors. These are factors that may militate against the imposition of a harsher sentence. However, “an employer is not required to take mitigating circumstances into account merely because they evoke sympathy. The test is whether, taken individually or

⁸⁴ Labour Relations Act 66 of 1995, CCMA Guidelines: Misconduct Arbitrations, para 95

cumulatively, they serve to indicate that the employee will not repeat the offence.”⁸⁵ Mitigating factors may include showing remorse, pleading guilty and absence of damage or loss to the employer.

(c) The employees circumstances

The employer in imposing the sanction is required to take into consideration the personal circumstances of the employee. The weight to be attached to the personal circumstances remains an unresolved subject and will also be discussed in detail in the chapter four of this study. In terms of the guidelines, the employees circumstances to be considered include length of service, clean disciplinary record and employees personal circumstances. It is generally accepted that a clean disciplinary record and a long period of service weighs in favour of the employee in the continued employment contract.

(d) The nature of the employee's job

The nature of business and employees job may be such that misconduct makes the continued employment intolerable. The example is the case of *Black Allied Workers Union v One Rander Steak House*⁸⁶ where the Industrial Court took into account that efficient and quick service was essential in a restaurant functioning on the basis of low prices and high turnover. It held that the employees' disobedience as well as their slack and inefficient service constituted a fair reason for dismissal.

⁸⁵ Grogan, J Dismissal 2nd ed Cape Town: Juta & Co. Ltd (2014) page 211

⁸⁶ (1998) 9 ILJ 326 (IC)

3.5 Jurisprudence from the Sidumo case

The Constitutional Court case of *Sidumo v Rustenburg Platinum Mines Ltd*⁸⁷ became a landmark case in resolving the questions on what is entailed in the notion of substantive fairness and what should be the role of commissioners in determining the fairness of the sanction imposed by the employer. As evident from chapter two of this study, South African courts have, over time, been giving contradictory judgments on how the notion of substantive fairness should be established where a sanction of dismissal has been imposed. The net effect of the *Sidumo* case was the jettisoning of the reasonable employer test whose application had been confirmed by the Supreme Court of Appeal in the case of *Rustenburg Platinum Mines Ltd v CCMA and Others*.⁸⁸

In the *Sidumo* Case, a security officer who was responsible for access control at one of the mines of the employer was required to search persons exiting the premises. He was captured on surveillance camera which showed that he had conducted only one search, that he did not perform searches at all on at least eight occasions and on fifteen occasions he did not perform the search according to the established procedures and that he allowed persons to sign the search register when no search had been conducted. The presiding officer at the disciplinary hearing found him guilty of carrying out his duties negligently and of failing to follow company procedures.

⁸⁷ (2007) 28 ILJ 2405 (CC)

⁸⁸ (2006) 27 ILJ 2076 (SCA)

The matter was referred to the CCMA which held that his dismissal was unfair taking into account that his violations were a mistake and/or unintentional; that no actual losses could be proved by the employer; and that he had 15 years of service with a clean record. The CCMA Commissioner, although rejecting the excuses by Sidumo, found that the misconduct did not go “into the heart of the relationship with the employer”, hence the continued work could not be said to be intolerable. Both the Labour Court and the Labour Appeal Court, although critical with some reasoning of the commissioner, found that the sanction of dismissal was too harsh and therefore unfair. In finding that dismissal was unfair, the courts took into account the long service of Sidumo and the fact that he had no previous confrontations with the rules.

The employer took the matter to the Supreme Court of Appeal, which overturned the decision of the CCMA Commissioner as confirmed by the Labour Court and the Labour Appeal Court. Re-affirming the ‘defer to employer’ approach Cameron JA said:

“...a CCMA commissioner is not vested with 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”⁸⁹

Referring with approval the dictum of the Labour Appeal Court in *Nampak Corrugated Wadeville v Khoza*⁹⁰ as well as that of *Count Fair Foods (Pty) Ltd v CCMA and Others*⁹¹, Cameron JA proceeded to say:

“It is in my view regrettable that the LAC has not consistently affirmed and applied the analysis. Although some panels have affirmed Ngcobo AJP’s approach, this

⁸⁹ *Rustenburg Platinum Mines Ltd v CCMA* 2007 (1) SA 576 (SCA) at para 40

⁹⁰ [1999] 2 BLLR 108 [LAC]

⁹¹ [1999] 11 BLLR 1117 [LAC]

case indicates how far the practice of the LAC has on occasion strayed from it. Instead of exhorting commissioners to exercise greater caution when intervening and to show a measure of deference to the employer's sanction so long as it fair, it has insulated commissioners' decisions from intervention by importing unduly constrictive criteria into the review process."⁹²

Sidumo and others took the matter to the Constitutional Court, which effectively rejected the reasonable employer test and replaced it with "a reasonable decision-maker" test. The "reasonable decision-maker" test is premised on the exercise of value judgment by a presiding officer. This means that it is the sense of fairness by the commissioner which must prevail and this should be done without deferring to the employer. A court will only interfere with the decision of the commissioner to the extent that no reasonable decision maker could have arrived at that decision. The Court also found that there is no constitutional obligation that that a commissioner, in determining fairness, should defer to the perspective of the employer⁹³. The commissioner is expected to act as an impartial adjudicator.

The Constitutional Court cited with approval the case of *National Union of Metalworkers of SA v Vetsak Co-operative Ltd and Others*⁹⁴ where the Appellate Division stated that:

"Fairness comprehends that regard must be had not only to the position and interests of the worker, but also those of the employer, in order to make a balanced and equitable assessment. In judging fairness, a court applies a moral or value judgment to established facts and circumstances. And in doing so it must have due and proper regard to the objectives sought to be achieved by the Act."⁹⁵

⁹² 2006) 27 ILJ 2076 (SCA) at para 41

⁹³ (2007) 28 ILJ 2405 (CC) at para 61

⁹⁴ [1996] 4 SA 577

⁹⁵ (1996) 4 SA 577 (A) at 589B-D

The Constitutional Court further established that fairness requires a balance of interests between the employee and employer. To strike that balance, Navsa J enumerated factors, not exhaustive, that must be taken into account:

“In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the 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...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”⁹⁶

In arriving at its decision, having applied the new test of a reasonable commissioner, the Constitutional Court held that the decision reached by the commissioner in this case was not one which a reasonable decision maker could not reach. The court had due regard to the fact that there was no dishonesty; that the mine suffered no losses; the employee had a history of long-serving duty and a clean disciplinary record.⁹⁷ It further found that the commissioner sufficiently applied his mind and considered all the elements of the Code of Good Practice.

The Constitutional Court judgment sought to put to rest the confusion which has been proceeding for years on application of the notion of substantive fairness. It is quite intriguing that the Supreme Court of Appeal opted to override the earlier decision of the Appellate Division in the case of *National Union of Metalworkers of SA v Vetsak Co-Operative Ltd* had conclusively decided and held that when determining whether dismissal constituted an unfair labour practice, the court must apply its own moral and value judgment.

⁹⁶ (2007) 28 ILJ 2405 (CC) para 78

⁹⁷ Supra, note 88, para 117

The codification and interpretation of what is entailed in the notion of substantive fairness in cases of dismissal for misconduct has marked a progressive step forward in the regulation of employment relations. These developments have, to a larger extent, assisted in eliminating contradictions witnessed in the judgments before the Constitution of the Republic of South Africa, Labour Relations Act and the jurisprudence as developed by the Constitutional Court in the *Sidumo case*.

CHAPTER FOUR

Introduction

The preceding chapters (two and three) have provided a detailed outline of the development of jurisprudence relating to the notion of substantive fairness in cases of dismissal for misconduct. Following years of conflicting court judgements on what is entailed in establishing substantive fairness, the Constitutional Court in the *Sidumo* case sought to resolve the conflict by determining that arbitrators must exercise value judgement in determining substantive fairness. The direct implication of this Constitutional Court judgment was the effective rejection of the 'employer deference' approach as borrowed from the English statute. The 'employer deference' approach required arbitrators to defer to the reasoning and interest of the employer.

In the *Sidumo* case, the Constitutional Court found that the 'employer deference' approach has no place in the South African law and arbitrators are, in exercising value judgment, expected to strike a balance between the interests of the employer and the employee. In balancing the interests of the parties the court, without being exhaustive, enumerated some factors that need to be taken into account by arbitrators which include the importance of the rule that had been breached; the reason that the employer imposed the sanction of dismissal; the basis of the employee's challenge to the dismissal; the harm caused by the employee's conduct; whether additional training and instruction would result in the employee not repeating the misconduct; the effect of dismissal on the employee; and his or her long service . These factors

complement the guidelines contained in the Code of Good Practice: Dismissal which appears in the Labour Relations Act 66 of 1995, as amended, which were discussed in detail in chapter 3 of this study.

This chapter will deal with the gaps in the application of value judgment in determining substantive fairness and further propose the constitutional value of dignity to anchor the application of the value judgment.

Challenges with the application of value judgement

The first grey areas on the exercise of the value judgment were highlighted in the very same case of *Sidumo*. Passing a separate concurring judgment in the *Sidumo* case, Ngcobo J observed as follows:

“...however objective the determination of the fairness of a dismissal might be, it is a determination based upon a value judgment. Indeed the exercise of a value judgment is something about which reasonable people may readily differ.

But it could not have been the intention of the law-maker to leave the determination of fairness to the unconstrained value judgment of the commissioner. Were that have to be the case the outcome of a dispute could be determined by the background and perspective of the commissioner. The result may well be that a commissioner with an employer background could give a decision that is biased in favour of the employer, while a commissioner with a worker background would give a decision that is biased in favour of a worker.”⁹⁸

In the attempt to constrain the application of the value judgement, Schedule 8 of the Labour Relations Act 66 of 1995 enumerates guidelines to be considered by any person who is determining whether or not dismissal for misconduct is fair. These guidelines have been discussed in detail in chapter two of this study. These

⁹⁸ (2007) 28 *ILJ* 2405 (CC), para 91

guidelines are purported be the basis within which balancing the scale of interests between those of the employer and those of the employee can be achieved.

Whilst the Constitutional Court in the *Sidumo* case was unanimous in rejecting the “defer to employer” approach in favour of value judgment, it appears that the weight to be accorded to the interests of the employer is still greater than that to be accorded to the interests of the employees. This is evident from Ngcobo J who observed that:

“what is required of a commissioner is to take seriously the reasons for the employer establishing the rule and prescribing a penalty of dismissal for breach of it...the commissioner should respect the fact that the employer is likely to have greater knowledge of the demands of the business than the commissioner.”⁹⁹

The above passage reveals the fact that the ‘defer to the employer’ approach still has a considerable level of influence within the expected exercise of value judgment by the commissioners.

The *Sidumo* case and all other judgements that followed have not sought to establish what value(s) as opposed to facts are relevant in exercising the value judgement. The requirement to balance the interests of the employer and employee remains a question of attaching weight to established facts as opposed to attaching weight to any value. The major deficiency of the exercise of balancing the interests of parties in establishing substantive fairness is explained succinctly by Andre Van Niekerk when he argues that:

⁹⁹ Supra, note 90, para 181

“Implicit to this [balancing approach] is the assumption that both the employer and employee are the beneficiaries of the constitutional right to fair labour practices, and that the enquiry commences with the scales evenly balanced...what weight is to be attached to each of the competing interests and if there is to be a ranking, how is the ranking of interests to be determined.”¹⁰⁰

Christine Venter further makes a point that:

“The problem with this method [balancing approach] is not only that we have long since forgotten that the idea that judges can ‘weigh’ interests is metaphorical, but that the metaphor is not even exact in that the idea of ‘balancing’ would seem to connote evenness and equity, while in reality judges decided that one interest carries more ‘weight’ than the other, and thus find in favour of that party. The interests are not evenly balanced, or judges would never reach a decision, but the metaphor erroneously suggests at least equilibrium if not equality”¹⁰¹

As argued in chapter one of this study, employers wield more power compared to the employees because of the fact that employers not only do they own the means of production, but they enact and determine the rules of the game. When an employee is hired, he/she enters into an already made up system where he/she has little influence, if any, on what becomes the code of conduct at the work place. Given these realities, it is unavoidable that the balance of interest of the parties will always start in favour of the employer. Consequently, the employee is required to prove the weight of his/her interest from a disadvantaged standpoint. This situation also places onus on the employee to prove his/her worth.

The force of the Schedule 8 Code of Good Practice: Dismissal remains that of guidelines and not law. In the case of *Moropane v Gilbeys Distillers & Vintners and*

¹⁰⁰ Van Niekerk, A. ‘Dismissal for misconduct – Ghost of justice, past, present and future, Act Juridica: Reiventing Labour Law: reflecting on the first 15 years of Labour Relations Act and future challenges, (2012) page 113

¹⁰¹ Venter C. ‘Old Wineskins – Bitter Wine: The inappropriate use of the balancing metaphor in the Hamdi and Al-Bihani Cases’ page 14. <http://ssrn.com/abstract=1594984> (accessed on the 10 October 2017)

*Another*¹⁰² Landman J dealt with the force of codes of practice and quoted the following remarks from an English text, I T Smith and J C Woo Industrial Law, 4th ed.

(B) at 266:

“Compliance with the codes’ provisions on matters of discipline and dismissal will therefore be most material to an employer’s claim that he acted reasonably and fairly although, as the code does not have the force of law, failure to comply with it will not make the action in question automatically unfair for there may be good reasons for not complying with the facts of a particular case”

In addition, Landman J made the following observation:

“I am of the opinion that the observations by Wood and Smith apply to the code of good practice set out in schedule 8 of the Act. These guidelines do not give rise to rights, they are incapable of supporting an independent action, at least not in this court. Only when their exercise or non-exercise leads to an unfair dismissal are they recognized and can the results of a failure to abide by them be remedied”¹⁰³

The force of the code of good practice as demonstrated in the above passages suggests that circumstances of each case may determine their applicability or how they weigh up. Consequently, as will be seen in the cases below, the code of good practice has not always favoured the employees even at the slightest act misconduct. The code of good practice supposes to give parameters to the exercise of value judgment; however it appears that in practices, as will be shown below, the exercise of the value judgment, itself, determines what force is to be attached to the guidelines.

The *Sidumo* case has been followed by some cases where it is apparent that the interests of the employers weigh more than those of the employees. Whilst the

¹⁰² (1997) 10 BLLR 1320; Ltd (1998) 19 ILJ 635 (LC),

¹⁰³ Supra, page 640 H-I

judges have followed the test as laid down in the *Sidumo* case, the softness of breach leading to dismissals indicates that the balancing approach does not always result in a balanced judgment and that force of the code of good practice is fluid. One of the immediate cases after the *Sidumo* case was the case of *Theewaterskloof Municipality v South African Local Government Bargaining Council (Western Cape Division and Others)*¹⁰⁴

The *Theewasterkloof Municipality* case involved the respondent whom the municipality erroneously paid an amount of R7 000 over two months as part of the Essential Transport Scheme. When the respondent was approached to repay the amount unduly paid to him, he offered to pay it in the instalment of R10 per month which would have taken 50 years to liquidate the debt.

The Labour Court upheld the decision to expel him on the basis that the relationship between the Municipality and the respondent had broken down irretrievable. In reaching its decision, the court considered that the respondent was holding a senior position in the municipality and was aware that he had unduly received the money and that he showed no remorse as he insisted for two months on his arrangement of repaying the money at the instalment of R10 per month.

Whilst the court considered the fact that the respondent had long period of service and a clean record over his service, it continued that:

“although a value judgement must eventually be based on a holistic appraisal of all factors, this is a case in which a primary comparison can helpfully be drawn between the length of service and clean record, on one hand, and the circumstances of the offence and lack of remorse amounting to defiance, on the other...when this is done,

¹⁰⁴ (2010) 31 *ILJ* 2475 (LC)

it becomes clear that the capacity of the municipality to continue its employment of Mr Henn is eroded as his defiance is prolonged from one week to the next”¹⁰⁵

This case is a proof that that the very factors that seek to circumscribe the exercise of value judgment cannot always be uniformly applied, hence fail to provide the normative justice required to balance the interest of the parties involved. The spirit of the *Sidumo* case, the Code of Good Practice and the factors listed are supposed to be considered from the standpoint of favouring the employee when the scales are to be balanced. However, what becomes apparent from the case in *casu* is that, depending on the circumstances of the case, it is possible not to consider the factors collectively, but select the few and put them on different ends of the scale in order to determine fairness.

The conundrum posed by the absence of what weight and/or value is to be attached to each competing interest between those of the employer and employee resulted to the decision in the case of *Miyambo v Commission for Conciliation, Mediation and Arbitration*¹⁰⁶ which palpably is not in line with the spirit and purport of the judgement in the *Sidumo* case. In this case, the employee was dismissed for the theft of a few pieces of scrap metal from the skip. The commissioner had found that the penalty of dismissal was unduly harsh, which is the finding that was overturned by the Labour Court whose decision was further confirmed by the Labour Appeal Court. The Labour Appeal Court reasoned that business risk is predominantly based on the trustworthiness of employees and that an accumulation of individual breaches

¹⁰⁵ Supra, page 10, para 13

¹⁰⁶ (2010) 31 *ILJ* 2031 (LAC)

of trust has significant economic repercussions – therefore the dismissal was justified for operational reasons and was fair.¹⁰⁷

Palpable from the decision of the *Miyambo* case is the greater weight placed on the lack of trustworthiness of the employee. The employee is expected to respect lawful orders and serve the employer with honesty, diligence and faithfulness. On the contrary, this is not the same standard expected from the employer.

The *Miyambo* case also heavily relied on the “zero tolerance” policy on theft as contained in the companies code of conduct. However, in the case of *Shoprite Checkers (Pty) Ltd v Tokiso and Others*¹⁰⁸ Landman JA observed as follows:

“...the law does not allow an employer to adopt a zero tolerance approach for all infractions, regardless of its appropriateness or proportionality to the offence...the touchstone of the law of dismissal is fairness and an employer cannot contract out of it or fashion, as if it were a no go area for commissioners. A zero tolerance policy would be appropriate where, for example, the stock is gold but it would not necessarily be appropriate where an employee of the same employer removes a crust of bread.”¹⁰⁹

Miyambo was dismissed for theft of few pieces of scrap metal from the skip with the aim of fixing his stove. Although the scrap metal was not going to be thrown away but would be sold by the company, this single act of misconduct could not even be counter-balanced with a long clean record of service by the employee, the impact of dismissal to Mr Miyambo and other surrounding personal circumstances.

¹⁰⁷ Supra, para 28

¹⁰⁸ (2015) 36 ILJ 2273 (LAC)

¹⁰⁹ Para 19

APPLICATION OF THE CONSTITUTIONAL VALUE OF DIGNITY – AN ALTERNATIVE APPROACH

In the section above, shortcomings of the exercise of value judgment in determining substantive fairness in cases of dismissal for misconduct have been discussed in detail. In the final analysis the exercise of value judgment, as it stands, fails to provide a coherent conception of justice based on value(s) to be protected in the cases of dismissal for misconduct. This section proposes the application of the constitutional value of dignity to underpin the exercise of value judgment in order to avoid inconsistencies and to properly protect workers from unscrupulous employers.

The exercise value judgement should be anchored on a value to be protected. In this proposed approach, the value to be protected is that of dignity of human beings. In South Africa, with a constitutional democracy method of governance, dignity is a stand-alone right contained in the Constitution as well as a value used to interpret other rights. This has been best illustrated in the cases of *Dawood and Another v Minister of Home Affairs*¹¹⁰ and *Government of the Republic of South Africa and Others v Grootboom and Others*.¹¹¹

Dignity is not only a right provided for in the Bill of Rights, but is amongst the anchors of Constitution of the Republic of South Africa. In terms of section 10 of the Constitution “everyone has inherent dignity and the right to have their dignity respected and protected.” The right to dignity, together with the right to life, is a non-

¹¹⁰ (2000) ZACC 8

¹¹¹ 2000 (11) BCLR 1169

derogable right in its entirety as provided by the s 37 table of non-derogable rights in Constitution.

It terms of the founding provisions of the Constitution, the Republic of South African is a democratic state founded, amongst others, on the values of human dignity. The importance of the right to dignity in the Constitution is further elaborated in section 36, the limitation clause. In terms of s36, rights in the Bill of Rights may be limited to the extent that such limitation is, amongst others, justifiable based on human dignity. Section 39 of the Constitution further provides that a body, when interpreting the Bill of Rights, must promote, inter alia, values based on human dignity.

The foregoing spells out in no uncertain terms the value that the Constitution, which is the supreme law of the land, places on human dignity. The Constitutional Court, the highest court in the land, has also placed prime value to the right to dignity. In the case of *S v Makwanyane*¹¹², Justice O'Regan found that:

“recognizing the right to dignity is an acknowledgment of the intrinsic work of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in the Bill of Rights”¹¹³

The late former Chief Justice, Arthur Chaskalson, underscored the significance of the right to dignity when he was delivering the Third Bram Fischer Lecture in May 2000 where he said:

¹¹² 1995 (3) SA 391 (CC)

¹¹³ *Supra*, para 328

“The affirmation of human dignity as one of the founding values of the Constitution is significant. The interim Constitution emphasised the values of democracy, freedom and equality. Although dignity is immanent in these values and in the rights entrenched in the interim Constitution’s Bill of Rights, its role as a foundational value of the constitutional order was not acknowledged in specific terms until the adoption of the 1996 Constitution. Consistently with this, the 1996 Constitution now refers to the ‘inherent dignity’ of all people, thus asserting that respect for human dignity, and all that flows from it, as an attribute of life itself, and not a privilege granted by the state.”¹¹⁴

In the case of *Dawood and Another v Minister of Home Affairs and Others*¹¹⁵

O’Regan J explained the value of human dignity as follows:

“The value of dignity in our Constitutional framework cannot be doubted. The Constitution asserts dignity to contradict our past in which human dignity for Black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels...human dignity is also a constitutional value that is of central significance in the limitation analysis.”¹¹⁶

Therefore, if the constitutional value of dignity is important in adjudication and interpretation as well as has a central significance in the limitation analysis, it stands to reason that the exercise of value judgment should also be guided and anchored on the constitutional value of dignity.

The previous injustices meted against Black people in general and Africans in particular made them to be viewed them as sub-humans where their value did not matter at all. To the owners of means of production, the employers, Black people were only useful to the extent that they were able to provide cheap labour for

¹¹⁴<http://www.tandfonline.com/doi/abs/10.1080/02587203.2000.11827594?needAccess=true&journalCode=rjhr20> (accessed on the 17 September 2017)

¹¹⁵ (2000) ZACC 8

¹¹⁶ Supra, para 35

employers to maximise their profits margins. These past injustices are recognized in the preamble of the Constitution. Restoring dignity of the historically downtrodden people requires that the protection at work place is as such that those who survive by selling their labour should not be treated as objects for profit maximisation. Dignity of a human being is inseparable with a sustainable livelihood, which is only possible through work security.

Work security is an integral part of dignity for any human being. It provides a person with food, shelter, clothing and whatever else desirable and necessary for a person's maintenance and improvement of conditions of life. When a person is unable to generate means to sustain life, his or her dignity gets impaired.

When an individual is unscrupulously denied of work security, such an individual will not have means for decent shelter, food, medical assistance and indeed the future of his or her descendants will be denied. All this will invariably lead to impairment of human dignity as enshrined in the Constitution. In the case of *Government of the Republic of South Africa and Others v Grootboom and Others*¹¹⁷ the court found that *"the foundational values of the Constitution, those of human dignity, freedom and equality are denied to those who have no food, clothing or shelter."*¹¹⁸

Inherent to the notion of substantive fairness is the need for the protection of employees from being unfairly denied work. Work is an anchor for protection of the

¹¹⁷ 2000 (11) BCLR 1169

¹¹⁸ *Supra*, para 71

constitutional value of and right to dignity. Flowing from this assertion, it stands to reason that the exercise of value judgment, for it to provide coherent normative justice, should be underpinned by the constitutional value of dignity.

The constitutional value of dignity will require the presiding officers to consider what real impact does dismissal have on the employee as opposed to only consider the impact on the side of the employer and operational needs.

In the case of Miyambo, the employee was dismissed merely for theft of a scrap metal which he took to fix his stove. If the court considered what impact dismissal for theft of a scrap metal will have on dignity of Mr Miyambo and his family, it would have been compelled to find that the sanction was disproportionate to the extent that it amounted to substantive unfairness. The dismissal of Mr Miyambo undermined his constitutionally protected right to dignity.

The application of the constitutional value of dignity does not in any way mean that employees will commit acts of misconduct with impunity. The right to dignity is also subject to the limitation clause like all other rights.

Section 36 (1) provides that:

“The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all factors including –

- a) The nature of the right
- b) The importance of the purpose of the limitation
- c) The nature and extent of the limitation

- d) The relation between the limitation and its purpose; and
- e) Less restrictive means to achieve the purpose.”

The implication of the application of the value/right to dignity in the exercise of value judgment is that dismissal as a sanction should pass the standard set by the s36 of the Constitution – the limitation clause. The employer would be required to prove the importance and the purpose of dismissal (as limitation); the relationship between dismissal and purpose it seeks to achieve; and whether there are no other less restrictive means to achieve the purpose.

The application of the value of dignity does not propose that the guidelines on the Code of Good Practice should be discarded. It aims to tighten the protection of workers from being treated as commodities to be dispensed with at the whims of the employer. It recognized the fact that in the employment contract, both parties need each other. Consequently, both parties must enjoy equal protection.

CONCLUSION

South African labour law has undoubtedly undergone progressive stages of development in so far as the protection of workers is concerned. It has developed from common law where rights and recourse of workers were governed by common law of contract and where the notion of substantive fairness was virtually non-existence. With the influence of political and socio-economic developments in South

Africa as well as International Labour Standards, the notion of substantive was introduced in the labour jurisprudence of South Africa.

Notwithstanding these positive and progressive developments of law, the notion of substantive fairness remained elusive until the Constitutional Court judgement in *Sidumo* case. Prior the *Sidumo* case, the South African court borrowed from the English Statute in dealing with the notion of substantive fairness. The net effect of the English Statute influence was the South African courts deferring to the interests of the employers and decided cases on what is in the advantage of employers.

Following a marathon of contradictory legal battles, the Constitutional Court in the *Sidumo* case sought to resolve the matter by finding that the notion of substantive fairness entails exercise of value judgment by presiding officers and that they are not required to defer to the interest of employers. The presiding officers are required to strike the balance between the interests of employers and those of employee and are guided by the guidelines contained in the Code of Good Practice.

Notwithstanding the Constitutional Court judgment, the exercise of value judgment does not provide and/or establish the value to inform any judgment in determining substantive fairness. As argue above, the guidelines contained in the Code of Good Practice have no force of law and subsequent cases from the *Sidumo* case have proven that, without an identified value as opposed to facts, employees continue to be at a disadvantaged position.

To curb the chasm in the exercise of value judgment, this study has proposed that the constitutional value of dignity to inform the exercise of value judgment. Consequently, in establishing substantive fairness in case of dismissal the presiding officers should consider how dismissal will impugn the dignity of the employee. Like all other rights, the value and right to dignity is subject to the limitation clause. Therefore, the consideration of the value of dignity in exercising value judgment will not mean employees can then commit acts of misconduct with impunity.

If the constitutional value of dignity is important in adjudication and interpretation as well as has a central significance in the limitation analysis, as was found in the case of *Dawood and Another v Minister of Home Affairs and Others*¹¹⁹ it stands to reason that the exercise of value judgment should also be guided and anchored on the constitutional value of dignity.

¹¹⁹ (2000) ZACC 8

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