

Supreme Court of Appeal of South Africa

MEDIA SUMMARY– JUDGMENT DELIVERED IN SUPREME COURT OF APPEAL

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Rustenburg Platinum Mines Ltd v CCMA [2006] SCA 115 (RSA)

In a judgment delivered today, the Supreme Court of Appeal overturned a judgment of the Labour Appeal Court (LAC) which had refused to intervene when the Commission for Conciliation, Mediation and Arbitration (CCMA) reinstated a patrolman, Mr Zingisile Sidumo, whom Rustenburg Platinum Mines had dismissed in 2000 for failing to carry out proper search procedures at the mine's beneficiation plant.

In its judgment the SCA restates important principles regarding the labour courts' oversight function in dismissal determinations by the CCMA.

In overturning the judgment of the LAC, the SCA expressed appreciation for the LAC's attempt to find a narrow test for review of CCMA decisions, because of the danger that the labour courts could be flooded with review applications from importunate parties.

But the SCA found that the LAC sought to tackle the problem at the wrong end. Instead of insisting that under the Labour Relations Act 66 of 1995 (the LRA) the discretion to dismiss for misconduct or malperformance lies primarily with the employer, to be overturned only with caution, the LAC appears to have upended the due order and conferred the discretion instead on the commissioner. 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, the LAC has mistakenly insulated commissioners' decisions from intervention by importing unduly constrictive criteria into the review process.

The SCA has held that the solution to the flood of cases the LAC understandably fears does not lie in unduly constricting the grounds of review. It lies in pointing commissioners firmly to the limits the statute places upon their power to intervene. The LRA confers the primary duty and power to dismiss on the employer – not on the CCMA.

The SCA has therefore held that CCMA commissioners must exercise caution when determining whether a workplace sanction imposed by an employer is fair. There must be a measure of deference to the employer's sanction, because under the LRA it is primarily the function of the employer to decide on the proper sanction.

In so finding, the SCA has reinstated a test developed in the LAC by Justice Ngcobo in 1999. The SCA expressed regret that the LAC has not consistently affirmed and applied Justice Ngcobo's analysis.

This, the SCA found, is because the LRA embodies a historic compromise between labour and employers, both being represented by experts on the drafting committee that produced it. The LRA's formulation of the employer's powers, and those of the CCMA in overseeing their exercise, reflected the careful balance that compromise entailed. It is therefore vital that the LRA's wording should be given proper effect. This had not occurred, and the proper balance had to be re-asserted.

The SCA, in a judgment by Cameron JA, in which Harms JA, Cloete JA, Lewis JA and Maya JA concurred, found that the patrolman had fourteen years' of unblemished service. However, after suffering severe losses from theft, the mine undertook video surveillance. This showed that over three shifts on three separate days the patrolman performed only one proper search. He performed many improperly, and had allowed a number of persons to sign the search register and then leave without performing any search on them at all.

The SCA found that the patrolman's misconduct went to the heart of the employment relationship and violated the trust the employer placed in him. What is more, the failure to search unsupervised – which constituted his core duty – was sustained over three shifts. Though the sanction of dismissal was undoubtedly severe, especially in its effects on the employee, it was impossible to say that it was not fair. Dismissal fell within the range of sanctions that the employer was fairly permitted to impose.

This, the SCA held, was because fairness is not an absolute concept. The LRA's criterion that a dismissal must be 'fair' suggests a range of possible responses, all of which could properly be described as fair. The use of 'fairness' in everyday language reflects this. We may describe a decision as 'very fair' (when we mean that it was generous to the offender); or 'more than fair' (when we mean that it was lenient); or we may say that it was 'tough, but fair', or even 'severe, but fair' (meaning that while one's own decisional response might have been different, it is not possible to brand the actual response unfair).

The SCA held that it is in this latter category, particularly, that CCMA commissioners must exercise great caution in evaluating dismissals. The mere fact that a CCMA commissioner may have imposed a different sanction does not justify concluding that the sanction was unfair. Commissioners must bear in mind that fairness is a relative concept, and that employers should be permitted leeway in determining a fair sanction.

The employee should therefore have been refused the relief he sought.