IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG

Case no: JA12/05

IN THE MATTER BETWEEN

ENGEN PETROLEUM LIMITED	**Appellant**
AND	
THE COMMISSIONER FOR CONCILIATION, MEDIATION AND ARBITRATION	**First respondent**
COMMISSIONER THABE NKADIMENG	**Second respondent**
JONES SIBANGANI MASHALE	**Third respondent**

JUDGMENT

ZONDO JP

Introduction

[1] This appeal is about what the correct approach is that a commissioner of the Commission for Conciliation, Mediation and Arbitration (**"the CCMA"**), the first respondent in this matter, must adopt when required to decide whether or not dismissal as a sanction in a particular case is fair. In the main there are two schools of thought on what the correct approach is. The one school of thought is to the effect that the commissioner is required to make up his own mind and decide the issue according to his own opinion or judgement. For convenience I shall call

this school of thought the own opinion school of thought. I call this approach the "**own opinion**" approach because, according to it, the commissioner must determine the fairness or otherwise of dismissal as a sanction according to his own opinion or judgement of what is fair or unfair and should not defer to anybody. The other school of thought is to the effect that the commissioner has no power to decide this question according to his own opinion or judgement but he is required to "**defer to the employer**" and hold the dismissal as a sanction fair unless it is so unfair that it makes him whistle or unless it is so excessive as to shock one's sense of fairness or it is so unfair that no reasonable employer would have regarded it as a fair sanction in which case the commissioner can then interfere with the employer's decision to impose dismissal as a sanction and hold the dismissal to be unfair. Its basis is that different reasonable employers could react to the same misconduct of an employee in different ways each one of which could fall within a range of possible reasonable responses. In terms of this school of thought it is said that the fact that the tribunal would have imposed a different sanction does not necessarily mean that the employer's sanction is unfair. The tribunal, so goes the argument, should not substitute its own opinion for that of the employer. In this judgment I shall call this school of thought "**the reasonable employer**" approach or the **"defer to the employer**" approach.

[2] In this matter Counsel for the appellant submitted that the correct approach is the reasonable employer test and that a CCMA commissioner is not entitled to use the "**own opinion"** approach in deciding the issue but is obliged to use the reasonable employer test. He submitted that, if a commissioner used the "**own opinion"** approach and substituted his opinion for that of the employer on the issue of

sanction, the commissioner will have misconstrued the inquiry and acted outside his powers and his decision would be reviewable. In support of his contention Counsel for the appellant relied upon the decision of this Court in **Nampak Wadeville v Khoza (1999)20 ILJ 598 (LAC)** and Ngcobo AJP's judgment in **County Fair Foods (Pty)Ltd v Commission for Conciliation, Mediation and Arbitration & others (1999)20 ILJ 1701 (LAC)** both of which judgments support the contention advanced by Counsel for the appellant. Of course, after those judgments this Court handed down its judgment in **Toyota SA Motors (Pty)Ltd v Radebe & others (2000) 21 ILJ 340 (LAC)** in which the reasonable employer test was rejected and it was said that it was not part of our law. The question of the reasonable employer test in our law of unfair dismissal was the subject of a big debate in the labour law field for some time during the 1980's. I thought it had been so decisively rejected by our courts then that I thought it had been buried. Of course subsequent developments have shown just how wrong I was in so thinking. In this regard I refer to the fact that in **Rustenburg Platinum Mines Ltd v CCMA & others 2007(1)SA 576(A)** the SCA has rejected the "**own opinion**" approach and adopted the reasonable employer test / the defer to the employer approach. I shall refer to this judgment of the SCA as the "**Rustenburg judgment**".

[3] It is now argued in this matter that the reasonable employer approach / the defer to the employer approach is the right approach which CCMA commissioners should adopt. It was about 1984 when the industrial court imported this concept into our labour law from English law. Since then there have been long periods when it seemed to have gone away. However, from time to time the question arises as to whether Courts and other tribunals which deal with dismissal disputes are required to

apply the reasonable employer test or the "**own opinion**" approach in determining the fairness of dismissal in our law of unfair dismissal. This time the issue has arisen again and this Court will deal with the issue fully and thoroughly once and for all. In saying this, this Court does not purport to claim a final say on the issue but it seeks to do so because it has previously rejected the reasonable employer test and it has been criticised in the Rustenburg judgment for its decision to reject the reasonable employer test. In any event, although the SCA has made its decision in the Rustenburg judgment to reject the "**own opinion**" approach and to prefer the reasonable employer approach, it would be within its rights to at any stage in the future reconsider the issue and either reaffirm its decision or reverse it. Should it decide to give the matter further consideration in the future, it would be able to do so with the benefit of full and thorough reasons supporting this Court's previous decision rejecting the reasonable employer test and preferring the "**own opinion**" approach.

[4] The reasonable employer test or the "**defer to the employer**" approach comes from English law. It seems to me that it is important to consider the reasonable employer test within the different statutory frameworks which obtained in England and in South Africa during the 1980's before it can be considered within the current statutory framework in SA.

The UK background of the reasonable employer approach / the defer to the employer approach

[5] From 1978 the statutory framework governing the reasonable employer test in the UK was sec 57(3) of the Employment Protection

(Consolidation) Act of 1978. Sec 57(3) of that Act read thus:

> "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"** (my underlining).

It would seem that at the moment this provision is contained in sec 98(4) of the Employment Rights Act, 1996 of the UK.

[6] In **British Leyland UK Ltd v Swift [1981] IRLR 91**(CA) three judgments were given by the three Judges who heard the matter, namely, Lord Denning, Lord Justice Ackner and Lord Justice Griffiths. Lord Denning included in his judgment a passage which appears to be quoted frequently in support of the reasonable employer test. That passage appears in par 11 at 93 of Lord Denning's judgment. It reads thus:

> "**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 that is the 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."

Lord Justice Ackner delivered a separate judgment in which he said that he agreed that the appeal should be allowed but did not expressly say whether he agreed with the reasons given by Lord Denning in his judgment. He appears to have relied on his own reasons for his agreement that the appeal be allowed. Lord Justice Griffiths also gave a separate judgment but he expressly stated at 94 par 27 that he agreed with the reasons given by Lord Denning for the conclusion that the appeal should be allowed. Accordingly, the passage from Lord Denning's judgment referred to above can be taken to have been part of the judgment of the Court.

The relevant statutory framework in SA during the 1980's and early 1990's

[7] Under the old Act the tribunal which dealt with unfair dismissal disputes at first instance in South Africa from the early 1980's to the time of the repeal of the Labour Relations Act, 1956 (Act 28 of 1956) ("**the old Act**") was the industrial court. Although called a court, that tribunal was not a court of law but did perform quasi-judicial functions.

At all relevant times there was some or other definition of an unfair labour practice which the industrial court had to apply in deciding whether a dismissal was unfair. Technically, the industrial court had to decide in each dismissal dispute that came before it whether the dismissal constituted an unfair labour practice. A finding by the industrial court that a dismissal constituted an unfair labour practice meant that the dismissal was unfair. A dismissal could be found to be unfair by reason of the fact that, although the employee was guilty of misconduct, dismissal as a sanction was excessive in all the circumstances of the case, and was, therefore, unfair. Obviously the basis of the finding of unfairness could also be that the employee was innocent of misconduct or that the dismissal was not effected in compliance with a fair procedure.

[8] Between the early 1980's and the repeal of the old Act, the definition of an unfair labour practice that the industrial court had to apply was amended in 1988 and 1991. The definition which applied before September 1988 read thus:

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

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

ii) the business of any employer or class of employers is or may be unfairly affected or disrupted thereby;

iii) labour unrest is or may be created or promoted

thereby;

iv) **t**

he labour relationship between employer and employee is or may be detrimentally affected thereby; or

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

[9] Pursuant to the Labour Relations Amendment Act 1988 (Act 83 of 1988) ("**the 1988 amendments**") and with effect from September 1988 the above definition of an unfair labour practice was replaced by a long definition of an unfair labour practice. It is not necessary to quote the post - September 1988 definition. It will suffice, for present purposes, to say that the part of the definition that is relevant to the issue under consideration was to be found in paragraph (a) of the definition in sec 1 of the old Act. It read as follows:

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

[10] Pursuant to the Labour Relations Amendment Act, 1991 (Act 9 of 1991) ("**the 1991 amendments**") there was a further amendment to the definition of an unfair labour practice in 1991. These amendments included a new definition of an "**unfair labour practice**". The new definition read thus:

"**Unfair labour practice means any act or omission, other than a strike or lock-out, which has or may have the effect that –**

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

(ii) the business of any employer or class of employers is or may be unfairly affected or disrupted thereby;

(iii) labour unrest is or may be created or promoted thereby;

(iv) the labour relationship between employer and employee is or may be detrimentally affected thereby."

There was no further amendment of an unfair labour practice after 1991.

Powers of the industrial court "to determine" a dispute under sec 46(9) of the old Act

[11] Sec 17(11)(f) gave power to the industrial court to "**make determinations in terms of sec 46**" of the old Act. Under sec 46(9) of the old Act the industrial court was given power to deal with, among others, disputes concerning alleged unfair labour practices which included disputes about the fairness of dismissals. Although there were amendments to sec 46(9) in 1988 and 1991, those amendments always retained one thing. That is that an unfair dismissal dispute was always required to be referred to the industrial court "**for determination**" or the industrial court was required by sec 46(9) "**to determine**" the dispute concerning the fairness of a dismissal. It referred to such a

dispute as an alleged unfair labour practice. Other disputes which were not dismissal disputes could also be referred to the industrial court for determination under that section.

[12] Sec 46(9) referred to a dispute referred to in sec 43(1)(c) of the old Act. Sec 43 dealt with what was generally referred to as status quo orders which the industrial court had power to make thereunder. Sec 43(1)(c) referred to disputes concerning an alleged unfair labour practice. The fact that at different stages between the early 1980's and the repeal of the old Act essentially sec 46(9) empowered or required the industrial court either "**to determine**" a dispute concerning the fairness of a dismissal or contemplated that such a dispute be referred to the industrial court **"for determination**" means that essentially the main function or power of the industrial court with regard to dismissal disputes remained intact for most of that period. The only other amendment brought about by the 1988 amendments to sec 46(9) of the old Act which is relevant to the present matter was an amendment of sec 46(9)(c) of the old Act. Before September 1988 sec 46(9)(c) of the old Act required the industrial court "**to determine**" the dispute without giving any indication as to how it was required to do so. After the 1988 amendments sec 46(9)(c) was amended but not so as to remove the phrase "**to determine the dispute**" to describe the function that the industrial court was required to perform but to deal with the terms in which it could determine a dispute concerning an unfair labour practice including unfair dismissal disputes. The amendment to sec 46(9)(c) provided that the industrial court was required to determine the dispute "**on such terms as it may deem reasonable, including, but not limited to, the ordering of reinstatement or compensation.**"

Powers of the old LAC in dismissal matters under the old Act.

[13] Sec 17A(1), inserted into the old Act by the 1988 amendments, established a new court, the Labour Appeal Court ("**the old LAC**"), which had provincial divisions on the same basis as the then Supreme Court of South Africa. A Labour Appeal Court consisted of a Judge of the Supreme Court, who would be the chairman of the Court, and two assessors except when it was dealing with a question of law or a question whether a particular question was a question of law in which case the Judge sat alone and decided such a question alone. The old LAC was given jurisdiction to deal with appeals from, among others, determinations made by the industrial court in terms of sec 46(9) of the old Act in respect of dismissals alleged to constitute unfair labour practices.

[14] Sec 17B of the old Act dealt with the powers of the old LAC. With regard to appeals from determinations of the industrial court made under sec 46(9) of the old Act sec 17B(1)(b) gave the old LAC power "**to decide**" such appeals.

Powers of the Appellate Division in dismissal matters under the old Act

[15] Sec 17C provided for an appeal from a decision of the old LAC to the Appellate Division (later the Supreme Court of Appeal) except on a question of fact provided that the old LAC granted leave to appeal. Where the old LAC refused leave to appeal, the Appellate Division could be petitioned for such leave. Sec 17C(2) provided that, after hearing such an appeal, the Appellate Division "**may confirm, amend or set aside the decision order against which the appeal has been noted or make any other decision or order, including an order as to**

costs, <u>according to the requirements of the law and fairness</u>" (my underlining).

[16] If one has regard to sec 57(3) of the English statute which was applicable in the UK during the 19980's as quoted earlier, one will see that sec 57(3) did not just require a tribunal to decide or determine whether a dismissal was fair – which is what can be said was required of the industrial court by the old Act in South Africa at the time. Sec 57(3) in effect instructed a tribunal that, when there was a dispute between an employer and an employee about whether the employee's dismissal was fair, it had to answer that question not directly and by simply saying yes or no. Sec 57(3) instructed a tribunal to in effect first ask whether the employer had acted reasonably in treating the reason for dismissal as a sufficient reason for dismissal and, if the answer was yes, to then answer the question about the fairness of the dismissal by saying that the dismissal was fair but, if the answer was no, to then answer that question by saying that the dismissal was unfair. It seems to me that, had sec 57(3) not contained this instruction, the English courts might well not have decided that the reasonable employer test was applicable in the UK. It seems to me that there was nothing in the statutory framework of South Africa applicable to the industrial court, the old LAC and the Appellate Division that justified or that would have justified the adoption of the reasonable employer test, or the "**defer to the employer**" approach. It would seem to me that the "**own opinion**" approach was the approach contemplated by the old Act.

[17] Notwithstanding the absence in the old Act of a statutory provision similar to or comparable to that part of sec 57(3) which I have underlined in the quotation of that subsection above which constituted

the statutory basis of the reasonable employer test in English law, some decisions of the industrial court did "**import**" the reasonable employer test into South Africa. The first one of these appears to have been **Building Construction and Allied Workers Union of SA & another v West Rand Brick Works (Pty)Ltd (1984) 5 ILJ 69 (IC)**. Between 1984 and the early 1990's the industrial court handed down other decisions which supported the reasonable employer test. However, there were also other decisions of the industrial court which rejected the reasonable employer test. It is not necessary to go into any details about the relevant decisions save to make the point that by far the majority of decisions of the industrial court applied the "**own opinion**" approach and not the reasonable employer approach. It would also seem that in most cases the old LAC also applied the "**own opinion**" approach.

[18] One of the members of the industrial court who at some stage had handed down decisions supporting the application of the reasonable employer test in South Africa in a number of cases during the mid-1980's turned his back on it later arguing that the amendment of the definition of an unfair labour practice by the 1988 amendments did not leave room for the reasonable employer approach (see **Govender v SASKO (Pty)Ltd t/a Richards Bay Bakery (1990) 11 ILJ 1282 (IC**). One of the decisions of the industrial court which rejected the reasonable employer test was **Chemical Workers Industrial Union v Reckitt & Coleman (1990) 11 ILJ 1319 (IC)** in which Dr John, AM, emphasised that the English statute on which the reasonable employer test was based expressly directed that the question whether a dismissal was fair or unfair was required to depend on whether the employer had acted reasonably in treating his reason for dismissing the employee as a sufficient reason.

[19] In what I believe was one of the first, if not the first, labour law book of note in this country, namely,: "**The New Labour Law**", 1987, Juta & Co, by Brassey & others, Brassey dealt with the reasonable employer test at 71-78. Brassey rejected the application of the reasonable employer test in SA labour law. He argued that the South African legislature had made a policy choice to have fairness proper and not the reasonable employer approach applied in the determination of the fairness of dismissal. That was even before the 1988 amendments. Subsequent to the 1988 amendments Cameron Cheadle and Thompson, in their joint work, "**The New Labour Relations Act – The Law after the 1988 amendments**", also agreed at 109 with Brassey that the South African legislature had chosen "**fairness proper**" as the criterion and rejected the reasonable employer test.

[20] In **Tubecon (Pty)Ltd v NUMSA (1991) 12 ILJ 437 at 443-445H** John Brand, a reputable arbitrator in labour disputes, rejected the reasonable employer test in unequivocal terms. He also referred at 444 to an arbitration award by CJ Albertyn in which, according to Mr Brand, the reasonable employer test was rejected as well. I accept that Mr Brand's terms of reference may have left no room for the application of the reasonable employer test. Nevertheless, this does not detract from the validity of his reasons for rejecting it. Prof PAK Le Roux and Paul Benjamin were to later add their voices in the rejection of the reasonable employer test. (see: *"***THE REASONABLE EMLPOYER TEST**: **SOME REFLECTIONS***"* by prof PAK Le Roux in *"*Labour Law Briefs*"* Vol No 5 of the 15th December 1990 and : *"***When dismissal disputes are stifled** … *"* by Paul Benjamin in Employment Law, Vol 6 NO 5117 at 118. In their work: *"***A Guide to South African**

Labour law", 2nd ed, 1992 at 197-198 Rycroft and Jordaan refrained from expressing a view on the issue. Accordingly, from the early 1980's to the early 1990's the reasonable employer test had been used only in the minority of cases by the industrial court, had lost some of the support it had initially had among members of that court, was not used in most of the cases in the old Labour Appeal Court and had been rejected by some of the prominent academics and practitioners in the field of labour law. It would also seem that it might not have found acceptance in arbitrations as well.

[21] I stated earlier on that in addition to the definition of an "**unfair labour practice**" in sec 1 of the old Act, sec 46(9) was applicable when the industrial court was required to decide whether a dismissal constituted an unfair labour practice. I drew attention earlier to the fact that sec 46(9) required the industrial court "**to determine**" such a dispute or required that such a dispute be referred to the industrial court "**for determination**".

[22] Under the current Act the bulk of dismissal claims previously done by the industrial court is now done by the CCMA. Accordingly, the industrial court can justifiably be taken as the predecessor to the CCMA. That makes it all the more important to establish whether under the old Act the industrial court was required to apply the reasonable employer test/ the "**defer to the employer**" approach or whether it was required to apply the "**own opinion**" approach.

[23] In my view the starting point in seeking to establish whether the industrial court was required to apply the reasonable employer test or the "**own opinion**" approach is to acknowledge that the industrial court

was a creature of statute. It derived its powers within the four corners of the old Act. (See Page and Thirion JJ in **Transvaal Pressed Nuts Bolts & Rivets (Pty)Ltd v President of the Industrial Court & others (1989) 10 ILJ 48 (N) at 67D-F).** Accordingly, if the reasonable employer test was not authorised by the old Act, the industrial court would have had no power to apply it.

[24] In my view the question whether or not the industrial court was required to apply the reasonable employer test or the "**own opinion**" approach depended on the meaning of sec 46(9) of the old Act in so far as it required the industrial court "**to determine**" a dispute concerning an unfair labour practice as well as the provisions of the definition of an unfair labour practice in the old Act. In interpreting the old Act, it would have been important to remember that words used therein had to be given their ordinary, natural and grammatical meaning unless that would lead to an absurdity. (see **Consolidated Frame Cotton Corporation Ltd v President of the industrial court & others (1986)7ILJ 489(A) at 494 F-G**).

[25] In **Trident Steel (Pty)Ltd v John NO and others (1987)8 ILJ 27 (W)** at 39 B-E Ackerman J, after carefully and thoroughly considering the history of the relevant sections of the old Act and some decisions, came to the conclusion that the phrase "**to determine**" a dispute as used in sec 46(9) meant to bring a dispute to an end. In Trident Steel it had been argued on behalf of the employer that the powers of the industrial court under sec 46(9) were limited to making declaratory orders and did not include the making of a reinstatement order or an order for the payment of compensation. Ackerman J had no hesitation in rejecting this proposition and holding that the injunction "**to determine the**

dispute" as found in sec 46(9) of the old Act empowered the industrial court to also order reinstatement as well as the payment of compensation. Accordingly, the industrial court could not be said to have brought a dispute to an end if to do so required that a reinstatement order or a compensation order be made but it did not make it. I do not think that the correctness of Ackerman J's decision in Trident Steel has ever been questioned.

The Appellate Division speaks

[26] Before 1992 some members of the industrial court had spoken through their judgments on the reasonable employer test. Academic writers had also spoken. The Appellate Division had not as yet spoken on the issue as at the end of the 1980's. However, the opportunity for the Appellate Division to pronounce on the issue presented itself in **MWASA & others v Perskor (1992) 13 ILJ 1391 (A) ("the Perskor case")**. In the light of the fact that sec 46(9) of the old Act required the industrial court "**to determine"** an unfair dismissal dispute, the question was what "**to determine**" a dispute entailed. This would be the formulation of the question in respect of the role or powers of the industrial court in dismissal disputes. In respect of the role or powers of the old Labour Appeal Court the question would be what deciding an appeal in regard to an unfair labour practice appeal entailed. This formulation of the question in regard to the old LAC is based on the fact that the relevant provisions of the old Act relating to the old LAC empowered it "**to decide**" an appeal to it from a determination of the industrial court under sec 46(9). With regard to the Appellate Division the relevant provision of the old act empowered it "**to confirm, amend or set aside**" the decision of the old LAC sought to be appealed against

"**according to the requirements of the law and fairness**" in an appeal to it from a decision of the old LAC.

[27] The Appellate Division gave its answer to this question in the Perskor case on what approach had to be adopted by the courts in deciding the fairness of dismissal.

[28] At 1400 in the Perskor case it held that this entailed the passing of a moral judgment. It put it as follows:

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

The significance of this passage from the Perskor case is that it was applicable not only to the Appellate Division and the old Labour Appeal Court but also to the industrial court when each one of those courts was required to determine or decide whether a dismissal was fair or unfair. In this regard it needs to be pointed out that the definition of an "**unfair labour practice**" which each one of those courts had to apply was the same. This passage is to the effect that the definition of an unfair labour practice entailed a determination of the effects of the practice complained of such as a dismissal and the fairness of such effects. This passage is further to the effect that a decision of a Court pursuant to such provisions entailed the passing of a moral judgment on a combination of findings of fact and opinions. This passage explained

the role or powers of the industrial court, the old Labour Appeal Court and the Appellate Division with regard to their respective functions in deciding or determining whether dismissal in a particular case was fair or unfair.

[29] The Appellate Division's decision in the Perskor matter was subsequently followed in a number of decisions of the Appellate Division even as recently as in 1999. (see **Atlantis Diesel Engines (Pty)Ltd v NUMSA (1994)15 ILJ 1257 (A) at 1257 A-B; NUMSA v Vetsak Co-operative Ltd & others (1996) 17 ILJ 455 (A) at 476 B-F; Wubbeling Engineering & Another v NUMSA (1997) 18 ILJ 935 (SCA) at 937E-938D; NUM v Free State Consolidated Gold Mines Ltd 1996 (1) SA 422 (A) at 446 C-I;** Olivier JA's judgment (concurred in by Zulman JA) in **Betha & others v BTR SARMCOL, A DIVISION of BTR DUNLOP Ltd 1998(3) SA 349 (SCA) at 369 I-E;** Streicher JA's judgment in **Betha v BTR SARMCOL, A DIVISION of BTR Dunlop Ltd 1998 (3) SA 349 (SCA) at 380 G-I;** Smalberger JA's judgment in **Betha V BTR SARMCOL, supra, at 386 H- 388 B**; Scott JA's judgment in **Betha v BTR Sarmcol, s**upra, at 402 I-J where he said that he was in full agreement with the reasoning and conclusion in Smalberger JA's judgment; **Dube & others v Nationale Sweisware (Pty) Ltd 1998 (3) SA 956 (SCA) at 960 D-I; NUMSA v GM Vincent Metal Sections (Pty)Ltd 1999 (4) SA 304 (SCA) at 314 F-H; Benicon Group v NUMSA & others (1999) 20 ILJ 2777 (SCA) at 2779 H-J**; **Boardman Brothers (Natal) - v Chemical Workers Industrial Union 1998(3) SA 53 (SCA) at 58 B-C**. All in all no less than twenty Judges of the Appellate Division/Supreme Court of Appeal had in different cases concurred in this approach. They are:

Smalberger, Hoexter, Goldstone, Kriegler, Botha, Howie, Kumleben, Nienaber, Marais, Scott, Zulman, Plewman, F H Grosskopf, Joubert, Nestadt, Streicher, Olivier, Schutz, Hefer, Farlam, Harms JJA, Melunsky AJA, Nicholas AJA and Madlanga AJA. The above cases are authority for the proposition that under the old Act the task of deciding or determining whether a dismissal was fair or unfair entailed the passing of a moral or value judgment on a combination of findings of fact and opinions by the Court. The next question is what this entailed. Did it entail applying the reasonable employer test? Did it entail that some deference be shown to the employer's choice of the sanction of dismissal? Did it entail the application of the "**own opinion**" approach? That is the question to which I now turn.

Did the passing of a moral or value judgment under the old act entail the application of the reasonable employer test/the "defer to the employer" approach or the "own opinion" approach?

[30] Did the Appellate Division's decision in Perskor as explained above mean that the industrial court or the old Labour Appeal Court or the Appellate Division was each deciding such an issue on the basis of its own opinion / judgment or on the basis of the reasonable employer approach and not substituting its opinion for that of the employer with regard to sanction? The Appellate Division supplied the answer to this question in the same case, namely, the Perskor case. Indeed, in the Perskor case the Appellate Division made it clear beyond any doubt that it was the Court's opinion of what was fair or unfair that the Court was required to give when passing a moral judgment in unfair labour

practice disputes involving dismissals under the old Act. At 1399H—1400B in the Perskor case the Appellate Division noted that the pre—September 1988 definition of an unfair labour practice was **"based on the effect which a particular practice has or may have on matters such as employment opportunities, work security, welfare, the disruption of an employer's business, the promotion of labour unrest, etc."** The court went on to say in the next few sentences:

[20] **"The question whether particular facts have or may have such effects can hardly be described as a question of law. But the matter does not end there. <u>The court is not only to decide whether such effects have been caused or may be caused, but must also have regard to considerations of fairness or unfairness. This is stated expressly in paras (i) and (ii) of the definition [of an unfair labour practice applicable prior to September 1988], but is also implicit in the very concept of an unfair labour practice. It is further underlined by the provisions of s17 (21A) which establish the jurisdiction of the Labour Appeal Court in relation to unfair labour practice disputes</u>. Subparagraph (c) empowers the Court on appeal in such matters to 'confirm, vary or set aside the order or decision appealed against or make any order or decision, including an order as to costs, according to the requirements of the law and fairness.' <u>Clearly the court's view as to what is fair in the circumstances is the essential determinant in deciding the ultimate question.</u> See Marievale Consolidated Mines ltd v President of the industrial court and others**

1986 (2) SA 485 (T) at 498J—490I (1986) 7 ILJ 152 (T), Brassey and others The New Labour Law at 12—13, 58—9, Van Jaarsveld and Coetzee Suid Afrikaanse Arbiedsreg vol 1 at 328" (my underlining**).**

The ultimate question that Grosskopf JA was referring to in this passage was the question **"whether particular facts constitute an unfair labour practice."** (see p.1394H—I in the same judgment). Botha and Goldstone JJA, Kriegler AJA and Harms AJA concurred in the judgment of Grosskopf JA.

[31] In **Atlantis Diesel Engines (Pty)Ltd v NUMSA (1994) 15 ILJ 1247(A) at 1257 A-B** Nicholas AJA said the same thing with the concurrence of Hoexter, Kumleben, Nienaber and Howie JJA. See also **Bencon Group v NUMSA and others (1999) 20 ILJ 2777 (SCA)** at 2779 par 7 through Farlam AJA. See also **NUMSA v Vetsak Co-Operative Ltd 1996(4) SA 557(A)** at 589 and at 589 A-D through Smalberger JA in a minority judgment. In the majority judgment in the Vetsak case Nienaber JA at 592J - 593B made among others the point that as to when a point is reached in a strike when the employer would be justified in dismissing striking employees "**is ultimately a matter for the courts…**". In **Wubbeling Engineering & Another v NUMSA (1997) 19 ILJ 935 (SCA)** at 938 A-D the SCA held in effect, through Plewman JA, that it is the task of the Court to have regard to the interests of not only the worker but also those of the employer "**in order to make a balanced and equitable assessment"** of what is fair in all the circumstances. In **NUM v Black Mountain Mineral Development 1997(4) SA 51 (SCA) at 54 H-**I Scott JA said in effect, among other things, that "**the Court must necessarily apply a moral or value judgment**" in "**deciding the question of fairness**".

[32] It is crystal clear from the above that the legal position under the old Act, which required the industrial court "**to determine**" a dispute concerning an unfair labour practice, required the old LAC "to decide" an appeal to it from a determination of the industrial court under sec 46(9) and the Appellate Division to "**confirm, amend or set aside**" a decision of the old LAC concerning the fairness of a dismissal, was that the industrial court, the old LAC and the Appellate Division were each required to decide the fairness or otherwise of a dismissal on the basis of their respective own opinion/judgment and not on the basis of the reasonable employer test or the "**defer to the employer**" approach. Each one of those Courts was entitled to substitute its own opinion for that of the employer on whether dismissal as a sanction was fair in a particular case.

[33] Indeed, it was the Appellate Division's decision also that both the old Labour Appeal Court and itself were required to do the same in appeals that came before those Courts from determinations of the industrial court made under sec 46(9) of the old Act. In fact when one examines almost all the cases that the Appellate Division/SCA heard which emanated from sec 46(9) determinations of the industrial court, one will realise that, when it came to the Appellate Division/SCA having to decide in each case whether a dismissal constituted an unfair labour practice, such issue was decided on the basis of the Appellate Division's/SCA's own opinion of what was fair. The Appellate Division/SCA did not "**defer to the employer**" or the reasonable employer on the issue of sanction. Indeed, the Appellate Division readily substituted its opinion for that of the employer with regard to the fairness of dismissal as a sanction in dismissal cases that came

before it on appeal. (See **PACT V PPAWU & others (1994) 15 ILJ 65(A); Slagment (Pty)Ltd v Building Construction and Allied Workers Union and others (1994) 15 ILJ 979 (A); Atlantis Diesel Engines (Pty)Ltd v NUMSA (1994) 15 ILJ 1257 (A) at 1257 C-D; NUMSA & others v Henred Freuehanf Trailers (Pty)Ltd (1994) 15 ILJ 1257 (A); Council for Scientific and Industrial Research v Fijen (1996) 17 ILJ18 (A) at 27H-I; NUMSA v Vetsak co-operative Ltd & others (1996) 17 ILJ 476; WG Davey (Pty)Ltd v NUMSA (1999) 20 ILJ 2017 (SCA); NUM V Black Mountain Mineral Development Co (Pty)Ltd (1997) 18 ILJ 439 (SCA); Buthelezi & others v Eclipse Foundries Ltd (1997) 18 ILJ 633(A); NUM v Free State Consolidated Gold Mines Ltd 1996 (1) SA 422 (A) at 450 E-I;** Olivier JA's judgment (in which Zulman JA concurred) in **Betha v BTR SARMCOL, A DIVISION OF BTR DUNLOP Ltd 1998(3) SA 349 (SCA)** particularly at **374 A-D;** Streicher JA's judgment in **Betha v BTR SARMCOL A DIVISION of BTR Dunlop Ltd 1998 (3) SA 349 (SCA) at 380 H-381H.)** Although at 381 F-G in **Betha & others v BTR SARMCOL** Streicher JA included a statement that "**(i)n my view, a reasonable employer would in the circumstances not have dismissed workers who had served him loyally for 25 years, before having satisfied himself that it was in fact not possible to reach agreement on the terms of the recognition agreement**," it is clear from the next paragraph in the judgment that Streicher JA applied his own view of what was fair to decide whether the dismissal was fair. He said in the next paragraph:

> "**My moral or value judgment, having regard to all the aforesaid facts and circumstances, is therefore that the**

dismissal of the weekly paid workers was unfair."

Smalberger JA's judgment in **Betha v BTR SARMCOL, supra, at 401 H-402E; Unilong Freight Distributors (Pty) Ltd v Muller 1998 (1) SA 581 (SCA); Dube and others v Nasionale Sweisware (Pty)Ltd 1998 (3) SA 956 (SCA) at 969 (SCA) at 969 F- 970 A; NUMSA v G.M Vincent Metal Sections (Pty)Ltd 1999 (4) SA 304 (SCA); Benicon Group v NUMSA & Others (1999) 20 ILJ 2777 (SCA)** particularly at 2785 paras 39-42**; Boardman Brothers (Natal) v Chemical Workers Industrial Union 1998 (3) SA 53 (SCA) at 58 D- 59**.

From all of the above the conclusion is inescapable that under the old Act the legal position was that the industrial court, the old Labour Appeal Court and the Appellate Division / Supreme Court of Appeal used what I have called in this judgment the "**own opinion**" approach to determine whether dismissal was unfair and this included deciding whether dismissal as a sanction in a particular case was fair. That was the position as the current Act came into operation in 1996 and continued to be the position of the Supreme Court of Appeal in regard to unfair dismissal cases governed by the old Act as recently as 1999. It is now necessary to consider what the position is in this regard under the current Act.

Does the Labour Relations Act 1995 (Act 66 of 1995) ("the Act") require a CCMA commissioner to apply the reasonable employer test / the "defer to the employer" approach or the "own opinion" approach in deciding whether dismissal as a sanction is fair or unfair in a particular case?

[34] Having come to the conclusion above that under the old Act the

industrial court, the old Labour Appeal Court and the Appellate Division / Supreme Court of Appeal applied the "**own opinion**" approach in deciding whether the sanction of dismissal in a particular case was fair, the question that arises, which is the question that needs to be answered in this case, is whether under the current Act the CCMA is required to decide the same issue also on the basis of the "**own opinion**" approach or on the basis of the reasonable employer approach. To determine which one of the two approaches is the correct one for a CCMA commissioner to adopt falls to be determined with reference to what the powers of a CCMA commissioner are in such a case.

[35] The determination of the powers of the CCMA in regard to the issue under consideration requires an interpretation of the Act. However, the Act should not be interpreted in isolation. It needs to be acknowledged that the Act is the successor to the old Act. Accordingly, the old Act and the jurisprudence which the Courts which applied that Act have bequeathed to us need to be taken into account not only to ensure that there is no repetition of the mistakes of the past but also to ensure that that which was good in that jurisprudence can be carried forward if it is not inconsistent with the current Act, its objects and the Constitution. If, as we move forward as a nation, we do not, from time to time, look back at our past in order to shape a future that is better than our past, there is a real danger that we will shape for ourselves and those to come after us a future that is no better than our past, or, even worse, a future that is worse than our past. That is true not only in our political life but also in respect of our legal system in general and our jurisprudence in particular. Courts, too, need to bear this in mind at all times.

[36] In July 1994, which was within three months of the first democratic

elections in this country, the new Cabinet appointed a Ministerial Task Team of labour lawyers "**to overhaul the laws regulating labour relations and to prepare a negotiating document in draft Bill form to initiate a process of public discussion and other interested parties**." (Explanatory Memorandum to the Labour Relations Bill, 1995 at (1995) 16 ILJ 278). The brief of the Ministerial Task Team, in so far as it related to the arbitration and adjudication of disputes of rights, included that the Task Team was "**to draft a Labour Relations Bill which would-**

- **provide simple procedures for the resolution of disputes through statutory conciliation, mediation and arbitration and the licensing of independent alternative dispute resolution services;**
- **provide a system of labour courts '<u>to determine disputes</u>' of right in a way which would be accessible, speedy and inexpensive, with only one tier of appeal;"** (Explanatory Memorandum (1995) 16 ILJ 278 at 279) (underlining supplied).

The fact that the Courts under the old Act used the "**own opinion"** approach in determining the fairness of dismissals as dealt with above does not appear to have been one of the problems that the Ministerial Task Team, appointed by Cabinets, was asked to address in the new Labour Relations Bill, 1995. That this way of deciding whether dismissal as a sanction was unfair in a particular case was not one of such problems is evident from the fact that, when the Ministerial Task Team set out in the Explanatory Memorandum to the Bill what the problems with the old Act were and with how disputes had been dealt

with under the old Act, this was not among the problems that they set out therein (see Explanatory Memorandum to the Labour Relations Bill, 1995 which appears at (1995) 16 ILJ 278). The question then arises whether, all this notwithstanding, the current Act departed from the approach of the old Act and authorised the reasonable employer test and outlawed the "**own opinion**" approach.

[37] In August 1998 Brassey AJ handed down his judgment in **Computicket v Marcus NO & others (1999) 20 ILJ 342 (LC).** In that judgment he adopted at 346 E-H the "**defer to the employer**" approach which seems the same as that adopted by Lord Denning in Swift although he did not say whether he, too, like Lord Denning, took the view that dismissal as a sanction would only be unfair if no reasonable employer would have dismissed the employee or if no reasonable employer might have dismissed the employee.

[38] This Court subsequently handed down its judgment in **Nampak Wadeville v Khoza (1999) 20 ILJ 578 (LAC)** in November 1998**.** Nampak was a judgment of Ngcobo JA which was concurred in by Myburgh JP and Froneman DJP. In that case this Court, through Ngcobo JA, relying on Lord Denning's judgment in **Brittish Leyland UK Ltd v Swift [1981] 1RLR** 91, adopted the reasonable employer test in paragraphs 33 and 34.

[39] Paragraphs 33 and 34 of that judgment are very important in the discussion of the issue under consideration. The reader will need to bear these two paragraphs in mind as repeated references will be made to them later on. Paragraphs 33 and 34 of the Nampak judgment read thus respectively:-

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

'There is a band of reasonableness within which one employer may reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other would quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair, even though some other employers may not have dismissed him."

34 It seems to me that the correct test to apply in determining whether a dismissal was fair is that enunciated by Lord Denning MR in Brittish UK Ltd v Swift at 93 para 11, which is:

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

[40] It will be seen from par 34 of the Nampak judgment that this Court expressly adopted Lord Denning's test for the determination of the fairness of a dismissal as found in his judgment in Swift. That test is:

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

[41] In June 1999 judgment was handed down in **County Fair Foods (Pty)Ltd v Commission for Conciliation, Mediation and Arbitration & others (1999)20 ILJ 1701 (LAC)** in which the issue of the correct approach for a CCMA commissioner to adopt when deciding the fairness of dismissal as a sanction arose again. In the County Fair case each of the three Judges who heard that matter, namely Ngcobo AJP, Conradie JA and Kroon JA, wrote his own separate judgment.

[42] In the County Fair case Kroon JA appears to have elected not to commit himself one way or another on the issue under consideration. At par 20 he was content to say in part: "**Even if the correct approach were that the arbitrator could decide de novo on what would constitute a fair sanction, [the arbitrator's] decision that fairness dictates that a sanction less than dismissal be imposed is not justifiable on any rational objective basis. The absence of that basis results in the arbitrator's award being vitiated by gross irregularity**."

[43] Ngcobo AJP referred to the Nampak case and in particular paras 33 and 34 thereof. Although some statements in that judgment, particularly in paragraphs 28 and 29, may seem to suggest that Ngcobo AJP was

saying that a commissioner may interfere with dismissal as a sanction imposed by an employer if such sanction is unfair – in other words without requiring any thing more than that the sanction of dismissal is unfair – it seems that, upon a reading of the judgment as a whole, the judgment goes further than that and says that a commissioner can only find dismissal as a sanction unfair – and can therefore, interfere with it – if it "**is so excessive as to shock one's sense of fairness.**" (par 30 of the judgment). It is assumed that, when dismissal is "**so excessive as to shock one's sense of fairness**", it is one that no reasonable employer would have considered fair. However, it is arguable that not every unreasonable dismissal can be said to be "**so excessive as to shock one's sense of fairness.**" Ngcobo JA also referred to Brassey AJ's judgment in Computicket.

[44] Conradie JA disagreed with Kroon JA and Ngcobo AJP that the appeal should be upheld. However, he agreed "**fully**" with Ngcobo AJP's approach that commissioners of the CCMA should show deference to the disciplinary sanctions imposed by employers. (see par 48 of the judgment in 1717). In either December 1999 or early in 2000 this Court handed down its judgment in **Toyota SA Motors (Pty)Ltd v Radebe & others (2000) 21 ILJ 340(LAC**) in which it rejected the reasonable employer test and, thus, departed from its own judgment in Nampak. This Court made it clear that it appreciated that it ought not to lightly depart from its own previous judgments but took the view that this was a case where it was entitled to do so. (see par 50 of Nicholson JA's judgment). Before coming to the conclusion that the reasonable employer test was not part of our law, this Court considered some academic writings and previous decisions. Furthermore this Court considered the fact that in English law the reasonable employer test was

based on a specific statutory provision and in South Africa we do not have a corresponding provision.

[45] In **Rustenburg Platinum Mines Ltd v CCMA & others 2007(1) SA 576 (A) at 594** par 43, a judgement of Cameron JA in which Harms, Cloete, Lewis and Maya JJA concurred, the SCA expressed regret that this Court has "**not consistently affirmed and applied the analysis"** of Ngcobo JA in par 33 of his judgment in **Nampak Corrugated Wadeville v Khoza (1999) 20 ILJ 578 (LAC)** and Ngcobo AJP's analysis in **County Fair Foods (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others (1999)20 ILJ 1701 (LAC)** at par 28. The one in Nampak's case is contained in par 33 of Ngcobo JA's judgment. It reads thus:

> "**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."**

[46] Ngcobo AJP's analysis in County Fair that the SCA was referring to is to be found in par 28 of Ngcobo AJP's judgment. That part of paragraph 28 of Ngcobo AJP's judgment that was quoted by the SCA in Rustenburg as containing part of the analysis which the SCA regretted that this Court has since "**strayed**" away from reads 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 the employer. They should not interfere with the sanction merely because they do not like it. There must be a measure of deference to the sanction imposed by the employer subject to the requirement that the sanction imposed by the employer must be fair. The rationale for this is that it is primarily the function of the employer to decide upon the proper sanction."**

[47] It is true that this Court has departed from the approach it had adopted in Nampak's case on the question of how a commissioner of the CCMA should approach his task in determining the question whether dismissal as a sanction is unfair. Of course, each superior court is entitled to depart from its previous decisions in certain circumstances if there is no decision of a higher court than itself on the point in question. However, it is also true that a court should be slow to depart from its previous decisions.

[48] In the light of the SCA's expression of regret in this regard and the fact that in Toyota this Court did not give all reasons supporting the rejection of the reasonable employer test, it seems that this Court should take this opportunity to give full reasons which support the approach that it took. There are other reasons as well why this Court should deal with the debate about the reasonable employer test fully herein. One of

them is that the main issue in this appeal was what the correct approach is that a CCMA commissioner should take when he has to decide whether dismissal as a sanction is fair. Counsel for the appellant argued very passionately and yet vigorously in support of the reasonable employer test. He emphasised the need for commissioners to defer to the employer with regard to the issue of a sanction. In this regard he relied heavily on the decision of this Court in Nampak and Ngcobo AJP's judgment in County Fair. Furthermore, the debate about what the correct approach is that CCMA commissioners should adopt in determining whether dismissal is fair is a debate on which many would wish to hear the views of this Court before it can be put to rest. I say this because of the place occupied by this Court in the arbitral and adjudicative system of labour disputes under the act

Interpretive framework

[49] Sec 23 (1) of our Constitution confers on everyone "**the right to fair labour practices"**. Sec 232 of the Constitution reads: "**Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament**". Sec 233 of the Constitution reads:

> "**When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law**".

Sec 39 (2) reads:

> "**When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the**

Bill of Rights".

The purpose of the Act is:

"**to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act…"** It is not necessary to list all the primary objects of the Act. However, those listed in sec 1 (a), (b) and (d) (iv) are relevant. Respectively, they are:

- to give effect to and regulate the fundamental rights conferred by sec 23 of the final Constitution.
- To give effect to obligations incurred by the Republic as a member state of the International Labour Organization, and
- To promote the effective resolution of labour disputes.

Sec 3 of the Act deals with the interpretation of the Act. It reads thus:

"**Any person applying this Act must interpret its provisions –**

a) to give effect to its primary objects.

b) **in compliance with the Constitution; and**

c)**in compliance with the public international obligations of the Republic…"**

<u>Does the language of the Act support the reasonable employer test or the "own opinion" approach?</u>

[50] In seeking to determine whether an arbitrator or commissioner of the CCMA is required to give his opinion or to defer to the employer when he decides whether dismissal as a sanction is or is not fair in a particular case, it seems that one must start by emphasising that the CCMA is a creature of statute and derives its powers within the four corners of the

Act read with the Constitution. In this context what was said of the industrial court in **Transvaal Press Nuts Bolts and Rivets (Pty) Ltd v President of the Industrial Court and others (1989) 10 ILJ 48 (N) at 67D—F** by Page and Thirion JJ can be said of the CCMA albeit within the context of the current Act. There the learned Judges had this to say, among other things, about the industrial court: "**The industrial court (although it is not strictly speaking a court at all—CF SA Technical Officials' Association v President of the industrial court and others 1985 (1) SA 596 (A); (1985) 6 ILJ 186(A)—exists only by virtue of the provisions of s17 of the Labour Relations Act and is, accordingly, a creature of statute. It accordingly has no power to assume jurisdiction in respect of any matter beyond those encompassed by its statutory jurisdiction."** In determining whether the CCMA is required to defer to the employer/apply the reasonable employer test or to apply the "**own opinion**" approach, it is necessary to determine what the statutory powers of a CCMA commissioner are when he has to decide whether dismissal as a sanction in a particular case is fair.

[51] In determining what the powers of the CCMA are when it has to decide whether dismissal as a sanction is fair, one should start with the language of the statute creating the CCMA. In this regard it is important to bear in mind that the primary rule in the construction of statutes is that words and expressions used in a statute must be interpreted according to their natural, ordinary or primary meaning unless this would lead to an absurdity. However, no less important is the proposition that the words or expressions used in a statute must also be interpreted in the light of their context, including "**the matter of the statute, its apparent scope and purpose, and, within limits, its**

background." (see **Jaga no and Another. 1950 (4) SA 653 (A) at 662 per Shreiner JA; Consolidated Frame Cotton Corporation Ltd v The President of the Industrial Court and Others (1986) 7 ILJ 489 (A) at 494F—G).**

[52] It would appear that the provisions of the Act that contain the powers of a CCMA commissioner when he has to decide whether dismissal as a sanction is unfair are the following:

(a) secs 115(b), 133(2)(a) and 136(1) – which provide that the commission must "**arbitrate the dispute**",

(b) sec 138(1) – which provides that a commissioner may conduct an arbitration in a manner that the commissioner considers appropriate "**in order <u>to determine the dispute</u> <u>fairly</u> and quickly, but must deal with the substantial merits of the dispute with minimum legal formalities**" (underlining supplied).

(c) Sec 138(6) – which provides that a commissioner must take any code of good practice issued by NEDLAC or guidelines published by the Commission in accordance with the Act into account in determining whether dismissal is fair.

(d) Sec 138(9) – which provides: "**the commissioner <u>may make any appropriate arbitration award</u> in terms of this Act, including but not limited to an award –**

(a) that gives effect to an arbitration agreement;

(b) that gives effect to the provisions and primary objects of this Act;

(c) that includes, or is in the form of a declaratory order" (underlining supplied).

[53] The language that seems significant under sec 138 relating to powers of a commissioner is the choice of the words "**to determine the dispute fairly**" in sec 138(1) and the choice of the words "**may make any appropriate arbitration award"** in terms of this Act in sec 138(9).

[54] In my view the phrase **"to determine the dispute fairly"** in sec 138 (1) is pivotal in deciding what the statutory powers are which the CCMA has in deciding whether dismissal as a sanction is fair. This is because a dispute about the fairness of a dismissal (see sec 191 (1) of the Act) encompasses both the issue whether the employee is guilty of misconduct as well as the question whether dismissal as a sanction is fair in the particular circumstance of a case except, of course, in those cases where one of these is not an issue between the parties to an unfair dismissal dispute. Where both the guilt of the employee and the fairness of dismissal as a sanction are in issue between the parties, it would not be a determination of the dispute in the sense of bringing it to an end if the tribunal found that the employee was guilty of misconduct but did not determine or decide whether dismissal as a sanction was fair.

[55] The phrase **" to determine the dispute"** when used in respect of the Industrial Court's powers under sec 46 (9) in the old Act was interpreted by Ackerman J, as already stated, in Trident Steel to say that it meant to bring a dispute to an end. Those same words, as well as the statutory provisions of the old Act which empowered the old Labour Appeal Court "**to decide**" an appeal concerning an alleged unfair dismissal matter and the Appellate Division / Supreme Court of Appeal "**to confirm, amend, or set aside the decision or order against which the appeal has been noted or make any other decision or order, including an order as to costs, according to the requirements**

of the law and fairness" were held by the Appellate Division in Perskor and the other subsequent decisions that I have referred to above to mean that the industrial court, the old Labour Appeal Court and the Appellate Division were required to decide the fairness or otherwise of dismissal as a sanction according to their own opinion or judgment of what was fair or unfair in all the circumstances of a particular case.

[56] It is difficult to see what basis could possibly exist to justify giving the phrase **"to determine the dispute"** in sec 138 (1) of the Act a meaning that is different from the one that was given to the same phrase in sec 46 (9) of the old Act by the Appellate Division. That meaning does not lead to any absurdity. Accordingly, it seems fair to say that sec 138 (1) of the Act empowers a CCMA commissioner to pass a moral or value judgment when it decides whether dismissal as a sanction is fair and that a CCMA commissioner is required to decide that issue in accordance with his own opinion or judgment of what is fair or unfair in all the circumstances of a particular case.

[57] The decision of this Court in Toyota to reject the reasonable employer test and to say in effect or by implication that the "**own opinion**" approach applies accords with this approach taken by the Appellate Division in Perskor and the other cases referred to above in relation to statutory language in sec 46 (9) of the old Act that is identical to the statutory language used in sec 138 (1) of the current Act in relation to CCMA commissioners. I do need to point out that the employee's right not to be unfairly dismissed which the Courts enforced under the old Act and, therefore, the employer's duty or obligation not to dismiss an employee unfairly under that Act, although not provided for in those terms, was founded upon the definition of "**unfair labour practice**" in

sec 1 of the old Act. The definition of an "**unfair labour practice**", together with sec 46(9) of the old Act, was also the source of the unfair labour practice jurisdiction of the industrial court which it used to decide the fairness or otherwise of dismissals in dismissal disputes under sec 46(9). Therefore, although sec 46(9), read alone, did not expressly require the industrial court "**to determine the dispute fairly**", which is what sec 138(1) requires of the CCMA, when read with the definition of an "**unfair labour practice"**, that is also what it required of the industrial court (my underlining). Accordingly, it cannot be said that, because, with regard to dismissals, there is no applicable definition of an "**unfair labour practice**" under the current Act similar to one or more of the definitions of "**unfair labour practice**" which appeared in the old Act at different stages, which may have influenced the Perskor decision and other decisions of the Appellate Division, those cases cannot apply under the current Act. So what one has is that sec 46(9) of the old Act read with the definition of "**unfair labour practice**" required the industrial court to exercise its unfair labour practice jurisdiction "**to determine**" whether an employee's dismissal was unfair. Sec 138(1) of the current Act requires the CCMA "**to determine fairly**" whether an employee's right not to be unfairly dismissed which is provided for in sec 185 has been infringed. That, of course, means that it must determine whether the dismissal was fair.

[58] As to the meaning of the phrase "**to arbitrate**" the dispute, which is to be found in sections 115(b), 133(2)(a) and 136(1) of the Act, in my view the phrase bears the same meaning for purposes of the Act as the phrase "**to decide**". Under the old act when that phrase described the function of the old LAC in relation to unfair dismissal appeals it was held in the Perskor case to mean that the old Labour Appeal Court was

required to pass a moral or value judgment on findings of fact and opinion and that it had to make such a decision on the basis of its own opinion of what was fair or unfair in a particular case. That being the case, in my view, the same must hold true for the phrase "**to arbitrate**" the dispute. Accordingly, in my view that phrase in sec 115(b), 133(2)(a) and 136(l) of the Act must be given the same meaning as "**to determine**" or "**to decide**" as discussed in the Perskor case.

[59] With regard to sec 138(9) the language used therein, i.e. "**the commissioner may make <u>any</u> appropriate arbitration award**"(my underlining) seems so wide as to give power to a commissioner to make such award as he may, in his opinion, consider appropriate or fair to make as opposed to requiring him to defer to the employer or to a reasonable employer.

[60] Apart from those provisions of the Act which deal with the powers of a commissioner in determining whether dismissal as a sanction in a particular case is fair, there are also other provisions of the Act which, in my view, seem more consistent with the "**own opinion**" school of thought than with the "**defer to the employer**" school of thought. I deal with them next.

[61] In sec 140 (2) it is provided: "**if in terms of section 194(1), the commissioner <u>finds</u> that the dismissal is procedurally unfair, the commissioner may charge the employer an arbitration fee**" (underlining supplied). Sec 141 (1) allows the CCMA to "**arbitrate the dispute**" if such dispute was supposed to be referred to the Labour Court for adjudication but instead all parties to the dispute consented that it be arbitrated by the CCMA. These provisions seem to me to be

more consistent with the "**own opinion**" approach than with the "**defer to the employer**" approach.

The reasonable employer test and the presumption of fairness of dismissal

[62] Sec 188(1)(a)(i) provides:

> "(1) A dismissal that is not automatically unfair **is unfair if the employer fails to prove—**
>
> a) **that the reason for dismissal is a fair reason—**
>
> **i) related to the employee's conduct or capacity."**

The formulation of sec 188(1) where it is said that a dismissal that is not automatically unfair "**is unfair if….."** connotes an objective determination of the fairness of the dismissal. It states that, if the conditions it prescribes are met, the dismissal is unfair. In other words, once one or both of the conditions are met, the unfairness of the dismissal does not depend upon a reasonable employer. The dismissal is determined by the statute to be unfair in such cases.

[63] It also seems that the reasonable employer test or the "**defer to the employer"** approach is in conflict with sec 188(1) of the Act. The relevant part of sec 188(1) has just been quoted above. It says that a dismissal that is not automatically unfair is unfair if the employer fails

to prove that there is a fair reason for the dismissal. In my view, once it has been established that the employee is guilty of misconduct, the commissioner would turn to the employer and say: Although the employee is guilty of misconduct, tell me why I should find that this is a fair reason to dismiss! If he was not satisfied with what he was told by the employer, he would, in accordance with the opening part of sec 188(1), find that the dismissal is unfair. The reasonable employer test or the "**defer to the employer**" approach actually requires the opposite. According to this approach, once it has been established that the employee is guilty of misconduct, the commissioner would turn to the employee and say: "**Tell me why I should find that this is not a fair reason to dismiss. You see, your employer here thinks that dismissal is a fair sanction for this misconduct on your part. Why should I interfere with his opinion of what is a fair sanction in this case?"** If he was not satisfied with what he was told by the employee, he would, in conflict with the opening part of sec 188(1), find that the dismissal is fair. Accordingly, the reasonable employer test/the "**defer to the employer**" approach creates a presumption that, if an employee is guilty of misconduct, the sanction of dismissal chosen by the employer is fair unless the employee demonstrates the contrary – a presumption that cannot be found anywhere in the act.

The reasonable employer test and the onus provisions

[64] Section 188A deals with pre—dismissal arbitration conducted by agreement between an employer and an employee when the employer seeks to bring disciplinary charges against such employee. Sec 188A (9) reads: "**An arbitrator conducting an arbitration in terms of this section must, in the light of the evidence presented and by reference**

to <u>the criteria of fairness</u> in the Act, direct what action, if any, should be taken against the employee" (underlining supplied). The significance of sec 188A (9) is the reference therein to "**the criteria of fairness in the Act.**" It seems that here the drafters of the Act wanted to emphasise that the criterion that the Act uses is that of fairness. In my view when this is read, it must be read to say that the criterion prescribed by the Act is that of fairness and not reasonableness.

<u>The reasonable employer test and the onus provisions</u>

[65] Sec 191(1) deals with a dispute about the fairness of a dismissal and a dispute about an unfair labour practice. The same disputes are contemplated in sec 191(5)(a) and (b). Sec 191(5) provides that the CCMA must "**arbitrate the dispute**" at the request of the employee if "**the employee has alleged that the reason for dismissal is related to the employee's conduct or capacity unless paragraph (b)(iii) applies,"** Sec 192(2) provides: "**If the existence of the dismissal is established, the <u>employer must prove that the dismissal is fair</u>."** Through a provision such as sec 192(2) the drafters of the Act sought to ease the employee's burden by making sure that, once he has proved the existence of a dismissal, it is upto the employer to prove that the dismissal is fair. The requirement that the employer must prove that the dismissal is fair is not confined to the employer simply proving that the employee is guilty of misconduct. It also entails that, where the employee admits that he is guilty or is properly found to be guilty, the employer must also prove that dismissal as a sanction is fair.

[66] In my view the "**defer to the employer**" approach or the reasonable employer test has the effect of turning sec 192(2) around as if it read:

"**Once the existence of a dismissal has been established, the employee must prove that the dismissal is unfair**." This is because in terms of the reasonable employer test in effect the view of the employer that the employee's act of misconduct deserves to be punished with dismissal is required to be shown a deference or must be accepted as fair and left intact unless it is grossly unfair or shockingly excessively unfair or so unfair that no reasonable employer would have regarded it as fair or so excessive as to shock one's sense of fairness. This is contrary to sec 192 (2). The "**own opinion**" approach is in harmony with sec 192(2).

[67] Sec 193 (1) provides that **"(i)f the Labour Court or an arbitrator appointed in terms of this Act <u>finds</u> that a dismissal is unfair, the Court or the arbitrator may…**" and then different remedies are set out which may be granted. The first part of this subsection seems to be more in line with the proposition that what the commissioner finds is that which constitutes the commissioner's opinion on the facts and other matters. It does not appear to me to be in line with a person who does not think that the dismissal is unfair but nevertheless says it is fair because the employer thinks it is fair which is what the "**defer to the employer**" approach requires of a CCMA commissioner. In my view, if the drafters of the Act had sought to say the latter, it would have been the easiest thing for them to say so in clear terms. The question arises: in what other way would the drafters have formulated this subsection if they wanted that the commissioner's finding should be his opinion or judgment and not that of the employer? It is difficult to think of any.

[68] If one has regard to the provisions of the Act that I have referred to above, and they cover the powers of a CCMA commissioner when

dealing with the issue facing us in this matter, one will notice that the provisions that are specific about what the commissioner is required to do either say he is required to "**arbitrate the dispute**" or that he is required to "**determine the dispute**". Within the context of a dismissal, the dispute that those provisions say the commissioner is required to arbitrate or determine is a dispute such as is contemplated in sec 191(1) of the Act. That is a "**dispute about the fairness of a dismissal**". In my view the phrase "**to determine the dispute**" must have been chosen because the old Act had the same phrase in sec 46(9) and, it having been judicially interpreted, its meaning was well-known. In my view the use of that phrase suggests that the drafters of the Act contemplated that the arbitrator was going to need to pass a moral or value judgment on the fairness of a dismissal as a sanction. After all it is trite that, if the legislature uses the same words in a statute that it has previously used in a repealed statute dealing with the same subject matter, it must be taken to intend such words to be given the same meaning as the meaning that the Courts have given to them in the repealed statute. It seems to me that, if the drafters of the Act had intended that the commissioner, in determining the dispute, should defer to the view of the employer, they would have gone further than simply saying that the commissioner must "**arbitrate**" or "**determine**" the dispute and they would not have chosen words that have been interpreted to mean the opposite of what they intended.

A comparison of sec 157(3) of the English Statute and sec 138 of the Act

[69] As has already been said, the "**reasonable employer**" test is derived from English law. Sec 57(3) of the Employment Protection

(Consolidation) Act of 1978 read as follows:

> "(T)he determination of the question whether the dismissal was fair or unfair, having regard to the reasons shown by the employer, **shall depend on whether in the circumstances (including 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 substantial merits of the case"** (underlining supplied).

[70] That part of sec 57(3) which has been underlined above and which appears between the word "**employer**" and the word "**and**" are the words in that subsection which authorised the adoption of the reasonable employer test because they directed how a tribunal dealing with an unfair dismissal claim had to go about determining whether a dismissal was fair. In our country there was no such provision in the old Act and there is no such provision in the current Act. It seems that the English legislature chose to add those words in sec 57(3) because it thought that, if the English statute simply required a tribunal to determine whether a dismissal was unfair, the tribunal would give such provision its ordinary and natural meaning which is that the tribunal should decide such an issue according to its own opinion of what is fair. It seems that for some reason the English legislature did not want such an issue to be decided on the basis of the opinion of a neutral party but wanted it to be decided on the basis of the opinion of a reasonable employer. In South Africa the drafters of the Act consciously did not include in our statute words such as those underlined in sec 57(3) above. Accordingly, the Courts must respect that legislative choice and give effect to it.

[71] There is an additional point with regard to sec 57(3) which fortifies me in my view that the drafters of our Act deliberately chose not to incorporate into our Act those words of sec 57(3) which have been underlined above and which direct that a dismissal be adjudged to be unfair only if the employer acted unreasonably in treating the reason for dismissal as sufficient. In this regard attention is drawn to the fact that the last portion of sec 57(3) directs that "**that question shall be determined in accordance with equity and the substantial merits of the case**." Attention can also be drawn to the fact that, very interestingly, sec 138(1) of our Act contains a similar injunction. It provides that the commissioner may conduct the arbitration in a manner that he considers appropriate "**in order to determine the dispute fairly and quickly but must deal with the substantial merits of the dispute …"** (my underlining). What is common between the last portion of sec 57(3) and sec 138(1) of our Act are the following features:

(a) in sec 57(3) there is an injunction "**to determine the question**" and in sec 138(1) there is also an injunction to the commissioner "**to determine the dispute**".

(b) The question that is required to be determined in sec 57(3) and the dispute that a commissioner is called upon to determine in terms of sec 138(1) is a dispute or question whether a dismissal is fair.

(c) sec 57(3) contains the injunction that the question be determined "**in accordance with equity**". Sec 138(1) contains an injunction that the dispute be determined "**fairly"**. That the question or dispute be determined in accordance with equity or fairly means the same thing.

(d) in sec 57(3) it is stated that the question must be determined in

accordance with "**the substantial merits of the case"**. Sec 138(1) requires that the dispute be determined "**with the substantial merits of the dispute**".

[72] I am of the view that there are too many features between sec 57(3) of the English statute and sec 138(1) of our Act which are similar for anyone to say that this was coincidental. It seems that the drafters of our Act did look at sec 57(3) and decided very deliberately to incorporate only the last part of sec 57(3) and not the middle part thereof which authorises the reasonable employer test. If they had wanted to incorporate the reasonable employer test into our Act, they would have also incorporated the middle part of sec 57(3) into the Act. They made a policy choice to leave out that part of sec 57(3) which would have imported the reasonable employer test into our Act. They knew that this was the subsection on which the reasonable employer test was based in English law. There had been reported cases in the Industrial Law Journal during the 1980's and early 1990's which had referred to sec 57(3) in regard to the reasonable employer test. The Ministerial Task Team had Prof Hepple as one of the international advisors, who would have advised it well not only on labour law internationally, but also on the position in English law. (see the Explanatory Memorandum at 279). They decided to pick and choose from sec 57(3) what they wanted to form part of the South African statute and they picked and chose the part that relates to the criterion of fairness and left out the part that required that fairness be determined on the basis of reasonableness. The legislature is entitled to make certain legislative policy choices and, in terms of the doctrine of the separation of powers, the Courts must respect such policy choices unless they are inconsistent with the Constitution. In this case the legislative choice that was made is that the reasonable employer test should not be part of our Act. There can be nothing inconsistent with the Constitution about that. Accordingly, the

courts must give effect thereto and should not do anything that would undermine or frustrate that policy choice.

The determination of the fairness of disciplinary warnings and the reasonable employer test/the "own opinion" approach

[73] Disputes falling under the category of unfair labour practices are dealt with in sec 186 (2). Sec 186 (2) provides that **"(a)n unfair labour practice means any unfair act or omission that arises between an employer and employee involving—**

> **(a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits, the unfair suspension of an employee or any**

other unfair disciplinary action short of dismissal in respect of an employee;

(b) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;

c) a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement; and

d) **an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000), on account of the employee having made a protected disclosure defined in that Act."**

[74] The powers of an arbitrator or CCMA commissioner when he deals with a dispute concerning an unfair labour practice provided for in sec 186(2) are set out in sec 193(4). Sec 193(4) reads:

"**An arbitrator appointed in terms of this Act may <u>determine</u> any unfair labour practice dispute referred to the arbitrator, <u>on terms that the arbitrator deems reasonable which may</u>**

include ordering reinstatement, re-employment or compensation" (underlining supplied).

These powers are materially similar to the powers which the old Act after the 1988 amendments conferred on the industrial court in regard to unfair labour practice disputes under sec 46(9)(c) which were discussed earlier. On the basis of how such powers were interpreted by the Appellate Division under the old Act in the Perskor and other decisions of the Appellate Division, in my view the same interpretation must be given to these powers in sec 193(4). That means that the arbitrator is required to give his opinion as to whether an unfair labour practice has been committed. One type of employer conduct which falls within the definition of an unfair labour practice under sec 186(2)(a) is disciplinary action short of dismissal in respect of an employee. This refers to, among others, disciplinary warnings.

[75] If in regard to the fairness of a dismissal as a sanction, a CCMA commissioner is required, as the reasonable employer test requires him, not to decide the fairness of a dismissal according to his own opinion or judgement of what is fair but to defer to the employer unless he is of the opinion that the dismissal is shockingly excessive as a sanction or is shockingly unfair or it makes him whistle or unless no reasonable employer would have regarded it as fair or unless it is so excessive as to shock one's sense of fairness, then the commissioner would be required to apply the same approach in regard to the determination of the fairness of disciplinary action short of dismissal such as a verbal warning, a first written warning, a second written warning and a final written warning. It may well be that, if ever there was a case to be made out for any deference to the employer with regard to sanction, it would be in respect of the determination of the fairness of disciplinary action

short of dismissal such as a warning because it would be very difficult in most cases to fault the employer in imposing one form of disciplinary action and not the other. For example, if an employer decided that the appropriate sanction in a particular case was a second written warning, how would one fault that employer and say it should have been a first written warning? If the employer imposed a final written warning as opposed to a second written warning, it would not be easy to fault the employer. That means that the CCMA commissioner would always be deferring to the employer in such cases and would not have any scope to interfere with a warning given by an employer. That is if one applies the reasonable employer test.

[76] The only conceivable way in which disputes about the fairness of different forms of disciplinary action short of dismissal can be determined is if the CCMA commissioner has power to decide their fairness on the basis of his own opinion of what is fair with no deference to the employer. Once a CCMA commissioner is required to defer to the employer in regard to such disputes, the workers' right to have such disputes referred to the CCMA for determination would be illusory and not worth the paper it is written on. It would be a hollow right because, in such a case, and in terms of the reasonable employer test, the commissioner would not be required or entitled to find such disciplinary action e.g. a warning unfair unless he thought it was shockingly excessive or shockingly unfair or unless it made him whistle or unless no reasonable employer would have imposed such a warning. Circumstances which would make one warning shockingly excessive or shockingly unfair or which would make one whistle or which would shock one's sense of fairness as opposed to another warning are, in my view, non-existent. If the Courts say that commissioners must apply the

reasonable employer approach in regard to such matters, for all intents and purposes the workers' right to bring such disputes to the CCMA is frustrated because most often they would have no prospects of success. This would frustrate their constitutional right provided for in sec 34 of the Constitution to take to a court of law or to another independent tribunal or forum any dispute which is capable of being resolved by the application of law. Accordingly, a construction of the Act which suggests that the Act permits the application of the reasonable employer test seems inconsistent with sec 34 of the Constitution when applied to disputes about disciplinary warnings. This must be so because, whereas sec 34 entrenches everyone's right to have access to the Courts or other independent fora for the purpose of the resolution of disputes that can be resolved by the application of the law, a construction of the act which permits the reasonable employer approach renders such a right illusory in that even if workers were to take such disputes to the CCMA, the result would always be a forgone conclusion.

[77] If one says that the reasonable employer test or the "**defer to the employer**" approach does not apply to disputes concerning unfair labour practices relating disciplinary action short of dismissal but applies to dismissal cases, what would be the statutory basis for drawing a distinction between such matters and dismissal matters in the light of the similarity of the language used in regard to both cases? In my view the language used both in respect of disciplinary action short of dismissal (i.e. sec 186(2) read with sec 193(4)) and the language used in sec 138(1) and (9) requires for the commissioner to rely on his moral or value judgment or opinion to decide whether a particular warning or dismissal is fair or not and not to defer to anybody.

[78] Since the language used to describe the powers of the CCMA arbitrators when they deal with unfair labour practice disputes relating to disciplinary action short of dismissal is materially similar to the language that was used at some stage to describe the powers of the industrial court under sec 46(9), it would be very difficult for anybody to say that that language must be given a meaning that is different from the meaning that was given to the same language under sec 46(9) of the old Act by the Appellate Division. That is that in effect such language meant that the task of the Court was to pass its moral or value judgment on the fairness of the conduct in question. That is the "**own opinion**" approach. If it is held, as in my view it must be, that, because of that, when the CCMA arbitrators or commissioners deal with the fairness or otherwise of warnings given to employees by an employer, they must decide the fairness thereof according to their own judgment or opinion, it would be an anomaly to still say that, when the same arbitrators decide the fairness of dismissals – when much more is as stake for the employee and he needs all the legal protection he can get, the reasonable employer test must be used which places him more at risk than he is when he challenges warnings.

[79] There is no doubt that the Act requires the commissioner to determine whether the dismissal is fair. In this regard it must be recalled that sec 191(1) says that the dispute is "**about the fairness**" of the dismissal. If that is the dispute that the commissioner is required "**to arbitrate**" or "**to determine**", obviously his task is to say whether the dismissal is fair in order to resolve the dispute between the two disputants, namely, the employer who says the dismissal is fair, and the employee who says the dismissal is unfair. In saying so, the arbitrator is naturally expected to rely on his own moral or value judgment or opinion. In this context

the commissioner is required to say whether the dismissal is fair. To me this scenario is more in support of the proposition that it is the opinion of a third party as to whether the dismissal is fair or not that is required as opposed to it being the opinion of the employer.

[80] The reasonable employer test or the "**defer to the employer"** approach is advocated only in relation to the question whether dismissal as a sanction is fair. Those who believe in this school of thought do not suggest that, when the commissioner seeks to decide whether the employee is or is not guilty of misconduct, the commissioner should not apply his own judgement on whether the employee committed the misconduct and should defer to the employer or to a reasonable employer. The true English law reasonable employer test also affects this part of the inquiry. In that country the tribunal is not required to make a finding whether or not the employee is guilty of misconduct. It is required to inquire whether the employer had reasonable grounds for believing that the employee was guilty of the misconduct with which he was accused.

[81] That this is what is required in English law is clear from the statute itself. Under our Act the commissioner is simply required to determine whether the dismissal is fair. In other words the wording that empowers the commissioner to find whether the employee is guilty of misconduct is the same wording that empowers the commissioner to decide whether the sanction of dismissal is fair. It is difficult to understand how it can be said that that same wording in the statute does not require the commissioner to defer to anybody but to give his own opinion or judgment on whether the employee is guilty but that the same wording does not require the same of him when he has to decide whether the

sanction of dismissal is fair but requires him to defer to the employer. One of the cannons of construction is that the same word or expression in a statute must, as far as possible, be given the same meaning throughout the statute.

The Code of Good Practice: Dismissal (Schedule 8 to the Act)

[82] As pointed out earlier, the Act provides that anyone applying or interpreting the act must take into account any Code of Good Practice issued under the Act should be taken into account. In this case the relevant Code is to be found in Schedule 8 of the Act. In taking into account the provisions of the Code, it must be remembered that the Code cannot and should not be given an interpretation or construction that is in conflict with the Act. It, therefore, seems that the correct approach would be to first seek to interpret the Act without taking the Code into account and, thereafter, to Consider the code. If the code has one meaning and that meaning is not in conflict with the Act, then such meaning must be taken into account. If, however, the meaning of the relevant provisions of the Code is in conflict with the meaning of the Act, then, quite obviously, the Act prevails. It could never have been intended that in the event of a conflict between the Act and the Code of Good Practice: Dismissal, the Act should yield to the Code. Indeed, the Code makes it clear in sec 1 that it is a guide that may be departed from in "**proper circumstances**." In my view proper circumstances would include a situation where it is in conflict with the Act. In fact item 3(4) of the Code also supports this because in its last sentence it provides that **"(w)hatever the merits of the case may, a dismissal will not be fair if it does not meet the requirements of sec 188**".

[83] Item 1(3) of the Code provides that **"(t)he key principle in this Code is that employers and employees should treat one another with mutual respect. A premium is placed on both employment justice and the efficient operation of business. While employees should be protected from arbitrary action, employers are entitled to satisfactory conduct and work performance from their employees**." In item 3(2) of the Code it is stated, among other things, that **"(e)fforts should be made to correct employees' behaviour through a system of graduated disciplinary measures such as counselling and warnings**."

Item 3(3) reads as follows in part:

> **"Repeated misconduct will warrant warnings, which themselves may be graded according to degrees of severity. More serious infringements or repeated misconduct may call for a final warning or other action short of dismissal. Dismissal should be reserved for cases of serious misconduct or repeated offences."**

This last sentence of item 3(3) does not mean, and should not be construed to mean, that, if the misconduct is serious, then the sanction of dismissal is automatically fair. Indeed, the misconduct of an employee may be serious and yet dismissal may still be unfair in all of the circumstances of a case. Support for this proposition can be found both in the Code itself and in certain decisions of both the Appellate Division and the old Labour Appeal Court when those Courts dealt with dismissal matters under the unfair labour practice jurisdiction of the old Act. There are many cases under the old Act in which the old Labour Appeal Court or the Appellate Division found the misconduct committed by an employee or employees to be serious and yet held the

dismissal as a sanction to be unfair. (see for example the Boardmans case, supra).Support for this approach if to be found in item 3(4)and 5 of the Code which is dealt with next.

Item 3(4) and (5) of the Code provide:

> "(4) Generally, it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes continued employment relationship intolerable. Examples of serious misconduct, subject to the rule that each case should be judged on its merits, are gross dishonesty or wilful damage to the property of the employer, wilful endangering of the safety of others physical assault on the employer, a fellow ***employee*****, client or customer and gross insubordination. Whatever the merits of the case for *dismissal* might be, a *dismissal* will not be fair if it does not meet the requirements of section 188.**
>
> 5) **When deciding whether or not to impose the penalty of *dismissal*, the employer should in addition to the gravity of the misconduct consider factors such as the *employee's* circumstances (including length of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement itself."**

It is noteworthy that the first sentence of item 3(4) makes it clear that it is not enough for the misconduct to be serious in order for it to be appropriate to dismiss an employee for a first offence. In addition to the misconduct being serious, it is required that the misconduct must be "**of such gravity that it makes a continued employment relationship intolerable**" before it can be said that dismissal is appropriate as a sanction for an employee's first offence.

[84] It goes without saying that, generally speaking, an employee's first act of misconduct, even if serious, would not render a dismissal fair if it was not, in the words of the Code, "**of such gravity that it makes a continued employment relationship intolerable**". And, of course, the ipse dixit of the employer that a particular act of misconduct is of such gravity that it makes a continued employment relationship with the employee intolerable is not good enough. In my view whether or not in a particular case the act of misconduct by the employee is of such gravity that it makes continued employment relationship intolerable is a question that must be determined by a party other than one of the two disputants, for example, the Court or an arbitrator objectively after taking into account all of the facts and circumstances of the case (See the SCA decision in Dube, above).

[85] Item 3(5) of the Code provides that, before an employer may impose the sanction of dismissal, he should "**in addition to the gravity of the misconduct consider factors such as the employee's circumstances (including length of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement itself."** This part of the Code is in line with a number of cases under the old Act in which the Appellate Division found acts of misconduct committed by employees to be serious and yet held that their dismissals were, nevertheless, unfair.

[86] Item 7 of the Code is also relevant. It reads as follows:

> "**7. Guidelines in cases of dismissal for misconduct.-**
> **Any person who is determining whether a dismissal for misconduct is unfair should consider-**
>
> **a) whether or not the employee contravened a rule**

or standard regulating conduct in, or of relevance to, the workplace; and

b) if a rule or standard was contravened, whether or not –

(i) the rule was a valid or reasonable rule or standard;

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

(iii) the rule or standard has been consistently applied by the employer; and

(iv) dismissal [is] an appropriate sanction for the contravention of the rule or standard."

[87] The provisions of the Code referred to above appear to include all the important provisions of the Code that would be relevant to the question whether the Code contemplates the "**defer to the employer**" approach/reasonable employer test or the "**own opinion**" approach. In my view one should not do as the SCA did in Rustenburg, namely, take into account only the use of the indefinite article "**an**", the use of the word "**appropriate**" and the use of fairness in general to conclude as to which school of thought the Code contemplates. In Rustenburg the SCA did not consider any provisions of the Act itself as opposed to one or two provisions of the Code and other matters to reach the conclusion that it did. In my view it ought first and foremost to have considered provisions of the Act itself because the powers of CCMA commissioners are to be found first and foremost in the Act and not in the Code. Indeed, there are provisions of the Act that are very relevant to the question of what the powers of CCMA commissioners are when

dealing with disputes about the fairness of dismissals. As will have been seen from the discussion of such matters and others above, the provisions relevant to that question include sec 138(1) and (9). As already stated above sec 138(9) provides that an unfair dismissal dispute is referred to a commissioner in order for the latter "**to determine the dispute**" fairly – a phrase to which a meaning has been ascribed judicially in this branch of the law. After all the CCMA is a creature of statute and any one seeking to establish what its powers, functions or obligations are should look for them in the Act.

The reasonable employer test, the international obligations of the Republic and sec 1 and 3 of the Act

The ILO convention

[88] It is necessary to have regard to the provisions of the ILO Convention 158 on Termination of Employment, 1982. Part of the reason why it is necessary to consider this Convention is that in terms of sec 1 of the Act one of the primary objects of the Act is "**to give effect to obligations incurred by the Republic as a member state of the International Labour Organisat**ion". Furthermore, sec 3 of the Act contains an injunction that provisions of the Act be interpreted in such a way as to give effect to the primary objects of the Act and "**in compliance with the public international law obligations of the Republic**". That is quite apart from the requirement, also provided for in sec 3 of the Act, that the provisions of the Act must be interpreted "**in compliance with the Constitution**". This last mentioned requirement is particularly important in the light of the injunction contained in sec 233 of the Constitution. The effect of sec 233 is that, if

there are two possible interpretations of a statutory provision one of which accords with international law while the other one does not, the interpretation that must be adopted is the one that accords with international law as long as it is a reasonable interpretation. If a construction of the Act is preferred without considering the relevant conventions of the ILO which the Republic has ratified such as this particular convention, there is a risk that such a construction may undermine, or, be in conflict with, the obligations of our country as a member state of ILO .

[89] Article 1 of the Convention reads:

> "**The provisions of this Convention shall, in so far as they are not otherwise made effective by means of collective agreements, arbitration awards or Court decisions or in such other manner as may be consistent with national practice, be given effect by laws or regulations."**

Article 4 reads:

> **"The employment of a worker shall not be terminated unless there is a valid reason for such termination in connection with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service."**

Article 8(1) reads:

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

Article 9(1), (2) and (3) reads:

> "1. The bodies referred to in Article 8 of this Convention shall be

empowered to examine the reasons given for the termination and the other circumstances relating to the case and to render a decision on whether the termination was justified.

2. **In order for the worker not to have to bear alone the burden of proving that the termination was not justified, the methods of implementation referred to in Article 1 of this Convention shall provide for one or the other or both of the following possibilities:**

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

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

3. **In cases of termination stated to be for reasons based on the operational requirements of the undertaking, establishment or service, the bodies referred to in Article 8 of this Convention shall be empowered to determine whether the termination was indeed for these reasons, but the extent to which they shall also be empowered to decide whether these reasons are sufficient to justify that termination shall be determined by the methods of implementation referred to in Article 1 of this Convention"** (underlining supplied).

Article 10 reads:

> "If the bodies referred to in article 8 of this Convention **find that termination is unjustified and if they are not empowered or do not find it practicable, in accordance with national law and practice, to declare the termination invalid and/or order or propose reinstatement of the worker, they shall be empowered to order payment of adequate compensation or such other relief as may be deemed appropriate"** (underlining supplied).

[90] It seems to me that the language used in the Convention is in line with the "**own opinion**" approach. In this regard article 4 prohibits the termination of a worker's employment unless there is a valid reason. It seems that what is meant by this reference to a valid reason is an objectively valid reason and not a reason that a reasonable employer would regard as valid. In this regard it is interesting to note that the requirement that there should be a valid and fair reason to dismiss which was contained in the then new definition of an unfair labour practice after the 1988 amendments persuaded De Kock M in the industrial court in **Govender v SASKO (Pty)Ltd t/a Richards Bay Bakery (1990) 11 ILJ 1282** to turn his back on the reasonable employer test which he had accepted in cases such as **FAWU & others v CG Smith Sugar Ltd, Noordberg (1989) 10 ILJ 907 (IC), Nkomo v Pick 'n Pay Retailers Lodge (1989) 10 ILJ 937 (IC) and Zulu v Empangeni Transport Ltd (1990) 11 ILJ 123 (IC) at 127C.** It is worth noting that the Appellate Division/Supreme Court of Appeal applied the "**own opinion**" approach in deciding the fairness or otherwise of dismissals irrespective of whether the law that applied was the pre-September 1988 or the post-September 1988 law under the old

act.

[91] As has been said above the absence of the word "**valid**" in the old Act before the 1988 amendments did not mean that whether there was a fair reason required the reason to be determined subjectively according to the employer's belief. It had to be determined objectively. However, the introduction of the word valid may have served to remove whatever doubt may have existed. When article 9(1) requires that the bodies referred to in article 8(1), which include a court or an arbitrator, be "**empowered to examine the reasons given for the termination and the other circumstances relating to the case and to render a decision on whether the termination was justified"** it seems to me that it requires the court or arbitrator to give its or his own opinion on whether the termination was justified. It is interesting to note that the word "**justified"** is used as opposed to "**justifiable**". Article 9(2)(b) refers a court or arbitrator being "**empowered to reach a conclusion on the reason for the termination having regard to the evidence provided by the parties and according to procedures provided for by national law and practice."** There is no reference to the court or arbitrator having to have regard to whether a reasonable employer would regard such reason for termination as valid.

[92] Article 9(3) provides in part that the court or arbitrator "**shall be empowered to determine whether the termination was indeed for these reasons".** That is where the reasons given by the employer for the dismissal are those relating to the employer's operational requirements. Article 9(3) goes on to say that, in such a case, **"the extent to which [the court or arbitrator] shall also be empowered to decide whether these reasons are sufficient to justify that termination shall be**

determined by the methods of implementation referred to in article 1 of this Convention." The opening part of article 10 reads: "**If the bodies referred to in article 8 of this Convention find that termination is unjustified….".** In my view the language used in the Convention supports the proposition that whether a dismissal is justified or not must be determined on the basis of the view of the bodies referred to in articles 8 and 1 and not on the basis of the view of the employer.

[93] It seems that, when regard is had to the provisions of article 9(3) and article 9(1) of the Convention, it can be said that article 9(3) permits individual countries to put in place a legislative dispensation of their choice in regard to whether a court, tribunal or arbitrator will have power, and if so, how much power, to examine the sufficiency of the economic reason for dismissal. In other words it permits one country to put in place a law that says a court or tribunal or arbitrator is not competent to conclude that an economic reason for dismissal given by an employer is not a sufficient reason for dismissal. It also permits another country to put in place a legislative dispensation that permits a court, tribunal or arbitrator to conclude that the economic reason advanced by an employer for a dismissal is not sufficient. It is possible that the Convention contemplates that a particular country may have a law that says that this is the position where the court or arbitrator is of the view that no reasonable employer would have regarded such economic reason as sufficient to dismiss.

[94] It seems that, if the question in this case was whether the correct approach authorised by the Act was for the commissioner to "**defer to the employer**" in regard to the sufficiency of an economic reason for

dismissal, there would have been no room for an argument that the "**defer to the employer**" approach is in conflict or inconsistent with article 9(3). However, the question before us, in so far as the Convention is concerned, is which one of the two approaches, namely, the "**defer to the employer"** approach/reasonable employer test or the "**own opinion**" approach is not consistent with or in conflict with the provisions of the Convention.

[95] In my view article (9) permits a country to have a regime that allows deference in regard an economic reason a dismissal for operational requirements but there is no corresponding provision in the Convention that applies to cases of dismissal for misconduct which permit a country to put in place a statutory regime that allows or requires deference to the employer in regard to sanction in cases of dismissal for misconduct. Accordingly, it seems that a construction of the Act which says that the Act requires bodies referred to in article 1 or 8(1) of the convention i.e. the Courts and arbitrators should defer to the employer on whether a certain act of misconduct of an employee is sufficient to justify dismissal is inconsistent with the Convention. Now that a view has been expressed above with regard to the relationship between the reasonable employer test and the Convention, it is necessary to have regard to the interpretation of the Convention by the Committee of Experts of the ILO.

The opinion of the Committee of Experts

[96] The provisions of the Convention that deal with dismissals for misconduct are, among others, those of article 9(1). Article 9(1) provides that a court, labour tribunal or arbitrator dealing with a

dispute whether a dismissal is justified "**shall be empowered to examine the reasons given for the termination and the other circumstances relating to the case and to render a decision on whether the termination was justified**."

[97] Chapter 111 of the 1995 General Survey of ILO Convention 158 on Termination of Employment the Committee of Experts discusses the topic: "**Protection Against Unjustified Dismissal**: **Obligation for termination of employment to be justified by a valid reason**". In that chapter the Committee of Experts makes the point in the first sentence of par 76 that **"(t)he need to base termination of employment on a valid reason is the cornerstone of the Convention provisions**." In the middle of that paragraph the Committee of Experts once again emphasises: "**The Convention requires that there be a valid reason for termination of employment…"**

[98] In paragraph 79 the Committee of Experts has this to say: "**During the preparatory work, the Office indicated that for reasons connected with the capacity or conduct of the worker to be considered as valid, they must have a bearing on the work of the worker or the working environment. It was also specified that Article 1 of the Convention on methods of implementation applies to the whole of the instrument and that it therefore also applies to article 4**. I**n other words, the definition or interpretation of valid reasons is left to the methods of implementation referred to in article 1 subject of course to the requirement that it must be in conformity with Article 4.** (My underlining)**"** Article 1 provides:

> "**The provisions of this Convention shall, in so far as they are not otherwise made effective by means of collective agreements, arbitration awards or court decisions or in such other manner as may be consistent with national practice, be given effect by laws or regulations**."

What article 1 means is that those states which ratify this Convention expect, among others, arbitrators and courts to give effect to the provisions of the Convention through, respectively, arbitration awards and court decisions. However, if arbitrators and courts fail to give effect to the provisions of the Convention, legislation would be enacted to give effect to the provisions of the Convention.

[99] In my view that what the Committee of Experts is saying in the last sentence of paragraph 79 quoted above is that it falls within the province of arbitrators and courts to define what constitutes valid reasons and to interpret whether a certain set of facts and circumstances fit in within the definition of a valid reason. In other words it is the prerogative of arbitrators and the courts to pass judgment whether a particular set of facts and circumstances constitutes a valid reason for termination. This statement by the Committee of Experts fully endorses the "**own opinion**" approach, is in line with how the Appellate Division decided unfair dismissal cases under the old Act and is inconsistent with the reasonable employer approach or "**the defer to employer**" approach because the latter approach is based on the notion that it is primarily not for the arbitrator or court to say whether dismissal as a sanction in a particular case is fair because it is the

employer's prerogative to say or decide what sanction is the appropriate sanction for a particular act of misconduct in his business.

[100] The Convention permits member states to make laws that preclude a court or an arbitrator from substituting its or his own opinion for that of the employer in regard to the sufficiency of reasons for a dismissal based upon operational requirements. There is no corresponding provision in the Convention permitting member states to make laws that preclude a court or an arbitrator from substituting its or his opinion for that of the employer with regard to the sufficiency of a reason for dismissal that is based on the conduct or capacity of an employee. In my view that this means that a member state may not make a law which precludes a court or arbitrator from substituting it or his opinion for that of the employer in the last-mentioned case. If a member state was so permitted in the last mentioned case, then the Convention would not have limited this to cases of dismissals for operational requirements. If the Act precludes, as the reasonable employer test entails, a CCMA commissioner from substituting his opinion for that of the employer on whether dismissal as a sanction in a particular case is fair, the Act is in conflict, or, is at least inconsistent, with the Convention.

[101] In par 197 of the General Survey of 1995 the Committee of Experts makes the point that article 9(1) of the Convention "**establishes the essential principle of the right to appeal, under which it must be possible for the reasons and the other circumstances relating to the case to be examined by an**

impartial body, <u>enabling it to decide</u> on the justification of the termination." Of course, the "**right of appeal**" referred to is not a right of appeal from one body to another body. It is simply a right to take the case elsewhere for adjudication or arbitration of the dispute in a court or forum of first instance. In par 198 the Committee of Experts says, among other things, that the court or labour tribunal or arbitrator "**shall be empowered to reach a conclusion on the reason for the termination having regard to the evidence provided by the parties…"** In par 203 the Committee of Experts refers, among other things, to "**the principle whereby in labour disputes legal provisions must be interpreted in favour of the worker**" (underlining supplied).

[102] In par 200 of the General Survey of 1995 the Committee of Experts said:

> "**<u>It is the responsibility of the impartial body to decide, in the light of the evidence presented, whether the termination is justified</u>"** (underlining supplied).

This statement suggests very strongly, if not conclusively, that the Committee of Experts of the ILO holds the view in effect that a court, tribunal or arbitrator is required to decide whether a dismissal is justified according to its or his own opinion or judgment of what is justified or fair and what is not in all of the circumstances in a particular case. This statement, given its ordinary and natural meaning, is inconsistent with the "**defer to the employer"** approach or the reasonable employer test because that approach entails that, even if the court, tribunal or arbitrator is of the opinion that the dismissal is unfair or unjustified, it or he is required to find that the dismissal was fair or justified if the

employer in the case or a reasonable employer might have regarded it as fair or justified or if the unfairness is not so strong that it induces in him a sense of shock.

[103] There is nothing in the wording of the relevant provisions of the Convention that could possibly provide a basis or justification for the proposition that the "**defer to the employer**" test is contemplated in regard to dismissals for misconduct or incapacity as opposed to dismissals for operational requirements. The provisions of article 9(3) which, it has been suggested elsewhere in this judgment, permit deference by the Court or tribunal or arbitrator to the employer in regard to the sufficiency of an economic reason for dismissal say that the court, tribunal or arbitrator

> "**shall be empowered to determine whether the termination was indeed for these reasons, <u>but the extent to which they shall also be empowered to decide whether these reasons are sufficient to justify that termination shall be determined by the methods of implementation referred to article 1</u>** (underlining supplied).

[104] In par 213 of the General Survey of 1995 the Committee of Experts have this to say:

> "**213. With regard to termination of employment for reasons based on the operational requirements of the undertaking, establishment or service, Article 9, paragraph 3, of the Convention specifies that the bodies referred to in Article 8 'shall be empowered to**

determine whether the termination was indeed for these reasons, but the extent to which they should also be empowered to decide whether these reasons are sufficient to justify that termination shall be determined by the methods of implementation referred to in Article 1' "

In par 214 of the General Survey of 1995 the ILO Committee of Experts makes the following points:

"From the outset of the preparatory work, it was considered that it would be best to leave each country to determine the question whether the bodies to which dismissals may be appealed should be authorized to review the sufficiency of reasons related to the operational requirements of the undertaking. This provision therefore affords a certain amount of flexibility by allowing each member State to determine to what extent the competent bodies should be authorized to review the employer's judgment as to the sufficiency of reasons based on operational requirements. Where workforce reductions are concerned, the employer must therefore clearly have a valid reason within the meaning of Article 4 of the Convention. But it is left to each country to determine the extent to which the impartial bodies before which appeals may be brought against termination of employment should be empowered to review the employer's judgement as to operational requirements, that is, the extent to which they are to be empowered to decide whether these reasons, which are valid by their

nature, are sufficiently important to justify the termination of employment. The text therefore allows each country to restrict the power of the competent body, when investigating whether termination of employment was justified, to review the employer's judgement in relation to workforce numbers."

[105] Accordingly, a construction of the Act which requires an arbitrator or a commissioner of the CCMA not to hold a dismissal to be unfair even when he thinks that it is unfair but to "**defer to the employer**" and, if the employer thinks it is fair, to hold it to be fair is, according to opinion of the Committee of expects of the ILO, either directly in conflict or at least inconsistent, with the Convention. If it is in conflict, or, inconsistent, with the Convention, it is also in conflict with or inconsistent with, the obligations of the Republic as a member State of the ILO. Such a construction violates sec 3 of the Act and completely undermines one of the primary objects of the Act, namely, to give effect to the obligations of the Republic as a member state of the international labour organisation.

Section 233 of the Constitution and international law

[106] Sec 39(2) of the Constitution of the Republic provides that, when interpreting any legislation and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. Sec 232 provides that customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act

of Parliament. Very importantly sec 233 of the Constitution provides that **"(w)hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."** It seems that, if the reasonable employer test is inconsistent with international law as represented by the provisions of the Convention, and the "**own opinion"** approach is consistent therewith, the construction of the Act that supports the reasonable employer test or the "**defer to the employer"** approach should be rejected on the basis of sec 233 of the Constitution. Accordingly, the Act must not be construed in a manner that will produce a meaning that will be inconsistent with international law.

Academic views under the Act

[107] I have considered the views expressed on the issue under consideration by various academic writers and textbook writers. I mention some of them and their works and where they express their views. They are:

Du Toit et al: LABOUR RELATIONS LAW: A Comprehensive guide, 4th ed, Butterworths at 384-385;

Grogan: DISSMISSAL DISCRIMINATION & UNFAIR LABOUR PRACTICES, 1st ed, 2005 at 226-228;

Thompson & Benjamin: South African Labour Law, Vol 1 at AA1-AA423;

Brassey: EMPLOYMENT AND LABOUR LAW, Vol 3: Commentary on the Labour Relations Act, A8-69 to A8-72;

Paul Benjamin : When dismissal disputes are stifled: Employment Law, Vol 6, No 5117 at 118

Prof PAK Le Roux : THE REASONABL EMPLOYER TEST: SOME REFLECTIONS: Labour Law Briefs, Vol 4, No 5 of the

I do not consider it necessary to discuss the views of these authors in detail as that would unduly burden this judgment which is already long. It will suffice to simply say what their views are and to look at the weight that should be accorded such views. Grogan and Du Toit et al seem to support the reasonable employer test/the "**defer to the employer**" approach. Thompson and Benjamin in their joint work support some kind of deference to the employer although they emphasise that their view is not a resuscitation of the reasonable employer test. Brassey makes some critical statements about the reasonable employer test. However, there are statements in his book which may be read to mean that his view is that there must be some deference to the employer. If that is his view, that would be in line with the view of Brassey AJ in Computicket. To reconcile the view Brassey expressed in THE NEW LABOUR LAW, supra, rejecting the reasonable employer test, with the view expressed by Brassey AJ in Computicket, it is arguable that, when Brassey rejected the reasonable employer test in the New Labour Law, he was rejecting that part of that test which requires the Court or tribunal not to decide whether the employee committed the act of misconduct for which the employer dismissed him but to limit its inquiry to whether or not the employer had reasonable grounds at the time of the dismissal to believe that the employee was guilty of misconduct. May be, he has no difficulty with the reasonable employer test when applied to the issue of sanction. Of course this attempt to reconcile the two views may still leave some questions open with regard to some of the statements Brassey makes in EMPLOYMENT AND LABOUR LAW, VOL 3 at A8-69 to A8-72. However, it is also important to point out that Brassey expresses the view somewhere at A8-70 that **"(u)ltimately the question is whether**

the employer could reasonably be expected to keep the employee in her employ." This statement is consistent with, if not the same as, the way the SCA saw the inquiry to be in Dube's case, supra, at 1998(3) SA 956 (SCA) at 960 G-H .Indeed, it seems to resemble what the code says in item 3(4).

[108] Prof PAK Le Roux and Paul Benjamin, in their respective articles, are opposed to the reasonable employer test. In his article referred to above Benjamin is unequivocal in his opposition to the test. However, as already stated earlier, in his joint work with Thompson, the view expressed therein seems to favour some deference to the employer. However, Prof Le Roux is unequivocal in his rejection of the reasonable employer test or any deference to the employer except, possibly, in the case of a dismissal for operational requirements.

[109] It is difficult to give much weight to the view expressed by some of the academic writers referred to above in favour of the reasonable employer test because they expressed their views in support of that without the benefit of a discussion of the provisions of the Act that are relevant to the role and powers of the CCMA when required to decide the fairness of dismissal as a sanction in a dispute, particularly secs 115, 138(1), 138(9) as well as sec 188(1) and 192(2) of the Act which are all very important to the issue. They also did not consider the implications of the ILO Convention 158 on Termination of Employment, with special reference to the primary objects of the Act, sec 3 of the Act and sec 233 of the Constitution. Of course, this is a shortcoming from which the Rustenburg judgment also suffers. There are some references to some of the sections of the Act in par 7 of the Rustenburg judgment but they do not feature in paragraphs 36 to 48 of the judgment which is where

the issue under consideration is discussed in that judgment. The views of those academic writers who support the reasonable employer test also suffer in addition from the other shortcomings not mentioned herein but mentioned in respect of the article largely relied upon by the SCA in Rustenburg which are referred to shortly.

[110] In "**Dismissal As a Penalty for Misconduct: The Reasonable Employer and other approaches (2000) 21 ILJ 2145**", John Myburgh SC and Andre Van Niekerk discuss the reasonable employer approach and one or two other approaches with regard to how a CCMA commissioner is supposed to approach his function to decide whether dismissal as a sanction is fair in a particular case. This is the article upon which, the SCA, by its own admission, largely relied to resurrect the reasonable employer test in Rustenburg. In discussing this article credit can be given to its authors for the fact that at least they referred to and, to some extent, discussed some of the provisions of the Act in coming to the conclusion supporting the reasonable employer test. Most of the academic writers referred to above who support the reasonable employer test did so without any reference to or discussion of provisions of the Act. However, the fact that the authors must be given credit as aforesaid does not mean that the article does not have shortcomings. The following are its shortcomings:

(a) the learned authors fail to provide a critical analysis of those sections of the Act to discover what effect they have on the powers of CCMA commissioners when they deal with the fairness of dismissal as a sanction.

(b) although there is a reference to sec 138 (1) of the Act in the article, there is no appreciation of the importance of the words "**to determine the dispute**" and to do so "**fairly**" in

that provision.

(c) there is also no attempt to link this phrase to sect 46 (9) of the old Act as well as the case law relating to that phrase under the old Act.
(d) there is no reference to sec 138 (9) of the Act which permits a CCMA commissioner to make "**any appropriate arbitration award…"**
(e) despite the importants of the provision of sec 138(9) of the act, the article does not take into account what effect sec 138(9) has on how a CCMA commissioner is required to deal with the fairness of dismissal as a sanction.
(f) although the article does refer to sec 188 and 192, there is no consideration of whether the reasonable employer test or the "**defer to the employer**" approach is consistent with those sections.
(g) although there is a reference to the object of the Act as provided for in sec 1 of the Act with special reference to the effective resolution of labour disputes, there is no reference to, nor, discussion of that primary object of the act in terms of which the act is said to seek to give effect to the obligations of the Republic as a member state of the International Labour Organization.
(h) there is also no reference to sec 3 of the Act which, among others, requires that the Act be interpreted in compliance with the public international obligations of the Republic.
(i) there is no attempt to consider whether the reasonable employer test or the "**defer to the employer"** approach is compatible with any relevant Convention of the ILO such as Convention 158 on Termination of Employment, despite the obvious significance of such an instrument in the interpretation of the Act in the light of sec 1 and sec 3 of the Act.
(j) there is no reference to or discussion of the importance of sec 233 of the Constitution which is very important in the interpretation of this and any other Act.

(k) there is no attempt whatsoever to stand back and consider whether what is called the "**own opinion**" approach in this judgment is authorised by the Act nor is there an attempt to say: while it is true that the reasonable employer approach is fair to the employer, is it or can it be equally fair to the worker? If it is not equally fair to the worker, is the "**own opinion**" approach – applied by a third party whose appointment has been approved by both organised labour and organised business – not a better approach? In the end the authors of this article suggest that the reasonable

employer test should be applied on the basis of "**shared values**". In this regard they refer to a statement by **Fabricius AM in National Union of Mineworkers & others v Vaal Reefs Exploration & mining Co Ltd (1997) 8 ILJ 776 (IC) at 77H-I** that such a decision should be taken "in the light of prevailing circumstances and social conditions, plus the good judgment of the market place "(***the boni mores***)".

(l) these learned authors also do seem to approve in the article of the reasonable employer test as dealt with in the Nampak judgment of this Court which does not mean the same thing as the suggestion that they also make that the decision on the fairness of dismissal should be taken in the light of prevailing circumstances and social conditions, plus the good judgment of the market place. Accordingly, they seem to support the reasonable employer test as set out in Nampak and the reasonable employer test as qualified by the proposition that the decision on the fairness of a dismissal must be taken in the light of the *boni mores* – which, in my view, are either contradictory approaches or at least which do not mean the same thing. Unfortunate as it may be, it is so that the Rustenburg judgment suffers from the same shortcomings from which this article suffers.

[111] In any event it is, in my view, not right that a test that should be used in the determination of disputes between employers and employees should be an "**employe**r" test, even if it is a "**reasonable**" employer test because it remains an employer test. Such a test is based on the perceptions and values of the employer side to these disputes. It emphasises the interests of employers more than those of workers. Such a test is probably as objectionable to workers as a "**reasonable employee test**" would be to employers. The latter test is also likely to give more emphasis on the interests of workers than those of employers. That is why elsewhere in this judgment the view is expressed that it would have been better if what was used was at least what is referred to in this judgment as the "**reasonable citizen**" test

where the fairness of the dismissal would be determined on the basis of what a reasonable citizen would regard as fair.

Other Considerations about the reasonable employer test

[112] There is another factor which, in my view, militates against the reasonable employer test. Under the old Act unions and workers had a right to resort to industrial action to secure the reinstatement of a dismissed employee and a right to refer a dispute about such a dismissal to the industrial court for a determination as an unfair labour practice under sec 46(9). Accordingly, unions and workers could choose which route they preferred in a particular case. Probably, they would think that, if they had a good case, they could refer such a dismissal case to the industrial court and not resort to a strike about it. Probably, if they had thought they had a bad case which they thought they would lose in the industrial court, they could resort to industrial action and use power to get the worker reinstated (see definition of "**strike**" in sec 1 of the old Act; see also sec 65 of the old Act). Indeed, the statute did not even prevent unions in any express terms from first referring such a dispute to the industrial court and later changing before there was a determination by the industrial court and resorting to industrial action. They could also start by resorting to industrial action but later change and go to the industrial court if industrial action did not produce a settlement. Whether or not the industrial court could legitimately take the view that it would not come to the assistance of the union because it had started by resorting to a strike is open to doubt because, if the Act permitted the unions to do that, it may have been impermissible for the industrial court to effectively preclude them from exercising their right.

[113] Under the current Act, unions and workers gave up their right to resort to industrial action about disputes concerning unfair dismissals and can only take those to either arbitration or adjudication (sec 65(1)(c) of the Act). In terms of sec 65 of the current Act to resort to a strike about a matter which a party has a right to refer to arbitration or the Labour Court is precluded. A union has a right to refer a dispute about the fairness of its member's dismissal to arbitration or adjudication, as the case may be. An analysis of the Act suggests that unions and workers may have been persuaded to agree to this because reinstatement would be the preferred remedy in terms of the statute and arbitrators would be independent people who would apply fairness as they see it and not the employers' perception of fairness. If unions and workers had been told that the arbitrator would apply the employer's values or perceptions of fairness as opposed to his own values or perceptions of fairness, they probably would have rejected the deal.

[114] The idea behind the insistence that the statute should make reinstatement the preferred or primary remedy when an employee's dismissal has been found to have been substantively unfair was to keep as many workers in jobs as possible. Fundamental to that objective was or would have been whose opinion or judgment carried the day on whether in a particular case dismissal was unfair because, if it was the arbitrator's opinion – and the unions would have had a say in his appointment – there was a better chance that making reinstatement a primary remedy would yield results. However, if it was going to be the employer's opinion of what the appropriate sanction was that would, for all intents and purposes, carry the day, there would have been little chance that making reinstatement a primary remedy would yield results. This would be so because to use the employer's opinion to decide

whether dismissal is fair would only work if dismissals were first found to be unfair and using the employer's opinion of whether dismissal was a fair sanction would drastically reduce the number of cases in which dismissals would be found to have been unfair and, therefore, also drastically reduce the number of dismissed workers who got reinstated. In the latter case, having reinstatement as a primary remedy would not be effective in making sure that as many dismissed workers as possible got their jobs back.

[115] It would seem that unions and workers would have been persuaded to agree to forgo their right to strike over dismissals on the following basis. You have no need to insist on keeping the right to strike to secure the reinstatement of any of your colleagues or members whom you believe to have been dismissed unfairly because under the new dispute resolution system the fairness of dismissals will be decided by arbitrators who will not only be independent but also who have been appointed with the concurrence of representatives of organised labour in the Governing Body of the CCMA. Accordingly, dismissals will be decided by arbitrators that you will have approved of and they will use their views of what is fair and what is unfair to decide the cases, not the employers' views of what is fair or unfair. It can, therefore, be said that employers should not necessarily get excited at the revival of the reasonable employer test because it may well have the consequence that workers feel that in respect of a large number of dismissal cases it is pointless to refer them to the CCMA in order to get their jobs back and, therefore, that they should begin to resort to strikes over dismissal disputes. That will be bad news for our labour relations in the country as it may take the country back to the type of labour relations that we had before 1994 which was characterised by a lot of strife and labour

unrest.

[116] At 318 of the Explanatory Memorandum the Ministerial Task Team said:

> "A major change introduced by the draft Bill concerns adjudicative structures. In the absence of private agreements, a system of compulsory arbitration is **introduced for the determination of disputes concerning dismissal for misconduct and incapacity. By providing for the determination of dismissal disputes by final and binding arbitration, the draft Bill adopts a simple, quick, cheap and non-legalistic approach to the adjudication of unfair dismissal. The main objective of the revised system is to achieve reinstatement as the primary remedy. This objective is based on the desire not only to protect the rights of the individual worker, but to achieve the objects of industrial peace and reduce exorbitant costs. It is premised on the assumption that unless a credible, legitimate alternative process is provided for determining unfair dismissal disputes, workers will resort to industrial action in response to dismissal"** (underlining supplied).

[117] There is an argument that, if commissioners of the CCMA substitute their opinions for those of employers with regard to the fairness of dismissal as a sanction, the CCMA will be inundated with cases and that should be avoided and the reasonable employer test ensures that this is avoided. This view reveals a failure to appreciate the full rational behind the creation of the CCMA. It is right and proper that as many disputes as possible that are not resolved amicably in the workplace should be referred to the CCMA or bargaining councils and other

mutually agreed fora for conciliation and, later, arbitration irrespective of what any one may think of the merits or demerits of such disputes. The existence of the CCMA and other dispute resolution fora provided for in the Act helps to channel, among others, workers' grievances to where they can be ventilated without any interruption and disruption of production - at least up to a point. It is also right and proper that unions should be encouraged and not discouraged to refer dismissal disputes with employers to the CCMA for arbitration if they feel aggrieved by such dismissals. In that way they can ventilate all issues about their grievances in regard to such dismissals in that forum before a third party who can listen to all sides of the dispute and, using his own sense of what is fair or unfair, decide whether the dismissal is fair or unfair. In that way the workers would have less urge to resort to industrial action over dismissal disputes.

[118] If the outcome of the arbitration is based on a third party's sense of fairness rather than that of the employer, albeit a reasonable employer, there are better prospects that workers and unions will accept the outcome of such arbitration even if it goes against them than would be the case if the outcome thereof was based on the perceptions or value judgment of the employer on what is fair and what is not fair. Part of the rationale for the creation of the CCMA was that there should be a forum to which employers and employees would have easy access for the purpose of the ventilation of their disputes without going the route of industrial action at least for some time. That is why it was decided that, except in exceptional cases, the CCMA would not or should not make cost orders to parties if they were unsuccessful in the cases coming before the CCMA. All of this was done in order to, among others, encourage unions and workers to refer their cases including

cases concerning dismissals for misconduct, to the CCMA even if the employer or somebody else might not think that such cases were meritorious. The Act ensures that cost orders will be used to discourage cases falling within the exceptional category. The reasonable employer test will discourage unions and workers from bringing their cases to the CCMA and it will be an additional deterrent. When unions and workers are discouraged from bringing their cases to the CCMA and bargaining councils, where must they take them to? To the streets? The "**own opinion**" approach will provide them with an incentive to bring such cases to the CCMA and not to take them to the streets.

[119] In terms of the Act many unfair dismissal claims should end at the CCMA. That is why they are referred to arbitration and there is no right of appeal. That is why the Act provides that arbitration awards are final and binding. The Act does not envisage that at that level – namely at the arbitration level at the CCMA - there should be any deference to the employer by the CCMA commissioner because the CCMA is a forum of first instance and everybody must be able to feel that they are able to ventilate all issues before a third party who will use his own sense of fairness to decide what is fair and what is not. In terms of the Act the deference should occur at the level where a party seeks to review an arbitration award of the CCMA in the Labour Court, but not before. That is why the grounds of review provided for in sec 145 of the Act are so limited. Of course, they have been expanded through cases such as Carephone (Pty) Ltd v Marcus NO and Others (1998) 18 ILJ 1425 (LAC)) since the passing of the Act. The limited grounds of review seek to ensure that there is only a single level where deferment occurs and when it occurs, it is not deference to one of the disputants but deference to an independent third party whose appointment has been

approved by organised labour, organised business and government. Deference to such a third party is to be preferred to deference to one of the parties to the dispute.

[120] Should any party feel that at review level it is not able to ventilate all issues because there is deference to the CCMA commissioner or his award, the consolation for such party would be that there is a forum where he was able to ventilate issues before a third party who did not defer to any body. That is at the CCMA arbitration. Part of what is wrong with the reasonable employer test is that it stifles the ventilation of issues in a forum of first instance and creates a scenario where deference takes place at two levels instead of one. In terms of the reasonable employer test the CCMA commissioner must defer to the employer at arbitration with regard to the fairness of dismissal as a sanction. That is the first level of deference. When the employee feels aggrieved by the decision of the commissioner and brings a review application to the Labour Court to set aside the commissioner's decision, there is a further deference. That is the deference by the Labour Court to the CCMA commissioner's decision which is created by the fact that that is a review on rather limited grounds and is not an appeal. That is double deference. In my view the Act does not intend to insulate the employer's decision to dismiss so much from challenge. This double deference will make it so much more difficult to challenge the employer's decision to impose the sanction of dismissal in a case!

[121] Moreover, the workers also agreed, as part of the deal on a new dispute resolution system under the Act, to having their compensation capped at a maximum of 24 months remuneration in the case of automatically unfair dismissals and 12 months' remuneration in other cases. In my

view the unions and the workers did not forego all of these rights or benefits on the basis that in deciding whether their dismissals were unfair, arbitrators would uphold dismissals as fair if employers regarded them as fair even if their own true opinion was that the dismissals were unfair. Accordingly, the reasonable employer test undermines the deal between organised business, organised labour and government as reflected in sec 193 and 194 of the Act.

A comparison of the reasonable employer approach and the own opinion approach purely on the merits.

[122] What is normally said in support of the reasonable employer approach is that there is no reason for the employer's decision to effectively be set aside simply because another person, the arbitrator or court, takes a view that is different from that of the employer as to what the fair sanction should be for the employee's misconduct. It is said that different people may take different views on the issue of a fair sanction and provided that the view taken by the employer falls within a range of possible reasonable responses to the employee's conduct, the employer's decision should stand. It is said that the employer is entitled to set the standards of conduct that he expects from his employees and to fix the sanction that will be applicable in the event of non-compliance with such standard. It is also said that the reasonable employer test does not ignore the interests of the employee and, for that reason, it is not a bad test.

[123] Whatever test or approach is adopted, it must be one that recognises that the employer and the employee are disputants in regard to a dispute and they must be treated in a manner that acknowledges this. It must

also be recognised that as far as possible they must both be treated in a manner that is as likely as possible to produce a resolution of the dispute that each party can live with. Their dispute is about whether the dismissal is fair or not. The employer says it is fair whereas the employee says that it is unfair. As the employer is economically very strong and usually bears the knowledge of the reason for dismissal, he bears the onus to prove that the reason for dismissal is fair.

[124] Part of the difficulty with the reasonable employer test is that, quite apart from whether or not it is authorised by the Act, I do not think that there are sound reasons why the test to determine fairness between an employer and an employee must be based on an employer test. Why is it not based on the reasonable employee? If employers would have an objection if the test were that of a reasonable employee, equally workers would have objections to a test that is based on the perceptions of fairness of employers. If both the employer's and the employee's perceptions of what is fair do not enjoy the support of both sides, why is it that the test of a reasonable citizen who is neither an employer nor an employee but simply a reasonable citizen not used? Such a test, which may be called a reasonable citizen test, would operate like this. When all the evidence and material relevant to the fair sanction has been gathered, the question would be whether, on the basis of all the evidence and mitigating and aggravating factors in a particular matter, a reasonable citizen, taking into account both the employer's and the employee's interests, would regard the sanction of dismissal as fair in all of the circumstances based on his own opinion or judgment of what is fair or unfair. The CCMA commissioner would place himself in the position of the reasonable citizen and reach such conclusion as he thinks would be reached by the reasonable citizen.

[125] The advantage about the reasonable citizen test is that the reasonable citizen falls neither on the side of the employer nor on that of the employee. In that way he is neutral and his values are neither exclusively those of the employer nor exclusively those of the employee. He is also a member of the public and, where relevant, he can also take into account public interest. The reasonable employer test does not have this advantage because it sees the matter through the eyes of the employer albeit a reasonable one. Rulings made on the basis of the perceptions of the reasonable citizen have greater chances of being accepted by both sides than would otherwise be the case. In that way it promotes the acceptability of the outcome of the proceedings because the outcome is based on the opinion/judgment or perception of a neutral party who has, nevertheless, taken the interest of both parties into account in reaching the conclusion that he has. To use the opinion or judgment or perceptions of one of the parties to a dispute to decide the dispute between the parties undermines the dispute resolution mechanism of the Act. This is not necessarily a suggestion that the correct test under the Act is the reasonable citizen test. In my view even such a test is not authorised by the Act. What is authorised by the Act is that the commissioner must pass his own moral or value judgment on the fairness of a dismissal as a sanction in a particular case. All that is being said with regard to the reasonable citizen test is simply that it would have been a better test than the reasonable employer test or even a reasonable employee test.

[126] If it is accepted that the reasonable citizen test would be better than the reasonable employer test, then, in my view, a CCMA commissioner should be accepted as being that reasonable citizen and the dispute

should be determined on the basis of his opinion/judgement of what is or is not fair. This is because:

(a) the CCMA commissioner is a neutral party to the dispute,

(b) representatives of organised labour, organised business and government, as represented in the Governing Body of the CCMA, all have had a say in the appointment of every CCMA commissioner.

This means that he is acceptable to all sides once he has been appointed because both organised business and organised labour in the Governing Body approve that he be appointed. Obviously, if through the interview, such candidate was shown not to possess or subscribe to the kind of values the Governing Body has in mind for a commissioner, he would not be appointed. Why then should such a person's opinion/judgment not be the one that is decisive on whether dismissal as a sanction in a particular case is fair? This system is as close to privately agreed arbitration as anything can be.

The reasonable employer test equals minority rules even among employers

[127] The reasonable employer test says that, provided there is one reasonable employer who would or even might have imposed dismissal as a sanction, the dismissal is fair. The implication of this approach is that even if most reasonable employers would not have dismissed the employee, if the minority would have dismissed, that dismissal must stand. Why must a decision that could only have been supported by a minority prevail over a decision that would have enjoyed the support of the majority? It is difficult to see any reason for this? If ever the reasonable employer test was also concerned about the interests of employees, one would have expected it to say that the tribunal must ask itself whether the majority of reasonable employers would have

regarded the sanction of dismissal as fair in a particular case and, if they would not have so regarded it, such decision should not stand but if the majority of reasonable employers would have regarded it as unfair, it should not stand even if there is a minority of reasonable employers who would have regarded it as fair. But that is not what the reasonable employer test entails.

Reasonable employer test and undue bias in favour of the employer.

[128] When in **WG Davey (Pty)Ltd v NUMSA 1999 (3) SA 697 (SCA)** it was submitted on behalf of the appellant that the test of fairness had to be judged in relation to the employees' failure to comply with the ultimatum and that the old LAC had erred in focusing the enquiry on whether the appellant should have extended the ultimatum to 31 August, the Supreme Court of Appeal responded thus: "**This submission seems to lose sight of the need to consider fairness from the viewpoint of both parties to a dispute, a matter which is fundamental in seeking to achieve one of the objects of the LRA – the preservation of labour peace (see the Vetsak case at 593 G-I)"**. In my view these words apply with equal force to the reasonable employer test. Two reasons can be advanced for this. The one, which is similar to the point that prompted the SCA to make this statement in the WG Davey case, is that that proposition implies that greater attention must be given to the interests of the employer than those of the employee. The second is that just as labour peace was one of the objectives of the old Act, it is still one of the objectives of the current Act. In this regard sec 1 of the Act provides that the purpose of the Act is "**to advance economic development, social justice, labour peace**

….”

Reasonable employer test and the rule against fixed rules

[129] In Vetsak, supra, at 592 D-F Nienaber JA wrote:

> “The test [of the tribunal concerned expressing a moral or value judgment as to what is fair in all the circumstances in order to determine whether an unfair labour practice has been committed] is too flexible to be rendered to a fixed set of subrules; which is why one is somewhat sceptical of recent attempts by the Labour Appeal Court (“**this Court”) and academic writers to typify and rank the considerations which are to be factored into a finding of fairness.”** The reference to the Labour Appeal Court in this passage is not a reference to this Court but a reference to the old Labour Appeal Court created under the 1988 amendments to the old Act. The idea behind the passage is that, as far as possible, the determination of fairness on the basis of fixed rules should be avoided.

[130] In **NUM v Vetsak Co-operative Ltd 1996(4) SA 557 (A)** at 589D Smalberger JA said: “**In my view, it would be unwise and undesirable to lay down, or to attempt to lay down, any universally applicable test for deciding what is fair.”** In my view the reasonable employer test seeks to do precisely this - against this caution which was echoed by Nienaber JA, writing for the majority in Vetsak at 592 D-F.

The reasonable employer test and dismissal as a measure of last resort.

[131] Our jurisprudence in labour law is to the effect that dismissal is a drastic step, and should, therefore be an ultimate sanction and a measure of last resort (Dube’s case 1998 (3) SA 956 (SCA) at 959 G-H;

Free State Cons 1996 (1) SA 422 (A) at 448 H-I; **W G Davey (Pty) Ltd v NUMSA 1999(3)SA 697 (SCA) at 706 A-C** and Scott JA in **NUMSA v Black Mountain Mineral Development 1997(4)SA51(SCA)** at 61E). This is said because, in the light of the vulnerability of most workers and their families, who depend largely, if not solely, on their work for a livelihood, dismissal is compared to capital punishment. The idea is that so serious a measure should not be invoked except as a measure of last resort. Our case law reveals that, when our courts apply this principle, it is the Court which decides whether in a particular case dismissal has been invoked as a measure of last resort. The reasonable employer approach/the "**defer to the employer"** approach is, in my view, inconsistent with this principle.

[132] In the discussion relating to item 7 (b) (iv) of the Code the SCA, in par 45 of its Rustenburg judgment, said: "**The benchmark the code repeatedly sets is whether the sanction is 'appropriate'. This requires the sanction to be <u>suitable or proper.</u> As Myburg and Van Niekerk observe, 'The benchmark of appropriateness necessarily implies a range of responses."** The SCA said this as support for the proposition that a CCMA commissioner has limited power in terms of the Code to find the sanction of dismissal imposed by an employer unfair. The effect of this passage by the SCA is that, provided the employer's decision is appropriate or suitable or proper, a CCMA commissioner should not interfere with it.

[133] If it is accepted that "**appropriate**" means "**suitable**" or "**proper**", as the SCA said in the passage quoted from par 45 of its judgment, then that is also the meaning that must be given to that word in sec 138(9) of the Act where it is provided that a commissioner may make "**any**

appropriate" arbitration award. That means that the reasoning that the SCA relied upon in par 45 of its judgment to say that the intention was that the employer's decision should not be lightly interfered with by a CCMA commissioner should actually be used in support of the proposition that the intention was that a CCMA commissioner's arbitration award should not be lightly interfered with. That is why sec 138(9) gives a CCMA commissioner such wide powers by saying that he may make "**any appropriate**" arbitration award. If what the Code says purports to limit the power of a CCMA commissioner which the Act seeks to widen, the Code would be in conflict with the Act in which case the Act will prevail. In this regard it needs to be remembered that the Act actually prevails even over other Acts other than the Constitution or an Amendment Act amending the Act where there is a conflict between the Act and another Act (see sec 210 of the Act). Accordingly, the reasons given by the SCA in relation to the meaning of the word "**appropriate**" to say that the Code gives the employer a wide discretion has to yield to the proposition that the act gives a CCMA commissioner a wide discretion to make "**any appropriate**" arbitration award in order to resolve a dispute.

[134] That sec 138(9) gives a CCMA commissioner extremely wide powers in making an arbitration award was not a mistake. It is in line with the rationale behind the establishment of the CCMA and one of the primary objects of the Act. As has been stated elsewhere in this judgment, part of the rationale for the creation of the CCMA was that, as far as possible, dismissal disputes and other disputes should be resolved finally by the CCMA and should not go beyond that institution. That would be achieved by giving the CCMA wide powers to resolve such disputes in the way it sees fit with as little interference as possible by

the Courts with its decisions and arbitration awards. The provision in sec 138(9) that a CCMA commissioner may make "**any appropriate**" arbitration award is also in line with the promotion of "**the effective resolution of labour disputes**." (sec 1(d)(iv) of the Act).

[135] A body or tribunal such as the CCMA cannot be empowered to ensure an effective resolution of disputes by unduly limiting its power to resolve disputes – by confining it to resolving disputes in a particular way. Such an institution will be better capacitated to help achieve that primary object of the Act if, as far as possible, the Act is construed in a manner that allows it more power or discretion to resolve disputes as it sees fit than if it is precluded from resolving disputes as it sees fit but is prescribed to as to how it should go about resolving disputes. Of course, this does not mean that the Act can ever or should ever be construed in a manner that is inconsistent with the Constitution. A construction of the Act that will capacitate the CCMA to do its work more effectively which is also consistent with the Constitution should be preferred to a construction that will tie the CCMA's hands in trying to resolve disputes. Anyone who has any experience in the processes of mediation and arbitration will know that the more powers you give to a mediator or an arbitrator to resolve a dispute in any manner he may consider appropriate, the more the chances are that the dispute will be resolved.

[136] Sec 138(9), when read with sec 145, reveals that the CCMA was intended to have wide powers to resolve disputes and that the Labour Court was intended to have limited powers to interfere with CCMA awards because, if the position was the other way around, this would undermine the promotion of the effective resolution of labour disputes which is one of the primary objects of the Act. The SCA also referred to

sec 188(1)(a)(i) and 192(1), (2) but not in the context of how the provisions of those sections affected the powers of a CCMA commissioner when he decides whether dismissal is a fair sanction in a particular case. It also referred to the promotion of the effective resolution of labour disputes (sec 1 (d)(iv) but to say nothing more than that that is one of the primary objects of the Act. No other provisions of the Act were referred to by the SCA which related to the powers of the CCMA.

[137] In par 39 of its Rustenburg judgment the SCA said that it was "**vital** that the LRA's wording should be given proper effect" but, as already stated above, the Rustenburg judgment did not give effect to the most important wording of the Act relating to the powers of CCMA commissioners in relation to the issue under consideration. That is sec 138(1) and (9) of the act.

[138] In par 40 of the Rustenburg judgement the SCA stated that **"(a) sentence in a criminal case is insulated against intervention because its imposition involves the exercise of a discretion entrusted to the judicial officer which is not readily overturned.**" It went on to say in the next sentence. "**By contrast, a CCMA commissioner is not vested with a discretion to impose a sanction in the case of workplace incapacity or misconduct. The discretion belongs in the first place 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**." What the SCA was saying in this passage was that it is understandable to say that on appeal a decision on sentence in a criminal matter should not be lightly interfered with and should actually be insulated against interference because the court

which imposed the sentence sought to be appealed against would have exercised a discretion entrusted to a judicial officer.

[139] The SCA said that a CCMA commissioner is not vested with a discretion to impose a sanction in the case of a workplace incapacity or misconduct. In my view this last mentioned statement by the SCA finds no justification in the provisions of the Act giving the CCMA power to deal with dismissal disputes. In support hereof the following can be said. Sec 138(1) of the Act gives power to a CCMA commissioner to "**determine**" a dispute "fairly". This includes a dismissal dispute. In Trident Steel Ackerman J held, correctly in my view, that under the old Act the requirement in sec 46(9) of the old act that the Industrial Court determine an alleged unfair labour practice dispute meant, in the case of a dismissal dispute, not only that the industrial court could issue a declaratory order that a dismissal constituted an unfair labour practice but also that it could order the reinstatement of such employee or the payment of money to such employee if that was required in order to bring the dispute to an end. That same function is given to the CCMA by sec 138(1) of the Act which requires the CCMA to determine the dispute. Indeed, the drafters of the Act made sure that in sec 138(1) they used the same phrase which Ackerman J had dealt with in Trident Steel, namely "**to determine**" in order to describe the function of the CCMA. In my view the same meaning that Ackerman J gave to that word under the old Act applies to the same word under the current Act. That being the case, in my view, where a CCMA commissioner finds that the sanction of dismissal imposed by the employer is unfair, he has power, if he orders the employee's reinstatement, to impose a penalty or sanction short of dismissal in order to bring the dispute between the employer and the employee to an end. This has to be so because, if he

did not impose another sanction but simply ordered the reinstatement of the employee, the employer would feel free to impose another sanction to deal with what at that stage will be an as yet unpunished act of misconduct by the employee.

[140] When the employee initially took his dispute to the CCMA, the dispute between the employer and the employee would have included the question whether, if the employee was guilty of misconduct, what the fair sanction was. If the CCMA commissioner then does not decide what the fair sanction is if dismissal is not a fair sanction, he will have failed to determine the dispute and to bring it to an end. He will have effectively referred the dispute back to the employer instead of bringing it to an end himself. To say that the CCMA commissioner does not have power to impose a sanction in such a case is to say that he should refer it back to the employer. If the employer then imposes a final written warning and the employee feels that that is still unfair and that he should have been given a first or second written warning, the dispute about what the fair sanction is for the act of misconduct of which the employee is guilty will rage on and will then have to be referred to the CCMA again for determination.

[141] If a CCMA commissioner finds that a final written warning is unfair and, again does not impose the sanction that he considers to be fair, the issue is effectively referred back to the employer. If the employer imposes a second written warning and the employee still feels that that is unfair as it should be a first written warning the dispute would once again make its third trip to the CCMA for determination. Those are the implications of the approach taken by the SCA that a CCMA commissioner does not have the power to impose a workplace sanction.

That approach can simply not be right. It is inconsistent with the meaning of the word "**determine**" given to it by Ackerman J in Trident Steel and would undermine the promotion of the effective resolution of labour disputes given in sec 1(b)(iv) of the act as one of the primary objects of the Act. The effective resolution of disputes has to mean an expeditious resolution of disputes. The approach suggested in this judgment that a CCMA commissioner does have the power to impose a workplace sanction when he has found that dismissal is an unfair sanction in a particular case is in line with Ackerman J's judgment in Trident Steel and would promote the effective resolution of disputes because in such a case the CCMA commissioner imposes the sanction that he considers should have been imposed by the employer in the first place and, in that way, the dispute is brought to an end after only one trip to the CCMA.

[142] In my view a CCMA commissioner also derives his power to impose a workplace sanction on an employee in a dispute before him by reason of the wide powers conferred upon him by the provisions of sec 138(9) which say that he "**may make any appropriate arbitration award …"**. That alone is wide enough to give a CCMA commissioner such power. But, just in case there is doubt that sec 138(9) is wide enough to confer such power on a commissioner, the balance of sec 138(9) should remove such doubt. When the balance of sec 138(9) is included, sec 138(9) gives the CCMA commissioner power to make "**any appropriate arbitration award in terms this Act, including, but not limited to, an award –**

a) ….

b) **that gives effect to the provisions and primary objects of this Act**

c) ….."

Accordingly, a CCMA commissioner would be entitled in terms of sec138(9)(b) of the act to impose a warning on an employee whose reinstatement he is ordering if he has found that the employee is guilty of misconduct but that dismissal is not a fair sanction.

[143] In the Rustenburg judgment the SCA gave three reasons in par 45 for the proposition that the Code locates "**the first-line responsibility for workplace discipline and sanction with the employer**". The first was the fact that the Code requires the CCMA commissioner to consider whether dismissal is "**an**" appropriate sanction for a contravention of a rule or standard. The SCA said that the fact that the Code refers to "**an**" appropriate sanction and not "**the**" appropriate sanction – that is the use of an indefinite as opposed to the definite article "**the**" - is an indication of the legislature's awareness that more than one sanction could be considered "**fair**" for the contravention of a rule or standard. The suggesting SCA that the legislature knew that there could be more than one sanctions that are all appropriate or fair and that, therefore, if dismissal was one of them, then the commissioner should not regard it as unfair and should not interfere with the employer's decision to dismiss. It would seem that what the SCA was saying here sought to underline the proposition that as long as the decision to dismiss fell within a range of possible reasonable responses to the conduct of the employee, it should be held to be reasonable and, therefore, fair.

[144**]** Some observations need to be made in response to this statement by the SCA. The one is that the use of the indefinite article "**an**" in the phrase "**an appropriate sanction**" appears in a part of the Code that requires the CCMA commissioner to consider certain factors in determining

whether a dismissal as a sanction is fair. In the provisions of the Act there is no provision that contains the phrase "**an appropriate sanction**". Sec 188(1) simply provides that a dismissal that is not automatically unfair is unfair if the employer fails to prove that the reason for dismissal is a fair reason and that it was effected in accordance with a fair procedure. On the contrary it is in respect of the powers of the CCMA commissioner that the Act uses the adjective "**appropriate**." In sec 138(9) it allows the commissioner to make "**any appropriate**" arbitration award. If one takes the reasoning applied by the SCA in respect of the use of the indefinite article "**an**" to say that he must decide whether the sanction is one of a number of appropriate sanctions, one would say that sec 138(9) allows a CCMA commissioner to make any of a number of appropriate arbitration awards and, provided the one he makes can be said to be one of a number of appropriate ones, the commissioner's decision must stand and should not be interfered with on review.

[145] The second reason, which is discussed elsewhere herein, given by the SCA is that the use of the adjective "**appropriate**" necessarily implies a range of responses. The third is that the text of the Code has "**its roots in the inherent malleability of the criterion it enshrines, namely, fairness, which is not absolute.**" The SCA went on to say: "**The criterion of fairness denotes a range of possible responses all of which could be properly described as fair.**" In my view in this sentence the SCA seeks, without warrant, to in effect suggest that, like reasonableness, fairness also denotes a range of possible responses all of which could properly be described as fair. The SCA then went on to say: "The use of 'fairness' in every day language reflects this. We may describe 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 even may say that it was tough but fair, or even 'severe but fair, or (meaning that while one's own decisional response might have been different, it is not possible to brand the actual response unfair**)."

[146] In my view the view that the use of "**fairness**" in every day language reflects that the criterion of fairness denotes a range of possible responses all of which could properly be described as fair is not correct or alternatively is a wrong question to ask in order to give an answer of statutory interpretation. Statutory interpretation requires that words in a statute be given their ordinary, natural and grammatical meaning unless this would lead to an absurdity (see **Consolidated Frame Cotton Corporation Ltd v President of the Industrial Court & others (1996) 7 ILJ 489 (A) at 494 F-G).** The Act requires the CCMA commissioner to decide whether a dismissal is unfair. In effect the statute puts the following question to the CCMA commissioner: "**Is this dismissal fair**?" In my view the ordinary, natural and grammatical meaning of the word "**fair**" when anybody is asked whether dismissal is fair in a particular case is that such person should answer that question on the basis of his own opinion of what is fair or unfair.

[147] When somebody asks you whether a particular dismissal is fair, he, quite obviously, is asking you for your opinion based on your own sense of fairness. He is not asking you to give him your friend's opinion on the fairness of such a dismissal. He is also not asking you to defer to him or your employer or the employer of the dismissed employee. He is not asking you to give him what you think would be the opinion of a reasonable person. He wants your view and your view only. Usually he has a reason why he wants your view. It will usually be because he has

high regard for your opinion or judgment or your sense of justice and fairness. If you do not give him an answer that is based on your sense of justice and fairness but give him an answer based on someone else's sense of justice and fairness, you will not have answered his question and you will have failed to give him your own sense of justice and fairness. You will have failed him! The same can be said with regard to a CCMA commissioner who must decide whether dismissal as a sanction in a particular case is fair or not. As already stated above the question that the statute in effect poses to him is: is this dismissal fair? The commissioner must give an answer to that question. In my view the only answer he is entitled and, actually obliged to give, is one based on his own sense of justice and fairness. He must say: in my opinion/judgement or according to my sense of justice and fairness in this case the dismissal is fair or unfair, as the case may be. He cannot and ought not to say: although in my opinion/judgment this dismissal is unfair I hereby hold that it is fair because the employer thinks it is fair or because, defering to the employer, I think there is no basis for me to interfere and hold it to be unfair because I cannot say that no reasonable employer would have dismissed in the circumstances of this case. The view expressed herein that in a case where a tribunal is required to decide whether a dismissal is fair or unfair, it is required to give an answer to that question in accordance with its own view or judgment of what is fair or unfair was held by the Appellate Division/Supreme Court of Appeal to be the correct position in a number of cases under the old Act as discussed earlier in this judgment. There is no sound basis for any suggestion that under the current Act there should be a departure from a legal position as entrenched as this in this branch of the law. If anything the current Act contains provisions that seem to have been intended to ensure that the judicial opinion given in those cases under

the old Act would apply with equal, if not more, force under the current Act.

[148] The third reason given by the Rustenburg judgment for the statement that the Code is significant in locating the first-line responsibility for workplace discipline and sanction with the employer is this: when the Code states that generally it is not appropriate to dismiss for a first offence unless the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable, that, says the Rustenburg judgment, "**necessarily imports a measure of subjective perception and assessment, since the capacity to endure a continued employment relationship must exist on the part of the employer. It follows that the primary assessment of intolerability unavoidably belongs to the employer**." The SCA went on to say that this did not mean that the employer's mere say-so or a mere assertion on implausible grounds will be sufficient. In my view this approach to the determination of intolerability leans too much in favour of the employer (even if his mere say-so or his assertion of intolerability on implausible grounds will not suffice) because in the past the Supreme Court of Appeal has said that intolerability of a continued employment relationship must be assessed objectively. **Dube & others v Nationale Sweisware (Pty)Ltd (1998) 19 ILJ 1033 (SCA) at 1037 A-D.** There is no sound basis why the SCA should depart from its previous decision on this point.

What form or variation of the reasonable employer test / the defer to the employer approach did the SCA approve of in the Rustenburg judgment?

[149] In par 40 of its judgment in Rustenburg the SCA quoted with approval that part of par 33 of the Nampak judgment of this Court which Ngcobo AJP also quoted in par 28 of his judgment in County Fair. The last sentence of that passage says in part that in determining whether a sanction is fair, the question is "**whether in the circumstances of the case the sanction was reasonable**." What the SCA did not include in the quotation is another part of the same paragraph 11 of Lord Denning's judgment which was quoted in par 34 of the Nampak judgment which says that a dismissal is unfair only if no reasonable employer would have dismissed the employee in a particular case.

[150] The question which arises is this: Does the fact that the SCA did not quote that part of the paragraph or did not refer to it mean that it did not approve of par 34 of Ngcobo JA's judgment in Nampak or does that omission not necessarily mean a disapproval of part of his judgment in Nampak? In paragraph 41 of its judgment in Rustenburg the SCA said that the key elements of Ngcobo JA's approach were:

> **"(a) the discretion to dismiss lies primarily with the employer;**
>
> **b) the discretion must be exercised fairly; and**
>
> **c) interference should not lightly be contemplated."**

Immediately after setting out these elements, it went on to say: "**That is indeed what the statute requires."** Two observations may be made in this regard. First, when one has regard to the three elements which the SCA said constitute the key elements of Ngcobo JA's approach, the crux of Ngcobo JA's approach in Nampak is left out. At the end of paragraph 33 and in par 34, he explained with reference to the passage of Lord Denning's judgment in Swift that a dismissal is only unfair if no reasonable employer would have dismissed the employee in the

particular case. In my view to mention the key elements of Ngcobo JA's approach in Nampak without mentioning this key element is to misconstrue Ngcobo JA's approach in that case.

[151] The effect of the three elements which the SCA set out in par 41 of its judgment as the key elements of Ngcobo JA's approach is no more than simply that commissioners should not lightly interfere with an employer's decision on sanction but that employers must act fairly in regard to the imposition of disciplinary sanction. To describe Ngcobo JA's approach as encompassing only the elements stated by the SCA to be the key elements of his approach is to say that Ngcobo JA adopted an approach that told commissioners to "**defer to the employer"** with regard to sanction but gave them no guideline as to when they could interfere with the employer's sanction. Ngcobo JA did not make the error of not giving guidance to commissioners. In Nampak he made it clear in par 34 of his judgment that commissioners could only interfere if no reasonable employer would have dismissed in the particular circumstances. Accordingly, a proper reading of Ngcobo JA's judgment in Nampak will reveal, particularly in par 34, that his approach went much further than the SCA stated it to be in par 40 of its judgment in Rustenburg.

[152] In its judgment in Rustenburg, the SCA began par 42 of its judgment by saying in effect that what it had set out in par 41 as the key elements of Ngcobo JA's approach as taken from his judgment in Nampak "**is indeed what the statute requires**". The SCA went on to say in the next sentence that in County Fair "**Ngcobo AJP returned to the fairness criterion and to the just ambit of employer discretion**." It went on to say in the next sentence: **"[Ngcobo AJP] now emphasised**

(d) that commissioners should use their powers to intervene with 'caution', and (e) that they must afford the sanction imposed by the employer 'a measure of deference' " After this sentence the SCA quoted with approval parts of paragraphs 28, 29 and 30 of Ngcobo AJP's judgment in County Fair. The SCA chose to quote the last two sentences of par 30 of Ngcobo AJP's judgment in County Fair. In those two sentences it was said: "**In my view, interference with the sanction imposed by the employer is only justified where the sanction is unfair or where the employer acted unfairly in imposing the sanction."** In so far as this sentence means that the commissioner must first conclude that the sanction is unfair before he interferes, there can be no quarrel with it. However, if one reads Ngcobo AJP's judgment as a whole, it seems that that sentence did not mean only that. When is a commissioner expected to find that the sanction is unfair? Ngcobo AJP answered this question thus in the last two sentences of par 30 which the SCA quoted with approval: "**This would be the case, for example, where the sanction is so excessive as to shock one's sense of fairness. In such a case, the commissioner has a duty to interfere."** As already stated earlier, the last two sentences of par 30 of Ngcobo AJP's judgment in County Fair seem to refer to an extremely high standard, namely, that a sanction will be unfair where, for example, it is shockingly unfair or shockingly excessive.

[153] After quoting, among others, the last two sentences of par 30 of Ngcobo AJP's judgment in County Fair, the SCA said in part in the first sentence of 43 of its judgment: "**This analysis**" – by which it was referring to Ngcobo AJP's analysis in parts of paragraphs 28, 29 and 30 of his judgment in County Fair, "**is firmly rooted in the prescripts of the statute and affords an approach to the duties of commissioners**

that is not only fair and practicable, but would also shield the labour courts from the very flood of litigation the alternative test have mistakenly been designed to avoid". Before going further, it seems justified to respond to this perceived concern about a flood of litigation to the Labour Court and Labour Appeal Court. This Court operates on the basis that it is right and proper that as many dismissal cases as unions and workers feel aggrieved about should be referred to the CCMA and bargaining councils for conciliation and arbitration except those that are frivolous or vexatious if this may help to ensure labour peace. This Court's understanding is that, if CCMA commissioners adopt the "**own opinion"** approach and decide cases according to their own sense of justice and fairness, there will be a better chance that parties who lose in such arbitrations will accept the outcome thereof and not take the matter further on review than will be the case if CCMA commissioners are seen to abdicate their responsibility and defer to the employer. In the former case the losing party is able to defer to the sense of justice and fairness of a third party and accept the result.

[154] This Court's understanding of the Act is that, when a CCMA commissioner has resolved the dispute by giving an arbitration award, only those cases which satisfy one or other of the limited grounds of review permitted by the Act read with the Constitution, may be taken further on review to the Labour Court. The rest of the cases end at the CCMA and bargaining councils whole arbitration awards are in terms of the Act final and binding. When one reads Ngcobo AJP's judgment in County Fair as a whole, it is very clear that it cannot be correct to say, as the SCA does in the second sentence of par 42 of its judgment, that all Ngcobo AJP emphasised in that judgment about when

commissioners should interfere with sanctions imposed by employers is only the two matters that the SCA listed in par 42. Those two elements were **"(d) that commissioners should use their powers to intervene with 'caution' and (e) that they must afford the sanction imposed by the employer 'a measure of deference'**.

[155] In my view those two elements do not add anything that had not already been captured in the three elements that the SCA regarded in par 41 of its judgment as the key elements of the approach taken in Nampak. Furthermore, when the SCA sought in par 44 to distil the key elements of Ngcobo JA's approach as set out in Nampak, it left out the key test as approved in par 34 of the Nampak judgment, namely, that a dismissal will only be unfair if no reasonable employer would have dismissed the employee – which was quite a conspicuous omission in par 41 of the SCA's judgment. When the SCA sought to distil the key elements of Ngcobo AJP's approach as set out in his County Fair judgment, particularly in paragraphs 28, 29 and 30 thereof, it also omitted not only Ngcobo AJP's reference in par 29 of his County Fair judgment to paras 33 and 34 of his Nampak judgment but also the last two sentences of par 30 of Ngcobo AJP's judgment in County Fair. In the last two sentences of par 30 of the County Fair judgment is where Ngcobo AJP effectively said that a sanction will be unfair if, for example, it is so excessive as to shock one's sense of fairness.

[156] When one has regard to Ngcobo JA's judgment in Nampak and compares it with what the SCA says were the key elements of his approach one will see, in my view, that Ngcobo JA's approach is inadequately represented in par 41 of the SCA's judgment and what is left out is the most critical elements of Ngcobo JA's approach. When

one has regard to Ngcobo AJP's judgment in County Fair as a whole and compares it with what the SCA says in the second sentence of par 42 of the Rustenburg judgment he emphasised in County Fair, one may argue that the SCA ought to have also mentioned the gist of the last two sentences of par 30 of Ngcobo AJP's judgment in County Fair.

[157] At the beginning of par 42 of its judgment the SCA said that the elements of Ngcobo JA's approach as set out in par 41 of its judgment were "**indeed what the statute requires…**". If that is all that the statute requires, then the statute does not require that a dismissal be taken to be unfair only when no reasonable employer would dismiss in a particular case. This is so because this is not captured in the key elements of Ngcobo JA's approach as seen by the SCA in par 41. For all intents and purposes all that is required of a commissioner in terms of par 41 of the SCA's judgment is that he should not lightly interfere with the employer's sanction.

[158] At the beginning of par 43 of the SCA's judgment, the SCA, referring to, among others, the last two sentences of par 30 of Ngcobo AJP's judgment in County Fair, says that that analysis "**is firmly rooted in the prescripts of the statute…"** The question arises: What is it that the SCA says the statute requires: is it the approach contained in par 41 of its judgment which requires no more than that a CCMA commissioner should not lightly interfere with the sanction imposed by the employer which in the first sentence of par 42 the SCA says is "**what the statute requires**" or is it the approach reflected in the last two sentences of par 30 of Ngcobo AJP's judgment in County Fair – which are included in the quotation in par 42 of the SCA judgment – which the SCA says in the first sentence of par 43 is firmly rooted in the prescripts of the

statute or is it the reasonable employer test as formulated by Lord Denning in Swift's case which was approved by this Court in Nampak that says a dismissal is unfair only if no reasonable employer would have dismissed the employee in a particular case? Which one of the three the SCA says is the correct one is difficult to tell. What is clear is that it cannot be all three.

[159] In the second sentence of par 43 of its judgment in Rustenburg the SCA said that it is "**regrettable [that this Court] has not consistently affirmed and applied the analysis"** contained in Ngcobo AJP's approach as reflected in, among others, the last two sentences of par 30 of his judgment in County Fair. In the third sentence of par 43 the SCA said that, **"(a)lthough some panels have affirmed Ngcobo AJP's approach**", the case before it, namely, the Rustenburg case, indicated "**how far the practice of [this Court] has on occasion strayed from it"**. In the next two sentences the SCA said in par 43:

> **"Instead of insisting that under the LRA the discretion to impose the sanction lies primarily with the employer, to be overturned only with caution, the approach evidenced in the present case 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, it has insulated commissioners' decisions from intervention by importing unduly constrictive criteria into the review process."**

[160] It will be noticed that, when in these two sentences the SCA says what in its view this Court should have done, it was content to simply say that this Court should have said to the commissioners that the sanction imposed by the employer should be overturned only "**with caution"**, that the commissioners should exercise greater caution when intervening, and should "**show a measure of deference to the employer's sanction, so long as it is fair…**". Does this mean that the SCA says it would have been enough for this Court to say only this? In other words would this Court not have also had to say, as was approved in Nampak, that a dismissal as a sanction would only be unfair if no reasonable employer would have dismissed the employee in the circumstances of the case? Is the SCA saying that this Court would not have had to say, in accordance with the last two sentences of par 30 of Ngcobo AJP's judgment in County Fair and par 42 of the SCA's judgment in Rustenburg read with the first sentence of par 43 that **"… interference with the sanction imposed by the employer is only justified … where, for example, the sanction is so excessive as to shock one's sense of fairness**" which the SCA says in the first sentence of par 43 is "**firmly rooted in the prescripts of the statute**"?

[161] These statements in par 43 of the SCA's judgment do not help to clarify precisely which one of the three forms or variations of the "**reasonable employer**" test the SCA is saying is the correct one. If the statements that commissioners should "**defer to the employer**" and only intervene with caution are intended to represent the complete test or approach without saying that commissioners must only intervene if no reasonable employer would have dismissed or without saying that they must intervene only if dismissal is so excessive as to shock ones' sense of fairness, why did the SCA not clearly and unequivocally say that it

did not approve of those parts of the test as given in the Nampak judgment of this Court and in Ngcobo AJP's judgment in County Fair? If the SCA was approving of those statements, why did it not include them in what it listed as the key elements of Ngcobo AJP's approach?

[162] In par 46 of its judgment the SCA said that the statement that the court's duty is to determine whether the decision that the employer took falls within the range of decisions that may properly be described as being fair "**equally describes the duty of a commissioner**". In par 48 of its judgment the SCA sought to summarise what it had said in the judgment. In so far as the issue under consideration is concerned, it did so in (d) and (e) of par 48. There it said:

> **"(d) 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.**
>
> **d) In determining whether a dismissal is fair, a commissioner need not be persuaded that dismissal is the only fair sanction. The statute requires only that the employer establish that it is a fair sanction. The fact that the commissioner may think that a different sanction would also be fair does not justify setting aside the employer's sanction."**

It is interesting to note that conspicuous by its absence from this summary is any statement that a commissioner will only be entitled to

interfere with the employer's sanction if no reasonable employer would have dismissed in the circumstances or if the sanction is so excessive as to shock one's sense of fairness. Once again, the question arises: does the fact that the SCA omitted these important parts of Ngcobo AJP's approach mean that it was disassociating itself from them? But how could the SCA disapprove of those parts of Ngcobo AJP's approach because in the same judgment it said that it was regrettable that this Court had not consistently applied Ngcobo AJP's approach? If this Court had consistently applied Ngcobo AJP's approach, it could not have done so without including one or both of these parts of his approach.

[163] One way of understanding the SCA's judgment is to say that it means that commissioners must defer to the employer's sanction and not interfere with such sanction lightly and that it says nothing more than this. What would support this understanding is that effectively this is what the SCA said in giving its understanding of the key elements of Ngcobo AJP's approach. It is also the gist of what the SCA put in its summary in par 48 of its judgment. However, it must be recognised that the SCA seems to have adopted in par 40 of its judgment Ngcobo JA's statement to be found in par 33 of the Nampak judgment to the effect that the question is "**whether in the circumstances of the case the sanction was reasonable**". It said at par 40 that this statement explains what it described in that paragraph as the key elements of Ngcobo JA's approach. In further support of this understanding one would say that, when the SCA came to do in par 51 what in its view the commissioner should have done in determining whether dismissal as a sanction was fair in the Rustenburg case, it did not anywhere say: is this a case where no reasonable employer would have imposed the sanction of dismissal?

However, it did say in the last three sentences of par 51 of its judgment that the sanction of dismissal certainly fell "**within the range of sanctions that the employer was fairly permitted to impose**" which may suggest that, if the sanction had fallen outside the range of sanctions that the employer was "**fairly permitted to impose**", the SCA may have concluded that in such a case the sanction was unfair and ought to have been interfered with. In terms of this understanding one would say that the SCA did not anywhere say that commissioners must only interfere with the employer's sanction if no reasonable employer would have imposed the sanction of dismissal.

[164] What would count against the above understanding of what the SCA decided are the following factors:

(a) the SCA did not anywhere disapprove of any parts of this Court's judgment in Nampak.

(b) the SCA did quote the last 3 sentences of par 30 of Ngcobo AJP's judgment in County Fair.

(c) the SCA is unlikely to have said that it was regrettable that this Court had "**strayed**" from Ngcobo AJP's analysis or approach if it, too, adopted an approach that "**strayed**" from Ngcobo AJP's approach.

(d) this would mean that the SCA instructed commissioners to "**defer to the employer**" without giving them any guideline as to the point at which they should interfere with the employer's sanction of dismissal and it is difficult to think that the SCA could do so because of the great deal of uncertainty that this would create among CCMA commissioners.

(e) the SCA did in par 40 quote with approval among others a statement in par 33 of Ngcobo JA's judgment in Nampak to the effect that the question is whether in the circumstances of the case the sanction was reasonable.

[165] Another understanding of the SCA judgment would be one that rejects the understanding referred to above and would say that the SCA's judgment means that dismissal as a sanction would be unfair and, therefore, susceptible to being interfered with by a CCMA commissioner if no reasonable employer would have imposed dismissal as a sanction in such a case or if dismissal as a sanction was "**so excessive as to shock one's sense of fairness**". What would support this understanding are the following factors:

(a) the key elements of Ngcobo AJP's approach as outlined by the SCA must not be read in isolation from the rest of the judgment but must be read as part of the entire judgment;

(b) the SCA's summary at the end of its judgment must also not be read in isolation but must be read in conjunction with the rest of the judgment;

(c) all the factors mentioned in (a), (b), (c), (d) and (e) at the end of the preceding paragraph.

[166] It is because of the matters referred to in the preceding few paragraphs that I find it difficult to tell with any degree of certainty exactly what form or variation of the reasonable employer test the SCA decided in Rustenburg should be applied in deciding whether dismissal as a sanction is fair. However, I do not think that it is open to me to throw my hands in the air and say that I cannot apply any form or variation of the reasonable employer test because I do not know which one the SCA has approved. I think it is my responsibility to do the best that I can to apply that form or variation of the reasonable employer test which, to the best of my understanding of the SCA judgment, I think the SCA has approved. In doing so I may err. But I must try the best that I can.

[167] In the light of all of the above it seems to me that it is fair to say that the

SCA decided that dismissal is unfair only if it is so excessive as to shock one's sense of fairness or if no reasonable employer would have dismissed the employee in all of the circumstances. I say this particularly because of the SCA's quotation with approval in par 40 of its judgment of par 33 of Ngcobo JA's judgment in Nampak and the SCA's quotation in par 42 of its judgment of the last three sentences of par 30 of Ngcobo AJP's judgment in County Fair and what it says immediately thereafter in par 43. That test seems to be that a CCMA commissioner must ask himself whether dismissal as a sanction is shockingly unfair or shockingly excessive or is one which no reasonable employer would have regarded as fair. If he concludes that it is shockingly unfair or shockingly excessive, or that no reasonable employer would have thought it fair, he may interfere with the employer's sanction. If he concludes that it is not shockingly unfair or shockingly excessive, or if he concludes that a reasonable employer might have regarded dismissal as fair he may not interfere and the employer's sanction must stand. In my view the approach or test decided upon by the SCA as the test that CCMA commissioners are required by the Act to use in determining whether dismissal as a sanction is fair is extremely onerous but this Court will have to give effect to that decision because it is bound by the Rustenburg judgment.

[168] It is interesting to note that in the Rustenburg judgment the SCA criticised this Court in so far as it may have taken the approach that it and the Labour Court should not lightly interfere with a decision of a CCMA commissioner on review. The SCA said in par 40 that **"(a) sentence in a criminal case is insulated against intervention because its imposition involves the exercise of discretion entrusted to the judicial officer, which is not readily overturned. By contrast, a**

CCMA commissioner is not vested with a discretion …" What is interesting is that in County fair to which the Rustenburg judgment does refer, Conradie JA took a completely different attitude in paragraphs 42, 43 and 44 to that taken in the Rustenburg judgment about reviews of CCMA awards. In particular Conradie JA said in part in par 43: "**The test for altering a sanction imposed by a CCMA commissioner is not so far removed from the one applied to the alteration of a sentence in a criminal appeal**." Paragraphs 42, 43 and 44 of Conradie JA's judgment are worth quoting in full. They read thus:

> "**42**. **I am in agreement with my brother Kroon that s 145 of the Labour Relations Act 1995 does not permit an appeal against a commissioner's decision. I agree, also, that this means that a court of appeal may not consider the merits of the dispute except to determine whether the result reached by the decision maker was, on the facts before him or her, justifiable.**

43. A result which a court of appeal considers to be incorrect may nevertheless be justifiable. It is not justifiable if it is dramatically wrong. Where the result is, for some reason or other, perverse, one would quite naturally say 'I cannot allow this to happen'. There is no real difficulty with cases of that kind. But where the result diverges from the result which one would like to have seen, interference is not justified. The test for altering a sanction imposed by a CCMA commissioner is not so far removed from the one applied to the alteration of a sentence in a criminal appeal. If you look at the sentence and say to yourself 'this sentence is so excessive (or so lenient) that I cannot in all good conscience allow it to stand', it is open to interference. If you think merely that you would not have imposed the same sentence, it is not. Unless the sentence makes you whistle, it must stand. The general principle underlying this approach is that a court is reluctant to interfere on appeal with the exercise of discretion if the only ground for the suggested interference is its unreasonableness. The reluctance of a court to interfere on review (on the grounds of its unreasonableness) with the exercise of a discretion must therefore be at least as strong, if not stronger.

44. Two eminent labour law scholars recently applied their minds to

this very question. In Coetzee v Lebea NO & another (1999) 20 ILJ 129 (LC) Cheadle AJ stressed that in reviewing an arbitration award of a CCMA commissioner 'the best demonstration of applying one's mind is whether the outcome can be sustained by the facts found and the law applied. The emphasis is on the range of reasonable outcomes not on the correct one'. The dispute between Computicket v Marcus NO & others reported in (1999) 20 ILJ 342 (LC), gave Brassey AJ the opportunity to say the wise words quoted by my brother Ngcobo in his concurring judgement. (See also Zaaiman v Provincial Director: CCMA Gauteng & others (1999) 20 ILJ 412 (LC), Federated Timbers (Pty) Ltd v Lallie NO & others (1999) 20 ILJ 348 (LC)" (my underlining).

[169] Notwithstanding what Ngcobo AJP may have said elsewhere in his judgment in County fair, it would appear that he may have been in agreement with what Conradie JA said in the paragraphs quoted above. In par 27 of his judgment in County fair Ngcobo AJP said the following:

> "27. **The constitutional requirement that administrative action must be justifiable in relation to the reasons given for it means no more than that the decision of the commissioner must be supported by the facts and the applicable law. The reviewing court must ask itself whether the award can be sustained by the facts and the applicable law. If the award can be sustained by the facts and the law, interference with the award is not warranted. If it cannot, interference is warranted**"(my underlining)

[170] This paragraph in Ngcobo AJP's judgement in County fair does not appear to be in agreement with some of the dicta in the SCA's

judgement in Rustenburg concerning the correct approach to reviews of CCMA awards. However, a discussion of that aspect of the Rustenburg judgment falls outside the scope of this judgment.

[171] It is interesting to note two statements of the law which appear in both Conradie JA's judgment and Ngcobo AJP's judgment in the County Fair case as referred to above. In par 42 Conradie JA said in effect that in reviewing arbitration awards of the CCMA a Court may only consider the merits of the dispute "**to determine whether the result reached by the decision maker was, on the facts before him or her, justifiable.**" Ngcobo AJP said effectively the same thing when, in par 27 of his judgment, he said that "**the reviewing Court must ask itself whether the award can be sustained by the facts and the applicable law**" and that, if it can, interference is not warranted but, if it cannot, interference is warranted. As two of the three Judges of Appeal who heard the County Fair case were agreed that this was the position, that statement of the law was a decision of this Court.

[172] I also need to point out that the Nampak judgment was a case which was governed by the old Act. For that reason the decisions of the Appellate Division in Perskor and the other cases referred to above were binding on this Court when it adopted the reasonable employer test in that case. Accordingly, when this Court in Toyota rejected the reasonable employer test and in effect, by implication, approved the "**own opinion**" approach, the effect of its judgment was to regulate its position to be in line with the position as set out in by the Appellate Division / the Supreme Court of Appeal in the Perskor and the other cases. It is regrettable that this Court has been criticised for such a decision. I now proceed to set out the facts of this case and apply the

Rustenburg decision of the SCA in deciding the appeal.

The facts

[173] The appellant is a registered company which carries on business in the petroleum industry. It has its head office in Cape Town and other offices in different parts of the country. At all times material to this matter it also had a depot in Nelspruit, Mpumalanga Province. It employs, among others, truck drivers who drive its trucks to deliver petrol products to customers. The third respondent was one of the truck drivers employed by the appellant. He was employed on 24 May 1994.

[174] On the 29th July 2002 the third respondent had, like on many other days, driven a truck of the appellant to deliver petrol products to a customer. The appellant's trucks were fitted with a tachograph. The tachograph would record the movement of the truck from the time it started moving until it stopped. Accordingly, if a driver stopped the truck on his journey, the tachograph would record this and the appellant could tell this by analysing the chart of the tachograph. This helped the appellant to see when a driver had made unauthorised stops on his way.

[175] It would appear that there was a rule within the appellant providing that drivers **"may not switch off, remove or in any other way tamper or interfere with a C—track monitoring system installed on the vehicle."** That was clause 3 of the appellant's relevant policy. The reference to a C—track monitoring system is a reference to the tachograph system that had been installed in the vehicles. Clause 4 of the same policy or document provided that it was the driver's duty to ensure, before leaving the appellant's premises, that the tachograph was in good condition and, if it was not, to report this to his supervisor. Clause 4 further provided that any contravention of this policy or this rule was **"likely"** to result in the summary dismissal of the driver

concerned. The third respondent had apparently signed the appellant's document containing these rules.

[176] Prior to the 17th September 2002 the appellant had dismissed employees who had contravened the rule against tampering with or interfering with the tachograph. However, there is no indication as to what the full facts of those cases were. For example it is not known how many employees had been dismissed within, for example, the previous three to five years. There is also no indication as to how many of them had had long service periods with the appellant nor do we know how their disciplinary history looked like. In other words we do not know whether such employees had had previous instances when they had contravened this or other rule of the appellant.

[177] As already stated on the 17th of September 2002 the third respondent drove a truck of the appellant to deliver petroleum products to a customer. He knocked off at about 15h25. His supervisor later had reason to suspect that he had made unauthorised stops on his trip and had tampered with the tachograph system. He called the third respondent to confront him with this but the third respondent denied having had any unauthorised stop or having interfered with the tachograph system. The chart of the tachograph was taken to a tachograph analyst who was independent of the appellant for an assessment. The tachograph analyst analysed the chart and came to the conclusion that there had been an unauthorised stop in the third respondent's trip and that there had been interference with the tachograph system.

[178] Subsequent to the appellant receiving the opinion of the tachograph analyst, the appellant called the third respondent to a disciplinary hearing. The allegation that the third respondent faced was that he had tampered with the tachograph without any authorisation. The third respondent denied having tampered with the tachograph. Evidence was led and the chairperson of the disciplinary inquiry concluded that the third respondent had contravened the rule. Pursuant to such finding the third respondent was dismissed. Subsequently, a dispute arose between the appellant and the third respondent about the fairness of the latter's dismissal. In due course the dispute was referred to the first respondent in terms of sec 191 (5)(a) of the Act for arbitration. The first respondent assigned the second respondent, one of its commissioners, to arbitrate the dispute.

Arbitration, the decision of the commissioner and his reasons

[179] The second respondent heard evidence from the appellant's witnesses and from the third respondent. One of the appellant's witnesses was the tachograph analyst who had analysed the chart of the tachograph and concluded that there had been tampering with the tachograph. Although the third respondent continued to deny that he had tampered with the tachograph, the second respondent concluded that he had. This conclusion was justified on the evidence that was before the second respondent. Accordingly, this matter must be decided on the basis that that finding by the second respondent must stand.

[180] The second respondent came to the conclusion that the dismissal as a sanction was in the circumstances of this case too severe and that the appellant should have given the third respondent a final written warning

instead of a dismissal. In coming to this conclusion the second respondent had regard to sec 188 (2) of the Act and the Code of Good Practice: Dismissal in schedule 8 to the Act. Sec 188 (2) of the Act requires that any person considering whether or not the reason for a dismissal is a fair reason must take into account any relevant code of good practice issued in terms of the Act. He also considered sec 185 which provides in part that every employee has the right not to be unfairly dismissed. He also had regard to sec 192 (2) which provides that, if the existence of a dismissal is established, the employer must prove that the dismissal is for a fair reason.

[181] The second respondent also referred to "**Schedule 8(7) of Code**". This was meant to be a reference to item 7(a) of Schedule 8 to the Act which is the Code of Good Practice: Dismissal. He also made the point that the third respondent had not been charged with theft or stock loss. However, he did record that one of the appellant's witnesses, Norris, had testified that the appellant had suffered a loss of 295 litres of petrol as a result, I assume, of the third respondent's conduct but went on to point out that that loss carried no weight with him because the appellant's representative had argued that such loss was within acceptable limits.

[182] In paragraphs 20 and 21 of his award the second respondent said:

> **"20 It was the respondent's testimony and argument that the type of misconduct Mashele was charged with was so serious that it deserved a summary dismissal. The respondent's Policy stipulates the 'any contravention of the rules contained in the Policy is likely to result in a summary dismissal of the driver**

concerned'. In my opinion the term "likely" used in the policy is not mandatory. Schedule 8(3)(4) of the Code provides that "generally it is not appropriate to dismiss an employee for a first offence, except if the misconduct is so serious and of such a nature that it makes a continued employment relationship intolerable.

21. Schedule 8 (3)(5) of the Code provides that 'when considering whether or not to impose the penalty of dismissal, the employer should, in addition to the gravity of the misconduct consider factors such as the employee's circumstances (including the length of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement itself'. Mashele opened the tachograph. The respondent did not suffer any loss of product or damage to the tachograph devise or the truck. The respondent did not lead evidence to show what it had suffered as a result of Mashele's action of opening the tachograph."

Where in par 20 of his award, the commissioner referred to Schedule 8(3)(4) of the Code, he meant item 3(4) of schedule 8 to the Act. Where he referred to schedule 8(3)5 of the Code, he meant, I think, item 3(5) of Schedule 8 to the Act although he did not quote item 3(5) accurately.

[183] In the end the second respondent found that dismissal was too severe as a sanction. In paragraph 25 he ordered the appellant to reinstate the third respondent **"with effect from the date of his dismissal"** but in par 27 ordered that the reinstatement **"is without back pay**." In par 26

he ordered the appellant to **"grant [the third respondent] all the benefits that could have accrued to him had he not been unfairly dismissed**."

Review proceedings and decision of the Labour Court

[184] The appellant was aggrieved by the award issued by the second respondent. It accordingly brought an application in the Labour Court to have the award reviewed and set aside. In this regard the appellant alleged that the second respondent had committed misconduct in relation to his duties as an arbitrator, that he had committed a gross irregularity in the conduct of the arbitration proceedings and that he had exceeded his powers. The Labour Court, through Maya AJ, (now Maya JA of the Supreme Court of Appeal) dismissed the appellant's application for a review. Subsequently, the Labour Court granted the appellant leave to appeal to this Court.

The Appeal

[185] Against the above background it is necessary to establish whether the decision of the commissioner that dismissal was too harsh as a sanction is reviewable. The commissioner found that the third respondent had made himself guilty of tempering with the technograph system installed in the truck that he had driven. The commissioner also had regard to evidence that a loss of 295 litre of petrol was within acceptable limits. He made the point that the third respondent had not been charged with theft or stock loss. He also pointed out that the respondent had a service of ten years and had a clean record. The commissioner may have been mistaken to say that the third respondent had a service of ten years with the appellant. The third respondent seems to have been employed by the

appellant on the 24th May 1994 and was dismissed in September 2002. He probably had about eight years service. It may be that not much turns upon this.

[186] In having regard to the nature of the unacceptable conduct, the fact that the third respondent had a long service and that he had a clean disciplinary record, the commissioner was heeding the injunction contained in item 3 (5) of the Code of Good Practice. He also had regard to item 7 of the code. Mr Clarke, the expert witness called by the appellant, testified that the most common reason why drivers tamper with the technograph system is simply to disguise a stop. Accordingly, it seems to me that it could be a stop for a variety of reasons. Having regard to all of these and other matters and applying the "**own opinion**" approach the commissioner found that the dismissal was substantively unfair and ordered the third respondents' reinstatement. In the light of the judgment of the SCA with regard to the "**own opinion"** approach the conclusion has to be that his decision must be reviewed and set aside.

[187] What must be done with the dispute? Must it be referred back to the CCMA for a fresh decision or must this Court deal with it itself? In the light of the long period that has lapsed since the dispute arose, the fact that we have before us all the evidence necessary for the resolution of the dispute and the fact that we have the required expertise to deal with this dispute, it seems to me that we should not remit the matter to the CCMA but we should determine it ourselves.

[188] The third respondent had been employed for about eight years. He had a clean disciplinary record. Tempering with the technograph system is a

serious act of misconduct by a driver in the appellant's employ. The disciplinary code applicable in the workplace says that an employee found guilty of this type of misconduct is likely to be dismissed. The third respondent testified that he knew about the rule against tempering with the technograph system. He also testified that he knew that if he was found guilty of such misconduct, he would be or was likely to be dismissed. Maybe the third respondent should be given a second chance. But according to the judgment of the SCA in Rustenburg the question is whether or not dismissal as a sanction on the circumstances of this case can be said to be shockingly excessive or so excessive as to shock one's sense of fairness or whether no reasonable employer would have dismissed the employee. If dismissal is so excessive as to shock one's sense of fairness or if no reasonable employer would have dismissed the employee, the SCA says the dismissal is unfair and can be interfered with but, if not, it should not be interfered with. While I definitely do think that dismissal was excessive as a sanction in the circumstances of this case and very unfair, I am not able to say that it is so excessive that it shocks my sense of fairness or that no reasonable employer would have dismissed the employee in all the circumstances of this case. Because I am unable to say that, then, in terms of the SCA's decision in Rustenburg, I must not interfere with the employer's decision to impose the sanction of dismissal.

[189] The Court a quo may well have reached the same conclusion if it had applied the test (as I understand it) decided upon by the SCA in Rustenburg but that was before the Rustenburg decision of the SCA.

[190] Before I make the order that I propose to make in this matter, I note that in par 49 of its judgment in the Rustenburg case the SCA made the

statement that there is "**long-standing LAC authority**" for the proposition that an employee's "**absence of remorse, and his conduct in untruthfully denying the ambit of his duties before the commissioner, and in persisting in that defence in his affidavit in the review, itself rendered his continued employment intolerable**". As support for this statement, the SCA referred in footnote 34 to par 25 of Conradie JA's judgment in **De Beers Consolidated Mines Ltd v CCMA (2000) 12 ILJ 1051 (LAC)** par 25. It seems important to point out that in saying that what Conradie JA said in par 25 of his judgment in the De Beers matter was "**long-standing LAC authority**", the SCA was mistaken. In that matter I sat with Conradie JA and Willis JA. All three of us gave separate judgments. Neither I nor Willis JA concurred in par 25 of Conradie JA's judgment. Since par 25 of his judgment was not concurred in by anyone of us, his judgment is not the judgment of this Court in the matter. Accordingly, it cannot legally be said that the statement he made in par 25 of his judgment is "**LAC authority**". I thought it necessary to clarify this because otherwise practitioners could be misled into believing that such statement was indeed an authoritative statement of this Court.

[191] With regard to costs I think that it accords with the requirement of law and fairness that no order as to costs should be made.

[192] In the premises I make the following order:

1. The appeal is upheld.
2. No order is made with regard to costs on appeal.
3. The order of the court a quo is set aside and replaced with the following one:

(a) The application is granted

(b) No order is made as to costs

(c) The award issued by the commissioner in this matter is hereby reviewed and set aside and replaced with the following one:

"(i) **the applicant's claim for unfair dismissal is dismissed**

(ii) It is hereby declared that the applicant's dismissal was for a fair reason".

_____
Zondo JP

I agree

_____
Jappie AJA

I agree

_____
H M Musi AJA

Appearances:

For the appellant : Adv A.L. Cook
Instructed by : Perrot Van Niekerk & Woodhouse Inc

For the respondent : Mr Masango
Instructed by : D M Masango Attorneys

Date of judgment : 4 May 2007