



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 85/06

Medium Neutral Citation: [2007] ZACC 22

Sidumo and Congress of South African Trade Unions v Rustenburg Platinum Mines Ltd, Commission for Conciliation, Mediation and Arbitration and Moropa NO

Decided on: 5 October 2007

MEDIA SUMMARY

The following media summary is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 5 October 2007 the Constitutional Court delivered judgment in this matter. The judgment has been eagerly awaited by employers and employees. It is of special significance to the Commission for Conciliation, Mediation and Arbitration (the CCMA) and to the Congress of South African Trade Unions (COSATU), which had applied to intervene.

The case involved the dismissal, more than seven years ago, of Mr Sidumo by Rustenburg Platinum Mines. Mr Sidumo was employed to patrol the Mine's high security facility where precious metals are separated from lower grade concentrate. He was dismissed for failing to apply established search procedures. He contested his dismissal and referred his dismissal dispute to the CCMA in terms of the compulsory arbitration provisions of the Labour Relations Act (the LRA). The commissioner found that Mr Sidumo was guilty of misconduct but found that no dishonesty was involved and took into account his clean service record of 15 years and consequently reinstated him with three months' compensation subject to a written warning valid for three months. The Mine applied to the Labour Court to review and set aside the award. The Labour Court dismissed the application. The Mine unsuccessfully appealed against the decision to the Labour Appeal Court. The Mine then appealed against that decision to the Supreme Court of Appeal where it was successful. The Supreme Court of Appeal held that the dismissal was fair. Mr Sidumo, in turn, applied to this Court for leave to appeal against that decision.

A key finding of the Supreme Court of Appeal was that in deciding unfair dismissal disputes commissioners of the CCMA should approach the employer's sanction in

relation to misconduct with a measure of deference because it is the employer's function in the first place to impose a sanction.

In this Court four judgments have been written. All agreed that the Supreme Court of Appeal decision must be overturned. They are unanimous that, in deciding a dismissal dispute, a commissioner is not required to defer to the decision of the employer. The commissioner is, however, not given the power to consider afresh what he or she would do but to decide whether what the employer did was fair. In reaching a decision the commissioner must have regard to all relevant circumstances. The judgments differ, however, in respect of certain aspects of how the functioning of the commissioner is to be characterised.

Navsa AJ, with whom Moseneke DCJ, Madala J, O'Regan J and Van der Westhuizen J concurred, agreed with the Supreme Court of Appeal that compulsory arbitration proceedings undertaken by the CCMA constituted administrative action, but held that it was not subject to the provisions of the Promotion of Administrative Justice Act. The majority held that in accordance with the requirements of section 33 of the Constitution, which provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair, and considering the purpose of the review provisions of the LRA, the standard to be applied when a decision by a commissioner on a dismissal dispute is sought to be reviewed is the following: Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?

In applying this standard to the facts of the case the majority accepted that there had been no evidence that loss had been suffered by the Mine as a result of Mr Sidumo's misconduct. It considered that the commissioner erred in describing the misconduct as a mistake or as unintentional. It held, however, that the commissioner was correct to find that the absence of dishonesty was significant. It took the view that Mr Sidumo's failure to own up to his misconduct should count against him. It balanced this against his clean and lengthy service record and concluded that having regard to the reasoning of the commissioner, based on the material before him, it could be said that his conclusion was one that a reasonable decision-maker could reach. The facts were such that decision-makers acting reasonably may reach different conclusions.

Mr Sidumo's application for leave to appeal and COSATU's application to intervene were granted. The appeals against the decisions of the Supreme Court of Appeal were upheld. All the costs orders in the courts before the present appeal were set aside and substituted with an order that no costs were to be paid by any of the parties. In respect of the present appeal no order was made as to costs.

In a minority judgment in which Mokgoro J, Nkabinde J and Skweyiya J concurred, Ngcobo J held that this case did not require the Court to decide whether the conduct of arbitration proceedings by a CCMA constitutes administrative action. He held in any event that the conduct of arbitration by a CCMA commissioner essentially involves the same functions that are performed by a court of law and is therefore adjudicative and not administrative in nature.

According to Ngcobo J this case required the Court to give meaning to the grounds upon which arbitration awards by CCMA commissioners may be reviewed by the Labour Court. He emphasised that in answering this question, courts must be guided by the principle that where legislation which was enacted to give effect to a constitutional right specifies the grounds upon which decisions of tribunals giving effect to that legislation may be reviewed, a court reviewing the decision of that tribunal should start with the interpretation of the specific grounds contained in the statute in question. The grounds must be construed in the light of the primary objectives of the LRA and the provisions of the Constitution, in particular, those entrenching the right to fair labour practices. He cautioned against developing a standard of review based directly on the Constitution and thereby ignoring the specific provisions of the LRA which set out the specific grounds of review.

Against this background, he held that parties to CCMA arbitrations had a right to have their cases fully and fairly determined. This required commissioners to apply their mind to the issues that are material to the determination of the disputes before them. He held that where a commissioner failed to have regard to a matter which was material to the dispute, the arbitration proceedings could not in principle be said to be fair. He held that this constituted a gross irregularity in the conduct of the proceedings as contemplated in section 145(2)(a)(ii) of the LRA. He further held that the ensuing award ought to be set aside not because the result is wrong but because the commissioner has committed a gross irregularity in the conduct of the proceedings. He further held that similarly, where a commissioner rendered an award which was manifestly unfair, he or she exceeded his or her powers under the LRA and the resultant award must be set aside on the grounds that the commissioner has exceeded his or her powers as contemplated in section 145(2)(a)(iii) of the LRA.

On the facts of the case he concluded that none of the grounds of review contained in the LRA had been established. He accordingly concurred in the order of Navsa J.

O'Regan J wrote a brief judgment concurring in the judgment of Navsa AJ. She differed with the approach of Ngcobo J on the question of whether the decisions made by CCMA commissioners were administrative action or not. She reasoned that there was no reason why sections 33 and 34 of the Constitution needed to operate in a mutually exclusive manner. She held that the CCMA decisions were clearly governed by section 34, and to answer the question whether they were also governed by section 33, she considered the constitutional purpose of that section. She held that its purpose was to ensure that administrative action was compliant with the constitutional standards of lawfulness, reasonableness and procedural fairness. As the CCMA is an administrative tribunal making adjudicative decisions, she reasoned that it would be consonant with our constitutional framework for those decisions to be reviewed on the grounds provided for in section 33. She agreed therefore with Navsa AJ that the decisions of CCMA commissioners were administrative action.

In a separate judgment supporting the outcome, Sachs J held that pigeonholing the conduct of a commissioner as either “judicial function” or “administrative action” displayed undue subordination to formal classification of rights, and insufficient regard for the manner in which rights overlap and basic values animate and bind discrete rights together. In his view the function of the commissioner is a hybrid one, composed of an amalgam of the separate but intermingling right to fair labour practices, the right to just administrative action and the right of access to court. He accordingly agreed with both judgments as far as they went in their separate legal frames. Though different in form they concurred on the context, interests and values involved. Formal trappings aside, he had difficulty in seeing how a reasonable commissioner could act unfairly, or a fair commissioner could function unreasonably.