Employment Law Department E-mail Flyer – May 2007

INTRODUCTION

In our ongoing efforts to keep our clients up to date with the latest developments in employment law, Martin Oosthuizen went to the Constitutional Court on 8th May 2007 to hear the Rustenburg case being argued. Here is a summary of his report. Should you require more detail please feel free to contact us.

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THE RUSTENBURG CASE:

THE CONSTITUTIONAL COURT CONSIDERS ITS VERDICT

MARTIN OOSTHUIZEN

Most IR practitioners will have heard of the *"Rustenburg case"*. Indeed, the mention of the word *"Rustenburg"* and the words *"reasonable employer test"* is sufficient to cause practitioners to nod knowingly, even if their knowledge of its significance is highly suspect.

In short, a security guard, Mr Sidumo, was dismissed by Rustenburg Platinum Mines Ltd., his employer, for failing to carry out searches of personnel in terms of company rules and procedures.

In 24 cases, his search record revealed one correct, 8 incorrect, and 15 no searches at all. A record which is unlikely to impress most employers.

However, Mr Sidumo claimed his dismissal was unfair and referred it to the CCMA.

The Commissioner determined that the sanction of dismissal was too harsh.

Rustenburg took the CCMA Award on an unsuccessful review application to the Labour Court and thereafter, unsuccessfully, appealed to the Labour Appeal Court.

Its subsequent appeal to the Supreme Court of Appeal was so successful that it became famous within days of being handed down.

Relying on a number of earlier cases, Judge of Appeal, Edwin Cameron, in a carefully crafted and analytical judgment concluded that the CCMA, Labour Court and Labour Appeal Court were all wrong in their approach in regard to the employer's sanction of dismissal and the grounds for a successful review.

He wrote the following about the approach of the CCMA:

*"Commissioners must exercise **caution** when determining whether a workplace sanction imposed by an employer is fair. There must be **a measure of deference** to the employer's sanction, because under the LRA, it is primarily the function of the employer to decide on the proper sanction."* (my emphasis)

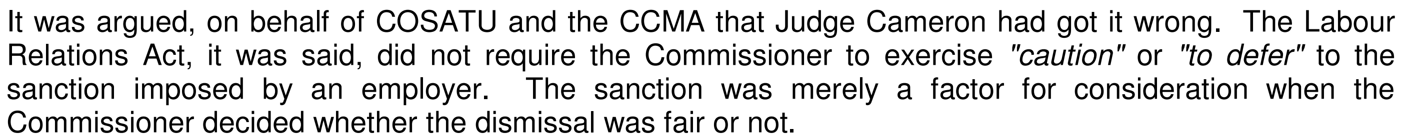
He also wrote in regard to the Promotion of Administrative Justice Act No. 3 of 2000:

"PAJA applies in the review of the decisions of CCMA Commissioners."

While employers were most content with the Judgment, particularly with the above findings, the CCMA, the Unions and their members were not content at all. They appealed to the highest court in the land – the Constitutional Court.

On **8 May 2007**, that Court was packed with the litigants and other interested parties for the hearing of the Rustenburg case.

I was there too. It was a memorable occasion to watch the heavyweights of labour law slugging it out before ten Constitutional Judges.



It was argued, on behalf of COSATU and the CCMA that Judge Cameron had got it wrong. The Labour Relations Act, it was said, did not require the Commissioner to exercise *"caution"* or *"to defer"* to the sanction imposed by an employer. The sanction was merely a factor for consideration when the Commissioner decided whether the dismissal was fair or not.

It was further pointed out to the Court that one of the principles upon which the LRA 1995 was founded, was that questions of fairness, whether in relation to dismissal or in the broader context of unfair labour practices, should be determined objectively by an independent party (*i.e.* the CCMA). It was submitted that the purpose in enacting the LRA 1995 was to protect and preserve the rights of workers incorporated in that principle.

Accordingly, there could be no *"restraint"* or *"deference"* to the employer's decision to dismiss as prescribed by the SCA judgment. Moreover, there was nothing in the language of Section 188(1)(a) of the LRA (*i.e.* a dismissal is unfair if the employer does not prove that it was for *"a fair reason"* related to the employee's conduct or capacity), being the proper starting point for analysis, to suggest that the Commissioner is obliged to show *"deference"* to the employer's decision.

It was also argued for COSATU and the CCMA that the extended grounds of review contained in the provisions of PAJA did not apply to the review of CCMA Awards.
They submitted that a CCMA Award was adjudicative and, therefore, did not constitute administrative action for purposes of PAJA.

Rustenburg, on the other hand, contended that Judge Cameron could not be faulted and that employers were entitled to recognition by the CCMA of the fact that they exercised a disciplinary discretion in deciding to dismiss. Moreover, it was argued that the CCMA Award was administrative action which entitled employers to use the wide provisions of PAJA to take a CCMA Award on review.

In addition, Rustenburg emphasised that the SCA judgment did not use the term *"reasonable employer test"* to describe the approach of *"deference"* and *"caution"* which should be used by the CCMA Commissioner. It was submitted that a better description would be *"the fair employer test"*. This meant that a Commissioner should not set aside a dismissal imposed by an employer unless it was objectively unfair, *i.e.* unless it fell outside of an objectively fair range of responses to the misconduct in question.

If the Constitutional Court approves Judge Cameron's judgment, employers will have gained important rights to protect their disciplinary sanctions and to review an adverse decision by the CCMA. However, it is my view that the Constitutional Court will prefer to empower the CCMA to make a decision on the fairness of a dismissal which does not defer to the employer and which will be more difficult to take on review.

You will receive our comments on the Constitutional Court judgment once it is delivered.

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