IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

Held at Johannesburg

CASE NUMBER JA49/05

In the matter between:

NATIONAL UNION OF METAL WORKERS OF SOUTH AFRICA OBO CHRISTOPHER LEON CLOETE Appellant

and

TRENTYRE (PTY) LTD **1st** Respondent

THE MOTOR INDUSTRY BARGAINING COUNCIL (DISPUTE RESOLUTION CENTRE) **2nd** Respondent

M.E. MARAIS N.O. **3rd** Respondent

JUDGMENT

ZONDO JP

[1] I have had the benefit of reading the judgment written by Patel JA in this matter. I agree with the order he proposes as well as the reasons he advances in his judgment in support of that order.

However, I wish to add to those reasons and emphasise certain matters which, in my judgement, are also important. As Patel JA in his judgment has set out the evidence, I do not propose to repeat that exercise. I shall, accordingly, go straight to the matters with which I wish to deal. It will be convenient to read Patel JA's judgment first before reading this one.

[2] The main issue with which I wish to deal in this judgment is the extent to which Mr Cloete was under the influence of alcohol on the day in question. In this regard it needs to be pointed out that it is not our law that the mere fact that an employee is found to be under the influence of liquor in the workplace on a particular day means that the only appropriate sanction in every case is dismissal. Each case must be decided on is own merits but, generally speaking, progressive discipline must be applied. This does not mean that it will never be fair for an employer to dismiss an employee for a single instance of being under the influence of alcohol. Whether or not dismissal is a fair sanction in a particular case is an issue that must be decided with due regard to the nature of the employee's job, his length of service, his disciplinary record, the extent to which he was under the influence of alcohol and other relevant factors. Whether or not the sanction of dismissal is fair in a particular case is a value judgment that the CCMA commissioner or some other arbitrator must make on the basis of his or her own sense of fairness which, subject to other grounds of review set out in sec 145 of the Labour Relations Act, 1995 (Act 66 of 1995) ("**the Act**"), the Labour Court and this Court cannot overturn if it is a decision that could be reached by a reasonable decision maker.

[3] Trentyre is involved in the business of tyre repair and supply. Cloete was employed as a wheel balance/general worker. It was common cause between the parties that Cloete had been under the influence of liquor. What was not common cause was the extent to which he was under the influence. In his evidence Cloete said among other things that he was at some stage asked to do wheel balancing and experienced some difficulty in removing the wheel weights.

[4] Mr Herman Klaaste was Cloete's friend and colleague. He testified that he was with Cloete the whole day and that at about 15h30 he and Cloete had gone to buy lunch. He testified that, when they returned, Cloete was asked to work with a customer's wheels and had done so and there was no problem with his work. Klaaste said that, before he and Cloete had gone to buy lunch, Cloete had indicated that he was feeling drowsy. Klaaste testified that Cloete had been normal in terms of work but his eyes had been red from the morning. Klaaste also testified that, when he arrived in the morning, Cloete had smelt of alcohol. Klaaste also testified that on the day in question it was a very busy day and yet Cloete's work was without any problems. Klaaste said that at some stage Cloete was removing wheel weights in the present of a customer and there was no problem. Klaaste specifically said that Cloete did not walk unsteadily. Klaaste's evidence is very important. As he was Cloete's friend, one would have thought that he would display bias in favour of, his friend, Cloete, in giving his evidence but he categorically said that Cloete had red eyes the whole day and he smelt of alcohol. That seems to me to be the evidence of an honest witness. The commissioner held that Klaaste was a credible

witness and a "**stable**" person. This finding by the commissioner was not attacked in the review application papers.

[5] Mr Jan Mathys, one of Cloete's witnesses, testified also that he worked with Cloete the whole day and that Cloete worked normally. Mr Mathys testified that he had spoken to Cloete after lunch and had not observed anything wrong with Cloete. Matthys' evidence seems to corroborate that part of Klaaste's evidence that was to the effect that there was nothing wrong with Cloete's work on that day.

[6] Trentyre's witnesses who gave evidence that is relevant to the extent to which Cloete was under the influence of alcohol were Messrs Strydom, Aggenbach, Lockwood and Louw. I set out what they each said in their evidence in this regard. Mr Strydom said that he saw Cloete arrive in the morning. Mr Strydom said that, as far as he was concerned, Cloete was absolutely normal when he arrived in the morning and during the morning. However, he testified that after 14h30 he went to the fit room after getting some report about Cloete. He said that at the time Cloete was removing wheel weights and he observed that Cloete's hand/eye co-ordination was not right and that he was unsteady on his feet. He went to call Mr Lockwood for a second opinion and came back. He testified that he observed on this occasion that Cloete's hand/eye co-ordination was not 100%. He testified that he said this because sometime Cloete would hit the rim or the weights. On the advice of Mr Aggenbach, Strydom called Cloete to his office and Cloete smelt of alcohol, his eyes hung and were bloodshot and he was aggressive.

[7] Mr Aggenbach testified that Cloete's eyes were bloodshot and that he staggered. Mr Lockwood testified that he was not near enough to Cloete to have been able to smell alcohol. Mr Louw testified that in the company arrangements are made for an employee who has a drinking problem to be assisted.

[8] With regard to Trentyre's witnesses the commissioner was not completely happy with some of the aspects of Trentyre's witnesses' evidence. He specifically stated at page 7 of his award that certain aspects of their evidence were not reliable. In this regard he stated that Mr Lockwood's evidence in the disciplinary inquiry was that he had observed that the appellant was under the influence of alcohol but during his evidence in the arbitration his evidence was, according to the commissioner at page 8 of his award, "**to the contrary**." The commissioner also recorded that at the arbitration Mr Lockwood had been asked whether the appellant had smelt of liquor on the day in question and he answered that he had not come near enough to the appellant to have been able to tell whether the appellant had smelt of liquor and yet, said the commissioner, Mr Aggenbach had testified that he had called Mr Lockwood into the office to sign the necessary charge sheet while the appellant was in the room.

[9] The commissioner concluded in his award that on the probabilities the appellant "**indeed was, <u>to some extent</u>, under the influence of alcohol during working hours** (my underlining). He went on to say: "**I am, however, not convinced that the [appellant] was intoxicated to the extent that [Trentyre's] first two witnesses**

wanted me to believe. I cannot use the example used by Mr Louw, for example, make a positive finding that the [appellant] was not in a condition to properly fix wheel bolts."

[10] From the above it is quite clear that the commissioner was saying that, although the appellant was under the influence of liquor, he was not under the influence of liquor to the extent testified to by Trentyre's witnesses. In the light of this it becomes necessary to refer to the evidence of Trentyre's witnesses on the extent to which they said the appellant was under the influence of liquor. This is to be found in the fourth paragraph at page 7 of the commissioner's award. There the commissioner recorded that Trentyre's two witnesses testified that the appellant was drunk at about 16h00 on the day in question and that, if their description of his condition was true, there would be little doubt that the appellant was "**drunk to the extent that he would not at all be able to perform his duties**." The commissioner said that Trentyre's two witnesses testified that earlier in the day the appellant had acted normally. Later the commissioner said: "**I did not conclude that the [appellant] was intoxicated to more than some extent**."

[11] At the top of paragraph 1 of his arbitration award the commissioner stated that he would accept that Cloete was so much under the influence of liquor that he could not perform his duties with the expected skills. I have three difficulties with this statement by the commissioner. The one is that in his award the commissioner proffered no reasons or information on which he based this statement. Another difficulty with this statement is that earlier on in his award the commissioner had said, and I have quoted this part

of his award earlier in this judgment – that he could not make a positive finding that "**the appellant was not in a condition to properly fix wheel bolts.**" Fixing wheel bolts would have been part of Cloete's duties and, if the commissioner was not in a position to positively find that Cloete was not in a condition to properly fix wheel bolts, what other duties was he saying Cloete could not perform with the expected skills? In this regard it needs to be pointed out that the commissioner fails in his award to spell out what those other duties were which he thought Cloete could not properly perform because of the extent to which he was under the influence of liquor. Furthermore, the commissioner had himself said in his award that he was not prepared to accept the evidence of Trentyre's witnesses as to the extent to which Cloete was under the influence of liquor. If he was not prepared to accept that Cloete was as much under the influence of liquor as Trentyre's witnesses sought to make out, then it must be accepted that, in so far as Trentyre's witnesses may have testified that Cloete was so much under the influence of liquor that he would not have been able to perform his duties with the required skills, the commissioner was at some stage of his award not prepared to accept this but later made a statement to the same effect. In my view this means that on this point the award is self – contradictory.

[12] At any rate the question arises as to which witnesses testified that Cloete was so much under the influence of liquor that he could not perform his duties with the required skills. We know that Klaaste, who worked with Cloete the whole day on the day in question, testified that, although Cloete's eyes were red and he smelt of liquor, he had no difficult doing his work. What Trentyre's two

witnesses said in this regard is to be found in the commissioner's own award at page 7. There the commissioner recorded that the description which Trentyre's two witnesses gave of Cloete was such that, if it was true, there would be little doubt that Cloete would not at all have been able to perform his duties. Since his own understanding of the evidence of the two Trentyre witnesses was that Cloete was so much under the influence of liquor that he would not have been able to perform his duties, it must be so that, when elsewhere in his award he said that he could not accept the evidence of Trentyre's witnesses about the extent of Cloete's being under the influence of liquor, the commissioner meant that he could not accept that Cloete was so much under the influence of liquor that he could not perform his duties. Accordingly, his finding that Cloete was so much under the influence of liquor that he could not perform his duties with the requisite skill was not based on the evidence given by Trentyre's witnesses nor was it based on any witness' evidence. Indeed, it had no evidential basis. On the evidence before him and in the light of his rejection of the evidence of Trentyre's witnesses of the extent to which Cloete was under the influence of alcohol, the only conclusion open to the commissioner to reach was simply that Cloete was under the influence of liquor but not to the extent that he could not perform his duties.

[13] With that conclusion, there can be no doubt that the decision that dismissal was, in the circumstances of this case, too harsh a sanction and that, accordingly, dismissal was substantively unfair, is not a decision that a reasonable decision-maker could not reach. However, even on the finding that the extent to which Cloete was

under the influence of liquor was such that he would not perform his duties with the requisite skill, I would not interfere on review with the decision that dismissal was in this case too harsh and was substantively unfair, particularly on the test of reasonableness decided upon by the Constitutional Court in the Sidumo case as the decision whether a dismissal is fair or unfair must in a CCMA arbitration be decided by the CCMA commissioner on the basis of his sense of fairness, although such decision must be reasonable.

[14] The commissioner referred to case law on dismissal for drunkenness in the workplace. The case law included **Mondi Paper Co v Dlamini [1996] 9 BLLR 1109 (LAC) at 1111, Tanker Services (Pty)Ltd v Magudulela [1997] 12 BLLR 1552 (LAC)** at 1553 and concluded that this was a case where dismissal as a sanction was too harsh. In this regard he applied progressive discipline. He took into account that the appellant had worked for three years and, except for a warning for late coming, had no adverse disciplinary record. He took into account the fact that the appellant was a good and dedicated worker but, nevertheless, thought that his conduct was sufficiently unacceptable to warrant that he be given a final written warning valid for 12 months and that he should not get any compensation for the period from the date of dismissal to the date of reinstatement. The date of reinstatement is, of course, the date of reinstatement in terms the order of the commissioner. That is 16 August 2004.

[15] In the light of the above can it be said that the commissioner's decision that the sanction of dismissal was too harsh and his order that the appellant be reinstated are unreasonable in the sense that

they are decisions that a reasonable decision-maker could not reach? In my view that can certainly not be said on these facts and circumstances. If I had sat at a commissioner I would definitely have also found that dismissal as a sanction was too harsh in the circumstances of this case.

[16] In any event the grounds as contained in its founding affidavit upon which Trentyre had sought to have the arbitration award reviewed and set aside were that the commissioner committed a gross irregularity or exceeded his powers for one or more of the following reasons:

(a) he interfered with the sanction imposed by the employer when it was unwarranted to do so in all of the circumstances.

(b) the commissioner's conduct in interfering with the employer's sanction when it was unwarranted to do so gave rise to the inference that he did not apply his mind at all to the issues or that he did not apply his mind properly.

(c) he failed to have due regard to the relevant principles and misdirected himself and completely ignored or failed to appreciate that dismissal was in all the circumstances, justifiable and fair given the nature of the appellant's functions and duties.

(d) he exceeded his powers "**by substituting the sanction of dismissal with a sanction that [the appellant] must be reinstated and issued with a final written warning**."

(e) that the commissioner's finding and conclusions that the dismissal was unfair was unjustifiable and irrational.

[17] The above were for all intents and purposes the only grounds upon which Trentyre sought in its founding affidavit to have the commissioner's award reviewed and set aside. There was no other complaint of any substance against the award. Some of the grounds are vague and constitute conclusions but no information is provided to substantiate the conclusions. Some of the grounds of are based on justifiability as a ground of review of arbitration awards based on the law as it was in this regard prior to the handing down of the Sidumo judgment of the Constitutional Court and, since that decision, they are no longer of application in review cases of CCMA awards. I have no hesitation in saying that not a single one of these complaints or grounds has merit. In my view not much needs to be said further about them.

[18] In the light of the above the Court a quo ought not to have interfered with the arbitration award and should have dismissed the review application.

ZONDO JP

I agree.

PATEL JA

I agree.

WAGLAY JA.

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

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NATIONAL UNION OF METAL WORKERS OF SOUTH AFRICA OBO CHRISTOPHER LEON CLOETE APPELLANT

and

TRENTYRE (PTY) LTD FIRST RESPONDENT

THE MOTOR INDUSTRY BARGAINING COUNCIL (DISPUTE RESOLUTION CENTRE) SECOND RESPONDENT

M.E. MARAIS N.O. THIRD RESPONDENT

JUDGMENT

PATEL JA

INTRODUCTION

[1] The appellant, National Union of Metal Workers of South Africa ("NUMSA"), with leave of the Labour Court, brings this appeal on behalf of Mr Christopher Leon Cloete ("Cloete"). The first respondent is Trentyre (Pty) Ltd ("Trentyre"), a tyre repair and supply company and the erstwhile employer of Cloete. The second respondent is the Motor Industry Bargaining Council (Dispute Resolution Centre). It is cited herein because Cloete referred an unfair dismissal dispute to second respondent and the third respondent was the arbitrator who found the dismissal to be unfair and ordered his reinstatement. A sanction of a final written warning valid for twelve months was imposed. The matter went on review to the Labour Court and Kruger AJ set aside the decision of the arbitrator and held the dismissal to be substantively fair.

BACKGROUND

[2] Cloete had been employed by Trentyre as a wheel balancer/general worker. On the 8th January 2004 Cloete

was dismissed for being drunk and drinking alcohol while on duty. It is not in dispute that at the time of his dismissal Cloete had been employed for a period of three years and was technically a first offender although he had received a warning for late coming. Numsa thereafter referred an unfair dismissal dispute on behalf of Cloete to the second respondent. As pointed out earlier the matter proceeded to arbitration before the third respondent. The only issue which the third respondent was required to determine was whether or not Cloete's dismissal was substantively unfair. It is common cause that the procedural fairness of the dismissal was not in issue.

Arbitration proceedings

[3] The first person to testify on behalf of Trentyre was Mr. Chris Strydom, a floor supervisor and salesperson. It was his duty to ensure that the operations ran efficiently and that safety standards were observed. Cloete's task as a wheel balancer required him to be sober because of potential risks if wheels were not balanced properly. Strydom testified that on the morning of the 17th December 2003 he observed Cloete and he appeared to be normal. However in the mid afternoon he noticed that Cloete's coordination appeared to be affected and that he was

unstable on his feet and smelt of alcohol. His eyes were droopy and his speech was slurred. He further testified that he was aware that Trentyre's disciplinary code provided for immediate dismissal for the offence with which Cloete was subsequently charged. Strydom went in search of Mr. Lockwood to get a second opinion. I deal with Lockwood's evidence herein below. Strydom returned to the floor and observed that Cloete was balancing a wheel but his coordination was not 100% in that he sometimes hit the rim or the weights. He reported the matter to Mr. Jacob Agenbach, the acting manager in order to get advice as to how he should handle the matter. Agenbach asked him to summon Cloete to his office. Cloete only reported to the office after being called four times. In the office he appeared to be aggressive and refused to undergo a breathalyzer test and also to go to the hospital for a blood test. He wanted to leave the office. Strydom could not with certainty say that Cloete had been drinking on the premises. Cloete explained that he had been taking medication which would have contributed to his disposition.

[4] Thereafter Mr Jacob Andries Agenbach, the administrative manager who acted as a manager when the manager was absent, testified. He was alerted by Strydom who was of

the view that Cloete was drinking on duty. He summoned Cloete who would not come until he personally had to go to the ‘fit room’ and inform him that he needed to speak to him and that he was going to be charged with misconduct. He smelt alcohol on him and his eyes appeared to be blood shot. Cloete further refused to take a breathalyzer test and was disagreeable to having his blood drawn. He decided to telephone the police because he wanted independent evidence to prove that Cloete was under the influence of alcohol. Cloete was also becoming aggressive. Cloete’s contention was that he had taken medication. When the police officer, Louw, arrived Cloete took him to the tearoom but no pills were found. It was Louw who decided to incarcerate him on a charge of drunkenness. He said that even after Cloete had left his office, the room smelt of alcohol. The company code clearly provided for dismissal for the charge Cloete faced. He could not say whether the code was explained to the workers on a continuous basis.

[5] The next person to testify was Mr Charles Levack Lockwood. He was a salesperson in control of consignment stock. At about 15h00 he was invited by Strydom to observe Cloete. He saw that something was amiss with Cloete as Cloete worked on the balancing

machine. He also overheard Cloete say that he was tired. He, however, was not close enough to smell alcohol on him.

[6] The next person to testify was Mr. Stephen Louw, the branch manager. He was elsewhere on the 17th December 2003. At about 15h00 upon receiving a telephonic message, he telephoned Agenbach who informed him that Cloete was under the influence of alcohol. He further testified that Cloete was a shop steward and had two months prior to the incident represented a co-worker, Arendse who was also charged with a similar offence. At that disciplinary enquiry Cloete specifically raised the issue as to why management had not taken Arendse for a blood test or a breathalyzer test. He independently made enquiries from a pharmacist as to whether the pills Cloete allegedly took would have the effect constrained for. However without a clear indication by Cloete in his evidence of the kind of pill he was taking it would have been impossible for Trentyre to call evidence in rebuttal. All employees, when they started employment, were given a copy of the Disciplinary Code and were required to sign each page. The company had a general procedure in place which allowed it to breathalize employees suspected of

drinking. There had been no other similar incident at their depot. Arendse whom Cloete represented worked on the mine. The company had a policy of assisting anyone who had a drinking problem. As far as Cloete was concerned, other than instances of late coming for which he had received a written warning, he had a clean record. Louw was of the opinion that as a shop steward Cloete should have led by example. Cloete's negligence in discharging his function especially if he had not fitted bolts to a wheel properly could have had very grave repercussions.

[7] After Louw's evidence, Trentyre closed its case and Mr. Herman Klaaste, a fitter in the employ of Trentyre, took the stand to testify on behalf of Cloete. On the day in question he worked with Cloete. The gist of his evidence was that in the morning he had seen that Cloetes eyes were bloodshot and that he reeked of alcohol. His condition remained the same throughout the day. There had been no problem with Cloete's work. He testified further that at around midday Cloete had complained of feeling drowsy. They had thereafter gone to buy food and returned and continued with their work. He was working when the police came and arrested him. He conceded under cross-examination that Cloete was his friend and he knew him well.

[8] Thereafter Cloete took the stand. His evidence was that on the night of the 15th he had attended a year-end party. He had not drunk much that night because he was on standby duty. The next day, the 16th December, was a public holiday. He had consumed alcohol until late in the evening. He had slept for about four or five hours and felt fit enough to go to work on the 17th. He conceded that he still smelt of alcohol. He and Strydom continued working through lunch and, because he did not feel well, he took his medication on an empty stomach and only had lunch at around 15h00. He was requested by Strydom, the floor supervisor, to do wheel balancing. He jacked up the car but experienced some difficulty in removing the wheel weights. Klaaste helped him with the washing of the tyres. He was called thrice by Strydom and Lockwood but, because he was busy, he did not respond immediately but told them that he would come as soon as he was finished.

[9] When Agenbach confronted Cloete about smelling of liquor, he did not demur but informed him that he had drunk the night before. He was then told by Agenbach that he was going to be charged. Mr. Strydom then wrote out the charge sheet and asked him to sign. He refused to do so. Nor would he take the breathalyzer test because he

feared that the pills he had taken would give a refracted reading. He said that Agenbach prevented his exit from the office and insisted that he take the test. He testified that nobody insisted that he should go and see the doctor or have his blood drawn. After he had pleaded with them for 5 minutes, they let him leave. He was not aggressive. After he left the office and while he was attending to his job, the police arrived. The police officer forcefully took him back to Agenbach's office and asked him to blow into the breathalyzer. He explained that he had taken medication and therefore refused to blow. He refused to go with the police officer to the doctor to have his blood drawn for that very reason and further because he had been drinking the night before. When the police officer asked to have a look at the medication which he had taken, he referred him to his locker. Upon arriving at the locker and finding no medicine, he remembered that he had brought sufficient medication for that day only. He was detained at the police station and later released. No charges were preferred against him. It is not clear on what basis the police got themselves involved in what appears to have been an issue only between an employee and his employer. As I have pointed out earlier Agenbach’s explanation for calling in the police was that he wanted independent verification of Cloete’s disposition coupled with his

aggressive behavior. Cloete initially denied knowledge of the contents of the code but was constrained to admit that he did know about it since he represented Arendse at a disciplinary hearing. He felt that he was being victimized because he was a spokesperson for the workers. He denied being unfit to do his work or that he had any difficulty with co-ordination save that, before lunch he felt feint and blank and, therefore, he had taken his pills. His only reason for refusing to comply with the employer's demands was because of the medication he had taken.

[10] The next person to testify on behalf of Cloete was Jan Mattys. On the 17th of December he had worked with Cloete all day. He noticed that Cloete's eyes were slightly red. When it was put to him that Cloete smelt of alcohol he said that was possible but he had executed his work properly. He denied that Cloete was unsteady of feet. He could not say whether Cloete felt unwell despite the fact that he worked approximately four feet away from him. He was aware that people were not allowed to work under the influence of alcohol.

[11] The arbitrator found that Cloete's explanation for refusing to undergo the test to be reasonable. But without drawing any adverse inference she stated that:

"It is however not irrelevant that the applicant (Cloete) did not request that he be taken to his doctor, Dr Grobler"

On the conspectus of evidence the arbitrator found that it was probable that "the applicant indeed was to some extent under the influence of alcohol during working hours". She, however, rejected the level of intoxication contended for by Trentyre. She accepted that Trentyre was a national company and the disciplinary code was of general application. She also accepted that the disciplinary code provided for dismissal for being under the influence or drinking at work. She found the following mitigating circumstances outweighing the aggravating features as constrained for by the manager, Louw, in his evidence: Cloete was a good worker who had been in the employ of Trentyre for a period of three years and, save for a warning for late coming, he had a clean record. The fact that the previous day was a public holiday and Cloete may have indulged to excess was also brought into the ambit of reckoning.

[12] The arbitrator noted that Cloete's version was that he was not intoxicated. This version to an extent was supported by his witnesses. The arbitrator was of the view that the purpose of discipline was to correct behavior and not to punish wrongdoing. She said that the penalty of dismissal should not be applied inflexibly. She said that Trentyre had failed to discharge the onus resting on it that it was reasonable to dismiss Cloete in the circumstances. She found, therefore, that the sanction of dismissal was unfair and reinstated Cloete without any back pay. She further issued a final written warning against Cloete for drunkenness while on duty valid for a period of twelve months from the date of reinstatement.

PROCEEDINGS BEFORE THE LABOUR COURT

[13] The company was aggrieved by the arbitration award. The matter thereafter served on review before Kruger AJ. The relief sought in the review application was in essence for the setting aside of the award of the arbitrator and for a finding to be made that Cloete's dismissal was substantively fair. The founding affidavit does not crisply set out the basis for the attack but stripped of its prolixity, Trentyre challenged the arbitrator's finding that despite Cloete being intoxicated the sanction imposed by Trentyre was "unduly harsh and too extreme in the circumstances".

The founding affidavit does not set out clearly the grounds for the attack of the arbitrator's award especially in what way the arbitrator had misdirected herself in coming to the conclusion that the sanction imposed by Trentyre was "unduly harsh and too extreme in the circumstances". Be that as it may Kruger AJ reviewed and set aside the arbitration award and remitted the matter to the second respondent for a fresh arbitration hearing before a commissioner other than the third respondent. He also ordered Numsa to pay the costs of the application.

[14] The learned Judge, in the absence of specification by Trentyre of the grounds of review, concluded that the arbitrator did not have sufficient regard to the following factors:

"1 Cloete was fully aware of the company's policy for misconduct concerned. It included that the company may require the undertaking of a breathalyzer test.

2 Cloete refused to sign the charge sheet (whereby he would simply have acknowledged receipt thereof) when requested to do so.

3 Cloete refused to undergo the breathalyzer test when requested to do so by his employer.

4 There was some aggression on the part of Cloete when he was requested to follow the procedure adopted by the applicant which formed part of its policy and of which Cloete was aware.

5 The applicant saw fit to involve the police who attended the premises who also requested Cloete to undergo a breathalyzer test, which he refused.

6 Cloete refused to go to a doctor thereafter.

7 The reason for refusing to undergo the breathalyzer test was the alleged use of medicine but knew that the alcohol test would be positive and therefore he had another reason not to disclose that and that was also a breach of trust on his part.

8 He did not request to be sent to his own doctor, and

9 The police independently saw fit to detain Cloete for about four hours in the police cells. (Cloete testified the police wanted to charge him with drunkenness).

10 On the alleged use of medicine he did not call his own doctor and did not provide any corroborative evidence as to the nature thereof."

[15] Although the learned Judge *a quo* did not categorically say so, he seems to have been of the view that the arbitrator had committed a gross irregularity by not taking into consideration the above factors in coming to the conclusion that the sanction imposed was unduly harsh. As pointed out earlier Trentyre in its review application did not specifically plead that the arbitrator had failed to take these grounds into account. Be that as it may he granted the appellant leave to appeal.

The Appeal

[16] Before us, counsel for Cloete and Trentyre were in agreement that the finding made by the arbitrator that Cloete was intoxicated on the day in question was not in issue although the degree to which he was intoxicated and whether he had taken alcohol at his workplace or not was in issue. Trentyre did not lead any evidence before the arbitrator to show that Cloete had drunk alcohol at work nor that he was found in possession of any bottles of alcohol. The gravamen of the appeal was therefore

whether the learned Judge was correct in taking into consideration the factors outlined above ([Para. 14]) in coming to the conclusion that the arbitrator had misdirected herself in coming to the conclusion that the arbitrator had misdirected herself when she concluded that the sanction imposed on Cloete by Trentyre was unduly harsh.

[17] However before considering this issue it is imperative to reflect on the test to be applied by the court *a quo* in setting aside an award made by an arbitrator the commissioner. In the recent decision of the Constitutional Court in the, as yet unreported case of *Z. Sidumo and Another v Rustenburg Platinum Mines and Others* (Case No CCT 85/06) wherein the majority of the Court per Navsa AJ, held that 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 Para 75 in the *Sidumo* case the Constitutional Court said, inter alia: "Ultimately, the commissioner's sense of fairness is what must prevail and not the employer's view."

[20] This court in evaluating the Sidumo judgment has recently stated in *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and others* Case No: DA 10/05 in the yet unreported judgment of Zondo JP at para [96] as follows:

"It will often happen that, in assessing the reasonableness or otherwise of an arbitration award or other decision or finding of a CCMA commissioner, the Court feels that it would have arrived at a different decision or finding to that reached by the commissioner when that happens, the court will need to remind itself that the task to determine the fairness or otherwise of such a dismissal is in terms of the Act primarily given to the commissioner and that the system would never work if the Court would interfere with every decision or finding or arbitration award of a CCMA commissioner simply because it would have dealt with the matter differently. Obviously, this does not in any way mean that decisions or findings of the CCMA are not shielded from the legitimate scrutiny of the Labour Court on review. Sidumo attempts to strike a balance between two extremes, namely, between interfering too much with decisions or arbitration awards of the CCMA and refraining too much from interfering with CCMA's awards or decisions. That is not a balance that is easy to strike. Indeed, articulating it may be difficult in itself but

applying it in a particular case may tend to be even more difficult"

These dicta are very apt in this case. When one takes the totality of the circumstances into account can it be said that the decision the decision to which the arbitrator arrived at was not that which a reasonable arbitrator/commissioner would arrive at. I propose considering the factors listed by Kruger AJ in order to determine whether he was correct in coming to the conclusion to which he did.

[21] <u>As regards factors 1,2,3,4,6,7,8 and 10</u>

A copy of the disciplinary Code was not introduced in evidence nor was there any suggestion that such a code was arrived at by agreement between the parties. Accordingly it is difficult to understand how the court *a quo* came to the conclusion that Trentyre's disciplinary code required "the undertaking of a breathalyzer test". Counsel for Trentyre conceded in argument that no such provision existed. Absent such a provision there was no contractual obligation on Cloete to submit to a test or have his blood drawn. Similar considerations apply to his failure to attend a doctor nominated by Trentyre or to see his own doctor. Nor was there any obligation on him to call his

doctor to testify. No adverse inference could be drawn from Cloete's failure to sign the charge sheet. All employees are entitled to reflect on the charge sheet before blithely signing the same. There was no evidence that Cloete was given this opportunity. Nor was there cogent evidence that Cloete was aggressive. On the other hand the evidence of his witnesses was to the contrary.

[22] <u>As regards factors 5 and 9</u>

These factors relate to the intervention of the police. Other than stating in evidence that Trentyre needed independent evidence to corroborate their version, I can see no reason why these factors were relevant to the conclusion to which the learned judge arrived. If indeed the intervention of the police was necessary and relevant then and in that event the evidence of the police officer was not canvassed at the hearing. Without such *viva voce* evidence, I can see no reason why the hearsay evidence of Trentyre's witnesses should be relevant to the conclusion to which the learned Judge came or for that matter, such factors should have been brought within the ambit of reckoning by the adjudicator in arriving at an appropriate sanction.

[23] In my view the arbitrator properly took into account the following factors in arriving at an appropriate sanction:

(a) This was an isolated incident and occurred a day after a public holiday. Cloete could have been counseled and given a warning to obviate any future lapses. There was no evidence that Cloete was dependant on alcohol and therefore the prospects of cure or correction through counseling would be of no benefit to him.

(b) Although his job entailed responsibility, no cogent evidence was presented to show that any damage was occasioned to the rim or the tyre which Cloete was balancing when he was confronted or for that matter that he had executed his other tasks in a shoddy or negligent manner on the day in question.

(c) Although Cloete did not immediately attend the office of the manager upon being summoned, his explanation that he was completing the task allocated to him cannot be regarded as being so unreasonable so as to be incredible. In any event had Trentyre regarded his conduct to be an act of insubordination, he should have been charged accordingly.

(d) The arbitrator did in her award punish Cloete by depriving him compensation in respect of loss of earnings for a period of about six months. She also issued a final warning for drunkenness while on duty valid for a period of twelve months from the date of

reinstatement. This punishment for an isolated incident is in my view not only adequate but reasonable.

[24] When the above considerations are taken into account can it be said that the decision arrived at by the arbitrator is one that a reasonable decision-maker could not reach? In my view based on this test the arbitrator's award must prevail. With regard to costs I am of the opinion that the requirements of the law and fairness dictate that there should be no order as to costs both in this court and in the court below.

[25] In the premises the following order is the order of this court:

(i) The appeal is upheld;

(ii) There is to be no order as to costs.

(iii) The order made by the Labour Court in this matter on 21 June 2005 is set aside and the following substituted therefor:

"(a) The application is dismissed;

(b) There is to be no order as to costs."

Date of Hearing: **22 November 2007**

Date of Judgment: **27 March 2008**

<u>Appearances</u>:

For the Appellant: **G A Leslie**

Instructed by: **Cheadle Thompson & Haysom**

For the Respondent: **M Wagner**

Instructed by: **Bowman Gilfillan Inc**