IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case no DA4/06

REPORTABLE

In the matter between:

EDCON LTD	Appellant
and	
B PILLEMER NO	First Respondent
COMMISION FOR CONCILIATION MEDIATION AND ARBITRATION	Second Respondent
PC REDDY	Third Respondent

JUDGMENT

SANGONI AJA

Introduction

[1] This is an appeal against the whole of the judgment of Pillay J handed down in the Labour Court on 9 November 2005. The judgment concerns the dismissal of an application to review and set aside the arbitration award by the first respondent, the commissioner appointed in terms of Section 191(5) of the Labour

Relations Act 66 of 1995 (LRA) who arbitrated the dismissal dispute between the appellant and the third respondent, under the auspices of the second respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA).

[2] The appellant is Edcon Ltd, a duly registered company that is the erstwhile employer of the third respondent. After the amalgamation with an entity called HD Lee, it took over the employment of the third respondent in 1992. The third respondent's employment with H.D Lee commenced in 1987. For purposes of this case employment by the appellant was taken to have commenced in 1987.

Background

[3] In accordance with the applicant's policy, the third respondent, then CTM quality controller, was entitled to a company car, which she received in April 2003. There were terms and conditions. It is common cause that in the event of an accident, involving the vehicle, she would be required to:

- report the accident within 24hrs to the South African Police Services and obtain a case number;
- to report any accident to the appellant and to the relevant insurance company;
- to complete and sign the relevant motor accident claim form;
- not to carry out any repairs without the approval of the insurance company.

[4] On 8 June 2003, the vehicle was involved in an accident while being driven by her son. She did not report the accident to the police nor to the appellant. She did not meet the other requirements set out in paragraph three hereof. Her husband repaired the vehicle in his panel beating workshop at his own cost. It transpired later that the reason for non compliance was that she was under the impression that her son was precluded from driving the vehicle in terms of the car policy. It turned out later that the impression was wrong.

[5] After about six months from the date of the accident, the appellant got to know about the accident. When confronted in regard thereto, the third respondent initially denied the vehicle had been involved

in an accident, she also denied that her son was driving. She eventually admitted the accident but she still told an untruth as to where it occurred and under what circumstances.

[6] On being questioned further, she made a clean breast of everything. She was suspended and charged in an internal enquiry. The charge against her was as follows:

> Failure to be honest and act with integrity in that
>
> "You committed an act, which has affected the trust relationship between the company and the employee in that on 6 June 2003; you failed to report an accident of a Company vehicle (Reg No ND 95403, Toyota Corolla GLE, grey in colour) which your son was driving on the day of the accident (8 June 2003) and this resulted in a breach of trust between yourself and the Company". (my underlining). P27

[7] She pleaded guilty and was found guilty. The real issue for determination was whether the misconduct committed resulted in a breach of trust between the third respondent and the appellant or whether the sanction of dismissal was fair in the circumstances of the case. It will be noted that the element of breach of trust relied upon was the failure to report the accident. The allegations against the third respondent do not rely on the continuing lies by her after

the accident was discovered.

[8] The respondent challenged the dismissal at the CCMA. In essence, the challenge related to the inappropriateness of the sanction. The dispute was arbitrated by the first respondent. In the award the first respondent declared the dismissal substantively unfair and directed the reinstatement of the third respondent with no entitlement to arrear salary. The first respondent found that the appellant led no evidence relating to whether the trust relationship had in fact broken down. She took into account the third respondent's unblemished record of 17 years service, and that she was two years away from retirement. According to her, the misconduct was not so gross that by reason thereof, the long standing trust relationship had been destroyed.

[9] The award was taken on review to the Labour Court in terms of section 145 of the LRA. Pillay J dismissed the application with costs. She found that:

> "The arbitrator took into account all the circumstances, including her initial dishonesty and came to the conclusion that the employment relationship had not broken down.

There is no reason why I should disagree with that conclusion of the arbitrator. Her reasoning is manifestly justifiable on the basis of the information before her. She

considered the reasons for the dishonesty and rescued the third respondent from dismissal".

Later in the same judgment, she remarked;

> "The CCMA is not a rubber stamp, as I have said elsewhere before, for decisions of the employer. Justice is not justice unless it is tempered with mercy".

This appeal is against that judgment

Grounds of appeal

[10] The first ground is that the Court *a quo* should have found that the respondent failed to apply her mind to the facts of the case, more particularly in her decision that the misconduct committed was not gross and of such gravity that dismissal was the appropriate sanction. The second ground relates to hearsay evidence allegedly admitted and acted upon by the first respondent in considering whether a breach of trust had occurred. The third ground also refers to hearsay evidence with regard to whether there was another case where the appellant company gave another employee a sanction other than dismissal. It refers to inconsistency in the application of sanction. Essentially, the primary enquiry in this appeal is whether it can be found that the court *a quo* was wrong in deciding not to interfere with the award of the commissioner.

Test for appropriateness of dismissal

[11] I propose to first deal with the last two grounds. Val Barnes and Clive Dwyer, both managers of the appellant, authored certain documents which were placed before the Commissioner at the arbitration. The first document is a letter addressed to Clive Dwyer by Val Barnes. Wherein she refers to the good working relationship she had with the third respondent since 1976, asking that she be kept on her team notwithstanding the incident. She describes her as "a very honest and hard working lady". The other document is addressed by Clive Dwyer to *Whom It May Concern*. He states that between January and November 2004, the third respondent worked under and reported directly to him. In mitigation as he put it, he felt it necessary to make it known that another Quality Assurance employee had an accident while her son was driving a company vehicle accused was not reported. The person concerned attempted to have the vehicle repaired on a false insurance claim. The outcome was that the employee was warned and asked to pay the damages. Dwyer goes further to say because of the similarities in the two cases, he approached the other employee's manager, got a record of the case and submitted a copy to the investigator of the current case and to the Chief Executive Officer (CEO) of the

appellant. He then expresses a wish that the other case be used as a precedent, the third respondent to be warned and called upon to pay for final repairs. (Incidentally, such repairs are said to be in the region of R6700.) As will be observed the thrust of these documents is that a sanction of dismissal in the circumstances of this case is not appropriate as the trust relationship has not been destroyed.

[12] The appellant challenges the admissibility of the contents thereof on the basis of the hearsay rule. The basis for the objection to this kind of evidence is that the authors of the documents did not personally give evidence and were thus not subjected to cross examination to test the veracity of their testimony.

[13] From the reading of the award, it is apparent that the commissioner considered the content of the documents in question in favour of the third respondent. The question is whether she committed an irregularity in doing so, more particularly in the light of the fact that proceedings before the commissioner should be less formal, and in the light of the exception to the hearsay rule. The authors of the documents in question are part of the management of the

appellant in which case the appellant could have ensured their attendance as witnesses. One of them, Clive Dwyer, submitted at the internal enquiry, a statement regarding an interview he had with the third respondent, as her immediate manager, in connection with the incident in question. The document he wrote was presented even to the internal appeal proceedings, there considered and no objection on hearsay basis was raised. It is common cause that the third respondent did not call Val Barnes to testify because she was not available on the last day of the hearing. The commissioner had expressed her intention to conclude the matter on that same day.

[14] In the interests of justice, hearsay evidence may be admissible in terms of section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988. The factors to be considered are the following:

> (c) the court having regard to-
>
> (i) the nature of the proceedings;
> (ii) the nature of the evidence
> (iii) the purpose for which the evidence is tendered;
> (iv) the probative value of the evidence;
> (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
> (vi) any prejudice to a party which the admission of such evidence might entail; and
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> (vii) any other factor which should in the opinion of the court be taken into account.[1]

1 S v Ndlovu & Others 2002 (6) SA 305 (SCA); Tshilonga v Minister of Justice & Consitutional Development 2007 (4) SA 135 (LC) at 162 B

[15] The nature of the arbitration proceedings is characterised *inter alia*, by the fact that disputes are intended to be resolved quickly and through relatively simple and non technical procedures. I am of the view that *in casu,* it would be expected that the appellant, who in any event bore the onus to establish that the employment relationship between the parties had broken down, would not rigidly insist that the third respondent was the one to call the two as witnesses. In the spirit of employing the minimum of legal formalities, particularly bearing in mind that they were in its employ as managers, it could have been relatively easy for the appellant to call them if the evidence was in dispute. The nature of their evidence was not of a narrative nature but based on their belief and opinions. No meaningful prejudice could result from failure to call them. There was nothing to alert the commissioner to the fact that she should not have regard to the evidence of Dwyer in particular. On the contrary, if one has regard to the nature of the evidence, the author of it, the overall circumstances of the case and relatively informal nature of the proceedings, I do not think the commissioner can be criticised for having regard to that evidence.

[16] The sentiments expressed by the learned Judge in the court *a quo* are very much in line with the test and standard endorsed by the Constitutional Court in the yet unreported case of *Sidumo and Another v Rusternburg Platinum Mines Ltd*[2] registered under case CCT85/06. The Constitutional Court overturned the judgment of the Supreme Court of Appeal, per Cameron JA, wherein it was found that:

> "… a CCMA commissioner is not vested with a discretion to impose a sanction in the case of workplace incapacity or misconduct. That discretion belongs in the first instance 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."

[17] Cameron JA referred to judgments of this Court written by Ngcobo JA in *Nampak Corrugated Wadeville*[3] and *County Fair Foods (Pty) Ltd*[4], and set out what he identified as key elements in the test then adopted by Ngcobo JA. These elements are:

- The discretion to dismiss lies primarily with the employer:
- The decision must be exercised fairly;
- Interference should not lightly be contemplated;
- Commissioners should use their powers with 'caution';

2 Sidumo and Another v Rusternburg Platinum Mines Ltd registered under case CCT85/06

3 Nampak Corrugated Wadeville V Khoza (1999) 20 ILJ 578 (LAC) para 33

4 County Fair Foods (PTY) LTD v CCMA (1999) 20 ILJ 1701 (LAC) para 28

- They must afford the sanction imposed by the employer 'a measure of deference'.

[18] In his judgment in the *Sidumo* case, in the Constitutional Court, Ngcobo J, elaborated on the elements of the employer's discretion, and fairness as follows:

> "Equally true is that when an employer determines what is an appropriate sanction in a particular case, the employer may have to choose among possible sanctions ranging from a warning to dismissal. It does not follow that all transgressions of a particular rule must attract the same sanction. The employer must apply his or her mind to the facts and determine the appropriate response. It is in this sense that the employer may be said to have discretion.
>
> But recognising that the employer has such discretion does not mean that in determining whether the sanction imposed by the employer is fair, the commissioner must defer to the employer. Nor does it mean that the commissioner must start with bias in favour of the employer. What this means is that the commissioner …. does not start with a blank page and determine afresh what the appropriate sanction is. The commissioner's starting point is the employer's decision to dismiss. The commissioner's task is not to ask what the appropriate sanction is but whether the employer's decision to dismiss is fair".

[19] What seems to be highlighted in this passage is the fact that "fairness requires that regard must be had to the interests both of the workers and those of the employer". Regarding the 'reasonable

employer test', Navsa AJ, who wrote the main judgment in the *Sidumo* case referred with approval to the following passage by Zondo JP in *Engen Petroleum Ltd v CCMA & Others*[5]:

> "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".

[20] I proceed to briefly outline the facts in the *Sidumo* case. The employee was a security officer whose duty was to search employees before leaving a certain point. Video surveillance revealed that he had, in 24 specifically monitored instances, conducted only one search in accordance with established procedures. On eight occasions, he conducted no search at all. Fifteen other searches did not conform to the procedures. The video also confirmed that Sidumo allowed persons to sign the search register without conducting any search at all. For this he was dismissed. The commissioner took into account the employee's long service, the fact that no losses appear to have resulted from his failure to perform his duty, that the violation had been unintentional or a 'mistake' and that it had not been shown that the employer had been dishonest and found that the dismissal

5 Engen Petroleum Ltd v CCMA & Others (2007) 28 ILJ 1507 (LAC) para 73.

was too harsh a sanction. He did not consider the offence committed to "go into the heart of the relationship (with the employer), which is trust". This resulted in the award reinstating the employee.

[21] The so called 'reasonable decision maker-test' serves as a basis for the decision in *Sidumo*. If the commissioner made a decision that a reasonable decision maker could not reach, he/she would have acted unreasonably which could then result in interference with the award. This in my view, boils down to saying the decision of the commissioner is to be reasonable. To my understanding the dictum in *Sidumo* is not about shifting from the 'reasonable employer test' in favour of the so called reasonable employee test. Instead, meaningful strides are taken to refocus attention on the supposed impartiality of the commissioner as a decision maker at the arbitration whose function it is to weigh all the relevant factors and circumstances of each case in order to come up with a reasonable decision. It is in fact the relevant factors and the circumstances of each case, objectively viewed, that should inform the element of reasonableness or lack thereof.

[22] In *Bato Star Fishing (Pty) (Ltd) v Minister of Environment Affairs*[6], the Constitutional Court, per O' Regan J, had added more detail to the principle relating to the reasonable decision maker. She put it this way:

> "What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. Although the review functions of the court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution".

[23] The concept of 'reasonableness' as a standard of review is not anything new in our law. I understood Mr Redding SC for the applicant to have held the same view as regards the formulation of the test in *Sidumo*. As an example, in the South African Law Commission Report (SALC)[7] a similar phrase is used. 'The decision was so unreasonable that no reasonable organ could have

6 Bato Star Fishing (Pty) (Ltd) v Minister of Environment Affairs 2004 (4) SA 490 (CC).
7 SALC (1991), clause 3 (1) (g).

made the decision'. The commissioner's conclusion *in casu*, set out in paragraph 8 above as well as the facts of the case are such that it cannot be found that a reasonable decision maker in the position of the commissioner could not reach the conclusion which she did.

[24] It is interesting to note that in the founding affidavit filed on behalf of the appellant, deposed to by Leoni Petro Valentine the following averment was made:

> "The charge of failing to report the accident is not itself misconduct that would ordinarily lead to dismissal. The problem the Third Respondent faced was the question of whether her lack of candour during the investigation destroyed the trust relationship, which if established then dismissal would be appropriate."

[25] When one looks at the misconduct charged in the internal enquiry, appearing in paragraph 6 of this judgment, it will be noted that the essence of the allegations against the third respondent is 'failure to be honest', only in the context of failure to report the accident. In his submission Mr Redding sought to extend the element of dishonesty to untruthful accounts of the accident made by the third respondent during investigations. Fair enough, that element of dishonesty may be considered together with other factors for purposes of the appropriateness of the sanction. If it is however

"her lack of candour during the investigation (that) destroyed the trust relationship" as the averment goes in paragraph 23 supra, does not beg the question whether that should not have been specifically alleged in the charge to enable the third respondent to appreciate the real nature of the charge(s) against her. That appears to be a very crucial allegation, in the absence of which, as the appellant seems to suggest in the excerpt above, the appellant would not consider dismissal on the basis of the destruction of the trust relationship.

[26] The contention of the appellant is that all the instances of lies were traversed at the arbitration in the course of leading the evidence. This may be so. That does not however take away the duty to inform the accused person, with sufficient particularity, of the real nature of the charge.

[27] In light of the foregoing I would dismiss the appeal. There is no reason why costs should not follow the result. Having regard to the fact that the retirement date of the third respondent has gone past it is felt that that there would be a need to spell out the implications of the order in the event the appeal was dismissed. The parties were

invited to participate in the formulation of the order in this regard without abandoning their respective stances but purely to avoid confusion. The parties agreed to the terms set out in paragraph 2 of the order.

[28] In the result the following is the order of this court:

1. the appeal is dismissed with costs;
2. the appellant pay to the third respondent all arrear salary due to her from the date of the order by the first respondent reinstating the third respondent to her employment, being the 5th July 2004 until the date of her mandatory retirement on the 5th August 2006, including salary increments, bonuses and total contributions to the provident fund on her behalf (in the amount of R31 113.06)

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CT SANGONI
ACTING JUDGE OF APPEAL.

[29] I am less sanguine than Sangoni AJA about the implications of the judgment in *Sidumo*. Nevertheless, I agree that, in the light of the test applied in that case, more particularly the facts thereof, one cannot conclude that the court *a quo* was wrong in failing to interfere with the decision of the commissioner. I agree that the

appeal must be dismissed with costs. I am also pleased to note that paragraph 2 of this court's order is made with the agreement of the parties in the event that paragraph 1 followed upon this court's conclusions.

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NP WILLIS
JUDGE OF APPEAL.

I agree with SANGONI AJA.

_____
L P TLALETSI
ACTING JUDGE OF APPEAL.

APPEARANCES:

For the Appellant:	Adv Redding SC
Instructed by:	M Alaxander of Deneys Reitz Inc.
For the Respondent:	Adv Madhoo
Instructed by:	R Naidoo of Naidoo and Company