IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

REPORTABLE

CASE NO: C23/08

In the matter between:

NATIONAL UNION OF MINE WORKERS	1ST APPLICANT
JAN JAPPIES	2ND APPLICANT
AND	
COMMISSIONER FOR CONCILIATION, MEDIATION & ARBITRATION	1ST RESPONDENT
COMMISSIONER SEELE MOKOENA N.O	2ND RESPONDENT
HOTAZEL MANGANESE MINE	3RD RESPONDENT

JUDGMENT

Molahlehi J

Introduction

[1] This is an application to review and set aside the arbitration award of the second respondent, the commissioner, which was issued under case number NC1798/07 dated 11 December 2007, and in terms of which the commissioner found the dismissal of the second applicant to have been both substantively and procedurally fair.

[2] The parties have also applied for the condonation of the late filling of the review application and the answering affidavit respectively. At the beginning of the hearing of this review the parties indicated that they had agreed not to oppose each others condonation application. I see no reason why the late filling of the respective parties' papers should not be condoned.

Background

[3] The material facts in this matter are not in dispute. The first applicant (the applicant) who was prior to his dismissal employed by the third respondent was dismissed after he was found to have been under the influence of alcohol during working hours. On the day in question the applicant was confronted by one of the supervisors and required to undergo an alcohol level testing because he suspected him of being under the influence of alcohol. The applicant refused to undergo the test and proceeded to his work, underground.

[4] The applicant was taken out of his workplace by one of the security officers who subjected him to alcohol level test. The results of the test were positive and the applicant was accordingly charged with being under the influence of intoxicating liquor.

[5] The applicant was thereafter dismissed for that misconduct. Being unhappy with the outcome of the disciplinary hearing the applicant referred an alleged unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (the CCMA). As indicated in the introduction the commissioner found the dismissal to have been fair and dismissed the applicant's claim.

[6] The applicant did not deny having been confronted by one of the supervisors and been accused of smelling alcohol. He testified that the smell of alcohol was because he had taken alcohol the previous night.

The arbitration award and the grounds for review

[7] In arriving at the decision that the dismissal of the applicant was fair the commissioner reasoned that the applicant had breached a rule prohibiting him from attending at work whilst under the influence alcohol. The commissioner arrived at that conclusion after having regard to both the oral and documentary evidence before him. As concerning the issue of whether the breathalyzer worked properly on that day the commissioner found that on the balance of probabilities it worked well supported in particular by the fact that it was not disputed that the applicant smelled alcohol on that day.

[8] As concerning the inconsistent application of the discipline regarding the transgression for which the applicant was charged with, the commissioner seems to have accepted that other employees who were previously charged with the same transgression were not dismissed. He however did not this to constitute unfairness because those cases occurred prior to the amendment to the policy regarding the subject matter. The commissioner found that the policy amended to address the inconsistency that existed between the policy and the disciplinary code which the first applicant had complained about.

[9] The applicants in their founding affidavit raised several grounds of review. They contended that the commissioner committed a gross irregularity. They contended that the commissioner committed a gross irregularity; his arbitration award was unreasonable and unjustified. They further contended that the arbitration award was reviewable in terms of s 145 of the LRA for the following reasons:

1. The commissioner committed gross irregularity in accepting that the "old" disciplinary code or alcohol policy amendments were communicated to the applicant.

2. The commissioner failed to consider whether or not it was fair of the fair of the respondent to have two contradictory policies regarding the issue of alcohol.

3. It was unreasonable of the commissioner to apply the disciplinary policy over and above the alcohol policy.

4. It was unreasonable for the commissioner to find that the relationship between the applicant and the respondent had broken down.

5. The commissioner irregularly deferred to the disciplinary code and the sanctioned imposed by the respondent.

6. The commissioner failed to consider mitigating factors in confirming the dismissal of the applicant.

7. The commissioner failed to apply his mind to the inconsistent application of the disciplinary sanction imposed on the applicant.

[10] In the summary affidavit the applicants raised further criticism against the approach adopted by the commissioner in arriving at the conclusion the dismissal was fair. This includes the criticism that once a plea of guilty was made by the applicant there was no need to call witness to

testify for the applicant. The other concerns the alleged rigidity in the application of the policy on sanction, the unreasonable finding on the issue of intoxication, misconstruing of the plea of guilty and the alleged no consideration of the provisions of Schedule 8 of the LRA.

Evaluation

[11] The complainant of the applicant that the commissioner deferred to the sanction imposed the respondent is an issue which was addressed in clear term by the Constitutional Court in the *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others (2007) 28 ILJ 2405 (CC).* The notion that the commissioner of the CCMA in determining the fairness of a dismissal should defer to the decision of the employer was propounded by the Supreme Court Appeal in the *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation & Arbitration & Others 2007 (1) SA 576 (SCA); (2006) 27 ILJ 2076 (SCA),* a case which was subsequently overruled by the Constitutional Court in *Sidumo.* The ratio of that decision is that the reasonable employer test does not apply in our law. Therefore a commissioner's award that defers to the decision of employer is reviewable.

[12] The test to apply in considering applications review of CCMA arbitration award is that of a reasonable decision maker. The enquiry to be

conducted in applying the reasonable decision maker test is that of determining whether or not the conclusion reached by the commissioner is one which a reasonable decision maker could not reach.

[13] The approach adopted in *Sidumo* was followed with approval in *Palaborwa Mining Co Ltd v Cheetam and Others (2008) 29 ILJ 306 (LAC),* the case whose facts are similar to those of the present case in many respect. Similar to the present case the employer in *Phalaborwa* had a policy governing the employees who around to be under the influence of alcohol at work. In terms of that policy an employee who was found to be under the influence of alcohol of more than 0.05 gram of alcohol per 100 mi of blood while on duty may be dismissed for a first offence. It was found in that case that the employee was aware of the policy. The employee, who was the company secretary, was subjected to a random alcohol test at the main entrance to the employer which was a mining company. His blowing into an alcohol meter indicated that he was probably under the influence of alcohol. The was thereafter taken to a security control room for an alcohol test which showed that he had 0.115 gram per 100 ml in his blood. A further test was taken 20 minutes later, showed a reading of 0.095 gram per 100ml. in the same was as is the case in the present instant the employee admitted having consumed alcohol the previous night. The commissioner, having found the dismissal of the employee to have been substantively and procedurally fair,

confirmed the dismissal. The decision of the commissioner was confirmed on appeal by Labour Appeal Court.

[14] In concurring with the conclusion reached by Willis JA, in *Phalaborwa*, Patel JA had the following to say about the implications of *Sidumo*:

> *[13] Sidumo enjoins a court to remind itself that the task to determine fairness or otherwise of a dismissal falls primarily within the domain of the commissioner. This was the legislative intent and as much as decisions of different commissioner may lead to different results, it is unfortunately a situation which has to be endured with fortitude despite the uncertainty it may create. I have to remind myself that the test ultimately is whether the decision reached by the third respondent is one that a reasonable decision maker could reach at all in the circumstances. On this test I cannot gainsay the decision of the third respondent."*

Earlier in the same judgment the Learned Judge had the following regarding the issue of the sanction imposed by the commissioner:

> *[12] I must add that the question of an appropriate sanction to be visited on an employee who is found to be intoxicated is not without its own difficulties. Post the Sidumo judgment, a court has constantly to remind itself that*

in assessing the reasonableness or otherwise of a decision of a CCMA commissioner. A court sitting on review may arrive at a different decision or finding to that reached by the commissioner."

The above resonate with what was said in *Sidumo* by Navsa AJ, in the middle of paragraph [75] when said:

"The CCMA correctly submitted that the decision to dismiss belongs to the employer but the determination of its fairness does not. Ultimately, the commissioner's sense of fairness is wht must prevail and not the employer's view. An impartial third party determination on whether or not a dismissal was fair is likely to promote labour peace."

[15] The only conclusion to reach, based on the above legal; analysis, is that I have no option but to disagree with the contention of the applicants that the decision of the commissioner is unreasonable. In addition the reading of the arbitration award doe not support the applicants contention that the commissioner deferred to the decision of the respondent. In determining the fairness of the of the dismissal the commissioner, as he was entitled to and being the only person in law to do so, considered and applied his mind to the evidence and the facts before arriving at the conclusion that the

dismissal was for a fair reason. In arriving at his conclusion as he did the commissioner reasoned, at paragraph [28], of the arbitration award as follows:

"[28] Although the applicant disputed knowledge of such amendments, particularly through Sekgeri, who testified that if the changes were communicated to the union, he would have informed its consistency. By his own admission, the applicant testified that he was aware that he was aware that he was not suppose to come to work while under the influence of alcohol. Sekgeri testified that he was involved in many cases where employees were charged for being under the influence of alcohol, referring to incidents that took place before the applicant was dismissed. The applicant pleaded guilty at the enquiry as he admitted to Pedro that he smelled of alcohol and that he drank brandy the previous evening. If the smell of alcohol, it most probably that he had some degree of alcohol in his system and this may as well authenticate the working conditions of the breathalyzer which detected this through his breath. It is against this background that I find that the applicant breached the workplace rule regulating the conduct of which he was dismissed."

[16] It is also in my view that the commissioner cannot be faulted for unreasonableness in as far as the applicant's compliant regarding the inconsistency in cases of dismissal does not apply as a matter of rule but

rather as part of the assessment of the fairness of the dismissal. It therefore means, in terms of the principle enunciated earlier in this judgment, it is only the commissioner and no one else who has to determine the impact of the inconsistent application of the discipline of the fairness of the dismissal.

[17] In the present instance it is clear from the reading of the award that the commissioner applied his mind to the issue as was raised by the applicant and found that whilst a different approach was previously adopted by the respondent in dealing with similar cases, that approach changed with the amendment to the policy. In this respect the commissioner found that the policy was amended after the first applicant has raised its concerns regarding the inconsistency in the application of the policy. The amended policy introduced a zero tolerance to those who are fond to be under the influence of alcohol at work. The commissioner found that on the balance of probabilities the employee was aware of the rule for which he was accused of having breached.

[18] Turning to the issue of gross irregularity, it is essential for the applicant, in order to succeed with the complaint of gross irregularity, to show that he or she has been denied a fair hearing due to the manner in which the commissioner conducted the arbitration proceedings. It is apparent from the reading of the award that the commissioner applied his mind to all the

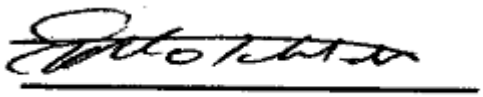
relevant facts and 0.arried at the conclusion that the dismissal was for a fair reason after taking into account the totality of the evidence and the circumstances of the case. The commissioner was in this case dealing with an employee who initially was told to undergo alcohol test because he smelled alcohol, an issue he never denied. He was defiant and persisted ingoing underground even when he was told not to do that after it was discovered that he smelt alcohol.

[19] In my view, in the light of the above the applicants' application stands to fail. The first applicant has however an on going relationship with the respondent and therefore I am of the view that it would not be proper to allow the costs to follow the results.

[20] In the premises the following order is made:

1. The application is dismissed.

2. There is no order as to costs.



Molahlehi J

Date of the hearing: 28 January 2010

Date of Judgment 23 April 2010

Representation:

For the applicant: Adv N Cloete

Instructed by: Neville Cloete Attorneys

For the respondent: Professor H Pienaar

Instructed by: Nkaiseng Chenia Baba Pienaar Swart Inc