IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN PORT ELIZABETH

CASE NO: P 539/02

In the matter between:

United National Breweries (SA) **Applicant**

and

Commission for Conciliation, Mediation and Arbitration **First Respondent**

Luvoyo Bono NO **Second Respondent**

Fawu obo Mlonyeni **Third Respondent**

JUDGMENT

CELE AJ

INTRODUCTION

[1] The applicant seeks to have an arbitration award dated 8 July 2002

which the second respondent issued while he was acting under the auspices of the third respondent, reviewed and set aside, in terms of section 145 of the Labour Relations Act 66 of 1995("the Act").
The application is not opposed.

Background facts

[2] The third respondent commenced employment with the applicant in September 1993 as a forklift driver at the Butterworth deport. He reported on duty as usual at 6H00 on 30 August 2001. At about 9H30 he met three company employees within the company premises. These were Messrs Leon Ncebe and a third whose names were unknown to him. Mr Leon Ncebe then asked him why he was smelling of liquor. The third respondent said that it could have been because he had consumed some liquor on the previous night. He explained that such liquor was a bottle of squadron and two beers. He said that after that he went to bed and by then it was around twelve midnight.

[3] Mr Ncebe instructed the third respondent to proceed to the gatehouse where he would be subjected to an alcohol testing by means of a breathalyser. He duly complied. A red indicator was showing on the breathalyser. Mr Ncebe instructed the third respondent to leave the company premises and he told the third respondent that he would later be warned for a disciplinary hearing. The third respondent left the company premises.

[4] The third respondent was subsequently summoned to appear before

an internal disciplinary hearing which was led on 5 September 2001. He was charged with "being under the influence of alcohol on duty".

[5] The chairperson of the internal disciplinary hearing found the third respondent to have committed the act of misconduct with which he was charged and dismissed him. The third respondent lodged an internal appeal with no success. A dismissal dispute then arose between the parties and the third respondent referred it for conciliation to the first respondent. The dispute was not capable of resolution and a certificate to that effect was issued on 19 October 2001. The dispute was described as one concerning an unfair dismissal. On 24 October 2001 the third respondent referred the dispute for arbitration.

The arbitration proceedings

[6] Mr M. Tonga, the official of FAWU, a trade union which the third respondent was a member of, represented him. Mr Khanye, the Employee Relations Specialist represented the applicant. The issue to be decided was the fairness or otherwise of the third respondent's dismissal.

[7] The applicant called one witness, one Mr Roes Graham Swann. He was an employee of the applicant and the chairperson in the internal disciplinary hearing. He admitted his presence on the day and at the time when the third respondent was confronted about his state of sobriety. He gave evidence and said that –

- He was in his office on the day in question doing production planning. There were few other people with him in the office and this included Mr Ncebe and Mr Deon.

- The third respondent arrived into the office and sat down. Mr Ncebe spoke to the third respondent in Xhosa which Mr Swann did not understand. He however, heard Mr Ncebe telling the third respondent to go to the gatehouse and to wait there for him. Mr Ncebe also said that there was a problem between the third respondent and one Mr Fourie, the nature of the dispute was not disclosed to them at the time.

- He did not hear anything else which might have been said between the third respondent and Mr Ncebe. The reason he provided was that he continued with the work which he was busy with. That made it difficult for him to hear the contents of a discussion as Mr Ncebe received a telephone call. He presumed that the call came from Mr Fourie as it was after that call that Mr Ncebe said there was a problem between Fourie and the third respondent. He admitted that telephone instrument was on his table but insisted that he did not hear what Mr Ncebe was saying nor could he hear that which was being told to him, on that telephone call.

- He was then given a charge sheet, sometime after the first incident and was asked to preside in the internal disciplinary hearing. It is at that stage that he came to know of what the problem was which Mr Ncebe had alluded to on the day he sent the third respondent to the gatehouse.

- The breathalyser reading was 0, 15 which was the highest reading it could have.

- In relation to the charge, he said that he took it seriously. This was because there were a number of company employees, between 5 and 10, where the third respondent was working. Further, it was because there was company property at that workstation. People and property could have been injured or damaged by a forklift driver who was under the influence of alcohol.

- He considered the fact that the third respondent had quarrelled with his wife that led to him taking liquor.

- He had found that the third respondent had a number of warnings before and held these against him. He was not clear on whether the warnings were still valid but said that the validity of the warnings was between three to six months as per company policy.

- He took into account, the fact that there had been various meetings to warn the staff against taking alcohol at the company premises and that such had become a problem to the company. He produced minutes of the meeting of management and the shop stewards, dated 4 September 2001. As the third respondent was dismissed on 5 September 2001, it became clear that wrong minutes were brought. He referred to a letter, which he said had come from head office and was put on the notice board. He conceded though that its contents might not have come to the knowledge of the third respondent.

- The report of the disciplinary hearing he had made had no reference to mitigating circumstances which he would have considered. He said that he had however considered them but was unable to state any of them.

- He said that the chairperson for the internal appeal hearing was Mr Fourie. He admitted that he did speak to Mr Fourie about this case but said that he only asked Mr Fourie what the outcome of appeal hearing was. He described their meeting as having been informal and said that he is the one who had gone into Mr Fourie's office to ask. He admitted that Mr Fourie told him that the third respondent had raised the question of impartiality of him (Mr Swann) during the internal disciplinary hearing. That in brief was his evidence.

[8] The third respondent testified that: -

- On the day of the incident he was at work and was to leave the company premises at about 9H30 to go and obtain a PDP licence. He then proceeded to a company official to report that he was leaving. That official referred him to Mr Ncebe. He then proceeded to Mr Ncebe and found him in an office where he was with Mr Swann and a third gentlemen. It was at that encounter that Mr Ncebe asked him why he was smelling of liquor. He said that he told him that the liquor smell could have been because, on the night before he had had a fight with his wife and then went to bed between twelve and one, at night as he had been consuming squadron brandy and two beers.

- He said that Mr Ncebe told him to proceed to the gatehouse so that he would blow into the breathalyser. He duly complied. He said that the breathalyser was already showing a red indicator before he blew into it. He said he only learnt later that he was not supposed to blow it when a red light on it was showing. He said that he did sign the results of the breathalyser but had not read them.

- He said that he was then suspended and later, he was told of the

date for the disciplinary hearing. He later attended the disciplinary hearing. Mr Swann was the chairperson thereof. He said that he did not dispute that he was under the influence of liquor because the breathalyser had fooled him. He said he did not arrive at work, on the day in question under the influence of liquor. He said that the shop stewards at the applicant's work place did not tell him that being under the influence of liquor while at work was a dismissible offence. He said he learnt of it through shop stewards of the company which he previously worked for. He said also before he came to work, on the day of the incident, he had taken some medication.

- He said that, as a licensed driver, he knew that driving under the influence of liquor was an offence.

- He said further that there was a colleague of his who was tested for alcohol and was found to have been under influence by the applicant but was not dismissed. That person, he said was a Mr Kota.

[9] Mr Kota was then called as a witness for the third respondent. He confirmed that he had been tested for the presence of alcohol in his body, by means of the breathalyser. He said that a yellow indicator came out from the breathalyser. He said that there was an internal disciplinary hearing for him but he was only suspended for five weeks. He said further that there was another occasion when he was under the influence of liquor but one Mr Hattingh of the applicant, chased him away from the company premises without testing him. He said further that the shop stewards at the applicant's work place did not inform the employees that taking liquor at the work place was a dismissible offence. That was, in

brief, the evidence of the third respondent.

The arbitration award

[10] Two main reasons were given by the second respondent for the ward. In relation to the existence and the knowledge of the rule, he said:

> "It is common cause that there is a rule regarding the use or the abuse of alcohol at the workplace. There is also no question as to the validity and or reasonableness of this rule, especially when it comes to forklift drivers as they move material from one point to another and expose other workers and company to potential harm and damage if they are not in full control of their physical and mental abilities. It is also common cause that the employee was aware of this rule."

[11] In relation to the consistent application of the rule he had this, *inter alia*, to say:

> "Without a shadow of a doubt, the employer is inconsistent in applying this rule, some are privileged and protested (sic) from breaking the rule by being sent home. Sometimes the employer gives a lesser sanction with no justifiable grounds.

[12] He then found that the dismissal of the third respondent was rendered unfair because of the inconsistent application of the rule. Such finding, he said, however had not justify the third respondent's actions of consuming alcohol, going to work under those circumstances and presenting himself as a potential danger to the employer's property and to the fellow workers. He found that it

would be unfair to award compensation as the employee's action clearly amounted to serious misconduct.

[12] The second respondent found the dismissal of the third respondent to have been unfair and he ordered the applicant to reinstate him retrospectively but without compensation. It is this finding which the applicant seeks to have reviewed and set aside.

Grounds for review

[13] The submissions made by the applicant are that the second respondent:

1. misconducted himself in his duties,
2. committed a gross irregularity in the conduct of the proceedings and that
3. he issued an award which is neither rational or justifiable in relation to the evidence properly available before him.

Analysis

Misconduct

[13] In **Hyperchemicals Internation v Maybaker Agrichem 1992 (1) SA 19 ILJ 799 (LC),** Preiss AJ had to consider the meaning of misconduct in an application to set aside an arbitration award, in terms of section 33 (1) of the Arbitration Act 42 of 1965, section 33 (1) mirrors section 145 of the Act. He referred to Halsbury para 622 at 330 which had a passage quoted in Jacobs, The Law of Arbitration in South Africa at 138. Part of that paragraph reads:

"…However on one or other of those grounds the expression includes on the one hand that which is misconduct by any standard such as being bribed or corrupted and on the other hand mere technical misconduct such as making a mistake as to the scope of the authority conferred by the agreement of reference. That does not mean that every irregularity of procedure amounts to misconduct."

[13] In **Abdull and another v Cloete NO and others (1998) 19 IJ 799 (LC),** the arbitrator had given reasons for an award which were not capable of being understood as they were mutually contradictory in material respects. Pretorius AJ found that the arbitrator had failed to properly apply his mind to the issues before him. He had then to consider if such failure to apply his mind constituted either misconduct in relation to the duties of the commissioner as an arbitrator or a gross irregularity in the conduct of the arbitration proceedings. At para 12 he said:

" As far as misconduct is concerned, it is at least arguable that an arbitrator will make himself guilty of misconduct in relation to his duties as an arbitrator if he fails to apply his mind responsibly and fairly to the issues before him. An arbitrator who acts in this fashion does not conduct himself in accordance with the requirements of the LRA which enjoins the arbitrator to give due consideration to the issues before him, to apply his mind thereto and come to a reasoned conclusion."

Gross irregularity

[14] This kind of an irregularity will inevitably relate to the procedure

adopted in the course of the proceedings either of a tribunal, a court or in the arbitration proceedings. It will therefore not mean or relate to an incorrect judgement. It refers not to the result but rather to the method of a trial. The consequence attendant to there being a gross irregularity is that the aggrieved party will have been prevented from having his or her case fully and fairly determined. See in this respect **(1) Ellis v Morgan; Ellis v Desai 1909 TS 576 at 581 and (2) Goldfields Investments Ltd and another v City Council of Johannesburg and another 1938 TPD 551 at 560 (3) County Fair Foods (Pty) Limited v CCMA & others (1999 4 LLD 459 (LAC) at para 30.**

Rationality and Justifiability of an award

[15] Froneman DJP set the test for a decision whether the decision of a tribunal or arbitrator is rational in **Carephone (Pty) Ltd v Marcus NO and others (1998) 19 ILJ 1425 (LAC),** thus:

> "…is there a rational objective basis justifying the connection made by the administrative decision maker between the material property available to him and the conclusion he or she eventually arrived at?"

[14] The decision in **Carephone**, supra, was subsequently examined in various cases. One such is **Shoprite Checkers (Pty) Ltd v Ramdaw NO and others (2001) 22 ILJ 1603 (LAC).** In his judgment Zondo JP concluded, *inter alia,* that the term "justifiable"

which had been used in the **Carephone** case although not synonymous with the term "rational" bore a sufficiently similar meaning to justify the conclusion that rationality can be said to be accommodated within the concept of justifiability. He held further that a decision, which was justifiable could not be said to be irrational and a decision that was irrational could not be said to be justifiable.

[16] The main gripe of the applicant lies in the finding by the second respondent that, in spite of the seriousness of the offence, the dismissal was substantively unfair in relation to the applicant's inconsistent application of the rule. This related to a sanction given by the applicant to Mr Kota who upon being found to have been under influence of alcohol was suspended from duty without pay for about five weeks. When there was a second liquor related incident, Mr Kota was not even subjected to a breathalyser test but was chased away.

[17] The submission by the applicant is that there was a significant difference in time between the incidents of Mr Kota and those of the third respondent. At first glance, one gets the impression from the transcript of the arbitration proceedings that the submission has merits. A further reading of the record reveals otherwise. Mr Tonga was putting questions to Mr Kota and the record reads:

> "Now we want to understand how far apart are this incidents of you alleged to have been drunk to this one of Mr Mlonyeni who was found

drunk in August 2001? … Huge difference.

Would you say these incidents, your incidents and the incidents of Mr Mlonyeni, happened in the same 2001? …Well I cannot really determine the period."

[18] No further evidence was led in relation to this aspect. The second answer which Mr Kota explains shows clearly that the first answer he gave was nothing but a conjecture or guesswork. When he could not really determine the period in question, it was accordingly not within his personal knowledge that there was a huge difference in the two periods. In my view, this submission by the applicant has no merits. This is even more so when it is borne in mind that both incidents took place on the same year, 2001. That of the third respondent took place on 31 August 2001. There is no evidence on the record of what a significant period would be from 31 August 2001.

[19] The business of the applicant had previously been under the management of National Sorghum Breweries ("NBS") at that stage the sanction of being under the influence of alcohol while on duty was a final warning for the first offender and a dismissal for the second offence. After the applicant took over, the rule appears to have been changed. This appears from the supplementary affidavit of Mr Khanye of the applicant. No details of the change appear from the evidence of Mr Swann, the only witness who testified for the applicant. The record of the arbitration proceedings suggests though, that both incidents of the third respondent and those of Mr Kota took place under the management of the applicant.

[20] The applicant submits that the third respondent admitted that he was under the influence of alcohol. It is difficult to understand the basis on which this submission is made. The evidence of the third respondent at the arbitration hearing was in fact to the contrary. He said that a red indicator which was showing on the breathalyser, even before he blew into it, fooled him. The result was that, during the internal disciplinary and the internal appeal hearings, he did not dispute that he was under the influence of alcohol on the day of the incident. The refutation by the third respondent came only when he was testifying and his version was not put to Mr Swann. It must however, be borne in mind that the applicant chose to call one witness, who was the chairperson of the internal disciplinary hearing. It was his evidence that he did not detect the third respondent to have been under the influence of alcohol on the day in question. He was not the person who tested the alcohol level of the third respondent. Effectively therefore, he could not testify on the substantive charge against the third respondent. When he said at the arbitration hearing, that the alcohol level concentration of the third respondent on the breathalyser was 0.15, he was testifying on what was told to him as the chairperson of the disciplinary hearing.

[21] During the arbitration proceedings, there might have been a stage when the parties agreed on which documents would be admitted into the record proceedings. The record is silent in relation thereto. However, the parties did refer to some documents, which it seems, were part of each other's bundle. I take it that the second respondent based his finding that the third respondent admitted a

serious misconduct on such documents. In the absence of the minutes of the internal disciplinary hearing that finding could not stand in law.

[22] The applicant submits that the offence committed by the third respondent is serious compared to that of Mr Kota. On the contrary, these appear to have been similar. Both employees were drivers of the applicant, working among other employees where there was property of the applicant, which could have been damaged by an intoxicated driver. The offences appear to have been committed in the same year. Suspicion on the third respondent came about as a result of a smell and the breathalyser test confirmed the presence of alcohol in his body system.

[23] There is no evidence which suggests that the alcohol in his body impaired the manner of the execution of his duties from the time he started work till he was at the office. The applicant has not identified any features of this case, which distinguish it from that of Mr Kota. The submission therefore that the second respondent ought have deferred to the sanction imposed by the applicant, in my view has no merits.

[23] A proper conspectus of all the evidential material properly made available to the second respondent indicates to me that no gross irregularity as alleged, and as discussed in cases herein, was committed by the second respondent. Further, there is a rational objective basis justifying the connection made by the second respondent between the material properly available to him and the

conclusion he eventually arrived at.

Order

1. The application is dismissed
2. No costs order is made.

CELE AJ

Date of hearing: 22 November 2005

Date of Judgment: 15 March 2006

Appearances

For the Applicant: **MAJIJA**

Instructed by: **MASEREMULE INCORPORATED ATTORNEYS**

For the Respondent: **FAWU**

Union Official**: M POYO**