REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 665/2011

In the matter between:

SOUTH AFRICAN BREWERIES LTD	**Applicant**
and	
CCMA	**First Respondent**
TARIQ JAMODIEN N.O.	**Second Respondent**
CEDRIC KARSTENS	**Third Respondent**

Heard: **16 May 2012**

Delivered: **24 May 2012**

Summary: Review – dismissal – arbitrator's sense of fairness – no deference to employer – arbitration is a hearing *de novo* – arbitrator decides whether dismissal was fair.

JUDGMENT

STEENKAMP J

Introduction

1] An arbitrator must decide whether the dismissal of an employee was fair. In doing so, whose sense of fairness must prevail? Is the arbitrator's decision akin to sitting in review on that of the employer, as some commentators would have it, or must the arbitrator decide the question afresh?

2] More than five years after the decision of the Constitutional Court in *Sidumo & another v Rustenburg Platinum Mines Ltd & others*[1] there still appears to be no clarity in this regard, given the arguments before this court. I shall attempt, with some trepidation, to articulate the test again against the background of this case.

Background facts

3] The third respondent, Cedric Karstens ("the employee") started working for the applicant in 1989. He was dismissed for misconduct on 15 March 2011. At the time of his dismissal, he was employed as a process operator on the production line.

4] As most readers would be aware, the applicant (SAB) bottles beer. The allegations of misconduct arise from an incident on 7 February 2011, when the employee allegedly opened a bottle of beer and drank some of it. He was disciplined and dismissed for the following allegations of misconduct:

> "1. Drinking alcohol on duty on 7 February 2011;
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> 2. Unauthorised removal and consumption of SAB products on site on 7 February 2011;
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> 3. Operating machinery after having consumed alcohol in the workplace on 7 February 2011."

5] An internal appeal was dismissed. The employee referred an unfair dismissal dispute to the CCMA (the first respondent). Conciliation failed. The employee referred the dispute to arbitration. The arbitrator, Mr Tariq

1 (2007) 28 *ILJ* 2405 (CC); [200] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC).

Jamodien (the second respondent), found that the dismissal was substantively unfair. He ordered SAB to reinstate the employee, not retrospectively, but prospectively from 15 August 2011. The employee was effectively suspended without pay for some four and a half months. His reinstatement was also coupled with a final written warning, effective for 12 months (in accordance with SAB's disciplinary procedure) from the date of reinstatement.

The award

6] The arbitrator found that the employee had entered the SAB laboratory on 7 February 2011 at about 05h17 and had taken a brown labelled bottle – apparently a beer bottle – from the fridge where it was stored; opened it; and drank from it. He rejected the employee's version that the bottle contained carbonated "D-water" as this component was no longer carbonated. On video footage with sound that showed the employee opening the bottle, a clear "fizz" sound could be heard, from which he inferred that the contents were carbonated. It was beer, not water. No miracle had occurred to change it from one to the other.

7] The arbitrator took into account that SAB takes a tough stance on alcohol-related misconduct. However, he pointed out that he should "holistically assess" the merits of the parties' respective cases and expressed the view that he should "come to a decision which is even-handed and fair." Taking into account that dismissal is reserved for the most serious cases of misconduct, particularly in circumstances where the employment relationship cannot be reconstructed, he concluded that dismissal was too harsh a sanction – in other words, unfair.

8] In doing so, the arbitrator had regard to *Sidumo,* where the Constitutional Court enjoined arbitrators to take the following factors into account in determining whether a dismissal was fair:

8.1 The totality of circumstances;

8.2 The importance of the rule that had been breached;

8.3 The reason the employer imposed the sanction of dismissal;

8.4 The harm caused by the employee's conduct'

8.5 Whether additional training and instruction may result in the employee not repeating the misconduct;

8.6 The effect of dismissal on the employee; and

8.7 The employee's service record.

9] The arbitrator also pointed out that, in *Fidelity Cash Management Services v CCMA & others*[2], the Labour Appeal Court held that in considering the totality of circumstances, the commissioner would have to answer the question whether dismissal was in all of the circumstances a fair sanction. In answering that question he or she would have to use his or her own sense of fairness.

10] The arbitrator considered drinking on duty and the unauthorised taking of the beer to be the main elements of the allegations levelled against the employee. With regard to the third allegation – that of operating machinery after having consumed alcohol – he took into account that the employee had undergone a breathalyser test that registered 0,00% alcohol. This implied, to the arbitrator's mind, that the employee had not placed the business at risk.

11] The arbitrator further found that the evidence only established that the employee had taken a few sips of beer. He concluded:

> "To my mind this misdemeanour, although serious, does not warrant dismissal, particularly given that the only hint of similar incidents regarding Mr Karstens was a matter that happened 18 years ago. I am of the view that in these circumstances progressive discipline would have sufficed."

12] The reference to a matter that happened 18 years ago was that the employee had gone through SAB's Employee Assistance Programme 18 years ago after he was found to have been over the prescribed alcohol

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2 (2008) 29 *ILJ* 964 (LAC).

limit. Other than that, he had 22 years' service with a clean disciplinary record.

13] The arbitrator also noted that there was no actual evidence that the tenets of trust and good faith that existed particularly between the employee and his manager, Mr Macaulay, had forever been rendered irretrievable. Taking into account the totality of circumstances, he found that after 22 years' employment and with a generally unblemished disciplinary record, the employee deserved a sanction short of dismissal. This sanction was an effective suspension without pay for four and a half months, coupled with a final written warning.

The test on review

14] The test that this court must apply in deciding whether the arbitrator's decision is reviewable has been rehashed innumerable times since *Sidumo*: It is whether the conclusion reached by the arbitrator was so unreasonable that no other arbitrator could have come to the same conclusion.

15] In this regard, the Supreme Court of Appeal has recently had cause to remind this court that the test is that of review and not appeal.[3]

16] In *Sidumo*[4] the Constitutional Court very clearly held that the arbitrator's conclusion must fall within a range of decisions that a reasonable decision-maker could make. And the reasonableness test is still aptly described in the pre-*Sidumo* case of *Computicket v Marcus NO and others*[5]:

> "The question I have to decide is not whether [the arbitrator's] conclusion was wrong but whether ... it was unjustifiable and unreasonable."

17] As Waglay DJP recently pointed out in *The National Commissioner of the*

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3 See *National Union of Mineworkers & another v Samancor Ltd (Tubatse Ferrochrome) & Others* [2011] ZASCA 74 (25 May 2011).

4 Supra paras 118-119.

5 (1999) 20 *ILJ* 343 (LC) 346.

South African Police Service v Myers & Others:[6]

> "Whatever one's personal view may be, the test as set out in *Sidumo* ... is whether or not the arbitrator's decision that dismissal is an appropriate sanction is a decision that a reasonable decision-maker could reach."

18] Having considered the evidence at arbitration, the learned DJP held:

> "I cannot accept that the arbitrator's decision fell outside of the band of decisions to which reasonable people could come."

19] In *Fidelity Cash Management Service v CCMA & others*[7] Zondo JP applied the *Sidumo* test thus:

> "It will often happen that, in assessing the reasonableness or otherwise of an arbitration award or other decision 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 of determining 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 arbitration award of the CCMA simply because it, that is the court, would have dealt with the matter differently."
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> And:
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> "The test enunciated by the Constitutional Court in *Sidumo* for determining whether a decision or arbitration award of a CCMA commissioner is reasonable is a stringent test that will ensure that such awards are not lightly interfered with. It will ensure that, more than before, and in line with the objectives of the Act and particularly the primary objective of the effective resolution of disputes, awards of the CCMA will be final and binding as long as it cannot be said that such a decision or award is one that a reasonable decision-maker could not have made in the circumstances of the case. It will not be often that an arbitration award is found to be one which a reasonable decision-maker could not have made

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6 CA 4/09 (unreported), Labour Appeal Court, Cape Town (2 March 2012) paras [103] – [104].

7 [2008] 3 BLLR 197 (LAC) paras [98] and [100].

> but I also do not think that it will be rare that an arbitration award of the CCMA is found to be one that a reasonable decision-maker could not, in all the circumstances, have reached."

20] It is against this background that the applicant's grounds of review must be assessed.

Grounds of review

21] The applicant raises four grounds of review. I shall discuss them individually, but in essence they are these:

21.1 The commissioner committed a material error of law by imposing a sanction which he deemed to be appropriate rather than determining whether the applicant's decision to dismiss was fair.

21.2 The commissioner committed misconduct or a gross irregularity in that he did not properly considered the documentary evidence presented at the disciplinary hearing, namely the applicant's disciplinary code, in terms of which the three instances of misconduct amounted to dismissible offences.

21.3 The commissioner committed misconduct or a gross irregularity in that he placed too much weight on immaterial evidence, being the breathalyser test results.

21.4 The commissioner acted unreasonably by finding that the applicant's decision to dismiss was unfair, despite finding that the employee was "guilty", ie he had committed the misconduct complained of.

The fairness test

22] The first ground of review – and the one most strenuously argued by Mr *Leslie* – is that the commissioner committed a material error of law by imposing a sanction which he deemed to be appropriate rather than determining whether the applicant's decision to dismiss was fair.

23] In this regard, he relied particularly on the following *dictum* of Navsa AJ in

Sidumo:[8]

> "In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision, a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances."

24] But this paragraph must be read in the context of his earlier discussion:[9]

> "It is a practical reality that, in the first place, it is the employer who hires and fires. The act of dismissal forms the jurisdictional basis for a commissioner, in the event of an unresolved dismissal dispute, to conduct an arbitration in terms of the LRA. The commissioner determines whether the dismissal is fair. There are, therefore, no competing 'discretions'. Employer and commissioner each play a different part. 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 what 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."

25] The Labour Appeal Court very recently discussed the *Sidumo* test in *Wasteman Group v SAMWU & Others.*[10] Davis JA confirmed that:

> "The commissioner is required to come to an independent decision as to whether the employer's decision was fair in the circumstances, these circumstances being established by the factual matrix confronting the commissioner."

26] In my view, the commissioner's view can best be summarised thus: The employer decides to dismiss. The commissioner conducts an arbitration *de novo.* In the light of the totality of circumstances, established by the evidence at arbitration, the commissioner must then decide whether the

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8 *Supra* para [79].

9 *Ibid* para [75].

10 Unreported, CA 6/2011 (8 March 2011).

decision to dismiss was fair. In doing so, it is the commissioner's own sense of fairness that must prevail. There can be no deference to the employer.

27] It should be clear from my understanding of the commissioner's role that I do not agree that the commissioner's role with regard to the employer's decision to dismiss is akin to the role of this court sitting in review of the arbitrator's decision. The commissioner must decide whether the decision to dismiss was fair; this court may only decide whether the arbitrator's decision was so unreasonable that no other arbitrator could have reached the same decision. Even if the court's own sense of fairness may dictate a different outcome, it cannot interfere with the decision of the arbitrator. The converse applies to the arbitrator when deciding whether the employer's decision to dismiss was fair.

28] In the present case, the arbitrator carefully considered all the evidence before him. Despite the seriousness of the misconduct, he came to the conclusion that the sanction of dismissal was not fair, especially given the applicant's unblemished record of 22 years and the inference that he caused no operational risk. Even if this court may have reached a different conclusion, it is not so unreasonable that no other arbitrator may have reached the same conclusion. The award is not reviewable on this ground.

Second ground of review: documentary evidence

29] The applicant complains that the arbitrator did not sufficiently consider its disciplinary code. It submits that dismissal is the appropriate sanction for the type of misconduct perpetrated by the employee.

30] What is immediately apparent from the disciplinary code, though, is that it states in terms:

> "These are merely guidelines and each case must be treated on its own merits."

31] The arbitrator did accept that SAB takes a tough stance on alcohol-related misconduct. However, taking into account the totality of circumstances, he

came to the conclusion that dismissal was not a fair sanction in this specific case. That conclusion was not so unreasonable that no other arbitrator could have reached it.

Third ground of review: breathalyser test

32] The applicant criticises the arbitrator's finding that its business was not at risk, based on the breathalyser test showing no alcohol, because that test was administered some seven hours after the employee had drunk from the bottle of beer.

33] The arbitrator still found, quite properly, that the employee had operated machinery after having consumed alcohol; but he context was that the evidence had only shown him taking "a few sips of beer", and the breathalyser test showed that he had no discernable alcohol on his breath, albeit seven hours later. The conclusion that the employee had not placed the business at risk must also be seen in the light of the applicant's own disciplinary guidelines (on which it relied under the second review ground). Those guidelines specify that it is an offence to work on a SAB production site while "being intoxicated and/or under the influence of alcohol." That, in turn, is defined as having a breath alcohol content of more than 0,24 mg/1000ml. In this case, there was no such evidence; in fact, the employee's breath alcohol level was 0. There was no evidence to show that he was intoxicated or under the influence of alcohol; at most he had drunk some ("a few sips of") beer.

34] Given this context, the conclusion that dismissal was not a fair sanction was a reasonable one.

Fourth ground of review: dismissal unfair

35] This "catch-all" ground of review is based on the argument that, having found the employee "guilty"[11] – i.e. that he had committed the misconduct – the arbitrator should have found that dismissal was a fair sanction.

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11 I am repeating the shorthand phrase used by the arbitrator without in any way propagating a criminal procedure model of discipline in the workplace.

36] However, it should be clear from an analysis of the award that the arbitrator properly weighed up all of the evidence before him – the totality of the circumstances, in the parlance of *Sidumo* – and it is in the light of all those circumstances that he found that dismissal was not a fair sanction, despite the fact that the employee had committed misconduct. In doing so, he acted reasonably; the fact that the employer, the applicant's counsel or even this court may have formed a different view, is not the test on review.

Conclusion

37] The conclusion that the arbitrator reached is one that a reasonable decision-maker could have come to. It is not open to review, as opposed to appeal.

38] Both parties have asked for costs to follow the result. There is no apparent reason to differ.

Order

39] The application for review is dismissed with costs.

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Anton Steenkamp

Judge of the Labour Court of South Africa

APPLICANT:	G Leslie
	Instructed by Bowman Gilfillan.
THIRD RESPONDENT:	J Whyte of Cheadle Thompson & Haysom.