REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C24/2011

In the matter between:

TAXI-TRUCKS PARCEL EXPRESS (PTY) LTD	**Applicant**
and	
NATIONAL BARGAINING COUNCIL FOR THE ROAD FREIGHT INDUSTRY	**First Respondent**
PETER HEATHER N.O.	**Second Respondent**
SATAWU OBO T CALUZA	**Third Respondent**

Heard: **29 May 2012**

Delivered: **6 June 2012**

Summary: Review – LRA s 145 – employee under the influence of alcohol after having been intoxicated the night before. Arbitrator found sanction of dismissal too harsh – replaced with prospective reinstatement and limited backpay – effectively four months' unpaid suspension. Finding within a range of reasonable outcomes. Not reviewable.

JUDGMENT

STEENKAMP J

Introduction

1] The employee, Mr Thaditola Caluza, went to work whilst still under the influence of alcohol on Monday 3 August 2009. He had had a lot to drink the night before at a traditional function. It is common cause that he did not drink any alcohol on duty or at the workplace; but the effects of the previous day's festivities were such that, when he underwent a breathalyser test, his blood alcohol level was found to be three times over the legal driving limit.

2] The employee was not a driver. The applicant is an express parcel delivery company. The employee was employed as a general worker. On the Monday in question, he was loading tyres onto trucks.

3] He was dismissed for being under the influence of alcohol at work. At arbitration, the arbitrator found that dismissal was too harsh a sanction. He ordered the applicant to reinstate the employee, but limited the amount of backpay. This had the effect that the employee had effectively been suspended without pay for four months.

4] The applicant wishes to have that award reviewed and set aside.

Background facts

5] The employee was a general worker. He loaded and off-loaded vehicles, sorted freight, and sometimes accompanied vehicles on their delivery route (albeit not on the day of the misconduct leading to his dismissal). At the time of his dismissal, he had worked for the applicant for between six and seven years and he had a clean disciplinary record.

6] On Sunday 2 August 2009 he attended a traditional function. He drank a lot and asked his brother to take him home at some stage, although the festivities were still going strong. The next morning, he reported for duty. He thought that he had slept off the excesses of the night before and he

did not think he was still drunk.

7] During the course of the morning the employee and a colleague sought to address an unrelated grievance with management and one of the company's employees formed the impression that Caluza was under the influence of alcohol. He smelt of alcohol and his eyes were bloodshot. He was not slurring, had a sensible conversation with his manager, and he was not stumbling, although the manager thought he was "a bit wavy".

8] When confronted, the employee explained that he had drunk a lot the night before. He consented to a blood test. The test showed that his blood alcohol level was 0,15 g/100ml.

9] The applicant's witnesses testified at arbitration that the company had a "zero tolerance policy" with regard to being under the influence of alcohol at the workplace. Although the operations manager, Pienaar, testified that this meant that the offence would automatically lead to dismissal, the evidence of the human resources manager, Burger, was somewhat more nuanced. He said that the company would have to follow its disciplinary code and that the circumstances would have to be considered by the chairperson of a disciplinary hearing.

10] The disciplinary code classifies being under the influence of alcohol as a "grade 3 offence". The code provides that a grade 3 offence "may result in a final warning or dismissal". Those offences "could result in summary dismissal ... after a formal disciplinary hearing." Plainly, contrary to Pienaar's understanding, the misconduct complained of need not necessarily be visited by a sanction of dismissal; it could lead to a lesser sanction, such as the one deemed fair by the arbitrator in the circumstances of this case.

11] The arbitrator appreciated this distinction. With regard to the "zero tolerance approach" he found:

> "I find this approach to be unfair. A clerk for example would not be a danger to himself or to others and would not tarnish the image of the company as he would seldom, if ever, deal directly with clients or customers. However

this would be totally different for an individual who held the position of a driver, a pilot or a managing director."

The award

12] Having had regard to the background facts and the principles outlined in *Sidumo*[1], the arbitrator found that the employee had committed misconduct, but concluded:

> "I am of the opinion that the trust relationship had not been irretrievably broken down and had the [company] applied progressive discipline and [had the employee] been given a lighter sanction this would have been sufficient to change his behaviour. I have also considered that the [employee] did not act with any intent to the detriment of his employer and showed remorse. The question to be answered is if the [employee] was given another chance, would the incident repeat itself. I am of the opinion this would not be the case. It is thus my view that the sanction of dismissal was too harsh and an alternative sanction short of dismissal would have sufficed."

13] The arbitrator also took into account that there was no evidence before him that the trust relationship had been irreparably broken; and that the employee had apologised and shown remorse.

Review grounds

14] The applicant raised the following grounds of review in elaboration of its general submission that the arbitrator's conclusion on sanction i the light of the evidence before him was unreasonable:

14.1 The applicant's disciplinary code. But, as the applicant concedes, that code merely specifies that being under the influence of alcohol during working hours may lead to dismissal or a final warning.

14.2 The rule itself is not unfair, contrary to the arbitrator's finding; it can be applied in different ways.

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1 *Sidumo & another v Rustenburg Platinum Mines & others* (2007) 28 *ILJ* 2405 (CC); [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC).

14.3 The arbitrator did not sufficiently take into account the importance of the rule with regard to safety.

14.4 The arbitrator did not consider the "potential" for the employee bringing the company into disrepute, should he have interacted with customers (although he did not).

14.5 The arbitrator did not consider the precedent it would set if the employee were not dismissed.

14.6 The arbitrator did not consider the potential for arm sufficiently.

15] Having been briefed at a late stage, Mr *Ackermann* elaborated somewhat on these grounds in his oral argument. He submitted that:

15.1 The arbitrator's findings were not supported by the evidence;

15.2 His findings are illogical; and

15.3 His findings are misconceived.

16] Mr *Ackermann*'s main problem with the arbitrator's interpretation of the applicant's zero tolerance policy was that it did not accord with the reality. It is so that the branch manager, Pienaar, testified that this offence would inevitably lead to dismissal. But in reality, he argued – and despite Pienaar's apparently flawed understanding of the policy – the applicant would not dismiss an employee who is under the influence of alcohol as a matter of course.

17] It is so that the HR manager, Burger, clarified this position somewhat. However, I do not agree that this in itself renders the arbitrator's award reviewable. The applicant still applied the policy in a way that led to an unfair dismissal in the view of the arbitrator. In forming that view, the arbitrator's own sense of fairness prevailed, after he had properly considered the factors outlined in *Sidumo.* It is not open to this court to interfere.

18] Also, with regard to the employee's job function, I must incline more to the view of the arbitrator than to that of Mr *Ackermann.* The arbitrator drew a

distinction between different types of job function. That is in accordance with the legal principles outlined in our case law. And despite the applicant's legitimate concerns about safety, the functions of a general worker loading goods simply cannot be equated to that of the applicant's drivers in applying its "zero tolerance" policy with regard to being under the influence of alcohol at the workplace.

Legal principles

19] The application for review – as opposed to appeal – must be considered against the background of the applicable legal principles. In this regard, I propose to deal mainly with the "fairness test" as outlined in *Sidumo* and subsequent authorities; and with the specific authorities relating to alcohol-related misconduct.

The fairness test

20] The arbitrator in *South African Breweries v CCMA & others*[2] also found that a sanction of dismissal in an alcohol-related misconduct matter where the employer had a "zero tolerance" policy was unfair. He ordered the employer to reinstate the employee prospectively, coupled with a final written warning. The effect of the award was that the employee was suspended without pay for some four and a half months.

21] In holding that the arbitrator's award was not unreasonable, this court attempted to make sense of the fairness inquiry. That discussion is apposite to this case.

22] In this regard, the following *dictum* of Navsa AJ in *Sidumo*[3] is often cited:

> "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

2 [2012] ZALCCT 17.

3 *Sidumo & another v Rustenburg Platinum Mines & others* (2007) 28 *ILJ* 2405 (CC); [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC) para [79].

> defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances."

23] But this paragraph must be read in the context of Navsa J's earlier discussion:[4]

> "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."

24] The Labour Appeal Court very recently discussed the *Sidumo* test in *Wasteman Group v SAMWU & Others.*[5] 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."

25] In my view, as discussed in *South African Breweries*[6], 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 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.

26] In the course of his argument, Mr *Ackermann* referred me to the judgment

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4 *Ibid* para [75].

5 (2011) 32 *ILJ* 1057 (LAC).

6 *Supra* para [26].

of the Labour Appeal Court in *Samancor Chrome Ltd (Tubatse Ferrochrome) v MEIBC & others.*[7] But that judgment was overturned on appeal by the Supreme Court of Appeal.[8] And this court needs to bear in mind the following word of caution sounded by Nugent JA on appeal:[9]

> "It is apparent from the reasons given by the Labour Appeal Court that it did not appreciate the limited nature of the question that had been before the Labour Court – and hence the limited question that was before it on appeal. Nowhere in its reasons is there any express finding that the award was one that no reasonable decision-maker could make nor does it appear by implication. The most that can be said is that it found that the arbitrator erroneously categorised the dismissal – a matter to which I will return – but error is not by itself a proper basis for reconsidering an award. Having found that there was an error the Labour Appeal Court said that 'manifestly, the question as to whether a dismissal in the circumstances of the present dispute, is substantively fair depends upon the facts of the case' and proceeded to consider the facts, reaching the following conclusion:
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> 'In the circumstances of this case and for the reasons so set out, [Mr Stemmett] should have considered that the decision to terminate [Mr Maloma's] employment was fair and manifestly fair'.
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> That approach to the matter would have been appropriate if the arbitrator's award had been under appeal but not where it was being

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7 Unreported (JA 38/2009), 26 November 2010.

8 *NUM & others v Samancor Chrome Ltd (Tubatse Ferrochrome)* [2011] 11 BLLR 1041 (SCA); (2011) 32 *ILJ* 1618 (SCA).

9 *Ibid* para [7].

subjected to review."

Dealing with alcohol-related offences

27] In support of his argument that being intoxicated on duty should be met with a sanction of dismissal rather than a less drastic one, Mr *Ackermann* referred to the recent judgment in *Transnet Freight Rail v Transnet Bargaining Council & others.*[10] But that matter concerned the question whether alcohol abuse should be treated as misconduct rather than incapacity in circumstances where the employee is not an alcoholic. The main *ratio* for holding that the arbitrator's award was reviewable in that case, was that the arbitrator failed to have regard for the principles distinguishing misconduct from incapacity and, more specifically, that the evidence and common cause facts were that the employee in that case was not an alcoholic and did not suffer from alcoholism. The arbitrator committed a gross irregularity in extending the requirement to treat alcoholism as a disease (i.e. an incapacity) to employees who are not alcoholics and who do not suffer from alcoholism (or any other medical illness) simply by virtue of the fact that their misconduct involved alcohol. In the case before me, the misconduct was treated as such and the only significant question on review is whether the arbitrator's ruling on sanction is sustainable.

28] There are other reasons why the *Transnet* case is distinguishable. Firstly, the employee in that case was employed in a safety critical position which necessitated the strict application of the rule against being intoxicated at work. Secondly, a serious written warning had been issued to the employee for a similar offence and that was still valid. Neither of those factors applies to the employee in this case, although safety considerations did play a role – a significant one, Mr *Ackermann* argued. However, I do not think the safety aspect in the case of a general worker loading goods can be equated to that of a train driver, as was the case in *Transnet.*

10 [2011] ZALCJHB 15.

29] Some principles relating to alcohol-related misconduct were nevertheless discussed in *Transnet* and I shall consider those principles in the context of this case.

30] Grogan[11], in discussing the case of *Tanker Services (Pty) Ltd v Magudulela*[12] in which it was found that the employee, who was found to have been under the influence of alcohol, committed an offence justifying dismissal, notes the following:

> "...[I]n *Tanker Services (Pty) Ltd v Magudulela* the employee was dismissed for being under the influence of alcohol while driving a 32-ton articulated vehicle belonging to the employer. The court held that an employee is 'under the influence of alcohol' if he is unable to perform the tasks entrusted to him with the skill expected of a sober person. The evidence required to prove that a person has infringed a rule relating to consumption of alcohol or drugs depends on the offence with which the employee is charged. If employees are charged with being 'under the influence', evidence must be led to prove that their faculties were impaired to the extent that they were incapable of working properly. This may be done by administering blood or breathalyser tests...
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> Whether employees are unable to perform their work depends to some extent on its nature. In *Tanker Services*, the question was whether Mr Magudelela's faculties had been impaired to the extent that he could no longer perform the 'skilled, technically complex and highly responsible task of driving an extraordinarily heavy vehicle carrying a hazardous substance'. Having found that he could not safely do so in his condition, the court concluded that Magudelela's amounted to an offence sufficiently serious to warrant dismissal."

31] In the case before me, the employee was not performing 'skilled, technically complex and highly responsible tasks'. He was loading tyres onto trucks. Evidence was led that forklifts were being driven around in the same area and that he could inadvertently have stepped in front of one. Even if this were to be accepted, I do not think the situation can be

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11 *Workplace Law* p 224.

12 [1997] 12 BLLR 1552 (LAC).

equated to the example cited by Grogan or to that in *Transnet.* The same holds true for the factual matrix in *Exactics-Pet (Pty) Ltd v Petalia NO* [13] where the employee was a crane driver.

32] The arbitrator in this case appreciated this distinction and pointed out that a "zero tolerance approach" could not be applied without more to a clerk in the same way as a driver or a pilot.

Evaluation / Analysis

33] It is against this background that the court has to decide whether the conclusion reached by the arbitrator was so unreasonable that no other arbitrator could have come to the same conclusion. The court must bear in mind that, as Waglay DJP recently pointed out in *The National Commissioner of the South African Police Service v Myers & Others*:[14]

> "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."

34] And in Myers, 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."

35] Mr *Ackermann*'s cogent submissions may well have persuaded another arbitrator sitting as a forum of first instance. It may be that this court, sitting in an arbitration or even on appeal, may have come to a different conclusion to that of the arbitrator. But his conclusion, based on his own sense of fairness, falls within a band of reasonable outcomes. He carefully considered the factors outlined in *Sidumo*. He took into account that progressive discipline in this case may well have had the desired outcome of correcting the employee's unprecedented misconduct. His conclusion

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13 (2006) 27 *ILJ* 1126 (LC).

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

that dismissal was too harsh a sanction under the circumstances is not one that no reasonable arbitrator could have come to.

36] The arbitrator did find that the "zero tolerance" rule was unfair; but he did so having regard to the specific circumstances of this case. Although Burger paid lip service to the discretion allowed by the applicant's disciplinary code, the way in which it was applied was closer to Pienaar's understanding. There is no indication that, in deciding on dismissal as a sanction, the applicant took the specific circumstances of this case and the employee's own circumstances into account. On the other hand, that is precisely what the arbitrator did in coming to the conclusion that he did come to. That was not unreasonable.

37] With regard to costs, I take into account that the applicant and SATAWU have an ongoing relationship. The effect of the arbitration award is also that the employee and the applicant will have to continue their relationship. In law and fairness, each party should pay its own costs.

Order

38] The application for review is dismissed. There is no order as to costs.

Anton Steenkamp

Judge of the Labour Court of South Africa

APPLICANT: Adv LW Ackermann

Instructed by Smith Tabata Buchanan Boyes, Cape Town.

THIRD RESPONDENT: Adv M Euijen

Instructed by Gray Moodliar, Port Elizabeth.