Reportable
Of interest to other judges

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN
Case no: C 507 / 06

In the matter between:

THE NATIONAL UNION OF MINEWORKERS First applicant
WILLIAM KHOZA Second applicant

and

CCMA First respondent
COMMISSIONER SHIRAZ MAHOMED OSMAN Second respondent
DE BEERS KIMBERLEY MINES LTD Third respondent

JUDGMENT

STEENKAMP J:

INTRODUCTION

[1] The arbitrator in this matter handed down his award on 10 August 2006, ie before the seminal judgment of the Constitutional Court in *Sidumo & another v Rustenburg Platinum Mines Ltd & others*[1] had been handed down. In determining "whether to interfere with the sanction imposed [by] the employer", the arbitrator specifically deferred to the sanction imposed by the employer and decided that it was "appropriate".

[1] (2007) 28 *ILJ* 2405 (CC)

[2] In a post-*Sidumo* milieu, does that make the award reviewable without more? Or can it be said that "no deference" would have made no difference to the reasonableness of the award?

BACKGROUND FACTS

[3] The second applicant, William Khoza, was employed by the third respondent, De Beers Kimberley Mines Ltd, as a screen operator. He was dismissed for misconduct in February 2006. The misconduct comprised entering false information on a log sheet after the employee had failed to lock out a conveyor belt. After an unsuccessful internal appeal, he referred an unfair dismissal dispute to the CCMA (the first respondent). The arbitrator (the second respondent) found that the employee had failed to lock out a conveyor belt; that he had falsified information on a log sheet; and that the sanction of dismissal was appropriate. In coming to that conclusion, he took into account that the employee had been dishonest. The element of dishonesty arose from falsifying the information as well as lying to his supervisor when he was confronted about it.

[4] At the arbitration, the employee (who was assisted by an union official) testified that:
4.1 There had been a shutdown at his workplace on 9 February 2006. His supervisor asked him to "lock out" the conveyor belt. This entailed switching out the electrical current so that the belt would stop.
4.2 He wrote down the incorrect information on the log sheet that employees had to fill in when locking out a conveyor belt. He subsequently "rectified" that "mistake".
4.3 The charge – of falsifying information – was vague and he did not intend to do so.
4.4 He disputed that his supervisor, Mr Chaza, had approached him on three occasions to ask him whether he had locked out the belt.

4.5 He testified that he had in fact done the lock out and completed the log sheet.

4.6 He found out subsequently that the belt had not been locked, but insisted that his watch may have been wrong when he logged the lock-out .

[5] The arbitrator found that, on a balance of probabilities:

5.1 The employee knew the lock out procedure, as had worked in that position for more than a year.

5.2 He failed to lock out the conveyor belt.

5.3 His version that he had locked out the belt at 07:30 is not plausible -- the company's computerised report indicates that it had only been locked out from 10:15 to 14:01.

5.4 The time that the employee logged on the log sheet did not appear sequentially. On the probabilities, he attempted to falsify information on the log sheet, and not to "rectify a mistake".

5.5 The employee had acted dishonestly.

5.6 The sanction of dismissal was "appropriate".

5.7 Dismissal was substantively fair.

[6] Before I deal with the grounds of review, I must dispose of the question of condonation.

CONDONATION

[7] The third respondent's answering affidavit was filed some 24 days late. Its heads of argument were filed more than two years late, shortly before the hearing of the matter and more than two years after the registrar had directed it to file its heads.

[8] The explanation for these delays is laid mostly at the door of an attorney who has since left the employ of the third respondent's attorneys of record.

[9] The test on whether to exercise the judicial discretion to grant condonation is set out in the by now well-worn *dictum* in *Melane v Santam Insurance Ltd*[2]*.* And the Labour Appeal Court summarised it thus in *Mziya v Putco Ltd*[3]*:*

2 1962(4)SA 531 (A) 532.
3 [1999] 2 BLLR 103 (LAC)

"What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. There is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused…"

[10] Mr *Cloete,* for the applicants, very generously indicated at the commencement of the hearing that he would not oppose the third respondent's application for condonation. I took into account that position, as well the explanation for the delay. Although it has often been held that a litigant cannot always hide behind the negligence of its legal representative, it is clear that the third respondent always intended to oppose the application. And although the delay is substantial – especially in the case of the heads of argument – both parties agreed that it is in the interests of justice that the arguments on both sides should be fully ventilated. Coupled with that, and as will appear more fully from the judgment on the merits, the third respondent has strong prospects of success. In those circumstances condonation is granted. The parties agreed, though, that if the third respondent were to be successful, costs should follow the result, save for the costs occasioned by the application for condonation.

THE REVIEW GROUNDS

[11] The grounds of review raised by Mr *Cloete* are limited. They are these:

11.1 The arbitrator committed a reviewable irregularity by applying the wrong test, ie by deferring to the employer's decision on sanction. This is contrary to the role of an arbitrator as spelt out in *Sidumo.* Coupled with this, the arbitrator should have decided what was a "fair" sanction, and not an "appropriate" one.

11.2 The arbitrator did not take mitigating circumstances into account.

DISCUSSION

[12] I shall deal firstly with the "no deference" argument.

[13] The arbitrator specifically referred to the decision of the Labour Appeal Court in *County Fair Foods (Pty) Ltd v CCMA & others.*[4] He considered himself bound by that authority and stated that "…commissioners must defer to disciplinary sanctions imposed by the employer and only interfere if the sanction is so excessive that it shocks one's sense of fairness. I am of the opinion that the sanction of the respondent is appropriate. The applicant in all probability had acted dishonestly. The sanction for dishonesty is appropriate."

[14] There can be no doubt that, even though the arbitrator applied the law as he understood it at the time, I must apply the test on review as clarified by the Constitutional Court in *Sidumo.* In the oft-repeated language of *Bato Star,*[5] "Is the decision reached by the commissioner one that a reasonable decision maker could not reach?"

[4] (1999) 20 *ILJ* 1701 (LAC)

[5] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others* 2004 (4) SA 490 (CC) at para [44], paraphrased in *Sidumo* para [110].

[15] In *Phalaborwa Mining Co Ltd v Cheetham & others*[6] this court stated that, "without further ado, this court will apply the decision of the Constitutional Court in *Sidumo v Rustenburg Platinum Mines."* And in *National Union of Mineworkers v CCMA*[7] the court, in dealing with the review of an award that had been issued in 2005 (ie pre-*Sidumo*) evinced a preparedness to apply the *Sidumo* test on review, but found it was not necessary in the particular circumstances of the case.

[16] There can be no doubt that this is the correct legal position. It is not so much a matter of applying the *Sidumo* test retrospectively, but simply in applying the law as it always was, albeit clarified by the Constitutional Court in *Sidumo.*

[17] As the Labour Appeal Court recently stated when considering the doctrine of *stare decisis:*[8]

[6] (2008) 29 *ILJ* 306 (LC) at 316

[7] (2008) 29 *ILJ* 378 at 386-7 para [27]

[8] *Mapurunyane v CCMA & others* (JA 46/07, 4 June 2010, as yet unreported) para [92], citing Wille's *Principles of South African Law* (Du Bois et al, 9th ed, Juta 2007) p 88.

"The legal effect of the overruling of a precedent is founded on the notion that this is not a law-making exercise but that the later court corrects a mistake made by the earlier court about what the law has been all along. The upshot is that it has a retrospective effect in the sense that the law must then be taken always to have been as stated in the later case."

Applying *Sidumo* to the award

[18] Is the decision reached by the arbitrator (the second respondent) one that a reasonable commissioner could not reach?

[19] In order to decide this, I must consider whether the result – ie that the dismissal was fair – is reasonable on the basis of an objective viewing of

all the material that was placed before the commissioner at arbitration.[9] In this sense, the *Sidumo* test is essentially a result-based test.

[20] The following remarks in *Fidelity Cash Management*[10] are of assistance in cases such as this one:

[9] See the discussion in *Fidelity Cash Management Services v CCMA & ors* (2008) 29 *ILJ* 964 (LAC); [2008] 3 BLLR 197 (LAC) paras [100] – [103].
[10] *Supra* 997 G-I

"*Whether or not an arbitration award or decision or finding of a CCMA commissioner is reasonable must be determined objectively with due regard to all the evidence before the commissioner and what the issues were that were before him or her. There is no reason why an arbitration award or finding or decision that, viewed objectively, is reasonable, should be held to be unreasonable because the commissioner failed to identify the reasons that existed which could demonstrate the reasonableness of the decision or finding or arbitration award.*"

[21] In the present case, the commissioner did not necessarily fail to identify the reasons why dismissal may have been fair (or, in the commissioner's words, the appropriate sanction). When he deferred to the employer, he applied the wrong test in law. But was the dismissal nevertheless fair?

[22] It should be borne in mind that the parties agreed in a pre-arbitration minute that the arbitrator had to decide on the following: "Though the union believes that there was some mistake on the part of the applicant, they do not believe that dismissal was the appropriate penalty" (my underlining). And at the very beginning of the arbitration, the arbitrator stated: "*That's the only issue that I am supposed to preside on. The sanction of dismissal was too harsh. Too harsh or not appropriate for the offence, for the alleged offence. If anyone disagrees, speak now.*" The applicants – neither Mr Khoza nor his trade union representative – raised no objection. In those circumstances, it ill behoves the applicants now to complain that the commissioner should not have decided whether the sanction of dismissal was appropriate, as he did.

[23] In any event, it seems to me that the distinction Mr *Cloete* attempted to draw between the questions as to whether the sanction was "appropriate" or "fair", is more apparent than real. If the sanction imposed by the employer was fair, it must have been appropriate. And if it was appropriate for the type of misconduct, it must have been fair – at least in a case such as this, where the applicants did not place procedural fairness in dispute.

[24] In this regard, we should bear in mind the duties of an arbitrator as set out in the Code of Good Practice: Dismissal:11

11 Schedule 8 to the LRA, Item 2(1)(b)iv)
12 As he then was – now CJ
13 Para [176] – [178]; my underlining.

"*Any person who is determining whether a dismissal for misconduct is unfair should consider whether the dismissal was an appropriate sanction for the contravention of the rule or standard.*"

[25] Ngcobo J[12] elaborated on this requirement in *Sidumo:*[13]

"It is no doubt the prerogative of the employer to determine in the first instance that it will dismiss employees who are guilty of particular infractions of its disciplinary code and then in a particular case decide whether to impose that sanction. Both the rule and the sanction must be reasonable, otherwise dismissal cannot be fair. All this is implicit, if not explicit from Item 7 of the Code which requires a commissioner, in considering whether a dismissal is fair, to consider the reasonableness of the employer's rule or standard and the appropriateness of dismissal as a sanction for the contravention of the rule or standard.
"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… 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 a discretion. 9

"But recognizing 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."
It is in this sense that I must consider whether the commissioner's finding – ie that the dismissal was substantively fair – was a reasonable conclusion, even though the commissioner was under the impression that he had to defer to the employer.
[26] In this regard, the commissioner took into account the following facts that emerged during the arbitration:
26.1 The inherently dangerous nature of the company's operations;

26.2 The employee's particular responsibilities in relation to the safety of fellow workers;

26.3 The possible consequences of his failure to follow the correct lock out procedure – it was uncontested that it could have led to fatalities;

26.4 The employee's conduct in covering up his misconduct when confronted;

26.5 The employee's continued dishonesty and lack of remorse. In this regard, he lied to his immediate superior, Chanza, on the date of the incident; secondly at the disciplinary hearing; and thirdly at the arbitration. Only at the hearing of this application did his legal representative concede that he had acted dishonestly).

26.6 The employer's evidence that the trust relationship had broken down irretrievably.

[27] Significantly, these last three factors – amongst others - distinguish the circumstances leading to the employee's dismissal from those pertaining to Mr Sidumo.

[28] What about the issue of mitigation? It does not appear from the reasons for the award that the arbitrator specifically had regard to evidence in mitigation. Nor does it appear that the applicants led any evidence in mitigation at the arbitration. However, the employer's human resources superintendent, Mr Mathakgame, did testify that the recommended sanction for the offence (of falsifying information) in the company's disciplinary code was dismissal; that the employee had acted dishonestly; and that mitigating and aggravating circumstances had been considered at the disciplinary hearing. This included the employee's record and personal circumstances. However, the offence was seen in a serious light and went to the heart of the trust relationship. The employee's supervisor, Mr Chaza, testified that he had known him (Khoza) for more than eight years; however, this long service should count against him, as he was familiar with the relevant procedures. The second applicant, Khoza, testified that he had worked as a "screen operator" since 1994.

[29] In *Cox v CCMA*[14] the court expressed the opinion that, where it had been shown that the employee was dishonest and that the trust relationship had broken down, mitigation may not be relevant. And in the recent case of *Miyambo v CCMA*[15] the Labour Appeal Court reiterated that "our courts place a high premium on honesty in the workplace".[16]

[30] The court in *Miyambo* cited with approval the following *dictum* in *Hulett Aluminium (Pty) Ltd v Bargaining Council for the Metal Industry & others*[17]:

14 (2001) 22 *ILJ* 137 (LC)
15 [2010] JOL 25840 (LAC), 2 June 2010
16 Para [17]
17 [2008] 3 BLLR 241 (LC) para [42], cited at *Miyambo v CCMA* para [16]

"…the presence of dishonesty tilts the scales to an extent that even the strongest mitigating factors, like long service and a clean record of discipline are likely to have a minimal impact on the sanction to be imposed. In other words whatever the amount of mitigation, the relationship is unlikely to be restored once dishonesty has been established, in particular in a case where the employee shows no remorse. The reason for this is that there is a high premium placed on honesty because conduct that involves corruption by the employee damages the trust relationship which underpins the essence of the employment relationship."

CONCLUSION

[31] In the light of these authorities and the evidence led at the arbitration, I do not consider the conclusion that the arbitrator reached to be one that a reasonable commissioner could not reach. Even if the arbitrator had considered the fairness of the sanction of dismissal in the light of *Sidumo*, and without considering any deference to the employer, the conclusion that dismissal was a fair sanction would have been reasonable. And in the light of the employee's dishonesty and lack of remorse, his long service would not have been sufficient mitigation to alter the fairness of the sanction.

[32] The application for review is dismissed. The applicants are ordered to pay the third respondent's costs, save for the costs occasioned by the third respondent's applications for condonation.

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ANTON STEENKAMP
Judge of the Labour Court

Date of hearing: 22 September 2010
Date of judgment: 22 October 2010
For the applicants: Neville Cloete attorney, Kimberley
For the third respondent: Jose Jorge of Perrott, Van Niekerk & Woodhouse, Cape Town