

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)**

CASE NO: JA 7/2006

REPORTABLE

In the matter between:

PALABORWA MINING COMPANY LIMITED
Appellant

and

ANTHONY JAMES CHEETHAM

Respondent

First

(Applicant a

quo)

**COMMISSION FOR CONCILIATION MEDIATION AND
ARBITRATION**

Respondent

Second

(First Respondent a

quo)

REUBEN HLOKWE N.O.

Respondent

Third

JUDGMENT

WILLIS JA:

[1] The appellant (the employer) appeals, with the leave of the court *a quo* (*per* Revelas J), against the order of that court in which the award of the third respondent, a commissioner of the Commission for Conciliation Mediation and Arbitration (“the CCMA”) was reviewed and set aside. I shall refer to the third respondent as “the commissioner”.

The Labour Court made the following order:

- i) The dismissal of the Applicant was substantively unfair by virtue of the second respondent’s failure to give adequate regard to the applicant’s personal circumstances;
- ii) The Applicant is to be paid compensation in an amount equal to eight months compensation; and
- iii) The Third Respondent is to pay the Applicant’s costs

The Second Respondent in the court *a quo* was the commissioner. The Third Respondent in the court *a quo* was the employer. The commissioner delivered his award on 13th April 2004. He found the dismissal of the first respondent (the employee) to have been both substantively and procedurally fair. The employee took the commissioner’s decision to the Labour Court on review. This resulted in the order of the Court *a quo* which was given on 24th October 2005.

The employee did not wish to be reinstated.

[2] The reasons which the court *a quo* gave for finding the dismissal to have been unfair were that the commissioner had adopted an “inflexible approach” and that

on the evidence before me, the applicant did not behave in a fashion which endangered others. His job description did not place him in a category where he could harm others. Furthermore, his demeanour could not be described by anyone as being any one of those listed in the code. It would appear that if he was not tested for alcohol, nobody would have noticed that he had consumed alcohol. Furthermore, the applicant is 58 years old and a first offender. These are all factors which should have been taken into account but were not.

[3] The material facts are, essentially, common cause. The employer, which operates a mine, has a written policy that any mine employee – which this employee was – found to have more than 0,05 gram of alcohol per 100 millilitres of blood while on duty may be dismissed for a first offence. The employee was aware of this policy. The employee, who was company secretary, was subjected to a random alcohol test at the main entrance to the mine on 13th March, 2003. His blowing into a alcohol meter indicated that he was probably under the influence of alcohol. He was immediately taken to a security control room for an alcometer test which showed that he had 0,115 gram per 100ml in his

blood. A second test, taken twenty minutes later, showed a reading of 0.095 gram per 100ml. The employee admitted having consumed alcohol the previous night, although his accounts of how much varied from time to time. The employee tried to challenge the accuracy of the readings but, as the commissioner correctly observed, the evidence as a whole was, on a balance of probabilities, against the employee. Counsel for the employee conceded in this court that the employee's guilt was not in issue in the appeal. Furthermore, there was no cross-appeal noted in regard to the court *a quo's* finding in this regard. The employee had eight years of service with the employee. He was 58 years' old at the time. The level of intoxication, above the proscribed limit, resulted in his dismissal. His internal appeal was unsuccessful. The employer has justified its strict policy in this regard by relying on its duty to ensure the safety of its employees working at the mine. It justified its dismissal of this particular employee on the grounds that it had to be consistent and, although he was a first offender, in view of the employee's senior and responsible position, he should have been above reproach with regard to this issue. When the dispute relating to the alleged unfair dismissal of the employee was referred to the commissioner for arbitration, he found no quarrel with the employer's reasons for dismissing him. No exceptional circumstances were raised at any stage by the employee. He did, however, complain that he was under a certain amount of stress and had been taking antibiotics. The

commissioner, having found the dismissal of the employee to have been substantively and procedurally unfair, confirmed the dismissal.

[4] The question of the appropriate standard in cases when the arbitration awards of commissioners of the CCMA are considered on review has vexed employees and employers, lawyers, the CCMA, the Labour Court, the Labour Appeal Court and the Supreme Court of Appeal since the commencement of the Labour Relations Act No 66 of 1995 (LRA). The law reports are replete with judgments in this regard. The difficulties which the issue has presented have required considerable forbearance on the part of litigants. The legal determination of appropriate margins of tolerance for decisions made by others is, unfortunately, not only intellectually complex but also profoundly dialectical. The Constitutional Court has now spoken on the matter in the as yet unreported case of *Sidumo v Rustenburg Platinum Mines* (Case No CCT 85/06). The judgment was delivered on 5th October, 2007. This court is indebted to counsel for the parties in referring us to many of the cases which were considered by the courts before this recent judgment of the Constitutional Court. It seems fair to say that, insofar as the appropriate standard is concerned, these judgments are now, essentially, of archival relevance only. It should be recorded that the heads of argument in this matter were filed in August and December 2006 by the employer and employee

respectively. The Constitutional Court itself has said that its judgment raised “issues of importance to employers and employees alike”. With due respect to the Constitutional Court, it must be observed that this statement reflects an acutely modest understatement. The judgment is indeed of massive importance. Whatever other consequences there may be, the task of the Labour Courts has been hugely facilitated by the Constitutional Court’s judgment. The standard is:

the one in *Bato Star*¹: is the decision reached by the commissioner one that a reasonable decision-maker could not reach?

These are the *ipsissima verba* of Navsa AJ, delivering the judgment of the majority of the Constitutional Court². Despite the fact that decision-makers, acting reasonably, may reach different conclusions, the LRA has given the decision-making power to the commissioner and there it rests, unless it be concluded that a reasonable decision maker could not reach such a conclusion.³ Indeed, read together with *Bato Star*, upon which the majority decision in *Sidumo v Rustenburg Platinum Mines* so strongly relies, the judgment has the clear effect that the courts, and, in particular, the Labour Courts, must defer (but not in an

¹ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para [44] and see para [107] of the *Sidumo v Rustenburg Platinum Mines* case (*supra*) where O’Regan J is quoted, quoting, in turn, from Lord Cooke in *Associated Provincial Picture houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA) at 233-4; [1947] 2 All ER 680

² See para [110] of the judgment

³ See para [119] of the judgment

absolute sense) to the decision of the commissioner.⁴ In the minority judgment of Ngcobo J, it is noted that the intention of the LRA is that

as far as is possible arbitration awards would be final and would only be interfered with in very limited circumstances.⁵

It needs to be emphasised that, although different paths of reasoning were followed in the differing judgments of the Constitutional Court dealing with this particular case, the court was unanimous as to the order which should be made. Lest there be any doubt, it is this:

the Commissioner's award is restored.⁶

[5] The result in the Constitutional Court's decision in the *Sidumo v Rustenburg Platinum Mines* case illuminates the reasoning. In that case, the employee was a security officer whose duty it was to search employees leaving a certain point. Video surveillance revealed that he had, in 24 specifically monitored instances, conducted only one search in accordance with established procedures. On eight occasions, he conducted no search at all. Fifteen other searches did not conform to procedures. The video also revealed that Sidumo allowed persons to sign the search register without conducting any search at all.⁷ For this he was dismissed. The commissioner took into account the employee's long service, the fact that no losses appear to have resulted from his failure to perform his duty, that the violation had been unintentional or a "mistake" and that it had not been shown that the employee had been dishonest and found that the dismissal was too harsh a sanction.⁸ This resulted in the award reinstating the employee.⁹ Despite robust criticisms of the commissioner's reasoning¹⁰, the Constitutional Court

⁴ See *Bato Star* (footnote 1 above) at paras [46] to [48]

⁵ See at para [245] of *Sidumo v Rustenburg Platinum Mines* case (*supra*)

⁶ See at para [121] of *Sidumo v Rustenburg Platinum Mines* case (*supra*)

⁷ See para [15] of the judgment

⁸ See para [21] of the judgment

⁹ *ibid*

¹⁰ See paras [115], [116], [284] and [285] of the *Sidumo v Rustenburg Platinum Mines* case (*supra*). The criticisms of the Supreme Court of Appeal and the Labour Appeal Court were even more trenchant – see paras [16], [33] and [51] of *Rustenburg Platinum Mines Ltd v CCMA* 2007 (1) SA 576 (SCA).

restored the commissioner's award.¹¹ This was the dispute which travelled, with sharply differing views among the judiciary, to the Labour Court, the Labour Appeal Court, the Supreme Court of Appeal and, finally, seven years after the dismissal, to the Constitutional Court.

[6] Ironically, in *Bato Star*, the Constitutional Court referred with approval to Schutz JA's endorsement of Professor Hoexter's understanding of "deference" as entailing, *inter alia*, "according...due respect", being "sensitive to the interests legitimately pursued", being sensitive to "the practical and financial constraints", "a careful weighing up of the need for - and the consequences of ... intervention", and "a conscious determination not to usurp the functions of...".¹² The context was different. Do these considerations evaporate and does the principle change when it comes to an employer's decision to dismiss? It seems that they do. The decision of the Constitutional Court *Sidumo v Rustenburg Platinum Mines* (Case No CCT 85/06), does not entail a shift away only from any degree of deference towards employers¹³. It also:

¹¹ See para [121] of the judgment

¹² See para [46] of the Constitutional Court's judgment in *Bato Star (supra)*, Schutz JA's judgment in *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd and Another; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA) at para [47]; Professor C Hoexter 'The Future of Judicial Review in South African Administrative Law' (2000) 117 SALJ 484 at 501-2; also cited by Cameron JA in *Logbro Properites CC v Bedderson NO and Others* 2003 (2) SA 460 (SCA) at para [21].

¹³ See, especially, paras [61] to [79] of the judgment in which any deference by the commissioner, in determining the fairness of the employer's decision to dismiss was, with emphatic resolution, rejected.

- (a) as in this case, reduces the scope for a dissatisfied employee to take his or her dispute further¹⁴; and
- (b) reduces the potential for the Labour Courts and the Supreme Court of Appeal to exercise scrutiny over the decisions of commissioners who are appointed to arbitrate in terms of the LRA¹⁵.

The majority judgment in *Sidumo v Rustenburg Platinum Mines* made it clear that the CCMA is not a court of law, although there are similarities.¹⁶ Nevertheless, the courts must defer to it. Ngcobo J held that the function of the CCMA is adjudicative when commissioners resolve labour disputes through arbitration.¹⁷ Indeed, he says that the function is judicial in nature.¹⁸ The CCMA is not, however, in Ngcobo's opinion a court of law.¹⁹ Nevertheless, its functions are "substantially similar in form and substance to those performed by a court of law".²⁰ Interestingly, the considerations which justify deference to decision-makers such as members of the executive and public servants²¹ are

14 For reasons which it is hoped are clear from the preceding paragraphs in this judgment, the test is now very much narrower and simpler. And see, also, footnote 42 below. Indeed, it will be rare indeed that the courts can interfere with a dismissal which has been confirmed by a commissioner. It is surely difficult for a court, in the light of two successive decisions in the same matter, by different persons, having different interests, to find that the decision to dismiss was one which a reasonable decision-maker could not reach?

15 Again, for reasons which, it is hoped are clear from the preceding paragraphs in this judgment, the test is now very much narrower and simpler. And see, also, footnote 42 below.

16 See paras [84] and [85] of the judgment

17 See paras [204],[208],[212],[216],[217],[218],[229], [236] and [237] of the judgment.

18 See para [236] of the judgment

19 See para [220] of the judgment.

20 See para [236] of the judgment

21 See, once again, para [46] of the Constitutional Court's judgment in *Bato Star (supra)*, Schutz JA's judgment in *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd and Another; Minister of Environmental Affairs*

not readily apparent when it comes to commissioners of the CCMA. The following features are important when considering the powers and functions of commissioners who are appointed to arbitrate in terms of the LRA:

- i) unlike judges, commissioners are not subject to any comparable provisions of section 16 of the Supreme Court Act²² which requires that, except in special cases, judges are to conduct their proceedings in public²³;
- ii) Unlike courts, the decisions of commissioner's are not amenable to appeal²⁴;

and Tourism and Others v Bato Star Fishing (Pty Ltd (supra at footnote 12) at para [47]; Professor C Hoexter 'The Future of Judicial Review in South African Administrative Law' (supra at footnote 12); also cited by Cameron JA in Logbro Properites CC v Bedderson NO and Others (supra at footnote 12) at para [21].

22 No 59 of 1959

23 Section 138 (1) of the LRA appears to give the commissioner a wide discretion to decide what he or she considers appropriate. It is true that section 34 of the Constitution of the Republic of South Africa, 1996 provides that "everyone has the right to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum." (Emphasis added). Section 34 of the Constitution appears, however, to give the right to litigants and not to the general public. See, however, Bosch, Molahlehi, and Everett's The Conciliation and Arbitration Handbook, published by LexisNexis, Butterworths, 2004 at p145 in which they argue that, by reason of section 34 of the Constitution, arbitrations held under the auspices of the CCMA should, generally, be public. In any event, "the public gaze" is less overt when commissioners discharge their functions than when courts do so. The very design of court buildings is such that public attendance is encouraged and the discharge by judges of the process of adjudication is on display. The rooms in which commissioners arbitrate are, essentially, indistinguishable, from boardroom offices around the country.

24 See section 143 of the LRA which provides that arbitration awards by commissioners of the CCMA are final. Ironically, if the director of the CCMA, exercises a discretion in terms of section 191 (6) of the LRA or to refer a dispute to the Labour Court, if an employee elects, in terms of section 191 (12) of the LRA for the dispute to be heard by the Labour Court, or if the dispute, in terms of section 191(5) is one which must be heard by the Labour Court, then an appeal lies, in terms of section 166 of the LRA to the Labour Appeal Court.

- iii) judges are accountable to the Judicial Services Commission²⁵ but there is no comparable provision in the LRA or elsewhere for commissioners²⁶;
- iv) there is no provision of law for the appointment of commissioners which is comparable to the provisions of section 174 of the Constitution which relate to the appointment of judges;
- v) the norms, traditions, practices and customs which require that a person should, *inter alia*, have a lengthy track record of proven competence in order to qualify as a “fit and proper person”²⁷ to be appointed as a judge do not apply in the case of commissioners;
- (vi) unlike arbitrators appointed in terms of the Arbitration Act²⁸, or, for that matter, arbitrators appointed Bargaining Council panels, commissioners do not discharge their powers with the consent of the parties;²⁹
- vi) unlike public servants, commissioners are not accountable to a member of the executive branch of

²⁵ See section 177 of the Constitution

²⁶ See, in contrast, section 113 of the LRA

²⁷ See section 174 of the Constitution

²⁸ Compare sections 1 and 3 of the Arbitration Act, No. 42 of 1965 with sections 27, 30 and 65, read with sections 191(1) and 191(5) of the LRA (on the one hand) and with sections 115(1) (b), and 133 (2) read with sections 191(5) and 193(1) of the LRA (on the other hand).

²⁹ See footnote 28 above

government³⁰ who, in turn, is held accountable by his or her respective legislature³¹;

- vii) unlike public representatives, commissioners are not answerable to an electorate³²;
- viii) unlike private sector employees, commissioners are shielded from the feedback and responsiveness that are, albeit often imperfectly, inherent in market forces;
- ix) unlike employers, commissioners do not have to bear the costs, economic and otherwise, either of dismissal (on the one hand) or of reinstatement of compensation orders (on the other);
- x) unlike employees, commissioners do not have to bear the tragic consequences which often flow from dismissal;
- xi) although there is a Code of Good Practice for Dismissals³³, unlike departments of government, the CCMA has no policy guidelines which operate to ensure consistency, predictability and reliability in the decisions of commissioners;
- xii) unlike the courts, the CCMA does not have, and cannot

³⁰ Compare section 113 of the LRA, which makes the CCMA independent of the State, political parties, trade unions and employer organizations with section 92, read with section 197 (1) of the Constitution

³¹ See sections 92, 133 & 152 (read with section 156) of the Constitution

³² Compare section 113 of the LRA with section 19(2) of the Constitution

³³ See Schedule 8 of the LRA

have, a hierarchical system with binding precedent or through which guidelines can evolve over time.

A lawyer might better understand the peculiar³⁴ position of CCMA commissioners when they arbitrate in terms of the LRA if it were to be described as both quasi-administrative and quasi-judicial. The position of commissioners of the CCMA has elements of both administrative and judicial powers and functions without, in any conventionally understood sense, quite being either. Furthermore, the traditional “hands off” approach of the courts to arbitrations has, at its root, the fact that the parties agreed not only to submit to arbitration but also agreed upon their arbitrator³⁵. In *Dickenson & Brown v Fisher’s Executors*³⁶ the following *dictum* of Lord Halsbury in *Caledonian Railways v Turcan*³⁷ was quoted with approval:

The parties have *selected* the arbitrator as judge of fact and law, and if he be ever so erroneous in the decision at which he has arrived it is conclusive upon the parties...; his award is final, and whether it be right or wrong in point of law, it is a matter with which I am not entitled to deal. (emphasis added)

Indeed, the term “compulsory arbitration” when used to refer to

³⁴ The adjective is here used in its original, pure and literal sense of “particular”, “special” or “exclusively belonging to” rather than the more colloquial sense of being “odd”- see the Oxford Dictionary. A lawyer might prefer the term *sui generis* to describe the position.

³⁵ See, for example, *De Beers Consolidated Mines Ltd v CCMA & Others* (2000) ILJ 1051 (LAC) at [2000] 9 BLLR 995 (LAC) at paras [55] to [59]

³⁶ 1915 AD 166 at 174

³⁷ 1898 AC 256

arbitrations conducted by commissioners of the CCMA in terms of the LRA, without the agreement of the parties, is almost an oxymoron. An arbitration is:

A method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding.³⁸

It seems not unreasonable to assume that the term “arbitration” was employed in the LRA because it had gained a certain currency and perhaps even a certain “magic” by reason of the extraordinarily successful contribution of a private agency, the Independent Mediation Service of South Africa (“IMSSA”) to labour relations, and indeed other areas as well, in the decade which preceded the coming into being of the democratic order in our country. IMSSA arbitrations were consensual. Commissioners of the CCMA have the advantages both of administrative decision-makers (their decisions are not disturbed merely because a court considers them to have been wrong) and judicial officers (independence) but are not subject to most of the checks and balances that are applicable to an administrative decision-maker or a judicial officer or even a decision-maker in the private sector. The implications are considerable.

[7] It is apposite, for a number of reasons, to refer to the well-known case of *Cassell &*

³⁸ Black’s Law Dictionary, 7th Edition. The Oxford Dictionary, however, defines arbitration by reference to the parties having *chosen* the arbitrator.

*Co Ltd v Broome*³⁹ which has been referred to with approval in *S v Kgafela*⁴⁰. Lord Denning and two other judges of the English Court of Appeal had decided that the decision in the House of Lords in a certain case⁴¹ had been decided *per incuriam* and was *ultra vires*. The Court of Appeal went further still and said that the decision was “unworkable” and that “judges should direct juries in accordance with the law as it was understood *before Rookes v Barnard*.” (the decision in the House of Lords with which the Court of Appeal disagreed). In the House of Lords each of their lordships delivered a separate Speech. The Lord Chancellor, Lord Hailsham of St Marylebone, whose opinion prevailed, said:

In view of their importance it is unavoidable that before entering into the merits of the appeal I should discuss in a few paragraphs both the propriety and desirability of the course taken by the Court of Appeal. I desire to do so briefly and with studied moderation.

Lord Hailsham went on to refer to the importance of judicial precedent in a hierarchy of courts and said that a dispute between the Court of Appeal and the House of Lords was “unedifying”. He then went on to say:

But, much worse than this, litigants would not have known where they

³⁹ [1972] AC 1027; [1972] All ER 801 (HL)

⁴⁰ 2003 (5) SA 339 (SCA) at para [3]

⁴¹ *Rookes v Barnard* [1964] AC 1129; [1964] 1 All ER 367 (HL)

stood. None could have reached finality short of the House of Lords, and, in the meantime, the task of their professional advisers of advising them either as to their rights, or as to the probable cost of obtaining or defending them would have been, quite literally impossible. Whatever the merits, chaos would have reigned until the dispute was settled, and, in legal matters, some degree of certainty is at least as valuable a part of justice as perfection.

The fact is, and I hope it will never be necessary to say so again, that, in the hierarchical system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal to accept loyally the decisions of the higher tiers.

Lord Reid, who concurred with Lord Hailsham (as did Lord Morris of Borth-Y-Gest, Lord Wilberforce (on the question of precedent), Lord Diplock and Lord Kilbrandon) noted that the Court of Appeal chose to “attack the decision of this House as bad law”. He said they were “quite entitled to state their views and reasons for reaching that conclusion” but was dismayed that they did not apply the decision of the House of Lords. He described this as an “aberration”. Later he said that “(i)t is perfectly legitimate to think and say we were wrong.” The point is this: courts lower in the hierarchy may disagree with decisions of those that are higher and may even say so. Nevertheless, they are bound to follow the decisions in higher courts. It has been impossible not to have been aware that “the chickens have been squawking” since the decision in *Sidumo v Rustenburg Platinum Mines*. It would be unedifying for this court to enter into the coop. In any event, the views of at least one of the members of this court have been expressed

elsewhere.⁴² Without further ado, this court will apply the decision of the Constitutional Court in *Sidumo v Rustenburg Platinum Mines*.

[8] If one compares the facts *in casu* with the facts in the case with which the Constitutional Court was concerned, then the obvious, inevitable and necessary conclusion is that the learned judge in the court *a quo* was clearly wrong in interfering with the award of the commissioner. The appeal must succeed. As was noted earlier, the implications of the Constitutional Court's decision are considerable. Clearly, commissioners of the CCMA have a weighty responsibility to act fairly.

[9] Counsel for the employer graciously conceded that, as this was a difficult matter which had come before the CCMA and the Labour Court before the decision in *Sidumo v Rustenburg Platinum Mines*, it would be appropriate not to make a costs order against the employee. This approach is to be commended.

[10] The following is the order of this court:

- i) The appeal is upheld;

⁴² See, for example, *De Beers Consolidated Mines Ltd v CCMA & Others* (2000) ILJ 1051 (LAC); [2000] 9 BLLR 995 (LAC) at paras [37] to [61]; and see also *Branford v Metrorail Services (Durban)* (2003) 24 ILJ 2269 (LAC) at 2275-2277; [2004] 3 BLLR 199 (LAC) at 205-206. In the former case, the relevant judgment proposed interfering with the award of the CCMA commissioner with a result favouring the employer, in the later the relevant judgment proposed not interfering with the award of the CCMA commissioner to the benefit of the employee. Interestingly, the final outcome in both cases would, in the light of the Constitutional Court's decision in *Sidumo v Rustenburg Platinum Mines*, now not be possible.

- ii) The order of the court *a quo* given in this matter on 24th October 2005 is set aside;
- iii) The following is substituted for the order of the Court *a quo*:

“The application is dismissed.”
- iv) There is no order as to costs either in this court or the court *a quo*.

**DATED AT JOHANNESBURG THIS 30TH DAY of
NOVEMBER, 2007**

N.P. WILLIS

JUDGE OF THE LABOUR APPEAL COURT

PATEL JA:

[11] I have had the benefit of reading the erudite judgment of my brother Willis JA. I do not disagree with his conclusion and his reasoning but do not necessarily agree with all opinions expressed by him in paragraph [6] of his judgment.

[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 to constantly remind itself that in assessing the reasonableness or otherwise of a decision of the CCMA Commissioner, a court need not necessarily agree with the decision of the Commissioner. A court sitting on review may arrive at a different decision or finding to that reached by the Commissioner. By way of example, I advert to the case of *Mondi Paper Co v Dlamini* [1996] 9 BLLR 1109 (LAC) where the court held that it is not sufficient for the employer to establish on a balance of probabilities that the employee was drunk on duty. McCall J at page 1113 stated this

“In my opinion, the evidence goes no further than to establish that the Respondent had consumed alcohol and was smelling of alcohol at the time when the tests were taken. The fact that his speech was slurred is, in itself, not indicative of intoxication. It may be an indication of intoxication and it is one of the recognized methods of determining intoxication, but unless one excludes any other possibilities such as tiredness or the fact that the person has a natural tendency to slur his speech, it is not in itself proof of intoxication. The test carried out with the apparatus, although they tended to show a level of about 0.08 percent are also not conclusive, and as I understand the evidence, ought not to be regarded by the Appellant as conclusive, because a slightly lower blood/alcohol level than that would have meant a totally different attitude by the Appellant towards the person to be disciplined. Unless the equipment was totally reliable and completely

accurate, it would be unfair, in my view, simply to rely on the reading in order to determine whether a person should be dismissed or sent home with a warning.”

The employee in this case was a clerk in the stores. The breathalyser test found him to be sufficiently drunk on duty and this constituted a dismissible offence in the employer’s disciplinary code. The apparatus to measure his drunkenness was found to be inaccurate. The employee’s dismissal was deemed to be unfair and the decision of the Industrial Court was allowed to stand. If this decision is to be followed, the outcome for the employee would be different. I myself have a fair amount of sympathy for the employee but that is not the test since the *Sidumo* judgment.

[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 commissioners 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 in all at the circumstance. On this test I cannot gainsay the decision of the third respondent. I therefore concur with the conclusion

and order by Willis JA.

C.N.PATEL

JUDGE OF THE LABOUR APPEAL COURT

TLALETSI AJA:

[14] I have had the benefit of reading the judgments of both Willis and Patel JJA. I have a similar reservation to that expressed by Patel JA in paragraph [11] of his judgment especially with regard to paragraph [6] of the judgment of Willis JA. I concur, however, with the conclusion and order of Willis JA.

L.P. TLALETSI

ACTING JUDGE OF THE LABOUR APPEAL COURT

Counsel for Appellant: *F.A. Boda*

Attorneys for Appellant: Brink Cohen Le Roux Inc

Counsel for Respondent: *F. Venter* (heads of argument prepared by *T.E. Seery*)

Attorney the Respondent: Johannes De Beer Inc

Date of hearing: 9th November, 2007

Date of Judgment: 30th November, 2007