



REPUBLIC OF SOUTH AFRICA

Not Reportable

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Case no: CA 13/2012

In the matter between:

SOUTH AFRICAN BREWERIES LIMITED

Appellant

and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

First Respondent

TARIQ JAMODIEN N.O.

Second Respondent

CEDRIC KARSTENS

Third Respondent

Heard: 29 August 2013

Delivered: 30 May 2014

Summary: review of arbitration award. Employee dismissed for unauthorised consumption of employer's property and being intoxicated while on duty- evidence proving only unauthorised consumption of alcohol. Employee misconducting himself- misconduct not serious as to warrant dismissal- lack of remorse and dishonesty not another charge but an aggravating factor- arbitrator finding dismissal inappropriate - Labour Court refusing to intervene- Labour Court's judgment upheld- appeal dismissed with costs.

Coram: Waglay JP, Musi and Dlodlo AJJA

JUDGMENT

DLODLO AJA

Introduction

- [1] This is an appeal against the judgment of the Labour Court. In its judgment, the Labour Court found that the arbitrator reached a conclusion that a reasonable decision-maker could have come to and that therefore such conclusion should not be set aside.
- [2] In the award, the Commissioner described the employee's (Karstens) dismissal as unfair. It is contended on behalf of the Appellant that the award ought to have been reviewed and set aside on the basis that the arbitrator's approach to sanction failed to take into account material facts and that he over-emphasized certain other considerations to the detriment of the Appellant. The contention made on behalf of the Appellant is that the extent of Karstens' dishonesty coupled with his recalcitrant attitude in the subsequent hearings displaced any mitigating effect that his length of service and disciplinary record could have had. On the other hand, on Karstens' behalf, the contention advanced is that the arbitrator correctly applied the prevailing law that required him to determine under all the circumstances whether the dismissal was fair.
- [3] The determination of whether the dismissal was fair is a requirement that must be exercised by the arbitrator independently. I set out the factual background *infra*.

The factual background

- [4] Karstens worked for the appellant as from 1989. Three counts of misconduct were proffered against him and he was found guilty on all three counts on 15 March 2011. He was subsequently dismissed from the employment upon the conclusion of all the internal processes. The charges Karstens faced were (a) Drinking alcohol on

duty; (b) Unauthorized removal and consumption of alcohol belonging to the appellant; (c) Operating machinery after having consumed alcohol. All these charges, I hasten to add, emanated from one incident. Karstens was employed by the appellant as a process operator. It is apparent from the record of the proceedings that the appellant had been experiencing theft of beers from its sample refrigerators. It then installed a covert video camera in its samples laboratory on 6 February 2011.

- [5] It was said that early in the morning of 7 February 2011, Karstens took a 750 ml beer bottle from the appellant's sample refrigerator and consumed it. The CCTV footage used as evidence shows that Karstens "*had taken a few sips from the bottle of beer.*" Karstens then returned to work on the appellant's production line where he operated heavy machinery. When he was confronted with the CCTV footage, Karstens came up with an elaborate and an untruthful defence. He stated that the bottle contained carbonated water and not beer. Even at his internal disciplinary proceedings, an internal appeal hearing and the arbitration itself this remained Karstens' defence. Karstens' defence was, however, rejected by the Commissioner as untruthful. In effect, Karstens was pronounced guilty of the charges proffered against him as listed above. Notwithstanding these findings, the Commissioner concluded that the misconduct was not serious enough to warrant dismissal.
- [6] The Commissioner concluded that the dismissal was substantively unfair and reinstatement without back pay was ordered. It is important to mention that the overriding fact in the Commissioner's view appears to have been that Karstens had long service with the Appellant. The latter then applied to the court *a quo* to review and set aside the award. In concluding that the sanction of dismissal was unfair, the Commissioner reasoned that (a) the breathalyzer test had measured 0.00% "*which implies that he was fit to work and hence did not place the business at risk;*" (b) the first charge (drinking on duty) was described by the Commissioner as a "*misdemeanour*" on the basis that Karstens had taken "*a few sips from the bottle of beer;*" (c) the second charge was referred to as "*the unauthorized taking of beer*". The dishonesty displayed by Karstens' failure to own up was contrasted by his long

service and his generally unblemished disciplinary record. That led to the Commissioner's finding that Karstens deserved a sanction short of dismissal. As stated earlier on in this judgment, the review application was unsuccessful primarily on the finding that the conclusion reached by the Commissioner was one which a reasonable decision-maker could have reached.

Discussion

- [7] The review test is contained in the majority judgment of the Constitutional court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC); [2007] 12 BLLR 1097 (CC). The review test set out in paragraph 110 of the judgment reads:

'Is the decision reached by the Commissioner one that a reasonable decision-maker could not reach?'

The Labour Appeal Court in the *Afrox Healthcare Ltd v Commission for Conciliation Mediation and Arbitration and Others* (2012) ILJ 1381 (LAC); [2012] 7 BLLR 649 (LAC) per Mlambo JP in upholding an appeal brought by a company commenced by undertaking an assessment of the Commissioner's reasoning in the context of the evidence led and concluded that the Commissioner had not taken proper account of material placed before him and had failed to conduct a proper appraisal of the critical portions thereof.

- [8] Turning to the review test (having referred to *Sidumo* matter *supra* and *Carephone (Pty) Ltd v Marcus NO and Others* [1998] 11 BLLR 1093 (LAC) and other authorities), the LAC held as follows:

'The fact of the matter is that the reasonable decision-maker yardstick crafted in Sidumo, viewed in proper context, is none other than that in the absence of a 'rational objective basis' (the Carephone test) between the decision arrived at and

*the material placed before the decision maker, the relevant decision is clearly not one which a reasonable decision maker would have arrived at.*¹

[9] In the instant matter, the Commissioner had to answer questions such as (a) was Karstens guilty of the charges; and if so, (b) was dismissal a fair sanction; and, if not, (c) what penalty, if any, should be imposed. This task on the shoulders of the Commissioner had to be performed by way of a *de novo* hearing and the Appellant bore the *onus* of proof. The record of proceedings reveals that when embarking on the analysis of the materials before him, the Commissioner dispensed with the defence put up by Karstens in respect of the charges he faced. In other words, he indeed found that Karstens was guilty of misconduct. Then obviously the next issue the Commissioner had to determine was what was a fair sanction. In dealing with the sanction, the Commissioner referred to the *Sidumo* judgment *supra* particularly where the judgment reads that “*fairness requires a balancing of the interest (sic) of the employer and employee parties*” and that “[a]n arbitrator must consider the totality of circumstances in determining the fairness of the sanction.” I agree with the proposition made on behalf of Karstens that the arbitrator considered his role to be the determination of whether the employee’s dismissal was fair based upon all the relevant circumstances. Notably, in the award, the Commissioner recorded the ratio of this Court in *Fidelity Cash Management Services v CCMA and Others* [2008] 3 BLLR 197 (LAC), namely, “...the Commissioner would have to answer the question whether dismissal was in all the circumstances a fair sanction.” demonstrates that the arbitrator was alive to the issues placed before him for determination.

[10] He correctly found that the Appellant was entitled to take a tough stance on alcohol related misconduct and that the stance should not readily be interfered with. But the arbitrator had a duty to assess “*all factors*” and come to a decision “*which is even handed and fair.*” Upon the analysis of the evidence and the charges proffered against Karstens, the record shows that the arbitrator found that the real issue was the drinking of alcohol whilst on duty and the unauthorized taking of the property

¹ *Afrox Healthcare Ltd* at para 21.

belonging to the Appellant (in other words, theft). According to the finding made by the decision-maker, the only proof of the level of intoxication was the physical observation of Karstens drinking “*a few sips of beer*”. It is common cause that the subsequent breathalyzer test did not reflect any percentage of alcohol. The conclusion arrived at by the Commissioner that for purposes of determining the fairness of the dismissal the first charge of drinking on duty could not conceivably have led (under all the circumstances) to Karstens’ dismissal being justified, is being assailed on behalf of the Appellant.

- [11] As to the second charge (the consumption of the Appellant’s property), the Commissioner (having weighed various factors, aggravating and mitigating) concluded that despite the dishonesty element “*fairness, however, demands that I seriously consider factors such as the value of the items involved, the employee’s length of service and disciplinary record.*” The stance adopted on behalf of the Appellant on the latter aspect, namely that the Commissioner ignored highly relevant considerations (that is Karstens’ continued dishonesty and lack of remorse) deserves consideration. I do not accept that the Commissioner failed to give consideration to the dishonesty element as such. This was, in my view, considered by the Commissioner. It was not an irrelevant consideration that the Commissioner mentioned the following:

‘... taking into account the totality of the circumstances, I find that after 22 years employment and with a generally unblemished record [Karsten] deserved a sanction short of dismissal.’

- [12] On behalf of the Appellant, it was contended that seeing that Karstens’ transgressions involved dishonesty, he should have been dismissed. For this contention reliance is placed on authorities such as *Hulett Aluminium (Pty) Ltd v Bargaining Council for the Metal Industry* [2008] 3 BLLR 241 (LC) para 42, cited with approval by the LAC in *Miyambo v CCMA and Others* [2010] 10 BLLR 1017 (LAC) paragraph [16], where an employee persisted in her dishonesty by denying that she had participated in any wrongdoing (theft of scrap metal) at her disciplinary hearing and the arbitration. The court held *inter alia* that: “...the presence of

dishonesty tilts the scales to an extent that even the strongest of mitigating factors, like long service and a clear record of discipline are likely to have minimal impact on the sanction to be imposed...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.”

[13] Notably also in *Kalik v Truworths (Gateway) and Others* [2008] 1 BLLR (LC) it was held by the Labour Court that an employment relationship “....broken down as a result of an act of dishonesty can never be restored by whatever amount of mitigation. The underlying reason for this approach is that an employer cannot be expected to keep dishonest workers in his/her employ. The other reason for this is to send an unequivocal message to other employees that dishonesty will not be tolerated.”

[14] It was argued on behalf of the Appellant that the Commissioner misconceived the correct test when considering the fairness of the sanction meted out to Karstens. According to the Appellant’s contention, the arbitrator was required to determine what was a fair sanction rather than one that was “*appropriate*.” This is derived from the test as formulated by Navsa AJ in *Sidumo supra* where the learned judge held that in terms of the LRA, a Commissioner has to determine whether the dismissal is fair. But importantly, Navsa AJ continued to clarify and held that in arriving at a decision, a Commissioner is not required to defer to the decision of the employer but what is required is that he or she must consider all relevant circumstances. Davis JA clarified and even simplified the task to be undertaken by the Commissioner in *Wasteman Group v SAMWU and Others*² when he held *inter alia* 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’.

² [2012] 8 BLLR 778 (LAC) at para 781D-E.

- [15] I agree with the court *a quo* that the Commissioner's role is not akin to the role of the court sitting in review of the arbitrator's decision. The Commissioner decides whether the decision to dismiss was fair but the court reviewing the matter may only decide whether the arbitrator's decision was so unreasonable that no other arbitrator could have reached the same decision. Therefore, in the instant matter, the only question that arises for determination is whether the Commissioner improperly disregarded certain factors in mitigation or in aggravation. Perhaps one needs to stress that it is not my understanding of the test per *Sidumo supra* to be whether the Commissioner attached deserved and/or appropriate weight to each individual factor or reached a conclusion that was (in the view of the Court) the correct one. The test formulated in *Sidumo supra* confirms earlier decisions of this Court that there is a "*range of reasonable outcomes*" in any matter.
- [16] The Commissioner clearly accepted that there are many authorities that "deem" all acts of dishonesty to cause a breakdown in the continuation of the employment relationship. But he was then alive to the requirement that each case had to be treated on its own merits and that not all cases involving dishonesty deserved the ultimate sanction of dismissal. The Commissioner correctly stated that it was his duty to holistically assess these factors given the context of the matter and in accordance with the trite principle that dismissal will not be lightly resorted to but is and remains reserved only for the most serious misconduct. One of the factors that influenced the Commissioner's finding was the degree of consumption and the question of whether the drinking of this beer rendered Karstens intoxicated. Mr. Karstens had "*a few sips*" and this finding was based on the visual evidence contained in the CCTV recording. This in turn received some confirmation from the subsequent breathalyzer test.
- [17] On behalf of the Appellant, it was submitted that it was unreasonable for the Commissioner to make a finding that only a few sips had been consumed whilst the probabilities showed that the entire 750 ml bottle had been consumed. It was pointed out that many hours had passed between the actual drinking of the beer and the use of the breathalyzer such that the blood alcohol level had diminished

irrespective of how much Karstens had drunk. However, the fact of the matter is that the only evidence presented showed that Karstens drank a few sips from the bottle and not that he consumed all the contents of the bottle. There was thus no other evidence with regards to the balance of the contents of the bottle. I do not accept that the Commissioner should have concluded that the balance of the contents of the bottle had been consumed as well, probably outside of the area of view of the CCTV camera. There was simply no evidence to that effect. The Appellant remained burdened with the *onus* of proof. The results of the breathalyzer negated the possibility of intoxication on the part of Karstens. I hold the view that it was completely rational for the Commissioner to have found as he did that there was little, if any, risk posed to the Appellant or its employees by the conduct of Karstens. He also found that the degree of theft was serious.

[18] Indeed no evidence was led that the relationship of trust between the Appellant and Karstens had in fact been destroyed irretrievably. The high water mark in this regard is Macauley's (who gave evidence on behalf of the appellant) "*disappointment*" with Karstens given their lengthy history of working together. It is so that another Commissioner might have reached a different conclusion. But I remain of the view that the conclusion reached by the Commissioner in the instant matter is not one that no reasonable Commissioner could reach. It is certainly within the range of reasonable outcomes. The Commissioner considered Karstens' lack of contrition and he took this factor into account when deciding the question of whether dismissal was fair and whether reinstatement was appropriate. He found that having balanced this factor with the other factors, reinstatement without retrospectivity was a fair outcome to the dispute.

[19] In *Edcon Ltd v Pillemer NO and Others* [2010] 1 BLLR 1 (SCA), the Supreme Court of Appeal expressed the view that an employee's dishonest conduct during an investigation following the commission of the misconduct with which the employee was charged could not be elevated to in effect become a new disciplinary charge. Such conduct remained an aggravating factor, and as such, it is to be assessed holistically along with all other relevant factors. Ultimately it was for the employer to

demonstrate what effect the employee's lack of candour had on the employer's business. The SCA in saying the foregoing was referring to the decision of this Court in *De Beers Consolidated Mines Ltd v CCMA and Others* [2007] 12 BLLR 1097 (LAC). This Court in *Wasteman* matter *supra* also recognized that the degrees of misconduct could find their expression in the award ultimately made by the arbitrator or judge. Thus in the same *Wasteman* matter *supra*, the judge in the court *a quo* had corrected the arbitration award to reinstate the employee with limited retrospective effect. The same approach was adopted in the instant matter by the Commissioner.

[20] In *Wasteman* matter *supra*, this Court made the following finding:

*"The logic of the argument, namely that the [arbitrator] considered this to be the ultimate form of insubordination, while the learned judge in the court a quo considered it to be short of the ultimate sanction, simply does not stand up to scrutiny. There is an enormous difference between an order which seeks to take insubordination seriously, but notwithstanding, orders reinstatement and one who (sic) denies an employee any opportunity of working for that employer."*³

There is no basis in law or in logic to distinguish this approach from cases involving dishonesty, particularly of the sort perpetrated by Karstens. There are questions of degree and the Commissioner was (all factors considered) entitled to determine to his own satisfaction whether the sanction of dismissal was fair and, if not, what sanction ought to have been applied to remedy the wrong.

Order

[21] In the circumstances, I would make the following order:

- (a) The appeal is hereby dismissed with costs.

³ At 783I-J.

Dlodlo AJA

I agree

Waglay, JP

I agree

Musi AJA