IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no JA 45/2015

In the matter between:

DIKOBE, MATLOTLENG, GERALD	**Appellant**
and	
MOUTON, DAVID, N.O.	**First Respondent**
COMMISSION FOR CONCILIATION,	
MEDIATION AND ARBITRATION	**Second Respondent**
SUN INTERNATIONAL T/A SUN CITY	**Third Respondent**

Heard: **26 May 2016**

Delivered: **15 June 2016**

Coram: Ndlovu, Sutherland JJA *et* Murphy AJA

JUDGMENT

SUTHERLAND JA

Introduction

[1] Two men walk into the bar of a casino. One is a VIP (a very important punter). The other is an off-duty employee of the casino. A routine surveillance camera records them at the bar. Drinks are bought. Payment is made with vouchers,

not money. These vouchers are issued by the casino to VIPs; an incentive to prolong their stay and, one must suppose, facilitate a mood conducive to gamble away more than the vouchers are worth. The employee handles the vouchers. Both men receive and remove the drinks thus bought.

[2] Upon the basis of this episode, the employee, ie, the appellant, was confronted with an allegation that he breached a workplace rule. Exactly what this rule supposedly prescribes is addressed hereafter. The "Disciplinary enquiry record" of the third respondent, the employer, Sun City, describes the charge as:

> 'Unauthorised possession and use of MVG [1]drinks voucher in that on 18 July 2008 - you were in possession of MVG vouchers and used them to purchase drinks at the Rhino bar'.

[3] He was convicted of that charge, and dismissed summarily. In a subsequent arbitration, it was held that the dismissal was substantively fair. On review, that award was confirmed. On appeal, the award and review judgment are challenged. The appeal falls to be decided in accordance with the test of whether the award is one which a reasonable arbitrator could not have rendered.[2]

[4] The transcribed record of the arbitration, owing to a defect in the recording device, is woefully inadequate because much is omitted. The parties are content to do the best they can with what remains. The record is partially amplified by the notes of the arbitrator. Happily, hardly any material facts are in dispute. The key evidence is about the movements of the appellant and the VIP, Moloro, at the bar and the handling of the vouchers, as captured on camera. A text narrative of what was observed on camera is available.

[5] Apart from issues concerning several applications for condonation by the appellant for failure to comply with the rules of the court, to which reference is made later, the critical questions that arise on appeal are threefold:

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[1] MVG = most valued guest or VIP.
[2] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC).

5.1. What hard facts *can be found* about what occurred at the bar on 18 July 2008?

5.2. Can the versions of the appellant and the VIP, Moloro explaining what occurred, be rebutted or rejected?

5.3. Is there a rule in existence that the appellant breached? In this regards, the key enquiry is what the content and scope of the rule was, and what the understanding of the rule by the casino staff could reasonably be.

The evidence

[6] The material portion of surveillance report notes that between 15h16 until 15h28:

> '15h16: [appellant] was seated on the wall opposite the Rhino bar.
>
> 15h16.59: A punter [ie Moloro] arrives from the gaming area and hands one drinks voucher over to [appellant], [appellant] already has a secondary (sic) voucher in his possession. They proceed to the Rhino bar area.
>
> 15h17.12: [appellant] hands one voucher over to [Moloro] and keeps the other in his possession.
>
> 14h17.17: Both [appellant] and [Moloro] arrive at the bar counter.
>
> 15h18.13: [appellant] and [Moloro] order drinks from the barman on duty utilising the two drink vouchers.
>
> 15h18.14-40: The barman prepares a drink for [Moloro]
>
> 15h19.20 – 54: The barman prepares a drink for the [appellant]
>
> 15h20.16: [appellant] hands over two drink vouchers to the barman.
>
> 15h20.33: [appellant] places remaining vouchers in his front left trouser pocket.
>
> 15h20.44: [Moloro] vacates Rhino bar area. [appellant] moves from the Rhino bar area to the wall where he was previously seated.'

[7] These bare facts provoke two questions; how and why was appellant "in possession" of a voucher at the inception of the episode and why did appellant ostensibly pocket the "remaining" vouchers at the end of the episode.

[8] The appellant's version of these events is that he and Moloro are friends. They arrived at the casino together. A round of drinks had already been procured before the episode which is captured on camera took place. What the surveillance film portrays is a second round of drinks. When Moloro walked into the picture in this filmed episode, Moloro handed to the appellant a voucher and a booklet of vouchers. On the way to the bar, appellant gave a single voucher to Moloro, and retained the booklet. At the bar, Moloro gave the single voucher back to appellant, and appellant tore out a further voucher from the booklet. Appellant put two vouchers on the counter, and put the booklet in his trousers. The barman asked for a third voucher. Appellant tore out another voucher from the booklet and gave it to the barman. This booklet was returned to Moloro, at some later stage. The arbitrator's award perfunctorily notes that the appellant stated that Moloro had given a single voucher and a booklet, which Moloro had authorised him to use.

[9] The transcript of Moloro's evidence is very bad. Unlike the evidence of the appellant, there is no copy of the arbitrator's notes of evidence to assist analysis. The allusion to Moloro's evidence in the award is, like that of the appellant, perfunctory and consists of a single sentence recording that Moloro stated that he offered the appellant a drink and had given him vouchers to do so. What can be made out from the faulty transcript is that Moloro claims that he sent the appellant to buy drinks for himself, he offered the appellant a drink, the vouchers he gave to appellant for that purpose were not enough and a further voucher was handed over. Moloro confirms that appellant retained possession of his booklet whilst Moloro went off to gamble.

[10] The narrative noted here is the sum of the relevant evidence other than one aspect which requires discrete treatment.

[11] An exercise was conducted to try to tie up the drinks bought in the surveillance episode with the vouchers issued to Moloro. There was an ostensible discrepancy. However, nothing certain could be ascertained, as innocent explanations could not be ruled out, including the barman affixing the vouchers randomly to invoice slips. At the hearing of the appeal, this point was fairly conceded by counsel for Sun City. The significance is plain: did the appellant have in his possession contraband vouchers? However, whatever legitimate suspicion may have arisen the factual matrix was such that no safe inferences could be drawn. The award is silent on the matter, and properly so.

What Rule?

[12] The conclusions of the arbitrator were that it was proven that the appellant was indeed in possession of the vouchers, that he was not authorised to be so, and moreover, used them to buy a drink for a "guest" and himself. From the award, it is plain that the arbitrator approached the matter on the footing that employees were "not allowed to possess any vouchers".

[13] Although appreciating that the enquiry required him to interrogate the "rule" that was supposedly breached, there is nothing in the award to indicate that the arbitrator actually did so. The arbitrator cited paragraph 15 ([the correct citation is paragraph 7[3]) of the code of good practice but the allusion seems to have been an empty ritual.

[14] Reference was made to the customary acknowledgement of a receipt of the rules handbook and the seniority of the appellant (he was a slots manager with long service) being relevant to his awareness of the rules, but there is no appreciation that the rule relied upon was, at best, oral, and had not been

[3] 7 Guidelines in cases of dismissal for misconduct
Any person who is determining whether a dismissal for misconduct is unfair should consider-
(a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and
(b) if a rule or standard was contravened, whether or not-
(i) the rule was a valid or reasonable rule or standard;
(ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
(iii) the rule or standard has been consistently applied by the employer; and
(iv) dismissal was an appropriate sanction for the contravention of the rule or standard.

recorded in any document of any kind disclosed in the proceedings. The receipt of the rules handbook was therefore of no help at all in determining the key issue. In argument on appeal, an allusion was made to certain written rules about not taking bribes, behaving honestly, not consuming the employer's stock, and not being in possession of the employer's property, which plainly the appellant must have known. However, as he was not charged with any of these felonies, reference to them is irrelevant. Instead, the arbitrator was overly impressed by the notion that the appellant, in relying on the VIP's authorisation, could not "shelter" behind such a permission, when, as the arbitrator understood the rule, it was not subject to such a qualification.

[15] In my view, the arbitrator did not grasp the need to prove the content, scope and the effective communication of the alleged rule, which had been in dispute throughout the proceedings.

[16] An employer who seeks to discipline an employee for breach of an oral rule must expect to encounter obvious difficulties. That insight, self-evidently, is why rules need to be written down. Of course, there is no need to write down "thou shalt not steal" and similar injunctions, but when a need for a rule that is workplace-specific is required, the prudence of so doing is manifest. This case illustrates that predicament admirably.

[17] Is the rule relied on here simply "thou shalt not possess a voucher issued to a VIP"? As it has nowhere been recorded, is this formulation an accurate representation of what was communicated to the staff? What does "possess" mean? Does it mean: do not touch? If a VIP sends an employee with the VIP's booklet to buy drinks for the VIP is that "possession" as contemplated by the rule? It can be safely inferred that possession by an employee of a booklet that has not been issued to a VIP is prohibited; that much flows logically from the purpose of the vouchers.

[18] If it be posited that the VIP vouchers may not be "used" by an employee, what does this encompass? Perhaps the place to begin this enquiry is what the VIP is allowed to do with the vouchers. If, say, Booklet No 101 is issued to Punter

A, is he forbidden to use them to buy a drink for punter B? No evidence is tendered to clarify that possibility. Moreover, it is not a logical inference to draw that a VIP may not "use" the vouchers for that VIP's guest, stereotypically, his non-gambling girlfriend in attendance to marvel at his skills in the art of gambling. When presented at the bar, no proof of identity is asked for by the barmen. Why should the casino care who is the beneficiary of the VIP's largesse? If it does care, no evidence was adduced to demonstrate the rationale and the limits, if any.

[19] The defence of the appellant, throughout all the proceedings, was that his "possession" of the vouchers was with Moloro's express permission. The word "possession" is of course the word that a layman would use to describe the *handling* of the vouchers. Were the appellant aware of the term "detentio", he would probably have denied being in "possession" and claimed he merely "detained" the vouchers as agent of Moloro.

[20] If the appellant had not handled the vouchers and Moloro alone had done so and stood him a drink, would that have breached the rule? It may fairly be inferred that a rule could reasonably exist to inhibit on-duty employees from accepting a drink from a guest. But would such a rule extend to the example of an employee being off-duty and, as such, in the identical position as any other guest in the casino? Does the rule encompass off-duty employees? If so, why would that be reasonable? Presumably, when off-duty, an employee may enter and transact business like any other visitor. The only witness asked, Lezile Guba, a Senior Shift Surveillance Manager, said she did not know if there was a rule against off-duty employees drinking in the casino.

[21] When the appellant says he breached no rule known to him when he accepted Moloro's hospitality and did so in Moloro's presence, and in that context, handled Moloro's vouchers, why is he wrong? He expressly put this in issue and there is no evidence whatsoever to rebut his claim that no such prohibition exists. Nor, logically, in my view, can any inference be drawn from the evidence that casts doubt on that claim.

[22] In my view, the employer, Sun City, failed to establish proof of a rule that the appellant breached. The vagueness of a rule against "possession" is plain; boundaries need to be drawn. The brute fact of "handling" vouchers, without more, cannot be the sum of a reasonable rule. Moreover, no evidence of the communication of an intelligible rule was tendered. The high point of evidence on this aspect is a remark that pre-shift briefings alluded to the vouchers being a guest benefit not intended for staff use, but exactly what the scope of the rule of "non-use" remains obscure.

Conclusions

[23] In summary:

23.1. The award is not reasonable, having failed to address the key question of the content, scope and application of the rule relied upon to allege a breach.

23.2. The evidence demonstrates no breach of any reasonable rule.

23.3. The appellant's dismissal was unjustified.

[24] It may be mentioned that the award is bereft of any consideration of the appropriate sanction, it seemingly being that the arbitrator took it for granted that guilt on the terms he found, warranted dismissal. That approach is, in principle, wrong.

[25] Moreover, on the proven facts, ie an off-duty employee accepted drinks from a guest who paid for them with vouchers intended for the guest's consumption, and the employee handled the vouchers, it is far from obvious that termination of the employment relationship was warranted. Moreover, when added to that factor, the appellant's unblemished 17 years of service, the dismissal, even if a breach of a rule, in the terms described above, had occurred, dismissal was not obviously warranted.

[26] In the judgment of the review court, the question of the rule was not considered. The reason for that was that the Labour Court took the view that the rule was not in dispute. That approach was misconceived. The "rule" was

contested from the very first interview the appellant was called to attend when he was suspended pending a disciplinary enquiry. The contents of the pre-arbitration conference minute alluded to by the Labour Court affords not the slightest support for the notion that the rule was a common cause fact.

[27] Reinstatement has been sought and must be granted. An argument was advanced to suggest that the lapse of time militates against such an order. That factor alone is of no relevance. In the absence of evidence to demonstrate intolerability or impracticability as contemplated by section 193(2) of the Labour Relations Act 66 of 1995, no lawful reason exists not to order reinstatement.[4] Axiomatically, where an employee is exonerated from misconduct, no factual basis can exist to found an argument that the trust relationship is compromised.

[28] It was pointed out that the appellant was responsible for a delay of about a month in all of the elapsed time for which condonation is granted, along with condonation of the other delays in compliance with the rules of this Court, not least, on account of the prospects of success on the merits. The delays were brief and occasioned by his impecuniosity which inhibited him putting his attorney in funds to prosecute the case, a satisfactory explanation. In context of an elapse of approximately eight years since his dismissal on 18 August 2008, I regard that month as *de minibus*, and it may fairly be ignored.

[29] As to costs, given the circumstances described and the appellant, as an individual having prosecuted his case alone, fairness dictates the granting of costs.

The order

[30] An order is made thus:

30.1. Condonation of the failure to comply with the rules of the court is granted.

30.2. The lapsed appeal is reinstated.

[4] See too *Edcon Ltd v Pillemer NO and Others* (2009) 30 ILJ 2642 (SCA).

30.3. The appeal against the judgment of the court *a quo,* refusing to review and set aside the award, is upheld.

30.4. The award of the arbitrator is reviewed and set aside.

30.5. The third respondent is ordered to re-instate the appellant with effect from the date of his dismissal, on 18 August 2008, without loss of any remuneration and related benefits or loss of seniority and of service entitlements.

30.6. The appellant shall be liable to tender his services to the third respondent upon service on the appellant of a written notice, furnishing notice of at least one full calendar month plus one day, calculated from the date of such service, of a date to resume work.

30.7. The third respondent shall bear the appellant's costs in the Labour Court and in this Court, excepting all costs relating to the preparing and service of condonation applications.

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Sutherland JA

Sutherland JA (with whom Ndlovu JA *et* Murphy AJA concur)

APPEARANCES:

FOR THE APPELLANT:	Adv T Moretlwe
	Instructed by Kgokong Namenmg Tumagole Inc
FOR THE RESPONDENT:	Adv P Le R Theron
	Instructed by Saloj'ee Du Plessis Van Der Merwe