



REPUBLIC OF SOUTH AFRICA
THE LABOUR COURT, JOHANNESBURG
JUDGMENT

Reportable

Case No: JR 1779/10

In the matter between:

NATIONAL UNION OF MINE WORKERS

First Applicant

MOILOA BOFOLO

Second Applicant

and

**COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

First Respondent

COMMISSIONER R DIBENG N.O

Second Respondent

XSTRATA COAL SA GOEDGEVONDEN

Third Respondent

Heard: 16 May 2014

Delivered: 09 October 2014

Summary: Review application. The test for review restated. Employee dismissed for entering workplace after testing positive of alcohol. Employee shop steward knew about the policy prohibiting the entering of the workplace after testing positive of alcohol

JUDGMENT

MOLAHLEHI JIntroduction

- [1] This is an application to review and set aside the arbitration award made by the Second Respondent (the Commissioner) under case number MP2918-10 dated 17 June 2010. In terms of that arbitration award the Commissioner found the dismissal of the Second Applicant (the employee) to have been fair.

The background facts

- [2] The employee was charged with the following offence: "Being at work under the influence of alcohol." The charge was subsequent to the employee entering the work place after the breathalyser test was conducted on him, the outcome of which was positive. The record reveals that the employee had pleaded guilty at the disciplinary hearing.. He however filed an unfair dismissal dispute with the CCMA, the outcome of which was, as indicated earlier, that the dismissal was for a fair reason.
- [3] The case of the Third Respondent at the arbitration hearing was that the employee was after being tested for alcohol and refused entrance at the gate where the test was performed, proceeded and entered the workplace through a different gate.
- [4] The essence of the employee's defence was that he did not enter the workplace to perform any duties but it was for the purpose of addressing members of the union on an issue they required information on.
- [5] The case of the Third Respondent during the arbitration proceedings was that the employee had committed a dismissible offence in that he had contravened the disciplinary policy regarding zero tolerance to entering the work place whilst having taken alcohol.
- [6] The general principles governing the use of alcohol and drugs at the Third Respondent's workplace is dealt with under clauses 6.3.1 and 6.3.2 of the Disciplinary Code which read:
- "6.3.1 Management accepts that alcoholism or the addiction to drugs is a treatable illness and that employees may be afforded however, not be effective, severe disciplinary action shall be instituted against offenders."
- 6.3.2 No employee is obliged to submit to the breathalyser tests for alcohol and/or cannabis testing, nor should Management make any attempt to force employees to submit to such tests. However, Management's desire to ensure safe working conditions should always be emphasized, as well as the duties to

prevent people under the influence of drugs or alcohol proceeding to his/her place of work. Every attempt to dissuade the alleged transgressor to submit to such tests should be made. Management can take disciplinary action on the basis of circumstantial evidence and witnesses, where there has been a refusal to submit to such a test. Where there is a suspicion that an employee is under the influence of drugs or alcohol, he/she should immediately be suspended from working pending the inquiry, which must be convened as soon as conveniently possible. If found guilty of time and (sic) inquiry, the employee will not be paid for the day/days of suspension.

[7] The relevant parts of Code of Conduct relating to intoxicating substances read as follows:

- “1. The employee endorses this code of conduct relating to zero-tolerance policy as follows-
 - 1.1 The absolute work rule that no employee may report for work of commence with where all the present on the Company’s premises was under the influence of intoxicating substances such as liquor or drugs ...
 - 2 ...
 - 3 ...
 - 4 It is recognized that an employee will also work or commences work or enters the Company’s premises under the influence of intoxicating substance is a potential hazards to himself/herself as well as to his/her fellow employees, and to any other person in the Mine.
 - 5 It is recognized and accepted by the parties that the zero-tolerance policy is necessary and should be consistently applied at Mine premises.
 - 6 ...
 - 7 Any employee who enters the premises of the Company including any of its Mines was under the influence of an intoxicating substance will face discipline in accordance with the provisions of the Company’s disciplinary code and procedure, which can result in the penalty of dismissal.
 - 8 ...
 - 9 ...
 - 10 ... in terms of the company’s disciplinary code that procedure, a similar event of drunkenness or intoxication at the workplace can result in summary dismissal i.e dismissal without notice.

The grounds for review

- [8] The applicants challenge the arbitration award on the grounds that the Commissioner committed an irregularity in finding that the employee was under the influence of alcohol even though there was no evidence before him that the employee's capabilities were not impaired to the extent that he was not able to perform his duties. The applicants also contend that the Commissioner in determining the dispute considered irrelevant evidence and disregarded evidence that indicated that the employee was not under the influence of alcohol.
- [9] Furthermore, the applicants contend in their replying affidavit that the decision is unreasonable because it is not supported by the evidence which was before him.

The arbitration award

- [10] The Commissioner found firstly that the rule for which the employee was accused of having breached, was known and was never placed in dispute during the arbitration proceedings. It was common cause that the employee was a shop steward who had been involved in the formulation of the alcohol policy upon which the charges were founded on.
- [11] In relation to the substantive aspect of the charges the Commissioner found that the employee had undergone an alcohol test which he failed and thereafter used a different gate to the one where the test was conducted to gain entry into the work place. In this respect the Commissioner observed:
- “ . . . he deceitfully and purposefully cross proverbial red line, knowing full well that the policy he had signed on behalf of the trade union provided for a dismissal if found to be under the influence of alcohol . . . ”
- [12] The Commissioner rejected the suggestion by the employee that the contents of alcohol in his blood stream was due to the red bull drink he had taken before arriving at the workplace. It was on this basis that the Commissioner found the dismissal of the employee to have been for a fair reason.

Evaluation

- [13] The challenge to the arbitration award in the present instance is based on both grounds of gross irregularity and unreasonableness of the decision reached by the Commissioner.

- [14] The test to apply when considering whether an arbitration award is reviewable is the well-known reasonable decision maker test which is set out in *Sidumo and another v Rustenburg Platinum Mines Ltd and Others*,¹ and it entails an enquiry into whether the decision made by the Commissioner is one which a reasonable decision maker could not reach. In that case the Constitutional Court held that:

“ . . . The better approach is that section 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in *Bato Star*: Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?”

- [15] The extend of the reasonable decision maker's test in review matters was further confirmed and clarified in *Herholdt v Nedbank Ltd*,² where the Supreme Court of Appeal held that:

“[25] In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.”

- [16] It is common cause in the present instance that the employee pleaded guilty to the charge which had been proffered against him at the disciplinary hearing. The Commissioner was thus faced with having to determine whether the sanction of dismissal in the circumstances was fair or otherwise.
- [17] In considering whether the decision to dismiss was fair, the Commissioner did not have to determine whether the employee was drunk or whether he was so drunk that he could not perform his duties. As a result thereof, he had to determine whether he entered the workplace in breach of the policy prohibiting entry into the workplace whilst he had alcohol in his blood.

¹ [2007] 12 BLLR 1097 (CC).

² 20130(6) SA 224 (SCA)

- [18] The Commissioner arrived at the conclusion that the dismissal was fair after taking into account the policy which the employee was not only aware of its existence but had been part of the team that developed the policy as a shop steward. As a shop steward the employee in breaching the policy did exactly what he told the other employees not to do. After telling the other employees that the union would not represent them if they entered the workplace with alcohol in their blood he turned around and did the same thing. After testing positive of alcohol, instead of going back home as was required of him, the employee sneaked into the premises through the other entry.
- [19] It is apparent that the Commissioner rejected the explanation given by the employee for entering the premises after testing positive to alcohol. The employee testified that he entered the premises because he had to address employees on the implementation of the policy. He conceded that he was not the only one who could have addressed the employees on the policy but contended that the others had failed to do so.
- [20] In my view, in arriving at the decision as he did, the Commissioner applied his mind to the material facts which were placed before him and arrived at a reasonable decision. The Commissioner cannot be faulted for any irregularity in the manner in which he dealt with the dispute. I accordingly find no basis to interfere with the outcome of the Commissioner's decision.

As concerning the issue of costs, it is my impression that the parties still have a good relationship. It would therefore not be proper to allow costs to follow the results.

Order

- [21] In the circumstances the applicants' application to review the arbitration award made by the Second Respondent under case number MP2918-10 dated 17 June 2010 is dismissed, with no order as to costs.

E MOLAHLEHI

Judge of the Labour Court of South Africa

Appearances:

1. For the Applicant: Advocate L Pillay
Instructed by: MS Molebaloa Attorneys
2. For the Respondent: Bongani Masuku of Tabacks Attorneys.

Labour Court

Labour Court