

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

CASE NO: PA 3/02

REPORTABLE

In the matter between:

GOODYEAR SA (Pty) LTD
Appellant

and

**COMMISSION FOR CONCILIATION MEDIATION AND
ARBITRATION**

First Respondent

NGCOLE HEMPE NO
Respondent

Second

NATIONAL UNION OF METALWORKERS

Third Respondent

MAKUBALO

Fourth Respondent

JUDGMENT

WILLIS JA:

[1] The appellant (to whom I shall refer as “the employer”) brought an application before the court *a quo* (*per* D. Pillay J) in terms of section 145 of the Labour Relations Act, No. 66 of 1995, as

amended ("the LRA"), to review an award of a CCMA Commissioner reinstating the fourth respondent in the employment of the employer. I shall refer to the fourth respondent as "the employee". The court *a quo* dismissed the application with costs. It also dismissed the application for leave to appeal. Consequent upon a successful petition to this court, the employer now appeals against the judgment of the court *a quo*.

[2] The material facts are common cause. The employee had been employed as a "passenger tyre sorter" by the employer. He had twenty years' service. A mini-bus commonly known as a "kombi" and described by the witnesses as such arrived, unannounced, at the home of the employee, while he was sleeping, about five hours before he was due to begin his normal shift at 23h00 on 6 December, 1999. In the kombi were personnel of the employer. They asked him if he was prepared to work overtime by commencing his shift early as management was having a problem with absenteeism. The employee had been sent for by the employer's area manager. The employee agreed to commence working his shift early. He said he did so because he did not want to incur the anger of the employer's area manager. The area manager's own evidence suggests that if an employee does not agree to work overtime there can be negative repercussions for the employee in the form, for example, of not being given the opportunity, for a while, of earning extra money by working overtime. The employee was then transported to the workplace where it appeared to other senior staff that the employee was under the influence of alcohol. Two breathalyser tests were done on the employee. They showed readings of the ratio of alcohol in his blood to be 0,229 mg/100 ml and 0,239 mg /100ml respectively. These tests plus other observations made of the employee indicate clearly that the employee was considerably under the influence of alcohol but not completely intoxicated. There

is a clear company rule against reporting for work under the influence of alcohol. The employee was aware of this rule. He had signed an acknowledgement of this rule. The employee had a currently valid final written warning, issued the immediately preceding August, for this very same form of misconduct. He had narrowly avoided dismissal on that occasion and had been required to attend the employer's assistance programme. The employee was, as a result of his reporting for work under the influence of alcohol, dismissed after a properly convened disciplinary enquiry. He referred a dispute about his alleged unfair dismissal to the CCMA in terms of section 191 of the LRA. After an unsuccessful conciliation, the matter was then referred to arbitration, in terms of the LRA. The second respondent was the duly appointed arbitrator. It is the award of the second respondent which the employer unsuccessfully sought to review in the court *a quo*.

[3] In a terse arbitration award, the second respondent came to the following conclusion:

"To have dismissed the employee in these circumstances is not only too harsh but unfair as he was doing the company a favour.

This dismissal is substantively unfair."

The second respondent made the following award:

"1. The applicant will be reinstated.

2. The employer shall pay the employee six (6) months salary, calculated as follows: R21.19 an hour x 37.5 a week x 4.33x 6 months=R20 644.36.

3. The applicant will report for duty on the 12 February 2001 to a position on terms and conditions not less favourable than before dismissal."

Although the court *a quo* made certain criticisms of the award, it declined to set it

aside. These criticisms are not relevant for the purposes of this judgment.

[4] Relying on cases such as **Carephone (Pty) Ltd v Marcus N.O & Others** 1999 (3) SA 304 (LAC), (1998) 19 ILJ 1425 (LAC), [1998] 11 BLLR 1093 (LAC); **County Fair Foods (Pty) Ltd v CCMA & Others** (1999) 20 ILJ 1701; **Adcock Ingram Critical Care v CCMA & Others** (1999), 20 ILJ 1799 (LAC), [2001] 9 BLLR 979 (LAC); **Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others** (2001) 22 ILJ 1603 (LAC); **Stocks Civil Engineering (Pty) Ltd v Rip N.O. and Another** (2002) 23 ILJ 358 (LAC); **Crown Chickens Limited t/a Rocklands Poultry v Kapp & Others** (2002), 23 ILJ 863 (LAC), [2002] 6 BLLR 493 (LAC); and **Miladys (A Division of Mr Price Group Limited) v Naidoo & Others** (2002) 23 ILJ 1234 (LAC), the employer's counsel, *Mr Wade*, submitted that the finding that the dismissal of the employee was substantively unfair was not rationally connected with the facts and was unjustifiable.

[5] The bald facts that the employee reported for work under the influence of alcohol at a time when he had a current final written warning for the same form of misconduct strongly suggest that *Mr Wade's* submissions should prevail. The combined weight of the following set of facts casts a different light on the matter:

- i) The unannounced arrival of persons sent by the area manager at the home of the employee while he was enjoying his free time;
- ii) The pressure, whether subtle or not, on him to comply with the request that he work overtime.
- iii) The influence of alcohol would, in all probability, have impaired the employee's judgment as to whether or not he should have declined to accept the invitation to work overtime.

The importance of the classic *dictum* that “each case must be decided on its own merits”, repeated in innumerable cases, is well illustrated here.

[6] *Mr Wade* also criticised the second respondent for not making a concrete finding that the employee had been guilty of misconduct. It would seem from the award of the second respondent that he did not exercise his powers in terms of section 193 (1) of the LRA to make the reinstatement of the employee operate fully retrospectively. He may therefore have decided, by necessary implication, that the employee had been guilty of misconduct. *Mr Wade* submitted that the failure to make the award fully retrospective arose from the employee’s delays in bringing the matter to an expeditious resolution. The position is not clear. Whether or not the second respondent did find (or should have found) that the employee was guilty of misconduct is, in my opinion, irrelevant to the outcome of this case. Either the second respondent found:

- i) That the employee had been guilty of misconduct but there had been substantial mitigation: or
- ii) The employee had not been guilty of misconduct.

He could not have come to the conclusion which he did on any other basis. Neither finding would have been so obviously wrong that it could be interfered with on the basis that it was irrational or unjustifiable. Whichever route he followed, the second respondent nevertheless concluded that the dismissal was unfair. Again, against the overall factual background, this conclusion was not so obviously wrong that it could be interfered with on the basis that it was irrational or unjustifiable. No possible basis was suggested upon which a court could interfere with the discretion of the second respondent not to make the reinstatement fully retrospective and

award, in effect, only six months' "back-pay."

[7] Viewing the canvas of facts of this case as a whole, we cannot find that the court *a quo* erred in failing to set aside the award. The award was not irrational; it was not unjustifiable.

[8] There is no reason why costs should not follow the result.

[9] The appeal is dismissed with costs.

**DATED AT JOHANNESBURG THIS 4TH DAY of
SEPTEMBER, 2003**

N.P. WILLIS

JUDGE OF THE LABOUR APPEAL COURT

I agree.

C. R. NICHOLSON

JUDGE OF THE LABOUR APPEAL COURT

I agree.

C.N. JAFTA

ACTING JUDGE OF THE LABOUR APPEAL COURT

Counsel for Appellant: *R.B. Wade*

Attorneys for Appellant: Chris Baker and Associates

Counsel for the Respondent: *C. Roodt*

Attorneys for the Respondent: Naidoo Attorneys

Date of hearing: 2nd September, 2003

Date of Judgment: 11th September, 2003