

Not reportable
Not of interest

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN

Case no: C 942 / 2008

In the matter between:

G4 SECURITY SERVICES SA (PTY) LTD

Applicant

and

COMMISSIONER ELDRIDGE EDWARDS N.O.

First respondent

CCMA

Second respondent

LUCIEN CRAIG WYNGAARD

Third respondent

JUDGMENT

STEENKAMP J:

INTRODUCTION

[1] This is an application to review and set aside an award of the first respondent (the arbitrator) under case number WE 11402-08.

[2] The attack on the award is that it is unreasonable, based on two crisp points:

2.1 the Commissioner created a gross irregularity by taking evidence into account that was not before him; and

- 2.2 the Commissioner committed a gross irregularity by ordering reinstatement when the employee (the third respondent) only requested compensation.

BACKGROUND

- [3] The employee, Lucien Craig Wyngaard, was employed by the applicant as a security officer from 1 November 2002 until his dismissal in August 2008.
- [4] The incident that led to his dismissal is that a number of security officers were driven home by a colleague, one Jonas, in a company vehicle on 15 July 2008. The other occupants of the vehicle were the employee; Ms Natasha Thomson; a controller, Mr Soni; and the shift manager, Mr Orris.
- [5] When they reached Orris's home, he gave his colleagues a bottle of vodka and a number of bottles of beer. They stayed at the car in front of Orris's house for 30 to 40 min and drank the alcohol. When they left, Jonas was still driving and they went to pick up one Fortuin.
- [6] Fortuin subsequently reported that the occupants of the vehicle were intoxicated. Soni also reported the incident the next day. Because of this, Soni was not disciplined, but the others were called to disciplinary hearings.
- [7] The misconduct put to the employee was that:
- "On 15 July 2008 at 2040 you did not report irregularities / misconduct by a shift manager occurring in your presence to management."
- [8] The employee admitted having drunk the alcohol supplied by Orris. The chairperson, one Sondag, found that the misconduct was serious enough to warrant dismissal.
- [9] The employee referred an unfair dismissal dispute to the CCMA. The arbitrator found that the dismissal was procedurally fair substantively unfair and ordered reinstatement. The reason for the finding on substantive unfairness is contained in paragraph 20 of the award, which I quote in full:

"Mr Sondag conceded under cross-examination ... that Mr Orris, who also holds a senior position with the respondent, is still employed. The respondent did not leave evidence to explain why Mr Orris was not dismissed. If the applicant had a duty to report as a senior officer surely Mr Orris had the same duty. Mr Orris gave Mr Jonas the alcohol and was thus largely responsible for the occurrence of the incident. I therefore found that the respondent was inconsistent in the application of the rule and sanction. The respondent failed to discharge its onus of proving that the dismissal is substantively unfair."

EVALUATION

[10] The deponent to the founding affidavit, Ilza Coetzee, stated under oath:

"The Commissioner's findings of fact have no foundation on the evidence placed before him. As the record will reveal Mr Orris was also dismissed and this was placed before the Commissioner."

[11] I could find no such evidence – i.e. that Orris had been dismissed – on the record. Neither could Mr *Hutchinson*, who appeared for the applicant. But neither could I find any evidence on the record that "Mr Sondag conceded under cross-examination that Mr Orris... is still employed." And Mr Hutchinson assured me from the bar that there is no such evidence to be found.

[12] In the circumstances, the very basis for the finding of inconsistency does not exist. This finding is so unreasonable that no reasonable Commissioner could have come to the same conclusion on the evidence before him.

[13] With regard to the relief, it appears from the CCMA referral form (Form 7.11) that the employee specifically requested compensation and not reinstatement. When the company presented written heads of argument to the Commissioner at arbitration, it pointed out that the employee only sought compensation. The employee did not argue otherwise. Nevertheless, the Commissioner ordered retrospective reinstatement. This is also a decision that no reasonable Commissioner could have made, given the clear nature of the relief sought.

Remit or substitute?

[14] The award falls to be set aside. Mr Hutchinson submitted that I should substitute my own award for that of the arbitrator, and that I should find that the dismissal was fair.

[15] I do not agree. The two issues forming the basis of the review – whether Orris was dismissed and the issue of compensation – were not ventilated at the arbitration. It will be necessary for a different arbitrator to hear evidence on those two aspects in order to make a proper finding on the fairness of the dismissal.

[16] With regard to costs, I take into account that this application was unopposed. There is no reason in law or fairness to make a costs order.

ORDER

[17] The arbitration award of the first respondent (the arbitrator) under case number WE 11402-08 dated 5 November 2008 is reviewed and set aside.

[18] The dispute is referred back to the CCMA (the second respondent) for a fresh arbitration before another Commissioner.

[19] There is no order as to costs.

STEENKAMP J

Date of hearing: 22 March 2011

Date of judgment: 24 March 2011

For the applicants: Adv E Hutchinson

Instructed by Moodie & Robertson

(No appearance for respondents)