REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case No JR 433/2010

In the matter between

RECH'S NURSERIES (PTY) LTD	**Applicant**
and	
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	**First Respondent**
JOSIAS SELLO MAAKE	**Second Respondent**
NUFBWSAW obo MAMATEPA SOLOMON	**Third Respondent**

Heard: 15 December 2011

Delivered: 19 January 2012

Summary: The employee was dismissed for selling liquor on the farm. The commissioner's award was constructed around the charge which he found did not disclose a defence. Held, that charge was of sufficient clarity to allow the employee to defend himself. The commissioner's findings were speculative and not based on a proper consideration of all the facts. He did not assess the reliability of witnesses and ignored material evidence. The award was one which a reasonable decision maker would not have made.

JUDGMENT

Seedat AJ

Introduction

[1] On 24 January 2010, the second respondent (commissioner) handed down an award finding that the dismissal of the employee, though procedurally fair, was not for a fair reason and awarded compensation of R7,200.00.

[2] The applicant seeks to review and correct or set aside that award or refer it back to the CCMA to be arbitrated by another commissioner.

The applicant's evidence

[3] On the 10 August 2009, Mr Stroh, the farm manager employed by the applicant, was told that alcohol was being sold on the farm. The next day, Mr Stroh addressed a meeting of all the workers. Mr Makula, a senior supervisor, acted as the interpreter. He told the workers that he had been informed about the purveyance of liquor on the farm and that this practice is illegal. At that point, the employee called out that he was the one selling liquor and he was doing so because he did not 'earn enough' and no one would stop him. Mr Stroh told the employee that the farm was a private property and alcohol may not be sold and this was set out in the farm rules. He emphasised that the farm rules prohibiting the sale of liquor on the farm were explained to all the employees and displayed on the notice boards. Hence, the employee was aware of the rules.

[4] On 15 August 2009, he discussed this issue with one of the directors of the applicant and it was agreed that the employee should be charged. The employee was given notice of the hearing which proceeded on 26 August 2009. An interpreter was arranged for the benefit of the employee who admitted to selling liquor. He was found guilty and dismissed.

[5] Mr Makula had translated during Mr Stroh's address to the workers. He confirmed that the employee had interrupted Mr Stroh's talk by claiming that he was the one selling liquor and would continue doing so because his 'salary was meagre'. The employee knew of the rule that he could not sell liquor on the farm as it had been explained to him. He further assisted with the

translation when the employee was given the notice to attend a disciplinary hearing.

[6] A chain-saw operator, Mr Phifadi, also testified for the applicant. He was present at the meeting and the employee had called on Mr Stroh to tell the other workers that he was the person selling liquor and nobody could stop him from running his tavern. There were rules that prohibited the sale of liquor and these were put up on the notice boards and discussed by the employees. Mr Phifadi, himself, had bought liquor from the employee.

The employee's version

[7] The employee's evidence was that he had worked for the applicant since 1988. He attended a meeting with the other workers on 24 August 2009 with regard to the sale of alcohol on the farm. He did not say anything at this meeting. The next day he was told he would have to go somewhere and on 26 August 2009 he was taken to a hearing. He denied selling liquor on the farm and was not familiar with the farm rules.

[8] Mr Mawasha was a witness for the employee. No rules were explained to him and the employee did not sell any liquor. He was certain that the manager had not addressed any meeting with all the workers.

The commissioner's award

[9] The commissioner found that the dismissal was procedurally fair but had fallen short of a fair reason because the charge that was preferred against the employee was defective for not disclosing an offence. The charge reads:

'Admitting selling liquor on employer's property to company employees and others.'

'In my considered opinion', wrote the commissioner, 'there exists no foundation for this charge. Whilst it may constitute an offence for an employee to engage in acts of illegal sale of alcohol on the employer's premises, in this case, there was however no justifiable basis upon which to charge the [employee] in the manner in which he was charged.'

[10] The commissioner's reasoning was that the purpose of the meeting was to inform the workers that as from then, the sale of liquor on the farm would not be permitted and the applicant could not have had the intention to charge the employee for 'his past acts of selling alcohol on the farm'.

[11] The commissioner then comments that the applicant could have charged the employee with insolence or insubordination toward the manager.

The applicant's grounds for review

[12] The application for the review of the commissioner's award is consumed with obfuscation and prolixity with at least fifteen grounds catalogued. Many of these grounds are repetitive and pleonastic. This approach, obviously done to cover all eventualities, adds no substance to the application. It only makes the task of the courts invidious. Practitioners would find it more useful to affect simplicity in the drafting of their papers rather than try their hand at abstruseness.

[13] Effectively, the grounds for review can be summarised as follows:

- The commissioner did not apply his mind in coming to the conclusion that the charge did not disclose an offence.
- The commissioner failed to take into account the evidence that the applicant only became aware that the employee was selling liquor at the meeting of the workers.
- The commissioner committed an irregularity by finding that the applicant should have charged the employee with insolence and insubordination.

Analysis of the evidence

[14] The evidence of Mr Stroh was simply that he had reacted to a report that alcohol was being sold on the farm by calling a meeting of all the workers. The employee had openly remarked that he was the person selling liquor because he had a small income and that he would continue doing so. This triggered the process to charge the employee. Mr Stroh's evidence was corroborated in material respects by the senior supervisor, Mr Makula and another employee, Mr Phifadi.

[15] The commissioner's reasoning was that it had not been the intention of the applicant to charge the employee until the meeting. Indeed, said the commissioner, the meeting had been called to warn all the workers that the sale of alcohol will not be allowed on the farm. If the applicant wanted to discipline anyone selling liquor, it would have preferred charges against the employee long before the meeting.

[16] This finding of the commissioner is not based on any evidence adduced at the arbitration. Indeed, the employee's testimony was a bare denial of any wrongdoing and focused heavily on the notification to attend the hearing and the conduct of the hearing itself. The evidence of his witness, Mr Mawasha is of little assistance.

[17] The commissioner's take on the charge is rather perplexing. It is trite that a charge must be formulated with sufficient clarity to allow an employee to answer it. 'The information on the charge-sheet must be sufficient to make the accused's [sic] right to prepare a real and not an illusory right'.[1] Grogan posits that 'if the employees are given sufficient information to enable them to ascertain the misconduct alleged, the fact that the employer characterises the misconduct incorrectly does not necessarily constitute a fatal irregularity.'[2]

[18] The charge against the employee was prompted by his declaration that he was the one selling alcohol. It is of sufficient clarity to leave no doubt as to the nature of the offence with which the employee was being charged and he could have prepared his defence accordingly. In any event, the employee who was assisted by a union representative did not challenge the validity of the charge either at the disciplinary hearing or before the commissioner in arbitration.

[19] Furthermore, it was not within the commissioner's remit to frame the charges on behalf of an employer or even to counsel the employer on what the charges against the employee should have been.[3]

[20] Navsa AJ in *Sidumo and Another v Rustenburg Platinum Mines Ltd & others*[4] stated:

'In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at that decision a commissioner is not required to defer to the decision of the employer. *What is required is that he or she must consider all relevant circumstances.*' (emphasis added)

[21] A little further on, Ngcobo J in his judgment, said:

'[W]here a commissioner fails to have regard to material facts, the arbitration proceedings cannot in principle be said to be fair because the commissioner fails to perform his or her mandate. In so doing…

1 *Police & Prisons Civil Rights Union v Minister of Correctional Services* (1999) 20 ILJ 2416 (LC) para 37.
2 John Grogan *Dismissal* (2010) Juta: Cape Town 229.
3 See Shamima Gaibie *Disciplinary Proceedings – Rights, Limits and Dangers* (2010) 31 ILJ 2247.
4 (2007) 28 ILJ 2405 (CC) stated at para 79.

the commissioner's action prevents the aggrieved party from having its case fully and fairly determined'.[5]

[22] And in *Edcon Ltd v Pillemer NO & others*[6] Sangoni AJA confirmed that it is the function of the arbitrator 'to weigh all the relevant factors and circumstances of each case in order to come up with a reasonable decision.'

[23] Bhoola J in *Pernod Ricard SA (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration and Others*[7] wrote:

'In reaching his conclusion the commissioner clearly disregarded material and substantial evidence that provided the factual context in which the dismissal of the third respondent occurred. It is trite law following *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC) that this constitutes a gross irregularity and a misdirection that warrants setting aside of the award without regard to the additional grounds of review. The obligations of a commissioner are to have regard to the totality of the facts to prevent a decision being based on a piecemeal approach to the evidence.'

[24] The entire award of the commissioner was constructed around the charge on which the employee was brought before a disciplinary hearing. His finding that the charge does not disclose an offence was made on his own conjecturable interpretation of facts. The commissioner raised the possibility that the applicant may not have known that the employee was selling alcohol until the meeting but rejected it because first, Mr Stroh must have been aware that it was the employee selling the liquor; and secondly, the disciplining of the employee was prompted by the employee's 'insolent or insubordinate' conduct of the employee toward Mr Stroh. No rationale for this conclusion can be found in the award.

[25] The commissioner not only did not assess the reliability of the witnesses but blithely disregarded the evidence[8]. Indeed, the award is riddled with speculation rather than suffused with a proper consideration of all the evidence. The commissioner shirked the responsibility of weighing the evidence on the probabilities and coming to a conclusion that would be reasonable in the factual context.

[26] Clearly, the arbitrator did not apply his mind to all the material issues and as a result he committed gross irregularities in the conduct of the arbitration. Likewise, in analysing the material before the arbitrator, I must find that that the award is not one which a reasonable

5 fn 4 para 268.
6 (2008) 29 ILJ 614 (LAC) para 21.
7 (2011) 32 ILJ 1199 (LC) para 22.
8 *Sasol Mining (Pty) Ltd v Ngqeleni NO and Others* (2011) 32 ILJ 723 (LC).

decision maker could have made.

[27] This is an instance, especially since the application is not opposed by the employee, where no purpose would be achieved by sending the matter back to the CCMA for a rehearing.

Order

[28] In the premises I make the following order:

1. The finding of the commissioner that the dismissal was procedurally fair is upheld.

2. The finding that the dismissal was not for a fair reason is reviewed and set aside and substituted with an order that the employee’s dismissal was substantively fair.

3. There is no order as to costs.

SEEDAT AJ

REPRESENTATION

FOR THE APPLICANT: Advocate R Venter

Instructed by: Serfontein Viljoen & Swart Attorneys.

FOR THE RESPONDENT: No appearance