



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

CASE NO JR 1444/12

In the matter between:

**MIDFIELD ESTATE HOME OWNERS
ASSOCIATION**

Applicant

and

**THE COMMISSION FOR
CONCILIATION, MEDIATION AND
ARBITRATION
COMMISSIONER G.S JANSEN VAN
VUUREN N.O
LESIBA ADAM NGOETJANA**

First Respondent

Second Respondent

Third Respondent

Date heard: 22 April 2014

Judgment delivered: 23 April 2014

Date edited: 24 June 2014

EX-TEMPORE JUDGMENT

VAN NIEKERK J

- [1] This is an unopposed application heard yesterday. It is an application to review and set aside an arbitration award made by the second respondent, to whom I shall refer as the Commissioner, on 3 May 2012. In his award, the Commissioner found that the applicant had failed to establish that the third respondent was under the influence of liquor while on duty and reinstated him with effect from the date of his dismissal. I do not intend to repeat the facts relevant to the dismissal of the third respondent; they are captured in the summary of the evidence prepared by the Commissioner.
- [2] The applicant in these proceedings contends that in the exercise of the Commissioner's functions he committed a gross irregularity and that the award is reviewable on that basis. The heads of argument submitted by the applicant make reference to principles that predate the recent decisions by the Supreme Court of Appeal and Labour Appeal Court respectively in *Nedbank* and *Harold and Goldfields* and the heads allow to a significant extent on what might be termed process related conduct on the part of the Commissioner.
- [3] The scope of intervention by this court in applications for review where a gross irregularity on the part of the decision maker as alleged has now been clarified. This court may intervene if, and only if, the outcome of the proceedings under review in the form of the decision made by the Commissioner is so unreasonable that no reasonable decision maker could

come to that decision on the available material. In the present instance, the Commissioner's reasoning is reflected in paragraphs 34 to 39 of the award, they read As follows:

- "34. The respondent had to prove that the applicant had worked or reported for duty under the influence of drugs or alcohol.
35. Messrs Halgryn and Slater both testified that the applicant had smelled of alcohol and that he had in fact conceded having two beers before he came on duty, but that *per se*, does not imply that he made, that he had made himself guilty of misconduct. The question is whether he had actually been under the influence of alcohol.
36. Mr Slater also contended that the applicant had been unsteady on his feet, that his speech had been slower than usual and that his eyes had been red but not bloodshot. Mr Slater added that it appeared as if the applicant had to concentrate before he said anything but he did not elaborate any further. It is, for instance, not clear why Mr Slater said that the applicant had been unsteady on his feet.
37. Mr Halgryn significantly did not corroborate Mr Slater's observations. He said absolutely nothing about the applicant's state of sobriety.
38. The applicant, on the other hand, denied having been under the influence of alcohol and Mr Bobelo corroborated his version.
39. There is no reason whatsoever why Mr Slater's uncorroborated version should be preferred to the applicant's corroborated version. It follows that the respondent has not discharged the onus to prove that the applicant had indeed been under the influence of alcohol."

In relation to sanction, the Commissioner had the following to say:

“40. It also follows that the applicant should not have been dismissed.

41. Standard Rule 5: Respondent’s Disciplinary Code in any event explicitly distinguished between a serious and a minor offence when an employee is found to be under the influence of alcohol. The rule only applies for a final, only provides for a final written warning in the case of a minor offence.

42. Mr Slater’s evidence certainly did not indicate that the applicant had been heavily (seriously) intoxicated. Mr Slater did not, for instance, say that the applicant had been falling over his feet, that his speech had been slurred or that his eyes had been blood shot and it follows that dismissal would not have been appropriate even if I were wrong in holding that the applicant should not have been found guilty in respect of the charge in question.”

[4] Insofar as the applicant in the present proceeding relies on the conduct of the Commissioner, it should be recalled that arbitration proceedings in the CCMA were meant to be a robust process and that the Act provides Commissioners with wide powers to conduct proceedings as they deem appropriate. While the Commissioner must, of course, afford the parties a right to a fair hearing, the imperatives of expeditious dispute resolution underlying the Act may require an approach that is, as I have indicated, more robust than that ordinarily encountered in the civil or criminal courts.

[5] There is nothing in the record that establishes, in my view, that the Commissioner was not impartial, that he had extended, exhibited any bias in favour of one party or the other. While he often intervened in the proceedings and conducted them in to what I have referred as ‘in robust fashion’, both parties were the subject of intervention and in my view, neither party was prejudiced on account of the Commissioner’s conduct and certainly not denied a fair trial.

- [6] Turning next to the award itself, the applicant contends, as I understand the submission, that the evidence viewed as a whole cannot serve reasonably to establish the conclusion reached or to sustain the conclusion reached by the Commissioner. In particular the applicant contends that the Commissioner should have rejected the third respondent's version and preferred that proffered by its own witnesses. The charge against the third respondent was that he was under the influence of alcohol while on duty.
- [7] The Commissioner's decision in effect is that the applicant failed to establish that the third respondent was indeed under the influence. In my view, the Commissioner's finding, i.e. that Slater's evidence had not necessarily and itself established that the third respondent was under the influence and that, that evidence had not been corroborated by Halgryn and that the third respondent's concession of having consumed two beers before coming on duty were insufficient to establish the fact of drunkenness, is not a finding that falls outside of the band of decisions to which a reasonable decision maker could come.
- [8] The fact that the third respondent had failed to put to the applicant's witnesses during the course of the arbitration proceedings that he had been taking medication is not fatal. The Commissioner correctly admonished him for this failure but his decision, the Commissioner's decision that the applicant had failed to establish that the third respondent was drunk was a decision made on the adequacy or more accurately, the inadequacy of the evidence proffered by the applicant's witnesses themselves.
- [9] In these circumstances, in my view, the award is not reviewable and the application stands to be dismissed. Insofar as the applicant attacks the Commissioner's conclusion that the penalty of dismissal was in any event harsh, again this court's capacity to intervene is in relation to the issue of sanction, is limited. The Constitution Court in the *Sidumo* decision has established the same threshold of reasonableness in relation to sanction and again this court is entitled to intervene if, and only if, any decision on sanction to which a Commissioner

comes is so unreasonable that no reasonable decision maker could come to that decision.

- [10] Insofar as the Commissioner suggests that even if the applicant had been under the influence, the degree to which he had so been and the nature of his misconduct viewed in context, warranted a lesser penalty. Again, that is not a decision that is so unreasonable, given all the circumstances and in particular the provision of the applicant's Disciplinary Code that this court would be entitled to intervene.

For those reasons, I make the following order:

1. The application is dismissed.

ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT