



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

CASE NO.: JR911/13

In the matter between:-

ASSMANG LIMITED (BEESHOEK MINE)

Applicant

and

**COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

First Respondent

DAVID BOBBEJAAN N.O

Second Respondent

WILLIAM BROWN GASERANYE

Third Respondent

Heard: 28 OCTOBER 2014

Judgment : 21 January 2015

Summary: Review application- failure to observe the zero tolerance to alcohol rule-employee aware of the rule- employee previously warned and counseled for similar misconduct-final written warning valid-dismissal-

question whether arbitrator can interfere with sanction of dismissal imposed by employer in circumstances.

JUDGMENT

SONO, AJ

- [1] The Applicant seeks an order to review and set aside the arbitration award issued by the Second Respondent in terms of which the Second Respondent found the dismissal of the Third Respondent to be substantively unfair.
- [2] The Second Respondent ordered that the Applicant should reinstate the Third Respondent retrospectively and compensate him in the amount of R83 399.50. The Second Respondent further ordered that the Third Respondent should be issued with a sanction less than dismissal and be referred for counseling for alcohol abuse.
- [3] The Applicant seeks an order to review and set aside the arbitration award on the basis that the Second Respondent committed reviewable irregularities and reached conclusions that a reasonable decision-maker could not reach. The Application is unopposed.
- [4] The salient facts of the matter are as follows:-
- [5] The employee was charged and found guilty for being under the influence of alcohol. The Applicant has a zero tolerance policy to alcohol on its premises. Accordingly, in terms of this policy, employees may not enter the premises of the Applicant with any amount of alcohol in the bloodstream at all.
- [6] In terms of the said policy, employees who work in the production area also known as the Red Area are tested for alcohol everyday upon accessing the area. In other words, the testing is compulsory in respect of employees who work in this area.

- [7] Employees who work in the administrative section (offices) are only tested on a random basis.
- [8] Being a mine, however, the Applicant is bound by the provisions of the Mine Health and Safety Act¹, which prohibits an employee from entering the mine premises whilst under the influence of alcohol.
- [9] Safety of employees in its workplace is of paramount importance to the Applicant and failure to ensure the safety in the workplace by the Applicant, not only has consequences for the employees but for the Applicant as an employer. See in this regard: *Samancor Chrome Ltd (Tubatse Ferrochrome) v Metal and Engineering Industries Bargaining Council and Others*².
- [10] Accordingly, the Second Respondent ought to have taken into account, the importance of the safety rule concerned, the reasons for their existence, and the seriousness and potentially life threatening consequences of a breach of such rule.
- [11] On the day in question, the Third Respondent was tested for alcohol as he exhibited red eyes. Upon being tested, the Third Respondent was found to have 0,041 mm alcohol content in his bloodstream.
- [12] It is an established fact that being under the influence of alcohol takes more than just having alcohol content in ones bloodstream. One must exhibit certain characteristics which ultimately indicate an inability on the part of the employee to perform his duties.
- [13] Be that as it may, the Third Respondent pleaded guilty to the charge. Thus the only issue for determination by the Second Respondent was whether the sanction imposed by the Applicant was appropriate based on the evidence presented before him, taking into account that in any event, the Applicant's disciplinary code prescribes dismissal as a sanction for misconduct of this kind.
- [14] In addition, the Third Respondent was not a first time offender. He was previously counseled for failing a voluntary alcohol test.

¹ Act 29 of 1996

² (2011) 32 ILJ 1057 (LAC).

Arbitration proceedings

- [15] During the arbitration proceedings, the Third Respondent raised a point to the effect that the Applicant did not apply the zero tolerance rule consistently in that another employee who was employed in the Red Area, was not dismissed for having being found to be under the influence of alcohol at the workplace.
- [16] The Applicant explained that the employee was not dismissed because the evidence pertaining to his intoxication was misplaced and for that reason disciplinary action against that employee could not be continued with.
- [17] The Second Respondent found that notwithstanding the explanation by the Applicant, the Applicant did indeed act inconsistently by dismissing the Third Respondent when the employee who was employed in the Red Area, found in similar circumstances or even worse than the Third Respondent because this employee was employed in the Red Area. In coming to his conclusion, the Second Respondent considered that the Applicant by distinguishing between the Red Area and Administrative Offices, wherein alcohol testing is compulsory in the former area and not so, in the latter area, the Applicant had set different tolerance standards for its workplace depending on whether, it was the so-called Red Area (production) or the Administrative Area (offices).
- [18] The Second Respondent further found that the fact that the Third Respondent was under the influence of alcohol did not place anyone at risk because the Third Respondent worked in the Administrative Offices area.
- [19] The Third Respondent further testified that in the entire period of his employment with the Applicant, being just a little over a year, he had never been to the production area of the Applicant at all as such, he could not have placed other employees or the operations of the Applicant in danger.
- [20] In the circumstances, the Second Respondent found that the dismissal of the Third Respondent was too harsh and he recommended a final written warning coupled with professional counseling in order to assist the Third Respondent with his alcohol problem.

- [21] The question is whether his interfering with the sanction imposed by the Applicant, the Second Respondent committed a reviewable irregularity.
- [22] The Court in *Herholdt v Nedbank Ltd*³ held that :

“ material errors of fact, as well as the weight and relevance to be attached to the particular facts, and are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to be render the outcome unreasonable.”

- [23] There was no dispute that the employee was aware of the Applicant's rule prohibiting alcohol on the premises. The Third Respondent further understood the importance of the rule as well as the consequences of breach of this rule being that, such breach would lead to dismissal.[24] Worse for the Third Respondent, he had previously been warned and counseled for the same kind of misconduct. With regard to the earlier misconduct, evidence was led before the Second Respondent that the Third Respondent had volunteered for testing. Clearly, the Third Respondent was not only disingenuous by failing to submit himself to a voluntary test as he did in the previous instance but it is clear that he deliberately flouted the Applicant's rule in the hope that he will not be discovered as he works in the section of the Applicant's workplace where alcohol testing is only random.
- [25] It seems that the Second Respondent was largely swayed in his decision by the fact that another employee who was found to be under the influence of alcohol at work was not dismissed as in his arbitration award, he does not take issue with the finding of guilty made against the Third Respondent but that the sanction was too harsh based on his ill-placed considerations of consistency and that the Applicant was duty bound to send the Third Respondent for counseling for his drinking habits.
- [26] The Second Respondent however failed to consider the material evidence on behalf of the Applicant relating to the employee who was not dismissed, to the effect that the evidence relating to this employee was misplaced and therefore the Applicant could not proceed with the

³ (2013) 34 ILJ 2795 (SCA),

disciplinary action against that employee. It cannot be said that the Third Respondent was in a same situation as this employee. The Third Respondent did not deny that he was under the influence of alcohol. He pleaded guilty to the charge.

- [27] Although the Applicant's explanation in this regard may seem inadequate as to how the evidence was placed, neither the Second nor Third Respondent could second guess the Applicant in this regard. In the absence of objective evidence, however or whatever the reason it was misplaced, the Applicant could not discharge the onus of proving the misconduct against the employee.
- [28] Be that as a way however, the Third Respondent was previously issued with a final written warning which was still valid at the time of the second misconduct involved herein.
- [29] The Second Respondent failed to take cognizance of the aforesaid facts and place due weight on them, with the result that he arrived at conclusions which a reasonable decision – maker could not reach.
- [30] The mere fact that the Third Respondent did not work in the production section but instead worked in the office does not and cannot be construed to imply that the safety rules were not equally applicable to him. No area within the premises of the Applicant was exempt from the application of the zero tolerance to alcohol rule. Indeed, although the risk in the office section may be much lower than it is in the production section however, the employee broke the rule knowing fully well that such breach will result in dismissal. As stated afore, he was under a valid written warning for breaking the same rule. In this regard, the Second Respondent failed to appreciate the distinction between the existence of a rule on the one hand and the enforcement thereof, on the other.
- [31] The Second Respondent committed a further reviewable irregularity by finding that the Applicant ought to have imposed a lesser sanction than dismissal and referred the Third Respondent to counseling.
- [32] No evidence was led by the Third Respondent to the effect that he was suffering from alcohol dependency. The mere fact that the Third Respondent had tested positive for alcohol twice within two months, on its

own could not lead to a conclusion that therefore the Third Respondent was alcohol dependant so as to create a duty on the part of Applicant to refer the Third Respondent to counseling.

- [33] It is indeed correct that a misapplication of the law and legal principles does not lead to a reviewable irregularity, however the conclusion reached by the Second Respondent misapplying the applicable legal principles does not fall within the realm of conclusions that a reasonable decision – maker could reach.

The issue of the breakdown in the employment relationship

- [34] The Second Respondent reached a further reviewable irregularity by finding that because the misconduct committed by the Third Respondent was not related to the nature of work he was employment for, being finance, therefore the employment relationship could not be broken.
- [35] Although it is correct that the test in these sorts of matters is whether continued employment relationship is rendered intolerable or whether the trust relationship has been broken down, the question is whether the employee's conduct in the circumstances has had that effect on the employment relationship.
- [36] There is no doubt as to the rational why the Applicant would have a zero tolerance rule against alcohol in its workplace. The Third Respondent was aware of the rule and that its breach could result in dismissal. More importantly, the Third
- [37] Respondent was previously counseled and issued with a final written warning for the same conduct, which warning was still valid. By making himself guilty of the same misconduct in these circumstances, the reasonable inference to be drawn is that the Third Respondent deliberately committed the misconduct.
- [38] It is unfathomable how in these circumstances, it can be said that the employment relationship has not been rendered intolerable.
- [39] The Applicant did indeed apply the principle of progressive discipline and counsel the Third Respondent accordingly. To expect the employer to exercise further leniency towards an employee who commits a misconduct knowing the consequences, is with respect, unreasonable.

- [40] In the premises therefore, the Second Respondent's finding that dismissal was unwarranted because the Applicant failed to lead evidence to show that the employment relationship had broken down in the circumstances, is unreasonable.

Conclusion

- [41] On a full conspectus of all the facts and circumstances of the matter, the Second Respondent reached a conclusion that a reasonable decision – maker could not reach on the basis of the material before him. Accordingly, the arbitration award issued by the Second Respondent under Case Number: NC2910 – 12 falls to be reviewed and set aside.

Order

- [42] In the premises the following order is made: -
- 42.1 The arbitration award issued by the Second Respondent under Case Number – NC 2910 - 12 dated 17 March 2013 is reviewed and set aside;
 - 42.2 The First Respondent is ordered to set the matter down for a hearing *de novo* before a Commissioner other than the Second Respondent.
 - 42.3 There is no order as to costs.

Bankey Sono
Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant : Advocate M Van As

Instructed by : Cliffe Dekker Hofmeyer Inc.

LABOUR COURT