



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 618/13

THABA YA BATSWANA

Applicant

and

STANLEY DUMISA SABA

First Respondent

**COMMISSIONER FOR CONCILIATION
MEDIATION AND ARBITRATION**

Second Respondent

COMMISSIONER NONCEBA CAROLINE HLABA

Third Respondent

Heard: 8 July 2015

Delivered: 10 July 2015

JUDGMENT

HULLEY, AJ

Introduction

- [1] The applicant applies to review and set aside an arbitration award dated 26 February 2013 issued by the third respondent in favour of the first respondent.

The evidence

- [2] The first respondent was a bar tender working at a hotel owned by the applicant.
- [3] He was charged with gross misconduct for being “under the influence of alcohol” while on duty on 15 December 2012 and a failure to follow the company policies and procedures relating to such allegation. (A charge of absenteeism was apparently not proved at the disciplinary inquiry).
- [4] The first respondent was found guilty (there is some dispute as to whether he pleaded guilty at the disciplinary inquiry) and was ultimately dismissed. The first respondent then referred a dispute to the second respondent for conciliation and when conciliation failed the matter proceeded before the third respondent as arbitrator.
- [5] At the conclusion of the proceedings the third respondent found that the first respondent’s dismissal was substantively unfair though procedurally fair. She awarded compensation equivalent to 3 months’ salary.
- [6] Since the applicant’s grounds of review ultimately come down to a challenge on the arbitrator’s appreciation of the evidence and how she dealt with it, I set out some of the evidence.
- [7] The applicant called two witnesses, Mr Peet Beneke and Ms Michelle Olver. The first respondent testified on his own behalf.
- [8] Beneke testified that he was employed as the Senior Front House Manager for the hotel, overseeing the waiters and barmen, following up with customers, placing and receiving orders, doing stock takes and so forth. The first respondent was employed by the hotel as a barman.
- [9] At approximately 23h00 on 15 December 2012 the first respondent requested Beneke permission to leave early. Beneke detected alcohol on the first respondent’s breath and asked him to subject himself to a breathalyser. The first respondent agreed and a breathalyser test was conducted. It indicated, so he said, that the first respondent had consumed alcohol and was above the

legal limit permitted for the driving of a motor vehicle. Beneke testified that the first respondent queried the first test and accordingly a second test was performed on him. The results were the same.

- [10] In cross-examination of Beneke the first respondent challenged the results of the breathalyser test. He appeared to contend that Beneke had substituted the results of the second test with those of the first. He pointed out to Beneke that he (the first respondent) had wished to sign for the second test, but Beneke had indicated that it was not necessary for him to do so. Beneke appears to have accepted that he had indeed informed the first respondent that it was not necessary for him to sign the results of the second breathalyser test. On Beneke's version, he considered it was unnecessary because the exchange between him and the first respondent was captured on the surveillance cameras.
- [11] Olver testified that she was the Manager of a restaurant belonging to the company which appears to have been linked to the hotel.
- [12] On a previous occasion she had caught the first respondent drinking on duty and subjected him and another employee who was also caught to a disciplinary hearing which led to a final written warning being issued.
- [13] Olver was referred to the judgment of the chairman of the disciplinary enquiry which led to the first respondent's dismissal. It appears from that document that Olver acted as the complainant in initiating the charges against the first respondent. She testified that the facts set out in the judgment were an accurate reflection of what transpired.
- [14] The document reflects that the First Respondent was asked whether he understood the charges and to plead thereto. He pleaded guilty to the charge of being under the influence of alcohol whilst on duty on 15 December 2012 and a failure to follow the company's policies and procedures. He pleaded not guilty to a charge of absenteeism, and was found not guilty of that charge.
- [15] Olver further testified that the first respondent had agreed at the hearing that he arrived at work under the influence of alcohol and stated that he had been

at a party the previous evening and believed that the alcohol would have worked its way out of his system by the following day.

- [16] Both Olver and Beneke testified that the company had a zero tolerance policy towards intoxication on duty.
- [17] Olver, like Beneke, was challenged on whether the results of the breathalyser test were indeed those of the first respondent. She was ultimately forced to concede that she was not aware of whether the results were those of the first respondent.
- [18] In his testimony the first respondent confirmed much of the evidence which had been produced by Beneke. He confirmed that he had approached Beneke shortly before 23h00 on 15 January 2011 with the request to leave early. During the course of his conversation with Beneke the latter indicated that he smelt alcohol on his breath and requested him to submit himself to a breathalyser test. The first respondent denied that he smelt of alcohol or that he was intoxicated. Nevertheless, he agreed to the breathalyser being conducted on him.
- [19] The first respondent indicated that he was dissatisfied with the first breathalyser test that was conducted and requested a second to be performed. It was and he requested an opportunity to sign for the results of the second breathalyser test but was informed that it was not necessary for him to do so. He insisted on a second test being administered and it was. He stated that the results of the second test demonstrated that he was not intoxicated. (This latter aspect was never put to either of the applicant's witnesses).
- [20] The first respondent denied the accuracy of the facts set out in the judgment of the chairperson of the disciplinary inquiry. He indicated that he had pleaded not guilty to any of the charges. (Once again, these facts were never challenged in cross-examination of Olver).

- [21] The first respondent stated that Olver had trumped up these charges against him because she had a prior warning against him and wished to “get rid of” him.
- [22] Under cross-examination he denied having stated that he had consumed alcohol at a party the previous evening. In fact, the first respondent not only failed to challenge the evidence of Olver in this respect, but in his evidence in chief stated “we had a party at home, I had lots of alcohol”.

The arbitration award

- [23] The arbitrator in coming to her conclusion noted that it was common cause that the first respondent was on a final written warning for being under the influence of alcohol and that no evidence was presented at the disciplinary hearing or at the arbitration. She noted that the first respondent was aware of the rule given that he had previously been issued with a final written warning.

- [24] The arbitrator then stated:

“7.6 The Applicant [the first respondent *in casu*] disputed the first breathalyser test and a second one was administered. The Applicant did not co-sign for the results and therefore disputed that he was under the influence. There is no reason for me to disbelieve the Applicant as he attended a disciplinary hearing where he was issued with a final warning. It will also be improbable that the Applicant would refuse to sign for the test results and why was there no witness to verify that the Applicant had refused.

7.7. The first witness, Peet, testified that the breathalyser was missing when he came from his shift. The second witness did not produce any evidence in the disciplinary hearing to prove that the Applicant failed the test. Therefore, it was not the responsibility of the Applicant to ask for evidence. He who alleges must prove.

7.12 The evidence required to prove that a person has infringed a rule relating to consumption of alcohol or drugs depends on the offence with which the employee is charged. If employees are charged with being ‘under the influence’, evidence must be led to prove that their faculties were impaired

to the extent that they were incapable of working properly. Without proof, the sanction of dismissal, is therefore too harsh.”

Consideration of the grounds of review

[25] The applicant has raised several criticisms of the third respondent’s award. I do not intend dealing with them in light of the conclusion to which I have come.

[26] Suffice to state, however, that ‘when reviewing arbitration awards under the LRA, little purpose is served by referring to copious passages from the transcript to highlight why the version advanced on behalf of one party was improbable and should have been rejected’.¹

[27] In *Herholdt v Nedbank Limited (Congress of SA Trade Unions as amicus curiae)*², the Supreme Court of Appeal noted that –

‘for a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by Section 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.’³

[28] There are various indications in the award which suggest that the arbitrator either completely misconceived the nature of the inquiry she was called upon to conduct or alternatively, failed to understand how the evidence impacted upon that inquiry.

[29] In the first instance, the arbitrator’s finding that there was “no reason for me to disbelieve the [first respondent] as he [had] attended a disciplinary hearing [previously] where he was issued with a final warning” begs the question. She

¹ *Distell Limited v Commission for Conciliation, Mediation and Arbitration and others* (2014) 35 ILJ 2176 (LC), at 2192 I – 2193 A

² 2013 (6) SA 224 (SCA)

³ *Herholdt, supra*, at 234 A - C

was called upon to determine whether the first respondent was indeed intoxicated. The fact that he had attended a previous disciplinary inquiry and had been found guilty and issued with a final written warning provided no support for the view that he was *not* intoxicated on the occasion under consideration. If anything, the fact that he had been guilty of intoxication previously *may* provide some support for the conclusion that he was intoxicated on the latter occasion. (Whether such evidence will be admissible having regard to the rule against similar fact evidence need not be determined here).

[30] Secondly, the arbitrator's view that it was "improbable" that the first respondent would "refuse to sign for the test results" is inconsistent with the evidence. None of the witnesses testified that the first respondent had in fact refused to sign for the test results. Both Beneke and the first respondent testified that the first respondent requested to sign for the test results, but Beneke stated that it was not necessary.

[31] Thirdly, the arbitrator's finding that the company had failed to produce any evidence at the disciplinary hearing to prove that the first respondent had failed the breathalyser test ignores the testimony of Olver that it was not necessary to produce the test results because the first respondent had in fact pleaded guilty to the charges. While this finding was consistent with the first respondent's testimony, it must be borne in mind that he had never challenged Olver's testimony in cross-examination and had never challenged the authenticity of the judgment of the disciplinary chairman which supported Olver.

[32] That having been said, I agree with the third respondent's view that where an employee is charged with being under the influence of alcohol, evidence must be led to demonstrate that the employee's faculties were impaired to the extent that he or she was incapable of performing his or her duties. That view is supported by the court in *Mondi Paper Company v Dlamini*⁴, a case referred in the heads of argument filed on behalf of the first respondent.

⁴ [1996] 4 All SA 92 (N)

[33] In the *Mondi* case McCall J, with respect, correctly, came to the conclusion that where a person is charged with “*drunkenness*”, what was required was to demonstrate ‘an impairment of the faculties to the extent that the ability of the person to perform his job was impaired or there was a danger to safety’.⁵ Although the learned Judge was paraphrasing what was contained in the heads of argument of counsel in that matter, it is clear that the learned judge agreed with those views. The learned Judge went further to state that in such circumstances (i.e. where the charge is one of drunkenness) evidence of a breathalyser test is of little value *per se*.

[34] In *R. v Procter*⁶ the appellant had been charged with the contravention of a statute which prohibited a person from driving or controlling a train whilst intoxicated. The court in considering what was meant by the phrase “*intoxicated*” in the statute stated:

‘The word ‘intoxicated’ is a word of degree depending upon the circumstances – in the same way as the phrase ‘being under the influence of liquor’ is a question of degree depending upon the circumstances.’⁷

[35] In that case the court found that the purpose of the statute was the protection of human life as well as the protection of property. The court noted in that case that –

‘The question then arises: ‘In what way is the consumption of alcohol - intoxication - covered by the protective provisions of the section?’ It is well known that, after a person has consumed a sufficient quantity of alcohol – sufficient depending upon the capacity of the individual concerned – the faculties become impaired: the vision becomes blurred, the hearing less acute, the mind bemused, and the reflexes between the brain, eye, hand and foot become sluggish. When a person has been proved to have consumed alcohol and it has been shown that, as a result of taking that alcohol, his reflexes have become affected and he behaves in a manner which is

⁵ at 98

⁶ 1951 (4) SA 298 T

⁷ at 299 D

irrational, then, other things being equal, it could be said that his actions were induced by an over-indulgence in alcoholic liquor.”⁸

- [36] In this case there was little evidence to demonstrate that the first respondent had reached such a level of intoxication.
- [37] No evidence was led as to the purpose of the rule or of the nature of the first respondent’s employment. The general duties of a barman are, however, to serve customers by preparing drinks and sometimes by mixing different drinks. Unfortunately, no evidence was led on that score.
- [38] Having regard to the authorities which I have cited above, it is clear that evidence of the breathalyser test is not in and of itself sufficient to establish the charge.
- [39] Returning to the award, it is clear that the arbitrator did apply her mind to issue of whether the first respondent was under the influence of alcohol. She came to the conclusion that he was not. In arriving at this conclusion, she made a number of findings which are not supported by the evidence or are clearly wrong. She also failed to have regard to the fact that the first respondent had pleaded guilty to the charge, that many crucial aspects of his evidence had not been put to the company’s witnesses (despite the fact that he clearly understood his obligation to challenge their testimony) and had made various contradictory statements. On the face of it, the evidence of the first respondent appeared highly suspicious and ought to have been rejected. At the very least, the arbitrator ought to have explained why she was prepared to accept the evidence of the first respondent notwithstanding the contradictions and his failure to put aspects of his version to the applicant’s witnesses.
- [40] Nevertheless, the conclusion which the arbitrator arrived at is not only one which a reasonable commissioner could have arrived at, it appears to be the correct one.

⁸ at 299 F - H

- [41] Evidence of the first respondent's intoxication was, at best, scant. There was no suggestion at all that his faculties had been impaired. The only direct evidence that was relevant to the question of the first respondent's intoxication was the evidence of Beneke that he smelt of alcohol and the results of the breathalyser test. That evidence only established that the first respondent had consumed alcohol. But that was not the charge against him.
- [42] The one complicating feature is the fact that the first respondent in fact pleaded guilty to the charge (I think it can be accepted on the evidence that this was proved). Who best to determine whether his faculties had in fact been impaired, but the first respondent himself? On the other hand, the fact that the first respondent pleaded guilty to the charge may have been influenced by the commonly held view that a failure of the breathalyser test was sufficient proof of his guilt. The view was, however, wrong.
- [43] In all the circumstances, the application must fail.
- [44] As regards the question of costs, I am satisfied that the first respondent's testimony was not entirely honest. I do not intend allowing him any costs in this matter.

Relief

- I. In the circumstances, the application is dismissed and there is no order as to costs.

Hulley, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicant: Mr R Atcheson of Lee and McAdam Attorneys

On behalf of the Respondent: Mr H. Kgotleng of Kgotleng Attorneys

LABOUR COURT