



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 2574/10

In the matter between:

**NATIONAL UNION OF MINeworkERS
obo VICTOR DLAMINI**

Applicant

and

**COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

First Respondent

COMMISSIONER HAWYES N.O.

Second Respondent

EXXARO COAL MPUMALANGA (PTY) LTD

Third Respondent

Heard: 02 February 2017

Delivered: 07 February 2017

Summary: An opposed application to review and set aside the arbitration award. The award issued by the second respondent falls within the bounds of reasonableness. There is no justifiable basis upon which this Court can upset the award made by the second respondent. Held: (1) The application for review is dismissed. (2) The applicant is to pay the costs of the application.

JUDGMENT

MOSHOANA, AJ

Introduction

- [1] This is an opposed application seeking to review and set aside an arbitration award issued by the second respondent under the auspices of the first respondent. The second respondent found that the dismissal of Victor Dlamini was substantively fair and dismissed the referral with no order as to costs.

Background facts

- [2] Victor Dlamini (Mr Dlamini) was employed as a bar man for a period of over 32 years. On or about 13 March 2009, the third respondent arranged a farmer's information session and function at the Pick and Shovel located at its Coal Mines Pan. Mr Dlamini and Mr Amos Mabuza were requested by management to supply liquor and soft drinks at that function. Mr Dlamini completed a request form, which was approved by management. The approved drinks were accordingly taken to the function which lasted not more than three hours. There were about 20 attendees at the function. They were served with drinks of their choices. Not all the drinks were consumed at the end of the function. The balance of the drinks were taken back to the bar where Mr Dlamini reconciled the difference and recorded same on a *piece of paper* which subsequently disappeared.

- [3] On or about 16 March 2009, Mr Dlamini contacted one Ms Kim Amos and represented that a certain amount of drinks were consumed at the function. Management did not believe that such quantity as represented by Mr Dlamini could have been consumed by the 20 attendees for the period for which the function lasted. An investigation was launched. Such an investigation revealed certain discrepancies. As part of the investigations, one Mr Francis Alwyn Venter Van Rooyen approached each of the attendees who disputed having consumed the quantity represented by Mr Dlamini. Mr Van Rooyen also divided the quantity so represented by the 20 attendees. This exercise led him to a conclusion that each attendee on average consumed 11.6 units in three hours. This he found improbable. He also observed that the drinks were rounded off to sixes, dozens and cases. The applicant was then charged with fraud and or gross dishonesty. He was found guilty in *absentia* and was dismissed. He was aggrieved by his dismissal. With the assistance of his Union, National Union of Mineworkers (NUM) a dispute of alleged unfair dismissal was referred. Subsequently the second respondent published the award under attack.

Grounds of Review

- [4] The applicant raised a number of grounds, in its papers. In the light of the crystalized test for review it is unnecessary to repeat all of them in this judgment. Suffice to mention that it is apparent that the applicant is seeking to appeal as opposed to reviewing.

Argument

- [5] In Court Mr Makinta for the applicant submitted that the award of the second respondent is riddled with speculations and thus unreasonable. On the other hand, Ms Leyden for the third respondent argued that the award is reasonable and the review application should thus be dismissed with costs. I engaged Mr Makinta on the submissions he made in Court.

It became clear to me that his submissions were based on a selective reading of the record. He sought to criticize the findings of the second respondent which findings were perfectly supported by what the record revealed.

Evaluation

- [6] Applying the reasonableness test, I am unable to find that the second respondent has rendered an award which a reasonable commissioner could not render. It was common cause throughout the arbitration proceedings that Mr Dlamini represented that a certain quantity of drinks was consumed. The third respondent did not believe the said representation. Before the second respondent the third respondent adduced evidence, which when assessed supports the contention that the representation by Mr Dlamini is false. The second respondent found that there was no direct evidence before him. In that regard, he concluded thus:

“The case of the Respondent rests upon circumstantial evidence. It is necessary for me to find that the inference of fraud and gross dishonesty is consistent with the proven facts and that all other reasonable inferences are excluded.”¹

- [7] In performing the assessment, he reflected on the uncontested evidence of Mr Van Rooyen that the returned stock was in so picture exact in its make-up. He also found that it is improbable that the farmers would have consumed the amount of liquor and beverages alleged by Mr Dlamini given the amount of time they had to imbibe it. In *Cooper & Another NNO v Merchant Trade Finance Ltd*² Zulman JA held thus—

¹ Para 20 of the award page 30 pagination.

² 2000 (3) SA 1009 (SCA).

“the court in drawing inferences from the proved facts, acts on a preponderance of probability. ...If the facts permit of more than one inference, the court must select the most “plausible” or probable inference.”³

[8] As a court of review I must always remind myself that I cannot substitute the findings of an arbitrator simply because I would have come to a different finding. If an award is one that a reasonable commissioner can arrive at, I cannot substitute it. I am unable to fault the second respondent’s findings. On the proven facts, it is reasonable to conclude, using inferential reasoning, that Dlamini did in fact misrepresent the quantity of the drinks consumed.

Order

In the premises, I make the following order:

1. The review application is hereby dismissed.
2. The Applicant, NUM, is to pay the costs of this application.

G. N Moshwana
Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: E.S. Makinta of E S Makinta Attorneys, Fourways.

For the First Respondent: S Leyden of Shepstone and Wylie, Johannesburg.

³ Id at para 7.