



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 1059/16

In the matter between:

QK MEATS SA (PTY) LTD

Applicant

and

**THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

COMMISSIONER ERIC MYHILL N.O.

Second Respondent

GIWUSA obo ANNASTACIA NTHABISENG TSUBELLA

Third Respondent

Heard: 22 November 2018

Delivered: 30 November 2018

Summary: Review of an arbitration award – ignoring relevant evidence makes the outcome to be one that a reasonable commissioner may not arrive at – equally misconceiving the nature of the dispute – the charges that led to a dismissal – makes the outcome to be one that a reasonable commissioner may not arrive at. Held: (1) The award is reviewed and set aside and replaced with an order that the dismissal is substantively fair with no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

- [1] The applicant is seeking to review and set aside an award made by the second respondent in terms of which he found that the dismissal of Annastacia Nthabiseng Tsubella (the dismissed employee) is procedurally fair but substantively unfair. He ordered the applicant to reinstate the dismissed employee without any loss of benefits and pay her back pay. The application is opposed by the third respondent.

Background facts

- [2] The dismissed employee was employed by the applicant on 12 May 2011 as Acting Team Leader. On or about 15 September 2015, the applicant held its 10th annual sports day anniversary. The function was held at the Germiston Stadium. Employees were required to clock in at work and collect a voucher for breakfast and lunch before heading to the venue. A day before, a letter was issued to the effect that alcohol was prohibited at the event. Allegations emerged that there was alcohol at the event. Resultantly, the dismissed employee was placed on suspension on full pay pending the outcome of investigations into the alleged charges on 17 September 2015.
- [3] On or about 23 September 2015, the dismissed employee was subjected to a polygraph test. On 27 September 2015, Mr P A Vorster, the Polygraph Examiner, issued a report which concluded that the dismissed employee indicated deception during the examination. Prior to that a notice of a disciplinary enquiry was issued on 25 September 2015 calling

upon the dismissed employee to answer allegations of misconduct on 29 September 2015. The notice contained a catalogue of allegations. The allegations ranged from dishonesty up to and including gross negligence.

- [4] One of the allegations was that the investigations revealed that the dismissed employee distributed, sold, dealt, handled alcohol to staff members during working hours and or company related function and or entered the company and or business related premises (i.e. Sports day) whilst in possession of alcohol and by doing so breached the company's policies and procedures as well as putting the health and safety of staff in jeopardy. Lastly, that the dismissed employee has been distributing, selling, dealing or handling alcohol without the required licence illegally.¹

- [5] A disciplinary enquiry chaired by an independent chairperson, one Mike Lockley ensued. After hearing evidence, the dismissed employee was found guilty on all the charges. After hearing aggravating and mitigating factors, the chairperson issued a sanction of dismissal effective 6 October 2015. Aggrieved by her dismissal, the dismissed employee referred a dispute of alleged unfair dismissal to the first respondent. In turn, the second respondent was appointed to resolve the dispute through arbitration. On 13 April 2016, the second respondent published his award. The applicant was aggrieved thereby and launched the present application on 06 June 2016.

The arbitration proceedings.

- [6] At the commencement of the proceedings, Mr Jansen, representing the applicant at arbitration, outlined the allegations that led to the dismissal of the dismissed employee. The transcript reveals the following:

'COMMISSIONER: You do not have to go into too much detail.

¹ Own emphasis.

MR JANSEN: Okay

COMMISSIONER: What was the misconduct?

MR JANSEN: The employee was involved in selling and breaching company policies regarding alcohol, dishonesty and so forth.

COMMISSIONER: Was there any alcohol at the sports day?

MR JANSEN: Well, she was involved with the process of selling² the alcohol, and that took place during working hours, as the day was seen as a normal work day.

COMMISSIONER: What was the other point, selling, involved in selling alcohol?

MR JANSEN: And then also assisting with company's equipment to design and print, labelling for whisky brand that was issued.

COMMISSIONER: Sorry, I do not understand, what did she do, assist who?

MR JANSEN: She assist and helped the main contributing person to design and label the brand of whisky.

COMMISSIONER: Okay. Okay, so does the applicant deny that she was involved in this or what?

MR GALENI: Yes, she denies that.'

- [7] The above reveals that the applicant was seeking to justify the dismissal with reference to the charges that led to the dismissal of the dismissed employee.

The grounds for review

- [8] Various grounds of review were set out in the founding affidavit and can be summarised thus:

- 8.1 Failure to advise the applicant's representative to declare a witness hostile i.e. not extending a helping hand;
- 8.2 Failure to take into account evidence;

² Own emphasis.

8.3 Misconceived the evidence upon which a finding was made to dismiss the dismissed employee;

8.4 Ignored relevant evidence.

[9] Cumulatively, the applicant contends that the outcome of the second respondent is not one a reasonable commissioner can arrive at in light of the evidence placed before him.

Evaluation

[10] Mr Cook, appearing for the applicants did not press with any vigour the ground of failure to extend the helping hand. He did not abandon the ground though. My view, which I have expressed before is that in the light of the review test as developed in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*³, I do not believe that on its own this is a ground for review. It cannot, to my mind, be an irregularity that vitiates an award when the outcome arrived at falls within the bounds of reasonableness.⁴ Accordingly, this ground must fail.

[11] Failure to take into account evidence is a serious irregularity which affects the outcome. If a commissioner fails to take into account relevant evidence, it is almost impossible to arrive at a conclusion that a reasonable decision maker would arrive at. Equally, misconceiving the evidence upon which a dismissal is premised has the same effect. It must be borne in mind that if an employer dismisses an employee for a particular misconduct, once challenged to show the fairness of that dismissal, an employer is behooved to justify the dismissal using the allegations that led to the dismissal. In *casu*, the dismissed employee was found guilty of all the charges catalogued in the disciplinary notice. Mr Jansen attempted to summarize those allegations at the commencement of the arbitration proceedings.

³ (2007) 28 ILJ 2405 (CC).

⁴ See *Witbooi v Commission for Conciliation, Mediation and Arbitration and Others* (2018) 39 ILJ 1852 (LC).

[12] Therefore, the duty of the arbitrator is to firstly establish whether the evidence presented before him proves that on a balance of probabilities a dismissed employee is guilty as alleged. Reading the award reveals that the second respondent missed the point by a proverbial mile. He recognised that the allegations that led to the dismissal of the dismissed employee were spelt out in the Notice of Disciplinary Enquiry.⁵ Having done so, he decided to consider part of the allegations, much to the chagrin of the others. He concluded thus:

‘There is no direct evidence that she was found in possession of alcohol on the premises of the Respondent or the Stadium where the Sports Day function took place so the Respondent relies heavily on the results of a polygraph test ... The Respondent relies on these results to support its contention that Tsubella was guilty of the aforementioned charges.’

[13] Clearly, the above demonstrates that the second respondent failed to consider why the dismissed employee was dismissed by the applicant. He instead went off on a tangent and suggested a charge, which in his mind, was mitigated by the fact that it was an instruction from a senior manager. Strange enough he does not find that the dismissed employee was guilty of any offence, yet there is mitigating factors. Instead he goes to making a finding that there was double jeopardy, an issue that was never raised as a procedural defect by the dismissed employee.

[14] Instead of considering whether there is any evidence to support the allegation that the dismissed employee was assisting the main person in selling alcohol, he concentrated on a charge that the dismissed employee was not charged with, i.e. that of misusing company property. The evidence presented proves on a balance of probabilities that the dismissed employee assisted Mr Anderson in his business of selling whisky. The evidence actually, to my mind, proves that Mr Anderson and the dismissed employee were in business together. Instead of

⁵ Paragraph 59 of the award.

appreciating the evidence of the comment sourced on the business cards, he relegated it to a misuse of company property.

[15] This evidence, properly appreciated, proves that the dismissed employee assisted and was actually involved in the selling of alcohol in breach of company policy. She knew that Mr Anderson was selling alcohol at the petrol stations. She knew or must have known that when Mr Anderson made a sojourn at the Engen garage, on the Sports Day, it was for the purposes of selling alcohol. It was the evidence of Mr Anderson that at Engen garage, he gave a whisky bottle to one Candice on the day in question.

[16] Knowing fully well that the selling and/or dealing with alcohol was contrary to the company policy, she conveniently testified that she did not observe the exchange, yet in a statement she stated that a bag of juices was given as opposed to whisky. The evidence properly appreciated proves that the dismissed employee was indeed guilty of selling and/or distributing of alcohol during working hours, an illegal conduct as Mr Anderson and she did not possess the relevant license. Such is the case even without necessarily taking into account the polygraph results. However, the results lend credence to such evidence.

[17] To my mind, a reasonable commissioner would, in light of the evidence presented, have arrived at a conclusion that the dismissed employee was indeed guilty of the misconduct that led to her dismissal. It must follow that the dismissal was substantively fair. The misconduct that led to the dismissal of the dismissed employee is a very serious one. It goes to the root of the trust relationship, accordingly dismissal as a sanction was a fair sanction. According to the disciplinary code of the applicant dealing with alcohol is a dismissible offence.

[18] Before I conclude, I wish to comment in passing on this issue of declaring Mr Anderson a hostile witness. Even if the representative

would have successfully applied to declare Anderson a hostile witness, all that would have meant is that the general rule of not cross-examining one's own witness would have been lifted. However, the evidence of Mr Anderson in whatever form would still be required to be assessed together with the evidence of others. An important factor in the evidence of Mr Anderson is that he had a close relationship with the dismissed employee. On the probabilities such evidence supports the allegation that the dismissed employee assisted Mr Anderson in the business of selling and/or distributing alcohol.

[19] Accordingly, I conclude that the award is reviewable in law. With regard to costs, I have a wide discretion to exercise. I am minded not to make an order as to costs.

[20] In the results, I make the following order:

Order

1. The award issued by the second respondent on 13 April 2016 under case number GAJB21775-15 is hereby reviewed and set aside;
2. It is replaced with an order that the dismissal of the dismissed employee is substantively fair;
3. There is no order as to costs.

GN Moshoana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate AL Cook

Instructed by: Allardyce & Partners, Johannesburg.

For the Third Respondent: Attorney M Bayi of Bayi Attorneys.

LABOUR COURT