

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

CASE NO: JR 1227/17

In the matter between:

SERVEST SECURITY A DIVISION OF

SERVEST (PTY) LTD

Applicant

And

LUNATHI NKWANE

First Respondent

L SHEAR N.O,

Second Respondent

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

Third Respondent

Heard: 29 January 2020

Judgment delivered: 31 January 2020

JUDGMENT

VAN NIEKERK J

- [1] This is an application to review and set aside an arbitration award issued by the second respondent (the arbitrator) on 2 June 2017. In his award, the arbitrator found that the first respondent (the employee) had been unfairly dismissed and made an award of compensation in the amount of R15 168.00.
- [2] The employee was employed by the applicant as a security guard. He was engaged at the Orlando Stadium on the night of 31 December 2016 – 1 January 2017. The employee was dismissed for failing to inform control that he had found beers on the premises, that he had consumed intoxicating substance while on duty, that he had jeopardized a major contract, and that he had been grossly negligent in failing to conduct a proper hand-over when completing his duty on 1 January 2017.
- [3] After hearing the evidence of the applicant's human resources manager and the employee, the arbitrator came to the following finding:
1. As indicated the applicant had been found guilty of failing to do a proper hand-over, consuming alcohol, failing to protect client's property and jeopardising a major contract.
 2. He admitted drinking a can of beer, but said that this occurred after he had completed his duty and admitted handing a can to the relieving guard.
 3. The applicant said, however, that he was unaware that any property had gone missing and was only informed at his disciplinary enquiry.
- [4] The arbitrator went on to reach the following conclusion:

1. It is correct that drinking alcohol is an offence by any security official. However, no evidence was brought to prove that this had taken place prior to the applicant concluding his duties. In any event, one would imagine that the fact that this occurred on New Year's Day would be regarded as somewhat of a mitigating factor.
2. With regard to the alleged theft of the television and computer, no evidence was provided regarding this matter and no evidence was provided which directly implicates the applicant. There were two other security guards working the same shift.
3. It is my conclusion that the applicant was *not guilty* of the offence regarding the theft, and with regard to the hand-over, the consumption of alcohol, even if this did occur immediately after knocking off, given the date of the offence, and the timing of the offence, I conclude that dismissal was too harsh.

[5] The applicant contends that the arbitrator committed a reviewable irregularity in making his award in that he failed to apply the correct approach to determine a material dispute of fact, that he failed to have proper regard to the improbability of the employee's version that he consumed alcohol after the conclusion of his shift, that he had regard to irrelevant evidence being that New Year could constitute a mitigating factor, and that he failed to apply his mind to evidence regarding the hand-over to the relieving guard and the employee's failure to protect the client's property.

[6] At the hearing of the application, Mr. Mayer, who appeared for the applicant, abandoned the attack on the arbitrator's findings in respect of the misconduct other than the consumption of alcohol on duty. In this regard, Mr. Fuller contended that the record disclosed, on the employee's own version, that he had consumed alcohol during his shift.

[7] The test to be applied is one that recognises and reinforces the distinction between a review and an appeal. This court must be particularly cautious not to blur the line, especially where the grounds for review smack off no more than a disagreement with the arbitrator's findings. This court is entitled to intervene if and only if the arbitrator's decision is one that falls outside of a band of decisions to which a reasonable decision-maker could come on the available material. In

Head of Department of Education v Mofokeng & others [2015] 1 BLLR 50 (LAC), the LAC said the following:

[30] The failure by an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity. However, the Supreme Court of Appeal (“the SCA”) in *Herholdt v Nedbank Ltd* and this court in *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and others* have held that before such an irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome...

[32] ...Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc. must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived inquiry or a decision which no reasonable decision-maker could reach on all the material that was before him or her.

[33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator’s conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute. A material error of this order would point to at least a *prima facie* unreasonable result. The reviewing judge must then have regard to the general nature of the

decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, if an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.

- [8] In the present instance, the record clearly discloses the employee's testimony that he acquired beers from some persons that he had 'chased away, and that in the company of another guard who does not drink, he 'opened up one beer and I started drinking.' In answer to the commissioner's question as to the time at which he had started drinking, the employee replied 'Ten to six, Commissioner.' It was not disputed that the employee worked a 6pm to 6am shift. Given that there is direct evidence by the employee himself that he commenced drinking before the end of his shift, the arbitrator's conclusion to the contrary simply cannot be sustained. Had the arbitrator had regard to the evidence that served before him, he would have concluded that the employee was guilty of the offence of drinking on duty. Any conclusion to the contrary is unreasonable.
- [9] The applicant contends that all of the relevant evidence is before the court and that little purpose would be served by remitting the matter for rehearing. I agree. The evidence discloses an act of serious misconduct by the employee, on his own version. It is not disputed that the applicant's disciplinary code provides that consumption of an intoxicating substance or drugs while on duty is a dismissible offence. Drinking in duty is a dismissible offence, and the employee was aware of the rule in this regard. I fail to appreciate how it can be said that the fact that the offence was committed on New Year's Day is somehow exculpatory. The core of

the employee's duties is to safeguard the property of the client, and the strict rule against drinking on duty is obviously directed against any compromising of this obligation. In the light of the seriousness of the employee's admitted misconduct and given the nature of his employment, the penalty of dismissal is appropriate.

[10] At the hearing of the application, the employee's only concern was that other employees had also been drinking and that they remained employed by the applicant. The issue of inconsistency was not raised at the disciplinary enquiry, nor was it pertinently raised as a defence in the proceedings under review. The employee did not file an answering affidavit making any averments to this effect, and made only what amounts to a statement from the Bar. The arbitrator clearly did not identify inconsistency as an issue that required his attention or decision, and no mention is made of it in the award. In these circumstances, this is not an issue that is relevant to these proceedings.

[11] Finally, the court has a broad discretion in terms of s 162 to make orders for costs according to the requirements of the law and fairness. The applicant is an individual employee whose opposition to the application is misguided, but not frivolous. The court is generally reluctant to make orders for costs against employees who seek to pursue genuinely felt grievances in good faith. There is no compelling reason to order that the third respondent be liable for the applicant's costs.

I make the following order:

1. The arbitration award issued by the second respondent under case number GAJB 3364-17 on 2 June 2017 is reviewed and set aside.
2. The award is substituted by the following:
"The applicant's dismissal was substantively and procedurally fair."

André van Niekerk

REPRESENTATION

For the Applicant: Mr. R Mayer, Fullard Mayer Morrison Inc.

For the First Respondent: In person

Labour Court