REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case nos: JR667/2011 and J515/2013

In the matter between:

ADT SECURITY (PTY) LTD **Applicant**

and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION **First Respondent**

COMMISSIONER GS JANSEN

VAN VUUREN N.O. **Second Respondent**

THEMBINKOSI XOLANI KHUMALO **Third Respondent**

Heard: 31 October 2013

Delivered: 12 November 2013

Summary: Review of CCMA arbitration award – arbitrator in effect miscategorising the dispute as that of incapacity instead of misconduct. The arbitration award is not one that a reasonable decision maker could have reached

on the issues and the evidence presented. Arbitration award reviewed and set aside – dismissal of third respondent procedurally and substantively fair.

JUDGMENT

MAENETJE AJ

Introduction

[1] There are two applications that were heard together. The first, under case number JR667/2011, is an application in terms of section 145 of the Labour Relations Act, 66 of 1995 ("the LRA") to review and set aside an arbitration award handed down by the second respondent, dated 24 February 2011. The second, under case number J515/2013, is an application to make the arbitration award an order of Court in terms of section 158(1)(c) of the LRA.

[2] The applicant conceded that if the review application is dismissed, the application to make the arbitration award an order of Court should succeed.

Material facts

[3] The applicant charged the third respondent with misconduct on 29 September 2010 for smelling of liquor when reporting for duty, or whilst on duty, on 26 September 2010 at the Silverton Hub. The third respondent was found guilty and dismissed by notice of dismissal dated 22 October 2010.

[4] It was common cause at the arbitration that the third respondent committed the misconduct as charged. The third respondent admitted under questioning by the second respondent that he had taken liquor in the morning of 26 September 2010 before reporting for work.

[5] It was also common cause that in terms of the applicant's rules, smelling of liquor on duty or when reporting for duty constitutes misconduct and that the third respondent was aware of the rule. Evidence tendered at the arbitration shows

that the rule is important because employees of the applicant, such as the third respondent, drive vehicles on duty and handle firearms.

[6] Mr Etienne de Villiers ("De Villiers"), a security site manager of the applicant, chaired the disciplinary hearing.

[7] The applicant was previously found guilty of the same misconduct and was issued with a final written warning in August 2010. There is a dispute as to whether a formal hearing preceded the final written warning. This is irrelevant for purposes of the present applications.

[8] The third respondent unsuccessfully challenged his dismissal by way of an internal appeal. He then referred an unfair dismissal dispute to the CCMA, which dispute remained unresolved and ended up in arbitration before the second respondent.

[9] De Villiers and Mr Dudolph Botha ("Botha"), a reaction force manager of the applicant, and who is also the third respondent's manager, testified for the applicant at the arbitration proceedings.

[10] When questioned by the second respondent, De Villiers stated that the applicant has a policy on drug addiction or alcoholism. That policy had not been placed before the second respondent in the arbitration proceedings. In response to questions from the second respondent, De Villiers explained how the policy works. He said that in terms of the policy, if an employee has an alcohol problem he must report it to his superior for investigations. If the investigations reveal that the employee has an alcohol problem, i.e. that he is an alcoholic, the applicant will assist him to get outside help.

[11] It was common cause that although the third respondent claimed to have admitted to De Villiers at the disciplinary hearing that he had an alcohol problem, he had never previously reported any alcohol problem to his superiors for investigation. In other words, he had never admitted to be an alcoholic in order

for this to be investigated with a view to assist him to obtain outside help.

[12] It was also common cause that De Villiers had not followed the applicant's policy on alcoholism prior to dismissing the third respondent, nor ensured that the applicant had followed it.

[13] At the arbitration, the third respondent initially strenuously denied that he had an alcohol problem. He said that he had told De Villiers that he had an alcohol problem in order to gain some advantage in the face of the charge for misconduct. Under strenuous questioning by the second respondent, he eventually admitted that he had an alcohol problem, which he said started when his first-born child passed away on 29 July 2008. But he also said that at the time when he was charged with misconduct for the second time, he believed that he was winning the fight against the alcohol problem.

Arbitration award

[14] The second respondent found the dismissal of the third respondent to be both substantively and procedurally unfair. He ordered reinstatement on the terms and conditions that applied prior to dismissal, but qualified this as follows:

> '(2) to permit … to resume his employment on or before 22 March 2011, provided that he should not be permitted to drive any vehicle or to carry a firearm unless he successfully complete a rehabilitation programme to be paid for by the respondent and provided further that the respondent will be entitled to terminate the applicant's service or to consider alternative measures such as demotion or a transfer to another position if the applicant refuses to co-operate or if rehabilitation fails.'

[15] The second respondent directed that the third respondent be paid for the entire period during which he did not work, provided that such remuneration shall not be less than R25 000,00, subject to tax and any other legitimate deductions. The total amount due to the third respondent was to be paid on or before 22 March

2011.

[16] The second respondent further directed that the third respondent's leave and other benefits be restored as if he had not been dismissed.

[17] The reasons for the second respondent's findings on substantive and procedural fairness are captured in paragraphs [33] to [40] of the arbitration award. It is convenient to quote them as they are not lengthy:

> '[33] The applicant was a pathetic witness who repeatedly contradicted himself. He certainly created the impression that he was an alcoholic indeed.
>
> [34] The applicant conceded that he had, in fact, smelled of liquor when he reported for duty on 26 September 2010 and Mr. De Villier's decision to find him guilty as charged can therefore not be faulted.
>
> [35] The question is whether the applicant should have been dismissed. Item 10(3) of the Code clearly states that counseling and rehabilitation may be appropriate steps for an employer to consider in the case of alcoholism or drug abuse and the respondent's own procedure echoes this.
>
> [36] It is now clear that the respondent had not complied with their own policy in regard to alcohol dependency.
>
> [37] Mr. De Villiers had clearly forgotten about this policy when he conducted the applicant's disciplinary hearing. He was well aware of the fact that the applicant had received a final written warning for smelling of alcohol a month earlier, but he ignored this obvious warning bell and dismissed the applicant.
>
> [38] Mr. De Villiers conceded that he should not have dismissed the applicant without first establishing whether the respondent's alcohol policy had been complied with. This (incomprehensible) oversight rendered the applicant's dismissal procedurally unfair.

[39] The respondent's failure to assist the applicant through counseling and rehabilitation also rendered his dismissal substantively unfair. Dismissal was not the appropriate sanction in these circumstances.

[40] The respondent has not discharged the onus of proving that the applicant's dismissal had been fair.' (My underlining)

Should the arbitration award be reviewed and set aside?

[18] The test for the review of CCMA arbitration awards has been restated and clarified in the relatively recent decision of the Supreme Court of Appeal ("SCA") in *Andre Herholdt v Nedbank Ltd*[1] . Albeit that the outcome of this case before the SCA turned on the facts, the SCA decided the legal issues – regarding the proper review test of CCMA arbitration awards – at the invitation of the parties.

[19] There are two contentions by the applicant, which were pursued during oral argument that warrant consideration:

a. The first is that the second respondent committed misconduct in the manner in which he descended into the arena during the arbitration proceedings. It was contended that he took it upon himself to lead evidence, cross-examine witnesses, and almost interrogate them. For this reason, it was submitted, the arbitration award falls to be reviewed and set aside on the ground in section 145(2)(a)(i) of the LRA – i.e. that he committed misconduct in relation to the duties of a commissioner as an arbitrator.

b. The second was that the second respondent miscategorised the reason for the third respondent's dismissal and reached a conclusion that no reasonable decision maker could have reached on the issues and the evidence before him. The third respondent was dismissed for smelling of

[1] 2013 (6) SA 224 (SCA) at paras 6 to 8 of the judgment. .

alcohol. In the absence of any evidence that the third respondent suffered from alcoholism, the second respondent made a finding that the third respondent was an alcoholic. In doing so the second respondent miscategorised a charge of misconduct as a matter of incapacity based on alcoholism that required to be treated in terms of the applicant's policy on alcoholism, which reflects Item 10(3) of the Code of Good Practice: Dismissal. Item 10(3) of the Code specifically includes alcoholism as a form of incapacity and suggests that counselling and rehabilitation may be appropriate measures undertaken by a company to assist employees.

[20] The first contention is not sustainable on the facts and the law. The third respondent was unrepresented at the arbitration. An employee and not a legal representative represented the applicant at the arbitration. In such circumstances, it is permissible for a commissioner to take charge of proceedings and to ask questions in order to arrive at the truth.[2] This is in line with the provisions of section 138(1) of the LRA, which entitle a commissioner to conduct the arbitration in a manner that he considers appropriate to determine the dispute fairly and quickly. What is important is for the commissioner to do so even-handedly and not favour one party over the other. The transcript of the arbitration proceedings in this matter shows that the second respondent asked questions of all witnesses that testified, and challenged their answers where appropriate in order to arrive at the truth, and did so even-handedly.

[21] The second contention has merit.

[22] It is clear from paragraph 37 of the arbitration award that the second respondent placed the duty on the applicant, in particular De Villiers, to find out whether or not the applicant suffered from alcoholism merely because a month earlier he had been found guilty of misconduct for smelling of liquor on duty. On the contrary, the policy required an employee who suffered from alcoholism to report

[2] See for example, *Consolidated Wire Industries (Pty) Ltd v CCMA and Others* (1999) 20 *ILJ* 2602 (LC).

his condition to his superiors and ask for help. This, the third respondent had never done.

[23] Thus on the evidence before the second respondent, there was no evidence that the third respondent had previously reported that he suffered from alcoholism and requested help from the applicant which was not forthcoming. Nor was there evidence that the third respondent's dismissal related to incapacity as a result of alcoholism. He was dismissed for misconduct because he smelled of liquor on duty. His case had to be treated as one of misconduct, applying the rules relating to misconduct to determine whether the applicant had proved the misconduct and whether dismissal was a fair sanction.

[24] Instead, the second respondent veered from the path of dealing with the case as one of dismissal for misconduct and effectively considered it as one of incapacity. He did so after having accepted that the third respondent was a pathetic witness who contradicted himself materially, including on whether or not he was alcoholic.

[25] As Steenkamp J explains in *Builders Trade Depot v CCMA and Others*:[3]

> 'The category of misconduct for reporting for duty under the influence of alcohol has not been extinguished by the incapacity classification for employees with alcoholism. An obligation to assist an employee who does not suffer from such incapacity does not rest on the shoulders of an employer. Such an employee is responsible for their actions and can, and should, be held accountable for any misconduct they commit.'

[26] In the arbitration award, the second respondent never makes a positive finding that the third respondent is an alcoholic. The closest he comes to such a finding is in paragraph 33 where he records that the third respondent was a pathetic witness who repeatedly contradicted himself. He then concludes that the

[3] [2012] 4 BLLR 343 (LC) at para 37.

contradictions "created the impression that he was an alcoholic indeed". This is a remarkable finding in the face of the contradictions, which related precisely to whether or not the third respondent was an alcoholic. It is based on speculation and conjecture and not evidence.

[27] Having effectively focused on incapacity as a result of alcoholism, the second respondent invoked the obligation to investigate the third respondent's condition and to afford him assistance. He then concluded that the failure to investigate the third respondent's alcoholism and to afford him such assistance as he required rendered his dismissal procedurally and substantively unfair. He did not at all consider whether in case of misconduct, dismissal was a fair sanction.

[28] Where the evidence did not establish that the third respondent had previously admitted to be alcoholic, i.e. was truly dependant on alcohol, and sought help from the applicant, and that the matter was one of incapacity and not misconduct, the second respondent reached a conclusion that no other reasonable decision maker could have reached. The miscategorisation in the circumstances had material consequences for the outcome reached, which is unreasonable, and renders the arbitration award reviewable.[4]

[29] For all of the above reasons, the review application must succeed. The application to make the arbitration award an order of Court must fail. Both parties submitted that they did not ask for costs in the event of success.

Order

[30] I, therefore, make the following order:

1. The arbitration award of the second respondent is reviewed and set aside and replaced with the following order:

[4] See also *Transnet Freight Rail v Transnet Bargaining Council and Others* [2011] 6 BLLR 594 (LC); *Gold Fields Mining South Africa v Commission for Conciliation Mediation and Arbitration,* Case number JA 2/2012, 4 November 2013, (LAC) at paras 28-32.

"The dismissal of the third respondent was procedurally and substantively fair".

2. There is no order as to costs.

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Maenetje AJ

Acting Judge of the Labour Court of South Africa.

APPEARANCES:

For the Applicant: H Schensema (Routledge Modise Inc)

For the Respondent: A Goldberg (Goldberg Attorneys)