REPUBLIC OF SOUTH AFRICA

Reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Case no: D 822/10

In the matter between:

BUILDERS TRADE DEPOT	**Applicant**
and	
CCMA	**First respondent**
Commissioner Ian BULOSE	**Second respondent**
Commissioner Phillip VAN ZYL	**Third respondent**
Mannie NAIDOO	**Fourth respondent**

Heard: **15 November 2011**

Delivered: **28 November 2011**

Summary: Review – rescission ruling and arbitration award – employee applying for rescission of arbitration award where employer party was absent. Application of LRA s 144. Arbitration award – employee drinking on duty – extant written warning for same misconduct – arbitrator nevertheless found dismissal unfair. Award unreasonable – reviewed and set aside.

JUDGMENT

STEENKAMP J

Introduction

1] The applicant seeks to review a rescission ruling made by commissioner Ian Bulose (the second respondent), as well as a subsequent arbitration award by commissioner Phillip van Zyl (the third respondent). The dispute arises from the dismissal of the employee, Mr Mannie Naidoo (the fourth respondent) by the applicant. It is common cause that Naidoo had been drinking whilst on duty and that, at the time of his dismissal, there was an existing written warning pertaining to the same offence applicable to him. Commissioner van Zyl nonetheless found his dismissal to have been unfair.

2] Somewhat peculiarly, commissioner Bulose had found in an earlier arbitration award that the dismissal was fair. That arbitration was heard in the absence of the employer party, and the commissioner nevertheless found – on the employee's version only – that the dismissal was fair. Despite the fact that the employee was present and the employer was not, the employee applied for rescission of the award and commissioner Bulose granted it. Naidoo referred the dispute to arbitration afresh and commissioner Van Zyl, having heard the evidence of both parties, came to the conclusion that the dismissal was unfair. He ordered the applicant to reinstate Naidoo with no backpay and to couple the reinstatement with a final written warning. The applicant now seeks to review both those awards.

The rescission ruling

3] Naidoo was dismissed on 1 December 2009. He referred a dispute to the CCMA on 23 December 2009. The matter was set down for con/arb on 25 January 2010. The applicant objected to con/arb on 12 January 2010.

Naidoo's attorney of record wrote to the CCMA on 13 January 2010, confirming that conciliation only would proceed on 25 January 2010. The applicant accordingly did not attend the proceedings on that day. Naidoo did. Despite this agreement and the notification to the CCMA, commissioner Bulose continued with arbitration in the applicant's absence and heard Naidoo's evidence. He found that the dismissal was fair.

4] The applicant's attorneys, having read the award, wrote to Naidoo's attorneys on 17 February 2010 seeking clarification why the arbitration went ahead in its absence.

5] Shortly thereafter Naidoo filed a rescission application in the CCMA. The applicant opposed it on various ground, including the following:

5.1 Naidoo did not have *locus standi* to apply for rescission as the arbitration was not heard in his absence.

5.2 Naidoo had dishonestly carried on with the arbitration despite an agreement to the contrary.

5.3 The dismissal was fair and there was in any event no basis for the application.

6] Commissioner Bulose handed down his ruling on rescission on 19 March 2010. He ignored the preliminary point relating to *locus standi.* He appears to have accepted that Naidoo had behaved in a "reprehensible" manner by proceeding with the arbitration, contrary to the agreement between the parties, but nevertheless found:

> "Furthermore, while I am persuaded by the view that the conduct of the [employee] was reprehensible, the balance of convenience based on the established legal principles dictate that the application should be granted."

7] Commissioner Bulose did not explain what those "established legal principles" were. He nevertheless rescinded his own award and it was set down for a fresh arbitration before commissioner Van Zyl.

Is the ruling on rescission reviewable?

8] It is certainly unusual for a party who was present at the arbitration proceedings, rather than the absent party, to apply for the rescission of a subsequent award. But is it prohibited? Put another way, did commissioner Bulose exceed his powers by considering the application?

9] Rescission of CCMA awards are governed by s144 of the LRA. That section reads as follows:

> "**144. Variation and rescission of arbitration awards and rulings**.—
> Any commissioner who has issued an arbitration award or ruling, or any other commissioner appointed by the director for that purpose, may on that commissioner's own accord or, on the application of any affected party, vary or rescind an arbitration award or ruling—
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> (a) erroneously sought or erroneously made in the absence of any party affected by that award;
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> (b) in which there is an ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission; or
>
> (c) granted as a result of a mistake common to the parties to the proceedings."

10] Naidoo submitted in his application for rescission before the CCMA that the award had been "erroneously granted". In so doing, he appears to have relied on s 144(a). However, he failed to take into account the second clause in that subsection – ie that the award must have been erroneously made "in the absence of any party affected by that award".

11] The first aspect that becomes clear from a reading of the section is that "any affected party" may apply for an award to be rescinded – ie not only the absent party. In terms of subsection (a), though, only an award erroneously made "in the absence of any party affected by that award" may be rescinded. In this case, the employer was affected by the award made in its absence. So was the employee – because the commissioner

had ruled his dismissal to have been fair – but it was not made in his absence. Although he was clearly an "affected party" alluded to in the main clause of s 144, therefore, Naidoo could not have been the affected party in whose absence the award was made, as contemplated in subsection (a). It appears to me from a reading of s 144(a) that an employee who was present during arbitration proceedings, and who is affected by the award, cannot apply for the rescission of the award in terms of that subsection.

12] But the inquiry does not end there. I also have to consider the provisions of subsections (b) and (c).

13] Section 144(b) is not applicable to this case. Neither party has alleged that there was an ambiguity or an obvious error or omission in the award.

14] That leaves subsection (c). Was the award made "as a result of a mistake common to the parties to the proceedings"?

15] The parties – or at least their legal representatives – were *ad idem* that the dispute should be conciliated only on 25 January 2010. The commissioner mistakenly proceeded with arbitration. If there was a mistake, it was made by the commissioner. It was not a mistake common to the parties. Naidoo participated in the process; the employer did not. That is akin to the situation in *Department of Health v Naidoo & another*[1] where the court held that variation in terms of s 144 was impermissible where a mistake was that of the arbitrator, and not one common to the parties.

16] It is tempting to accept that the arbitration award was erroneously granted in the mistaken belief that the matter was to be dealt with as a con/arb. In terms of s 191(5A)(c) of the LRA, the commissioner must continue with arbitration immediately after conciliation in a dispute "in respect of which no party has objected to the matter being dealt with in terms of this subsection." In the current case, not only did the applicant object, the parties reached agreement that arbitration would not proceed on the day of conciliation. As the learned authors state in *Labour Law through the*

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1 [2004] 9 BLLR 890 (LC).

Cases[2]*:*

"If a party objects to the process, the CCMA is precluded from invoking section 191(5A)."

17] However, the award was not erroneously made in the absence of the party affected by the award, ie Naidoo, as contemplated by s 144(a). Nor was the mistake common to the parties, as contemplated by subsection (c).

18] Further guidance may be sought in the interpretation of rule 42 of the Uniform Rules of the High Court. Apart from a slight effort to make the language plainer, section 144 is the same as that rule.

19] The clause "mistake common to the parties" in rule 42(1)(c) was interpreted in *Tshivashe Royal Council v Tshivashe*[3] to occur "where both parties are of one mind and share the same mistake". That is not what happened in this case; Naidoo snatched at a bargain by carrying on with arbitration in the absence of the employer party, when both parties had been *ad idem* that the matter would only be conciliated. It is only when the award was issued some time later and it was not in his favour that he sought to have it rescinded.

20] The question who an "affected party" is who has *locus standi* to apply for rescission in terms of that rule and the common law was considered in *United Watch & Diamond Co (Pty) Ltd v Disa Hotels Ltd.*[4] Corbett J[5] stated:

"In my opinion, an applicant for an order setting aside or varying a judgment or order of Court must show, in order to establish *locus standi*, that he has an interest in the subject-matter of the judgment or order sufficiently direct and substantial to have entitled him to intervene in the original application upon which the judgment was given or order granted."

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2 Du Toit et al, *Labour Law through the Cases* (LexisNexis, Issue 17) LRA 8-98(2).

3 1992 (4) SA 852 (A) 863 A-B.

4 1972 (4) SA 409 (C).

5 (as he then was) at 415A.

21] My difficulty in the current case is that Naidoo was present when the arbitration was heard. Even though he clearly had an interest in the award and was affected by it, he was not the party in default and therefore falls outside the scope of s 144(a).

22] It is so that not only judgments (or awards) granted by default can be rescinded. The common law position was summarised by Trengove AJA after a lengthy discussion of the authorities in Roman-Dutch law in *De Wet and others v Western Bank Ltd:*[6]

> "The Courts of Holland ... appear to have had a relatively wide discretion in regard to the rescission of default judgments, and a distinction seems to have been drawn between the rescission of default judgments, which had been granted without going into the merits of the dispute between the parties, and the rescission of final and definitive judgments, whether by default or not, after evidence had been adduced on the merits of the dispute."

23] But the application in this case was brought in terms of section 144 of the LRA. As discussed above, the application did not fall properly within any of the three circumscribed circumstances envisaged by that section.

24] In summary, it appears to me that commissioner Bulose exceeded his powers when he granted the employee's application for rescission. His decision to rescind his own award is not open to review must be reviewed and set aside and his original award must stand.

25] But even if I am wrong, I would have reviewed and set aside the subsequent award of commissioner Van Zyl.

Review of the second arbitration award

26] It is common cause that Naidoo was under a current written warning for driving a forklift whilst under the influence of alcohol. It is also common cause that he is a relief forklift driver, but he was not fulfilling those duties on 26 November 2009, the day in question concerning the current inquiry. As a salesman, he was dealing with members of the public.

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6 1979 (2) SA 1031 (A) at 1041 C-E.

27] The applicant's branch manager, Mr Graham Axon, visited the store on the day and spoke to Naidoo. Axon testified at arbitration that he could smell alcohol on Naidoo's breath, that the was unsteady on his feet and slurred his speech, and that his eyes were bloodshot.

28] When Axon initially confronted him, Naidoo denied that he had been drinking. He then agreed to do a breathalyzer test. The test showed that his blood/alcohol level was over the legal limit to drive a vehicle. Naidoo then said that he had drunk a "Long Tom" (ie 450 ml) beer during his lunch break on an empty stomach. He signed a statement confirming it.

29] At the arbitration, Mr *Van Vollenhoven*, who appeared for Naidoo in those proceedings as well as this review, initially argued that Naidoo was an alcoholic and should be treated as such. However, Naidoo strenuously denied that he had a drinking problem.

30] Commissioner Van Zyl pointed out in his award that Naidoo had changed his version a few times during his testimony. He also accepted that there was an existing written warning against Naidoo for similar misconduct, ie driving a forklift under the influence of alcohol. He nevertheless found that Naidoo was not under the influence of alcohol "to such an extent that he could not perform his duties properly"; that his dishonesty was not sufficiently serious to warrant dismissal; and that the dismissal was substantively unfair. He ordered the applicant to reinstate Naidoo from the date of the award, coupled with a final written warning for six months.

31] Commissioner Van Zyl's award is in sharp contrast to that of Commissioner Bulose, who found on Naidoo's own evidence that his dismissal was fair.

32] Commissioner van Zyl accepted that Naidoo already had a written warning for similar misconduct against him that was still valid. Yet he saw fit to reinstate Naidoo, coupled with a further written warning. This finding cannot be reconciled with the consent of progressive discipline and is itself so unreasonable that no reasonable arbitrator could have come to the same conclusion.

33] Furthermore, the Commissioner sought to impose "a greater duty" on the applicant to find out what was causing the employee's drinking, despite the fact that the employee was adamant that he was not an alcoholic; that the Commissioner accepted this; and that the employee had a written warning for similar misconduct against him.

34] I recently had occasion to consider similar issues in *Transnet Freight Rail v Transnet Bargaining Council & others.*[7] Some of the principles that were extensively discussed and that case are apposite to this one and I will attempt to summarise them.

35] Section 10 (3) of the Code of Good Practice: Dismissal specifically includes alcoholism as a form of incapacity and suggests that counselling and rehabilitation may be appropriate measures to be undertaken by a company in assisting such employees. The requirement to assist such employees by providing them with treatment has been widely accepted. However, when an employee who is not an alcoholic and does not claim to be one, reports for duty under the influence of alcohol, he is guilty of misconduct. The distinction between incapacity and misconduct is a direct result of the fact that it is now accepted in scientific and medical circles that alcoholism is a disease and that it should be treated as such.

36] In this regard Grogan states the following in *Workplace Law*[8]:

> "Employees may be dismissed if they consume alcohol or narcotic drugs to the point that they are rendered unfit to perform their duties. There may, however, be a thin dividing line between cases in which alcohol or drug abuse may properly be treated as misconduct, and those in which it should be treated as a form of incapacity. The Code of Good Practice: Dismissal specifically singles out alcoholism or drug abuse as a form of incapacity that may require counselling and rehabilitation [Item 10(3)]...
>
> It is clear, however, that in certain contexts being intoxicated on duty can be treated as a disciplinary offence..."

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7 [2011] 6 BLLR 594 (LC).

8 pp 226 and 266

37] 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.

38] Once a commissioner finds that an employee is not an alcoholic he/she is required to consider whether a finding of guilt is fair and whether the sanction applied by the employer is reasonable and justified in the circumstances. In order to do this the commissioner is required to continue to apply the law relating to misconduct and not that relating to incapacity.

39] Grogan[9], in discussing the case of *Tanker Services (Pty) Ltd v Magudulela*[10] in which it was found that an employee who was under the influence of alcohol committed an offence justifying dismissal, notes the following:

> "...[I]n Tanker Services (Pty) Ltd v Magudulela the employee was dismissed for being under the influence of alcohol while driving a 32-ton articulated vehicle belonging to the employer. The court held that an employee is 'under the influence of alcohol' if he is unable to perform the tasks entrusted to him with the skill expected of a sober person. 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. This may be

9 *Workplace Law* p 224.

10 [1997] 12 BLLR 1552 (LAC).

done by administering blood or breathalyser tests...

40] In the current case, based on his own observations and the breathalyser test, Axon formed the view that Naidoo was unable to perform his duties. Even though he was not called upon to drive a forklift on the day, Naidoo had to interact with members of the public. That would have led to embarrassment for the company.

41] With regard to sanction, Section 3 of Schedule 8 of The Code of Good Practice: Dismissal places an expectation on employers to use corrective and progressive discipline in dealing with the misconduct of employees.

42] In *Sidumo & another v Rustenburg Platinum Mines Ltd & others*[11] the Constitutional Court held that in assessing whether an employer's decision to dismiss is fair:

> "A commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list."

43] In cases involving misconduct for reporting for duty under the influence of alcohol a commissioner should, in determining the fairness of dismissal, consider and weigh against each other (based on the above), among other things:

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11 [2007] 12 BLLR 1097 (CC) para [72].

43.1 That the employee knew of the rule and was aware that breaching it could result in dismissal;

43.2 That the employee wilfully committed the misconduct;

43.3 The nature and responsibilities of the employee's job function;

43.4 The basis for the employee's challenge to dismissal;

43.5 The importance of the rule breached;

43.6 The principles and necessary application of progressive discipline and the importance of consistency;

43.7 The employee's disciplinary record, including the presence or lack of any relevant valid warnings of final written warnings that may be in effect;

43.8 The harm (or potential to bring harm) as a result of the misconduct.

44] A further consideration ought to be the implications of being lenient in the application of an important rule and the message such leniency sends to other employees regarding the infringement of such a rule. The need to deter other employees from committing the same misconduct is a response to risk management and is as legitimate a reason for dismissal as a breakdown in trust. In this regard Conradie JA in *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation & Arbitration & others*[12] stated the following:

> "A dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the particular enterprise. That is why supermarket shelf packers who steal small items are routinely dismissed. Their dismissal has little to do with society's moral opprobrium of a minor theft; it has everything to do with the operational requirements of the employer's enterprise."

12 (2000) 21 *ILJ* 1051 (LAC) para [22].

45] The Labour Appeal Court considered the relevance, application and purpose of final written warnings in *National Union of Mineworkers & Another v Amcoal Colliery t/a Arnot Colliery & Another*[13]. That case involved an instance of collective misconduct. The employees who were party to the misconduct had varying levels of discipline on their file. Those already on final written warnings were dismissed. The other employees received a lesser sanction which was subsequently reduced by one level in terms of the company's progressive disciplinary structure (e.g. an employee with a clean record was initially given a serious written warning with was later reduced to a warning). Those who had been dismissed did not have their sanctions reduced and the court found that this was fair. In this regard the court was of the opinion that an argument that the sanction of dismissal should have also been reduced failed to consider the fact that the other employees had disciplinary records that allowed for a lesser sanction than that initially imposed. Their records did not constrain the employer to impose a particular punishment and nothing else. The employees already on a final written warning however left the employer with little choice but to dismiss them. If their dismissal had been reduced it would have been to a final written warning and there would have been no progression of discipline at all. The Labour Appeal Court was of the opinion that failure to impose the sanction of dismissal would mean that they were not punished for that offence and that further, the employee's offence was a fairly serious one and did not justify the extension of any final warning.

46] The implication of this finding, as discussed by Grogan[14] is that:

> "...[A]n employee's disciplinary record may be taken into account when considering whether the employee should be dismissed for a particular offence. This follows from the requirement that dismissal should be 'progressive'. An employee on a final warning for the same offence will normally be regarded as

13 (2000) 5 LLD 226 (LAC).

14 *Dismissal* pp 100-101

irredeemable, and dismissal will be justified if the employee commits a similar offence during the currency of the warning."

47] Commissioner van Zyl failed to take these principles into account in coming to the conclusion that he did. His conclusion was so unreasonable that no reasonable arbitrator could have come to the same conclusion.

Conclusion

48] Both arbitration awards must be reviewed and set aside. Given the full exposition of the facts as recorded in the arbitration proceedings, it would serve no purpose to remit the dispute to arbitration for a third time. The second award, as well as the ruling on rescission, must simply be reviewed and set aside. That means that the first arbitration award of commissioner Bulose stands and that Naidoo's dismissal was fair.

49] In fairness, Naidoo should not be held liable for the applicant's costs in circumstances where the second award was in his favour, even though commissioner Bulose may have been accurate when he described Naidoo's behaviour in the first process as "reprehensible".

Ruling

50] The rescission ruling of commissioner Bulose dated 19 March 2010 and the arbitration award of commissioner Van Zyl dated 29 July 2010 are reviewed and set aside. The arbitration award of commissioner Bulose finding that the dismissal of the fourth respondent, Naidoo, was fair, remains valid.

51] There is no order as to costs.

A J Steenkamp
Judge

APPEARANCES

APPLICANT:	Bruce MacGregor of MacGregor Erasmus, Durban.
FOURTH RESPONDENT:	Shaun van Vollenhoven Instructed by N Bramdeo Attorneys, Durban.