



CASE NO: LC 102/2010

IN THE LABOUR COURT OF NAMIBIA

In the matter between:

ETOSHA TRANSPORT (PTY) LTD

APPELLANT

and

EDWARD NAMISEB

1ST RESPONDENT

THE LABOUR COMMISSIONER

2ND RESPONDENT

SONNYBOY MBENGELA MWANAWINA

3RD RESPONDENT

THE LABOUR INSPECTOR

4TH RESPONDENT

CORAM: SMUTS, J

Heard on: 16 May 2012

Delivered on: 31 May 2012

JUDGMENT

SMUTS, J [1] This is an appeal against the award an arbitrator under s 89 of Act 11 of 2007. The arbitrator (third respondent in this appeal) handed down his award on 9 November 2010, reinstating the first respondent to the appellant's employ and for an award of N\$17 500 in compensation (representing seven months wages).

[2] The first respondent was employed by the appellant as a forklift operator. The appellant was a contractor of Namibia Breweries Limited (NBL) and operated at the latter's premises. On the assumption of his duty shift, the first respondent was tested positive for alcohol by means of a breathalyzer. The instrument measured 0,40. A form was also completed and formed part of the documentation of the disciplinary hearing. The completed form refers to other aspects of the first respondent's conduct and appearance which tended to show that he was under the influence of alcohol. He was then charged in a disciplinary hearing of being under the influence of alcohol at his work place. He pleaded guilty and was dismissed. He lodged an internal appeal against this dismissal but was unsuccessful in that appeal. He then complained to the Labour Commissioner of an unfair dismissal.

[3] That complaint proceeded to arbitration. Those proceedings were peculiar. They were termed a "joint arbitration". Two arbitrators presided over two arbitration proceedings involving two employees of the appellant who had both been dismissed for being under the influence of alcohol. Quite why the two cases were not consolidated and heard by a single arbitrator under rule 16 (of the rules relating to the conduct of conciliation and arbitration) is not clear to me. There was however no objection by the parties' representatives at the hearing and they appeared to agree to this strange procedure. Although unusual and in my view inappropriate, it would not necessarily of itself amount to an irregularity, given the agreement by the parties and their representatives to the proceedings been conducted in this way. However the proceedings were not properly conducted in the respects set out below and were irregular.

[4] The applicants in the arbitration proceedings were asked at the outset to "present" their cases. Despite the repeated request by their representative that they give evidence under oath, this was rejected by one of the arbitrators, referred to as arbitrator 1. But he did so in respect of both proceedings. This even though he did not have any jurisdiction to make rulings in respect of the proceedings involving the first respondent. Not only was it irregular for him to make that determination in respect of proceedings

which he did not have any jurisdiction over, but the refusal to permit a party to give evidence under oath and for cross-examination for that witness to properly take place is my view also irregular. The arbitrator in question justified his decision to do so by stating that it would not be necessary for evidence under oath and that the matter should proceed in what he termed as the “traditional way”. It was not stated quite what tradition was referred to in this context. Certainly, it would not constitute any proper way in which an arbitration proceeding should be conducted if there are factual disputes and where evidence is to be given to resolve them. This form of irregularity has been referred to in other judgments of this court¹. A further irregularity which occurred was that the same arbitrator (again lacking jurisdiction) in explicably ruled that the appellant’s witness could not remain in the attendance whilst the applicants presented their cases.

[5] In the course of the “presentation” of the first respondent, he handed in the internal disciplinary proceedings, including the internal appeal proceedings. The designated arbitrator (the third respondent) permitted the appellant’s representative to question the first respondent about his presentation. It would seem that the first arbitrator acted as an interpreter in this process. But he did not limit his activities to translating. He unfortunately proceeded to intervene and ask questions himself which also should not have occurred (and constituted a further irregularity).

[6] The first respondent in his presentation acknowledged that it was impermissible for him to work under the influence of alcohol. He also did not appear to dispute in the disciplinary hearing (and its appeal) and in the arbitration proceedings that he was in fact under the influence. He had in fact admitted in the internal proceedings and in the course of his presentation that he had consumed alcohol prior to assuming duty. He said that there had been a death in his family and that he had requested time off when reporting for duty which was not granted. He then proceeded to report for his duty and was tested positive for alcohol.

¹ Nampower v Nantinda, case LC 38/2008 unreported 22/03/2012
Ok Furniture v Araeb 04/11/2011

[7] The thrust of certain of his complaints in his presentation rather concerned the manner in which the internal proceedings were conducted. He complained that he had not been given the opportunity to cross-examine witnesses and not afforded sufficient time to prepare for the proceedings. He also complained that the breathalyzer was not operated by an employee of the appellant but by a security guard working at NBL. He also complained in the internal appeal proceedings that the sanction of dismissal was too harsh, given the fact that he had not previously committed an infraction. He also raised in his presentation that he had not agreed to the breathalyzer test being taken.

[8] The arbitration proceedings could not be completed in one session. They were adjourned before the appellant's witnesses could give their evidence. On resumption, the appellant's representative did not appear. Nor did he file a proper application for postponement although he had informally and by way of letter requested a postponement. In this request, he indicated that the first respondent's representative had agreed to it. But the latter did not confirm the agreement when he was asked about this at the resumption. In the absence of a proper application, the arbitrator was in my view entitled to refuse a postponement. The points raised in the notice of appeal directed at this refusal are in my view unsound.

[9] Taking into account what is contained on record, it would seem to me that the appellant's representative had acted recklessly. He had apparently also not informed his client, the appellant, of the resumption of the proceedings and there was no representative or witness of the appellants even present them.

[10] The arbitrator then proceeded to deal with the matter on the basis of what it been placed before him, as he was entitled to do.

[11] The arbitrator found that there had been no evidence before him to indicate "any enabling legislation that gave the security guard (who conducted the breathalyzer test) authority to perform an alcohol test on the applicant." He also found that there was no evidence of any expertise or skills on the part of the security guard performing that test. The arbitrator also made much of the fact that the security guard was employed by a

different company. He also found that too much emphasis was placed upon the policy of NBL (of zero tolerance toward alcohol consumption on duty or performing work under the influence of alcohol). This despite the fact that the first respondent accepted it that he was not permitted to do so by his own employer. The arbitrator further found that “no evidence was placed before me to indicate that the respondent had a policy which clearly stated that an employee who was found with a certain amount of alcohol content in his/her blood will be regard as having committed a dismissal offence”.

[12] The appellant appealed against that award. When this appeal was originally called on 14 October 2011, the first respondent was not present. Nor was he represented. I directed that the matter should be postponed and despite having been invited to attend the allocation of date of appeal and not attended, I directed that the notice of set down of the appeal be served upon the first respondent. When the matter was next called on 21 November 2011, it was indicated that the first respondent was hospitalized and would not be able to attend the proceedings. The appeal was again postponed to 27 January 2012. The court order postponing the appeal to that date was served by Deputy Sheriff upon the first respondent, as appears from the return on 8 December 2011. The first respondent appeared in court on 27 January 2012. He indicated that he wanted to pursue his application for legal aid and wanted to be represented in the proceedings. I granted a postponement for this purpose to 18 May 2012. In doing so, I made it very clear to him that this would be the final postponement, given the prior postponement of the appeal and that the onus would be upon him to vigorously pursue his application for legal aid.

[13] On the date of hearing of 18 May 2012, the first respondent was not present in court at the designated time. His name was called out and there was no response and the proceedings commenced. Ms Petherbridge made her submissions and at their conclusion, I adjourned the proceedings, reserving judgment. Immediately after doing so, it was brought to my attention that the first respondent had entered court and had taken up a seat in the body of the court room. I returned to court and enquired from him why he had not been in court on time. He stated that he had attended at another court

room, only to be directed to the correct one later on. He further said that he would need another postponement as his application for legal aid was not finalized.

[14] The first respondent acknowledged that I had stated at the previous hearing on 27 January that the postponement to 18 May 2012 was a final postponement. In answer to my question as to what steps he had taken to follow up his application, he produced a letter addressed to him and dated 20 October 2011 from the Directorate of Legal Aid which referred to his application for legal aid of 22 June 2011. This letter sought a copy of the award and notice of appeal. He stated that he had provided those documents in January 2012 to that office. (Receipt would appear to be acknowledged on 25 January 2012). The letter also had a date stamp of 14 May 2012, manually changed to 16 May 2012. He acknowledged that he had called upon that office twice on in the week of 14 May 2012 to follow up his application because he was on a farm in the Kunene region. He said that he had made phone calls to that office but could not provide any details as to dates of these calls or whom he had spoken to.

[15] Ms Petherbridge, who appeared for the appellant, opposed a postponement and submitted that the first respondent had been extremely remiss in failing to follow up his application for legal aid. Ms Petherbridge referred to the previous postponements and that the appellant was prejudiced as its representative appeared each time and had been prepared and ready to proceed on each occasion and was entitled to have the appeal finalized without further delays.

[16] After careful reflection, I decided to refuse the postponement given the failure on the part of the first respondent to properly follow up his application, particularly after I had expressly enjoined him to do so in January 2012. He had shown a lackadaisical attitude and indifference towards his application by failing to follow it up properly. The appellant would plainly be prejudiced by a further postponement which would not be cured by a costs order, given the provision of s118 of the Act.

[17] After refusing the postponement I invited the first respondent to make submissions on the merits of the appeal. He disputed that the security guard was

trained in the use of breathalyzer equipment. He also said that he had asked for the day off when he had reported for duty. He also complained about the disciplinary hearing, saying that there was no-one to assist him. He also said that he had not consumed alcohol while on duty but beforehand. He accepted that it may be wrong to go to work in the state he was in (after there had been a death in his wife's family which, he said had led to alcohol consumption) and wanted another chance.

[18] Turning to the arbitrator's award, it would seem that the arbitrator erred in his assessment of the material before him in finding that there was no evidence before him that the appellant had a policy to the effect that working under the influence constituted dismissible offence.

[19] The arbitrator found the dismissal to be unfair and reinstated the first respondent. The first respondent had in his presentation had after all accepted that he was not permitted to work under the influence of alcohol and could be dismissed for that. This was unfortunately overlooked by the arbitrator and gave rise to his incorrect approach. Even in the absence of evidence of a policy to that effect – which did not arise given the first respondent's acceptance – it would clearly be an implied term in any employment contract that driving or operating hazardous machinery like a forklift operator under the influence of alcohol would be a material breach of the employment contract and could give rise to termination if a fair process was followed.

[20] These issues raised in the arbitration concerning the fairness of the procedure were not raised when the first respondent was charged internally. He had pleaded guilty. He did not appear to have disputed throughout the proceedings including in the arbitration proceedings that he was in fact under the influence of alcohol when he had reported for duty. The arbitrator does not even refer to the fact that the first respondent had pleaded guilty in the disciplinary proceedings and that he did not request a representative at the time. Nor would one expect a person pleading guilty would exercise the opportunity to cross-examine any witnesses. That would serve little purpose in those circumstances. The arbitrator would not appear to have taken into

account the admission on the part of the first respondent that he was in fact under the influence of the alcohol at the time he was tested. He also did not take into account the completed form which indicated several other factors which were consistent with being under the influence of alcohol.

[21] Not only were there certain irregularities in the conduct of the proceedings which I have already referred to but I also find that the arbitrator's award is not supported by the material before him and should be set aside.

[22] The arbitrator also failed to take into account the nature of the first respondent's duties, being a forklift operator. Plainly being under the influence of alcohol would constitute a significant safety hazard not only to the first respondent himself but to his fellow employees and indeed anyone in the vicinity of his work at NBL. An employer in the position of the appellant is in my view entitled to take strict disciplinary action against the employees under the influence of alcohol and particularly those operating equipment such as forklifts or driving motor vehicles. It after all constitutes a criminal offence for a person to drive a motor vehicle under the influence of alcohol. For an employee to do so in the course of his employment would be in my view constitute a very serious disciplinary offence which could and invariably should attract serious consequences including a dismissal. These issues including the seriousness of the offence were entirely overlooked by the arbitrator, constituting misdirections.

[23] The arbitration award is accordingly set aside. No order is made as to costs.

SMUTS,

ON BEHALF OF THE APPELLANT

Instructed by:

MS PETHERBRIDGE

PETHERBRIDGE LAW CHAMBERS

ON BEHALF OF RESPONDENTS

THE FIRST RESPONDENT IN PERSON

MR. NAMISEB