IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO: JR 3135/05

In the matter between**:**

Morris Material Handling (Pty) Ltd	**Applicant**
Commissioner Adv. Mpho Phetla	**1st Respondent**
Metal and Engineering Industries Bargaining Council (MEIBC)	**2nd Respondent**
Van Wyk, Ferdinand Petrus	**3rd Respondent**

JUDGMENT

Justice Ngcamu AJ

1. This is an application to review and set aside the arbitration award issued by the first respondent on 25 October 2005 in which the commissioner found that the dismissal of the third respondent was substantively unfair and awarded compensation in the amount of R144 000-00. The application is opposed by the third respondent.

2. The applicant in this matter is a labour broker. The third respondent was employed by the applicant as a project engineer and placed at Billiton Group where applicant had a contract. Billiton has a zero alcohol tolerance on site. If a person is tested positive, he is not allowed on site.

3. On 15 May 2005, the third respondent consumed four beers in the evening. On 16 May 2005 he proceeded to work. He did not undergo a voluntary breathalyzer test. A compulsory test was done. Two tests were performed at different times by the security. He tested positive on both. He was then not allowed to enter the site. Two hours later, the third respondent went to a private doctor where he was tested. The test showed that there was no alcohol in his body.

4. The third respondent was charged with two counts of misconduct being:

(a) Reporting for duty under the influence of alcohol at a customer's premises.

(b) Breach of employee's duty of good faith.

5. A properly constituted disciplinary hearing took place. He was found guilty on both counts of misconduct and was dismissed. The third respondent referred a dispute alleging that the dismissal was unfair. The conciliation did not resolve the dispute. The dispute was arbitrated by the first respondent who issued the award under review.

6. The applicant has raised one ground of review namely that the commissioner committed a gross irregularity in failing to take into account relevant evidence and consideration in concluding that the third respondent's dismissal was substantively unfair.

7. Mr. Van As for the applicant submitted that the third respondent was aware that Billiton had a zero tolerance policy for testing positive for alcohol and that the third respondent did not give an explanation why he did not undergo a voluntary test. He further submitted that the third respondent had himself to blame for the exclusion.

8. Mr. Kromhout who appeared for the third respondent submitted that the reporting on duty under the influence of alcohol and breach of good faith

was the charge and not the breach of zero tolerance. I agree with this submission. The charges against the respondent appear at p122 of the court record and have been repeated by me in paragraph 4 supra. With regard to the first charge, Mr. Langlois who testified for the applicant stated the following at p17 line 22 of the Transcript:

> "We did not find him under the influence."

This evidence nullifies the charge against the third respondent.

9. Mr. Langlois testified that under Billiton's policy being under influence means testing positive. This is not borne out by the policy. The policy as it appears at pages 141 and 142 of the court papers states:

> "Being under the influence of, testing positive for, or refusing to test for alcohol or drugs, is a serious offence at Bayside which can result in dismissal. Testing positive means having a blood alcohol level of higher than 0,00% or being tested positive for dagga."

10. What the policy means is that there are three offences relating to alcohol and drug use. These being

(a) being under the influence of alcohol or drugs
(b) testing positive for alcohol or drugs or
(c) refusing to test for alcohol or drugs. The applicant decided to charge the third respondent for being under the influence of alcohol and not for testing positive for alcohol. These are two different acts of misconduct under the policy. Testing positive is defined in the policy as having a blood alcohol level of higher that 0,00%

11. The allegation of being under the influence was clearly withdrawn by Mr Langlois and cannot be argued any more in these proceedings.

12. The third respondent went for a blood test with a private doctor two hours after the last test was done by the security. Mr. Van As submitted that the test is irrelevant as it was done two hours later. Dr Wagner filed a report

based on the blood test and the report was admitted as evidence during the arbitration hearing. The blood test showed that there was no alcohol in the third respondent's blood. The blood test was done by Dr Bouwer and Partners. In respect of criminal cases, the blood sample has to be taken within 2 hours of the arrest. It was not submitted that this applies in civil matters.

13. The commissioner considered the evidence of the blood test and found that:

> "An inference that could be drawn from the said expert opinion is that the employee could not be said to have alcohol in his blood and was therefore not intoxicated to the extent that the employer does not challenge the form and content of the expert opinion, such stands to be admitted as true to the effect that it presented evidence which stands un-rebutted by, the employer on the subject. Accordingly, it is my finding that the employee was not at fault for the misconduct of reporting for duty under the influence of alcohol at the customers place."

14. Mr. Van As submitted that the employee chose not to take the blood test in the company. The policy allows a person to ask for a blood test if he or she disputes the reading of the testing equipment. The policy does not provide for the total exclusion of the blood test taken outside the company. The fact that the third respondent chose to do blood test outside the company does not advance the applicant's case.

15. The applicant's argument centered on the fact that when the third respondent was tested, there was alcohol found. Be that as it may, the results did not show that the third respondent was under the influence of alcohol. The evidence showed that he tested positive of alcohol. The problem with this is that the charge against the third respondent was not that he had tested positive. The charge that the third respondent was facing was not proved and the applicant's witness withdrew the allegation

of being under the influence. The third respondent could not be found guilty of testing positive when he had not been charged with that misconduct. I reject the submission that the commissioner failed to consider relevant evidence. I am not able to find that the commissioner committed any gross irregularity with regard to the first charge.

16. It was submitted on behalf of the applicant that the third respondent put the employer's job in jeopardy and accordingly the breaching of trust had been committed. Mr. Kromhout for the third respondent submitted that there is nothing dealing with the good faith in the evidence.

17. The commissioner dealt with this in his award and found that :

> "The duty of good faith presupposes conduct which is consistent with honesty or not being deceptive. Looked at against this broad categorisation, the employee's conduct was such that he submitted to the testing by the security officer and had been co-operative in that regard."

18. The commissioner further found that:

> "It is my finding that by seeking a blood test; the employee had demonstrated substantial compliance with the policy of the client and made the results of the said test available to the employer. It is my further considered view from the aforegoing that the employee's conduct, objectively assessed, does not display any aspect of deception on his part and as such is not fault for a breach of good faith."

19. This finding cannot be faulted. The commissioner's award can be reviewed if the award is not justifiable for the reasons given. The review is process related. It is my view that the commissioner did not rely on any facts outside the material before him. I am also of the view that no material evidence was ignored by the commissioner.

20. I have already indicated that the third respondent was charged with one type of misconduct which was withdrawn. The applicant sought to argue a case of the misconduct with which the third respondent had not been charged. I am of the view that the award is rational and there is no gross misconduct on the part of the commissioner. Accordingly, the review should fail.

21. I see no reason why the costs should not follow the results. I am of the view that the applicant should have realised that the charge against the third respondent was not that he had tested positive but that he was under the influence of liquor. There was therefore no basis for the argument that the commissioner should have taken into account that the third respondent was tested twice and the results were positive. That argument has no relevancy on the charge against the third respondent. In the result, the following order is made:

(a). The review application is dismissed.

(b). The applicant is ordered to pay the costs.

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Ncgamu AJ

Date of hearing:	12 December 2006
Date of Judgment:	
For the Applicant:	Adv. M.J.Van As instructed by Anthony Hinds Attorneys.
For the Respondent:	Adv. E. Krombont instructed by A.J. Stone Attorneys.