

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

Case no: JR 915/2003

In the matter between:

COIN SECURITY GROUP (PTY) LTD

Applicant

and

DUSWO

First Respondent

P A THLAKE

Second Respondent

S NTOMBELA

Third Respondent

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

Fourth Respondent

JUDGMENT

CELE AJ

Introduction

[1] This application is brought in terms of section 166 of the Labour Relations Act 66 of 1995 for leave to appeal to the Labour Appeal Court against an *ex tempore* final decision of the Court in this matter, dated 16 August 2007. The parties have been cited as they appeared in the review application. The order appealed

against was issued in favour of the second respondent who has unassisted filed some opposing submissions to the application.

[2] As judgment was handed down on the same date that the matter was argued, both parties were present to note it. After the application for leave to appeal was filed a transcript of the judgment was obtained and I directed that it be served on the parties while granting them leave to supplement their submissions, in the event they wished to. Only the applicant filed some supplementary grounds for leave to appeal.

[3] This application is clearly therefore one that falls within the purview of rule 30(2) of the Rules of this Court. The initial application was filed on 08 September 2007 by fax and the original was subsequently filed with the registrar on 12 September 2007. The filing by fax placed this application within the 15 days time limit, in terms of rule 30(2).

Appeal grounds

[4] The applicant seeks leave to appeal on the following grounds:

4.1 “The learned judged (sic) erred in not finding that the excuse by the second respondent, for not acting as a crewman on the 4th of August 2000, and which was presented both during the disciplinary hearing and the appeal hearing, was inconsistent with the explanation which the second respondent gave during the arbitration

before the third respondent. The learned judge should have found that it was inconsistent. (sic)

4.2 The learned judge erred in finding that the third respondent did not commit a reviewable irregularity and that consequently the third respondent's award was not reviewable. The learned judge ought to have found that the third respondent did not apply his mind, relative to the inconsistency in the excuse by the first respondent during the disciplinary hearing and the appeal hearing in comparison to the arbitration before the third respondent and that the third respondent's award as a result thereof was reviewable.

4.3 In addition and alternatively, the learned judge ought to have found that the findings by the third respondent with respect to second respondent's explanation for not acting as a crewman, was not justifiable against the background of the inconsistency between his explanation during the disciplinary hearing and appeal hearing in comparison to the arbitration before the third respondent.

4.4 The learned judge erred by not finding that the true excuse for the failure by the second respondent to act as a crewman was the fact that he was on a final written warning, as was found by both the chairperson of the disciplinary enquiry. Mr. Kriek, as well as the chairperson of the appeal hearing. The learned judge ought to have found that the true reason for failing to act as crewman was

the existence of the final written warning, and that second respondent dismissal under the circumstances was substantively fair.

- [5] The learned judge erred by not considering the review grounds taken by the applicant with respect to the relief awarded by the third respondent. The learned judge ought to have taken this into account and ought to have found that:

- 5.1 Reinstatement was not appropriate;
- 5.2 Alternatively if reinstatement was appropriate, that it not be made retrospectively for the full period between first respondent dismissal on the 16th of August 2000 and the date of the third respondent's award being the 2nd of May 2003."

The submission made by the second respondent, Mr Thlako were couched in an affidavit and are each a mere denial of the truth said to be contained in the grounds of the appeal.

- [6] The commissioner whose award was sought to be reviewed and set aside found the dismissal of the second respondent to have been substantively and procedurally unfair. He then ordered the applicant to reinstate Mr Thlako with retrospective effect.
- [7] Three review grounds were proffered but when the application proceeded before me, it proceeded in the main, on the second ground. The first review ground related to the procedural aspect and it is about the fact that Mr Kriek was appointed to chair the disciplinary enquiry when in fact he had decided that the second

respondent was to be charge. On that ground it is suggested that he had not been privy to any of the facts on the day and could therefore easily proceed and chair he hearing.

The second ground is that the commissioner, the third respondent, failed to apply his mind on important material evidence, namely the version presented by the second respondent at the disciplinary hearing, which version was that he refused to work as a crewman, he refused to go out unless and until a final written warning had been withdrawn.

The third ground relates to the sanction that was imposed, namely the reinstatement of the second respondent.

The judgment sought to appeal against

- [8] In respect of the first review ground, I did not find any misconduct, gross irregularity or any failure by the commissioner to exercise his powers properly. Nor could I find that his decision was not justifiable as then alleged. On the third ground, I found that the commissioner had to reinstate Mr Thlako in terms of section 193(2) of the Act, unless the grounds therein stated, made it not suitable to reinstate him. I found no defect in the order of reinstatement.
- [9] The second review ground was the main consideration for the application. I found that:

- The award said nothing about the version Mr Thlako presented to Mr Kriek, as the chairperson of the disciplinary enquiry.
- I had first to look at the version of the applicant during the internal disciplinary hearing because the applicant bore the onus to prove the infraction complained of.
- Mr Welman called by the applicant had said that:
“On 06 August 2000, Mr P A Thlako refused to act as crewman, he was only willing to act as a vehicle guard. He has an aggressive attitude and refused to work as a crewman on which he was appointed.”
- The chairperson acquitted Mr Thlako of the charge of acting in an aggressive manner, but convicted him of disobeying a lawful and reasonable instruction.
- According to applicant’s own version Mr Thlako refused to work as a crewman but was willing to act as a vehicle guard. According to the applicant, the reason why Mr Thlako and his supervisor Mr van Tonder argued was on whether Mr Thlako had to work as a crewman or as a van guard.
- During the arbitration hearing, Mr Thlako presented a version in line with what Mr Welman had testified to in the internal disciplinary hearing. Mr Thlako said that as a new and customer unknown crewman, the safety of money

collection would be compromised. The customers would have to telephone the applicant to verify his identity.

- Mr Welman did not give a detailed account of who it was that Mr Thlako would have as a crewman instead. In his evidence at arbitration hearing, Mr Thlako said that Mr Jones was available and willing to be a crewman on that day
- Mr van Tonder did not testify during the disciplinary hearing and during the arbitration hearing when he was a crucial witness.
- Even if the commissioner had looked at the version presented by Mr Thlako during the disciplinary hearing, the probabilities of the case were that he would have found that the reason for the fracas was on the capacity in which Mr Thlako was to work on that day. It would not have been an insistence by Mr Thlako that the written warning against him be first withdrawn before he could go out. Such investigative task by the commissioner would therefore not have taken the matter any further.

Analysis

- [10] The significance in the two versions has a bearing on the reasonableness of the instruction given by Mr Van Tonder. According to Mr Thlako the instruction compromised security in the transportation of money from the applicant's clients to the bank. That version presented to the commissioner stood unchallenged by the applicant.

[11] The first ground of appeal suggests that Mr Thlako had to prove his innocence, that he lied and that therefore he was guilty of not obeying a reasonable instruction. It flies on the face of the reasonable explanation which the applicant's own witness proffered. It places the onus of proof to Mr Thlako, where it does not belong.

[12] In the second ground the applicant suggests that it ought to have been found that the commissioner did not apply his mind relative to the inconsistency in the excuse by Mr Thlako. Not only did I make such a finding against the commissioner but I investigated whether such failure denied the applicant of a fair trial of issues. I found that such investigative task would have taken the matter no further.

[13] In respect of the third ground, the finding sought by the applicant to have been made by the commissioner, could not be made in the absence of as crucial a witness as Mr van Tonder was. That left Mr Thlako's version at the arbitration hearing unchallenged.

The fourth ground suffers the same fate as the first ground. If the true reason for failing to act as crewman was the existence of a final written warning, applicant's own witness Mr Welman lied about that true reason. It is difficult to see then how the onus resting on the applicant was discharged, calling on an answer from Mr Thlako.

[14] If the applicant was in possession of a transcript of the judgment at the time of outlining the fifth ground, I believe this ground would either have been abandoned or restructured. I believe what has been said thus far covers the two supplementary grounds and that a need for repetition is uncalled for.

[15] All things considered, I am not of the view that the applicant has reasonable prospects of persuading another court that the dismissal of Mr Thlako was premised on a fair reason and that it was carried out in a fair manner. The question of the importance of this case has not been raised by the applicant, nor am I able to find any importance in the matter.

Order

[16] In the result I make the following order:

1. The application for leave to appeal to the Labour Appeal Court is dismissed.
2. No costs order is made.

Date of Hearing:

Matter decided in chambers

Date of Judgement:

08 February 2008

APPEARANCES:

For the Applicant: **None**

Instructed by

For the Respondent: **None**

Instructed by