

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JR922/07

In the matter between:

DEFENSOR SECURITY

Applicant

and

STEVEN MABALANE N.O.

First Respondent

COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION

Second Respondent

SANKI JOSEPH LIPHOKO

Third Respondent

JUDGMENT

FRANCIS J

1. This is an unopposed application to review and set aside an arbitration award made by the first respondent (the commissioner) under case number FS703/06, after he had found that the third respondent was unfairly dismissed and ordered the applicant to reinstate him and pay him seven months arrear salary.
2. The third respondent commenced employment with the applicant on 1 August 2003 as a security guard. He was at the time of his dismissal on 10 June 2006 earning R1 400.00 per month. On 10 June 2006 Don Douw Gerbrandt Raimondo called all the security guards together including the third respondent and told them that as from the following Monday all security guards had to wear uniform to work and that no communication would be allowed. This was during the security strike. Raimondo then asked them if any of them had a problem. The third respondent told Raimondo that he was staying with his

mother and that the strikers were going around their houses and that keeping contact with his family was therefore important for him. Raimondo told him that his word was final and that he was wasting his time. Raimondo continued to speak and then asked who was against what he was saying. When the third respondent tried to explain, Raimondo told him to get out of the premises. He waited at the gate when one of the applicant's senior asked him to sign a certain document that he refused to do. He left and referred an unfair dismissal dispute to the second respondent (the CCMA).

3. Don Douw Gerbrandt Raimondo testified for the applicant. He said that on 10 June 2006 he went to talk to the security guards about laptops, cellphones and problems that the client had with their security guards. He told them that cellphones were not permitted in terms of the job description. They all understood except the third respondent. He explained again the procedures for communication. The third respondent did not understand and he then told him to wait one side and to go to the office. After the meeting ended, the third respondent was still waiting around and Raimondo left for the office. He waited for the third respondent at the office but he did not arrive. They did not see him again. He denied that the third respondent was dismissed.
4. The applicant called Seleke Totse as its second witness. He testified that he was at the meeting and witnessed the quarrel between the third respondent and Raimondo. All the security guards accepted that they would not use their cellphones except the third respondent. The third respondent said that he had relatives that he must communicate with and Raimondo told him to go to the office that he did not do. Jackie Eloff testified as the applicant's third witness. He said that he was present at the meeting on 10 June

2006. They were enforcing the rule that security guards must not talk on their cellphones.

All the security guards understood except the third respondent because he spoke of his family problems. Raimondo told the third respondent to go to the office that he did not do.

5. The commissioner stated in his award that section 185(a) of the Labour Relations Act 66 of 1995 (the Act) provides that every employee has the right not to be unfairly dismissed. Section 192 of the Act provides that in any proceedings concerning any dismissal, the employee must establish the existence of a dismissal and once established, the employer must then prove that the dismissal in question is fair. It was clear that the issue in dispute was whether the third respondent was dismissed.
6. The commissioner said that the third respondent's testimony was that he was told by Raimondo to get out of the premises. The applicant's testimony on the other hand was that the third respondent was told to go to the office. The commissioner said that it was highly improbable in the first instance that the third respondent would be told to go to the office and decide to go home and stay there. He had been in the applicant's employment for three years and was not at that time leaving the applicant for another employment. The second point is that in circumstances such as those that obtained at that point, i.e. during the strike, it was reasonable for the third respondent to request that he be allowed to have constant communication with his mother, with only whom he lived. The third respondent's uncontested evidence was that the security strike was one of the most acrimonious and brutal in recent history. The strikers targeted those who continued with the employment and their families. The commissioner said that to want to make such

employees obvious targets was to a large extent unreasonable on the part of the employer.

It is in fact the employer's duty to ensure the safety and security of employees. Case law is abundant and quite clear about the procedures that the employer must follow in instances where the employee just leaves the employment. The duty is in fact placed upon the employer to ascertain why it is that the employee is not reporting for duty. In this case it seems that the applicant concluded that it was good riddance. The applicant's version that the third respondent was asked to go to the office and never pitched was highly improbable. It is not in consonant with the normal behaviour of employees or human beings that if an employee is told to report at the office, decides to stay away. The commissioner concluded that the third respondent was dismissed and that such dismissal was unfair. Section 193 of the Act required that he should order reinstatement. The applicant was ordered to reinstate the third respondent on terms and conditions that are no less favourable than those that prevailed before his dismissal. It was ordered to pay the third respondent arrear salary in the amount of R9 800.00 and reinstatement on or before 5 March 2007.

7. The applicant brought a review application and raised the following grounds of review:
 - 7.1 The commissioner's reasoning is flawed in finding as he did.
 - 7.2 The commissioner's decision cannot be regarded as justifiable considering the reasons given for it.
 - 7.3 The applicant's case is that the third respondent was never dismissed but that he had left the employ of the applicant out of his own accord. The commissioner ought to have found that there was no dismissal of the third respondent by the applicant. On the evidence before the commissioner the third respondent could

not on a balance of probabilities prove his alleged dismissal. The applicant's version was the more probable one and the commissioner ought to have found that the third respondent was not dismissed. The conclusion reached by the commissioner that the third respondent was dismissed and that such dismissal was procedurally and substantively unfair is unjustifiable in the light of the evidence adduced before him.

- 7.4 The commissioner failed to consider all the evidence before him, alternatively made a finding not justified by the evidence and it constitutes a gross irregularity or misconduct or exceeding the commissioner's power and it renders his conclusion that the third respondent was dismissed, unjustifiable with reference to the reasons given and the evidence before him. There is no rational connection between the evidence led and the conclusion reached by the commissioner.
- 7.5 The proceedings before the commissioner brought about an unjust result and stand to be set aside.
- 7.6 The order that the third respondent be reinstated and be paid the remuneration he would have been paid from date of dismissal to date of arbitration in inappropriate in the light of the fact that the applicant never dismissed him.
8. The applicant has raised several grounds of review. It is not necessary to repeat those. None of the grounds raised are those identified in *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* (2007) 28 ILJ 2405 (CC). The review test is whether the decision reached by the commissioner is one that a reasonable decision maker could not reach. The standard is now one of reasonableness. The applicant contended that the commissioner has committed misconduct and a gross irregularity. A commissioner in terms of section 138 of the Act required to decide whether a disputed dismissal was fair

and should do so fairly and quickly. A commissioner must also determine whether misconduct was committed and must consider all the facts and the evidence. The commissioner must consider and evaluate the inherent probabilities and assess the credibility of a witness. Where a commissioner flagrantly disregards relevant or crucial evidence or where the reasoning is fatally flawed, or incorrectly applies legal principles, a reviewing court may be inclined to conclude that the ultimate decision arrived at is one that no reasonable commissioner could have arrived at.

9. The commissioner was called upon to decide whether the third respondent was dismissed and if so whether the dismissal was unfair. The applicant's version is that it spoke to all employees about communication and the issue of cellphones at work. The third respondent was asked whether he had any problem with that and said that he had. He was told to wait and go to the office where the issue would be discussed. The third respondent's version as opposed to this was that there was a discussion about the use of cellphones. He raised the issue with the employer that he needed to communicate with his mother due to the security strike. The employer told him to leave the premises which he did.
10. The commissioner was faced with two mutually destructive versions only one of which was correct. He was therefore required to assess the evidence and make a credibility finding. This is precisely what the commissioner did. He had the benefit of having observed the witnesses before him and made a finding. The proceedings were not transcribed but only the commissioner's handwritten notes were. There are some gaps in the record which the applicant should have rectified. What the applicant wants this court to do is to second guess the finding made by the commissioner. This court is not able to

do so taking into account the state of the record. It is clear from the record that the third respondent was not charged with having absconded which is what the applicant appears to contend had happened. No explanation was proffered why the applicant did not follow this route. The third respondent's contention that he was dismissed is more probable than the applicant's version.

11. *Sidumo* enjoins the Court to remind itself that the task to decide the fairness or otherwise of a dismissal falls primarily within the domain of the commissioner. This was a legislative intent and as much as decisions of different commissioners may lead to different results, it is unfortunately a situation that has to be endured with fortitude despite the uncertainty it may create. The court must remind itself that the test ultimately, is whether the decision reached by the commissioner is one that a reasonable decision maker could reach under all the circumstances. On this test this court cannot gainsay that decision of the commissioner.

12. The application stands to be dismissed.

13. In the circumstances I make the following order:

13.1 The application is dismissed with costs.

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANT

: S ROELOFFS INSTRUCTED BY FRED VOGEL

ATTORNEYS

FOR THIRD RESPONDENT	:	NON APPEARANCE
DATE OF HEARING	:	14 OCTOBER 2008
DATE OF JUDGMENT	:	30 JANUARY 2009