

IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

REPORTABLE

CASE NO: JR 783/07

In the matter between:

KHULANI FIDELITY SERVICES GROUP

APPLICANT

AND

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

1ST RESPONDENT

COMMISSIONER JSC NKOSI N.O.

2ND RESPONDENT

PTWU OBO SHARON SIBEKO

3RD RESPONDENT

JUDGMENT

MOLAHLEHI J

Introduction

[1] This is an application in terms of which the Applicant seeks an order to review and set aside the arbitration award issued by the Second Respondent (the Commissioner) under case number GAJB 14275-06.

[2] The Applicant has also applied for the condonation for the late filing of this review application. The application was 5 (five) days late and the reasons for the lateness has to do with the attempts at negotiating a settlement of the outcome of

the arbitration hearing. I see no reason why condonation should not be granted in the light of the explanation and the short period of the delay.

[3] Accordingly the late filing of the review application is condoned.

Background facts

[4] The employee who prior to his dismissal was employed as a security officer was dismissed by the Applicant for absconding from her job.

[5] The employee testified that she received a final written warning on the 24 May 2006 and was thereafter instructed to report at a site in Springs starting from the 1 June 2006. Because she fell sick on the 1st June 2006 she did not report for work but attended at the local clinic for medical attention. She sent the medical certificate she received from the clinic to the Applicant through a fellow employee.

[6] The employee was surprise to receive a letter indicating that she was dismissed because she had absconded. The same was told to her when she reported for work on the 2nd June 2006. She was also told on that day not to report for duty anymore. She then referred a dispute to the First Respondent (the CCMA) which could not be resolved by conciliation and accordingly the matter was referred to arbitration.

[7] The case of the Applicant is that it has a computer system which automatically dispatches off a telegram when an employee is absent from work for more than 4 (four) days indicating that he or she has absconded. According to the

Applicant because the employee failed to report at work for 4 (four) days, she received a telegram on the 31st May 2006 which read as follows:

“PLEASE REPORT TO THE FSSS EAST RAND OFFICE WITHIN 48 HOURS.”

[8] On the same day 31st May 2006, the branch manager of the Applicant issued a letter indicating that the employee should report for duty at the site at the Department of Home Affairs on 1st June 2006, failing which desertion procedures would be invoked. The relevant part of this letter reads as follows:

“ To: Me S Sibeko co. no [...]

Cc: Mr Mickey Bartmann

Mr Mike Kotrze

Subject Re: Outcome of Disciplinary enquiry

- 1. Please note that employee Shoron Sibeko co no [...] was given a final written warning.*
- 2. The client ‘All Pay’ ABSA also issued a letter stating that she is not allowed to work for ‘All Pay any more due to being negligent with the firearm.*
- 3. Therefore the employee has to be posted at a normal grade C site. (the site, which has been allocated to her, is on Department of Home Affairs Springs). She is to report for duty at 0 6h00 on 01 June 2006 at the site; address follows: ...*

To date she has not reported for duty and should she not report for duty

on 01 June 2006 absconding procedures will be implemented.

I trust you will find the above in order.”

- [9] The disciplinary hearing against the employee which was held on the 12th June 2006 was conducted in the employee's absence. She was advised of her dismissal in the letter dated 12 June 2006. The relevant part of this letter reads as follows:

“Disciplinary outcome for Sharon Sibeko

- 1. Disciplinary outcome was given on 29/05/06. She was told to report to Mr Kotze for duty immediately, which she never did.*
 - 2. On 31 May 2006 a Union official phoned Mike Kotze, he told her that she (S Sibeko) was supposed to report for duty on 30 May 2006.*
 - 3. A letter was faxed to the Union on 31/05/2006 ...*
 - 4. 2 June 2006- An All Pay member brought a sick note to Mr Kotze advising that she had attended a clinic on 01/06/06 – not booked off.*
 - 5. She never returned or informed the company or her supervisor about her whereabouts.*
 - 6. Personal Department sent 2 telegrams:*
 - 1st one: informing her to report to the office within 48 hours;*
 - 2nd one: informing her that her services had been terminated;*
- Nothing was reported to the company about her whereabouts.*

7. *On 12/06/06 Mrs Sibeko brought me Lucas Pagel a sick note for the 8+ 9 June 2006- see copy attached. She asked for a copy and [sic] told he to go to the Personnel Department in Robertsville”*

[10] The version of the Applicant during the arbitration hearing was that the employee failed to report for duty for 4 (four) consecutive days resulting in a telegram being dispatched to her. The employee was then informed of her dismissal having failed to attend the disciplinary hearing despite being duly notified.

Grounds for review and the award

[11] In its founding affidavit the Applicant contended that because the Commissioner failed to apply his mind, his decision was unreasonable and constituted gross irregularity. This complaint is based on the averments that the Commissioner failed to consider the oral evidence; the written arguments submitted by Applicant and relied on “*evidence*” not presented in the hearing.

[12] The Applicant contended that the employee had repudiated her employment because of the unreasonable period of his absence from work.

[13] The Commissioner in his award found that the respondent in dismissing the employee relied on circumstantial evidence which was inconsistent. He further found that the Applicant issued two notices of dismissal, one on the 6th and the other 12th June 2006. He also found that the Applicant dismissed the employee for desertion despite the submission of the sick notes.

Evaluation of the award

- [14] In my view the Applicant's application stands to be dismissed because the Commissioner's decision can not be faulted for unreasonableness. The conclusion of the Commissioner is reasonable and meets the standard set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC). The test for review as set in *Sidumo*, is that of having to determine whether or not the conclusion of the Commissioner is one which a reasonable decision-maker could not have reached.
- [15] Desertion consists of absence without authorisation by the employee, with the intent to remain permanently away from his or her employment. The intent can generally be inferred from the circumstances of the absence of the employee. The period of absence and the surrounding circumstances can serve as an indication of the intention not to continue with the contract of employment.
- [16] In general, a short period of absence may not be sufficient to establish evidence of the intention not to continue with the employment contract. In other words a short period of absence without authorisation may not depending on the circumstance of the case constitute repudiation of the contract by the employee. However, and again depending on the circumstances of a given case, prolonged absence may serve as evidence of desertion particularly where the employee wilfully terminates communication with the employer during the period of absence.

[17] In *SA Broadcasting Corporation V Commission for Conciliation, Mediation & Arbitration & Others (2001) 22 ILJ 487 (LC)*, the respondent employee who had been employed by the SABC was dismissed but subsequently the dismissal was withdrawn. A meeting took place between the employee and management on 26 November 1997. The employee was orally instructed to resume work. The employee was of the view that in terms of his reinstatement he was entitled to wait for a written instruction to resume work before doing so. And therefore he did not return to work. The SABC addressed several letters to him warning him that he was obliged to report for duty. He was finally given an ultimatum that he would be regarded as having absconded if he did not return to work on 5 December. Subsequently, on 12 January 1998 the SABC terminated his services without holding an enquiry into his desertion. The employee referred a dispute to the CCMA concerning his alleged unfair dismissal. The Commissioner found that the employee had been unfairly dismissed and rendered an award in his favour. The SABC sought to set it aside the award on review.

[18] The court considered the SABC's contention that it had not dismissed the employee and held that the act of desertion does not terminate the contract but the acceptance thereof does. In other words the termination occurs once the repudiation is accepted by the employer. The same approach was adopted in *SACWU v Dyasi [2001] 7 BLLR 731 (LAC)*, where the Court held that desertion amounts to repudiation of the contract of employment which the employer is entitled to accept or reject. The acceptance of repudiation amounts to dismissal if employee once again tenders service.

[19] The Court went further in the *SABC's* case to say:

“The real problem arises from circumstances of unexplained absence. Mere absence is no more conclusive evidence of desertion (which is absence plus an intention not to return), than it is evidence of wilful absence without leave (which axiomatically includes an intention to return, albeit at a time of the employee's choosing). The means by which the employer established the existence or absence of the intention to return is the critical point of the debate. What constitutes desertion is of course a matter of fact. In some instances an unexplained absence for a reasonable period, that is to say, reasonable in relation to the employer's operational requirements, will establish the fact of desertion.”

[20] In the present instance the Commissioner reached the conclusion that the Applicant had dismissed the employee and that the dismissal was substantively unfair. In arriving at this conclusion the Commissioner took into account the facts and the circumstances of this case. He reasoned that it could not be said that the employee had the intention not to return to her employment in the light of her submission of the medical certificate which explained her absence for the 8th and 9th June 2006. The employee also reported for work on the 2nd June 2006 and also informed one of her senior about the reason for her absence.

[21] The issue in this matter is not whether the conclusion of the Commissioner is correct but whether it is reasonable. In my view the Commissioner arrived at the conclusion that there was an unfair dismissal after applying his mind to the facts

and circumstances of the case. In this regard the Commissioner correctly applied the principle applicable when dealing with a case of absconding by the employee. As indicated earlier the Commissioner found that there was no evidence of intention to terminate the contract of employment by the employee. She had submitted the medical certificate which is acknowledged by the Applicant and she reported for work on the 12th June.

[22] In the circumstances the review application of the Applicant stands to be dismissed. In the circumstances I see no reason why costs should not follow the result.

[23] The application to review and set aside the arbitration award issued by the Second Respondent under case number GAJB 14275-06 is dismissed with costs.

Molahlehi J

Date of Hearing : 29th July 2008

Date of Judgment : 3rd February 2009

Appearances

For the Applicant : Adv Van Ass

Instructed by : Blake Bester Incorporated

For the Respondent: Mr K Allardyce of Allardyce & Partners