

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO.: JR 910/06

Not Reportable

In the matter between:

COIN SECURITY GROUP (PTY) LTD

Applicant

and

FRANK MAKOLA

1ST Respondent

SMANGA TOLI N.O.

2ND Respondent

CCMA

3RD Respondent

JUDGMENT

CAWE AJ:

Introduction

[1] The present application was brought for the simultaneous hearing of:

a) An application in terms of Rule 11 brought by First Respondent

and

b) a review application brought by the Applicant

- [2] Both matters had previously been removed from the roll as there had been no action on the part of the Applicant in pursuing the review application.
- [3] After hearing presentations on the Rule 11 application I proceeded to hear the review application in order to curtail proceedings and to deal with both when I deal with the merits of the review.
- [4] The review application is to set aside the award rendered by the Second Respondent (the Commissioner) under case number GAJB 25309/05. The application is opposed by the First Respondent.

The Facts

- [5] The First Respondent was employed by the Applicant as a Project Manager. Before he commenced employment with the Applicant, he was employed by Chubb Security. He worked at Chubb Security as a Project Manager. First Respondent worked for approximately 8 years for Chubb Security.
- [6] On or about the 18th July 2005, he was suspended by Johannes Frederick Myburgh, the General Manager: Mid-East Area, Gauteng. This was pending an investigation. The investigation was conducted by the Branch Manager, Mr Dick.
- [7] At the conclusion of the investigation, he was notified to appear at a disciplinary enquiry for purpose of answering to allegations of:

derelection of duty;

disobeying a lawful and reasonable instructions;

contravention of the Armed and Ammunitions Act, Act 75 of 1996;

deviation from standing operating procedures;

poor work performance;

fraud and falsification of standard operational documentation;

un-communicated and un-authorised absenteeism on 20 July 2005.

- [8] Mr Myburgh, in his affidavit (paragraph 6.1) avers that

“The disciplinary enquiry was postponed on at least two occasions due to complaints by the First Respondent that he did not understand the charges. The chairperson of the disciplinary enquiry, Mr Marinus Wagemaker, Applicant’s General Manager Armed Reaction Pretoria, made a ruling that all documentation, including statements by all possible witnesses, be provided to the First Respondent before the disciplinary enquiry could proceed. This duly happened. The First Respondent therefore, prior to commencement of the disciplinary enquiry, was fully aware of the details of all of the allegations against him”

- [9] This is vehemently denied by the First Respondent in his papers.
- [10] Mr Wagemaker found the First Respondent guilty and dismissed him with immediate effect. The First Respondent appealed the dismissal. The appeal was dismissed.
- [11] He referred his unfair dismissal dispute to the Third Respondent. The dispute was not resolved at conciliation. It was then referred to arbitration and was arbitrated by the Commissioner who is cited as the Second Respondent in the proceedings before Court.
- [12] At the arbitration hearing Mr Myburgh represented the Applicant company. The First Respondent was represented by Audi Mehl and later by Joshua Jabangwe, both SAHCTU officials.
- [13] The Applicant called Robert Dick, its Bedfordview Branch Manager, Keith Lester, a Barloworld principle dealer and Willem Van De Venter, the liason officer and security head as its witnesses.
- [14] I shall not deal with the testimonies of the witnesses individually but as and when the need arises in my analysis of the grounds for review.
- [15] The First Respondent did not call any witnesses. His testimony is summarized as follows by the Commissioner in the award:

His version was that he was suspended on the 19th July 2005 and as charges were ambiguous, he requested clarity on same but none was given. He attended a hearing and still repeated clarity sought, which

was postponed to allow the Respondent to respond but failed to.

He was later dismissed and he appealed and the appeal chairperson also said that he did not comprehend the charges put.

He said that complaints referred to were only lodged after his suspension, which was clear fabrication.

He stated that the Respondent's standards did not allow implementation or compliance with Arms & Ammunition Act No. 75 of 1996 and that a firearm got lost on a site which had no safe.

The Respondent's witness testifies before these proceedings that they never lodged any complaints against him. The General Manager started to victimise him henceforth and also presided over the altercation between Zelda and him. The same General Manager recruited him from Chubb where he was the Area Manager for eight years. He worked well and a year later due to argument with Zelda, he was suddenly told of incompetence. He had a clean record until his argument with Zelda.

No performance standard was set or known to him.

He said an employee cannot be suspended and expected to report for duty during the currency of that suspension. Suspension means one stays away from work.

He said that clients normally tell one of ratings and they only sign. No prior complaint by any client was brought to his attention.

Responding to questions he said that it was not usual to bring clients to hearings. He said Willemse's statement confirmed that clients would sign without ratings provided.

He acknowledged to have discussed two complaints with the G.M. in 2004 and nothing in 2005.

He reiterated that delivery of quoted, monthly tax forms and meeting clients are not the Project Manager's jobs. He confirmed to have never been to any Respondent's safe on site.

[16] The Commissioner issued an award in the matter. His findings were that the First Respondent's dismissal was both procedurally and substantively unfair. It is this award that has led to the instant review application.

Grounds for review

[17] The Applicant's grounds for review are set out elaborately and accurately in Mr Myburgh's founding affidavit in support of the present application. I shall summarize them for the purposes of the

judgment.

- [18] Mr Myburgh avers that it is not true that the First Respondent did not have the charges explained to him as there were two postponements to enable further particulars being given to the First Respondent and this was done.
- [19] Mr Myburgh further denies that the charges against the First Respondent were fabricated because of the First Respondent's altercation with Mrs Myburgh. According to a submission made by Applicant's representative in Court the said altercation took place six months before the disciplinary enquiry. It had absolutely no bearing on the disciplinary hearing and the subsequent dismissal of the First Respondent.
- [20] Another issue that Mr Myburgh deals with in his affidavit, in support of the review application, is the fact that the Commissioner ignored evidence that was placed before him at arbitration. It is Mr Myburgh's averment that the Commissioner did not deal with the evidence that the First Respondent falsified signatures of Applicant's client's representatives. Mr Myburgh feels that this evidence should have been analyzed by the Commissioner. This, according to Mr Myburgh, shows that the Commissioner did not apply his mind to the issues before him.
- [21] Concerning the First Respondent's absence from work on the 20th July 2005 Mr Myburgh feels that the Commissioner should have taken into consideration the letter of suspension as it was part of the arbitration bundle. The letter stipulates that although the First Respondent has been suspended from his normal duties, he should report daily at the Bedfordview Head Office of the Applicant.
- [22] The issue of the missing firearm is also cited as one that was not analysed correctly by the Commissioner. According to Mr Myburgh the gist of the allegations against the First Respondent in this regard, was not whether or not the First Respondent was responsible for this firearm being lost, but rather his failure to investigate the matter after the firearm disappeared.
- [23] It is Mr Myburgh's further submission that the Commissioner did not refer to evidence that suggests that he and Mr Dick were not in "cahoots" in planning to dismiss the First Respondent.

- [24] In summary Mr Myburgh avers that the Commissioner did not apply his mind to the matter and evidence before him.
- [25] He also submits that the evidential material which was available to the Second Respondent, does not justify the findings which the Second Respondent made. The Second Respondent either misconducted himself, or alternatively he committed a gross irregularity.
- [26] First Respondent argued that there was procedural unfairness on the part of the Applicant as the charge sheet was not specific. The Applicant did not elaborate on the charges.
- [27] Another ground for opposing the review application is that it was contradictory for the Applicant to suspend the First Respondent but expect him to report to the Applicant's head office.
- [28] First Respondent takes issue with the fact that the Applicant only called witnesses at the arbitration and none were called at the internal hearing. This made it difficult for the Third Respondent to cross examine the witnesses for the first time at the arbitration.

Analysis

- [29] The Commissioner found that there was both substantive and procedural unfairness in the First Respondent's dismissal. He mainly based his findings on what he termed fabrication of charges by the Applicant.
- [30] In his analysis of evidence the Commissioner finds that Mr Myburgh was so intent on dismissing the First Respondent that he was in "cahoots" with the Applicant's clients to fabricate evidence against the First Respondent. It is not clear how he arrived at this conclusion, as there is no direct evidence that he refers to.
- [31] In January 2005 there was already communication between J. Myburgh and Z Myburgh, concerning complaints against the First Respondent from clients. This is contained on page 63 of the paginated bundle. Evidently there was no fabrication of the complaints against the First Respondent by the Applicant as was found by the Commissioner.

[32] The paginated bundle contains a number of complaints against the First Respondent that were addressed by the Applicant's clients to the Applicant. These include two cancelled contracts. I do not have to deal with these at length save to say that the First Respondent did not deny their content at arbitration.

[33] The issue of the First Respondent's absence while he was on suspension was dealt with at length by the Commissioner. He states in his award, on page 8,

Suspension means "temporarily staying away from duty for a specified or unspecified period, with or without pay" He was therefore unfairly charged with uncommunicated and unauthorized absenteeism on 20 July 2005. There is no absenteeism when an employee is suspended.

[34] The Commissioner ignores the fact that the letter of suspension stated that the First Respondent had to report to work even if he did not carry out work as a Project Manager. The Commissioner clearly substituted his own interpretation to the suspension of the First Respondent.

[35] The same can also be said in his (the Commissioner) analysis of the performance standards charge against the First Respondent. In his analysis he states that:

"I hold a different view from Robert's evidence that the employer has no obligation to retrain an employee whose performance is regarded as low. It is not only the employee who has to ask for help, the employer, in my opinion, has that legal obligation to help the employee improve his performance."

[36] As it was held in **Empangeni Transport (Pty) Ltd v Zulu ILJ 352 (LAC)**, that:

"performance standards generally fall within the employer's discretion, and unless the standards are manifestly unlawful, unfair or irrational, arbitrators should not substitute their judgment for that of the employer."

[37] It is clear that the Commissioner did not enquire as to what the

employer's standards were regarding the First Respondent's work performance. The First Respondent was recruited from Chubb where he was already a senior employee. He could not therefore be treated as a junior recruit and steadily be shown the ropes by the Applicant. His senior position meant he knew the ropes as far as managing the project assigned to him.

[38] The other issue which the Commissioner dealt with in his award was the altercation between the First Respondent and Mrs Myburgh. Although the First Respondent brought it up at the arbitration there was no proof that it had any influence on the charges that he had to face. In this regard the Commissioner erred in finding that it was one of the reasons that led to the First Respondent's dismissal.

[39] As far as substantive unfairness of the First Respondent I find that the Commissioner erred in his findings that the First Respondent was substantively unfairly dismissed. He disregarded material evidence that was before him. His decision is not one that a reasonable Commissioner would make. His award would not pass the reasonableness test as set out in **Sidumo** case.¹

[40] Regarding procedural fairness, there is absolutely no basis for the Commissioner's basis that the First Respondent's dismissal was unfair. The First Respondent had the disciplinary hearing postponed three times for him to prepare his case.

[41] The fact that the witnesses for the Applicant were called for the first time at the arbitration does not make the procedure at the hearing unfair as the arbitration is a process *de novo*. The First Respondent was afforded the opportunity to cross-examine these witnesses, through his representative at the arbitration. He could put any questions to them that he would have put at the hearing.

[42] In the premises I find that the Commissioner's award stands to be reviewed and set aside for lack of reasonableness.

[43] I therefore make the following order

1. The Third Respondent's award is reviewed and set aside and

¹ Sidumo and Another v Rustenburg Platinum Mines (Pty) Ltd and Others [2007] 12 BLLR 1097 (CC)

substituted by the following:

“The First Respondent’s dismissal was both procedurally and substantively fair.”

2. I make no order as to costs

CAWE AJ

Acting Judge of the Labour Court of South Africa

Date of hearing: 26 May 2011

Date of Judgment: 22 July 2011

Appearances:

For the Applicant: S. Lancaster

Instructed by: G Van der Westhuizen Macrobert Inc

For the Respondent: J Jabangwe, a union representative