

IN THE LABOUR COURT OF SOUTH AFRICA  
HELD AT BRAAMFONTEIN

Reportable  
CASE NO. J 2641/09

In the matter between:

PRIVATE SECURITY INDUSTRY  
REGULATORY AUTHORITY

Applicant

and

COMMISSION FOR CONCILATION  
MEDIATION AND ARBITRATION

First Respondent

SETH ABRAHAM MOGAPI

Second Respondent

JM SIAVHE N.O

Third Respondent

Date of Hearing: 11 August 2011

Date of Judgment: 02 November 2011

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JUDGMENT

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REDDY AJ

[1] This is an application in terms of section 158(1)(g) of the Labour Relations Act (the LRA)<sup>1</sup> to:

1. review and set aside the ruling of the third respondent dated 16 October 2009 under case number GATW 9452-09 ("the ruling");
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<sup>1</sup> 66 of 1995.

2. substituting the ruling of the third respondent with a ruling that the first respondent does not have jurisdiction to conciliate and arbitrate the dispute referred to it under case number GATW 9452-09, in respect of the alleged unfair dismissal of the second respondent by the applicant;
3. staying the proceedings in the first respondent in respect of the dispute, pending final determination of the application to review and set aside the ruling;
4. costs in the event of opposition.

[2] The application is opposed by the second respondent ("the employee").

### *Background*

[3] The employee was employed as a director of the applicant ("the employer") with effect from 1 April 2004.

[4] The employer regulates private security services within the Republic of South Africa. It is an organ of state and falls under the authority of the Minister of Safety and Security.

[5] In terms section 5 of the Private Security Industry Regulation Act<sup>2</sup> ["the Act"], the employer is governed and controlled by the Private Security Industry Regulatory Authority Council ("the PSIRA council").

[6] During the interview of the employee (and prior to his appointment to the post of director), he disclosed to the interview panel that he had a previous criminal conviction with a suspended sentence. One of the members of the interviewing panel was the chairperson of the PSIRA council. The employee further submitted to the chairperson a letter confirming same.

[7] The employee was later informed by the chairperson of the PSIRA council that he was recommended for the post and he was offered a letter of appointment which he signed on 8 March 2004. For all intents and purposes, the parties commenced the employment relationship on 1 April 2004.

[8] The letter of appointment provides that the employee must successfully undergo security clearance checks as determined by the PSIRA council from time to time. The clause reads as follows:

"2. Security clearance check

Your appointment and ongoing employment as Director is subject to you successfully undergoing such security clearance checks conducted by the National Intelligence Agency as may be determined by the Council from time to time. Your employment may be terminated with immediate effect should you not

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<sup>2</sup> 56 of 2001.

successfully undergo any security clearance check.”

[9] Section 14 (4)(c) of the Act provides that employees of the Authority “must successfully undergo such security clearance check conducted by the National Intelligence Agency, as may be determined by the Council if this is relevant in respect of their work.”

[10] From 1 April 2004 to May 2008, the employee performed the duties and functions of a director. On 27 May 2008, he was suspended pending disciplinary action in respect of various charges of misconduct. The disciplinary hearing was scheduled to take place in September 2008.

[11] In September 2008, the hearing was postponed and the parties engaged in a retrenchment consultation process. The reasons for his selection for retrenchment were that the employee had a criminal record and had failed to disclose that to the employer and that he had not successfully undergone a security clearance check. In other words, an operational requirement of his job had not been fulfilled and he had to be retrenched. During the course of the retrenchment consultations, the employee informed the employer that he had informed the PSIRA Council of his criminal record during the interview. It seems that this was the first time the employer became aware of such disclosure. Nonetheless the employer still required the employee to undergo a security clearance check. The employee agreed to do so and he completed the necessary forms in September 2008 which were then submitted to the National Intelligence Agency (“the NIA”).

[12] A response from the NIA was not forthcoming for many months and the employee remained on suspension. He wished to return to work (having been suspended for nearly a year). The employer would not consent to his return to work until the security clearance had been issued. The employee referred an unfair suspension dispute to the CCMA in April 2009.

[13] A series of correspondence was entered into by the parties' legal representatives regarding the employment relationship. The thrust of it was whether the employee would remain on suspension pending the outcome of the clearance check.

[14] In July 2009, the employer terminated the relationship on the basis that the employee had not successfully undergone a security clearance check and that as a result, the conditions of his appointment were not fulfilled. The employer further recorded that the appointment was a nullity and that the employment relationship had lapsed as a matter of law. The letter also recorded that the disciplinary proceedings against the employee were withdrawn.

[15] The employee referred an unfair dismissal dispute to the CCMA in August 2009. Pursuant to that referral the employer lodged an application in the CCMA seeking a ruling that the CCMA lacked jurisdiction to hear the dispute as the contract, according to the employer, had terminated by operation of law and there was therefore no dismissal.

[16] On 16 October 2009, the commissioner handed down a ruling dismissing the *point in limine* and confirming the CCMA's jurisdiction to hear the unfair dismissal dispute.

[17] In a letter dated 30 September 2009, the National Intelligence Agency ("the NIA") recorded that the employee had failed the security clearance as he had been convicted of a Schedule 1 offence in 2003. This letter had not come to the attention of the parties until after the ruling was handed down. The commissioner therefore had not had regard to this letter.

[18] The employer then launched these review proceedings in respect of the ruling. The arbitration hearing has in the interim been adjourned *sine die* pending the outcome of these proceedings.

#### *The review application*

[19] The employer submitted that by ruling as he did, the commissioner failed to apply his mind to the proceedings, misconceived the nature of his functions and exceeded his powers.

[20] The employer's submissions in respect of the CCMA's lack of jurisdiction can be summarised as follows:

1. The conditions for the employment contract were never fulfilled as the

- employee did not successfully undergo a security clearance check;
2. As a result a valid contract of employment did not exist and the employee was not an employee for the purposes of the LRA, alternatively if such a contract did come into existence, the employee did not successfully undergo a security clearance check and as a result the contract of employment was destroyed;
  3. The employee was not dismissed rather his services were terminated by operation of law and contract.

[21] In effect, the employer's argument is that for a dismissal to occur, the employer must have terminated the contract. This did not occur as the suspensive condition had not been fulfilled and a valid contract did not result. Alternatively, if the condition was resolute in nature and if a valid contract was in place, the contract was destroyed when the employee did not successfully undergo the security clearance check.

[22] One of the grounds of attack on the ruling is that the commissioner interpreted the condition as resolute in nature. The commissioner had found that the employer could not terminate the contract without the results of the security clearance check being known to the employer and until such time, the contract was valid and enforceable.

[23] The employer submits that in so concluding, the commissioner:

1. ignored the clear wording of the employment contract that the employee's appointment is subject to his successfully undergoing a security clearance check;
2. did not furnish any reasons why he regarded the condition as resolute and that there was no rational connection between the ruling and the evidence before him;
3. ignored the provisions of clauses 19.3 and 19.4 of the employee's contract of employment which recorded that the employee was responsible to direct and oversee the execution of policy, strategic management of the employer and perform functions of the director in terms of section 14(2) of the Act.

[24] The employee submits that a valid contract is in place as he twice submitted to clearance checks – in 2005 and 2008.

[25] The security clearance check that allegedly occurred in 2005 is in dispute. There are no copies of the relevant forms and the NIA has denied that it received such forms from the employee.

[26] The employee further submits that the employer also had obligations to perform in terms of the suspensive condition in that the employer had to subject the employee to the security clearance check before confirming his appointment. By failing to do so, the employer has deliberately prevented the fulfilment of the condition and is now seeking



to avoid the obligations of the ensuing contract. The employer, according to the employee, had fictionally fulfilled the condition and the contract is validly in place.

[27] A further submission by the employee was that as result of the parties entering into a contractual relationship despite the PSIRA Council's knowledge of his previous conviction, the employer had waived the enforcement of the condition.

[28] The employee also submits that he was entitled to be heard before the contract was terminated.

*Analysis of the arguments*

*The employee's appointment was subject to his successfully undergoing a security clearance check:*

[29] Given the clear wording of clause 2 of the letter of appointment and section 14(4) (c) of the Act, it is plain that the employee's appointment and continued employment were subject to the fulfilment of a contractual condition that emanated from statute. The condition was therefore both contractual and statutory.

[30] The security checks are relevant to the employee's work and it is imperative that as a very senior employee, he is ethically able to enforce policy, strategy and decisions of the private security industry.

[31] If he does not successfully undergo the clearance check, his employment may be

terminated by operation of law with immediate effect. The fact that the word “may” is used in the contract makes it plain that any termination was not automatic but was an election at the instance of the employer - which is what occurred.

[32] The terms of the security clearance checks in line with the statutory and contractual obligations are that:

1. they are at the instance of the PSIRA Council;
2. they are to be performed by the NIA;
3. the NIA has to notify the employer of the outcome of the check;

[33] The effect of the checks being at the instance of the PSIRA Council is that the checks could not be initiated at the instance of the employer or the employee. This applies whether the checks were to occur prior to the commencement of the contract or during the course of the contract. When the council directs the employee to subject himself to a check he must do so – it is not an option available to the employee to refuse to subject himself to the checks. For this reason, the employee’s submission that the employer (as opposed to the council) had an obligation to subject the employee to the security clearance check before confirming his appointment is rejected. I therefore do not find that the employer had fictionally fulfilled the condition and that as a result the contract was validly in place.

[34] There was no evidence before the commissioner that the council required the

employee prior to 2008 to submit to a clearance check.

[35] A major portion of the dispute between the parties is whether the employee had successfully undergone the check at the time that the employment relationship was terminated. What does the term “successfully undergo clearance checks” entail?

[36] The employee submitted that the fact that he submitted to a test when asked to do so in 2008 was sufficient to satisfy the condition. The employer submitted that the discharge of the condition required more than submitting to the test, he had to successfully undergo it by achieving the necessary clearance from the NIA to be employed.

[37] I agree with the employer’s submission in this regard. The wording is clear: the employee had to successfully undergo the clearance test. It is not sufficient that he merely submitted himself to the test. There must be a positive finding by the NIA that he has achieved the necessary security clearance. This means that an outcome from the NIA is required. If the outcome is in favour of the employee then he has satisfied the condition on him. If the outcome is against the employee then he has not successfully undergone the clearance test and the condition remains unfulfilled. This means that the process for undergoing the security clearance check commences with the employee being directed by the Council to undergo the clearance check, the employee actually submitting himself to the test and the NIA providing an outcome of the clearance check.

[38] It is only on being informed that the employee had not been given the necessary clearance that the employer could correctly assert that the contract fell to be terminated by operation of law. Prior to this outcome being known by the employer, there was no factual basis upon which the contract could be terminated by operation of law.

[39] A further reason for this conclusion is that the employer is bound to its argument that the result of the clearance check is required and not merely the employee's subjection to the check before the employee can say that he has satisfied the condition. Taken to its logical conclusion, that argument similarly requires the employer to await the outcome of the clearance check before it could terminate the contract of employment. It flies in the face of the employer to assert that the contract falls to be terminated by operation of law when the outcome of the security clearance check that may have enabled a termination by operation of law did not exist.

[40] I therefore find that given that the employee could not initiate any security clearance checks himself that there was no factual basis for the employer to assert in the letter of termination that the employee had been "unwilling" or "unable" to obtain the security clearance since the commencement of his employment in 2004. Further, that until the employer had received the outcome from the NIA the process of undergoing the security clearance had not been completed and the employer could not terminate the employment relationship when it did.

[41] In this regard, I therefore find that the commissioner arrived at a decision that a reasonable commissioner would have arrived at when he found that the employer ought to have waited for the outcome of the clearance check from the NIA before terminating the contract with the employee.

[42] The employer further submits that the commissioner in finding that the employer ought to have waited for the outcome of the security clearance, had found that a reasonable period of time had not passed. The commissioner, the employer submitted, had committed reviewable errors by :

1. not giving any reasons for the finding that a reasonable period of time had not passed;
2. ignoring the employee's demand of an unconditional reinstatement following his continued suspension. The Minister could not have allowed for further time to pass as the employee would have recommenced his duties;
3. ignoring the passage of time since the conclusion of the contract in April 2004.

[43] Points 1 and 3 above are without merit for the following reasons: the employee was under no obligation to initiate the security clearance as this could only be done at the instance of the PSIRA Council. The employer could only rely on the reasonable passage of time if there had been directives in the past from the PSIRA Council that the

employee submitted to clearance checks and he had not availed himself to the clearance checks. . There was no evidence before the commissioner that the PSIRA Council had requested the employee to submit to a test before 2008. When asked to do so in 2008 the employee complied.

[44] Point 2 is without merit for the following reason: The employee had been suspended since May 2008 on the basis that he was to face disciplinary action in September 2008. The employer postponed the disciplinary hearing and commenced a retrenchment process in September 2008. One of the reasons for his being selected for retrenchment was that he had not undergone a security clearance check. He was asked to do so and he acquiesced. The forms for the check were submitted in September 2008 to the NIA. A considerable period of time had lapsed since the forms were lodged in September 2008 and the employee remained on suspension without the NIA issuing an outcome. The employee requested to return to his work and the employer declined this request. The employee referred an unfair suspension dispute to the CCMA in April 2009.

[45] The employee was not acting unlawfully in wanting to resume his duties. An employment relationship existed and he was entitled to resume his duties until the relationship was terminated. There was nothing that he could do to fast track the process with the NIA (having been previously advised that requesting an outcome from the NIA was the PSIRA Council's function and not his) and the retrenchment process seeming to have stalled until such time as the NIA had made its decision. He requested

the outcome of the security clearance check in November 2008. The employer responded that same month that the outcome was not available. On 5 June 2009, the employee wrote to the employer's attorneys informing them that he was aware that the NIA had corresponded with the employer and informed it that the NIA would not proceed with the security clearance until the impasse with the employee had been resolved. The employee enquired from the employer about this communication from the NIA. The employer replied in a letter dated 10 June 2009 that the outcome from the NIA was not ready as yet and denied that the NIA was reluctant to continue with the investigation. The next letter from the employer was in July 2009 terminating the contract for the employee's failure to satisfy the security clearance condition.

[46] It is plain from the above summary that the employer knew that the NIA had not decided the clearance issue as at June 2009 and that there was no conceivable reason for the employee to have remained on indefinite suspension since May 2008. Rather than conceding that the employee resumes his duties pending the outcome of the clearance check, the employer elected to terminate the contract of employment so as not to allow further time to pass.

[47] The position that would have supported a termination by operation of law (that is the employee had not been given a security clearance by the NIA) was not present when the termination occurred. The reason for the termination (as submitted by the employer in point 2 above) was to disallow the employee from resuming his duties. This is distinct from a termination for failing to obtain a security clearance.

[48] The employer ought to have enquired from the NIA prior to terminating the employee's services whether the clearance had been approved or not. A letter from the employer to the NIA was only sent on 18 September 2009, two months after the termination had occurred. This can be elicited from the NIA's letter in reply dated 18 September 2009.

[49] I find that the employment relationship was not terminated by operation of law but was motivated by the employer's will to prevent the employee from resuming his duties

[50] These grounds of review as listed in paragraph 42 above are also dismissed.

*Suspensive or resolute condition:*

[51] The employer submitted that the commissioner could not, on the evidence before him, determine the condition to be resolute in nature.

[52] Simply put, the non-fulfilment of conditions in a contract has the effect of either enabling or destroying a contract. The fulfilment of a suspensive condition results in the contract becoming enforceable retrospectively as if the contract was unconditional from the outset. The fulfilment of a resolute condition means that the contract is destroyed and the destruction of the contract operates retrospectively as if the contract never came into effect. (See Christie *The law of Contract in South Africa* 4ed (LexisNexis, Durban 2001 pages 159 to 169).



[53] The employer itself relied on the condition either being suspensive or resolute (see point 2 under paragraph 20 above). The submissions before the commissioner were that either:

- a. a valid contract did not exist because the suspensive condition was not fulfilled by the employee or
- b. that if a valid contract did exist then the resolute condition was not fulfilled by the employee and the contract was therefore destroyed.

[54] This submission is also contained in the Minister's July 2009 letter to the employee terminating the contract. The Minister records in that letter:

"Since the date of your purported engagement, a reasonable period has elapsed for the obtaining of the requisite clearance. In consequence of the foregoing, it must be concluded that the conditions of your appointment, whether precedent or subsequent ... have not been fulfilled, and as a result you must be treated as occupying no position within PSIRA..."

[55] Suspensive and resolute conditions are also known as precedent and subsequent conditions respectively.

[56] In relying on these facts and submissions, the employer placed evidence before the commissioner which allowed him to conclude that the condition was resolute. There is therefore no merit in the grounds of review submitted by the employer and recorded under paragraphs 22 and 23 above.

[57] To my mind, whether the condition was suspensive or resolute did not have a bearing on the actual termination of the contract. Although there is a public interest in the employee fulfilling the condition, as stated above the reason for the termination was not because the condition was not satisfied but to avoid the employee being reinstated after the indefinite suspension.

[58] I find that a condition existed and that the non-fulfilment of that condition could have resulted in a termination by operation of law – although that did not happen in this matter. Whether the condition was resolute or suspensive has a bearing on the parties' rights subsequent to the termination of the contract. In other words, one of the questions that must be answered, should a party seek redress as a result of a termination by operation of law, is whether the contract was in existence and whether a claim for damages arises. Having found in this matter that the termination did not occur for the failure to satisfy the condition, it is not necessary for me to decide whether the condition was suspensive or resolute.

[59] A consequence of this finding is that the employee's submission in respect of waiver is not relevant.

[60] Also of no relevance is the employer's submission whether a party can enforce a contract which is in contravention of statutory requirements. The employer relied on the cases of *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd* 2008 (3) SA

1 SCA and *Eastern Cape Provincial Government and Others v Contractprops 25 (Pty) Ltd* 2001 (4) SA 142 (SCA) in support of this submission. Those cases refer to the illegality of contracts that fall foul of statutory obligations. Having found that the employer terminated the contract to prevent the employee from resuming his duties, as opposed to his falling foul of the statutory obligations on him, it is not necessary for me to determine whether the contract was valid.

[61] The commissioner's ruling confirming the jurisdiction of the CCMA to hear unfair dismissal dispute in the above circumstances does not warrant interference by this Court. For the sake of clarity, I find that the contract was not terminated by operation of law in terms of section 14 (4) (c) of the Act. The employee was dismissed. The CCMA has jurisdiction to hear the unfair dismissal dispute.

[62] I am also mindful of the fact that the arbitration proceedings in this matter have been adjourned *sine die* pending the outcome of this review application. This Court has not lightly intervened in proceedings to dispose of issues on a piecemeal basis. To do so is to undermine the effective and speedy resolution of disputes intended by the LRA. [See *Trustees for the Time Being of the National Bioinformatics Network Trust v Jacobson and Others* (2009) 30 ILJ 2513 (LC) and the cases cited therein. See also *Molefe v Dihlabeng Local Municipality and Others* (2004) 25 ILJ 680 (O)].

[63] The employer would have been entitled to review the entire award and included the grounds it relies on in this application at the end of the arbitration proceedings.

[64] I accordingly find that the commissioner did not commit any reviewable irregularity in arriving at the conclusions that he did. I also find that the commissioner's ruling is a ruling that a reasonable commissioner would have arrived at.

[65] In the circumstances, I make the following Order:

1. The review application is dismissed with costs;
2. The arbitration hearing in respect of the unfair dismissal dispute must be set down for hearing.

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Reddy AJ

Appearances:

For the applicant: Mr Van Staden instructed by Savage, Jooste and Adams Inc

For the second respondent: Mr Nthambeleni instructed by Makhuparetsa Ramarumo Inc.