



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Of interest to other judges

Case no: JR 96/2010

In the matter between

SANELISIWE SUKAZI

Applicant

and

THE COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

First Respondent

KRIEL A (N.O.)

Second Respondent

FIDELITY SECURITY SERVICES

(PROPRIETARY) LIMITED

Third Respondent

Heard: 19 January 2012

Delivered: 17 February 2012

Summary:

JUDGMENT

LEPPAN AJ

[1] The Applicant instituted review proceedings in terms of Section 145 of the Labour Relations Act, as amended ("the LRA")¹ to review and set aside certain decisions made by the Second Respondent that –

1.1 the Applicant was not entitled to be legally represented in the arbitration proceedings which were conducted by the Second Respondent under the auspices of the Third Respondent; and

1.2 that in taking a decision to dismiss her claim of unfair dismissal, the Second Respondent committed a grave irregularity by relying upon hearsay evidence tendered by the Third Respondent's sole witness. Mr Des Beyleveldt ("Beyleveldt").

[2] It serves to mention that the Applicant amended her notice of motion in order to challenge the Constitutionality of Rule 25(1)(c) of the Rules of Practice and Procedure of the First Respondent which provides as follows:

'if the dispute being arbitrated is about the fairness of a dismissal and a party has alleged that the reason for the dismissal relates to the employee's conduct or capacity, the parties, despite subrule (1)(b), are not entitled to be represented by a legal practitioner in the proceedings unless

–

(1) the Commissioner and all the other parties consent;

(2) the Commissioner concludes that it is unreasonable to expect a party to deal with the dispute without legal representation, after considering

–

(a) the nature of the questions of law raised by the dispute;

(b) the complexity of the dispute;

(c) the public interest; and

(d) the comparative ability of the opposing parties or their legal representatives to deal with the dispute.'

[3] For the sake of convenience, the challenge to the provisions of Rule 25(1)(b) will be referred to as the "Constitutional challenge".

¹ 66 of 1995.

- [4] At the hearing of this matter, this Court, having regard to the decision in the matter of *Norman Tsie Taxis v Pooe M (N.O)* (2005) 26 ILJ 109 (LC) pointed out that in order for such Constitutional challenge to be ventilated and determined in this Court, various interested parties would have had to be notified timeously of the hearing and be provided with a proper opportunity to intervene. In this matter, such notification had not taken place and it would therefore be inappropriate, and indeed irregular, to proceed in the absence of that step being taken. The Applicant's Counsel suggested that the most expeditious manner for this dispute to be dealt with is for items 1.1 and 1.2 above to be considered in isolation to the Constitutional challenge. If the Applicant were to succeed in respect of items 1.1 and/or 1.2 which in essence pertain to the merits of the review, the Constitutional challenge would of itself be an academic debate.
- [5] I shall first consider the merits of the review and then the Second Respondent's refusal to grant the Applicant legal representation at the arbitration hearing.
- [6] The evidence presented in the review application, as well as in the disciplinary process and the arbitration hearing is summarised below:
- 6.1 The Applicant was employed by the Third Respondent in the capacity of a security officer. She enjoyed a clean disciplinary record and eight years completed service prior to her dismissal on 23 July 2009.
- 6.2 The Third Respondent renders security services to various customers with whom it enjoys service level agreements. One such agreement, operative at that time, was with Automark Toyota. It was at the latter's premises, called East Rand Toyota ("the site"), where the Applicant performed the duties of a security officer under the supervision and control of the Third Respondent.
- 6.3 The service level agreement between Automark Toyota and the Third Respondent required that two security guards be stationed at the premises of Automark Toyota at all times and that at least one of those guards must carry a firearm.

- 6.4 In her founding affidavit in the review, the Applicant said that on 5 July 2009, she reported for work at approximately 06h25 having advised the Third Respondent's controller that she would be reporting slightly late for work. The Third Respondent's Branch Manager, Mr Lucas Pagel ("Pagel") and Site Manager, Mr Patterson ("Patterson") had already arrived on site. The Applicant's colleague who was also a security guard, Mr Oupa Matlala ("Matlala"), who was meant to be on duty with her that day failed to report for work and Patterson telephoned Matlala in the Applicant's presence and instructed him not to come to work due to his lateness.
- 6.5 Patterson and Pagel were about to leave the site when the Applicant informed them that in order for her to perform her duties she required a firearm. Patterson refused to provide her with one and referred to her as incompetent to handle a firearm. The Applicant tried to reason with Patterson because she had a valid permit issued in terms of Regulation 21(f) of the Firearms Control Regulations promulgated under the Firearms Control Act, 6 of 2000. The Applicant's permit was valid for the period 06h00 on 4 July 2009 to 15h00 on 6 July 2009 and allowed her to carry a Rossi .38 revolver. Her pleas to Patterson fell on deaf ears. Patterson and Pagel left her on site without providing the Applicant with a firearm.
- 6.6 A short while later, at approximately 08h25 that morning, a Mr Mahlangu ("Mahlangu") arrived on site. He was unaware that she was the only guard on duty. Mahlangu received a telephone call from the Third Respondent's controller requiring him to collect a firearm and a replacement security guard, because Matlala had been instructed not to report for work that day due to his lateness. According to the Applicant, Mahlangu only returned to the site at 13h45, and he brought with him the replacement guard and a firearm. Mahlangu instructed the Applicant to take possession of the firearm but she refused as she had no record or information about the whereabouts of that particular firearm in the preceding six hours since she had been at work. An argument ensued between them

after which she chose to leave work "peacefully" rather than engage in any further debate on the matter.

6.7 The Applicant was invited to attend a disciplinary enquiry on 14 July 2009. She was asked to respond to the three complaints, namely-

6.7.1 a refusal to carry out a lawful instruction;

6.7.2 committing an act or acts detrimental to the interests of the Third Respondent in that she had refused to take possession of a "company" firearm which had allegedly been left unattended and that she, as a competent person, was duty bound to take possession of the firearm as she was aware of the various procedures that had to be followed in respect of its safe handling; and

6.7.3 placing the national service level agreement between the Third Respondent and Automark Toyota in jeopardy.

6.8 The Applicant, who was represented at her disciplinary hearing by a colleague and a shop steward, pleaded not guilty to these complaints. Beyleveldt led the case for the Third Respondent. He called a single witness, Pagel, to testify and he gave evidence that –

6.8.1 he instructed the Applicant's supervisor, Mahlangu, to proceed to the site and re-issue the firearm to the Applicant. He received feedback from him later that morning that the Applicant was refusing to be issued with the firearm or to take possession thereof. Pagel said this was the reason another security guard had to be taken to the site; and

6.8.2 the Applicant testified in her own defence and confirmed that she was on duty at the site at 07h00 on 5 July 2009 and was present when Patterson and Pagel arrived. They issued her with a warning for being late. She did not have a firearm in her possession. Pagel had already taken the firearm away. She claimed Patterson insulted her and told her she was not a competent person to handle a firearm. The Applicant

confirmed that she refused to take the firearm from Mahlangu because she wanted Patterson to issue it to her. She was nervous that Patterson and Mahlangu had set a trap for her because the firearm had already been removed by Pagel earlier that day.

- 6.9 The disciplinary enquiry chairperson, Mr J C Volbrecht, considered the evidence before him, called for factors in aggravation and mitigation of an appropriate penalty, and took a decision to dismiss her. She appealed but she was unsuccessful and hence her timeous dispute referral to the First Respondent. Following a failure to reach any agreement in the conciliation process, the dispute was referred to arbitration before the Second Respondent.
- 6.10 At the arbitration hearing, the Third Respondent led the evidence of Beyleveldt who could only report on what took place during the disciplinary hearing.
- 6.11 In contrast, the Applicant testified that when she came on shift at approximately 07h00 on 5 July 2009, she found Patterson and Pagel at the site. When they were about to leave the premises, she reminded them about her need for a firearm. She received abuse from Patterson, with whom she had not previously worked, and Pagel rebuked him for insulting her. Patterson had accused her of being an incompetent. She said Patterson showed her the firearm but would not give it to her. She tried to explain that she was in possession of a valid firearm permit but to no avail. Patterson telephoned Matlala to instruct him not to come to work due to his lateness.
- 6.12 The Applicant claims she was left to carry on her duties without a firearm. She said "they", with reference to Patterson and Pagel, would re-issue the firearm once a replacement guard was brought on site. Mahlangu, her supervisor, arrived at 08h20 that morning to complete the occurrence book. He received a call from the controller and was instructed to collect the firearm, as Mahlangu was not in possession of one at the time. The Applicant continued to work alone

until 13h45 when Mahlangu arrived on site with a replacement guard. She would not take the firearm from Mahlangu because she did not know its whereabouts in the period from 07h00 to 13h45. In her evidence, at pages 129 and 130 of the Record, the Applicant testified-

‘...if I take this firearm with me it is a danger to me I was going to fall on the wrong side of the law. ...when I refused to take the firearm, Mr Mahlangu phoned Mr Patterson and Mr Pagel informed them that I refusing to take the firearm, I've said the very person who took the firearm from site must come and re-issue it to me so as to see all the permits is there, we write a permit every day it is on a file to come and double check on the file to be said (sic) that I am a competent somebody...’

6.13 She admitted that she and Mahlangu argued and that she decided to leave site albeit that it was before the end of her shift.

[7] It is common cause in the arbitration hearing that the Applicant refused to carry out an instruction from her supervisor, Mahlangu, that she accepted the firearm. The question that arises is whether that refusal was reasonable in the circumstances. This question was not addressed by the Second Respondent in his award. The Second Respondent made a finding that the Applicant breached an important rule and that the instruction she had been given was a lawful one. The Second Respondent found that she knew, or ought to have known the rules, and was ‘the architect of her own misfortune’. (see: Records of Proceedings page 26).

[8] Whether her justification for refusing to accept the firearm was reasonable was queried by Beyleveldt when he was under cross-examination in the arbitration hearing (see: Record of Proceedings page 124) where a debate ensued as to why it took so long to bring the firearm back on site, namely a period of some six hours, from 07h00 to 13h45. Beyleveldt speculated that it was due to the time taken to locate another guard who could be brought on site as the Third Respondent did not maintain a pool of spare guards who could fill in for a member of staff who was suddenly absent from work. However, what is important about this debate is that there was no evidence to prove the safekeeping and whereabouts of the firearm during those

crucial six hours. The firearm had been handled by various people in that time. The Applicant's concerns remained unanswered, including the absence of the required paperwork to prove its safekeeping in that relevant period.

- [9] The Applicant's concerns were known to the Third Respondent from as far back as the disciplinary hearing and this was fortified by her grounds of appeal when she claimed that the relevant documents, which would prove the passage of the firearm from person to person on that fateful day, such as the 'firearm register and records,' were not produced.
- [10] Beyleveldt testified in the arbitration hearing that the firearm had been taken to the Third Respondent's armoury by "the Managers" but there was no corroborative evidence from any eye witnesses and no documentary evidence to support his evidence. Beyleveldt did not witness these events and his evidence amounted to hearsay. Accordingly, such evidence is not admissible in the absence of a cogent reason why the eye witnesses were not called to testify. See: *Secunda Supermarket CC t/a Secunda Spar and others v Dreyer NO and other* (1998) 19 ILJ 1584 (LC).
- [11] Inexplicably, the Third Respondent did not call Patterson, Pagel or Mahlangu to testify. It bore the *onus* in the arbitration hearing to prove that the Applicant's dismissal was substantively fair. It was incumbent upon it to lead the necessary and relevant evidence. Patterson was a material witness who could explain his interactions with the Applicant early that morning. He and Pagel knew what happened to the firearm in the crucial six hour period. Mahlangu was a material witness about the steps he took during that same period and his interactions with the Applicant at 13h45 that day when she refused to accept the re-issued firearm from him. Was the Applicant's reason for refusing the firearm justifiable? Was she within her rights legally to refuse? On her version, she would have put herself on the 'wrong side of the law.' This Court is not treated to the intricacies of that argument because the evidence was not led in the arbitration. One worse, the Second Respondent was oblivious to this argument. He did not query why that evidence was not tendered, and he did not caution the Third Respondent about the potential consequences of not leading that evidence,

namely that an adverse inference may be drawn from a party's failure to call material witnesses. See: *Blue Ribbon Bakeries v Naicker and Others* (2000) 12 BLLR 1411 (LC).

- [12] Furthermore, the Second Respondent failed to make a credibility finding in respect of the Applicant's testimony, more especially where her version about her refusal to adhere to the instruction to accept the firearm from Mahlangu was not consistent. In the disciplinary hearing, the Applicant said her refusal was based on her insistence that Patterson should re-issue the firearm to her because he had complained that she was an incompetent person. In the arbitration hearing, by way of contrast, she said she could not accept the firearm because she could not account for its use and/or whereabouts during the relevant six hour period. Did the Applicant have reason to refuse the instruction or did she adopt an unco-operative approach and act in an insubordinate manner?
- [13] In the circumstances, the Second Respondent's reliance on hearsay evidence and his failure to apply the appropriate tests to evaluate the evidence presented by the Applicant, the Second Respondent arrived at a conclusion that a reasonable decision-maker could not reach. The award stands to be reviewed and set aside.
- [14] With regard to the Second Respondent's decision to refuse the Applicant's application for legal representation, the Second Respondent failed to apply Rule 25(1)(b) and instead fashioned his own test to determine if such request for legal representation was warranted. He applied a test of 'fairness and justice', the origins of which, for the purposes of this aspect, escape one. He paid no attention to the comparable strengths of the parties to represent themselves, nor did he have regard to the obvious legal complexities that underpin this dispute. The Second Respondent failed to exercise the discretion bestowed upon him judiciously and accordingly his refusal to allow the Applicant to be legally represented cannot stand.
- [15] On the issue of costs, given that this Court finds partially for the Applicant, and no order is made on the fairness of her dismissal, costs in this matter would not be appropriate.

[16] In the circumstances, I make an Order in the following terms:

- 16.1 The award is reviewed and set aside.
- 16.2 The dispute about the fairness of the Applicant's dismissal is remitted back to the First Respondent to be arbitrated *de novo* before a Commissioner other than the Second Respondent.
- 16.3 No order as to costs.

LEPPAN

Acting Judge of the Labour Court

:

APPEARANCES:

FOR THE APPLICANT:

Mr G Rautenbach

SCInstructed by – Du Randt du Toit

Pelser Inc

FOR THE THIRD RESPONDENT:

Blake Bester Inc.

LABOUR COURT