



REPUBLIC OF SOUTH AFRICA

Not reportable

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR1968/2010

In the matter between:

G4S SECURITY SERVICES SA (PTY) LTD

Applicant

and

COMMISSIONER KATLHOLO WABILE

First Respondent

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

Second Respondent

SATAWU

Third Respondent

Heard: 24 February 2012

Delivered: 23 October 2012

Summary: Review application – Employee dismissed in his absence – company rule on absenteeism and interpretation thereof – dismissal substantively and procedurally unfair.

JUDGMENT

CELE J

Introduction

- [1] The arbitration award dated 7 July 2010 issued by the first respondent in this matter is the subject of this review application in terms of section 145 (2) of the Act¹. The application was opposed by the third respondent, a union acting on behalf of its member, Mr Mbombo, who was an employee of the applicant.

Factual Background

- [2] Mr Mbombo commenced his employment with the applicant, a private security industry, on 22 December 2006 as a security guard. In December 2009, the Customer Services Manager of the applicant, hereafter referred to also as the company, was Mr Samson Ximba. Mr Joel Khuse was another Customer Service Manager in charge of an area different from that of Mr Mbombo. On 17 December 2009, Mr Khuse issued a document to staff informing it of a number of medical doctors which he said the company would no longer recognise, stating therefore that no medical certificates purportedly issued by such doctors would be accepted and recognised by the company. That document bore no endorsement by the company's human resources (HR).
- [3] On 20 December 2009, Mr Mbombo worked a day shift and was to change to a night shift on 21 December 2009 but he failed to report for duty. He reported to the control operator of the company, who on that day was Mr Robert Mkhwanazi, that he was unwell. Mr Mkhwanazi made an occurrence book (OB) entry of the report with reference number 370. Mr Mbombo only returned to work on 22 January 2010.
- [4] The evidence of the company is that when the company noticed that Mr Mbombo was not reporting for duty from 22 December 2009, for more than three shifts, he was marked absent without leave and was subsequently removed from the company system as his whereabouts was unknown. The company decided to charge him with misconduct of being absent from duty without leave or permission. To that end, two telegrams were issued by the company to Mr Mbombo. The first was to inform him that a disciplinary

¹ The Labour Relations Act Number 66 of 1995.

enquiry was to be held against him on 06 January 2010. The second was to inform him of his dismissal as the outcome of that hearing which took place in his absence. He maintained that he never received the two telegrams.

- [5] According to the company's policy, an employee who is off sick should telephone or communicate with the company to report the number of days he or she is booked off sick. The position taken by the company was that Mr Mbombo failed to comply with that policy. Mr Ximba's evidence in this regard, was in the following terms:

Mr Ximba: The company rule say you phone six hours before your shift to say you cannot attend, if you claim to be sick after returning from the doctor, a sick note must be submitted. (sic)

Mr Pupuma: Can you explain to the commissioner, what you mean by saying he must report after returning from the doctor?

Mr Ximba: If an officer visited the doctor, was booked off sick, he needs to telephonically inform the company of when he has been booked off and make arrangements that the sick note must be submitted.

Mr Pupuma: Did the applicant comply with that?

Mr Ximba: No.'

- [6] The version of the parties differs on what happened on 22 January 2010 when Mr Mbombo reported for duty. According to the company's only witness Mr Ximba, he told Mr Mbombo that he had been dismissed, that his medical certificates he had produced were not recognised by the company, as the doctor did not exist, and that he was to lodge an appeal which he did but dismissal was confirmed.
- [7] According to Mr Mbombo, he telephoned Mr Ximba on three occasions to report that he was unable to report for work. Mr Ximba told him not to produce medical certificates from a 'Sangoma' on his return to work. In the last of the occasions, Mr Ximba told him that he had a firearm receipt from the police and that when Mr Mbombo returned to work, he was to report to him for it. He was confused about the exact dates when he telephoned Mr Ximba. He said

that while he was away from work he never received any telegrams sent to him by the company. He explained that the address used in the telegrams was wrong because of an incorrect spelling of the street name and an incorrect postal code of 1401 was used instead of 1400.

[8] He said that on his return to work, he gave Mr Ximba the medical reports to account for his absence. Mr Ximba said he was to investigate the medical certificates as well as the doctor who issued them and he then telephoned and spoke to the doctor. After that telephone call he told Mr Mbombo that, in the mean time, he was to go home and return on the following day as an investigation on the doctor was to be conducted. On the following day Mr Mbombo reported at work but was told to report at the control room which he continuously did until 1 February 2010 when another Manager verbally informed him that he had been suspended. He approached a shop steward for advice and it was confirmed to him that a suspension had to be in writing. A written letter of dismissal was subsequently given to him by Mr Pupuma the HR officer of the company. He lodged an appeal so as to inform the company of his side of the story but dismissal was confirmed. He then referred an unfair dismissal dispute for conciliation and later for arbitration.

[9] At arbitration, he testified on the understanding he had of the company rule on absenteeism due to sickness. His evidence in chief was presented in the following manner:

Mr Manganyi: Is that all? What is the procedure at G4S, when an employee is supposed to work and cannot report for work?

Interpreter: The procedure is for the employee to call the controller, you must call the controller, the controller will inform the manager and then the manager is to organise a spare of someone to replace you.'

Chief findings of the first respondent

[10] The first respondent made various chief findings in his arbitration award from paragraph 41 to 52 which for purposes of this application included:

[42] The applicant's understanding of the application of the rule on absenteeism is that he was expected to notify the respondent on his inability to report for duty beforehand and, if booked off on sick leave, he was expected to provide copies of his medical certificate/s to the respondent upon his return from sick leave. The respondent's understanding on the other hand, concurred with the applicant's understanding but extended the application of the rule to include the expectation that the employee would communicate any extensions of the sick leave to the respondent, and that the employee would make arrangements for the provision of the medical certificates to the respondent, presumably during the currency of the sick leave. I find that there is, as such, a dispute of facts regarding the proper application of the rule and, I find further that, in such a dispute, the respondent bears the greater onus of proof.

.....

[44] I find that, unless an employee occupies a position of relative authority as a consequence of which his or her absence from work might have a bearing on the capacity of the respondent to carry on its operations, that employee is entitled to uninterrupted sick leave as that employee's responsibilities can easily be assumed by another employee at his level in the employer's hierarchy of jobs. The applicant worked as a guard and there was no evidence placed before the proceedings to suggest that he wielded any authority. Instead, the applicant's testimony that, after he complied with the absenteeism procedure, it became the responsibility of the manager to arrange for a spare guard, was not disputed. I find that, having reported his incapacity, the applicant was then at liberty to remain on uninterrupted sick leave. Despite the applicant's meddled testimony that he phoned Mr Ximba on three separate occasions during his sick leave, I find that he was not even under an obligation to prove the existence of these alleged phone calls as the respondent, in its own turn, failed to prove that the rule on absenteeism imposed a duty on the applicant to make the phone calls.'

Grounds for review

[11] In support of the review application, the applicant outlined the grounds for review in the founding and supplementary affidavits as:

'The award of the first respondent is unreasonable, irrational and one which a reasonable commissioner could not have arrived at. The first respondent failed to apply his mind entirely to the following considerations:

1.1. The address that the applicant had on file was the address that the third respondent had furnished to it. When it was apparent that the third respondent was not reporting for duty and not notifying his manager of his absence, it stood to reason, that the applicant had to take steps to summon him to attend a disciplinary enquiry. At all material times, the applicant acted in good faith;

1.2. When the third respondent did not attend his disciplinary enquiry, the applicant reasonably decided to proceed with the disciplinary proceedings in his absence. Despite his dismissal, the third respondent suffered no prejudice because he was afforded an opportunity to appeal. At his appeal hearing, he was unable to furnish any acceptable excuse for his behavior.

2. The first respondent entirely misconstrued the rule in question. The applicant operates in the service industry and provides a crucial service, namely safeguarding the property and lives of clients. From an operational point of view, it is imperative for the applicant to expect employees at all times to inform it about whether they will be unable to attend to their duties. It is obvious that it is entirely insufficient for an employee to contact the employer on only the first day of his absence. In the present matter, the third respondent was absent for a period of a month. It would have been impossible for the applicant to have known about this state of affairs in advance. The applicant could not divine for how long it was required to obtain the services of replacement officers.

3. For an employee, the rule is not difficult to comply with. The third respondent was well enough to visit his doctor and accordingly, he would have been well enough to make contact with the control room. The third respondent was aware that his conduct was indefensible and that is why, at the arbitration proceedings, he was constrained to present false evidence. In this regard, he attempted to suggest that he had made contact with Ximba. To reiterate, it would have been the easiest thing in the world for him to have contacted the control room.

4. The falsity of his subsequent evidence is borne out by the grounds of appeal that he furnished after his dismissal. If he had made contact with Ximba during his absence, he would have alluded to this vitally important fact in his written statement setting out his grounds of appeal. That would have been an important fact to present in mitigation. The third respondent knew that the procedure was to contact the control officer to inform him about his absence. He also knew that it was imperative that he obtain an OB number.

5 On the first day of his absence, he followed the procedure and obtained the relevant OB number. Thereafter, he decided for reasons peculiarly within his own knowledge to ignore the procedure and thereby leave his employer in the lurch.

6. Taken to its logical conclusion, the reasoning of the first respondent is absurd, especially if viewed in a normal standard commercial context. According to the first respondent, irrespective of how many times an employee visits his doctor and irrespective of how many times his doctor books him off from work, all the employee has to do is, on the first day of his illness, inform his employer about his problem. The rule of the applicant clearly designed to inform the applicant on a daily basis about the number of employees who will not be able to report for duty. Once this inform has been obtained, contingency plans can be put into effect in order not to prejudice the service provided to clients. If sites and premises are not properly guarded, it stands to reason that the applicant may face civil claims from its clients. In the security industry, this is not an uncommon occurrence.

7. In light of the third respondent's lack of remorse, his brazen disregard of the rules and nonchalant attitude, reinstatement was wholly impracticable and unreasonable.

8. The commissioner failed to mention that in addition to the rule on absenteeism the Third respondent was aware of an existence of rule relating to the medical certificates to be furnished to the Applicant upon illness.

9. The Commissioner further erred by indicating that he rejected any suggestion by Mr Lucas Pupuma that the Applicant did not recognise the third Respondent's illness even though such suggestion was not made by him.'

Grounds in opposition to the review application

- [12] In essence, it was denied that the first respondent's award was unreasonable. In respect of the telegram, the submission was that a wrong address was used and Mr Ximba was challenged to produce the file with the address used but he did not meet the challenge. It was denied that the first respondent misconstrued the rule governing the granting of sick leave. It was denied that Mr Mbombo presented falsified evidence. It was submitted that the first respondent properly held that the dismissal of Mr Mbombo was unfair and that he was entitled to reinstatement.

Evaluation

- [13] The applicant's submission is essentially that the award of the first respondent is unreasonable, irrational and one which a reasonable commissioner could not have arrived at and that the first respondent failed to apply his mind entirely to the essential considerations of the case. The test for this application is accordingly whether the decision of the first respondent may be said to be one that a reasonable decision-maker could have reached, see *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*.² Paragraph 109 of the *Sidumo* decision is informative in matters such as the present and it reads:

'Review of reasonableness, as explained by Professor Hoexter, does threaten the distinction between review and appeal. The Labour Court in reviewing the awards of commissioners inevitably deals with the merits of the matter. This does tend to blur the distinction appeal and review. She points out that it does so in the limited sense that it necessarily entails scrutiny of the merits of administrative decisions. She states that the danger lies, not in careful scrutiny but in "judicial overzealousness in setting aside administrative decisions that do not coincide with the judge's own opinion. This Court in *Bato Star* recognised that danger. A judge's task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution'

² [2007] 12 BLLR 1097 (CC).

- [14] The merits of this matter will be dealt with but only to a limited sense. It will necessarily entail scrutiny of the merits of an administrative decision taken by the first respondent. As a starting point, it is important to point out that it falls within the prerogative of an employer to set disciplinary rules and standards within its operational requirements and to punish any material deviation there from. In exercising necessary discipline, the employer has to act with fairness.
- [15] In accepting that the applicant dismissed Mr Mbombo, the applicant simultaneously accepted that it had to show that there existed a fair reason on the basis of which it acted fairly to carry out the dismissal³

Procedural fairness

- [16] The dismissal of Mr Mbombo was carried out in his absence. The explanation by Mr Ximba was that a telegram was issued to him and that he failed to attend the hearing. In terms of a fair procedure, Mr Mbombo was entitled to be heard before his dismissal in compliance with the *audi alteram partem* rule. It was put to Mr Ximba that the address used for the telegram was incorrect in that the street name was wrongly spelt and the postal code used was 1401 instead of 1400. He insisted that the address used was the one in the file of Mr Mbombo, which by implication would have been supplied by him. Mr Ximba was challenged to produce the file but failed to do so. The applicant accordingly failed to produce reliable evidence on the basis of which the first respondent could make an informed decision. Mr Mbombo's evidence that his postal code was 1400 therefore stood with not much challenge and had to be accepted. The usage of an incorrect postal code lends credence to Mr Mbombo's version and it is probable that he did not receive the two telegrams.
- [17] The applicant expects its employees to use telephone to report if they are sick. In the same vein the applicant could have telephoned Mr Mbombo to confirm that he received the telegrams. It was foreseeable that holding a disciplinary hearing in his absence could lead to him dismissal. Where it is reasonable and fair to do so, a dismissal has to be avoided.

³ See section 192 (2) of the Act.

- [18] The appeal system of the applicant could not cure a right of Mr Mbombo to be heard. The appeal involved the consideration of written submission to the exclusion of *viva voce* evidence which has the advantage of cross-examination. Mr Mbombo was not even present when the appeal was considered. He was merely told of the outcome thereof. It was accordingly reasonable of the first respondent to hold that his dismissal was procedurally unfair. The ground of review attacking this finding must therefore fail.

Substantive fairness

- [19] The evidence of the applicant on the rule governing the authorisation of taking sick leave and whether Mr Mbombo breached that rule must now be considered. There certainly is no doubt that an employee who is unable to tender his or her services in the normal operation of business and in terms of a contract of employment, has to communicate such inability to his or her immediate superior within a reasonable time. In many instances the employer might have to rearrange its business where reliance was placed on the absent employee.
- [20] Mr Ximba's evidence was not disputed when he said that once an employee has been to a doctor and has been booked off for some period, such information is to be communicated to the company and arrangements for the submission of the medical certificate have to be made. All that Mr Mbombo said in this regard was that the employee has to call the controller who would then inform the manager who in turn would organise a spare of someone to replace the absent employee. Nowhere in his evidence did he testify as to when the medical certificate was to be handed in to the company. The undisputed evidence of Mr Ximba ought then to have prevailed, even in the absence of documentary evidence. The findings of the first respondent made in paragraphs 42 and 43 of the award are accordingly contrary to the evidence led by the parties and constitute a misdirection on his part.
- [21] In this case, Mr Mbombo telephoned the control room on 21 December 2009 and an OB entry number 370 was made. He said that on 22 December 2009 he consulted Dr Victor who booked him off. It does not appear anywhere in

his evidence that he disclosed to the company how long he would be absent for.

- [22] According to the medical report filed he well knew that he had been booked off from 21/12/2009 up to and including 23/12/2009. He did not make arrangements to submit his medical certificate while he was on sick leave. He said that he again visited Dr Victor on 26/12/2009 and was booked off up to and including 05/01/2010. According to him, he telephoned the company to report that he was still unwell. He never reported for how long he would be off sick. He said that he visited Dr Victor again on 06/01/2010 and was booked off up to and including 21/01/2010. His evidence was that at around this time he again telephoned Mr Ximba and reported being still unwell. It was never his evidence that he disclosed how long he would be off sick for. He still retained the medical certificates with him. The failure to disclose the period of his absence casts doubt that he even telephoned Mr Ximba at all. Had he telephoned, it would come naturally from Mr Ximba to tell him of the disciplinary hearing already held or in progress against him on 06 January 2010 and possibly of the outcome, depending on what time of the day he would have phoned.
- [23] Mr Mbombo therefore failed to communicate the necessary information about his absence and the length thereof to the applicant, in terms of the company rule. The first respondent exonerated Mr Mbombo by finding that once the first report of his incapacity was made, it was not necessary for him to make any further communication to the applicant as he was at liberty to remain on uninterrupted sick leave. The basis for this finding was that Mr Mbombo did not occupy a position of relative authority in the company having a bearing on the capacity of the company to carry on its operation. He found that Mr Mbombo was not even under an obligation to prove the existence of the alleged telephone calls as the applicant, in its own turn, failed to prove that the rule on absenteeism imposed a duty on Mr Mbombo to make the phone calls⁴.

⁴ See paragraph 44 of the award.

- [24] The finding of the first respondent in this regard is at odds with undisputed evidence led on the company rule on absenteeism. It also stands in sharp contrast to the duty of an employee to tender his or her services and to report the inability to do so. Mr Mbombo was clearly proved by the applicant to have breached its rule on absenteeism and was therefore guilty of the misconduct charged. The contrary finding by the first respondent was consequently unreasonable, as having been preceded by an incorrect assessment of evidence. This finding makes it unnecessary to pronounce on the validity or otherwise of the medical certificates submitted by Mr Mbombo.
- [25] The applicant proved that the sanction for the misconduct in question was a dismissal. Mr Mbombo challenged the fairness of the dismissal on the basis that his erstwhile colleague, Mr Josiah Radebe, also a grade C guard, was guilty of absenteeism for three or more consecutive shifts but was given a final written warning⁵. Mr Pupuma who represented the applicant attempted but failed to distinguish the case of Mr Radebe from that of Mr Mbombo. He questioned Mr Mbombo about the outcome of the hearing for Mr Radebe, an issue that was clear. He had been found guilty and was sentenced to a final written warning.
- [26] Once the issue of Mr Radebe was brought up to challenge the fairness of a dismissal, the applicant bore the *onus* to prove the difference, if any in the two cases, to show that it acted fairly in dismissing Mr Mbombo while giving Mr Radebe a final written warning. It did not distinguish Mr Radebe's case from that of Mr Mbombo⁶. The heads of argument of the applicant refer to Mr Mbombo having vanished for a period of a month. This is obviously incorrect as the period of absence for which he was dismissed is from 21 December 2009 to 06 January 2010.
- [27] In accordance with the parity principle, Mr Mbombo ought to have been given a final written warning. His dismissal was consequently substantively unfair. A period longer than two years has elapsed since his dismissal. The first applicant ordered the applicant to reinstate Mr Mbombo retrospectively with

⁵ See pages 140 to 141 of the pleadings.

⁶ See pages 78 to 80 of the transcript, in the pleading bundle.

no loss of earnings, from the date of his dismissal. It has now been found that he was guilty of breaching the company rule. I understand the requisite of the justice of this case to still require that re-instatement, albeit of a limited nature, be ordered in this matter. Mr Mbombo approached the arbitration hearing with the assumption that he was not guilty. He had no chance to show any remorse. Nor can it reasonably be said that the employment relationship has irretrievably broken down. The law and fairness of a costs order has now been considered.

[28] The dismissal of Mr Mbombo was procedurally and substantively unfair.

[29] The following order will then be issued:

1. The applicant is to re-instate Mr Lindile Mbombo retrospectively from the date of one year after the date of his dismissal, that is, with effect from 06 January 2011, with no loss of benefits that should have accrued to him. His earnings as on 06 January 2010 shall constitute the basis for calculation.
2. The applicant is to pay him the back pay within 40 days from the date of this order.
3. No costs order is made.

Cele J

Judge of the Labour Court.

APPEARANCES:

FOR THE APPLICANT:

Mr Hutchinson

Instructed by Moodie & Robertson,
Braamfontein, Johannesburg.

FOR THE THIRD RESPONDENT:

Mr Mkhawane

Instructed by Mabaso Attorneys,
Marshalltown, Johannesburg.

LABOUR COURT