



REPUBLIC OF SOUTH AFRICA

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable/Not reportable

Case No JR 2291/09

In the matter between:

URBAN AFRICA SECURITY CC

Applicant

and

COMMISSIONER DONALD KGALAKE NKADIMENG

First Respondent

THE COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

Second Respondent

SATAWU obo KENNETH NGOBENI

Third Respondent

Heard: 16 January 2013

Delivered: 15 March 2013

JUDGMENT

CHAVOOS, AJ

Introduction

- [1] This is an application for review in terms of Section 145 of the Labour Relations Act, 66 of 1995, as amended, ("the LRA") to review and set

aside an arbitration award of Commissioner S K Nkadimeng (“the Commissioner”) under case number LP7398/08 dated 16 August 2009 handed down under the auspices of the Commission for Conciliation, Mediation and Arbitration (“CCMA”).

- [2] Both the Third Respondent and Applicant submitted applications for condonation for the late filing of their answering and supplementary affidavits respectively and have consented to the late filing of the aforementioned affidavits being condoned.

Background Facts

- [3] The following facts are common cause:

- 3.1 Kenneth Ngobeni (“Ngobeni”) commenced employment with the Applicant on 1 May 2000 as a security officer at Tzaneng Mall in Tzaneen where the Applicant was contracted to provide security services.
- 3.2 He was a shop steward for SATAWU who have brought this Application on his behalf.
- 3.3 Ngobeni was charged and dismissed for gross misconduct in respect of an incident that occurred on 13 November 2008 at the Edgars store. More specifically, the Third Respondent was charged with the following:

‘Gross misconduct that brought the name of the employer in gross disrepute with the client in that you on 13 November 2008 in full uniform, left or deserted your post at Tzaneng Mall and illegally without permission entered Edgars and paraded on the red carpet like a model on the ramp. You were also abusive to Edgars store manager and threatened to report her after she confronted you regarding your misbehaviour and conduct.’

- 3.4 He was subsequently dismissed for such gross misconduct and referred his unfair dismissal dispute to the CCMA for adjudication.

- 3.5 A pre-arbitration meeting was conducted in which the issues in dispute were narrowed. It was agreed that the Commissioner was only required to determine the appropriateness of sanction, whether Ngobeni had apologised for his misconduct and what effect an apology by him would have on the sanction (page 22 of the transcript, paragraphs 5 – 10).
- 3.6 The only issue recorded as being in dispute was whether Ngobeni apologised to his employer for his behaviour which he admitted was not appropriate and brought the name of his employer into disrepute (page 7, paragraphs 15 – 20).

Evaluation

- [4] The critical part of the Commissioner's findings appear in paragraph 6.10 of his award where he finds that the employer had over-reacted by dismissing Ngobeni for refusing to apologise for his alleged rudeness.
- [5] I asked Mr Mphepya, the attorney acting on behalf of the Third Respondent to address me on the Commissioner's reasoning contained in paragraphs 6.8 to 6.10 of the Commissioner's arbitration award, which appeared to be a complete misdirection, the employee having been dismissed for gross misconduct as contained in the charge sheet.
- [6] He was unable to defend the Commissioner's reasoning and Mr Mphepya to his credit, conceded that the Commissioner was bound by the common cause material facts that were placed before him, misconstrued the nature of the enquiry and failed to deal with the material issues that were not placed in dispute rendering the award susceptible to review.
- [7] Whilst the issue of the apology was placed in dispute, this was not the reason why Ngobeni had been dismissed. The Commissioner in misunderstanding the true nature of the enquiry namely whether Ngobeni had indeed furnished the Applicant with an apology and if he did, what effect such an apology should have on the sanction, committed a procedural irregularity in the proceedings.

- [8] It is well established that where a commissioner fails to have regard to material facts placed before him, such process-related conduct by the commissioner constitutes a gross irregularity in the conduct of the arbitration proceedings because the commissioner would have failed in his duties in allowing an aggrieved party from having its case fairly determined. This principle has been well articulated by Van Niekerk J in *Southern Sun Hotel Interests (Pty) Ltd v CCMA and Others*.¹
- [9] Mr Mphepya conceded that the arbitration award should be reviewed and set aside but argued that it ought to be remitted back to the CCMA before a different commissioner for determination on the fairness of the sanction.
- [10] Mr Mphepya argued that no evidence on sanction or the breakdown of the trust relationship was led at the arbitration proceedings and having regard to the Supreme Court of Appeal decision in *Edcon Limited v Pillemer NO. and Others*² which dealt with the failure of an employer to call a witness to testify on the breakdown of the employment relationship, I did not have sufficient evidence on the record to substitute the CCMA's finding with one ordering that the dismissal of the employee was fair.
- [11] Mr Matthee, on behalf of the Applicant, could not, save for the closing submissions of Mr Botha the company representative, point to any portion of the record where evidence dealing with the breakdown of the trust relationship or operational risk to the business in justification of the sanction imposed had been adduced. He however contended that the offence in itself namely a desertion by a security officer of his post constituted gross misconduct which could not be condoned and as a consequence thereof it was appropriate for me to substitute the Commissioner's finding with one that the dismissal of the Third Respondent was substantively fair.
- [12] I am not in agreement with Mr Matthee on this point. The Applicant is fortunate to get a second bite at the cherry considering that it had led no

¹ [2009] 11 BLLR 1128 (LC).

² [2009] 30 ILJ 2642 (SCA).

evidence on the justification of sanction when this was precisely the issue that the Commissioner was required to determine. I am in no position, sitting as a Judge of review to substitute the Commissioner's finding with one that the dismissal of the Third Respondent was substantively fair given that no evidence on this aspect had been addressed at the arbitration. Fairness dictates that the issue of sanction be remitted back to the CCMA for adjudication.

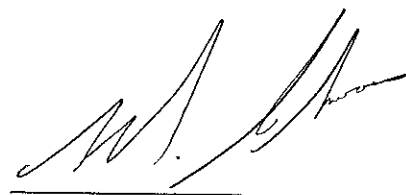
[13] In the premise, I make the following order:

13.1 The late filing of the Third Respondent's answering affidavit is condoned;

13.2 The late filing of the Applicant's supplementary affidavit is condoned;

13.3 The arbitration award of Commissioner Donald Kgalake Nkadimeng is hereby reviewed and set aside and remitted back to the CCMA before a different commissioner.

13.4 There is no order as to costs.

A handwritten signature in black ink, appearing to read 'M. A. Chavoos', written over a horizontal line.

Chavoos, AJ

Acting Judge of the Labour Court

APPEARANCES:

For the Applicant: Johann Matthee

For the Respondent: Frans Mphepya of Mabaso Attorneys