



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

CASE NO: JR1225/09

In the matter between –

GINA BHEKISISA TERENCE

Applicant

And

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

First Respondent

COMMISSIONER MUSA BALAYI

Second Respondent

EMMANUALS STAFFING

SERVICES (PTY) LTD

Third Respondent

Heard : 25 April 2014

Judgement: 30 April 2014

Summery: Review application.

JUDGMENT

MOLAHLEHI J

- [1] This is an application to review and set aside the arbitration award made under case number GAJB 966/09 dated 28 April 2009, in terms of which the second respondent (the Commissioner) found the

dismissal of the applicant to have been both procedurally and substantively fair.

- [2] At the beginning of the hearing of this matter Mr Makhuni, for the applicant sought leave to submit an additional supplementary affidavit because according to him no proper review case had been made in the applicant's papers.
- [3] The request was opposed and consequently the applicant applied for a postponement. Upon refusal of the postponement Mr Makhuni decided to proceed immediately despite the offer to stand the matter down to afford him the opportunity to prepare as he indicated that he had recently taken instructions in the matter.
- [4] It was agreed that despite the defect in the papers the Court should read the grounds as formulated in both the founding and supplementary affidavit of the applicant to be challenging the reasonableness of the arbitration award.

Background facts

- [5] The applicant who was prior to his dismissal employed as the sales consultant at the third respondent's Cell C store was dismissed after being charged with the following offence:

"MISCONDUCT
 Causing a loss to Company/ Client by not following Rules/Procedures through negligence.
 Any Act or behaviour which is considered so serious that it destroys Company's /Client's ability to trust the Employee and /or makes the employment relationship intolerable"
- [6] The applicant being unhappy with the outcome of the disciplinary hearing referred a dispute concerning an alleged unfair dismissal to the CCMA. The dispute proceeded to arbitration hearing after the unsuccessful conciliation. The outcome of the arbitration as indicated earlier was the dismissal of the applicant's claim on the basis that the dismissal was for a fair reason.
- [7] The facts which led to the dismissal of the applicant are fairly common cause. The applicant received a call from the security company on the

day in question informing him that the alarm at the store had been activated. This was at about 21H00.

- [8] The applicant did nothing in response to the call. Another call was made again by the security company at 03H00 in the morning. This time around the applicant arranged for a car with her sister and went to the store to check.
- [9] On arrival there he found that the store had been broken into and a substantial number of cell phones stolen. He contacted the police and one of his seniors regarding the robbery.

The grounds for review

- [10] The applicant contends that the decision of the Commissioner was unjustified as he was not responsible for the security at the store. The security at the store was the responsibility of the security company.
- [11] The applicant did not pursue the defect raised in his supplementary affidavit being that:
- a. He was not provided with the assistance of an interpreter.
 - b. The charges against him were not clear.
 - c. He was dismissed on the basis of hearsay evidence.

Evaluation

- [12] In contending that the outcome of the arbitration proceedings were unreasonable Mr Khuni contended that the Commissioner failed to take into account that the third respondent had failed to prove the fairness of the dismissal in that it did not disclose the job description and employment contract of the applicant to show that he was responsible for the security at the store.
- [13] It was also argued that the explanation by the applicant for what he did on the day in question was reasonable and should accordingly have ameliorated the severity of the sanction.
- [14] In considering this review I am enjoined to apply the reasonable decision maker test. The enquiry to conduct in this regard is that of having to determine whether the decision of the Commissioner is one which a reasonable decision maker could not have reached. Put in another way the question is whether the decision by the Commissioner meets the constitutional standard of reasonableness.

- [15] In my view the argument that the Commissioner failed in his duties in not taking into account the fact that the third respondent failed to produce the applicant's job description or his employment contract no merits. There was no need to produce any of those documents because the version of the third respondent as presented by Ms Cowie in that regard was not disputed.
- [16] In fact the applicant supported the version that he was responsible for the security at the store was supported by his own version. In this respect the applicant testified that on the day in question he locked the store and thereafter activated the alarm. He further testified that when he received the call the first time regarding the alarm, he thought it was a false alarm it. The same applies to the reason for not contacting his seniors. He did not contact his seniors because he did not have airtime on his phone.
- [17] In addition to the above it was to be noted that the applicant was the only employee in the store. The probabilities based on all these facts points strongly to the fact that the applicant was responsible for the security at the store.
- [18] In light of the above I am of the view that the Commissioner cannot be faulted for finding the applicant guilty of the offences for which he was charged with. The Commissioner also arrived at the conclusion that the dismissal was the appropriate sanction after taking into account that the trust relationship between the parties had broken down because of the conduct of the applicant.
- [19] In the circumstances the applicant's application to review the Commissioner's arbitration award stands to fail. It would however not be fair in the circumstances of this case to allow costs to follow the results.

Order

- [20] In the premises the applicant's application to review the arbitration award made under case number GAJB 966/09 dated 28 April 2009 is dismissed with no order as to costs.

Molahlehi J

Judge of the Labour Court South Africa

Appearances:

For the Applicant: Mr L Makhuni

Instructed by Makhuni attorneys

For the Respondent: Ms A Diepenaar

Instructed by Kirshman Inc.

Matter considered in Chambers