



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case No: PR 41/13

In the matter between

CYRIL ARTHUR PLAATJIES

Applicant

and

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

First Respondent

COMMISSIONER A NYONDO N.O

Second Respondent

XHOBANI SECURITY SERVICES

Third Respondent

Heard: 05 November 2015

Delivered: 13 November 2015

Summary: The commissioner's error of basing his decision on the substantive fairness of a dismissal on a part and not the whole of the termination clause of a contract of employment rendered his arbitration award unreasonable.

JUDGMENT

LALLIE, J

Introduction

- [1] This is an application to review and set aside an arbitration award of the second respondent (“the Commissioner”) in which he found the applicant’s dismissal procedurally and substantively fair. It is opposed by the third respondent. The applicant filed the record of arbitration proceedings late and applied for condonation. The main reason for the delay is that the applicant relied on an insurance policy for funding his litigation. The procedure for appointing his legal representative caused in the delay. The explanation is reasonable and the application reflects the applicant’s intention and efforts to pursue the review application. The applicant therefore established grounds for the condonation of the delay.

Material facts

- [2] Most material facts in this matter are common cause. The third respondent conducts business in the contract security services industry. The industry is regulated by the Private Security Services Regulatory Authority (the PSIRA) in terms of the Private Security Industry Regulation Act 56 of 2001 (the PSIRA Act). The third respondent employed the applicant as a contact manager. On appointment, the applicant fulfilled the requirements for his position in terms of the PSIRA regulations in that he was a registered grade A security officer. Clause 19 (c) of the applicant’s contract of employment granted the third respondent power to terminate the contract of employment if the applicant was convicted of a criminal offence which, in the reasonable opinion of the third respondent, affected his position as an employee. There was a housebreaking at the applicant’s house in which his private firearm was stolen. A criminal charge relating to the negligent loss of the firearm was preferred against him.

He pleaded guilty and on 12 November 2012, was found guilty based on his plea and sentenced to 12 months imprisonment which was fully suspended for five years.

- [3] On 9 January 2013, the applicant was suspended from duty. An enquiry into his capacity to perform his job functions owing to the impossibility to perform duties as a Security Contact Manager because the conviction of a criminal offence placed him in breach of clause 19 of his contract of employment as well as the PSIRA regulations. He was dismissed on 5 February 2013 and challenged the fairness of his dismissal at the first respondent where the commissioner issued the award which forms the subject matter of this application.

The award

- [4] The commissioner found that the third respondent had established that in terms of clause 19 (c) of the contract of employment, a conviction such as the one that the applicant had entitled it to terminate his services. He added that clause 19 (c) coupled with the PSIRA regulations made it clear that the respondent could not continue with the employment of the applicant. He concluded that the applicant's dismissal was fair because the conviction brought about an impossibility of performance on the part of the applicant. The third respondent could therefore not continue to employ the applicant.

Grounds for review

- [5] The applicant's main grounds for review are that the commissioner committed gross irregularities in the conduct of the arbitration by disregarding material evidence, making errors of both law and fact and reaching an unreasonable decision. The decision that the applicant's dismissal was procedurally unfair was attacked on the basis that he was denied external representation when by virtue of his seniority he could not be represented effectively by his fellow employees who were his juniors. The applicant submitted that the commissioner erred in not finding that the respondent was estopped from subjecting him to an enquiry and dismissing him based on the incident involving his lost firearm because one of its senior managers was aware of the incident and elected either to condone it or not take action against him within

reasonable time. The commissioner based his decision on the substantive fairness of his dismissal on his incorrect interpretation of both his contract of employment and PSIRA regulations. When he took a decision to consider evidence of events which took place and facts which came to light after his dismissal, he disregarded all those which favoured the applicant, thus committing a gross irregularity.

- [6] The third respondent opposed the application mainly on the basis that the commissioner took into account all the material evidence placed before him and reached a reasonable decision. It submitted that as the applicant was found guilty of a criminal offence, he was in breach of his contract of employment and it became impossible for him to perform his duties. It further denied that the dismissal was procedurally unfair as the incapacity inquiry was held in terms of its policies. Any delay in taking action against the applicant was reasonable, did not prejudice him and did not constitute waiver of the right to invoke clause 19 (c) of the contract of employment.
- [7] In determining whether to review and set aside the award, this court needs to consider, based on the totality of the evidence before the commissioner, whether the arbitration award constitutes a decision which a reasonable decision-maker could not reach. In this regard see *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*¹. In *Herholdt v Nedbank Ltd*² it was held that an arbitration award not based on the evidence before the commissioner is unreasonable.

Analysis

- [8] A consideration of the totality of the evidence before the commissioner reflects that he based his decision on the substantive fairness of the applicant's dismissal on clause 19 (c) of his contract of employment. Part of the principal issue before the commissioner was whether the third respondent acted in terms of clause 19 (c) of the contract of employment in dismissing the applicant. His decision therefore had to be based on a correct reading of clause 19 (c) of the

¹ 2008 (2) SA (CC)

² [2013] 11 BLLR 1074 (SCA)

contract. He, however, incorrectly found that a conviction such as the one the applicant had entitled the third respondent to terminate his services. In reaching the finding, the commissioner failed to take into account a material portion of clause 19 (c) which provides that the contract will be terminated if in the reasonable opinion of the employer the conviction of a criminal offence had an effect on the applicant's position as an employee. The commissioner's interpretation of clause 19 (c) therefore, did not take into account whether in the reasonable opinion of the third respondent the conviction warranted the termination of the contract. His omission had a direct effect on his decision.

[9] The commissioner was enjoined by section 138 (1) of the Labour Relations Act to 66 of 1995 as amended ("the LRA") to conduct the arbitration fairly. The applicant was dismissed on 5 February 2013. His status as a grade A security officer was withdrawn by the PSIRA on 14 March 2013. In reaching his decision that on dismissal it had become impossible for the applicant to perform his duties he took into account the third respondent's evidence that the applicant's status had been withdrawn in terms of the PSIRA regulations although the withdrawal took place after his dismissal. He failed to take into account evidence on behalf of the applicant that after his dismissal he appealed against the withdrawal of his status in terms of the same regulations. Fairness as envisaged in section 138 (1) of the LRA required the commissioner to have taken into account evidence of both parties on events which happened after the dismissal. The commissioner's conclusion that the applicant's deregistration by the PSIRA served as a total and permanent incapacity was premature because evidence before him was that his appeal against the withdrawal was still pending. The commissioner's reliance on *Mamabolo and Protea Coin Group (Pty) Ltd*³, an award based on totally different facts was unreasonable.

[10] The commissioner's error on the content of clause 19 (c) of the applicant's contract of employment and the application of the PSIRA regulations rendered his decision unreasonable.

[11] In the premises the following order is made:

³ (2011) 32 ILJ 2583 (CCMA)

11.1 The late filling of the record is condoned.

11.2 The arbitration award issued by the second respondent under case number ECPE 648-13 and dated 23 May 2013 is reviewed and set aside.

11.3 The matter is remitted to the first respondent to be arbitrated *de novo* by a commissioner other than the second respondent.

Lallie J

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: Mr Van Zyl of Francois Roux Attorneys

For the Third Respondent: Mr Posthuma of Snyman Attorneys

LABOUR COURT