



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR283/2012

In the matter between:

ENLIGHTENED SECURITY FORCE (PTY) LIMITED

Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

COMMISSIONER D HAUPT

Second Respondent

ROMEO MALGAS

Third Respondent

Heard: 08 July 2015

Delivered: 16 February 2016

JUDGMENT

VAN AS, AJ

Introduction

- [1] This is an application in terms of section 145 of the Labour Relations Act 66 of 1995 ("the LRA") to review and set aside the arbitration award handed down by the second respondent ("the Commissioner") on 2 December 2011 ("the arbitration award").
- [2] The third respondent ("the employee") opposes the review application. The first respondent ("the CCMA") and the Commissioner abide the decision of this Court.

Preliminary issue

- [3] At the commencement of this matter, on 8 July 2014, Mr Thabo Sethiba, the National IR Manager of the applicant, applied for a postponement of the review application because the applicant had appointed a new attorney of record who had failed to arrive at Court. Mr De Kock of Carelse Khan Attorneys, who appeared for the employee, opposed the application for a postponement on the basis that the employee's attorneys had telefaxed the notice of set down to the applicant on 15 June 2015 and had also sent the notice of set down per registered post to the applicant on that date.
- [4] There is a notice of withdrawal as the applicant's attorneys of record which Nkadameng Attorneys filed on 20 December 2012 in the Court file. There is no indication that the applicant has appointed new attorneys of record since December 2012 and Mr Sethiba also confirmed that the applicant has only recently taken steps to appoint a new attorney of record.
- [5] The applicant is *dominus litis* in these review proceedings and therefore should have taken reasonable steps to prosecute the review application. It is apparent from the Court file that the applicant has taken no steps since December 2012 and the employee's attorneys have arranged for the

matter to be set down before this Court.

- [6] Accordingly, I am satisfied that the applicant has not made out a case for the postponement of the review application and, therefore, directed that the matter should proceed before this Court.

The merits of the review application

- [7] Mr Sethiba made no submissions on the merits of the review application other than to state that the compensation awarded to the employee appeared to be excessive. He did not motivate this submission.
- [8] Mr De Kock submitted that the applicant does not challenge the Commissioner's finding that the employee's dismissal was procedurally unfair in the review application. He further submitted that insofar as the applicant's challenge on the substantive fairness of the employee's dismissal is concerned, the conclusion reached by the Commissioner is a conclusion which a reasonable decision-maker could have reached on the evidence.
- [9] I have read and considered the papers in the review application and the heads of argument which were filed by the parties. It is so that the applicant does not seek to review the finding on procedural unfairness in its founding affidavit and I, therefore, need not further consider this issue.
- [10] Insofar as substantive fairness is concerned, it is apparent from the arbitration award that the Commissioner carefully assessed the relevant evidence before concluding correctly, in my view, that the applicant had failed to adduce evidence to prove the three charges (misuse of company fuel, misuse of company vehicles and dismissal of staff without consulting anyone) which culminated in the dismissal of the employee.
- [11] I, therefore, agree with Mr De Kock's submission that the conclusion reached by the Commissioner as to substantive fairness is a conclusion

which a reasonable decision-maker could have reached on the evidence before the Commissioner in the arbitration proceedings.¹

Costs

[12] Mr De Kock submitted that I should award punitive costs against the applicant because of the dilatory manner in which the applicant has prosecuted the review application and its insistence on launching the review application in Johannesburg whereas the employee was employed in the Western Cape and the arbitration proceedings were held at the offices of the CCMA in Cape Town.

[13] Whilst I am sympathetic to the personal circumstances of the employee and appreciate that launching the review application in Johannesburg may have resulted in the employee incurring additional costs, I do not believe that either of these reasons warrant the award of punitive costs against the applicant. The employee could simply have applied for the matter to be transferred to the Labour Court in Cape Town thereby avoiding such additional travelling costs. Similarly, the employee could have applied for the dismissal of the review application which could also have been transferred to the Labour Court in Cape Town.

[14] Accordingly, I make the following order:

14.1 The review application is dismissed;

14.2 The applicant is to pay the employee's costs on a party and party scale.

¹ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC) at para 110.

Van As

Acting Judge of the Labour Court

Appearances

For the applicant: Mr T Sethiba

For the employee: Mr C De Kock of CK Attorneys