



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR664/15

In the matter between:

SWISSPORT SA (PTY) LTD

Applicant

and

SUANE RAYMOND SEANEGO

First Respondent

NKULULEKO ZULU

Second Respondent

NATIONAL TRANSPORT MOVEMENT ("NTM")

Third Respondent

LANCE CELLIER N.O. (ARBITRATOR)

Fourth Respondent

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

Fifth Respondent

Heard: 20 July 2017

Delivered: 10 October 2017

Summary: The Applicant sought to review and set aside an award of the Fourth Respondent on the basis that the outcome was unreasonable.

JUDGMENT

HUTCHINSON AJ

Introduction

- [1] This is an application in terms of section 145 of the Labour Relations Act¹ (LRA) to review and set aside an arbitration award of the Fourth Respondent.
- [2] The Applicant is a ground handler that operates under license for a range of Airlines in the Aviation Industry at all major airports throughout South Africa. The Applicant operates at a National Key Point that is operated in its entirety in the Airports Company of South Africa (ACSA) which is subject to the National Key Point Act².
- [3] The First and Second Respondents were employed as a baggage driver and a baggage sorter respectively. The Applicant and ACSA have concluded a Service Level Agreement (SLA) that governs the terms upon which the Applicant is required to employ its staff and similarly upon which ACSA is entitled to restrict and/or refuse entry.³
- [4] In order for the First and Second Respondents to carry out their duties, it is a requirement that they be allowed access in and out of the Airport, which access is solely governed by ACSA.⁴ In terms of clause 5.5 of the SLA, the Applicant is bound to comply with the terms of ACSA's access control policy. A material breach of the agreement could give rise to a cancellation of the contract which would ultimately lead to the Applicant losing its largest customer namely SAA.

¹ Act 66 of 1995 (as amended).

² Act 102 of 1980

³ Founding affidavit 12 at para 21

⁴ Founding affidavit 12 at para 22

In the event of ACSA deciding to terminate the access permit of any staff member of the Applicant, he or she will be prohibited from entering the airport.

- [5] On or about 6 October 2014, ACSA revoked the permits of the First and Second Respondents and thereby refused them access to the premises. The permits were revoked by ACSA on the suspicion that the First and Second Respondents were intoxicated at the time. The Applicant maintains that it was incumbent on the First and Second Respondents to discuss the revocation with ACSA and *“challenge ACSA to either return the permits or to follow the ACSA internal policy of appealing any decision to withdraw the permit.”*⁵

- [6] On 10 October 2014, the Applicant sent a letter to the First and Second Respondents advising them of the following:

“Please note that Swissport South Africa would like to give you up till Wednesday, 15 October 2014 to get your permit back which was confiscated by Airport Authorities on 06 October 2014 for allegedly being in possession of alcohol on the airside (restricted area). During this period we expect you to update us with all the relevant information.

The company will support you and give you all the assistance you need to get your permit back as we value your contribution to the company but please do not treat this as any expectation and/or guarantee from the company to get you your permit as this merely to assist you in getting your job or permit back. Please note that any form of communication with you or any other party in this regard is expected to be done in writing due to the fact that Swissport SA operate within the national key point, therefore it cannot be taken for granted.

Please note that no work no pay rule will apply.”⁶

- [7] According to the Applicant, the First and Second Respondents took no steps to approach ACSA with a view to obtaining a restoration of their permits. Pursuant

⁵ Founding affidavit 15 at para 33

⁶ Index of pleadings 41

thereto, on or about 22 October 2014, they were issued with a notification to attend a hearing to answer to the following allegation:

“Incapacity hearing on that 05 October 2014 you were drinking alcohol at work and when they wanted to do test for the alcohol you run out of the working place and the permit was confiscation by Airport Company South Africa (ACSA) on the 06 October 2014. And on that you can’t perform your duties.” ⁷

- [8] The First and Second Respondents’ employment was terminated on the basis of supervening impossibility of performance. Pursuant thereto, the Third Respondent referred an alleged unfair dismissal dispute to the Fifth Respondent. The Fourth Respondent was appointed under the auspices of the Fifth Respondent to arbitrate the dispute.

Award of the Fourth Respondent

- [9] The Fourth Respondent referred to the matter of *FAWU obo Meyer v Rainbow Chickens* ⁸ wherein it was held that the dismissal of a chicken slaughterer who could not perform his duties after his accreditation to slaughter was withdrawn by the Muslim Judicial Council was justified. The Fourth Respondent went on to state:

“(16) The parallels in the matter before me are obvious, but I do however have a number of concerns.” ⁹

- [10] The Fourth Respondent further held that the First Respondent had testified that they required correspondence from the Applicant but their subsequent request to one Marebe, an HR official, was rejected. Moreover, they could not approach ACSA’s security service provider because they needed a permit to enter into that part of the airport. At the incapacity hearing, they voiced their request for company assistance.

⁷ Index of pleadings 43

⁸ [2003] 2 BALR 140 (CCMA)

⁹ Index of pleadings 29 at para 16

[11] The Fourth Respondent held that as a reasonable employer, the Applicant should have itself investigated the alcohol related incident. Moreover, the Applicant should have assisted the First and Second Respondents when they approached Marebe. At the incapacity hearing, the Applicant should have also taken up the opportunity to approach ACSA. The Applicant did not conduct an investigation to determine whether the permits were confiscated for a *“vindictive and totally unjustifiable reason.”*¹⁰ The Fourth Respondent maintained that the dismissals for incapacity could have been avoided had the Applicant made some effort to establish the reasons for the cause of the incapacity.

[12] Notwithstanding the foregoing, the Fourth Respondent recorded the following:

“The respondent throughout has stressed that had the applicants requested assistance in writing to have their permits returned, they would have done so. Fransch was unable to suggest any manner in which the respondent could have assisted. Struwig argued that they are in no position to dictate to ACSA, and they have no influence over RAPS. I am thus at a loss as to what precisely the respondent would have done had they received a written request. Perhaps they would have responded in writing per Struwig’s testimony”.¹¹

[13] The Fourth Respondent further reasoned as follows:

“22) The obligation and requirement for persons on ACSA’s premises to be in the possession of a valid ACSA-issued permit was detailed by Struwig, has merit and is not contested. The respondent suggested that if ACSA withdraws a permit then the ‘supervening impossibility of performance’ applies and a dismissal for incapacity is justified. I do not necessarily agree. If an actual or implied term of either respondent’s SLA with ACSA, or their contract of employment with an employee provides for an employee’s unfair dismissal brought about directly by an organisation other than the employer, then this surely would be contrary

¹⁰ Index of pleadings 30 at para 20

¹¹ Index of pleadings 29 at para 16

to public policy and without legal effect. The matter *Nape v INTCS Corporate Solutions (Pty) Ltd* [2010] 8 BLLR 852 (LC) has reference.”¹²

[14] As to the appropriate relief, the Fourth Respondent determined that the First and Second Respondents should be reinstated with retrospective effect and added “*On their return to work, the respondent ought to retrieve their permits from ACSA/RAPS or, if not possible, to deal with the reason behind the 6 October 2014 confiscation of the permits.*”

Discussion

[15] The Fourth Respondent did not make any finding to the effect that the Applicant could have offered the First and Second Respondents alternative positions offsite.

[16] In the case of *SA Private Security Workers Union on behalf of Nomavila and Bosasa Operations (Pty) Ltd*¹³ the Applicant was a security officer working at OR Tambo International Airport. She was alleged to have committed misconduct and ACSA withdrew her permit. After discussing various authorities on the issue of incapacity arising out of a supervening impossibility of performance event, the Commissioner went on to state the following:

“[27] I am satisfied that the matter before me involves incapacity through a permanent impossibility of performance as a result of a supervening factor such factor not being caused or created by either the employee or the employer.”

[17] The Commissioner nevertheless found that the dismissal was unfair because the employer made little or no effort to place the Applicant in a post outside the airport, in one of its other operations.

¹² Index of pleadings 30

¹³ (2016) 37 ILJ 2172 (CCMA)

- [18] The uncontested evidence before the Fourth Respondent clearly indicated that ACSA was entitled to revoke the permits of staff members in its absolute discretion. There was nothing to suggest that the revocation was *mala fide* or for an arbitrary reason. The version of the First and Second Respondent that the clock card machine was not working when they clocked out is unconvincing. A reasonable suspicion existed that they were under the influence of intoxicating liquor and refused to take a breathalyser test. It was a matter of pure speculation as to whether the Applicant could have convinced ACSA to restore the permits.
- [19] Since SAA was the Applicant's largest client, there were clearly limitations to the extent that it could confront the former over the revocation of the permits. ACSA in its own right is under a legal duty to ensure that its own policies are strictly upheld. The entire safety and security of the airport would be compromised if ACSA were to willy-nilly restore confiscated permits.
- [20] The First and Second Respondents' refusal to acknowledge any wrongdoing, further complicated the matter. Accordingly, it was not a case where ACSA could have been approached on the basis that it should give the First and Second Respondent's a second chance.
- [21] For the above reasons, I am satisfied that a proper case has been made for reviewing and setting aside the award of the Fourth Respondent. In my view, no purpose would be served in referring the matter back to the Fifth Respondent to be arbitrated afresh. I am in possession of a full record and have had the benefit of considering the heads of argument that have been delivered by the parties.

[22] Accordingly, I make the following order:

Order

1. The award of the Fourth Respondent under case number GAEK9038-14 is reviewed and set aside and replaced with an order

that the dismissal of the First and Second Respondents was for a fair reason and in compliance with a fair procedure.

2. There is no order as to costs

WJ Hutchinson

Acting Judge of the Labour Court

LABOUR COURT

Appearances

For the Applicant: Adv. E Steenkamp

Instructed by: Jacobs Gonyora

For the Third Respondent: Ephraim Mphalele of the Union.

LABOUR COURT