THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR2267/13

In the matter between:

AIR TECH AVIATION MAINTENANCE (PTY) LTD **Applicant**

and

RAMATLOTLO GIBSON RAMAFOLE **First Respondent**

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **Second Respondent**

MABEL SEKITI N.O. **Third Respondent**

Heard: **12 JULY 2017**

Delivered: **21 November 2017**

JUDGMENT

THOMPSON, AJ

Background

[1] This is an application to review and set aside the arbitration award dated 19 September 2013 determined under the auspices of the Commission for Conciliation, Mediation and Arbitration (CCMA). The application was filed on 18 August 2014. The notification was undersigned on 29 October 2013 and served on the First Respondent by registered post on 30 October 2013. The First Respondent's answering affidavit was filed on 6 May 2015.

[2] On 14 November 2013 the employee lodged an application in terms of Section 158(1)(c) of the Labour Relations Act[1] (LRA) to declare the arbitration award an order of court and case number J2474/13 was issued. On 17 February 2014 the arbitration award was made an order of court. On 26 May 2014, the employer lodged an application in terms of Rule 16A and Rule 11 seeking an order rescinding the order granted in terms of Section 158(1) (c) to make the arbitration award an order of court.

[3] The parties were ordered to file supplementary heads of argument and address the crisp point whether the court is able to hear a review application once the arbitration award has been made an order of court.

Merits

[4] The First Respondent argued that the Court had determined in the matter of *Blue Marine (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[2]that an arbitration award that has been elevated to an order of court would be impossible to review. It further argued that the *res iudicata* approach was correct and that the review application is doomed to fail bar for

[1] Act 66 of 1995 as amended.
[2] (2003) 9 BLLR 853 (LC)

the successful rescission application. Counsel for the First Responded conceded that an agreement had been reached with the Applicant that he would not oppose the rescission application.

[5] Counsel for the Applicant conceded that the review application cannot proceed whilst the rescission application is pending. The First Respondent was aware of the review application at the time of lodging the Section 158(1)(c) application on 14 November 2013. The court file does not reveal whether the notice of set down was served on the Applicant. The court file does not reveal that at the hearing of that matter, before Van Niekerk, J in chambers that the pending review was brought to the court's attention. The Applicant states that it filed a Notice of Intention to Oppose and opposing papers on 18 November 2013. After filing the opposing papers, it received no further correspondence from either the First Respondent or the Registrar of this Court.

[6] I am inclined to accept that the Judgement was erroneously granted in the Applicant's absence and consequently it is not required to show just cause.[3] Rescission is hereby granted. I shall now deal with the merits of the review application.

[7] Mr Ramafole is an Aircraft Maintenance Engineer and was employed in May 2010. He was charged with gross insubordination in that he disobeyed a reasonable and lawful instruction to travel to Chad on 25 May 2013. He was found guilty and dismissed. At arbitration, it was found that his dismissal was substantively unfair and reinstatement was ordered.

[8] From the papers it is clear that there is a prelude to the First Respondent's dismissal. The First Respondent arrived in Chad on 26 March 2013. Soon after his arrival he received word that his mother had been hospitalised and it later turned out that she had a broken ankle. He sought a loan from the Applicant and permission to return to South Africa which was declined. Nevertheless, he left the workplace and returned to the Republic. As a consequence, he attended a disciplinary hearing and received a final written

[3] see Sizabantu Electrical Construction v Guma & Others (1999) 3 bllr 253 (LC)

warning and an amount of R14 357.92 deducted from his salary constituting damages. This sanction was contested as an unfair labour practice which resulted in the sanction being reduced to a written warning.

[9] The second incident involved an instruction to the First Respondent to travel to Chad on the 9 or 10 May 2013. On this occasion the First Respondent did not travel. At the internal disciplinary hearing he stated that he could not travel as he was ill. At the conclusion of the internal disciplinary hearing he provided a medical certificate. Consequently, he was found not guilty.

[10] The medical certificate was received on 16 May 2013 after the internal disciplinary hearing on the same day. He was instructed to travel to Chad on the 9 and on 10 of May 2013 and later to travel to Chad on 25 May 2013. He was on suspension until 21 May 2013. The evidence suggests that the First Respondent was on suspension until the outcome of the second disciplinary hearing, from 14 May 2013 to 21 May 2013 and was requested to report for duty on 23 May 2013. The Applicant sent a short message system (SMS) to the First Respondent stating that he had to travel to Chad on 25 May 2013, he denied receiving this. The First Respondent sent a SMS on 22 May 2013 stating that he would be late for the meeting on 22 May 2013. On the 23 May 2013 the First Respondent directed an email to the Applicant in which he raises 6 reasons for not wishing to travel. These reasons range from life cover, accident and disability cover, an agreement to pay all medical costs, an agreement to provide S and T for three meals a day, and a demand to be paid a danger allowance.

[11] Under item 4 the employee states " *should the need for family responsibility arise whilst on deployment, Air Tech agrees to fly me out within 24 hours of reporting to avoid similar past cases*" I disagree with Mr Nel that the text referred to above illustrates that the employee's refusal is based on short notice. Clearly this is a demand to be returned home in the event of family responsibility emergency on giving the company 24 hours' notice. The employees aim is clearly an attempt to prevent the earlier difficulties he experienced in March 2013, when his mother was hospitalised.

[12] It is clear, from the email, that the First Respondent does not take issue with short notice. The email, seen as a whole, suggests that the First Respondent is laying down a number of demands relating his conditions of employment, before he agrees to travel. In fact, the email is concluded with a threat to the employer by stating: "*Till such time we reach favourable conditions am sorry to let Air Tech that I won't be leaving for CHAD*". The email also seems to contain a barrage of allegations about unfair labour practices and violation of his basic conditions of employment, constitutional and human rights. The First Respondent conceded at arbitration that it is 'now industry.' The Applicant responded to the email on the same day warning the First Respondent that his conduct is viewed as gross insubordination. Of crucial importance is the employees' response: *'If air Tec is not willing to come into terms & amend my contract*… (my emphasis.) Clearly no request is made by the employee for additional time to make arrangements.

[13] The Applicant argues that the First Respondent was informed in the beginning of May 2013 that he would be travelling albeit for an earlier date. The employee refused to travel and later submitted a medical certificate resulting in a finding of not guilty. An SMS was sent to the First Respondent stating that he must travel on 25 May 2013, the First Respondent denied receipt of this. The First Respondent was also informed when he reported for duty on 23 May 2013 that he should travel on 25 May 2013. The First Respondent's evidence is that he was not afforded sufficient time to make preparations to travel.

[14] I have difficulty with this evidence as the First Respondent's email makes no mention of the short notice but rather sets out a list of demands. It is probable that the employment relationship soured due to the preceding circumstances. These are inter alia: The Applicant's refusal to provide a loan, refusal to allow premature departure from Chad due to the First Respondent's mother's hospitalisation, the deduction of a sum of R14 357.92 as well as the issuing of a final written warning, and his suspension. This treatment clearly gave rise to the barrage of demands articulated in his emails seeking to amend his conditions of employment. The first Respondent is forewarned that the employer views his actions as gross insubordination and reserves the right to

take disciplinary action. Of significant importance is that the First Respondent does not raise the short notice issue in a response. The First Respondent decides to leave the matter at that, with the demand to amend his conditions of employment. The documentary evidence on page A79, 80, and 81 does not support the employee's evidence.

[15] The Third Respondent in her award in paragraph 24 finds that the First Respondent never hesitated to do his job as he had to travel. He wrote an email hoping that the Applicant would give him time, at least 4 days, to sort himself out. The reason for this refusal to travel was short notice. Although this was the evidence it is not borne out by the contents of the email. As I pointed out earlier, no mention is made in the email of a time problem or a request to fly at a later stage.

[16] A further point of concern is the Third Respondent's view that the warning he received for leaving the workplace in Chad without the necessary permission and his failure to travel are not similar. I am of the view that both transgressions are in fact failure to obey a lawful instruction. Both have a strong element of insolence.

[17] The Third Respondent correctly considers the fact that First Respondent had failed to put to the Applicant's witness, in cross examination that the reason for his refusal to travel was short notice. The Third Respondent's conclusion that the First Respondent did not refuse to travel but would have considered travelling at a later date and that in the Third Respondent's view *"the Applicant was not considerate and flexible because they had considered the Applicant's request*…" demonstrates that the Third Respondent reached the wrong conclusion which is not supported by the documentary evidence. As stated previously, the contents of the email amounts to a barrage of demands and a refusal to travel. Crucially The Third Respondent does not seek an extension of time after been confronted with a threat of disciplinary action.

[18] The Third Respondent's conclusion that the First Respondent did not refuse to travel and would have considered travelling at a later date and that the Applicant was not considerate and flexible is clearly the wrong conclusion.

Having said this I am not convinced that the transgression was of such gravity that it warrants a dismissal. There is no evidence led on a breakdown of a trust relationship. The primary sanction is reinstatement but I am of the view that reinstatement is not the suitable remedy. I must consider the time delay finalising this matter particularly the apparent failure of the Third Respondent not to inform the court at the hearing of the default judgement stage that a review application was pending.

[19] I am of the view that the Arbitrator's decision was obviously wrong and stands to be reviewed and set aside.

[20] I am also mindful of the fact that the Applicant's single witness failed to address the issue of a deterioration or a breakdown of the trust employment relationship and whether the misconduct constitutes a dismissible offence. I take cognisance of the valid first written warning.

Order

[19] In the premises, the following order is made:

1. The arbitration award dated 19 September 2013 under case number SS4589-13 is hereby reviewed and set aside and replaced by the following order;

   1.1 The dismissal of the Applicant is substantively unfair and the Respondent is ordered to re-employ the Applicant within 30 days from the date of this order and the Applicant shall receive a final written warning for insubordination valid for a period of 6 months.

   1.2 There is no order as to costs.

THOMPSON AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Advocate: L A Roux

Instructed by: C Dell Attorneys

For the Respondent: Advocate: AJ NEL

Instructed by: Andrew Goldberg Attorneys