

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not reportable

Case no: PR 281/2018

In the matter between:

**MAFOKO SECURITY PATROLS
(PTY) LTD**

Applicant

and

DETAWU obo L MAGUTYWA

First Respondent

CCMA

Second Respondent

J FORBES N.O

Third Respondent

Heard: 29 October 2019

Judgment: 30 October 2019

JUDGMENT

VAN NIEKERK J

- [1] This is an unopposed application to review and set aside an arbitration award issued by the third respondent (the arbitrator) on 21 October 2018. In his award, the arbitrator concluded that the applicant had been unfairly dismissed, and

ordered that she be reinstated, but without retrospective effect.

- [2] The material facts are recorded in the award, and I do not intend to repeat them here. The grounds on which the review of the award is sought amounts to assertions that the arbitrator erred in finding that the first respondent (the employee) had not committed an act of insolence; and secondly, that the arbitrator erred in finding that the applicant had not refused to work on 24 June 2018. In the result, the applicant contends that the arbitrator reached a decision that no reasonable decision-maker could have reached in the circumstances.
- [3] In regard to the events of 24 June 2018, the arbitrator accepted the employee's evidence in his finding to the effect that 'it would be nonsensical that the [first respondent] would report for duty and yet refuse to work and for no apparent reason just leave. There is no evidence to suggest that the first respondent's reason for leaving was related to the phone call she received. It is uncontested that someone else was already in place.'
- [4] The evidence presented by the applicant was that the employee's phone rang, and that she left her supervisor while the supervisor was speaking to. The applicant's witnesses further confirmed that when they returned to the guardhouse after a parade, the employee had left. The employee testified that when she arrived at work on 24 June 2018, she was told not to sign in and to call back the driver as she had already been replaced. The procedure applicable in the circumstances was explained by a witness for the applicant who stated that both parties (i.e. the party being replaced in the party replacing the other party) must sign a document to this effect, the party being replaced is required to attend the parade is that a party may be assigned to another site, and that on the day in question, the employee had not been replaced by someone else. It is not disputed that the employee did not attend the parade, noise disputed that she left a place of employment are in order to return home. The arbitrator's findings do not account for this evidence and appear to suggest that it was open to the

applicant simply to leave her employer's premises once she had ascertained that she had been replaced. His conclusion that the applicant was not posted and was never going to be posted on 24 June 2018 ignores the evidence that was led.

- [5] In regard to the charge of insolence, the arbitrator finds at paragraph 42 of his award that the employee had, in effect, being charged with failure to cooperate with her employer. The arbitrator draws a distinction between that form of conduct and insolence and decides that while the evidence established that the employee was 'rude and cheeky', the objective reality was that she had been charged merely with being uncooperative. On this basis, the arbitrator concluded that if the applicant was of the view that the employee's conduct amounted to insolence, she ought to have been charged with insolence and not with failure to cooperate. What this conclusion ignores is the heading to the charge which is clearly stated as 'Insolence'. The essence of the charge against the employee was one of insolence. Further, the arbitrator was required to take a holistic view of the nature of the misconduct alleged. This court has often emphasised that arbitration hearings are not criminal proceedings and that allegations of misconduct should be dealt with on the basis of the substance of the misconduct and not the particular label attached to it. It would appear from the arbitrator's own assessment of the evidence that he regarded the employee's conduct as serious – it is only the labelling of that conduct as a failure to cooperate that persuaded him that it was not sufficiently serious to warrant dismissal. In this regard, in my view, the arbitrator committed a reviewable irregularity by failing to have regard to the substance of what it was that the employee was alleged to have done. Had he done so, he would have concluded that the employee's actions amounted to acts of serious misconduct.

- [6] For the above reasons, in my view, the award is reviewable and ought to be set aside. The court has a discretion as to whether the matter should be remitted for rehearing, or whether it ought properly to substitute the award. Ordinarily, where

the record is complete (as it is in the present instance) and where a rehearing would serve no purpose, the court is inclined to substitute the arbitrator's award for one that ought to have been made. In the present instance, in my view, no purpose would be served by ordering a rehearing of the matter. The record is complete and the court is in as good a position as any arbitrator would be to determine the dispute. As the evidence referred to above indicates, the employee committed serious acts of misconduct by leaving her workplace on 24 June 2018 and also by addressing her supervisor in the manner that she did. What counts heavily against the applicant is heard disciplinary record, to which the arbitrator referred. Having regard to all of the relevant facts and circumstances, dismissal is an appropriate sanction and the employer's decision to dismiss the employee ought to be upheld.

- [7] Finally, the applicant sought costs only in the event of the application being opposed. The issue of costs accordingly does not arise.

I make the following order:

1. The arbitration award issued by the third respondent under case number ECPE 4702 – 18 on 21 October 2018 is reviewed and set aside
2. The arbitrator's award is substituted by the following:
'The applicant's dismissal was substantively and procedurally fair, and the referral is dismissed'.

Andre van Niekerk
Judge

Appearances

For the applicant: Adv. Van Wyk, instructed by AH Stander Attorneys