

SOUTH AFRICA / JUDGMENT

Moni v Phiko Security Services (Pty) Ltd (PR60/23) [2024] ZALCPE 7 (27 February 2024) [2024] ZALCPE 7

COURT

Labour Court Port Elizabeth

BEFORE

M Makhura

CASE / FILE NUMBER

PR60/23

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IN

THE LABOUR COURT OF SOUTH AFRICA, GQEBERHA

Not

Reportable

Case

No: PR60/23

In the matter between:

NOSIPHO
MONI
Applicant
and
PHIKO
SECURITY SERVICES (PTY) LTD
First Respondent
COMMISSION
FOR CONCILIATION,
MEDIATION
AND ARBITRATION
Second Respondent
WILLIAM
PRETORIUS N.O.
Third Respondent

Heard:

22 February 2024

Delivered:

27 February 2024

JUDGMENT

MAKHURA, J

- [1] On 23 June 2022, Phiko Security Services (Pty) Ltd (the company), dismissed the applicant and her colleagues who were on duty on or about 10 June 2022 for alleged 'sub-standard performance including loafing, inefficiency, carelessness or negligence' alternatively 'gross negligence'. Aggrieved by the dismissal, the applicant and her colleagues declared an unfair dismissal dispute and referred it to the Commission for Conciliation, Mediation and Arbitration (CCMA). After arbitration proceedings, the dismissal of the applicant and her colleagues was found to be procedurally and substantively fair. The applicant approached this Court to review and set aside the award in terms of section 145 of the Labour Relations Act (LRA)[1].
- [2] The applicant was a security officer based at the Walter Sisulu University campus, East London. On 10 June 2022, the University campus hosted an event within the campus. The applicant, together with other security officers, were posted at the entrance of the new residence, with instructions not to allow any one inside without a positive student identity card. The supervisor was one Mr Monki (Monki). The event ended just before 00h00.
- [3] It is common cause that an intruder gained access to the new residence. This intruder was found by two students after the event and was taken to the guardhouse. At the time of this incident, Monki was not present at the guardhouse. The assistant supervisor spoke to Monki over the radio to explain what just happened and to seek further guidance.
- [4] Simon Phokwane (Phokwane), the company's Contracts Manager, arrived at the guardhouse and enquired from the employees who were present, including the applicant, how the intruder gained access to the new residence.
- [5] The students, who were still present at that point, explained to Phokwane that they caught the intruder in the room. Phokwane then asked one of the employees how the intruder gained access without being noticed and the response was that they were posted at other places.
- [6] As the employees could not provide an explanation on how the intruder gained access to the campus and who was posted at which place, Phokwane decided to charge all of them 'to get out the truth, because they could not pinpoint as out of the six who was at the entrance'.
- [7] Phokwane agreed that Monki was the supervisor of the employees, including the applicant. However, he testified that Monki was posted at a different location, not where the applicant and her colleagues were posted. It was then put to Phokwane during cross examination that Monki came to the main entrance where the applicant was and allowed people inside without proof of student identity. Phokwane disputed this version and said that 'there was no

way that Monki will allow any stranger to walk in'. Monki was not called to testify. In their evidence, the employees testified that:

'Nobody know how the intruder got in but there was a time where Mr Monki, would go, would come back from where he was posted to come and look at us. I received complaint from a lady by the name of Nosipho Moni. Nosipho said to me that Mr Monki is creating a situation where she cannot perform her duties to the best of her ability.

We wanted, as we wanted these registration and student cards, Mr Monki was letting students get, or people get inside, said that we must let them in, because he knows them. I could not be against that, because Mr Monki is my superior and I am taking instructions from him.'

[8] The commissioner started his analysis by accepting the respondent's case as credible. He did not conduct an analysis of the evidence and show how the evidence led by Phokwana and the chairperson of the disciplinary hearing, established misconduct on the part of the applicant and/or her colleagues. This was despite the version of the applicants that Monki allowed people to pass through the entrance without proof of student identity and the fact that Monki was not called to testify, despite the version being put to Phokwane at the start of the proceedings.

[9] The commissioner instead proceeded to deal with the applicant's version that they disputed negligence and said that he found it difficult to accept the applicants' denial of wrongdoing. The basis for this difficulty is alleged to be that the applicants, through the testimony of Fikiswa Dzaadza, gave two destructive versions of the event. The first version is that the applicants said they did not know how the intruder gained entry to the new residence and the second version is that they said it could have been possible that the intruder gained entry at the time when Monki was allowing students entry without proof of student identity.

[10] The commissioner rejected the version that the intruder gained entry at the time when Monki allowed a free pass for all. The reason for discrediting this version is that this was never communicated to Phokwane on the night of the incident and was not raised during the disciplinary hearing. The commissioner was equally unmoved by the applicants' version that they did not make an entry in the occurrence book about their supervisor allowing a free pass and did not confront him as their supervisor. The version of the applicants that Monki allowed a free pass was rejected as an afterthought.

[11] The commissioner concluded:

'In any event, even if I must consider the second version of the applicants, I am of the view that it does not assist the applicants in their case. It is settled law that when an employee, as in this case, is aware of misconduct committed but decides not to notify or inform the employer such a person may be found guilty of misconduct by association.

It follows that the applicants' conduct, on their own version, makes them accomplices to the misconduct committed by Monki in violation of the instructions given by the respondent on the day of the incident.

The most plausible inference to be drawn ... is that the applicants were negligent in the performance of their duty on the day of the incident. This is because as reasonable security guards they should have foreseen the possible harm takes steps to avoid it. They did not do so.'

[12] The applicants were then found guilty of negligence and their dismissal was found procedurally and substantively fair.

[13] The test to review an arbitration award is as set out in *Sidumo and another v Rustenburg Platinum Mines Ltd and others*, [2] and has been expanded upon extensively in subsequent judgments. [3] It is well established that in determining whether an award is liable to be reviewed and set aside, this Court is required to determine

whether the decision reached by the commissioner is one that a reasonable decision-maker could not reach.

[14] In *Duncanmec (Pty) Ltd v Itumeleng NO and Others* [4], the LAC restated the test as follows:

'[23] The principles relating to review of arbitration awards are now trite and need not be restated. Suffice to say that an arbitration award may be set aside if the award is disconnected from the evidence resulting in an unreasonable outcome. It should also be noted that not all irregularities in an arbitration hearing or in an award will necessarily vitiate the award. Notwithstanding the defects, if the arbitrator arrived at a reasonable decision, the award will not be interfered with. Reasonableness is, therefore, the yardstick against which an award is assessed.' [5]

[15] Although the applicant sought an order of procedural unfairness in her notice of motion, the grounds for review raised in the affidavit are directed at the substantive fairness of the dismissal.

[16] It is common cause that the intruder was caught trying to steal a television and that the television was later found to be damaged. Further, the intruder's parents replaced the damaged television. Despite this, the company did not obtain the intruder's statement to establish how he gained entry to the new residence, nor did it call the intruder to testify on its behalf. The result is that it remains a mystery how the intruder gained entry to the premises.

[17] The commissioner, on face of this lack of this crucial evidence, decided to deal with the matter based on inference. He said that there were three facts proven - (i) the applicants were posted to the main gate; (ii) an intruder was caught inside the residence and he was not a student and (iii) he gained entry through the main gate. It is simply not true that it was a proven fact that the intruder gained entry through the main gate. Phokwane was in no position to testify to this alleged fact and the company's second witness, the chairperson of the disciplinary hearing, was equally in no position to prove this as a fact. The employees

simply did not know but suspected that the intruder gained entry during Monki's time when he allowed free pass for everyone without checking the student identity card. From this point on, the commissioner's path was derailed as he had misconceived the evidence and the enquiry.

- [18] The finding that the applicants led two destructive versions is a misconception of the evidence and the issue before the commissioner. The employees' version was that they did not know how the intruder gained entry. Consistent with their lack of knowledge, they then speculated that the intruder could have gained access when Monki allowed a free pass for everyone. There are no two conflicting versions here.
- [19] The commissioner was dismissive of the applicants' version that Monki allowed entry to the new residence without student identity. This is despite the company failing to lead any shred of evidence to refute this version or to prove the misconduct. This version is too serious to dismiss considering first that the company had the burden of proving negligence and second that Monki was not called as a witness. To dismiss this on the basis that it was not raised on the day of the incident and at the disciplinary hearing, is proof that the commissioner misconstrued the evidence and the issue before him. He failed to appreciate that arbitration proceedings are de novo hearings and that the employer bears the onus of proof.
- [20] His reasoning that the law imposes an obligation on the employee to disclose misconduct committed by another constitutes a material error of law and a material misdirection on his part. Our law, particularly labour law, does not impose a general duty to 'rat'. The commissioner then proceeded to find that the employees' conduct makes them accomplices to the misconduct committed by Monki in violation of the instruction given by the company. He does not end there. He continues to find that the most plausible inference is that the employees were negligent in the performance of their duty on the day of the incident.
- [21] The evidence adduced at arbitration proceedings does not establish guilt on the part of the applicant. Therefore, I find that the company failed to prove the allegation of negligence and the applicant is found not guilty. Even if I am wrong and the applicant is guilty of negligence, the company had the onus to prove that its relationship with the applicant has irretrievably broken down. It is trite that the enquiry into substantive fairness of a dismissal is two-fold – a determination whether the employee is guilty of the allegation/s of misconduct and if so, an enquiry into the appropriateness of sanction.[6] The commissioner totally ignored the second stage of the enquiry.
- [22] The award is disconnected to the evidence. It is unsound, irrational, untenable and unreasonable. His decision could not be reached by a reasonable decision-maker. The defects are so glaringly unreasonable and material that no amount of different, generous and fair reading can rescue the award.

- [23] Therefore, the award stands to be reviewed and set aside. Having considered the nature of misconduct and the lack of evidence pointing to a breakdown of a continued relationship, I find that the dismissal is substantively unfair.
- [24] The full record is before me. Remitting the matter to the CCMA will not be in the interest of expeditious resolution of the dispute and justice. The applicant has sought the primary remedy of reinstatement. Section 193 of the LRA sets out the relief which a commissioner or this Court may grant upon finding that a dismissal was substantively and/or procedurally unfair. Where a dismissal is found to be substantively unfair and the employee seeks to be reinstated, the primary remedy of reinstatement must be awarded.[7]
- [25] There are various factors which may be taken into account when determining whether a reinstatement order should apply retrospectively, and if so, the extent thereof. However, the Constitutional Court, in *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile*,^[8] held that the employer bears the burden to demonstrate that the primary remedy of retrospective reinstatement should not apply, or should be limited.^[9] The company did not demonstrate that continued employment relationship with the applicant would be intolerable or that it would not be reasonably practicable to reinstate her. There is no evidence why the applicant should not be paid full backpay. I see no reason not to order the primary remedy with full retrospectivity and backpay.
- [26] Both parties did not seriously pursue the issue of costs. Ultimately, this is an issue that falls within my discretion in terms of section 162 of the LRA. I have, in the interest of law and fairness, decided not to award costs.
- [27] In the premises, the following order is made:

Order

1. The arbitration award issued by the third respondent dated 15 March 2023 under case number ECEL2918-22 and ECEL2853-22 is reviewed and set aside.
2. The award is substituted with the following order:

‘1. The dismissal of the applicant by the first respondent on 23 June 2022 is hereby declared procedurally fair but substantively unfair.

2. The first respondent is ordered to reinstate the applicant retrospectively from the date of her dismissal, on the same terms and conditions of employment that existed prior to her dismissal and without any loss of benefits.

3. The first respondent is ordered to pay the applicant backpay from the date of dismissal until the date she reports for duty within 14 days of this order.

4. The applicant is ordered to report for duty on 4 March 2024.’

3. There is no order as to costs.

M. Makhura

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr. C Jessop of Brown, Braude & Vlok Inc.

For the First Respondent: Adv. J Barker

Instructed by:

Dirk Kotze Attorneys

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Prepared on 9 October 2026 · Esheria