

SOUTH AFRICA / JUDGMENT

Silver Solutions Security (Pty) Ltd v Saayman N.O ands Others (PR192/22) [2024] ZALCPE 31 (15 July 2024)

[2024] ZALCPE 31

COURT

Labour Court Port Elizabeth

BEFORE

Mark Thys

CASE / FILE NUMBER

PR192/22

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FLYNOTES:

LABOUR

– Dismissal – Incapacity
– Supervening impossibility – Client of security
company refused employee access to its premises – Alleged
misconduct – Judgment to dismiss employee was inextricably
linked to decision revoking employee access – Arbitrator
lacked crucial material to assess whether removal was valid –
Omission ultimately affected determination – Supervening
impossibility not properly established due to lack of evidence –
Application dismissed.

THE LABOUR COURT OF
SOUTH AFRICA, GQEBERHA
Not Reportable
Case No: PR 192/22

In the matter between:

SILVER
SOLUTIONS SECURITY (PTY) LTD
Applicant
and
HADLEY
SAAYMAN, N.O.
First
Respondent
CCMA
Second
Respondent
GCOBISA
KULATI
Third

Respondent
Heard: 12 June 2024

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email and publication on the Labour Court's website. The date and time for hand-down is deemed to be on 15 July 2024.

JUDGMENT

THYS

Introduction

1. Transnet, a state owned company, operates a number of ports throughout the republic and has engaged Silver Solutions Security (Pty) Ltd to provide security personnel at its Coega port in Gqeberha.
2. Ms Kulati was an employee of Silver Solutions and was assigned to work at the Coega site.
3. It can be deduced from the record that Ms Gcobisa Kulati worked for Silver Solutions without any hassle until an incident occurred, which Transnet deemed unacceptable and used as grounds to deny her access to the workplace.[1]
4. In response to this incident, Transnet requested Silver Solutions to detach Ms Kulati from the Coega site/workplace and in compliance with this request; Silver Solutions removed Ms Kulati, accordingly.
5. Allegedly unable to find a solution (or suitable position for Ms Kulati elsewhere), Silver Solutions informed her to attend an incapacity

hearing. Prior to the incapacity hearing Silver Solutions had allegedly enquired from Transnet whether there was any alternative

rather than removing Ms Kulati from the site. Transnet was “not budging”.[2]

6. This incapacity gathering led to the termination of Ms. Kulati's service, essentially, on the basis that Transnet refused her access to its workplace – as she stood accused of soliciting money and chocolate from a crew member of a vessel and no alternatives were available.

Arbitrator's Findings

7. The arbitrator found that Silver Solutions did not fairly terminate Ms. Kulati's services and tendered multiple reasons in support of his conclusion(s). These reasons, in essence, are that:

1. Silver Solutions failed to furnish any substantiating evidence demonstrating reasonable efforts to dissuade Transnet from initiating or proceeding with the demand – to remove Ms. Kulati from its workplace. Furthermore, the investigation's details remain undisclosed or imperfect. While Silver Solutions contends that a comprehensive evaluation of alternatives was conducted, the discourse is limited to a cursory mention of its Department of Health's site and potential relief positions, lacking substantive detail. A more rigorous and thorough approach was warranted in this context. The arbitrator also noted the absence of the service level agreement and statements from the crew during the arbitration.

Grounds of Review

8. Silver Solutions labels the award as defective and challenges it on several grounds. These grounds are outlined/unpacked below and can be distilled into the following: (1) the arbitrator's failure to consider material evidence; (2) a misunderstanding of the case's essence; and (3) a departure from the terms of reference.
9. The essence of Silver Solutions' argument is that the only issues that were relevant is (1) whether or not access actually was revoked by Transnet and (2) whether or not Transnet had the right under the service level agreement to revoke the access of

Ms Kulati and (3) finally if the two questions were answered in the affirmative the effect of the above on the ability of Ms Kulati to render services.

Legal Framework

10. For Silver Solutions to successfully execute its review attack it must, at a minimum and/or in terms of its pleaded case, demonstrate that the award is compromised in such a way that the arbitrator's decision could not be reached by a reasonable decision-maker.
11. When deciding to overturn an arbitrator's decision/award the review (labour) court must ask whether the arbitrator's "decision is one that a reasonable decision-maker could not reach?"[3]
12. Over the years, the Labour Court has developed various methods to interpret what the Sidumo-bench meant by 'reasonableness'. One such method is that decisions made by the CCMA or Bargaining Council arbitrators will not be subject to review if they fall within the "range of decisions that reasonable people could arrive at". This implies that a court should refrain from interfering with a decision deemed "reasonable", even if it disagrees with the arbitrator's decision.
13. The Labour Appeal Court, in the case of *Bestel v Astral Operations & Others Ltd*[4], examined the concept of reasonableness 'in reverse', stating that it would deem a decision 'unreasonable' if it was... –
 1. unsupported by any evidence;

2. based on speculation by the commissioner;
 3. entirely disconnected from the evidence;
 4. supported by evidence that is insufficiently reasonable to justify the decision; or
 5. made in ignorance of evidence that was not contradicted.
14. This in a different manner or method, according to *Head of Department of Education v Mofokeng and others*[5], means “... [the] court must nonetheless still consider whether apart from the flawed reasons of or irregularity by the arbitrator, the result could be reasonably reached in light of the issues and the evidence ... To repeat flaws in the reasoning of the arbitrator evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material facts, etc must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in a wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should not be of such an order (singularly or cumulatively) as to result in a misconceived enquiry or a decision which no reasonable decision maker could reach on all the material that was before him or her.”

Analysis

of Law/Review Grounds

15. It is crucial to acknowledge that the LRA, particularly sections 185 and 188, among others, demand that dismissals must be ‘fair’ – in all respects. This, in my view, means the LRA necessitates ‘fairness’ from CCMA/Bargaining Council arbitrators. After all, how can they assess the fairness of a dismissal if they lack a sense of fairness themselves? My additional point, in this regard, is that the LRA emphasizes ‘fairness’ in arbitrators – not ‘precision’ and ‘flawlessness’. In reality, no arbitrator embodies such perfection. As it is said: ‘For we all stumble in many ways.’
16. I conclude further that, in section 188, the term ‘fair’ implies that employers must have a strong justifiable reason for terminating an employee’s service – related to the employee’s capacity, misconduct, or the employer’s operational needs – and the termination must be preceded by a fair pre-dismissal process.
17. The nature of the dismissal dictates the factors the arbitrator must consider, to determine the fairness of the dismissal.
18. When focusing on the (relevant) issue of incapacity, arbitrators have the authority and responsibility to examine whether an employee is incapable of fulfilling the inherent job requirements – typically due to ill-health, injury, or poor work performance. However, our employment law framework indicates that this specific examination is not always the case or practical. This is because our existing jurisprudence permits an employer to end an employee’s service based on “incapacity” resulting from, or is due to, the supervening

inability or impossibility to perform his/her duties. Provided, of course, that such a termination is fair. This legally implies that incapacity should not always be confined to ill-health, injury, or poor work performance, as classified by Schedule 8 of the LRA, at items 9 and 10.[6]

19. The fact that an employee's (in) capacity (as a valid reason for dismissal) extends beyond his/her physical abilities or skills plays an important role in our labour dispensation, because this adaptation caters for situations where an employee's permit, accreditation, license, or the like was cancelled or when the host employer refuses the employee access to its workplace – which does not concern the employee's capacity.
20. The *Swissport SA (Pty) v Seanego and others*[7] case serves as a relevant example. In this case this court held that the dismissal of the employees was for a fair reason and in compliance with a fair procedure, due to supervening impossibility of performance.
21. The LAC in the case of *Solidarity and another v Armaments Corporation of South Africa (SOC) Ltd and others*[8] also confirmed that an employee's inability to fulfil his/her contractual obligations due to supervening impossibility of performance is a form of incapacity.
22. Both this court and the LAC however concur that fairness in both the rationale and pre-dismissal processes is mandatory, even in cases where dismissal results from the supervening impossibility of performance.
23. Silver Solutions during the arbitration (as well as in its pleaded case before this court) tendered a paramount reason for Ms Kulati's dismissal – this is that she was employed for the purpose of performing work at Transnet's Coega site, Transnet revoked her access to this site as a result of a supervening impossibility (i.e. supposedly soliciting money and chocolate from a crew member) and Silver Solutions was not able to redeploy her – despite reasonable failed efforts to place her somewhere else (or at the Department of Health's site, which is Silver Solutions' only other workplace).
24. Silver Solutions argues that it indeed presented evidence that Transnet had the right to revoke access as per the agreement, and this evidence was never disputed by Ms Kulati. The arbitrator's remarks regarding – the service level agreement – were therefore uncalled for.
25. However, the factual accuracy of this proposition is questionable, because the record reveals that Ms Mbaza, representing Silver Solutions, testified that there existed an "agreement between [Silver Solutions] and [Transnet]." When Ms. Kulati's representative challenged Ms Mbaza to produce the agreement, given Silver Solutions' reliance on it, Ms Mbaza was unable to do so. The arbitrator acknowledged this in his award. This engagement, therefore, does not align with Silver Solutions' suggestion that its evidence relevant to the service level agreement was not disputed.

26. Silver Solutions, in addition, contends that the arbitrator got it wrong because Ms Kulati was not dismissed for misconduct, because a supervening impossibility validly/fairly caused the dismissal.
27. What is clear, from the record, is that whilst Silver Solutions relies on the incapacity of Ms Kulati the judgment to dismiss her was inextricably linked to the decision of Transnet – revoking her access, due to allege ‘misconduct’. It was therefore incumbent upon Silver Solutions, as the employer, during arbitration to have established ‘afresh’ Transnet’s right to deny Ms Kulati access and/or Silver Solutions’ right to remove Ms Kulati and/or that these actions aligned with the terms of their service level agreement or were, at the very least, in accordance with the stipulations of the contract of employment.
28. The record also shows that this agreement (and even the contract of employment) did not form part of the arbitration and/or Silver Solutions’ evidence. It is at any rate not part of the review record/proceedings. Without the presentation of this evidence/these documents, the arbitrator afresh lacked crucial material to assess whether Ms Kulati’s removal was valid and in terms of an enforceable provisions thereof. This omission ultimately affected the determination that Ms Kulati’s dismissal was fair.
29. In my view, the defense of supervening impossibility cannot be invoked unless there was a prior reason that directly caused the (initial) impossibility. In essence, the existence of misconduct (in this case) serves as the foundational trigger for any subsequent claim of supervening impossibility. An interrogation of the alleged misconduct together with the agreement during the arbitration was thus crucial because it could have verified that the supervening impossibility was properly triggered and that Transnet had legitimate grounds to remove Ms Kulati from the workplace.
30. Without such evidence, it cannot be asserted that a supervening impossibility properly existed or was properly established.
31. Additionally, this situation reveals or could have revealed that Transnet’s authority to remove Ms Kulati was weakened, indirectly compromising Silver Solutions’ ability to validly and fairly terminate her employment.
32. Had Silver Solutions presented evidence of Ms Kulati’s innocence or mitigating circumstances, it is conceivable that Transnet might have retracted its demand for her removal. Silver Solutions’ failure to do so – or to even attempt such an effort – casts doubt on the fairness of Ms Kulati’s dismissal.
33. The record further shows that Ms. Kulati was basically summoned to the incapacity hearing to be informed that she was terminated – “you are fired”. In this regard, there was no meaningful engagement relevant to the issue of alternatives. Such a fait accompli approach (where the outcome is predetermined) is unacceptable and conflicts with the ‘fairness’ agenda of our employment law.

34. The consequence of Silver Solutions suggestion is that Transnet's revocation, as stipulated in the service level agreement, automatically justifies dismissal. However, our legal framework cannot condone such a proposition, because agreements of this nature should not be wielded to undermine employee rights or unfairly treat them.
35. Put in a different way, it is incorrect for Silver Solutions to propose that the arbitrator's inquiry should have focused only on whether Transnet revoked access and whether such revocation was permissible under the service level agreement and/or that there was no obligation for Silver Solutions to produce the service level agreement or obtain evidence from a vessel crew member. This would mean an employer may dismiss an employee exclusively at the request of a third party.
36. The LAC, in this regard, in *Lebowa Platinum Mines Ltd v Hill*[9] made it clear that the mere fact that a third party demands the dismissal of an employee would not render such dismissal fair. This, in my view, means an arbitrator's inquiry should encompass all relevant factors to ensure a fair and comprehensive assessment.
37. It can also not be suggested that the arbitrator failed to consider material evidence – because he allegedly overlooked evidence presented by Silver Solutions, which aimed to persuade Transnet against requesting Ms Kulati's removal and explore alternative solutions.
38. This is so because the arbitrator rightly scrutinized Silver Solutions' claims that they had considered 'all' alternatives before dismissing Ms Kulati. The arbitrator explicitly rejected this assertion because otherwise he would not have stated that Silver Solution's reliance on mentioning only the Department of Health site and relief positions with minimal information was limited. By emphasizing the limited scope of the alternatives, the arbitrator indicated that more robust efforts were expected from Silver Solutions. The fact that the arbitrator stated that it was expected of Silver Solutions "to do a lot more to try and rescue Ms Kulati's work" underscores Silver Solutions' duty to exhaust all reasonable avenues.
39. Silver Solutions could have demonstrated diligence by considering creative solutions, such as applying bumping or reassigning Ms Kulati to a position at the Department of Health.[10] Silver Solutions could have explored whether another employee (within their organization) could be placed at Transnet, allowing Ms Kulati to take that employee's position at the Department of Health. This approach would not only have safeguarded Ms Kulati's job without causing job losses for other employees but would have demonstrated fairness on the part of Silver Solutions.
40. This is important because the LAC *East Rand Proprietary Mines Ltd v United Peoples' Union of SA*[11] in reiterated that an employer may dismiss at the behest of a third party, but it truly must have no alternative to the dismissal.
41. Fair labour practices therefore demand that employers act reasonably and explore alternatives before resorting to dismissal.

42. The arbitrator correctly emphasized Silver Solutions' obligation to exhaust alternatives and mitigate the impact on Ms Kulati's employment.

Imperfect Decisions

43. It is undeniable that even a cursory reading of the award reveals that the arbitrator's award leaves much to be desired. For instance, both in the main body and the executive part of the award, the arbitrator determined that Ms Kulati's dismissal was procedurally unfair. However, he does not provide any reasoning or justification for this conclusion anywhere in the award.

The Commissioner simply arrives at the conclusion that the dismissal was procedurally unfair, without informing the reader of the

analytical process he undertook or the evidence he considered to reach this decision.

Furthermore the arbitrator decided to award

compensation to Ms Kulati but this decision fell short in providing a clear explanation and/or reasons for his finding(s). In paragraph 14 of the arbitrator's award, it is stated that Ms. Kulati seeks retrospective reinstatement, alternatively compensation. However, in paragraph 32, the arbitrator clarifies that she only requested retrospective reinstatement.

44. It must nevertheless be noted that the reviewing court must evaluate whether the result (the dismissal) could be reasonably reached based on the evidence and issues. Mere errors of fact or law may not necessarily invalidate the award.[12]
45. The court must assess whether the overall outcome is reasonable despite such errors.
46. In my view, apart from minor errors, the arbitrator's conclusion remains unassailable because Silver Solutions needed to, but failed to prove a fair reason for Ms Kulati's dismissal.
47. In all, the arbitrator rendered a fair result and/or an award that any reasonable decision maker could have reached.
48. Given the above context and conclusion, I hold the view that addressing any other issue, such as procedural fairness, is unnecessary.

Costs

49. In matters of employment law, equity and fairness play a crucial role. Surely Silver Solutions' decision impacted Ms Kulati's livelihood. By pursuing this legal defense, Ms Kulati sought to protect her rights. This order acknowledges Ms Kulati's need to defend herself and promotes fairness in the legal process. Ordering Silver Solutions to pay her costs ensures a fair outcome. The fact that Silver Solutions could have but failed to exhaust all reasonable avenues before implementing dismissal makes the costs incurred by Ms Kulati even more justifiable. Thus, I order the employer Silver Solutions to pay Mr Kulati the employee's

costs.

Conclusion

50. Accordingly, I make the following order:

Order:

1. The application is dismissed, with costs – at Scale A.

Mark Thys

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mr. AJ Posthuma of Snyman Attorneys.

For the Respondent: Ms. KE Smailes of Smailes Attorneys.

[1]Refer to paragraph 6.

[2]Transcribed Record at page 3.

[3]Unless the review application is build upon the issue of “correctness” – i.e. to answer a jurisdictional question.

[4][2011] 2 BLLR 129 (LAC); [2010] ZALAC 19.

[5](2015) 36 ILJ 2802 (LAC); 2014 ZALAC 50.

[6]Workplace Law, John Grogan – 12th Ed, 2017, ch 14- p 287.

[7][2017] ZALCJHB 371.

[8] [2019] 3 BLLR 248 (LAC); (2019) 40 ILJ 535 (LAC).

[9](1998) 19 ILJ 1112 (LAC)

[10]Bumping is most relevant when LIFO (Last In, First Out) serves as the selection criterion in a retrenchment process. It involves

dismissing an employee for operational requirements, even if they were not initially chosen for retrenchment, in order to create a position for another employee.

[11](1996) 17 ILJ 1134 (LAC).

[12]Head of Department of Education v Mofokeng and Others (2015) 36 ILJ 2802 (LAC).

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