

SOUTH AFRICA / JUDGMENT

**Top Security (Pty) Ltd v Commission for
Conciliation, Mediation and Arbitration and Others
(JR519/09) [2011] ZALCJHB 93; [2012] 3 BLLR 311
(LC); (2012) 33 ILJ 992 (LC) (4 November 2011)
[2011] ZALCJHB 93**

COURT

Labour Court Johannesburg

BEFORE

Molahlehi

CASE / FILE NUMBER

JR519/09

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REPUBLIC OF SOUTH AFRICA

Reportable and of interest to other judges

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 519/09

In the matter between:

TOP SECURITY (PTY) LTD

.....Applicant

and

COMMISSION FOR CONCILIATION

ARBITRATION AND MEDIATIONFirst Respondent

COMMISSIONER M.S. RAFEE, N.OSecond Respondent

HLABISA; JOHNSONThird Respondent

Heard: 12 August 2011

Decided: 04 November 2011

Summary: Review: is the matter opposed when only notice of opposition and no answering affidavit filed? Late filing of heads of argument.

Introduction

This is an application in terms of which the applicant seeks to have the arbitration award issued by the second respondent (the Commissioner) under case no GAJB30041-08 dated 16 February 2011 reviewed and set aside. In terms of the arbitration award the Commissioner found that the third respondent (the employee) guilty of the offences he was charged with but did not confirm the dismissal because he found the sanction to have been too harsh. It was for this reason the dismissal was substituted with a final written warning and further the applicant was ordered to pay employee the full back pay.

The issue to be decided by this Court is whether the dismissal of the employee was substantively unfair. The issue of procedural fairness was not put in dispute.

The other issue to consider is whether the matter was opposed, the applicant having filed a notice of opposition but having failed to file the answering affidavit. Related to this is also the late filing of the heads of argument.

It seems to me convenient to deal with the issue of whether or not this matter was opposed before dealing with the substantive aspects of the review.

Mr Voyi on behalf of the employee did not dispute that the heads of arguments were late and that no condonation application had been made but contended that he was entitled to appear on behalf of the employee because the arbitration award was attacked on the basis of law and therefore in doing so he would rely on the applicant's own papers. He also suggested that his approach of not filing the heads was warranted because he was dealing with the matter of pro bono.

Mr Venter appearing on behalf of the applicant argued that because there was no opposing affidavit the only version that was before the Court on an affidavit was that of the applicant and therefore the matter should be treated as unopposed. In this respect Mr Venter relied on the decisions in *Moosa and Another v Knox*,¹ *Ebrahim and Another v Georgoulas and Another*² and *Bader and Another v Weston and Another*.³

In *Ibrahim and Another* case the respondent, in the same way as the present instance, chose not to file an opposing affidavit answering to the applicant's

allegations. The respondent chose in that case to take a legal point only and not formally answer to the allegations made in the

applicant's founding papers.

In Bader,⁴ the Court held that generally speaking our procedures requires that a respondent who wishes to oppose an application on the merits to place before the Court by way of an affidavit within the prescribed time limits. The Court also recognised that there may be instances where the need for an answering affidavit may not be necessary.

Rule 7(4)(b) requires that Notice of Opposition and answering affidavit must be delivered within 10 days from the day on which the application on the party opposing the application is served.

I accept that in certain instances a party may having filed a notice of opposition challenge the application on a point of law without necessarily having to file the answering affidavit. In fact I am tempted to suggest that in appropriate cases the Court should encourage this approach because it will be cost effective and will save time. This approach would be appropriate in particular in those cases where the outcome and not the process of the arbitration hearing is challenged.

In the present matter but for the failure by the third respondent to file his heads of argument on time or seek condonation for the late filing, I would have in all probabilities treated this matter as opposed and would have taken into account the submissions made by Mr Voyi. This matter accordingly remains unopposed.

Background Facts

The employee commenced employment in 2003 as a security officer earning R5 700, 00 per month. The employee was dismissed on the 18 September 2008 for misconduct related to hooting at a site in the early hours of the morning. The charges proffered against employee read as follows:

- ‘1. On or about 20th August 2008 at/ or about 3h30 am you seriously deviated from company policies and procedures and standards in that you hooted in a residential area disturbing the peace,
2. Serious deviation from company policies and procedures and standards in that you, when confronted by a member of the public about the disturbances at 3h30 am, were insolent and insulting towards the member and threatened violence towards him,
3. Serious deviation from company policies and procedures and standards in that you removed the guard from the site 104, 4th street without reason, and leaving the site unattended,
4. This behaviour caused or may have caused the company name to come into disrepute.’

The incident that gave rise to the above charges relates to the evening of the 20 August 2008 at site no 104, 4 Pokwane Street where the employee was posted.

The version of the applicant is that on the day Dr John Bell, a resident of 104 was woken up at about 3h30 am by repeated and persistent hooting near his home. And when he went to check he found that the hooting was from one of the applicant's cars which was driven by the employee.

It is common cause that there was an exchange of words between the employee and Dr Bell. The employee objected to the manner in which Dr Bell was talking to him regarding the noise created by the hooting. The employee told Dr Bell that he was talking to him like a child and that it was 'bloody well unacceptable.' In response Dr Bell said 'stop behaving like one.'

The employee whilst not denying the hooting, says that Dr Bell in speaking to him and his colleague, amongst others, said: 'what are you doing, you bloody stupid, you bloody idiot.' The employee says that he responded by apologising but instead of accepting the apology Dr Bell went further to say: 'you bloody black don't deserve to be in this neighbourhood.' The employee apologised the second time but Dr Bell continued yelling at him.

Thereafter the employee told him to stop swearing at him, and further said that if he did not he would 'moer you'. The other comment which Dr Bell is alleged to have made when the employee said he was sorry was:

'Sorry for what, you are thinking like a child. Your mind is black therefore you can't think....'

After the exchange between him and Dr Bell the employee drove away with the security officer who was on duty at no 104, to inspect the outer perimeter of the site. The employee was also charged for removing a guard from his post without arranging for a substitute.

The employee did not dispute that he drove away with the security guard but contended that he drove around the parameter of the property because they heard some strange movement which they went to inspect.

Grounds for Review

The essence of the complaint of the applicant about the arbitration award is that the Commissioner totally disregarded the evidence it led and failed to appreciate that the employee committed a serious offence. It is for this reason that the applicant contends that the decision reached by the Commissioner is not one which a reasonable decision maker could have reached.

The applicant also criticised the conclusion by the Commissioner regarding the removal of the security from site 104, 4th street as being unreasonable.

The Arbitration award

The Commissioner in his analysis starts by finding that in the process of the exchange that went on the day in question some racist slurs were made by Dr Bell. He arrives at this finding on the basis that had there been no such racial slurs there would have been no need for Dr Bell to have made mention of it in his e-mail. It is not clear from the arbitration award as to what weight was given in relation to the final conclusion. It seems to me very little, if at all. In fact in view of the finding concerning the racial slurs does not seem to have much relevance to the final conclusion reached by the Commissioner.

As concerning the issue of hooting which is central to the charges proffered against the employee, the Commissioner found that the employee did hoot on the day in question. It would seem that the hooting was according to him justified because there was no two-way radio through which to call the security guard. The Commissioner found that it was standard practice for hooting to occur.

Evaluation

It is trite that the duty of the Court to scrutinise an award for reasonableness remains even in unopposed review applications including determining the presence of the defects envisaged in section 145 of the Labour Relations Act 66 of 1995. The test for determining the reasonableness or otherwise of an arbitration award is set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*.⁵

It is clear from the reading of the arbitration award that the Commissioner found the employee guilty of bringing the name of the applicant into disrepute. He further found the use of the word 'moer' to have been unwarranted.

The Commissioner thus decided the fairness or otherwise of the dismissal on the basis of the harshness of the sanction. In this respect the Commissioner found the dismissal to have been unfair because of the harshness of the sanction.

It is now well established in our jurisprudence that the test to apply in review is that of a reasonable decision maker. In applying the test of a reasonable decision maker, the Court seating in review has to determine whether the outcome reached by the Commissioner falls within the range of acceptable and reasonable outcomes. The review Court does not concern itself with the correctness of the outcome but its reasonableness.

It is also trite that, it is the Commissioner's function to determine the fairness of the dismissal and not the reviewing Court. In other words the reviewing Court is not entitled to substitute the decision of the Commissioner for its own.

In the present instance, the Commissioner, summarised in some details the facts which were presented before him and thereafter made his findings. In his findings the Commissioner as indicated earlier found the employee was not guilty of hooting and removing the other security guard from the site. The employee was found guilty of bringing the applicant's name into disrepute. As concerning the issue of threatening Dr Bell with violence, the Commissioner found the word "moer" used by the employee to have been unwarranted. In other words the employee was found not guilty for this offence.

After the above findings the Commissioner finds that the dismissal was too harsh and substituted it with a final written warning.

In my view the Commissioner performed his duty as required by the law and on the facts and the circumstances of the case as was presented before him he found that the sanction of dismissal was too harsh. The Commissioner may well be wrong in his conclusion but that is not the test. The test is reasonableness, having regard to the circumstances and the totality of the matter or facts which were before the Commissioner. I am not persuaded that the Commissioner's decision is unreasonable and therefore warrants interference.

In light of the above, the application stands to fail. This being an unopposed application no order as to costs need be made.

Order

In the premises the applicant's application to review the decision of the second respondent is dismissed with no order as to costs.

Molahlehi J

Judge of the Labour Court of South Africa

APPEARANCES:

FOR THE APPLICANT: Adv F.Venter

Instructed by: Van Gaalen Attorneys

FOR THE RESPONDENT: Mr N. Voyi on behalf of the pro bono office.

1 1949

(3) SA 327 NPD.

2 1992

(2) SA 151 (BGD).

3 1967

(1) SA 134 (CPD).

4Id

5 2008

(2) SA 24(CC).

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