IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

REPORTABLE

CASE NO: JR 819/07

In the matter between:

LANDSEC	1ST APPLICANT
TORONTO HOUSE CC	2ND APPLICANT

AND

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	1ST RESPONDENT
COMMISSIONER BONGE MASOT N.O.	2ND RESPONDENT
THEOPHILUS NDIMANDE	3RD RESPONDENT

JUDGMENT

MOLAHLEHI J

Introduction

[1] This is an application to review and set aside the arbitration award of the Second Respondent (the Commissioner) made under case number GAJB 30277-05, dated 26th March 2007. In terms of that arbitration award the Commissioner found that the dismissal of the Third Respondent, Mr Ndimande (the employee) to be both procedurally and substantively unfair and ordered both his reinstatement and compensation.

[2] On the 29th day of July 2008, this Court made an order which is quoted at the end of this judgment. The reasons for the order are set out hereunder.

Backgrounds facts

[3] The employee commenced his employment with the applicants during February 2005 as a caretaker of the building "Toronto House". The employee was charged with poor work performance and having a bad attitude towards his work. The disciplinary enquiry which was chaired by a person who was not in the employ of the applicants found the employee guilty and ordered his dismissal during November 2005.

[4] The applicants called two witnesses, namely Mr Ndlovu ("Ndlovu"), the security manager of "Burglar Remedy", the building's appointed security company and Mr Mkhize ("Mkhize"), a member of the building's residents' committee.

[5] Ndlovu testified that the employee allowed his relatives to live in a room in the basement area of the building. Allowing relatives to stay in the basement, according to Ndlovu, posed a security problem for the security guards who had found it difficult to maintain order in that area of the building and every time they (security guards) raised this issue they were overruled by the employee. Ndlovu also testified about the employee having allowed 16 (sixteen) individuals to stay in a room, in the building.

[6] It was also Ndlovu's testimony that he believed that the employee did not reside on the premises as required by his contract and that he falsely declared that the

woman he was staying with was his wife. He believed that the employee had merely rented the room to the woman he claimed was his wife.

[7] Because of the employee not staying in the building there was nobody, according to Ndlovu, to complain to whenever the residence had problems. In the same vein, Ndlovu testified that various tenants had laid complaints about the employee not being willing to assist them when requested to do so in his role as caretaker.

[8] The other part of Ndlovu's testimony upon which the applicants relied on in dismissing the employee concerns the allegation that the employee had been seen drinking alcohol and causing a nuisance at the front gate of the premises, which he did in front of the security guards.

[9] The dismissal was also based on the testimony of Ndlovu that the employee had failed to circulate information flyers to the tenants, which was supposed to have notified the tenants about the rat poison, which had been place in the building. The flyers were according to him found in the dustbin.

[10] The employee denied all the allegations levelled against him and in particular called on Ndlovu to show where the computer system reflected that he was regularly leaving the building at night.

[11] Mkhize testified that the residents committee had received poor service from the employee in that the building was dirty. The cleaners could not enter the building according to him because the employee had failed to open the security access gate to allow the cleaners entry into the building. The other reason for the

alleged poor performance was based on the accusation that the employee failed to patrol and identify problems in the building.

[12] The employee denied the allegations made by Mkhize and testified that the woman with whom he was staying with in the building was his girlfriend and that is the reason she was not using his surname.

The arbitration award and the grounds of review

[13] As indicated earlier the Commissioner found the dismissal of the employee to have been both substantively and procedurally unfair and ordered the applicants to pay the employee an *"arrear amount of R36,000.00 (thirty-six thousands rand) as compensation, and further ordered the applicants to reinstate the employee from date of dismissal 17 November 2005."*

[14] The Commissioner in arriving at the conclusion that the dismissal was substantively and procedurally unfair reasoned that the charges as formulated by the applicants were badly formulated in that they refer to acts of capacity as opposed to misconduct. In this respect the Commissioner found that the evidence presented by the applicants pointed to a case of incapacity rather than that of misconduct.

[15] The Commissioner further found that even though the employee was charged with poor work performance and a bad attitude towards his work the dismissal was based on other allegations, unrelated to these charges or were not brought to his attention prior to disciplinary hearing. The allegations relate to the accusations that the employee consumed alcohol while on duty, sublet rooms in

the building, provided illegal immigrants and persons who were not allowed into the building to be there, accommodating people in the basement for financial gain, failed to distribute pamphlets warning tenants about the presence of rat poison, failed to attend to tenants complaints, and sublet his room to another person.

[16] The Commissioner found the dismissal to have been unfair because the applicants had charged the employee with poor work performance and thereafter lead evidence relating to misconduct and dismissed him for that reason.

[17] In their founding affidavit the applicants contended that the Commissioner's decision was reviewable in that he:

(a) failed to apply his mind to the matter;

(b) was biased towards the third respondent in his findings;

(c) misconduct himself in relation to his duties as commissioner;

(d) committed a gross irregularity in his conduct of the proceedings; and/or

(e) exceeded his powers by acting unreasonably and unjustifiably under the circumstances.

[18] The applicants also criticized the Commissioner's award for being vague and embarrassing, in that on the face of it, it lacked clarity in that it ostensibly ordered the applicants to pay the employee 12 (twelve) months salary as compensation and a further 16 (sixteen) months salary as a back-pay. The monetary value of the order amounted to 28 (twenty-eight) months salary, i.e

R84, 000.00, which amount is according to the applicants, highly excessive under the circumstances and fell outside the jurisdictional ambit of the CCMA. In addition, the compensation made was criticized for being excessive in contravention of the provisions of section 194 (1) of the Labour Relations Act 66 of 1995 (the LRA), in that the compensation was not *"just and equitable in all the circumstances"*. This criticism was raised in the context of the employee having been in the employ of the applicants for only 9 (nine) months at the time of his dismissal.

[19] As concerning the order of reinstatement the applicants contended that the Commissioner, failed to take into account the fact that the reinstatement was not reasonably practicable and accordingly failed to comply with the provisions of section 193(1) of the LRA.

[20] The award is further attacked on the grounds that the Commissioner:

(a) erred in finding that the charges referred to acts of capacity as opposed to acts of misconduct.

(b) erred in concluding that the charges were *"badly formulated"* and ignored the testimony of the employee that he did approach the applicants as soon as he received the notice to attend a disciplinary hearing and sought an explanation on the charges.

(c) failed to properly apply his mind to this matter in that he failed to apply the code of good practice in respect of dismissals for poor work performance in that he should have considered whether or not the employee failed to meet a

performance standard and if so, whether he was aware or reasonably should have been aware of the performance standard, and further, whether he (the employee) was given a fair opportunity to meet the required performance standard.

(d) unjustifiably erred and/or incorrectly found and/or committed a gross irregularity in that he accorded undue weight to the uncorroborated evidence of the employee being a single witness.

(e) grossly misconducted himself in arriving at the conclusion as he did without applying his mind.

(f) erred in his failure to accord the necessary weight to the evidence of the applicants' witnesses .

Evaluation of the award

[21] In considering whether the dismissal of an employee is fair or otherwise the first inquiry is to identify the reason for the dismissal. The duty to establish the reason for the dismissal rests with the employer. It is the employer who has to show why in fact the employee was dismissed. In order to succeed in showing that the dismissal was fair the employer has, in terms of section 188 of the LRA to prove:

> *"(1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove-*
>
> *(a) that the reason for dismissal is a fair reason-*

(i) related to the employee's conduct or capacity; or

(ii) based on the employer's operational requirements; and

(b) that the dismissal was effected in accordance with a fair procedure.

(2) Any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant code of good practice issued in terms of this Act."

[22] In considering whether or not the reason for the dismissal is a fair reason the Court and Commissioners are required to take into account the Code of Good Practice. Item 9 of Schedule 8 of the Code of Good Practice provides:

"Any person determining whether a dismissal for poor work performance is unfair should consider-

(a) whether or not the employee failed to meet a performance standard; and

(b) if the employee did not meet a required performance standard, whether or not-

(i) the employee was aware or could reasonably be expected to have bee aware, of the required performance standard;

(ii) the employee was given a fair opportunity to meet the required performance standard; and

(iii) dismissal was an appropriate sanction for not meeting the required performance standard."

[23] In general, a reason for dismissal consists of facts which are at the time the decision to dismiss is taken are known to the employer. It follows therefore that the reason for dismissal must be the one in existence at the time the employee is notified, of his or her dismissal. Another fundamental and key principle relating to fairness in dismissal cases is that the reason for the dismissal must be related or based on the charges which were proferred against the employee for which he or she (the employee) had a fair opportunity to respond to and to challenge.

[24] The facts to be taken into account in considering the fairness of a dismissal in a case involving misconduct are set out in item 7 o f the Code of Good Practice as follows:

"Any person who is determining whether a dismissal for misconduct is unfair should consider-

(a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and ..."

[25] It is trite that in dismissal cases the burden to prove that the employee was guilty of misconduct rests with the employer and failure to discharge it, renders the dismissal unfair. In discharging its burden the employer has to show that the

employee breached an existing rule which he or she knows about or could reasonably be expected to have known of its existence.

[26] I have already indicated that the Commissioner found the dismissal of the employee to be both procedurally and substantively unfair. In dealing with procedural fairness of the dismissal, in the present instance the Commissioner, found that the charges proferred against the employee related to capacity and not conduct. In other words the unfairness arose from the incorrect procedure chosen by the applicant. As appears from the above quotation the procedure to follows in both cases of misconduct and incapacity are distinctly different. Thus the Commissioner was correct in that the use of the incorrect procedure resulted in the dismissal being procedurally unfair. The requirements and the evidence to be adduced to show that the dismissal for misconduct was procedurally fair is different to what has to be shown in the case of dismissal for incapacity.

[27] The reasoning of the Commissioner in relation to the substantive fairness of the dismissal is that it was:

> *"... totally unfair that the first respondent charged the applicant with poor work performance, and thereafter led evidence on the allegation of misconduct, and dismissed him for that."*

[28] In my view, the Commissioner's reasoning and analysis cannot be faulted. The commissioner's conclusion is supported by the reasoning in the award and those that appears on the record. The notice that was sent to the employee stated:

> *"You committed misconduct as follows:*

1. Poor work performance.

2. Bad attitude towards your work."

[29] The investigation which was conducted by Mr Ndlovu, the manager of the applicant which led to the employee being charged concludes as follows:

"It is my conclusion therefore that the caretaker (Thio) has failed dismally to manage Windsor Gardens. He should either be transferred or be relieved of this position…

I sincerely regret my recommendation of him to the position, he just cannot meet the desired standard."

[30] In the founding affidavit the applicant states:

"[53] The Commissioner failed to properly apply his mind to this matter in that he failed to apply the code of good practice in respect of dismissals for poor work performance in that he should have considered whether or not the Third Respondent failed to meet a performance standard and if the Third Respondent did not meet the performance standard, whether the Third Respondent was aware or reasonably should have been aware of the performance standard, and further, whether the Third Respondent was given a fair opportunity to meet the required performance standard and whether the dismissal was the appropriate sanction for not meeting the performance standard."

[31] The letter of dismissal on the other hand states that the reason for the dismissal was because the employee was found guilty of misconduct.

[32] Applying the test in the *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others 2008 (2) SA 24 (CC),* I am unable to fault the decision of the Commissioner for unreasonableness. In my view the conclusion arrived at on the facts of the case by the Commissioner is one which a reasonable decision-maker could have reached. It has to be remembered that the function of this Court seating on review is not to determine the correctness of the Commissioner's award, that is the function of the Court seating on appeal. See *Minister of Justice and Another v Bosch and Others (2006) 27 ILJ 166 (LC).*

[33] I do accept the contention that the verdict arrived by the Commissioner is inappropriate in the circumstances of this case. The Commissioner has not reasoned in his award how he arrived at that conclusion. Whilst it is for this reason that I find the award reviewable, I do not believe that it would be appropriate to set aside the award and refer the matter back to the CCMA for this reason. There is enough information in the record to assist the Court in correcting the relief granted by the Commissioner. Remitting the matter back to the CCMA would result in an unnecessary delay and the Commissioner who is to consider the matter is likely to come to the same conclusion as the one which was reached by this Court in the order it made on the 29th July 2008.

[34] It was on the basis of the above discussion that I made the following order:

"1. The arbitration award issued by the second respondent under case GAJB 30277-05 dated is reviewed and corrected as follows:

(a) Clauses 7.2 and 7.3 of the arbitration award are struck out;

(b) Clauses 7.4 and 7.5 are substituted with the following award:

"The respondent Landsec Toronto House CC is ordered to reinstate the applicant, Mr Ndimande, retrospectively to the position he held before his dismissal or alternative position. The reinstatement shall be without loss of income or any benefit."

2. The arbitration award is made an order of Court.

Molahlehi J

Date of Hearing : 29th July 2008

Date of Judgment : 29th January 2009

Appearances

For the Applicant : Clifford Levin of Clifford Levin Attorneys

For the Respondent: Wellington Magwaza (Union Official)