

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG**

CASE NO: JR 58/05

In the matter between:

CHUBB SECURITY SA (PTY) LTD t/a

CHUBB ELECTRONICS SECURITY

AND

CCMA

COMMISSIONER N MBELENGWA

SATAWU

HLAYISANE SHADRACK MOTAUNG

APPLICANT

1ST RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

4TH RESPONDENT

JUDGMENT

NYATHELA AJ

Introduction

- [1] This is an application for review in terms of section 145 of the Labour Relations Act 66 of 1995 (the LRA) of an award issued by the second respondent on 13 December 2004 under case number GA 23309-03.
- [2] In terms of the award, second respondent found that the dismissal of the fourth respondent was procedurally and substantively unfair and ordered the applicant to reinstate fourth respondent with back pay.
- [3] Applicant seeks to review and set aside the arbitration award. Applicant further seeks an order to stay the enforcement of the award pending the finalization of the review in terms of section 145(3) of the LRA.
- [4] Third respondent is opposing the review application.

The parties

- [5] The applicant is Chubb Security SA (Pty) Ltd t/a Chubb Electronic Security, a private company with limited liability duly incorporated in accordance with the company laws of the Republic of South Africa.
- [6] The first respondent is the Commission for Conciliation Mediation and Arbitration (the CCMA), a juristic person established in terms of the LRA.
- [7] The second respondent is Norman Mbelengwa, a commissioner of the first respondent. The second respondent is cited herein in his capacity as the commissioner who presided at the arbitration proceedings under case number GA 23309-03.
- [8] The third respondent is the South African Transport and Allied Workers Union (SATAWU), a registered trade union established in terms of the LRA.
- [9] The fourth respondent is Hlayisane Shadrack Motaung, a former employee of the applicant.

Point in Limine:

Answering affidavit

- [10] Applicant raised a point in limine that respondent's affidavit should be rejected since the deponent did not have personal knowledge of the facts to which she deposed to and that such affidavit had not been confirmed by fourth respondent who had personal knowledge of the facts.
- [11] It is common cause that the deponent to respondent's affidavit is a union official who was only employed by fourth respondent's trade union after the conclusion of the arbitration hearing which is the subject of this review application.
- [12] It is further common cause that fourth respondent who had knowledge of what transpired in the arbitration hearing did not confirm the correctness of the facts deposed to by the said union official.

[13] I therefore find that the deponent to the answering affidavit had no personal knowledge of the facts deposed to in the affidavit and thus I reject the said answering affidavit.

[14] In view of the ruling that the answering affidavit is rejected, I do not deem it necessary to deal with the condonation application for the late filing of the replying affidavit as the contents thereof cannot be considered in the absence of an answering affidavit.

The Facts

[15] The fourth respondent was employed by the applicant as a Reaction Officer.

[16] On 22 May 2003, fourth respondent approached his Area Manager Mr Willie Naude' in his office. Whilst in the office, Mr Naude' informed fourth respondent that he was going to reduce his monthly performance bonus as a result of applicant's late coming. According to the applicant, fourth respondent swore and shouted at Naude' and left the office.

[17] After leaving the office, fourth respondent met one Philip Robertson, a manager employed by the applicant, in the corridor and forcefully pushed him aside using his shoulder. As Robertson walked back from Naude's office, he again met fourth respondent who once more pushed him aside with his shoulder. Fourth respondent also told Robertson that he was prepared to beat him up outside the building.

[18] Robertson initiated disciplinary proceedings against fourth respondent. Fourth respondent was charged for insubordination / disrespect / insolence towards superiors, intimidation / threat of violence and rude, abusive, insolent behaviour / language.

[19] The disciplinary hearing was took place on 29 May 2003. At the disciplinary hearing, fourth respondent advised the chairperson that he was a shopsteward and that his union should be notified of the disciplinary hearing. The hearing was consequently postponed to the 05th June 2003.

- [20] On 05 June 2003 fourth respondent pleaded not guilty to the charges and thereafter his representative requested for the postponement of the case as the charges were not clear. Applicant led evidence in chief to clarify the allegations against fourth respondent. The hearing was postponed to 11 June 2003 in order to allow fourth respondent and his representative time to prepare their case.
- [21] On 11 June 2003, fourth respondent requested that the hearing be postponed due to the fact that he was suffering from stress but did not have a medical certificate at the time. The chairperson dismissed the application for postponement. Fourth respondent and his representative walked out of the hearing. The chairperson proceeded with the hearing in their absence.
- [22] Fourth respondent went to consult with a doctor and obtained a medical certificate which booked him off duty from 09 to 11 June 2003.
- [23] Fourth respondent was found guilty of the three charges and was dismissed from employment.
- [24] On 07 July 2003, fourth respondent referred a dispute to the CCMA. The dispute was conciliated on 19 August 2003 and remained unresolved. The dispute was arbitrated on 22 November 2004.
- [25] The dispute was arbitrated by second respondent who found that the dismissal of the fourth respondent was both procedurally and substantively unfair and ordered the applicant to reinstate fourth respondent with back pay.

Grounds for review

- [26] In the founding affidavit the applicant stated amongst others the following as grounds for review:

26.1 Second respondent committed misconduct in relation to his or her duties as arbitrator

26.2 Second respondent committed a gross irregularity in the conduct of the the arbitration proceedings

26.3 Second respondent exceeded his or her powers

26.4 Second respondent's award falls to be reviewed in terms of section 145 of the LRA and / or the principles of fair administrative action and/or because his award is not rationally justifiable on the evidence that was placed before him, for, *inter alia* the following reasons:

26.4.1 Second respondent unjustifiably and/ or incorrectly and or committed a gross irregularity by failing to deal with the point in limine raised by Venter at the commencement of the arbitration proceedings. Second respondent should have ascertained on what grounds Motaung alleged unfair dismissal and on that basis made a ruling on whether or not the CCMA had jurisdiction to hear the matter, before proceeding with the arbitration

26.4.2 Second respondent unjustifiably and/ or incorrectly and/ or committed a gross irregularity by failing to make a ruling that he did not have jurisdiction to hear the matter when it became apparent during the cross-examination and re-examination of Motaung that he was alleging an automatically unfair dismissal in terms of section 187(1) of the LRA

26.4.3 Second respondent unjustifiably and/ or incorrectly and/ or committed a gross irregularity in finding that Motaung had correctly referred the dispute to the CCMA in terms of section 191(1) of the LRA. Second respondent failed to take into account the fact that Motaung stated both under cross-examination and re-examination that he was dismissed for exercising his rights as a shop steward and recruiting members for SATAWU, in other words, he alleged an automatically unfair dismissal and therefore the CCMA had no jurisdiction to hear the matter. Rather, the matter should have been referred to the Labour Court.

26.4.4 Second respondent unjustifiably and/ or incorrectly and/ or committed a gross irregularity in finding that the fact that, although Motaung alleged during cross-examination and re-examination that he suspected that he was dismissed for union activities, this did not preclude the CCMA from having jurisdiction to hear the matter. A commissioner is not empowered to assume jurisdiction to hear a matter which falls outside of the CCMA's jurisdiction

Analysis

Second respondent's failure to deal with the point in limine:

- [27] It is common cause that fourth respondent alleged during the arbitration hearing that he was dismissed for participating in union activities. The said evidence appears on page 216 of the paginated bundle of documents. It is further not in dispute that applicant raised a point in limine that the first respondent lacked jurisdiction to arbitrate the dispute in view of fourth respondent's allegation that he was dismissed for participation in union activities.
- [28] According to the record of the arbitration proceedings, second respondent proceeded with the arbitration hearing without making a decision on this point in limine.
- [29] However, in his award, second respondent stated the following with regard to the point in limine *"The fact that the applicant alleged during cross-examination that he suspects that he was dismissed for union activities does not preclude the CCMA from having jurisdiction to hear the matter"*.
- [30] It is evident from the above extract from the arbitration award that second respondent erroneously held the view that first respondent had jurisdiction to arbitrate a dispute where an employee has been dismissed for participating in union activities hence he did not make any ruling on the point in limine during the arbitration hearing.

- [31] In terms of section 187 read with section 5 of the LRA, a dismissal for participating in union activities is classified as an automatically unfair dismissal.
- [32] Section 191(5)(b) of the LRA, provides that a dispute regarding an automatically unfair dismissal should be referred to the Labour Court for adjudication. Thus the first respondent lacks jurisdiction to arbitrate disputes about automatically unfair dismissals.
- [33] I therefore find that second respondent's failure to decide on the point in limine raised in the circumstances of this case constituted a gross irregularity which renders the award reviewable.
- [34] I further find that as a consequence of the erroneous view held by second respondent, the latter proceeded to exceed his powers as stipulated in the LRA by arbitrating a dispute regarding an automatically unfair dismissal.

Order

- [35] In the premise I make the following order:

34.1 The award issued by second respondent under case number GA 23309-03 dated 13 December 2004 is reviewed and set aside.

34.2 The award is substituted by the following order:

28.2.1 First respondent has no jurisdiction to arbitrate the dispute.

34.3 I make no order as to the costs

Nyathela AJ

Date of Hearing : 19 June 2009

Date of Judgment : 15 January 2010

Appearances

For the Applicant : Adv F. Venter

Instructed by: Van Gaalen Attorneys

For the Respondent: Mr S.T Mabaso