REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 898/2012

In the matter between:

THORBURN SECURITY SOLUTIONS **Applicant**

and

CCMA **First Respondent**

RALPH ALEXANDER N.O. **Second Respondent**

SATAWU OBO MZIMKULU MABOZA **Third Respondent**

Heard: **30 May 2013**
Delivered: **21 June 2013**
Summary: Review – jurisdiction of CCMA and reasonableness of award.

JUDGMENT

STEENKAMP J

Introduction

[1] The employee, Mr Mzimkulu Maboza[1], is a security guard. He was dismissed by the applicant company after he failed to report for a shift. He referred an unfair dismissal dispute to the CCMA. The commissioner[2] found that the dismissal was unfair and ordered the applicant to reinstate the employee.

[2] The applicant raises two grounds to review that award:

2.1 The CCMA did not have jurisdiction to hear the dispute as the employee alleged that the reason for his dismissal was his trade union activities; i.e. that the dismissal was automatically unfair and that, therefore, the Labour Court has jurisdiction.[3]

2.2 The commissioner committed a gross irregularity in finding that the applicant was not entitled to roster the employee to work "overtime" on account of the "emergency" that existed at Fancourt, a site where the applicant provided services.

Background facts

[3] The applicant operates in the private security industry and employs security guards at numerous sites throughout South Africa. The employee was posted as a security guard at Fancourt estate outside George. He was dismissed on 6 June 2012 for refusing to work on his off day.

[4] During May 2012 a strike took place at Fancourt. The strike had elements of violence. Fancourt required additional guarding.

[5] The applicant drew up a duty roster providing for 16 employees, including Maboza, to work on Friday 25 May 2012. It is common cause that Maboza was not scheduled to work on that day on the normal duty roster. The applicant sent the affected employees at the memo to take note of the additional scheduled shifts. Maboza did not sign it. He did not report for

[1] He is cited as the third respondent, represented by his trade union, SATAWU.

[2] The second respondent.

[3] Sections 5, 187(1) and 191(5)(b)(i) of the Labour Relations Act 66 of 1995 (the LRA).

duty on 25 May 2012. He testified that the reason he did not report for duty was because he had to go to the clinic.

[6] At a disciplinary hearing on 6 June 2012 Maboza was dismissed for "breach of contract" and "refusal to obey a reasonable instruction". He referred an unfair dismissal dispute to the CCMA.

The arbitration award

[7] The arbitrator found that the dismissal was substantively unfair. He ordered the applicant to reinstate Maboza. He had been out of work for four months at that time, but the arbitrator only ordered the applicant to pay him backpay for three months.

Evaluation / Analysis

[8] I shall deal with each of the two grounds of review in turn.

Jurisdiction

[9] The employee did not refer an automatically unfair dismissal dispute to the CCMA with reference to section 187(1) of the LRA. His trade union, SATAWU, described the facts of the dispute as follows on the LRA form 7.11:

> "Employee was unfairly dismissed for refusal to work overtime."

[10] Under "reason for dismissal" the employee and his trade union ticked "misconduct".

[11] As the Constitutional Court has pointed out in *Gcaba*[4], recently reiterated by the Labour Appeal Court in *Rand Water v Stoop*[5] and by the Supreme Court of Appeal in *SAMSA v McKenzie*[6], jurisdiction is a matter that is decided with reference to the pleadings, in other words, the applicants' stated case. Whether the applicant has a good case or not and whether the applicant can prove his claim is a different matter. That is not a jurisdictional issue.

[4] *Gcaba v Min for Safety and Security and Others* 2010 (1) BCLR 35; (2010 (1) SA 238) (CC).

[5] [2013] 2 BLLR 162 (LAC).

[6] [2010] 3 All SA 1 (SCA).

[12] The arbitrator made the following finding:

> "The [employee] argued that he believed the true reason for his dismissal was because he was the more vocal of the two newly elected shop stewards. Having considered the facts before me I found that the true reason for the dismissal was based on the [company]'s version that the applicant refused to work overtime."

[13] The issue was fully canvassed at the arbitration and the arbitrator applied his mind to it. The company did not challenge the jurisdiction of the CCMA at the time. And Maboza conceded that his fellow shop stewards were not disciplined and that he was not aware of any victimisation directed at them.

[14] The arbitrator properly applied his mind to the evidence before him. That evidence revealed that the true reason for dismissal was alleged misconduct, and that he did have jurisdiction to hear the dispute. It is a reasonable and a correct finding.

Failure to work additional shift

[15] The alleged misconduct arises from Maboza's refusal to work on 25 May 2012. The company explained its instruction as follows in its memorandum of 21 May 2012:

> "Fancourt employees are going on a strike from Wednesday 23 May for an unknown length of time. This emergency situation requires additional security at Fancourt. The following… staff are instructed to report for overtime work at 06h00 on the days indicated."

[16] The employment agreement includes the following clause:

> "HOURS OF WORK
>
> The employee will conform to the hours of work as agreed with the company but employees may be required to start earlier and/or stay beyond those hours when it is necessary in the opinion of the company or to meet the requirements of the position (refer to the company policy on overtime)."

[17] The company also claimed in the disciplinary enquiry that the strike comprised an “emergency”, although Maboza disputed that and claimed that there were other employees who were available to work.

[18] I agree with Mr *Field*, who appeared for the employee, that the company conflated the concepts of “overtime”, “emergency work” and the additional shifts that had been rostered.

[19] The concept of “overtime” is limited to a possible requirement to start a shift earlier or to stay beyond the scheduled time for a particular shift. It does not relate to a requirement to work an extra shift.

[20] Although the company referred to the definition of “emergency work” in Sectoral Determination 6 for the Private Security Sector, that is not applicable to the facts of this case. The definition read as follows:

> “Work that is required to be done without delay owing to circumstances for which the employer could not reasonably have been expected to make provision and which cannot be performed by employees during the ordinary hours of work.”

[21] That definition is found in the context of exemptions relating to employees while there are engaged in emergency work. Those exemptions deal with meal intervals, rest intervals, consecutive hours of work and a limitation on overtime. The refusal by the employee to work an additional four shift on 25 may 2012 does not relate to any of these exemptions. The reference to “emergency work” is not applicable to this dispute.

Conclusion

[22] The company has not shown that there was a rule of which the employee was aware; that it was reasonable; and that it was broken, as contemplated by the Code of Good Practice: Dismissal. The arbitrator’s finding that the dismissal was substantively unfair, is a reasonable one.

[23] There is an ongoing relationship between the parties, that is between the employer on the one hand and the employee as well as SATAWU on the other hand. A costs order is not appropriate.

Order

[24] The application is dismissed, with no order as to costs.

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Anton Steenkamp
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	Willem Jacobs attorney.
THIRD RESPONDENT:	Wayne Field of Bernadt Vukic Potash & Getz.