REPUBLIC OF SOUTH AFRICA

Not reportable

THE LABOUR COURT OF SOUTH AFRICA,

IN CAPE TOWN

JUDGMENT

Case no: C 389/2011

In the matter between:

G4S SECURE SOLUTIONS (SA) (PTY)LTD	**Applicant**
and	
COMMISSIONER ANTHONY RUGGIERO (*N.O.*)	**First Respondent**
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**Second respondent**
THANDABANTU NTLOKO	**Third respondent**

Heard: 16 April 2013
Delivered: 10 July 2014
Summary: (Review).

JUDGMENT

LAGRANGE, J

Introduction

[1] The third respondent in this matter, Mr T Ntloko('Ntloko') was dismissed on 4 November 2010 after being found guilty of misrepresenting his criminal record when he applied for employment by the applicant in 1996 and for promotion in July 2010 to the position of a controller. He was also found guilty of being in breach of the Private Security Industry Regulatory Authority Act, 56 of 2001 ('PSIRA') which disqualified him from being employed in the security sector if convicted of a criminal offence.

[2] Ntloko had criminal convictions for rape and assault with intent to cause grievous bodily harm imposed in 1981 and 1991 respectively. Ntloko had claimed that he was unaware of either of these convictions when he applied for employment and when he applied for promotion. The basis for his belief was that he had not served jail time for either of the incidence and had been punished at the time they arose. In the first case committed when he was a minor he received six lashes and in respect of the second incident paid a fine of R250. He was never advised by the authorities that he had a criminal record as a result of these events. He also claimed to have been under the impression that all criminal records acquired before 1994 were "scrapped".

[3] From the record of the arbitration proceedings, it appears that when Ntloko applied for employment with the applicant he stated that he had not been convicted of a criminal offence on his application form and did not mention his criminal record in his curriculum vitae. He also testified that he had received the lashing for the first offence in a rural community forum, and when he paid a fine in respect of the second offence did not appear in court. Further, his evidence was that if he had been aware he had a criminal record he would have disclosed this when he applied for employment in 1996.

[4] Ntloko referred to his dismissal to the CCMA, claiming that it was substantively unfair. The arbitrator accepted that Ntloko was not aware of his criminal record and therefore was not guilty of misrepresentation when

he failed to disclose it by indicating that he had no criminal record when he applied for the job. The arbitrator also found that since PSIRA only came into effect in November 2001 and, given that the provision relating to the prohibition on employment of a person with a criminal conviction only applied to someone found guilty of an offence 10 years immediately prior to the application to be registered with the regulatory authority, Ntloko was not in breach of those regulations because the date of his last conviction was August 1991, which was more than 10 years prior to the commencement date of that Act.

[5] The arbitrator also found that even though criminal records had not been centralised in 1996 it was incumbent on the applicant to verify if an employee had been truthful in their declaration about their criminal record, however onerous that task might have been.

[6] Having effectively found Ntloko not guilty of the misconduct for which he was dismissed, the arbitrator somewhat confusingly dealt with the relief on the basis that he was deciding whether dismissal would be an appropriate sanction in the circumstances, before concluding that Ntloko's dismissal was substantively unfair. The arbitrator then concluded that there was no reason not to reinstate Ntloko retrospectively to the date of his dismissal.

[7] The award was handed down on 8 March 2011 and received by the applicants on 23 March 2011. Consequently it should have filed its review application by form a 2011, but was five weeks late in doing so. On 28 March 2011, which was the date Ntloko was due to recommence employment the applicant issued a letter stating that it intended to launch a review application and that he should not tender his services until further notice. The HR manager responsible for dealing with the matter at the CCMA had referred the matter to the local manager for consideration, who in turn required head office authorisation before instituting proceedings. The HR manager resigned at the end of March and the correspondence on the matter was only uncovered late in May by the local manager responsible. The applicant's attorneys of record were instructed to launch proceedings on 6 June 2011. In consequence, the applicant sought condonation for the late filing of the review application.

[8] Similarly, Ntloko's answering affidavit was only filed on eight may 2012 some four months after the applicant filed its supplementary affidavit on 17 January 2012. Ntloko also sought condonation for this delay. The reason for the delay was principally explained in terms of the relocation of the Cape Town Justice Centre office which commenced on the date Ntloko was due to consult with the legal aid attorney assigned to this matter. Owing to the latter's workload and the office relocation the consultation, which should have taken place on 28 February 2012, only took place on 18 April 2012.

The condonation applications

[9] I believe that the delay in the filing of the review application is not explained fully, but was not excessive and in view of the prospects of success considered below, the applicant was justified at least in part in bringing the review application in respect of the arbitrator's finding that Ntloko was not guilty. Accordingly, it is appropriate to condone the applicant's lateness when considering all the factors together.

[10] In respect of Ntloko's delay in filing an answering affidavit, the delay is more extensive, but he was largely reliant on free legal services provided by the Cape Town Justice Centre which was in some organisational disarray at the time. In so far as the delay might have delayed the hearing of this matter, an appropriate adjustment can be made in dealing with the retrospectivity of the order in this matter. As Ntloko's opposition was not frivolous and the delay was largely beyond his control, and bearing in mind the prospects of success below, the late filing of his answering affidavit should also be condoned.

Grounds of review

[11] There are three principal grounds of review on which the applicant relies. First and foremost, it contends that the arbitrator could not have reasonably concluded that Ntloko was unaware he had been convicted of criminal offences and therefore did not knowingly misrepresent the status of his criminal record. Secondly, the applicant contends that the arbitrator acted *ultra vires* in ordering Ntloko's reinstatement because the applicant

had at all material times indicated that he sought compensation and not reinstatement and only mentioned that possibility in closing argument. Thirdly, the applicant contended that the arbitrator misconstrued the nature of the enquiry by failing to appreciate that it was fair and reasonable for it to require an applicant for employment to disclose a criminal conviction, but instead placed the onus of establishing this fact on the employer. A fourth ground of review, related to the question of relief is that in any event the arbitrator failed to consider the fact that:

11.1 in his disciplinary enquiry Ntloko had presented a written statement in which he had recorded he did not believe he had a criminal record because he had not been 'in jail', but stated that he had appeared in court in respect of the second conviction for assault, and;

11.2 following the applicant's dismissal the applicant was obliged to apply for his de-registration as a security service provider in terms of s 23(1)(f) of the Private Security Industry Regulation Act , 2001 and that in order for him to re-register he would have to have shown he was 'a fit and proper person to render as security service' in terms of section 23.

[12] It would appear that although the arbitrator's attention was drawn to the statement made by the applicant at the time of the preliminary investigation by the employer in October 2010, the arbitrator failed to have regard to the fact that in that statement the applicant admits that he went to court in respect of the assault charge and that his brother obtained a lawyer to defend him and that a fine was imposed on him. This contrasts strongly with his version at the arbitration that he never appeared in court in respect of the second conviction. In respect of both incidents for which he was charged and convicted, a sentence was imposed. I agree with the applicant that it is difficult to understand how the arbitrator could reasonably have concluded that Ntloko was unaware of the status of his criminal record and could have denied having any criminal conviction. Consequently, I must agree that the arbitrator's finding that Ntloko did not knowingly failed to disclose his criminal conviction when he was employed

and when he applied for promotion is one that cannot be reasonably justified on the evidence before him, and must be set aside.

[13] In the circumstances, the arbitrator's finding must be replaced with a finding that the applicant was indeed guilty of not disclosing his criminal conviction on both occasions. This naturally requires the court to reconsider the appropriate sanction and relief if any flowing from the substitution of the finding on Ntloko's guilt.

[14] It is clear from section 23 (1) (d) of the PSIRA Regulation Act, that if the applicant had been convicted of either of the offences for which he was found guilty after November 1991 he would not have qualified for registration as a security service provider, and could not have been lawfully employed as such by the applicant. The arbitrator was correct in finding that Ntloko had not acted in breach of that regulation because his last conviction predated the 10 year period prior to the commencement of the PSIRA.

[15] In this regard, it is important to note that at the arbitration hearing the applicant's witness had confirmed that Ntloko was a good employee with a clean record and that she had never had any problems with his performance hence his application for promotion. The main difficulty expressed by the applicant' s witness at the arbitration was that if they retained Ntloko in employment the applicant might face the prospect of deregistration and a fine effort was discovered that it was employing a security officer with a criminal record. The witness is further recorded in the arbitrator's notes (which constitute the only record of the oral evidence) as having testified that he was sure that if Ntloko-had his criminal record expunged the applicant would reconsider employing him.

[16] Thus, on the available evidence trust issues arising from the misrepresentation do not appear to have been the applicant's principal concern despite the fact that Ntloko was guilty of dishonesty. On the evidence of its own witness it was the possible breach of PSIRA that was the primary consideration. It seems reasonable to conclude in the circumstances, and that the applicant probably would not have dismissed Ntloko if it had not believed it would be employing him contrary to the

provisions of PSIRA, but instead would have imposed a lesser sanction. Had the applicant's witness testified that in the light of the misrepresentation, the applicant would have dismissed Ntloko irrespective of its belief it would be in breach of PSIRA on account of its inability to trust him anymore, a different conclusion might have been warranted, but such a conclusion cannot be justified on the applicant's own evidence at the arbitration.

[17] In view of this evidence, it seems that a more appropriate sanction would have been a final written warning for dishonesty, even if the arbitrator's conclusion that the dismissal was substantively fair should stand. Accordingly, the relief awarded by the arbitrator in consequence of the unfair dismissal must be substituted, because the basis for finding the dismissal unfair rests on a different footing from that of the arbitrator who found it unfair based on a finding of not guilty.

Order

[18] In view of the analysis above,

18.1 The applicant's late filing of the review application and the third respondent's late filing of his answering affidavit are condoned.

18.2 The first respondent's finding that the third respondentwas not guilty of misrepresenting his criminal record when applying for employment in 1996 and when applying for promotion in 2010 is reviewed and set aside and substituted with a finding that he was guilty of such misconduct.

18.3 The relief awarded by the first respondent in paragraph 35 of his award is substituted with the following (using the citation of the parties as they appear in the award):

18.3.1 The respondent, G4S Secure Solutions SA (Pty) Ltd is ordered to reinstate the applicant, Thandabantu Ntloko with retrospective effect to 1 August 2011 on the same terms and conditions applicable prior to his dismissal and to pay the applicant his arrear remuneration calculated at the rate of remuneration he received at the time of his dismissal, for the

period 1 August 2011 to the date of his return to work within 14 days of his return to work in terms of this order.

18.3.2 The applicant must report for work within 14 days of this judgment.

18.4 No order is made as to costs.

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R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: W Hutchinson instructed by Moodie & Robertson Attorneys

FIRST RESPONDENT: N Masizana of the Legal Aid Board