

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case No: C143/2018

In the matter between:

THANDISIZWE TERIUS SHUMANE**Applicant**

And

CCMA**First Respondent****COMMISSIONER S MOHAMED****Second Respondent****BCS SECURITY SERVICES (PTY) LTD****Third Respondent****Date heard: 7 May 2019****Delivered: 2 August 2019**

JUDGMENT

RABKIN-NAICKER, J

[1] This is an unopposed application to review an arbitration award under case number WECT 4852&486/18. The second respondent (the Commissioner)

found that the suspension of the applicant on full pay did not constitute an unfair labour practice and that his dismissal was substantively and procedurally unfair.

- [2] The applicant was employed by the third respondent (the Company) in May 2017 and was suspended and then dismissed in November 2017. He has prepared his review unassisted. From his founding and supplementary affidavit it is difficult to discern review grounds except that the applicant believed that the Commissioner was 'against him' and did not deal with his evidence properly. In an unopposed case like this it is important that the Court carefully consider all the evidence before the Commissioner lest the matter is simply dismissed on the basis that an applicant is unable to express his grounds of review in the ways that a legal representative may do.
- [3] The issue to be decided in the arbitration proceedings was recorded as follows in the Award:
- "The applicant referred an Unfair Labour Practice dispute as well as an Unfair dismissal dispute. I am required to determine whether applicant's dismissal on 17 November 2017 was unfair as claimed by the applicant. I am also required to determine whether the applicant's dismissal on 17 November 2017 was substantively and procedurally unfair. The applicant was dismissed for: Abusive, derogatory and insulting language which refers to the uttering of any words, written expression of showing of hatred, ridicule or contempt for any person; Allegedly being under the influence of alcohol as well as Refusal, failure to carry out a reasonable or lawful instruction. The applicant is claiming that his dismissal was substantively and procedurally unfair."
- [4] The evidence given by the Operations Manager of the employer at arbitration, Mr de Vries was to the effect that the applicant was dismissed for the above charges. However, the record of the disciplinary hearing held on the 17 November 2017, which was before the Commissioner, and comprising of a standard form filled in by the chairperson of the hearing, recorded that the reason for the applicant's dismissal was that he "laid a false claim to CCMA that he was dismissed without a hearing whilst investigation is still ongoing." This one can assume related to the premature referral of a dismissal dispute by the

applicant who claimed he regarded himself as being dismissed on 9 November 2017, when he was told to go home and that his shifts would be cancelled while an investigation was underway.

- [5] The Advice of Dismissal form filled in by the Chairperson, Lovell Smith, also states that the applicant was found guilty of the following two charges:

“Submitting false charges at the CCMA of Dismissal pending a Hearing
Abusive, derogatory or insulting language.”

- [6] The bundle before the arbitrator also contains statements by the employer’s witnesses at the disciplinary, as to the events on the night of 8 November 2017. Included in these is that the SAPS when called in to test the applicant confirmed that he was not intoxicated. The Award records that the applicant said in his testimony that he was subjected to a breathalyzer test by the police and that therefore the charge of allegedly being under the influence of alcohol was omitted at the disciplinary hearing.

- [7] From the above, it is evident that the Commissioner made a mistake in stating that the applicant was dismissed for inter alia being allegedly under the influence of alcohol. Despite there being no legal representatives at the arbitration, the Commissioner also did not ask the witnesses about the reasons for the dismissal as reflected in the Disciplinary Report and Advice of Dismissal. She did however question the Chairman of the Hearing about the disciplinary report regarding other issues.

- [8] These mistakes by the Commissioner were material. However, this Court must take its enquiry a step further and ask whether these irregularities led to an Award that a reasonable decision-maker could not make¹. The evidence on the charge of abusive, derogatory or insulting language, for which the applicant was also dismissed, requires to be considered.

- [9] The Commissioner recorded the applicant’s case at arbitration as follows:

“9. Thandisiwe Shumane, the applicant testified that on 08 November he was at the site. Another security official arrived at the site in his vehicle and hooted. He

¹ See *Herholdt v Nedbank Ltd* (Congress of SA Trade Unions as Amicus Curiae) 2013 (6) SA 224 (SCA); (2013) 34 ILJ 2795 (SCA) et al

approached the gentleman and asked him what the problem is. This person told him to be quick and open the gate. He, the applicant told the person that he can wait until he opens the gate then he can leave and if he cannot wait till he opens the gate then he can go if he has a problem. An argument then ensued between him and the person. The person left and he, the applicant reported the incident. Franklin, the Control Room supervisor told him that he should not come to work with an attitude. The other controller tried to intervene between him and Franklin on the radio. The supervisor arrived with the breathalyzer test and Franklin told him to take the test. According to the applicant he asked the Franklin if the breathalyzer test was for him and what the procedures were regarding breathalyzer tests.

10. He refused to do the breathalyzer test because the respondent was infringing on his rights. Another guard was sent to the site to relieve him. He refused to leave the site because he wanted to prove to the respondent that he was not drunk and that he was able to work. Franklin called the police who arrived at the site. The police informed him he was disrupting the workplace. The police officer conducted a breathalyzer test and left him at the site. According to the applicant he did nothing wrong and if he did, the police would have taken him away from the site. The following day he received a message to report to the office. When he reported to the office, he was informed by the manger that he does not know anything about the message and that he should go home. The applicant further stated that he was supposed to report for duty but was prevented from doing so. He reported the matter to the Commission and when he took the documents to the respondent, he was issued with a notice to attend a hearing.”

[10] It is apparent from the applicant’s own evidence that he did argue with the person who tried to enter the site and hooted. He also confirmed that he knew the person who came every day and was working at the power station. The transcribed record reflects the following:

“PRESIDING OFFICER: Then why did you not allow him in that specific day?

MR SHUMANE: Because he was fighting me he said if I don't want to open this gate because I was busy opening the gate for him because he had an attitude – I did open the gate and I said if you don't want come in you may go.”

- [11] Mr Franklin did not give evidence at the arbitration. However, the applicant on his own version stated he was argumentative with Franklin and the person who came to the site; that he refused to let the company take a breathalyzer test and to leave the site when instructed to. The Commissioner records that at the disciplinary enquiry: “.the applicant acknowledged that he was cross at everybody and offered to apologize. This leads me to believe that the applicant was aware that his behaviour was unacceptable and that he was in fact guilty of misconduct.”
- [12] The Commissioner further took into consideration the evidence given by the employer that all the guards posted on the site were aware that if a government official comes to the site then they should be allowed access as the site is a national key point. In addition, she accepted that the breathalyzer procedure forms part of the company's code of conduct and that the control room supervisor, Franklin, is part of management and the applicant had to follow instructions given to him.
- [13] Given the gross insubordination of the applicant, the Commissioner's finding that dismissal was a fair sanction in the circumstances, cannot be described as one a reasonable decision-maker could not make. In addition, her finding on the issue of the applicant's suspension is not susceptible to review, given that he was paid during that period. In all the circumstances, I make the following order:

Order

The review application is dismissed.

H. Rabkin-Naicker

Judge of the Labour Court

Appearances:

Applicant: In person

LABOUR COURT