IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

CASE NUMBER: JR1275/01

In the matter between:

FIDELITY SPRINGBOK SECURIT SERVICES (Pty) Ltd	**Applicant**
and	
THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**First Respondent**
CRONJE NO	**Second Respondent**
WEBISI TELFORD	**Third Respondent**

JUDGMENT

CELE AJ

INTRODUCTION

[1] This is an application in terms of section 145 of the Labour Relations Act 66 of 1995 ("the Act") to review and set aside an arbitration award dated 14 June 2001 issued by the second respondent while he was acting under the auspices of the first respondent. The application is opposed by the third respondent.

Background Facts

[2] The third respondent commenced employment with the applicant on 8 October 1992 as a security officer. He then became a member of a trade union, SATAWU and later on, he became a shop steward of SATAWU.

[3] On 28 December 2000 there was a national security protected strike. A number of applicants' employees gathered at the Bloemfontein branch offices of the applicant. The third respondent was among the strikers that morning. There was a knock on the door of applicant's offices and one Mr L Tiller, the applicant's Branch Manager in Bloemfontein; went to answer it by opening the Wooden door. He left the security gate closed. The third respondent stood at the opened door and he asked to rather speak to Mr Pretorius, an Operations Manager. Whether the third respondent did or did not speak to Mr Pretorius is part of disputed facts. Mr Tiller then closed the door without allowing the third respondent in.

[4] Members of the SAPS then arrived at the offices of the applicant. They spoke to Mr Tiller and the third respondent. The third respondent and his colleague, as shop steward, Mr Motumi were allowed to enter the office. They made a telephone call to the applicant's head office relating to salaries. The third respondent spoke to a Mr Barry Woan. A document was then sent by telefax and a copy of it was given to the third respondent and then the employees group and the police left the building. The police addressed the group outside and then the group and the police left

the scene.

[5] As a result of the incident of 28 December 2000, the third respondent was charged by the applicant with an act of misconduct. The charge read:

> "On 28 December 2000, whilst participating in a national strike, you picketed at Bloemfontein branch office, in the process enticing fellow strikes also to picket with common intent, you threatened management to hold them hostage at the branch office until the following morning, you further had common intent to cause damage to company property and in the process you smashed against the company premises' door with a 500ml cold drink bottle, causing damage to said door."

[6] The internal disciplinary hearing proceeded on 22 January 2001. The third respondent attendant the hearing with two representatives, a Mr Mattai and a Mr Mabaso. The third respondent however, refused to participate in the proceedings. He neither made any statement nor answered any questions.

[7] At the end of the hearing, the third respondent was found to have committed the act of misconduct with which he had been charged and he was dismissed on that day, 22 January 2001. The third respondent was aggrieved by the dismissal. A dismissal dispute then arose between the third respondent and the applicant. On the following day, the third respondent referred the dismissal dispute for conciliation, to the first respondent. Conciliation failed to resolve the dispute. A certificate of outcome was issued by the first respondent on 23 February 2001. It was endorsed that the dispute was concerning an unfair dismissal. On that very day, the third respondent referred the dispute for arbitration.

[8] The arbitration proceedings were held on 2 May 2001 and on 21 May 2001. The second respondent finally found that the dismissal

of the third respondent was substantively unfair. He then ordered the applicant to reinstate the third respondent with retrospective effect to date of dismissal and on terms no less favourable than were applicable at the time of dismissal. It is this ruling which the applicant now seeks to have reviewed and set aside.

Arbitration proceedings

[9] Mr S.T. Matlou of SATAWU represented the third respondent while Ms Y.C. Taylor, a Labour Relations office appeared for the applicant. Dismissal of the third respondent was not in issue and so the applicant called its two witnesses first. They were Mr Tiller and Mr Pretorius.

[10] The evidence of both Mr Tiller and Mr Pretorius was that when Mr Tiller opened the door after the initial knock, the third respondent asked to speak to Mr Pretorius. Mr Tiller called Mr Pretorius who came and had a discussion with the third respondent. The third respondent informed them that employees gathered at the offices had come out of concern as they had not received their salaries which were normally paid to them on the 25th of every month. They had also come there to get their salary slips. It was conceded by the applicant that the third respondent had telephoned the office and had alerted them that employees would come there out of concern for the two issues, namely their no- payment of salaries and for their salary slips. The evidence of the applicant was that the discussion between Mr Pretorius and the third respondent did not help to resolve the issues. Mr Tiller then closed the door with the third respondent not allowed in. Messrs Tiller and Pretorius said

that as the door was closed, they had seen the third respondent being in possession of a 500ml mineral glass bottle. They also added that before the door was closed, the third respondent had threatened them by saying that the employees group would sleep at the office and would not go home. Applicant's view was that once the door was closed there were loud bangs on the front door, on the windows on the door next to the garage and on the steel roller – up door which had been kept closed. Mr Tiller said that he did see the third respondent knocking at the door with the bottle. Mr Pretorius said that he did not witness such as the door was then closed.

[11] It was applicant's evidence that the banging at the offices caused the staff members who were inside to fear for their lives. The further evidence was that the front door was damaged and had bottle marks and there was a crack on the door which was close to the garage. It was conceded by Mr Tiller that damage on the front door could be erased by means of sand – paper or a machine but that the other wooded door would have had to be replaced.

[12] It was further conceded that the applicant did not file any report to the police about the events which ensued at the office. In explaining why a charge was not laid with police, Mr Tiller said that they just wanted the police to resolve the matter, which was what the police had said they had come for.

[13] The applicant's further evidence was that the third respondent, as a shop steward and leader, did not intervene when there was banging at the offices. That in brief was applicant's case.

[14] The third respondent's version was that when he arrived at the office door and knocked, he did not have a mineral bottle as alleged by the applicant. He was met by Mr Tiller whom he did not know and asked to speak to Mr Pretorius but was told that he was busy and Mr Tiller asked how he could be of help. The third

respondent said he told him that the employees were there for their earnings and their pay slips. He said that Mr Tiller told him that their money had been deposited into the bank whereupon the third respondent produced a bank statement to show that no payments had been made. He said that he asked to be allowed into the office so that he could speak either to Mr Vaal Baartman or Mr Banny Woan at head office. He said that Mr Tiller would not allow him into the building as they were on a strike. He said that he told Mr Tiller that in 1998, when workers were on a strike they came to the offices on a pay day and were paid. He said that Mr Tiller still refused him entry and instead closed the door and walked away.

[15] The third respondent said that he continued to knock at the door and then saw police arriving. He said that they questioned him and then knocked at the door which was opened by Mr Tiller. He said that the police questioned Mr Tiller and finally convinced him to let him and an other shop steward in. Once they got inside, with the police, he said that he spoke to Mr Woan and reported to him that the employees had not received their pay. He said that Mr Woan who sounded surprised by the report, undertook to investigate the matter and to telephone them back. After a while a telephone call came through and the third respondent said he spoke to Mr Woan who promised to sort everything and, as agreed to between the parties, Mr Woan sent a document by telefax to confirm his undertaking. The third respondent said that he gave one copy of that document to the police, one to Mr Tiller and kept one for himself. He said that the employees' group and the police then left

the offices but the police told them not to return to the offices in the event payments were not received by employees as promised but that he was to telephone them instead. When indeed no payments were received as promised, he said that he telephoned the police and that helped to resolve the problem.

[16] The third respondent said that the strike went on until 3 January 2001 when it was decided that it was to end. He said that on 4 January 2001, he communicated with management and reported that employees on the night shift would start to work. He said that management informed him that not all employees were to report back for duty. He said that he was told to come to the office to collect some documents and when he did, he found that those were letters of suspension of some of the employees, including him. He said that up to the day he attended the disciplinary hearing the applicant company had not informed his union that he was suspended and charged with misconduct.

[17] The evidence of the third respondent was further that he raised the issue of the union not having been informed of the charges against him, as a shop steward. The chairperson of the disciplinary hearing allowed that to be investigated and, the third respondent said that when an instruction came from head office of the applicant for the chairperson to proceed with the hearing, the chairperson took the position that he would not preside in an enquiry where prescribed procedures were not followed and he took his belongings and left. He said that he also left with his companions.

[18] The third respondent said that he attended the next hearing after being duly warned for it but decided not to take part in it as proper procedures had not been followed by the applicant even after the

union had raised the issue with them. He said that at the end of the hearing he was found to have committed the act of misconduct with which he was charged and was dismissed. He was told of his rights to appeal and he said he lodged documents for the appeal but that the applicant never constituted the internal disciplinary appeal hearing. He then referred the dismissal dispute to the CCMA for conciliation but he said that the applicant did not attend that hearing.

[19] The third respondent then called Mr Moleka and Mr Malangwana. Both said that the third respondent did not have a bottle while he stood at the office door and they said that he did not speak to Mr Pretorius while he was standing outside the office door. They both denied that there were any markings left on the front office door as a result of the knocking or banging on it. They said that he was knocking with his hand. Both said that the third respondent did not threaten management. After all the evidence was led, the second respondent took the parties for an inspection *in loco* – to observe the condition of the office door. The proceedings were then adjourned for parties to hand in their written arguments. That was basically the evidence of the third respondent.

The arbitration award

[20] The second respondent found on the probabilities of the case that the third respondent had a mineral bottle as he was at the office door. He said that as a result of the inspection *in loco*, he had

observed various markings on the front door indicating half circles which might correspond to the bottom of a bottle being used on the door. He said that there was no evidence which suggested to him that there either were or were no markings on that door before the incident in question. He said that he could therefore not find on a balance of probabilities that the third respondent indeed used the bottle when he knocked against the door. He said that, even if he accepted that the third respondent used the bottle, the damage to the door was of minimal nature. He went on to examine whether the only reasonable option was a dismissal, if it was to be accepted that the third respondent used the bottle on the door. He found guidance on the words used in the charge sheet which he said indicated some form of evidence. He found on the balance of probabilities that the third respondent did not, in a violent way, knock or "smash" against the said door. He found that dismissal was not justifiable.

[21] Regarding the intent to threaten management, to hold them hostage, he found that at no point was any reference made that employees would sleep inside the building or that they would hold the management hostage inside the building until they received their payment.

[22] He found that, on the evidence, there were indeed other employees who committed acts of banging against windows and kicking against doors. He said that on the evidence there was no common intent made by the third respondent to associate himself with such conduct. The only intent which he said emanated from all the evidence, was of collecting money and payslips. He said that there was no evidence which could justify the employer to dismiss the

third respondent for his misconduct during the strike action or for the employer's operational requirements.

[23] He found that the applicant had complied with the procedures regarding the holding of a disciplinary enquiry as the union, SATAWU, was subsequent to the suspension of the third respondent, informed of it and he found that the third respondent had ample time to prepare for the hearing.

[24] He then found that the dismissal of the third respondent was substantively unfair and he ordered the applicant to reinstate him with retrospective effect from the date of dismissal without any loss of benefits. The applicant felt aggrieved by this finding and has embarked on the application to have the award reviewed and set aside.

Grounds for review

[25] Two grounds for review appear to have been relied upon by the applicant namely:

(1) Gross irregularity – by failing to properly determine the evidence before him, and

(2) Unjustifiability and irrationality of the decision of the second respondent.

Analysis

[26] The review application is premised on the provisions of section 145 of the Act which reads:

"(1) Any party to a *dispute* who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award-

(a) within six weeks of the date that the award was served on the applicant, unless the alleged defect involves the commission of an offence referred to in part 1 to 4, or section 17, 20 or 21(in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004; or

(b) if the alleged defect involves an offence referred to in paragraph (a) within six weeks of the date that the applicant discovers such offence.

(2) A defect referred to in section (1), means –

(a) that the commissioner –

(i) committed misconduct in relation to the ,duties of the commissioner as an arbitrator;

(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or

(iii) exceeded the commissioner's powers; or

(b) that an award has been improperly obtained".

[27[The applicant has also placed reliance for their application *inter alia* on **Shoprite Checkers (Pty) Ltd v Ramdaw NO & others (2001) 22 ILJ 1603 (LAC).** On page 1631 at para 82, Zondo JP had this to say-

"In considering whether or not the first respondent's award falls to be set aside on the ground that it is not justifiable in relation to the reasons given for it, I consider that one must have regard to the material that was properly available to the first respondent, the decision he took and the reasons that he gave for such decision. As one does this, one must bear in mind what Chaskalson P said in the Pharmaceutical Manufacturer's case, namely that a decision that is objectively irrational is likely to be made only rarely. Of course, I am saying this insofar as it seems that there is much commonality between justifiability and rationality. One must also bear in mind the

> importance of maintaining the distinction between appeals and reviews. It must also be borne in mind that the Act contemplates that disputes that it requires to be referred to arbitration are meant to be put to an end by way of arbitration and that the dispute resolution dispensation of the Act- which is meant to be expeditious – would collapse if every arbitration award could be taken on review and set aside."

[28] Nicholson JA expressed himself on how he understood "rational", in **Crown Chicken (Pty) Ltd t/a Rocklands Poultry v Kapp & others (2002) 23 ILJ 863 (LAC**) at 868, para 19 and said-

> "By rational I understand that the award of an arbitrator must not be arbitrary and must have been arrived at by a reasoning process as opposed to conjuncture, fantasy, guesswork or hallucination. Put differently the arbitrator must have applied his mind seriously to the issues at hand and reasoned his way to the conclusion. Such conclusion must be justifiable as to the reasons given in the sense that it is defensible, not necessarily in every respect, but as regards the important logical steps on the road to his order".

[29] The applicant submitted that the second respondent completely ignored the evidence of the nature of the strike action when making his determination. It is said that in particular, the clear and undisputed evidence before the second respondent was that the strike, despite being protected, was often violent and extremely destructive. Applicant said further in fact, the nature of the particular strike in this instance should have served as a factor against the third respondent, and not a factor in his favour. It is submitted that the second respondent, in failing to make such a

determination, committed a gross irregularity.

[30] The attack waged against the second respondent on the nature and proposition of the strike action is either misguided or an attempt at endeavouring to twist the very clear evidence presented at arbitration. The second respondent properly examined the behaviour of the third respondent while he stood and knocked at the door. He dealt with the evidence on whether the third respondent had a mineral bottle and if so, examined the violence which might have been perpetrated by the third respondent and his companions. He visited the scene, in an inspection *in loco* and found that only minimal damage was caused to the front door. This by the way was the evidence of the applicant. Even when considering that the second door, near the garage, sustained a crack, any suggestion that the strike was often violent and extremely destructive is fantasy, guesswork and baseless. In my view, the second respondent applied his mind seriously to the issue at hand and reasoned his way to the conclusion.

[31] The second respondent, having considered the evidential material properly available before him and the probabilities of the case, concluded that the evidence that the front door was damaged on the day of the incident in question, was lacking. Again, he seriously applied his mind to the issues at hand. Any disagreement with the conclusion which the second respondent arrived at, can only be justifiable in appeal and not review proceedings.

[32] In as much as the second respondent found that the third respondent lied in denying being in possession of the bottle, it did not follow necessary that the only plausible inference to draw was that the third respondent used the bottle to knock at the door with it. The second respondent again dealt with such evidence by reasoning his way to the conclusion he reached. That I may not agree with the conclusion he reached, does not entitle me, in review proceedings to review and set aside the award, only on that basis.

[33] It is interesting to note that the applicant has criticised the second respondent for failing to find that the strike was often violent and extremely destructive but is able to state that it does not matter what the damage to the door was. The applicant went on to say that the third respondent acted in an aggressive and hostile manner when refused access to the premises. In my view, the submissions by the applicant in this respect, have no factual basis. It is Mr Tiller who decided to close the door on the face of the third respondent. In so doing, he closed a chance for himself and his colleague to see if the third respondent did inspire the other employees to act unlawfully. What was then left was for the applicant to conjecture on what was going on behind the closed door. The second respondent was wide awake to this and he applied his mind appropriately to the issues at hand.

[34] The brief submissions made on behalf of the third respondent were that the second respondent applied his mind to the evidence before

him. In relation to the damage to property, it was said that the second respondent chose the direct evidence of the third respondent and his witnesses against the conjuncture of the applicant's witnesses.

[35] In relation to the charge of threatening management, the evidence of Mr Tiller is clear to that of Mr Pretorius. It is to the effect that the third respondent said that him and other employees would sleep at those premises and would not go. Against the background that they had come for their salaries which were already overdue and their pay slips, and considering the manner in which they all arrived at the offices, without dancing or singing, considering how they knocked and how entry was initially refused to the shop stewards, the words used were indeed no threat. They were an indication of how determined they were to pursue the issue at hand. The words were clearly not that management would be kept hostage in the offices. When Mr Tiller was invited to elaborate on the threat he said on page 10 of the transcript-

> "Before I closed the door, Mr Nebisi (third respondent) said that he will sleep at the office, he won't go home. The entire watch has no problem".

[36] Mr Tiller did not tender any other words allegedly said by the third respondent in threatening to keep management hostage. The second respondent consequently reasoned properly in concluding that there was no evidence of a threat to take any people hostage.

[37] There being no evidence of the third respondent having behaved in

an unacceptable manner, what Kroon JA said in **County Fair foods (Pty) Ltd v CCMA and others (1999) 20 ILJ 1701 (LAC)** in relation to the standard of conduct an employer may set for its employees, as suggested by the applicant, has no application in this case.

Order:

1. The application is dismissed with costs.

CELE AJ

Date of hearing : 24 November 2005
Date of Judgment: 07 March 2006

Appearances

For the Applicant : Mr SNYMAN
Instructed by : SNYMAN VAN DER HEEVER HEYNS
For the Respondent: CHEADLE THOMPSON & HAYSOM
Instructed by : ADV CORR