IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN

CASE NO: JR965.08

In the matter between:

NPCC CLEANING CONTRACTORS	Applicant
and	
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION, BLOEMFONTEIN	First Respondent
COMMISSIONER MPE NGCOSANE N.O.	Second Respondent
HOTELICCA obo M C NTSALLA	Third Respondent

JUDGMENT

TIP AJ:

[1] This is an application which came before me on an unopposed basis to review and set aside an award made by the second respondent ("the Commissioner") dated 19 March 2008. The award dealt with the dismissal of the third respondent employee ("Ms Ntsalla") who had been employed as a cleaner and was dismissed for unauthorised absenteeism and for disregarding a lawful and reasonable instruction, namely that she was not to depart on leave, pending further processing of her application.

[2] After the dismissal, Ms Ntsalla lodged an appeal, which was not concluded. She then referred a dispute to the first respondent, being the CCMA

Bloemfontein. The Commissioner held that the dismissal was substantively unfair and ordered the employee's reinstatement together with compensation of R4,996--.

[3] The applicant provides cleaning services and has a number of long term contracts with banks to provide such services. One of the banks is First National Bank, which has strict requirements in respect of the checking and approval of cleaning personnel. There are obvious security reasons for this. This entails that all the applicant's employees undergo thorough security checks including fingerprint vetting with any previous convictions being investigated. Checks of this nature take some time and it is for that reason that the applicant requires as a general rule that applications for leave must be made a month in advance in order that replacement employees for the leave period can be checked in the same way. Evidence outlining this background was placed before the Commissioner who, as set out below, did not accept that this process had been communicated to Ms Ntsalla.

[4] Mr Coetzee is the applicant's area manager. He gave evidence that he and the national manager, Mr Prinsloo, had on 25 October 2007 gone to the bank branch where Ms Ntsalla was working for a meeting. Ms Ntsalla then advised them that she wished to take leave from the next day, but was told that she hadn't applied for leave in time and that she couldn't go as from the next day. Instead, they said to her that they'd come back on Tuesday 30 October and see what could be done. Ms Ntsalla was instructed to bring with her on the Tuesday a replacement worker so that police clearance could be sought on an urgent basis. However, when the two managers went to the bank on that Tuesday the applicant had already gone on leave and a casual worker, who had undergone no clearance, was found working in her place. Ms Ntsalla had gone away on 26 October and returned to work on 5 November 2010. Enquiries showed that the casual worker in question was a second level replacement, in

the sense that Ms Ntsalla had arranged for a substitute who had in turn requested another casual to do the work. The applicant was able to ameliorate the security position by obtaining urgent police clearance for the casual worker and by satisfying the bank that this had been done.

[5] According to Mr Coetzee, Ms Ntsalla was well aware of the procedures. In particular, she was well aware of the importance of police clearance. Indeed, during the meeting with Ms Ntsalla at the bank on 25 October, one of the bank managers ("Lucky") had joined them and had also underlined this aspect. Ms Ntsalla had been reminded that if she went on leave without authorisation she would be disciplined and could lose her job.

[6] In her evidence, Ms Ntsalla said that she had obtained approval for her leave from Mr Coetzee five days before she went away. This was denied. Moreover, this had not been put to Mr Coetzee during cross-examination and was objected to when tendered in evidence. That difficulty aside, it is in my view inherently improbable that Ms Ntsalla would have approached her managers about leave on 25 October 2010 if that leave had already been approved.

[7] Ms Ntsalla testified also that a copy of the ID document of the replacement casual worker had been given to Mr Coetzee. This too had not put. It was denied and should not have been entertained as admissible. In further testimony, Ms Ntsalla said that she had explained that she needed the leave because her child was ill. This, similarly, had not been put and was denied. The applicant added that, if Ms Ntsalla had done so, the company's family responsibility leave policy would have been applied. There was also evidence from Mr Loudon, whose involvement is dealt with more fully below, that Ms Ntsalla had testified at the disciplinary enquiry that she had made no mention of her child being ill because the company had never asked about that.

[8] Significantly, Ms Ntsalla confirmed that she knew that banks were very strict about who was employed there for cleaning work. She also confirmed that Mr Coetzee had told her that she must arrange for a replacement to come in on Tuesday 30 October. At its lowest, this evidence provides corroboration for the applicant's version that she had been clearly told that she was not to go on leave with effect from Friday 26 October and that the position would be taken further on the following Tuesday.

[9] The record shows that the Commissioner was concerned from time to time to offer prompts to Ms Ntsalla, notwithstanding that she was represented by a union official. The Commissioner was also not content to apply the ordinary rules regarding testimony that had not been put to the company's witness. Instead, the Commissioner insisted that Mr Coetzee should be recalled after Ms Ntsalla had completed her evidence. This was done and Mr Coetzee then confirmed his denial of the contested portions of Ms Ntsalla's evidence, aspects of which I have outlined above. The record shows that the Commissioner raised no further queries about this with Mr Coetzee. If anything, it appeared that he accepted this clarificatory testimony.

[10] Mr Coetzee was not the only company witness. Its first witness was Mr Loudon, who has played a multi-faceted role in this matter. He is an official of an employer's organisation of which the applicant is a member. In that capacity, he was brought in to chair the initial disciplinary enquiry and, hence, it is he who found Ms Ntsalla guilty of the charges against her and recommended that she be dismissed. Then, in the arbitration proceedings, Mr Loudon appeared for the applicant. He gave an opening statement. He gave evidence. He led the evidence of Mr Coetzee. He conducted the cross-examination of Ms Ntsalla. He presented the closing argument.

[11] There was at no stage any objection to the performance by him of these

various functions. Notwithstanding that, it is patently most undesirable that this approach should have been adopted. It is essential that the chairperson of a disciplinary process should not only be independent but that he should also be seen to be independent. It is his role to weigh up and decide rival contentions as presented by the employer and by the employee and do so impartially. That need for independence does not come to an end once the enquiry has been concluded and demonstrations of partiality after the event may well taint the enquiry *per se*. To appear for the employer in a subsequent process, as has happened in this instance, can do nothing to promote a sense of confidence that the requisite independence was present.

[12] However, the core evidence in this case does not in any material way depend on the position of Mr Loudon. The direct account of events does not come from him, but from Mr Coetzee and Ms Ntsalla. Mr Loudon's testimony in the arbitration was confined to an account of the proceedings in the initial enquiry. The Commissioner chose to disregard all his evidence, but on the basis that it was hearsay. That was an incorrect approach and shows a lack of appreciation of the nature and evaluation of evidence. However, nothing much turns on this aspect of the matter.

[13] Of more moment is the manner in which the Commissioner dealt with the direct evidence, the key elements of which are as follows:

[13.1] In the first place, it was accepted by him that there was a rule governing applications for leave, as described by the applicant. This correctly reflected the undisputed evidence of Mr Coetzee and the documentary material.

[13.2] The Commissioner then addressed the question whether Ms Ntsalla was aware of the rule and concluded that she was not. In doing so, he apparently had no regard to the clear statement of this requirement in the applicant's 'leave

procedure' policy, which forms part of the terms and conditions of employment. Instead, he held that the company was obliged to have presented a previous leave application form signed by Ms Ntsalla as proof that she knew of the rule. No such form had been submitted in evidence and, essentially on this basis, the Commissioner found that Ms Ntsalla was not thus aware. That was an irregular approach on the part of the Commissioner. The notion of a previous signed form was not traversed at all in the proceedings. It surfaced for the first time in the award.

[13.3] Not only did the Commissioner ignore the policy document, he also gave no weight to the explicit oral evidence of Mr Coetzee that Ms Ntsalla knew of the requirement. He preferred her version that it was the practice merely to ask five days in advance. No sound reason is to be found in the award for this assessment of the evidence. A further feature of the evidence which it ignores is that the company's evidence that Ms Ntsalla was aware of the procedure was not challenged during cross-examination.

[13.4.] It seems that the Commissioner was a good deal influenced by his view that Ms Ntsalla had been granted leave for 26 October 2007, but that view did not fully reflect the evidence. It is so that Mr Coetzee testified that Ms Ntsalla had, on 25 October, initially asked to be allowed off for the following day. In the belief that this was for the purpose of regular medical treatments which he knew Ms Ntsalla had to receive, he responded that this could be done and that he would arrange for a replacement. It then became apparent that Ms Ntsalla wanted leave for the whole of the following week as well (and that her request for leave on the following day was not for treatment but was simply the first day of that leave period). Once that became clear, her request was refused, subject to it being further addressed on the following Tuesday. Properly construed, in my view, this evidence does not amount to a ground for preferring the evidence of Ms Ntsalla and for holding that she was not aware of the rule

relating to leave applications. It certainly cannot amount to support for the conclusion that leave could be taken without approval.

[13.5] On the basis of his reasoning as outlined above, the Commissioner correspondingly held that because Ms Ntsalla was unaware of the rule, she couldn't have broken it. On the facts, that is an unsound result. In logic, it is a *non sequitur*.

[13.6] The Commissioner further posed the question whether the rule was consistently applied. In addressing that question he did not meaningfully deal with issues of consistency. Rather, he held that Mr Coetzee had reneged from his usual practice not to require application forms or 'pretended' not to know about the practice, apparently because he was in the presence of his national manager. These are conclusions based on an unwarranted evaluation of the evidence, in the course of which the Commissioner at one stage plainly indicated that he considered Mr Coetzee to be a reliable witness, but in his evaluation treated him as a person willing to give false testimony.

[13.7] A final question which the Commissioner examined was whether dismissal was a fair sanction in the circumstances. He concluded that it was not, because it had not been shown by the company that Ms Ntsalla knew of the rule, that she had broken it and that it was in any case not consistently applied. This was a curious question to pose. It should only have arisen if the finding of guilt on the first or second charges had been upheld by him. But the conclusions reached by the Commissioner point to there being no finding of guilt – although the award does not squarely state as much. The analysis, it must be observed, falls well short of being precise.

[13.8] Finally, the Commissioner turned to the second charge, being the one of gross insubordination in that Ms Ntsalla proceeded to go on leave despite two

senior managers having expressly instructed her that she could not do so at that stage. He dealt with it in these terms: "*Due to the fact that the [company] had failed to discharge the onus on the first charge, the second charge fell away based on the inferences I have drawn on the first charge.*"

[13.9] This reasoning on the relationship between the two charges is slender. The inferences drawn by the Commissioner on the first charge were that it had not been proved that Ms Ntsalla was aware of the rule on leave applications and that she could therefore not have broken that rule. The second charge, however, presents no scope for inferences of that sort. It is a charge that turns on an unqualifiedly factual issue, namely whether or not Ms Ntsalla disobeyed an instruction not to go on leave until that matter had been further processed. In these circumstances, the Commissioner entirely misdirected himself in concluding that the second charge had fallen away. It had not and it required a determination, which task the Commissioner omitted to perform.

[14] Having regard to the considerations outlined above, I am satisfied that the applicant has made out a sufficient case for the review and setting aside of the Commissioner's award, albeit that it is not an impeccable case and was in part based on a transcription record which was far from exemplary. Ultimately, though, the decision I must make is whether or not the Commissioner's reasoning and determination have been shown not to be within the zone of being reasonable and acceptable. In my judgment, for the reasons given, the applicant has demonstrated that case. The application succeeds and the award must be set aside.

[15] In the interests of finality, costs and convenience, I agree with the applicant's submission that it would be to the advantage of none of the parties for this dispute to be referred back to the first respondent for a fresh round of arbitration. There are decisive features in the record and no good purpose

would be served by having them recycled yet again. Accordingly, in the exercise of the discretion which I enjoy, I am of the view that I should substitute my own conclusions for those of the Commissioner. They are that the charges against Ms Ntsalla were established, that the operational requirements of the applicant are of such a nature as to justify a consequential dismissal, and that the initial disciplinary outcome should therefore have been upheld.

[16] I accordingly make the following order:

[1] The award made by the second respondent on 19 March 2008 under CCMA case number FS6066-07 is hereby reviewed and set aside.

[2] The following determination is substituted for that made by the second respondent: "The dismissal of the applicant is determined to have been substantively fair and is accordingly upheld."

[3] There is no order as to costs.

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KS TIP
ACTING JUDGE OF THE LABOUR COURT

DATE OF HEARING: 28 September 2010

DATE OF JUDGMENT: 23 November 2010

FOR APPLICANT: Mr C J Geldenhuys
of Geldenhuys C J @ Law Inc