THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case Number: JR 2825/22

In the matter between:

GABRIEL ITUMULENG GALOGAKOE	Applicant
and	
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	First Respondent
BUSI SEOKETSA N.O.	Second Respondent
CSG SECURITY SERVICES	Third Respondent

Heard: **7 August 2024**
Delivered: 21 August 2024

(This judgment was handed down electronically by circulation to the parties' legal representatives, by email, publication on the Labour Court's website and released to SAFLII. The date on which the judgment is delivered is deemed to be 21 August 2024.)

JUDGMENT

FORD, AJ

Introduction

[1] This is an application to review and set aside the arbitration award of the second respondent ("the commissioner"), dated 22 November 2022. The commissioner found that the applicant was unable to prove the existence of an unfair labour practice.

[2] The applicant contends that the decision arrived at by the commissioner, is one a reasonable decision-maker could not reach, and that his suspension was both procedurally and substantively unfair.

The facts

[3] The applicant is employed by CGS Security Services (the third respondent "CGS") as a Security Site Manager, earning a gross salary of R26,000.00 per month.

[4] On 4 July 2022, he was suspended with full pay as a result of him accidentally damaging a golf-cart on the Carlswald Estate. On the same day, he was also issued with a notice to attend a disciplinary hearing on 7 July 2022, and attended the hearing as scheduled.

[5] At the hearing, it became apparent, having regard to the material evidence led by various witnesses, that:

5.1 it was not the first time that the same golf-cart was involved in a malfunctioning incident (the brakes failed); and

5.2 the incident did not pose a threat to anyone on the estate;

[6] It was contended on behalf of CGS that the applicant was found not guilty of the charges preferred against him. The applicant in turn, contended that he was never given the outcome of the hearing, he was simply informed that he is to return to work.

[7] Unhappy with what had transpired, the applicant referred an unfair labour practice dispute to the CCMA.

[8] The arbitration was set down before the commissioner on 10 November 2022, who, as stated earlier, found that the applicant was unable to prove the existence of an unfair labour practice.

The commissioner's reasoning

[9] In analysing the evidence in order to determine whether the suspension of the applicant was procedurally and substantively fair, the commissioner considered the evidence and the legal position as confirmed by the constitutional court in *Long v South African Breweries (Pty) Ltd and Others*[1] and other related authority.

[10] As to the procedural fairness of the suspension, and the applicant's complaint that he was not afforded an opportunity to make representations before he was suspended, the commissioner said this:

> In *Long v SABC (sic) and others (2019) 40 ILJ 965 (CC*) the Labour Court (sic) held that *"where the suspension is precautionary and not punitive, there is no requirement to afford the employee an opportunity to make representations. The consideration is that the employee must be paid his salary during the period of suspension"* As such, any prejudice to (sic) [that] the applicant might have suffered was mitigated by the fact that he received his full salary. The applicant was charged with misconduct in an internal hearing and was subsequently suspended. His suspension was effected on 04 July 2022 and he resumed his duties on 12 July 2022, on full pay.

[11] In respect of the applicant's submission that he suffered indignity and that his rights were violated on account of his suspension, the commissioner said:

> In *Minister* for *Justice and* Constitutional/ Development *and another v Tshishonga,* the Labour Appeal Court, in an award of *solatium* [2020] 10 BLLR 1053 (LG) page 1066, referred to a delictual claim under the *actio injuriarum* for guidance in what would constitute just and equitable compensation for

[1] (2019) 40 ILJ 965 (CC); 2019 (5) BCLR 609 (CC) ; [2019] 6 BLLR 515 (CC) (19 February 2019)

non-patrimonial loss in the context of an unfair labour practice. It stated that since compensation serves to rectify an attack on one's dignity, the relevant factors in determining the quantum of compensation in these case included but were not limited b: " .....the nature and the seriousness of the *injuria,* the circumstances in which the infringement took place, the behaviour of the defendant (especially whether the motive was honourable or malicious), the extent of the plaintiff's humiliation or distress, the abuse of the relationship between the parties, and the attitude of the defendant after the *injuria* had taken place."

[12] He then concluded that:

> The applicant was suspended subsequent to an incident where a client's property was damaged. He was called to an enquiry and suspended, but was called back to work and had resumed his duties soon thereafter. The factors as stated (supra) do not apply in the circumstances surrounding the applicant's suspension. The applicant was called into an enquiry as is the requirement in every workplace after any incident more so where it involved a client, whose security and safe-guarding of assets rested in the hands of the respondent It cannot be said that he suffered humiliation or indignity in that occurrence. Furthermore, the applicant had alleged a witch-hunt that the respondent was intent on perpetuating against him, but did not provide any other evidence in support of that claim.

[13] On the strength of the aforementioned analysis, the commissioner found that the applicant was unable to prove the existence of an unfair labour practice.

Analysis

[14] The attack launched against the commissioner's arbitration award, is one relating to reasonableness.

[15] The test for review is poignantly set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[2]. In *Sidumo,* the court held that '*the reasonableness*

[2] (2007) 28 ILJ 2405 (CC).

standard should now suffuse s 145 of the LRA', and that the threshold test for the reasonableness of an award was: '… *Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?...'*[3]

[16] In *Herholdt v Nedbank Ltd and Another*[4], the court said:

> '… A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable.'

[17] In their insightful article[5], *"To suspend or not to suspend?"* the learned authors, M. Conradie and J. Deacon explain the difference between a holding suspension and precautionary suspension. They say:

Suspension as a form of a holding operation usually occurs in practice where the employer suspends the employee until a formal enquiry or disciplinary hearing has been held. In circumstances like these, employers choose to suspend the employee before the employee has actually had an opportunity to state his case.

Suspension may take the form of a 'holding/cautionary suspension' pending a disciplinary hearing or as suspension as a disciplinary action. To distinguish between the two, one can consider the intention of the employer: if the suspension was intended to assist the employer in any way and not to punish the employee, it will most probably be suspension as a holding operation.[6]

[18] The question which arises, in light of the above , is whether suspension in both a holding capacity and as a disciplinary sanction, finds expression within the context of section 186(2)(b) of the LRA, as referenced in the wording: *"the unfair*

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[3] Id at para 110. See also *CUSA v Tao Ying Metal Industries and Others* (2008) 29 ILJ 2461 (CC) at para 134; *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 *ILJ* 964 (LAC) at para 96.

[4] (2013) 34 ILJ 2795 (SCA) at para 25. See also *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others* (2014) 35 ILJ 943 (LAC) at para 14; *Monare v SA Tourism and Others* (2016) 37 ILJ 394 (LAC) at para 59; *Quest Flexible Staffing Solutions (Pty) Ltd (A Division of Adcorp Fulfilment Services (Pty) Ltd) v Legobate* (2015) 36 ILJ 968 (LAC) at paras 15 – 17; *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2015) 36 ILJ 2038 (LAC) at para 16.

[5] Journal for Juridical Science 2009: 34(1), p. 38

[6] Id. para 2.2

suspension of an employee". That question has been answered by this court in *Perumal v Minister of Safety and Security and Others*[7]. The court said:

> A suspension is always disciplinary action, irrespective of whether it is implemented as a temporary measure to maintain the employee's status or as a sanction for misconduct. The words "any other" fortifies this interpretation. The phrase "disciplinary action" is also not restricted to mean "disciplinary sanction". (*Koka v Director-General: Provincial Administration North West Government* [1997] 7 BLLR 874 LC.)

[19] Where the suspension of an employee is effected contrary to the principles espoused in *Long*, namely where an employee is subjected to precautionary suspension (without pay), without being afforded the opportunity to make representations, such a suspension will be unfair. It will also be unfair, where the functionary who effected the suspension lacked the authority to do so[8]. And where an employee is suspended for an inordinately long period of time for no justifiable reason, it will also render the suspension unfair, as the existence of a justifiable reason, is a peremptory requirement for any suspension.

[20] In the matter before me, the applicant alleged that his suspension was procedurally unfair because he was not afforded an opportunity to make representations, before he was suspended. In addressing that complaint, the commissioner relied on the authority in *Long*. I cannot fault the commissioner's application of the law, as it now stands in *Long*. Where precautionary suspension is with pay, there is no requirement to afford the employee an opportunity to make representations, even if a policy directs otherwise.

[21] A suspension can be substantively unfair for a number of reasons, which must be assessed on a case-by-case basis, but central to these is the suspension of an employee for no justifiable reason.

[22] In so far as the substantive fairness of the suspension effected by CGS is concerned, I find the commissioner's reasoning equally sound. There is nothing untoward in the manner in which and the reason for which, the suspension was

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[7] (D550/2000) [2001] ZALC 77 (30 May 2001)
[8] *Biyase v Sisonke District Municipality and Another* (2012) 33 ILJ 598 (LC) at para 20.

effected. The justifiable reason being, that the applicant was suspended pending a disciplinary hearing. I have also noted that the applicant's suspension was uplifted shortly thereafter.

[23] I have considered the record of the proceedings setting out the evidence, the commissioner's assessment and analysis thereof, and find no reason for this court to interfere with the commissioner's decision.

[24] In the result I make the following order:

Order

1. The application to review and set aside the arbitration award of the second respondent is dismissed.
2. I make no order as to costs.

Bart Ford
Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Mr. F. Jwankie
Instructed by:	Mashiane, Moodley & Monama Inc
For the respondent:	No appearance