REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA; JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 2704/09

In the matter between:

SOUTH AFRICAN TRANSPORT AND ALLIED

WORKERS' UNION **First Applicant**

SOBUZA, N C **Second Applicant**

and

COMMISSIONER FOR CONCILIATION,

MEDIATION AND ARBITRATION **First Respondent**

AKIM, T NO **Second Respondent**

FIDELITY SPRINGBOK SECURITY SERVICES **Third Respondent**

Heard: **10 January 2013**

Delivered: 19 September 2013

Summary: Heads of argument – purpose of - to assist the Court. Where inaccurate references therein, not only unhelpful but misleading to the Court. Duty of practitioners in filing heads of argument.

Dismissal –existence of –onus of proving -duty of CCMA Commissioner to assist lay litigant and properly evaluate evidence before him or her.

JUDGMENT

BANK, AJ

Introduction

[1] The first applicant in this matter, the South African Transport and Allied Workers' Union ("SATAWU"), has, together with the second applicant employee party ("Sobuza") launched an application to review and set aside an arbitration award handed down by the second respondent ("the Commissioner") dated 13 August 2009 under case number GAJB 13794-09. In this award, the Commissioner found that Sobuza had not in fact been dismissed and consequently dismissed his referral for a substantively and procedurally unfair dismissal.

[2] Although this matter was initially opposed by the third respondent employer party, Fidelity Springbok Security Services ("Fidelity"), such opposition was formally withdrawn in a letter dated 17 June 2011 faxed by Fidelity's erstwhile attorneys, Blake Bester Inc, to the attorneys for the applicants, Cheadle Thompson & Haysom Inc. This letter was handed up to me as an attachment to the applicants' heads of argument, and it is stated therein that the review

application would not be opposed. The matter thus proceeded to be argued on an unopposed basis as there was, as expected, no appearance for Fidelity at the hearing of this matter. I have, accordingly, dealt with this review application on an unopposed basis.

[3] From a perusal of the documents in the court file, it appears that Sobuza first referred his dispute of unfair dismissal to the CCMA under case number GAJB 29480-08 and, in an arbitration award dated 26 January 2009 handed down by Commissioner Robert Mudau, Sobuza appears to have proven to the satisfaction of the CCMA that he had in fact been dismissed and Fidelity's claim that he had absconded from the workplace was found to be without substance. As a result, Sobuza was reinstated retrospectively without any loss of benefits and ordered to report for duty on 15 February 2009.

[4] The present unfair dismissal dispute arises from an incident that occurred subsequent to Sobuza's aforesaid reinstatement. Shortly thereafter, and during March 2009, Sobuza appears to have been informed that he was no longer required to report for duty at certain of Fidelity's clients due to his allegedly having a criminal record. He was then required to report to Fidelity's HR manager, one Mr Volbrecht ("Volbrecht"), at Fidelity's Robertville offices until an investigation into his criminal record had been completed. He was made to hand in his company uniform which he did on 6 April 2009. Fidelity's case is that Sobuza thereafter failed to produce the requisite proof that he had no criminal record in the form of a SAPS clearance and has, to date, failed to provide such proof. He has therefore not been dismissed. In the arbitration award, the Commissioner upheld this argument, finding that Sobuza had deserted his employment with Fidelity and thus failed to discharge the onus placed upon him of proving the existence of a dismissal.

<u>The review application</u>

[5] In the founding affidavit of the review application, it is alleged by one Thamsanqa Magoda ("Magoda") an organiser of SATAWU's Gauteng

Provincial Office, that he was present at the arbitration and had given first hand oral evidence of certain events. These events included telephone calls that he made to Fidelity's representatives, including a call to Volbrecht, who confirmed to Magoda that Sobuza was indeed not allowed to work at Fidelity due to the investigation into his alleged criminal record. This had, in turn, been confirmed to Magoda by Aubrey Mkhonto, Fidelity's industrial relations manager, who represented Fidelity in the arbitration proceedings.

[6] The argument advanced on behalf of Sobuza in the review application is, in summary:

6.1. the Commissioner unreasonably found that Sobuza had deserted his employment with Fidelity in that he had failed to conduct an assessment of whether Sobuza had demonstrated an unequivocal intention not to return to work and, at the very least, had failed to take proper cognisance of the evidence led which demonstrated that Sobuza had in fact been instructed not to report for duty because of his alleged criminal record;

6.2. there had been no evidence from Fidelity that it had made every attempt to locate Sobuza but had been unable to do so prior to concluding that he had deserted his position;

6.3. Fidelity had failed to convene a hearing and afford Sobuza an opportunity to be heard prior to dismissing him.

[7] In its opposing affidavit, Fidelity:

7.1. admits having informed Sobuza that he could not be deployed on site until the issue of his criminal record had been finalised;

7.2. states that it did not dismiss Sobuza as there was an agreement between the parties that Sobuza would first go to Pretoria to obtain a police clearance certificate;

7.3. was still awaiting receipt of such certificate when Sobuza had referred his dispute to the CCMA;

7.4. denies that Sobuza was told to return his uniform and further denied that Sobuza in fact did so;

7.5. argues that the Commissioner did not in fact find that Sobuza had deserted his employ but rather that he could not establish the existence of a dismissal due to too many inconsistencies in Sobuza's evidence and that he had failed to report to Fidelity with the requisite SAPS clearance certificate as had been agreed between the parties.

[8] I would then have expected a replying affidavit to be filed by Sobuza or SATAWU dealing with these allegations in order to assist the court in determining this factual dispute. Surprisingly, no such replying affidavit was ever filed. To be sure, no reference to any replying affidavit has found its way into the heads of argument submitted on behalf of the applicants by their attorneys. This is regrettable as it has made the determination of this matter that much more difficult. Nevertheless, had this been the only omission it might have been excusable but I now deem it appropriate to make some comments on the heads of argument filed on behalf of the applicants, comments which I raised during argument with Mr Navsa of the applicants' attorneys.

Deficiencies in heads of argument

[9] Firstly, the "material facts" relied upon by the applicants in the heads of argument do not tally with the footnote citations that are cited therein, ostensibly for the assistance of the court. I will quote two such examples:

9.1. paragraph 3 of the heads of argument states: "In the course of his duties he was required to report to the premises of certain of the third respondent's clients, which he did until 29 November 2008." The

citation for this statement is a footnote referring the court to paragraph 8 of the founding affidavit and the corresponding admission in the opposing affidavit. However, when one turns to the founding affidavit the paragraph in question says nothing of the sort but rather states that in March 2009 Sobuza was informed that he was no longer required to report for duty at specific clients of the company due to his alleged criminal record;

9.2. paragraph 4 of the heads of argument states that, from 30 November until 18 December 2008, Sobuza was instructed to report for duty as a "spare" at Fidelity's Robertville premises. The citation found in the footnotes as support for this startling statement is paragraph 9 of the founding affidavit which, in fact, says nothing of the sort but rather states that Sobuza attended at the company premises on 6 April 2009, and handed in his uniform to one Jason, as he was requested to do.

[10] The footnote citations that I have referred to above are not only completely incorrect but they have the effect of misleading the court. What is worse, the heads of argument have almost sought to introduce new evidence into the proceedings and put forth a version which simply does not appear from any of the papers.

[11] Heads of argument are required to be filed in keeping with the Rules and Practice Manual of this Court. Faced with the inordinately heavy caseload that it is, the Court requires, and relies upon, the assistance of counsel and attorneys in order to save time and trouble by directing its attention to the appropriate and relevant portions of the papers in order that a proper analysis of the issues can take place and to enable the Court to deliver judgment expeditiously. However, when heads of argument are filed which contain incorrect references and submissions which not only fail to accord with the contents of the affidavits to which they refer but are in fact at odds with such contents, then such heads of argument can not only be deemed to

be of no assistance to the Court whatsoever but are in fact misleading. I do not use the latter term lightly but in this case I feel it is completely justified.

[12] The remaining contents of the heads of argument filed on behalf of the applicants in this matter contain no references whatsoever to any relevant portions of the record and I have thus been compelled to trawl through a fairly lengthy record of the arbitration in order to ascertain for myself exactly what happened in those proceedings and to find the relevant passages myself. This has, to a large degree, caused the significant delay in the preparation and furnishing of this judgment. This cannot serve the public interest in that the expeditious disposal of matters, particularly review applications, is of paramount importance in this Court. Justice delayed is justice denied and this principle is undermined if attorneys and counsel fail to take their duty to the Court seriously in the filing of their heads of argument.

[13] In this regard, I refer to *S v Ntuli*[1] where the court hearing a criminal appeal had the following to say:

> 'Unless counsel properly represents his or her client, the right to a fair trial and the right to a fair appeal may be negated. At issue is simply the basic proposition that the minimum required of counsel is to prepare and present a proper argument on behalf of his or her client. Heads of argument serve a critical purpose. They ought to articulate the best argument available to the appellant. They ought to engage fairly with the evidence and to advance submissions in relation thereto. They ought to deal with the case law. Where this is not done and the work is left to the Judges, justice cannot be seen to be done. Accordingly, it is essential that those who have the privilege of appearing in the Superior Courts do their duties scrupulously in this regard.'[2]

[14] I trust that these remarks will be taken to heart and borne in mind by practitioners in this Court for future reference.

[1] 2003 (4) SA 258 (W).
[2] Ibid at para 16 per Marcus AJ and Mailula J.

[15] It was, therefore, left to me to assume the task of carefully reading the entire record of the arbitration proceedings in order to properly analyse the various submissions which I have highlighted above

The arbitration proceedings

[16] It is noteworthy that nowhere in the bundle of documents that was handed in and referred to in the arbitration proceedings is there any evidence of any criminal record on the part of Sobuza other than a document on an ACSA letterhead headed "criminal record of appeal form" in which Sobuza appears to explain the outcome of certain court proceedings in 1989 and given a six month custodial sentence. This form was signed by Sobuza on 7 March 2008 while Sobuza was employed by the Guardforce Division of Fidelity Khulani, by which name Fidelity used to be known. On this form, under the heading "employer's recommendation", it is stated:

> 'Working since 1995 with company[;] did not involve himself again in such activities.'

[17] After settlement of the earlier arbitration proceedings under case number GAJB 29480-08, there is a written agreement of full and final settlement which simply states that Sobuza was entitled to be given new application forms in order to obtain a new company number. This would have taken place after the CCMA ordered his retrospective reinstatement. Interestingly, the very next page in the record bundle contains a signed acknowledgment by Fidelity of receipt of Sobuza's uniform dated 6 April 2009. This fact was denied on affidavit by the deponent to Fidelity's opposing affidavit. This somehow came to the company's attention but, during the evidence at arbitration, this old existing criminal record appears to have somehow morphed into an allegation that there were pending criminal charges against Sobuza. There is, of course, no evidence of this. Sobuza seems to have been taken to task for failing to produce the requisite clearance certificate from the SAPS.

[18] The elusive Mr Volbrecht was clearly an important person in all these events yet he, for some reason, was never called upon to testify at the arbitration proceedings. In this regard, it is noteworthy that the Commissioner took Sobuza to task in several respects, not least of which was his supposed failure to call various corroborating witnesses such as a shop steward, Benjamin, as well as Volbrecht himself. The Commissioner blithely ignored the obvious difficulties that Sobuza would have encountered in being able to achieve this, especially as Volbrecht would have been Sobuza's superior. On the other hand, the record shows no evidence of any effort on the part of the Commissioner to assist Sobuza in understanding his rights in this regard. It is trite that a commissioner has the power to subpoena witnesses to arbitration hearings in terms of Rule 37 of the CCMA Rules and may so direct during the hearing of an arbitration in terms of Rule 37(3), which Rule is to be read in conjunction with Sections 142(1)(a) and (b) of the Labour Relations Act, 1995 ("the LRA"), as one of the powers of a commissioner in resolving such disputes.

[19] When it became clear to the Commissioner that Volbrecht's evidence would be crucial in order to make a proper determination of the dispute, he ought to have insisted that Volbrecht be called to testify, notwithstanding the fact that it was Sobuza that always bore the *onus* to prove the existence of his dismissal. On a proper reading of the record of arbitration proceedings, there appears to be no reason why Fidelity could not have made him available or why he did not in fact testify.

[20] In fact, it seems that although the employer's representative was keen to have Volbrecht testify, the Commissioner, on several occasions, reminded the parties that the *onus* rested with Sobuza and that he could not be advised how to handle his case. This alone appears to be a misdirection on the part of the Commissioner as it is trite law that an arbitrating commissioner is obliged to assist a lay litigant[3] and there can be no doubt that Sobuza was at

[3] *Consolidated Wire Industries (Pty) Ltd v CCMA and Others* (1999) 20 ILJ 2602 (LC) at paras 42-43; *Klaasen v CCMA and Others* (2005) 26 ILJ 1447 (LC) at para 27.

all material times a lay litigant in these proceedings, despite the presence and assistance of his union representative.

[21] Even if I am incorrect in this regard, the argument submitted on behalf of Sobuza correctly points out that the Commissioner ought first to have determined whether Sobuza demonstrated an unequivocal intention not to return to work prior to finding that he had deserted or absconded from his employment. Instead, the Commissioner focussed much of his attention on attempting to determine the various factual disputes before him based on an assessment of the conflicting versions before him. In finding that the version put forward by Fidelity was more probable than that of Sobuza, he then consequently found that no dismissal had occurred. For the reasons set out below I cannot agree that the inconsistencies in Sobuza's evidence are sufficiently material to lead to the conclusion that Sobuza must have deserted his employ with Fidelity and that he failed to discharge the onus of proving the existence of a dismissal.

[22] The Commissioner appears to have taken note of Sobuza's evidence that he had not been paid his salary since 23 September 2008[4] yet failed to appreciate the significance of this uncontroverted fact in determining whether Sobuza had in fact been dismissed. He appears to have simply accepted the mere say-so of the employer party regarding Sobuza's alleged criminal record. Indeed, he appears to have accepted that Sobuza bore the onus of demonstrating that he had no criminal record rather than insisting that Fidelity produce proof to the contrary. One would at the very least have expected some form of evidence of how and when this came to the company's attention along with some documentary supporting material in this regard.

[23] The Commissioner, moreover, appears to have failed to appreciate the importance of Sobuza's uncontroverted evidence that, while he accepted that he had to travel to Pretoria to obtain SAPS clearance, he had no funds with which to do so. This evidence is bolstered by the fact that it is not disputed

[4] See Award para 5.1.4, p 137.

that Sobuza's salary had not been paid for some months and his lack of funds thus clearly understandable. I find this to be a crucial misdirection on the part of the Commissioner. Moreover, he ought to have properly considered whether or not Fidelity had in reality treated this as a case of desertion on Sobuza's part. In *SABC v CCMA and Others*,[5] it was held that:

> 'It is not desertion when an employee who is absent from work intends returning to work. Desertion necessarily entails the employee's intention no longer to return to work.'

[24] The employer would have to establish this intention in a fair process.[6] The requirement to hold a hearing for an employee who has apparently deserted only really arises in cases of "unexplained" desertion, in other words, where employees have given no indication of whether they intend to resume work.

[25] In this case, there is nothing to suggest that Sobuza was unreachable or that his whereabouts were unknown. There is on the other hand, everything to suggest that Sobuza intended travelling to Pretoria in order to obtain the necessary documentation to demonstrate his clear criminal record but was unable to do so. It is puzzling as to why the Commissioner did not take Fidelity to task for failing to enquire as to Sobuza's whereabouts after his extended absence. If Fidelity had viewed Sobuza's behaviour as desertion then one would have expected it to convene an enquiry prior to reaching the conclusion that the fact of desertion had occurred. If this was indeed found to be the case then Fidelity would have been entitled to elect to terminate Sobuza's contract of employment.[7] If, on the other hand, Fidelity were still awaiting Sobuza's return to work with the requisite SAPS clearance form in hand one would have expected the employer to continue to pay his salary and make enquiries as to the date of his return, or to issue some form of ultimatum failing which his absence would be treated as desertion. It was, however, never Fidelity's case that it had continued paying his salary during

[5] [2002] 8 BLLR 693 (LAC) at para 13.
[6] *MEC: Department of Education, Gauteng v Msweli and Others* (2013) 34 *ILJ* 650 (LC) at para 31.
[7] *SABC v CCMA and Others* (2001) 22 *ILJ* 487 (LC)

the full period of his absence, which one would have expected in light of its adamant insistence that it had not dismissed Sobuza. There is moreover no evidence to suggest that this took place and I find it extremely unlikely that this would have occurred.

[26] Although nothing explicit appears to have been said in this regard, it is apparent from the evidence (and also reading between the lines) that Fidelity did not follow either course: it simply sat back and ceased paying Sobuza his salary. These actions can only accord with a decision on Fidelity's part that Sobuza's contract of employment was at an end and that there was therefore no need to make payment of his salary. I note that none of this played any part in the Commissioner's analysis of the evidence.

[27] For these reasons, it appears that the Commissioner failed to appreciate the nature of the enquiry he was conducting, took immaterial matter into consideration and failed to consider material matter. He, therefore, did not fully and fairly determine the case placed before him and the ultimate decision must be seen to be tainted by both process-related and substantive unreasonableness.[8] Recent case law has referred to what is now known as "Ngcobo J's gross irregularity *dictum*."[9] This refers to that Judge's minority judgment in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[10] according to which a gross irregularity will occur where a commissioner fails to have regard to material facts because the arbitration proceedings cannot in principle be said to be fair because the commissioner has failed to perform his or her mandate and thereby prevent the aggrieved party from having its case fully and fairly determined.

[28] Applying this *dictum* to the facts in this matter, it is clear to me for the reasons set out above that the Commissioner did not perform his mandate and thereby prevented Sobuza from having his case fully and fairly arbitrated.

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[8] See *Gaga v Anglo Platinum Ltd and Others* (2012) 33 *ILJ* 329 (LAC) at para 44.
[9] The term was coined by my colleague Antony Myburgh SC in his recent article "The LAC's latest trilogy of review judgments: *Is the Sidumo test in decline?"* (2013) 34 *ILJ* 19 at 20.
[10] 2008 (2) SA 24 (CC).

In fact, I would go so far as to state that not only does the evidence show that Sobuza was treated in a gravely unjust manner by his former employer but that the conduct of the arbitration by the Commissioner and his subsequent award against Sobuza only perpetuated this injustice.

[29] For all these reasons, I am of the view that the present arbitration award is vitiated by several material irregularities and falls to be reviewed and set aside.

[30] In their notice of motion, the applicants seek, in the alternative, a substitution of the Commissioner's award by means of a declarator to the effect that Sobuza's dismissal was both substantively and procedurally unfair or a remission of the matter to the CCMA for arbitration *de novo* before a different commissioner.

[31] Because of the inordinate length of time that this matter has dragged on and because I am satisfied that the evidence at arbitration clearly shows that Sobuza was effectively dismissed without any procedure having been followed, I deem it appropriate to grant the substitution as prayed for. No purpose is served by remitting the matter for another arbitration hearing and delaying justice in this matter any longer.

[32] In argument, Mr Navsa enjoined me to consider the awarding of compensation rather than reinstatement. I am mindful of the fact that the dismissal in question took place more than four years ago and agree that compensation is the appropriate remedy rather than reinstatement

[33] In the result, I deem it most appropriate and in the interests of justice that I grant the relief sought and make an award as to compensation in an amount equivalent to (8) eight months remuneration for Sobuza.

[34] Accordingly, I make the following order:

1. The arbitration award handed down by the second respondent under the auspices of the first respondent dated 13 August 2009 under case number GAJB 13794-09 is hereby reviewed and set aside and replaced with the following award:

"1.1 It is declared that the termination of the second applicant's employment was brought about by his dismissal by the third respondent as contemplated by section 186(1)(a) of the LRA;

1.2 the second applicant's dismissal by the third respondent is found to be both substantively and procedurally unfair;

1.3 the third respondent is ordered to pay compensation to the second applicant equivalent to (8) eight months' compensation at the rate of R1884.48 per month, ie, R15,075.84."

2. The third respondent is to pay the costs of the review application.

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BANK: AJ

Acting Judge of the Labour Court

Appearances

For the Applicant: Attorney Mr Navsa: Cheadle, Thompson & Haysom Inc

For the Respondent: No appearance.