IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

REPORTABLE

CASE NO: JR2175/09

In the matter between:

SOUTH AFRICAN FOOTBALL ASSOCIATION	Applicant
AND	
LUFUNO RAMABULANA N.O	1ST Respondent
THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	2nd Respondent
ZAIN CLEOPHAS	3rd Respondent

JUDGMENT

Molahlehi J

Introduction

[1] This is an application to review and set aside the arbitration award of the first respondent (the commissioner) issued under case number JATW13681/08 dated 5 July 2009. In terms of the arbitration award the commissioner found the dismissal of the applicant to have been unfair and ordered the applicant, SAFA to compensate the third respondent (the employee) in an amount equivalent to 12 (twelve) months' salary which totalled R670 000.00.

[2] The employee's answering affidavit was filed late. The reasons for the lateness are set out in the application for condonation. The application was unopposed

and having regard to the reasons tendered for the lateness and the prospects of success I see no reason why condonation should not be granted.

Background facts

[3] The third respondent who is hereinafter referred to as "the employee" for ease of reference was employed by the applicant as chief of security. The applicant was employed on a fixed term contract which commenced on the 1st August 2009 and was to expire on the 31st July 2011. The applicant was placed on a probationary period of three months and further in terms of the contract of employment he was to be remunerated at the rate of R670 000.00 (cost to the company) per annum.

[4] The fixed term contract under clause 10 (ten) provided as follows:

> *"The employee undertakes, at all times, to adhere to the associations Policies and Procedures, incorporating the* ***Disciplinary Code*** *and the Standard Terms and Conditions of Employment."*

[5] It is important to note that in terms of the disciplinary code which is in terms of the above clause incorporated into the terms of the contract of employment, provision is made for a procedure to follow in the event of incapacity on the part of the employee.

Case of the employee

[6] The version of the employee is that during September 2008, he received a call from an officer of COSAFA informing that Mr Raymond Hack, the CEO of

COSAFA flew to Nelspruit to investigate a case of theft against him (the employee). The official further informed the employee that she had also received a call from one inspector detective Makhubela of the SAPS regarding the same matter.

[7] About a month later, towards the end of October 2008, the employee was called to the office of Mr Hack where he found inspector Makhubela of SAPS as well as Mr Hluyo, the financial director of the applicant. Mr Hack informed the employee at that meeting that there were criminal charges against him. On enquiring as to the nature of the allegation be the employee Mr Hack informed him (the employee) that the allegations concerned a theft of money during a tournament of COSAFA, Mr Hack further informed him that although the allegations of theft was not a matter of SAFA he (Mr Hack) wish to have an explanation from the employee. The employee denied any knowledge of the allegations of theft against him.

[8] After presenting to the employee the theft allegations, Mr Hack then presented the employee with two options. The one option was for him to resign immediately in which case COSAFA would not press ahead with the criminal charges. The second option was that his failure to resign would result in the criminal case been pursued by COSAFA.

[9] The employee indicated that he would not resign. After the discussions about the theft allegations the employee left Mr Hack's office for short while but was then called back and informed that his probation period would be extended for a

month. He was also furnished with a letter confirming the extension of the probationary period dated 27th October 2008 which reads as follows:

> *"In terms of your employment contract your probationary period ends on the 31st October 2008, however, I would like to advise you that your probationary period will be extended by a further one month to enable the employer to assess you further."*

[10] On the 20th November 2008, whilst on duty at the Bafokeng soccer stadium the employee was arrested by members of the SAPS and taken to the Rustenburg police station. He was thereafter transferred to two other police stations one in Mpumalanga. He was granted bail on the 2nd November 2008. The employee returned to work on the 24th November 2008 after his release on bail. On his arrival at work Mr Hack enquired about the matter. The employee informed him that the arrest was unlawful. Mr Hack further enquired as to what has to be done about the probation which was about to expire of the 30th November 2008. Furthermore Mr Hack told the employee that his position would be re-advertised and that he (Mr Hack) also during that conversation told him that he "wanted him out."

[11] On the same day of returning to work after his release from the police incarceration, the employee took sick leave. Nothing turns on this; expect that it would appear that the applicant sought to challenge the validity of the medical certificate which was given to the employee during the arbitration hearing. The employee reported for work on the 25th November 2008.

[12] On the 28th November 2008, Mr Hack addressed a letter to the employees' attorneys indicating that he was considering the representation which had been made by the employee's attorneys.

[13] It is common cause that the employee's contract of employment was terminated on the 30th November 2008. The criminal charges against the employee were withdrawn during January 2009.

Case of the applicant

[14] The main witness of the applicant, Mr Soldatis in his contextualisation of the reasons for the dismissal of the employee, says that the dismissal was due to the public perception that had developed around the criminal case which had been instituted against the employees. In this respect he states in his evidence in chief during the arbitration hearing that:

> *"And so in the ordinary cause this dispute (the third respondent dismissal) needs to be contextualised and assessed against that very, very, very important obligation which we (suffer) have and that is the public perception. Whether that perception is justified or not that this may or may not be an unsafe place the fact of the matter is the success of the world cup depends on public perception."* (See transcription page 131)

[15] He further testified as follows:

"Now how in all good consciousness, Mr commissioner can we confirm the employment of an individual who, whether rightly or wrongly whether lawfully or unlawfully, fairly or unfairly has been arrested on charges of theft fraud or whatever it may be in instances where that individual is the very, very custodian of our safety and security measures the very issues that he is required to safe guard the public against? What is the public perception and what would the man in the street think if Cleophaus's employment under these circumstances where to be confirmed? I can take the matter not further than that." (See page 148 of the transcript)

[16] And when answering the question about the fairness of the dismissal during evidence in chief Mr Soldatis says the following:

*"This was a termination based on incapacity, incapacity in the form of specifically that compatibility related issues. It is compatible for an employer; given the considerations which I had testified on ... is it possible for an employer to continue with the employment relations under these particular circumstances? And bearing in mind the fact that we were of the view that this could, and in fact would certainly in the eyes of the football following, damage and jeopardise the credibility of the association, from that particular perspective we would see that he (third respondent) in fact recorded this in his bundle of documents that he had the four SAPS officials arrested at the match."(*See page 157 of the transcript)

Mr Soldatis admitted under cross examination that the employee had not been dismissed for lack of performance but was dismissed for incompatibility. During cross-examination Mr Soldatis in answering questions related to the reasons for the dismissal had the following to say:

"The public perception is almost one of the critical things – essentially the association is almost brought into disrepute as a result of this (the arrest)... the rote cost his trust and confidence...." (See page 179 of the transcription)

[17] Mr Soldatis further admitted under cross examination that the applicant did not follow item 8 of schedule 8 of the LRA in dismissing the employee.

Grounds of review

[18] The grounds of review upon which the applicant relies on in challenging the arbitration award of the commissioner are summarised at paragraph 8.2 of the applicant's founding affidavit as follows:

"8.2.1 misdirected his mind to the issues before him;

8.2.2 exceeded his powers;

8.2.3 committed a gross irregularity in the conduct of the proceeding;

8.2.4 reached an irrational and unreasonable conclusions."

[19] In the heads of argument the applicant sought to draw a distinction between probationary employees and permanent employee. In this regard the applicant relied on the case of ***Black Allied Workers Union and Others v One Rander***

Steak House (1988) 9 ILJ 326 (IC), where it was held that the status of a probationary employee differs from that of the permanent employee and that a disciplinary hearing can in fact be dispensed with if dismissal is substantively fair and if reasonable or stipulated notice is given. The applicant further argued that it was trite that the purpose of probation is to confer on the employer a right to terminate the contract at the end of the probationary period if the employee does meet the employer's expectation.

[20] The essence of the applicant's case was that the probationary period which had been extended could not be extended further because of the break down in the trust relationship between it and the employee. The trust relationship between the parties broke down according to the applicant because the employee was arrested during November 2008 in full view of officials and other dignitaries at the stadium.

Evaluation

[21] In terms of the pre-arbitration minutes the commissioner was to determine both the substantive and procedural fairness of the dismissal of the applicant. The commissioner in his analysis of evidence before him found that the reason for the dismissal of the employee was because of his arrest for being accused of theft.

[22] The commissioner further make the following findings:

- The criminal case was not related to the employee's work;

- The alleged criminal offence did not happen during the cause of his employment;
- The employee was arrested only as a suspect;
- The criminal case was dropped and to be reinstated for reasons unknown to the applicant.

[23] The commissioner reasoned further in the middle of paragraph 38 of his arbitration award that:

> *"On the same vein the respondent does not deny persons may be detained, arrested or framed illegally in criminal matters. I am also certain the world and the public at large will also be concerned about the treatment of employees by large corporation like SAFA. The public and the world will, I am certain be pleased with the proper treatment of the employees by any of its affiliates and SAFA included."*

[24] At paragraph 39 of the arbitration award the commissioner summarises the submissions of the applicant as requiring his treatment of the applicant to be different to the other employees in relations to the dismissal simply because the football world cup which at that stage was about to be staged in South Africa. He rejected the submissions made by SAFA and held that he was enjoined by schedule 8 item (1) of the LRA to determine the fairness of the dismissal of a probationary employee.

[25] In relation to the termination of the probationary employee the commissioner says:

> *"42 There must be a reason related to the purpose of the probation which in short is to give the employer an opportunity to evaluate the employees performance before the employment case be terminated.*
>
> *43 If the employer is not satisfied with the performance, suitability and competence of the employ(ee) may not confirm the employment.*
>
> *In fact the reasons for terminating a probationary employee may be less compelling than that of other employees not in probation.*
>
> *44 In the current matter, it has been conceded no evaluation on the competency of the applicant was made. There was no submission on his suitability for the work. It is not the employer's case that the applicant cannot do his job or was found unsuitable. The employer dismissed him using probation because he was arrested and as such is incompatible. No justification was made why he would be incompatible to do his job even when he was not been found guilty. The applicant was not required to explain in a properly convened hearing on charges relating to his involvement in his arrest. I do not belief applicant can be compatible for work because reasons advance by the Respondent.*

45 the respondent could not terminate his employment fairly without the assessment and similarly they cannot fairly dismiss him on the basis of the arrest without giving him the opportunity to explain his side of the case."

[26] On the basis of the above reasoning the commissioner found that the applicant could not terminate the employment of the employee fairly without the assessment of his performance and also that he could not be fairly dismissed without been given an opportunity to explain why he was arrested.

[27] In my view the reasoning and the conclusion of the commissioner in the arbitration award cannot be faulted for unreasonableness because the reasoning and the conclusion has support in the basic principles governing the determination of a fair dismissal. The guiding principles for determining whether or not a dismissal is fair or otherwise is set out in Item 2 of Schedule 8 of the Code of Good Practice which provides as follows:

"2 Fair reason for dismissal

(1) *A dismissal is unfair if it is not effected for a fair reason and in accordance with a fair procedure, even if it complies with any notice period in a contract of employment or in legislation governing employment. Whether or not a dismissal is for a fair reason is determined by the facts of the case, and the appropriateness of dismissal as a penalty. Whether or not the*

procedure is fair is determined by referring to the guidelines set out below.

(2) This Act recognises three grounds on which a termination of employment might be legitimate. These are: the conduct of the employee, the capacity of the employee, and the operational requirements of the employer's business."

[28] In terms of Item 4 of Schedule 8 an employer is required to conduct an investigation even if it is informal to determine whether or not there are good and valid grounds for dismissal. It is a further requirement of this guideline that the employer should inform the employee of the allegations against him or her and afford him or her opportunity to state his or her case in response to those allegations.

[29] Item 7 on the other hand reads as follows:

"7 ***Guidelines in cases of dismissal for misconduct***

Any person who is determining whether a *dismissal* for duct is unfair should consider—

(a) whether or not the employee contravened a standard regulating conduct in, or of relevant workplace; and

(i) if a rule or standard was contravened, whether the rule was a valid or reasonable rule or standard;

(ii) the employee was aware, or could reasonably expected to have been aware, of the standard;

(iii) the rule or standard has been consistently by the employer; and

(iv) dismissal was an appropriate sanction contravention of the rule or standard."

[30] There is no doubt in my view and from the reading of the arbitration award that the commissioner was influenced and followed the above guidelines in his reasoning and arriving at the conclusion that the dismissal was unfair. The dismissal of the employee by SAFA was based on suspicion which was never investigated by it nor did they even have the decency of affording the employee an opportunity of presenting his side of the story. There is no evidence that SAFA has a rule that employees who are suspected of theft should be dismissed. In my view, if such rule was to exist it would be unreasonable and invalid because it would go against the principles of a civilised and democratic society. Punishing a person on mere suspicion and unproven allegations can only be sustained in societies where uncivilised structures and mechanisms of dispute resolution are permissible.

[31] The principles governing the approach that the employer should follow when dealing with probationary employees is well established in our law. I do not intend dwelling into those principles save to say that probation is not a licence for treating and dismissing employees unfairly. In the present instance it would appear that SAFA sought refuge in the concept of probation to justify the very blatant unfair dismissal of the employee. The dismissal had nothing to do with the probationary aspect of the relationship between the parties. The testimony of

SAFA's witness indicates that the reason for the dismissal was based on fear of the perception of the public and FIFA if they were to confirm his contract in the unsubstantiated allegations of theft against him. It is apparent from reading the testimony of the key witness of SAFA that there was no concern whether or not the allegations were substantiated or not. Put differently, the dismissal had to do with some very strange and shocking reasoning by someone in SAFA that FIFA would endorse the unfair dismissal of the employee simply because some unsubstantiated allegations had been made against the employee and the police have on that basis arrested him.

[32] In the light of the above I am of the view that SAFA has failed to make out a case justifying interference with the arbitration award of the commissioner. Accordingly, SAFA's application stands to fail. In the light of this and the circumstances of this case I see no reason in law and fairness why costs should not follow the results.

[33] In the premises the application to review and set aside the arbitration award issued by the first respondent under case number JATW13681/08 dated 5 July 2009 is dismissed with costs.

Molahlehi J

Date of Hearing : 23rd September 2010

Date of Judgment : 17 November 2010

Appearances

For the Applicant : Adv C Ascar

Instructed by : Fluxmans Incorporated

For the Respondent: Adv E Van Graan SC

Instructed by : Roelof Van Der Merwe Attorneys