IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN BRAAMFONTEIN

CASE NO: JR 3065/04

In the matter between:

Financial Security Services CC **Applicant**

and

Commission for Conciliation, Mediation and Arbitration **1st Respondent**

Phala, ME **2nd Respondent**

Aviva Guthrie **3rd Respondent**

JUDGMENT

CELE AJ

INTRODUCTION

[1] This is an application in terms of section 158 (1) (g) of the Labour Relations Act 66 of 1995("the Act"), to review and set aside an arbitration award dated 23 November 2004 issued by the second respondent acting under the auspices of the first respondent. The application is opposed.

Background facts

[2] The third respondent was employed by the applicant as a book keeper. She resigned from that position. On the 23 September 2004 the third respondent entered into a written contract of employment for an initial period of three months with the applicant. She was assigned the duties of a personal assistant to Mr Deslongrais of the applicant. She was going to be trained by the outgoing secretary, a Mrs Govender. She would earn R4 000 per month.

[3] On 30 September 2004 the third respondent reported on duty as usual. She was then called to a meeting with Mr Leopold Schultz of the applicant. A letter of termination of employment contract was issued to and signed by the third respondent. That effectively ended her employment with the applicant. The said letter resulted in there being a dismissal dispute between the parties which the third respondent referred to the first respondent for conciliation.

The dispute could not be resolved and a certificate of non-resolution was issued. The third respondent then referred the dispute for arbitration.

[4] The second respondent found that the third respondent had been dismissed by the applicant and that such dismissal was substantively and procedurally unfair. He then ordered the applicant to pay three months salary i.e. R 12 000 as compensation to the third respondent. The applicant was aggrieved by the finding and has lodged this application.

The arbitration proceedings

[5] Mr J.J Van den Heever, an attorney, represented the applicant while the third respondent appeared without a representative. The second respondent invited Mr Van den Heever to indicate whether dismissal was in issue. The question posed by the second respondent was inter-posed by "inaudibles" in the transcript which made it difficult to discern the entire question posed. It appears though that when Mr Van den Heever answered in the affirmative, he was responding to the second respondent's question that he did not have to determine whether there was indeed a dismissal or not.

[6] The leading of evidence commenced with the second respondent inviting the third respondent to state her names into the record and thereafter being sworn in. The third respondent confirmed that she had referred a dispute to the first respondent alleging that she was

dismissed but said that she did not know the reason thereof. She said she was dismissed when an outgoing secretary, Mrs Govender, who had resigned and in whose place, the third respondent would step in, retracted her resignation. She said that Mrs Govender was supposed to train her and during that week of training she herself did not have much work to do.

[7] She said that on Thursday of 30 September 2004 she came to work as usual. She said that she then saw Mrs Govender going into Mr Deslongrais office and remained in that office for about an hour. She said that, that incident made her wonder what was going on in that office as it ought to have been Mrs Govender's last working day. When Mrs Govender came out, the third respondent said that she asked her what it was that was wrong and was told that there was nothing wrong except that Mr Deslongrais had asked her to stay on but that she had insisted on leaving.

[8] The third respondent then said that at about 9 am Mr Schultz came into the office and was soon followed by Mr Deslongrais. She said they were in that office for about twenty minutes. She said that Mrs Govender was called into the office. She said the conversation of the three lasted for about an hour. She said she was wondering at all times as to what was going on and she said that she became uneasy. She said that when finally Mrs Govender came out, she asked again about the meeting but was told again that nothing was going on except that they had begged her to stay on. She said that in all those meetings the office door would be kept closed.

[9] She said that Mr Schultz came out of his office with her file under his arm. He then called her to the boardroom where he sat her down. She said that he then told her that she was not coping with her work and that he had found that the job was not for her. That, she said, shocked and surprised her because she did not really do much work. She said that he told her that she had taken some computer generated letter and had faxed it to the computer desktop that was obviously not suited for the position. She said that she had been in that position for five days and therefore wondered how judgment on her ability could be made in such a short period of time.

[10] The third respondent said that Mr Schultz then handed to her a letter of dismissal. She said that she was so overwhelmed by the turn of events that she did not know how to respond thereto. She said that she signed the letter. She said that she could not protest or object to signing it because she was under a lot of stress, strain and duress.

[11] The third respondent disputed the applicant's version when it was put to her. Such version was that Mr Schultz had asked her if she was coping with her work to which question she responded by saying that the job was not for her. Mr Schultz then said to her that they (both) had to call it quits. She said that she could not get her self out of the job. She disputed there having been an agreement between her and Mr Schultz that, due to the fact that she was not

coping with her work, her contract would be terminated by agreement. She said that she was alleging that her case was one of unfair dismissal. That, she said, was premised on a unilateral change to the terms and conditions of her employment. That was briefly the evidence of the third respondent at the arbitration hearing.

[12] Contrary to the third respondent's version, Mr Schultz testified that in the meeting he had with third respondent on 30 September 2004, she conceded that she could not cope with the work of her position. He said that he had pointed out first to her that it had become clear that she was having trouble getting used to the work system and doing the job. He said that her response was that the job was not for her. He said that he told her that as they have been trying her out, it would not work and he asked if they were not to call it a day, right then. He said that she responded by agreeing and by saying that in that respect, she was with him. When he was asked if those were her exact words, he said, she said it was a good idea.

[13] Mr Schultz said that they then shook hands and he wished her good luck. After that, he said that he told her that he had already prepared a letter because he knew that she was not managing. He said that he had crossed out the "accepted" in the letter and had instead put "received". He said that she signed it to confirm that she received it. He said that she did not raise the objection at that time.

[14] He said further that he told her that she did not have to stay and he

then offered to pay for her taxi fee to take her home but she declined and said that she would telephone her mother. He said that she left the boardroom and proceeded to pick up the telephone at Mrs Govender's desk. He said that he overheard her saying to her mother on the telephone, that she had been fired. He said that he was shocked upon hearing that she was saying that she was fired. He said that it had been a mutual conclusion of the contract which contract was effectively not fruitful. He explained his failure, in going to her there and then to correct the position, to being shocked but also thought that it was her choice of telling her mother what had happened. He said he did not expect her to go to the CCMA. He said that if she had not gone to the CCMA, they would have considered her for the other positions.

[15] In her evidence, Mrs Govender said that she was charged with having to train the third respondent. That, she said, was at the time she had tendered her resignation and therefore had to leave the company at the end of the month. She said that she first trained the third respondent on 23 September 2004 and that at the end of that very day, the third respondent told her that she was sorry as that job was not for her and that she trained her and made her make and keep notes which she could refer to. Instead of referring to those notes, she said that the third respondent would ask her to repeat some of the explanations which she had already made. She said that the third respondent questioned certain procedures when those were explained to her.

[16] As regards the events of 30 September 2004, she said that she did see the third respondent and Mr Schultz going to the boardroom. When they came out, she said that the third respondent came to her and said that she had been fired. She said that she also overheard the third respondent saying that she had been fired, when she spoke on the telephone with her mother. That basically concluded the evidence of the applicant at the arbitration hearing.

The Arbitration Award

[17] The second respondent framed the issue which he was called upon to decide as:

> "Whether the dismissal of the applicant was procedurally and substantively unfair"

[18] The second respondent found the letter of termination of employment to have been the only record of what had occurred before the third respondent left the employ of the applicant. The author of the letter had indicated that the third respondent was not coping. He found that the letter did not reflect the agreement which Mr Schultz spoke of, in his evidence. He said that it was not clear what tool Mr Schultz would have used to asses the performance of the third respondent.

[19] The second respondent said that the dispute was about the performance of an employee. He said that Mr Schultz had an obligation to give the third respondent the necessary training

instructions and counselling. He found that Mr Schultz had immediately seen an easy way out and had sought to get rid of the applicant by improper means. He found that, in a haste to offload a burden, Mr Schultz had violated the principles governing an employment relationship and in particular the Act. He found it as a requirement that a dismissal ought to be effected for a fair reason and in accordance with a fair procedure. He found the conduct of the applicant to have flouted these basic tenants. He then found that the third respondent was indeed dismissed and that such dismissal was procedurally and substantively unfair. He then, ordered the applicant to compensate the third respondent with three months salary which came to R 12 000. It is this finding and the order which the applicant seeks to have reviewed and set aside.

Grounds for review

[20] Two grounds for review were submitted by the applicant, namely:

1) Gross irregularity in the framing of the question which the second respondent was called upon to answer, and therefore ignored the incident of the onus or that he incorrectly applied it;

2) That the award is not justifiable in terms of the reasons given for it. This ground was however abandoned during the hearing of the application.

Analysis

[21] In relation to the incidence of onus, section 192 of the Act states that in any proceedings concerning any dismissal, the **employee** must establish the existence of the dismissal. If the existence of the dismissal is established, the employer must prove that the dismissal is fair. The submission made by the applicant is that in circumstances of it disputing the third respondent's alleged dismissal, the third respondent bore the onus of establishing that there was a dismissal. Only after the dismissal would have been established, would it then be determined whether the dismissal was fair. This approach, which is a correct application of section 192 of the Act, is not being contested by the third respondent. It was submitted by the third respondent that it is apparent from the transcript that the second respondent did not pre-determine the issue of onus as alleged by the applicant. On the contrary, the third respondent said, that the second respondent elicited evidence from the third respondent in order to establish whether the third respondent was dismissed.

[22] The applicant is, in my view, correct in criticising the second respondent for framing the issue he was called upon to resolve, as the fact of dismissal was itself placed in issue. At the commencement of the arbitration proceedings, the second respondent dealt with a question of legal representation and allowed Mr J. J van den Heever, an attorney, to represent the applicant, while the third respondent conducted her own case. The

second respondent then asked Mr Van den Heever whether he (the second respondent) did not have to determine whether there was indeed a dismissal or not. Mr Van den Heever answered in the affirmative, thus agreeing that the second respondent did not have to determine whether there was indeed a dismissal. It is not apparent from the record why Mr Van den Heever made such a concession as the case of the applicant was that the third respondent was not dismissed but that her services were terminated by a mutual agreement. As practice would have it, where dismissal is in issue, the employee testifies first. This is what the second respondent did when he immediately invited the third respondent to testify first.

[23] *Ex facie* the record of proceedings, it is clear that the second respondent was alive to there being a need for the dismissal as a fact to be proved when he asked the third respondent the question "Now you have referred a dispute to the CCMA alleging that you are dismissed, but you don't know the reason". The third respondent gave an answer in the affirmative after which the second respondent then asked her when, according to her she was dismissed. Her reply was basically to the effect that she was dismissed because the outgoing secretary who had resigned decided to stay by retracting her resignation with the consequence that she herself had nowhere to stay. The second respondent then invited the third respondent to explain further what happened before she left the employ of the applicant. The third respondent then gave a long account of events of 30 September 2004. This encounter included an explanation of

how her services were terminated and the consequence thereof to her own life.

[24] In the award, the second respondent found that the third respondent was indeed dismissed. The evidence tendered by the third respondent together with the letter which Mr Schultz had written and handed to the third respondent, provided overwhelming evidential material properly made available before the second respondent to reach the conclusion which he did. In my view therefore, the second respondent did not pre-determine the issue as alleged by the applicant, notwithstanding the incorrect identification of the issues which he was called upon to determine. Accordingly, the application must fail.

[25] In the event that the application is dismissed, the third respondent had asked for a punitive costs order on the scale as between attorney and own client. The third respondent contended that the application had no basis in law or in fact. Further, it was submitted that the applicant stubbornly continued with the application well knowing that the third respondent had no alternative employment; that she had to lay off her domestic help and that family were living off one salary which was not substantial at all and that her entire life had then changed. The applicant had itself asked for a costs order in the event of opposition.

[26] The applicant through Mr Schultz orchestrated the exit of the third respondent from its employ after it had succeeded in persuading Ms Govender to retract her resignation. In dismissing the third respondent, the applicant displayed a high disregard of the Labour Relations Act 66 of 1995, as well as the third respondent's position.

[27] In these circumstances, it seems to me that the applicant was not *bona fide*. In my view the third respondent has made out a proper case where she should not be burdened with costs for defending a case which she was perfectly entitled to oppose.

[28] Accordingly, the following order will issue:

1. The application is dismissed.

2. The applicant is ordered to pay costs on the scale as between attorney and own client.

CELE AJ

Date of hearing : 22 March 2006

Date of Judgment: 20 April 2006

Appearances

For the Applicant : Mr Badenhosrt

Instructed by	:	Human Resources Helpline
For the Respondent:		Mr W Clark
Instructed by	:	Shaban Clark