IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO: JR 953/06

In the matter between:

SATAWU obo SERGENT KIGAOTO & TWO OTHERS **APPLICANT**

and

COMMISSION FOR CONDILIATION, MEDIATION AND ARBTIRATION **FIRST RESPONDENT**
SIPHO RADEBE N.O **SECOND RESPONDENT**
GROUP 4 SECURICO (PTY) LTD **THIRD RESPONDENT**

JUDGMENT

AC BASSON, J

[1] On 14 May 2010, this Court gave the following order:

"1. The applications for condonation for the late filing of the review application and the answering affidavit are granted.

2. *The application to review is dismissed with costs."*

3.

[2] This was an application in terms of section 145 of the LRA to review and set aside the award by the second respondent (hereinafter referred to as "the

commissioner" in terms of which the commissioner held that the dismissal of the applicants was substantively fair but procedurally unfair. For the procedural unfairness the applicants were awarded compensation in the amount of R 4 161.00 each.

[3] Before I deal with the merits I will briefly deal with the two condonation applications. The one application was for the late filing of the review application and the other was for the late filing of the answering affidavit. The parties indicated at the commencement of the proceedings that neither of these two applications are opposed. I have nonetheless considered both applications and have decided to grant both.

Merits of the review

[4] In terms of *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* (2007) 28 ILJ 2405 (CC) this Court must review the award of a commissioner and determine whether or not the decision reached by the commissioner is one that a reasonable decision maker could not reach.

[5] The three applicants were employed as security guards by the 3rd Respondent (Group 4 Securico (Pty) Ltd – hereinafter referred to as "the respondent"). They were charged with: *"1. Gross negligence with regard to the performance of duties. 2. Behaviour damaging the Group's image. 3. Conduct to the prejudice to good order and discipline."*

[6] According to the evidence a theft occurred at the premises of a client PG

Bison in Germiston where the three applicants were on duty as security officers. The events that gave rise to the charges were investigated by a certain Mr. Van der Watt (hereinafter referred to as "Van der Watt") who is the 3rd respondent's Investigations Manager. According to the evidence Van der Watt was called to the client's premises. He was informed that a theft of approximately 400 laminated sheets with the value of approximately R 3000.000.00 had taken place over the weekend of 25 October – 28 October 2002. It was not disputed that the applicants were on duty as security guards over that period. Also not in dispute was the fact that the theft took place. This is supported by the fact that Bison instituted a civil claim against the respondent for the losses that it had incurred as a result of the theft.

[7] According to the evidence Van der Watt met with Mr. Van der Westhuizen (hereinafter referred to as "Van der Westhuizen") who is the Distribution Centre Manager of the client. Van der Westhuizen showed Van der Watt that his office door was forced open and that the VCR which was connected to the surveillance system was removed. The alarm keypad was also removed from the office wall in the hall. The investigation further showed that there was no forced entry to the warehouse where the laminated sheets were held. Because of the weight of the laminated sheets, a forklift must have been used to move and load the sheets. The forklift key holder situated in the pay office was also forced open.

[8] Van der Westhuisen and Van der Watt also investigated the alarm report

sheet for the weekend. The report revealed that the alarm was deactivated and again rearmed in certain areas and from time to time.

The award

[9] The commissioner gave a brief summary of the evidence that was led at the arbitration. It is clear from the award that the commissioner took into account the totality of evidence that was placed before the arbitration and that he was alive to all the issues that were placed before him. It was the applicants' case that the alarm system was defective and that they did not detect anything wrong. The evidence on behalf of the respondent was that the three employees were on duty on the day the theft took place. Despite them being there the occurrence book entries recorded that everything was in order.

[10] It was common cause that the guardhouse was located next to the only entrance for vehicles and that there was a boom. It was also common cause that this was the only entrance to the property. It was also common cause that there was no evidence of a break-in through any of the walls surrounding the property. The laminated sheets (of about four tons) must therefore have left the property throught the main gate which was situated next to the guardhouse. The commissioner, confronted with this evidence, concluded as follows:

> "Their version as testified to by Letsoalo is improbable. It does not explain how stock of about 4 tons could leave the premises of the client without them being aware thereof. It is a fact that the alarm

was activated many time during the day and the applicants could not explain why the failed to detect that. The respondent had testified that the alarm was in good order on the day in question and this was not contested by the applicants. There was only one exit on the premises and the applicants were placed there throughout.

In the circumstances I find that the applicants were dismissed for a fair reason. And that the sanction meted out to the applicants was appropriate."

[11] Although I have considered the nine grounds for review listed in the founding affidavit, I intend only to make a few comments about some of the grounds. On behalf of the applicants it was argued that the commissioner unreasonably refused a request by the applicant for an inspection *in loco*. There is no merit in the argument, particularly in light of the fact that the outlay of the premises was not seriously disputed and more in particular, in light of the crucial common cause fact that the gate (the only entrance to the property) is situated next to the guard house. The fact remains: a theft took place at the time the applicants were on duty. As a result the client instituted civil proceedings against the respondent. I can find no reason to review the award on this basis. The applicants also sought to review the award on the basis that the commissioner "*Misbehaved himself in ruling in favour of the respondent in it's assumptions evidence that the incident occurred on the 26th October 2002 whilst first it was submitted that it occurred between 25th & 26th and not tangible evidence was presented to*

advance this theory except the contested print out of the alleged alarm activation". There is simply no merit in this argument. It is clear from the transcript that the applicants' representative had agreed that the events in question took place on the 26th. The applicants' also disputed the accuracies in the alarm system. I am not persuaded that the commissioner was unreasonable in accepting that the alarm was activated and deactivated many times during the day. Firstly, the alarm was tested and was found to be in proper order. Secondly, whether or not the alarm worked or not still does not explain how 4 tons of material loaded on a truck (by a forklift that was stored on the premises) left the premises through a boom gate right next to the guard house. Thirdly, it was only on the 26th of October – the day on which the theft occurred – that the alarm activations and deactivations took place. Fourthly, there was no evidence before the commissioner to suggest that Van der Westhuizen had fabricated the alarm report.

[12] In light of the aforegoing I therefore do not accept the submission that the commissioner did not apply his mind to the issues or that he did not get to grips with the true issue. I am also not persuaded that the commissioner had failed to apply his mind to the evidence. In the event I am persuaded that the commissioner arrived at a reasonable conclusion: Briefly: The applicants were on duty during the weekend that the theft took place. The alarm system was deactivated and activated some six times on the day the theft took place. When the alarm was tested after the incident, the technician found it to be in proper

working order. The laminated sheets that were removed from the premises weighed approximately 4 tons and the suspects must have in all probability have utilised a four ton truck to remove the material. There is only one entrance to the property which is situated next to the guard house. The suspects must therefore have left the premises through the boom gate next to the guard house. At the very least the conclusion reached by the commissioner that it was improbable that the applicants were not aware of a theft on such a large scale (stock of about 4 tons) is rational.

[13] In the event the application to review is dismissed and I can find no reason not to award costs against the applicant. Lastly, the respondent did file a counter-review. In light of the fact that it was abandend I do not intend to deal with the merits thereof.

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AC BASSON, J

DATE OF THE PROCEEDINGS: 14 May 2010

DATE OF THE JUDGMENT: 14 JUNE 2010

For the applicant: Mr Baloy of MM Baloy Attorneys
For the respondent: Mr. W Hutchinson instructed by Moodie & Robertson Attorneys