REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case No: JR 2632/11

In the matter between:

HIMAX SECURITY SERVICES CC **Applicant**

and

THABO SEKHABISA N.O. **First Respondent**

COMMISSION FOR CONCILILATION **Second Respondent**

MEDIATION AND ARBITRATION

SOUTH AFRICAN TRANSPORT AND ALLIED **Third Respondent**

WORKERS' UNION OBO NKOSI

Heard: **6 August 2014**

Delivered: **3 October 2014**

Summary: **review application; dismissal justified on account of a final written warning; final written warning set aside at the time of dismissal; employer**

unware of default award setting final written warning aside; rescission application made before the award in the arbitration; arbitrator deciding the issues as if there was no rescission application; whether award unreasonable for that reason.

JUDGMENT

MOOKI, AJ

[1] There are two related applications before court. The two matters were consolidated by order of this Court on 23 May 2014. The first application, in case number J2325/12 is an application by Phillimon Nkosi, a member of SATAWU, to make an arbitration award by the CCMA an order of this Court.

[2] The first respondent found the dismissal of the third respondent to be unfair and ruled that the third respondent be reinstated by 30 September 2011. The first respondent also ruled that the third respondent be compensated in the amount of R17 682.00 and that such amount being paid by 30 September 2011.

[3] The applicant opposes making the award an order of court because the applicant has launched a review of the award. The second application, in case number JR2632/11, is a review application by the applicant to set aside the award that is the subject of case number J2325/12. This application is also opposed.

[4] The applicant raised various grounds of review, but persisted only with one ground when the matter came to be argued. The particular ground is that the arbitrator was mistaken in believing that there was no rescission application at the time of the arbitration. Reliance on this ground is relevant on account of the following considerations.

[5] The applicant charged Mr Nkosi and other employees with the same misconduct. The applicant dismissed Mr Nkosi but not his co-accused, because Mr Nkosi had a final written warning; which was not the case with his co-accused.

[6] Mr Nkosi had, before his dismissal, obtained a ruling by the first CCMA which set the final written warning against him aside. The applicant was unaware of this ruling. The applicant first became aware of the rescission of the final written warning on 21 July 2011, during cross-examination of a witness for the applicant during the arbitration in which Mr Nkosi challenged his dismissal.

[7] The arbitration was adjourned after the evidence was given on behalf of the applicant. The applicant did not lead further evidence when the hearing resumed, which was on 13 September 2011. The applicant applied on 2 August 2011 to rescind the ruling setting aside the final written warning.

[8] The arbitration was concluded on 13 September 2011. The decision setting aside the final written warning was rescinded on 23 September 2011. The first applicant gave his award on 5 October 2011.

[9] The first respondent expressed doubt in his award as to whether the applicant had applied to rescind the final written warning. The applicant focused its attack on the award based on what the first respondent had to say about the rescission application. Ms Prinsloo, appearing for the applicant, submitted that the arbitrator erred in his finding that there was no rescission application.

[10] The first respondent found that it was apparent that there was no application to rescind the final written warning. This finding was attacked because it was made only because the first respondent, according to the applicant, would not entertain evidence about the applicant's application to rescind the ruling setting aside the final written warning.

[11] It was supplemented on behalf of the applicant that the award is unreasonable

because the first respondent:

11.1 told the parties that the issue regarding whether the final written warning had been cancelled be dealt with in argument;

11.2 Concluded that there was no application and did not appreciate the facts because he excluded evidence and that such evidence was material in determining whether there was a final written warning.

[12] It was submitted that the first respondent did not permit a fair trial of the issues, and that the matter should be sent back to the CCMA in order for another commissioner to consider the facts fully.

[13] The complaint ultimately is that the arbitrator did not allow evidence from which he would have known that the ruling setting aside of the final written warning was being challenged and that such a challenge could go either way.

[14] The record regarding the precision of the final written warning indicates the following. It was put to Mr Rasweko, a witness for the applicant, that the CCMA had cancelled the warning. The applicant's representative then enquired whether the applicant could respond to indicate whether the applicant was aware of the cancellation. The first respondent replied that such an indication could be given during closing submissions.

[15] The complaint against first respondent lacks merit. The issue of the setting aside of the final written warning was mentioned during the evidence on 11 July 2011. The application to rescind the ruling was made on 2 August 2011. There was no rescission application on 21 July 2011, when the applicant made its case during the arbitration.

[16] Ms Prinsloo accepted that there was no final written warning, as a matter of law, when the applicant dismissed Mr Nkosi. She however sought to persuade the court that the "factual position" differed from the legal position at the time

of the dismissal because the applicant was unaware that the final written warning had been set aside and that the dismissal was premised on there being a valid final written warning. The applicant relied on the existence of a final written warning to counter the claim of inconsistent treatment of Mr Nkosi compared with the sanction visited on Mr Nkosi's co-employees. The final written warning differentiated Mr Nkosi from his co-accused, who had no final written warning at the time when they were charged with misconduct.

[17] It was submitted on behalf of the applicant that the matter should be remitted for a new hearing. This is to allow the applicant to lead evidence on the final written warning.

[18] I am not persuaded that the award should be disturbed. The criticism pertaining to the rescission application does not render the award unreasonable. The relief sought by the applicant is also not permissible in review proceedings. This court is limited to determining the reasonableness of the decision by an arbitrator. The applicant ultimately seeks to introduce new evidence to justify dismissing Mr Nkosi. This is not competent in review proceedings. The later rescission of the ruling setting aside the final written warning does not change the fact that there was no final written warning at the time of the dismissal.

[19] The third respondent had brought an application to have the award made by the first respondent made an order of court. It was submitted on behalf of the applicant that Mr Nkosi had adopted the wrong procedure in seeking to have the review dismissed by invoking section 158(1)(c). Ms Prinsloo did not press this point with much vigour, and with good reason. It is clear that Mr Nkosi does not seek to have the review application dismissed. His application is manifestly to make the award in his favour an order of court. I am satisfied that the award should be made an order of court.

[20] I make the following order:

20.1 The review application is dismissed with the costs.

20.2 The arbitration award dated 13 September 2011, in proceedings before the Commission for Conciliation Mediation and Arbitration in case number GAEK 1519-11, is made an order of court.

20.3 The respondent in the application to make the award an order of court is ordered to reinstate the applicant within 7 days of service of this order on the applicant.

20.4 The respondent in the application to make the award an order of court is ordered to pay costs in that application.

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O Mooki

Judge of the Labour Court (Acting)

Appearances:

Applicant:	C Prinsloo
Instructed by:	De Villiers & Du Plessis Attorneys
Third Respondent:	D Majare (Attorney), of Mabaso Inc.