IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR1961/13; JR 1510/13

ARMAMENTS CORPORATION OF SOUTH AFRICA (SOC) LTD	**Applicant**
and	
CCMA	**First Respondent**
WILLEM KOEKEMOER, N.O.	**Second Respondent**
SOLIDARITY	**Third Respondent**
J M JOUBERT	**Fourth Respondent**

Heard: **27 August 2015**

Delivered: **20 January 2016**

JUDGMENT

WHITCHER J

Introduction

[1] The applicant ('Armscor') launched two review applications which were due to be heard together, but gave notice in its heads of argument that it abandons the application instituted under case number JR1510-13.

[2] The remaining application concerns the arbitration award of Koekemoer Cm ('the Commissioner') in which he rejected Armscor's point *in limine* that Mr Joubert was not dismissed, but rather that his contract terminated by operation of law after he failed to obtain security clearance in terms of section 37 of the Defence Act.[1] The Commissioner found that that Armscor dismissed Mr Joubert and accordingly the CCMA had jurisdiction to arbitrate, and then, on the merits, found that Mr Joubert's dismissal was substantively and procedurally unfair, and thus ordered his retrospective reinstatement.

[3] Armscor essentially abandoned its jurisdictional review of the award at the hearing and also accepted the Commissioner's findings that Mr Joubert's dismissal was procedurally unfair.

[4] This review application is specifically directed against the findings made by the Commissioner on the substantive fairness of Mr Joubert's dismissal, and the relief awarded by him. It also concerns the appropriate relief where it is found that a dismissal was only procedurally unfair.

The arbitration

[5] In essence, the following material was placed before the Commissioner in relation to the issues under review.

[6] In terms of section 37(2) of the Defence Act, which section is applicable to employees of Armscor:

> 'A member or employees contemplated in subsection 1(a)[2] *may not* be enrolled, appointed or promoted, receive a commission or *be retained* as a member or employee, *unless* such member or employee has been *issued with the appropriate or provisional grade of security clearance* by the Intelligence Division.'(Emphasis added).

[7] Armscor has a number of policies which have their source in section 37(2) of the Defence Act.

[1] 42 of 2002.

[2] Section 37(1)(a) provides that the Minister may prescribe 'different categories of security clearance to be issued by the intelligence Division for various categories of members and employees, and the employees of the Armaments Development and Production Corporation of South Africa Limited.

[8] Paragraph 6.6.1 of the Armscor Conditions of Employment Practice provides that the appointment and employment of an employee are subject to obtaining and maintaining an applicable security clearance.

[9] Paragraph 5.5.1 of the Armscor Security Clearance Practice provides that an appointment in Armscor is subject to obtaining and retaining a security clearance in relation to the security classification of the information to be accessed.

[10] Paragraph 5.15.2.4 of the Security Clearance Practice further provides that persons who fail to qualify for any grade of security clearance as a result of a negative vetting content will be dismissed or their contract of employment terminated.

[11] Mr Joubert was employed by Armscor from July 1981. At the time of his dismissal in December 2012, he was employed as a Senior Manager and earned a gross salary of R81 920.00. Over the course of his employment with Armscor, Mr Joubert had been granted security clearance certificates (at different grades) by the Intelligence Division of the SANDF.

[12] On 26 November 2012, for reasons never explained to Mr Joubert and Armscor, the Intelligence Division of SANDF refused to renew Mr Joubert's security clearance or to grant him any grade of security clearance, despite Armscor's Personnel Evaluation Division ("APED") recommending the grant of security clearance. Armscor informed him of the decision on 7 December 2012.

[13] On 18 December 2012, Armscor addressed a letter of termination to Mr Joubert. After citing the provisions of section 37(2) of the Defence Act and Armscor's related policies, Armscor went on to inform Mr Joubert as follows:

> "You are hereby informed that you have been refused all grades of security clearance. Consequently your contract of employment is terminated with immediate effect. You are further advised of your right to appeal within 30 days from the date of this letter, the decision to refuse you all grades of security clearance should you so wish, by personally requesting *a* review of

the clearance by lodging a written request via APED to the Personnel Security Review Board (PSRB)" (Emphasis added).

[14] On 7 January 2013, Mr Joubert lodged a request with the Defence Force for the urgent review of his security clearance and on 9 April 2013 sought reasons from the Secretary of Defence for the Defence Force's refusal to grant him any security clearance. To date of the arbitration and this review hearing, he has received no response from the Defence Force.

[15] At the arbitration, Armscor pointed out that it is not involved in, and has no control over, the decision-making process of granting security clearance certificates by the Intelligence Division of the SANDF.

[16] The same holds for decisions by the PSRB, which is established in terms of section 40 of the Defence Act and is tasked (in terms of section 41) with reviewing objections over the refusal of security clearance.

Grounds of review

Findings of substantive unfairness

[17] The parties agreed in the arbitration pre-trial minute that in the event that the Commissioner rejected Armscor's point *in limine,* and finds that Mr Joubert was dismissed by Armscor, the Commissioner was to determine the real legal basis for the dismissal and whether it was substantively and procedurally unfair.

[18] In this regard, Armscor contended at the arbitration that, insofar as Mr Joubert was dismissed for the purpose of the LRA, such dismissal was a dismissal for incapacity and that it was substantively fair in that it was dictated by section 37(2) of the Defence Act and Armscor's corresponding policies.

[19] Armscor referred the Commissioner to various legal authorities, including case law to the effect that incapacity can arise from any condition that prevents an employee from performing his work and that an employer may

legitimately dismiss an employee incapable of performing his obligations arising from the employment contract.[3]

[20] Armscor also cited an award in which a Commissioner found justifiable, on the basis of incapacity, the dismissal of a security guard who no longer complied with certain security regulations.[4]

[21] In essence, Armscor contended to the Commissioner that since Mr Joubert had been *refused all grades* of security clearance by the Intelligence Division of the SANDF, he was incapable of performing his job in any manner and that his dismissal for incapacity was substantively fair in that it resulted from a legal prohibition on employment brought about by section 37(2) of the Defence Act. His continued employment would have been unlawful as a consequence of him not having obtained the necessary security clearance in terms of the Defence Act.

[22] In addition, and in line with this, Mr Joubert's dismissal was sanctioned by Armscor's internal policies, which policies were based on section 37(2) of the Defence Act.

[23] In light of these submissions, I find that the issue of incapacity as the reason for dismissal and the fairness thereof was squarely placed before the Commissioner to determine.

[24] That this was a highly relevant alternative defence[5] is apparent from the facts that were common cause before the Commissioner, read with the case law cited by Armscor to the Commissioner.

[25] However, it is apparent from the award that the Commissioner left out of account the whole of this alternative defence submitted on behalf of Armscor. The Commissioner's only finding that goes directly to substantive fairness is this:

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[3] *NUM & another v Samancor Ltd (Tubatse Ferrochrome) & others* (2011) 32 ILJ 1618 (SCA); Samancor Tubatse Ferrochrome v MEIBC & others [2010] 8 BLLR 824 (LAC); Basson et al, Essential Labour Law (2009) 5th edition at page 135.

[4] *Mhlungu & another v Gremick Integrated Specialists* (2001) 22 ILJ 1030 CCMA.

[5] Alternative to the defence that Mr Joubert's contract terminated by operation of law.

> 'The respondent did not prove a fair reason to dismiss the applicant. I could not accept 'operation of law' as a fair reason to dismiss the applicant or by this means isolate the applicant from his basic rights pertaining to fairness'.

[26] The Commissioner thus failed to consider material facts and submissions placed before him and accordingly committed a material irregularity.

[27] The question is whether this material error caused a substantively unreasonable outcome, which the SCA in *Herholdt,*[6] found is reviewable as a species of gross irregularity.

[28] In summary, an award will be reviewable if the Commissioner ignores materially relevant facts and submissions (with this being prima facie unreasonable), if the distorting effect of this misdirection is to render the result of the award unreasonable.[7]

[29] I agree with Mr Myburgh that incapacity is the correct categorisation of the basis for Mr Joubert's dismissal and that this is apparent from this commentary by Prof Brassey SC, which was quoted with approval by the LAC in *Samancor*:[8]

> "Incapacity may be permanent or temporary and may have either a partial or a complete impact on the employee's ability to perform the job. The Code of Good Practice: Dismissal conceives of incapacity as ill-health or injury but it can take other forms. Imprisonment and military call-up, for instance, incapacitates the employee from performing his obligations under the contract. The dismissal of an employee in pursuance of a closed shop is for incapacity; *so is one that results from a legal prohibition on employment.*"[9] (Emphasis added.)

[6] *Herholdt v Nedbank Ltd* [2013] 11 BLLLR 1074 (SCA) at para 25.
[7] *Head of the Department of Education v Mofokeng & others* [2015] 1 BLLR 50 (LAC).

[8] Samancor Tubatse Ferrochrome v MEIBC & others [2010] 8 BLLR 824 (LAC).
[9] Brassey *Commentary on the Labour Relations Act* [RS 2, 2006] at A8-76, quoted with approval in *Samancor* at para 10.

[30] I also agree that, in line with this authority, Mr Joubert's dismissal was fair in that it resulted from a 'legal prohibition on employment' brought about by section 37 (2) of the Defence Act.

[31] In addition, Mr Joubert's dismissal was sanctioned by Armscor's unambiguous internal policy provision to the effect that 'persons who fail to qualify for any grade of security clearance as a result of a negative vetting content will be dismissed or their contract terminated'. Given its statutory underpinning (its source being in section 37(2) of the Defence Act), the nature of Armscor's business and the high levels of security clearance held by Mr Joubert as a senior manager, namely 'secret' and 'confidential', this rule or standard is patently fair and reasonable, as was Mr Joubert's dismissal ensuing from it.

[32] A consideration of the above facts and submissions – which were ignored in their entirety by the Commissioner – demonstrates that the Commissioner's finding of substantive unfairness was unreasonable. Put differently, a failure to consider these factors caused an unreasonable result.

[33] The submissions made on behalf of Mr Jourbert failed to convince me otherwise.

[34] A large measure of the submissions concerned the rationality of the Defence Force's decision (it being contended that the decision was irrational and reviewable), which is of no moment to the fairness of the decision taken by Armscor, it being a separate and distinct process. Armscor has no influence or control over the decision-making process of the Defence Force and the review board, and Armscor did recommend security clearance for Mr Joubert.

[35] It was further submitted that Armscor ought to have allowed the review process to run its course before taking a decision to dismiss Mr Joubert. By not waiting for the outcome of the review application, Armscor dismissed Mr Joubert in the absence of proof that it had become permanently and objectively impossible for Mr Joubert to be retained in his position. His incapacity had not been determined to be of a permanent nature that warranted dismissal.

[36] It was submitted that Armscor could have, for example, suspended or redeployed Mr Joubert, as alternatives to dismissal.

[37] I agree with Armscor's counter submissions. Mr Joubert could not have been deployed elsewhere in Armscor because his security clearance was removed in its *entirety* and it would be unreasonable to expect Armscor to keep a high earning employee on the books with no work in return, pending a review process, the duration of which they had no way of ascertaining. Even at the point of the review hearing, Mr Joubert's security issue had not been resolved. Armscor was entitled to dismiss him in the interim.

Relief of retrospective reinstatement

[38] Even if I am wrong in reviewing and setting aside the Commissioner's findings on the substantive merits of Mr Joubert's dismissal, the Commissioner's order of retrospective reinstatement is reviewable, as submitted by Armscor.

[39] Armscor made detailed submissions on the issue of relief at the arbitration. But, again, the award does not reflect the slightest application of the mind by the Commissioner to such.

[40] A fundamental issue not considered by the Commissioner is that, as a matter of law, a party cannot enforce a contract that is in contravention of statutory provisions.[10] Yet, this is precisely what the Commissioner did in ordering Armscor to continue its employment relationship with Mr Joubert, in circumstances where this is in contravention of section 37(2) of the Defence Act.

[41] I was referred to the case of *KZN Provincial Treasury*[11] in which an analogous situation arose. The employee had been dismissed by the treasury, and reinstated in an award by a commissioner. The order of reinstatement was in contravention of section 47 of the Constitution, which provides that public servants are prohibited from being members of parliament – the employee

[10] *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd* 2008 (3) SA 1 SCA at para 13; *Eastern Cape Provincial Government & others v Contractprops 25 (Pty) Ltd* 2001 (4) SA 142 (SCA) at paras 11-12.
[11] *KZN Provincial Treasury v General Public Service Sectoral Bargaining Council & others* [2006] 6 BLLR 573 (LC).

having become one after his dismissal. In setting aside the Commissioner's order of reinstatement, Van Niekerk AJ (as he then was) held:

> 'I am, therefore, in agreement with Mr Pillemer, who represented the applicant, that Dr Abonta's membership of the National Assembly precludes him from employment by the State and that it was not, therefore, competent for the arbitrator to reinstate Dr Abonta.'[12]

[42] Prof Brassey SC in a commentary on section 193 of the LRA wrote that '[r]einstatement or re-employment can be ordered only if the employment is lawful'.[13]

[43] In short, as Mr Myburgh put it, in circumstances where Mr Joubert's employment is not lawful, reinstatement was thus incompetent

[44] In conclusion, the Commissioner's failure to consider these fundamental issues caused him to produce an unreasonable decision on relief.

Procedural unfairness

[45] Armscor accepted the Commissioner's finding that Mr Joubert's dismissal was procedurally unfair, but submitted that six (6) months' salary would have been an appropriate and fair compensation because Mr Joubert had gained employment in mid-May 2013 at a salary of R81 000.00 per month. I disagree. I consider compensation equivalent to at least eight months' salary to be more equitable considering that his new employment is on a contract basis (his first being a year's contract) and the fact that Armscor dismissed an employee who had provided 31 years of service in the absence of any pre-dismissal procedures.

Order

[46] In the premises, the following order is made:

[12] At para 10.
[13] Brassey *Commentary on the Labour Relations Act* [RS 2, 2006] at A8-146.

1. The award of the second respondent on the substantive fairness of Mr Joubert's dismissal is reviewed and set aside and substituted with an award that Mr Joubert's dismissal was substantively fair.

2. The award of the second respondent on the issue of relief (reinstatement and backpay) is reviewed and set aside and substituted with an award that the applicant is directed to pay Mr Joubert compensation in an amount equivalent to eight (8) months' pay.

3. There is no order as to costs in respect of the review application filed under case number JR1961/13.

4. The applicant is ordered to pay the third and fourth respondents' costs associated with the review application instituted under case number JR 1510/13.

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Benita Whitcher

Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the applicant: Adv A Myburgh SC (instructed by Bowman Gilfillan Inc)
On behalf of the third and fourth respondents: Adv MJ Engelbrecht (instructed by Serfontein, Viljoen and Swart)