

**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Not Reportable

Case No: JR 917/16

In the matter between:

**FIDELITY SECURITY SERVICE (PTY) LTD**

**Applicant**

and

**SOCRAWU OBO KNOXWELL  
NENGWEKHULU & 1 OTHER**

**First Respondent**

**NORMAN MBELENGWA N.O**

**Second Respondent**

**COMMISSION FOR CONCILIATION,  
MEDIATION AND ARBITRATION**

**Third Respondent**

**Heard: 13 February 2019**

**Delivered: 25 February 2019**

**Summary: Unfair labour practice. Reinstatement of suspended employee not competent relief where it turned out during arbitration that the employee was dismissed prior to commencement of arbitration proceedings. The award reviewed and set aside in so far as the relief of reinstatement awarded by the arbitrator.**

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**JUDGMENT**

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**BALOYI, AJ**

## Introduction

[1] This application entails an arbitration award issued out by the second respondent who ruled that the suspensions of K Nengwekhulu and M Ncube (the individual employees) cited herein as the first respondent amounted to an unfair labour practice. He further ordered the applicant to reinstate them and pay each of them an amount equivalent to 5 months' remuneration for the arrear salaries. The applicant also made a substantive application for condonation of the late filing of the review application. Further, details on this point appear herein below.

## Factual background

[2] The applicant initiated disciplinary proceedings against the individual employees following certain complaints of stock losses from its client. They were placed on suspension pending finalization of the disciplinary hearing processes. On conclusion of the hearing they were informed that the outcome will be communicated to them. They were prompted to refer an unfair labour practice dispute as they did not hear from the applicant coupled with the fact that they were not remunerated for the whole period of waiting for the outcome. The applicant alleges that the employees were informed by Mr Mbatha that they were found not guilty and should come back to work. They did not report for duty and the applicant then decided to dismiss them for absconding. The second respondent ruled in favour of the individual employees and awarded them relief as stated above.

## The review application

[3] The applicant is challenging the arbitration award issued on 24 August 2015 on account of the second respondent's failure to consider all the relevant facts placed before him. The applicant's main contention is that Mr Mbatha informed the individual employees after their acquittal in the disciplinary hearing to return to work. Secondly, that the award was irrational and unreasonable for his failure to consider that the employees should have

referred an unfair dismissal dispute instead of unfair labour practice dispute. This is raised in the wake of a statement made at the commencement of the arbitration proceedings that their services were terminated for abscondment after the issuing of the disciplinary hearing outcome.

- [4] According to the applicant the arbitration award dated 24 August 2015 came to its attention for the first time on 29 April 2016 through the Sheriff of the Court who came to its premises for execution purposes. This application was filed on 17 June 2016 and the applicant submitted that the period of delay counting from 29 April 2016 is 7 days. The delay is attributed to internal investigations undertaken in its offices to trace the file of the matter. Thereafter, further difficulties were experienced due to the applicant's attorneys' reliance on Docex facilities in filing Court documents.
- [5] The first respondent in opposition of the application denied that the applicant only became aware of the award on 29 April 2016. Mr Nengwekhulu specifically pointed in his answering affidavit that he had personally attended to the service of the award on the applicant on 24 August 2016. Mr Aubrey Mkhonto refused to accept service and intimated that the applicant had intentions of reviewing the award. The applicant did not file a replying affidavit to deal with this allegation.
- [6] In argument, as pointed out by Mr Crafford for the applicant, it came out clearly that the application is rested upon three points. Firstly, that the second respondent misdirected himself by not acceding to the applicant's request to proceed with an unfair dismissal dispute since the unfair labour practice dispute had become academic in view of the individual employees' dismissal. Secondly, the second respondents were misdirected by ordering the immediate lifting of the suspension whilst the applicant had long lifted the suspension following the disciplinary hearing outcome. Thirdly, the reinstatement order was not competent as it was already submitted before the second respondent that the individual employees were dismissed after their suspension was lifted by the applicant.

- [7] In support of the employees' case, as argued by Mr Nengwekhulu for the first respondent, there was no way that the second respondent would accept that the employees were duly informed by Mr Mbatha to come back to work in the absence of proof of such communication. Secondly, the applicants only knew about their dismissal for a reason other than the one they were charged for on the date of arbitration proceedings. The second respondent was not misdirected in proceeding with the unfair labour practice dispute as they were at all times placed under suspension without pay. The applicant's problems were compounded by its failure to produce the individual employees' letters of dismissal and to demonstrate as to how they were notified about their dismissals.

### Evaluation

- [8] The applicant is inescapably required to pass through condonation of the late filing of the review application before the Court can deal with the review itself. Given the facts of the matter it is probable that the applicant became aware of the award on 24 August 2015 when Mr Nengwekhulu attempted to serve it on Mr Mkhonto.
- [9] In terms of section 145 (1) of the Labour Relations Act<sup>1</sup> (LRA) the applicant was required to file this application within six weeks after having been served with the award. In terms of section 138 (7)(b) of the LRA the commission must<sup>2</sup> serve the copy of the award to both parties or their respective representatives. In the absence of evidence that the Commission for Conciliation, Mediation and Arbitration (CCMA) served the applicant with the copy of the award as provided for in section 138, I am inclined to accept that the applicant only received copy of the award from the Sheriff of the Court on 29 April 2016. Although the applicant's reasons for the delay are not so compelling, the slight period of the delay of seven days does not reveal any prejudice suffered or to be suffered by

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<sup>1</sup> 66 of 1995, as amended.

<sup>2</sup> Own emphasis.

the first respondent. The relevant points on prospects of success are reserved for discussion below. On this note I am satisfied that this matter deserves to be ventilated on its merits and condonation should accordingly be granted.

[10] The core of the applicant's case is that one Mr Mbatha communicated with the individual employees to inform them to come back to work after their acquittal. This was denied and the applicant never made attempts to call Mr Mbatha to testify on this aspect. Based on the evidence before the second respondent, he cannot be faulted for finding that the individual employees were up until the date of arbitration still suspended which suspension was ultimately found to be unfair.

[11] It undisputable that the word of their dismissal only came on the date of arbitration proceedings and that the second respondent was made aware of this. This point turns on the relief of reinstatement that has been awarded. The second respondent has correctly ordered payment of arrear salaries for the period in which the employees were not at work due to suspension. On hearing that they were dismissed, which appeared to be breaking news for them, the second respondent should not have awarded reinstatement to remedy the unfair labour practice committed by the applicant. Awarding of this relief is in no doubt within the competency of the arbitrator tasked with the determination of an unfair dismissal dispute, a dispute which the second respondent had correctly refused to deal with. In this regard the second respondent has exercised the powers which he was not supposed to. Without hesitation the second respondent's award deserves this Court's interference.

#### Costs

[12] I have a wide discretion in this respect, and therefore in my view it will not be within the requirements of law and fairness to make a cost order in

circumstances where no party has an outright claim of success in this application.

[13] In the premises, I make the following order:

Order

1. The arbitration award under case number GAJB 11182/15 is reviewed and set aside and replaced with an order that:
  - 1.1 The applicant committed unfair labour practice by suspending K Nengwekhulu and M Mncube without pay.
  - 1.2 The applicant is ordered to pay Nengwekhulu and Mncube the unpaid salaries for the period of their suspension, that is R3 344.64 x 5 months = R 16 732.20 each.
  - 1.3 These payments must be made within 14 days of this order.
2. There is no order as to costs.

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MM Baloyi  
Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mr C Crafford of Crafford Attorneys

For the First respondent: Mr M Nengwekhulu of Nengwekhulu Attorneys

LABOUR COURT