

CCMA

Arbitration Award Rendered

Case Number: MP10575-15

Commissioner: Elias Lekgwathi

Date of Award: 12-Apr-2016

In the **ARBITRATION** between

DETAWU obo Maseko, F.N

(Union/Applicant)

and

Makhayoga Security Services

(Respondent)

Union/Employee's representative: Mr. Mathenjwa Albert

Union/Applicant's address: Office 5

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Employer's representative: Mr. Maila

Respondent's address: P.O Box 459

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DETAILS OF THE HEARING AND REPRESENTATION

1. This is the award in a dismissal dispute between **Ms. Maseko F.N**, the applicant and **Makhanyoga Security Services**, the respondent which was heard at Department Of Labour Building-Ermelo Cnr De Jager and Joubert Street at Ermelo. This matter was heard over a period of 2 (two) non-consecutive days.
2. The applicant was represented by Mr. Albert Mathenjwa a union official from DETAWU while the respondent was represented by Mr. Aubrey Maila. At the inception of the arbitration hearing the parties consent for the matter to be conciliated; it is appropriate to state that the conciliation hearing --- was conducted which unfortunately did not yield any positive result; since the parties were adamant that this matter could not be resolved. I then proceeded to arbitration hearing since there was no objection and the CCMA has jurisdiction to hear this matter.
3. The services of the interpreter was utilized as an when required. At the behest of the parties, an application to submit closing argument was submitted. In this case the parties were granted a maximum period of 2 days to submit closing argument in writing.

THE ISSUE TO BE DECIDED

4. The issue to be determined was whether the applicant's dismissal had been both substantively and procedurally fair or not. The applicant sought relief in the form of re-instatement with retrospective effect.

BACKGROUND AND SURVEY OF THE EVIDENCE AND ARGUMENT

5. The applicant was appointed as a security officer in May 2015; she earned an amount of R2874.00 per month. The following issues were established to be common cause
 - (a). that there was a disciplinary hearing.
 - (b) there was a dismissal and three charges of misconduct were leveled against the applicant and she was found guilty in respect of all charges. The sanction meted to the applicant was dismissal and subsequently she was dismissed on the 22 December 2015. The respondent operates in a security sector and has various clients in the government sector. The applicant was

stationed at the Department of Social Development in Ermelo.

PRELIMINARY POINTS:

6. No preliminary point was raised in respect jurisdiction. The CCMA has the necessary jurisdiction to arbitrate the dispute of alleged unfair dismissal arising from the security sector since there is no bargaining council operating/covering the security sector.

THE RESPONDENT'S CASE

Mr. Madingwane's testimony was as follows under oath:

7. Mr. Madingwane testified that he is currently employed by the Department of Social Development as a deputy director. He testified that the applicant was appointed by the respondent namely; Makhanyoga Security Services and she was stationed at Department of Social Development Ermelo. He stated that Makhanyoga was offered a contract after the contract with the previous security contract was terminated. The employer, Department of Social Development operates from 7:45 am-15:45pm from Monday to Friday and he may report for duty 24 hours.
8. He testified that it was Friday the 23 October 2015, when he was planning to go to Limpopo Province for a visit. He usually collect the old newspapers especially when he visit Limpopo. His wife went to the garage to pour a diesel and the attendant had inadvertently put petrol instead of diesel. He also changed tyres and came to the office to collect old newspapers. Upon his arrival at the gate, he observed that the Applicant was not there to assist him and he was later assisted by the security officer from different company. He wanted to take a photo of the events that took place on the night in question but he did not since his battery was running low. He wanted to complain about the Applicant's conduct but he was requested not to report her as she is currently having a final written warning. He characterize his relationship with the Applicant as professional one and he met the Applicant at Graceland Casino after the incidence.
9. During cross examination he stated that responsibility of the client is to communicate with the employer; Makhanyoga Security Services and its employee(s). He testified that he has never spoken to the service provider but he elected to communicate directly with the Applicant. He was not called during the hearing. He was informed by Khabisile that the Applicant had already had a Final Written

Warning in her file. He was aware that the Applicant has laid a criminal charges for sexual harassment against him. He testified that there was no security officer working for Makhanyoga on site when he arrived. He conceded that there were security officers that was posted to SASSA.

Ms. Maseko F.N testimony was as follows under oath:

10. She testified that on 23 October 2015, she was working nightshift and Mr. Madingwane came to the employer's site at Department of Social Development Services. She was asked by Madingwane why she not coming to work with her boy's friend. She told him that the employer's policy does not allow them to come along/ hang around with their boyfriend during working hours. Mr. Madingwane then told her that he might avail himself. She discussed with the lady that is working at the Department of Social Development Services. She reported to her that Mr. Madingwane came for the second time and he made sexual advances and this did not sit well with her. She testified that she was a victim of rape and she started to be afraid when Madingwane told her that he is his size.
11. During cross examination she testified that she had reported this incidence to her supervisor. She testified that Mr. Madingwane told her that they will be kissing and playing together during the night. She further stated that Madingwane was always talking about sexual intercourse. She stated that the matter was reported to Khabisile and she promised her that she will discuss this matter with Madingwane. She conceded that she was appointed as a supervisor. She testified that she had discussed her illness with Mr. Maila, it was agreed that she will be required to work dayshift and she was surprised when the daily rooster tell her that she must work during night shift. On 24 November 2015 she reduced her complain in writing. She conceded that there was a meeting between her and Nthabo, Madingwane and Gabisile. The meeting was called by Gabisile from Department of Social Development Services in an attempt to deal with the complaint of sexual harassment. She also stated that the matter was reported to Mr. Chumba.

Ms. Khabisile Constable Sibiya's testimony was as follows under oath:

12. She testified that she is current employed by the respondent as Admin Officer and her duties are mainly to oversee security measures on site and doing admin. She is appointed by the Social Development. She testified that the matter between Mr. Madingwane and the Applicant came before her around October 2015. It was alleged that Mr. Madingwane came during the night and made sexual advances and she indicated to him that she was not comfortable at all to deal with him. There was no investigation done by the employer of the Applicant including the Department of Social

Development Services. She testified that this matter was reported to the Department of Social Development Services around 20 November 2015 while it was reported to her in October. She stated that it is only now in March 2016, the Department took a tough stands to suspend Mr. Madingwane on allegations of sexual harassment. The Labour Relations Officer informed them that they will be briefed in due course with regards to any development pertaining to this matter. The matter was also reported to South African Police Services and she was asked to make a statement and she did.

13. During cross examination she stated that she is reporting to Madingwane and she does not have a mandate to call Mr. Madingwane to the meeting as per their reporting structure. She stated that she received a call from the Applicant and she reported the case of sexual harassment. She phoned the Applicant's employer to secure their presence for the meeting and the meeting was cancelled by Mr. Maila. During clarity seeking questions she stated that she is currently employed by her employer for 17 years and she knows Mr. Madingwane form professional level.

Mr. Felane Mnisi testimony was as follows under oath:

14. He is appointed by the Department of Social Development Servives as a general worker. He is responsible to carry the keys for the employer. He testified that on 20 October 2015, he saw Mr. Madingwane's car parked outside the gate. The light inside the car was on and it was outside working hours. He received a call from the Applicant and he informed her to communicate with Khabsile Sibiya. During cross examination he testified that he never talked to the Applicant about the sexual harassment issue. She mentioned the name of Mr. Madingwane in their telecommunications. This witness was not re-examined nor asked anything in clarity seeking questions.

ANALYSIS OF THE EVIDENCE AND ARGUMENT

15. It is an established principle of our law that in case of unfair dismissal dispute, the applicant must establish the existence of the dismissal. However the onus of proof rest with the respondent that the dismissal was fair and was for a valid reason. It was common cause that the applicant was appointed by the respondent as a Security Officer. The applicant contended that her dismissal was unfair both procedurally and substantively. The applicant was charged with 3 counts of misconducts and she was subjected to a disciplinary hearing, chaired by Mr. Maila and she was found guilty and dismissed as charged. Turning to the gist of this matter, the applicant challenged both substantive and procedural aspects of the dismissal . With regards to the procedural aspects the applicant contended that the matter was fairly complex since the allegations touches sexual harassment and she was entitled to be

represented by the trade union official Mr. Albert Mathenjwa. The employer had refused the applicant to be represented by Mr. Mathenjwa and his reasons for refusal was amongst others that Mr. Mathenjwa had crossed ship from SATAWU to DETAWA and the Applicant was a member of SATAWU during the alleged misconduct. Without too much deliberating to the issue, the employer did its part to afford the employee minimum requirement for procedural fairness.

16. In the matter of **Avril Elizabeth Home for the Mentally Handicapped v CCMA and others (2006) 27 ILJ 1644 (LC); [2006] 9 BLLR 833 [LC]**, it was held that the employer was merely required to conduct an investigation, give the employee or his representative an opportunity to respond to allegations after a reasonable period and thereafter to take a decision and give the employee notice therefore. I am convinced that the employer has complied with procedural fairness and the dismissal is to be found procedurally fair. There was no basis in law and fairness to allow Mr. Mathenjwa the right of representation since the matter was perceived to be of complex nature. The fact that the Applicant alleged a case of sexual harassment does not make the matter to be complex. Even if I were to agree that it was a complex matter, Mr. Mathenjwa does not have the automatic right to represent the Applicant at the company's level. It was not alleged that there was a potential prejudice that the Applicant was likely to suffer in the event Mr. Mathenjwa's representation was declined.
17. Regarding the substantive aspects, it is common cause that the Applicant was subjected to a disciplinary hearing on allegations of misconduct. It is also common cause that Mr. Madingwane was not called to give evidence during the disciplinary hearing. The employer relied on the evidence of a single witness during the arbitration hearing, Mr. Madingwane. It was Mr. Madingwane's evidence that he went to the office during the night to collect old newspapers since he was visiting Limpopo Province. Throughout his evidence he never stated that he was working during nightshift but he was visiting the employer's premises for his personal agenda. Mr. Madingwane testified that his relationship with the Applicant was professional in nature but he failed to conduct himself in a professional manner since after he alleged that the Applicant refused to open the gate, he did not report the Applicant to the employer.
18. His evidence that he was told that the Applicant had a Final Written Warning was not supported by a witness or documentary evidence. The employer put his reliance on page 9 of his bundle of documents, it provides that abuse of working procedures and serious sexual harassment (Level A) Under Nature of transgression- the first transgression would warrant disciplinary enquiry/ possibility of dismissal. The same page 8 under Level B, it provides that leaving work without permission/ informing manager and sexual harassment- first transgression written warning and second transgression it states that

disciplinary enquiry/ possibility of dismissal. It is a trite law that when the employer evaluating penalties, the employer should be guided by the applicable disciplinary code, if any. I am aware that the disciplinary code are generally regarded as guidelines; they need not be followed mechanically. It is not clear what the company disciplinary code impose in the event the employee is found guilty in charges of sexual harassment. There is a contradiction in respect of charges in level A and B of the employer's disciplinary code. There was no justification why the employer opted to invoke dismissal as opposed to written warning as per Level B. It was also expected that Mr. Maila should have taken a witness stand and justify the sanction that has been meted out to the Applicant.


19. I accept that the Respondent core business is to provide security to various client including the Department of Social Development Services. The Applicant led undisputed version that this matter was reported to the Department of Social Development Services and Mr. Maila, both the client and the employer failed to investigate this matter speedily. Ms. Gabisile Sibiyi's testimony was not challenged in that she requested a meeting with Mr. Madingwane and later with Mr. Maila. For some or other reasons that were not made known to the arbitrator Mr. Maila decided to cancel the meeting requested by Ms. Sibiyi. It was the employer's case that Ms. Sibiyi is more junior to discipline Mr. Madingwane, it was never disputed that there was a meeting arranged by Ms. Sibiyi in an attempt to deal with the complaint lodged by the Applicant. I am not convinced that the Applicant had committed a misconduct that would warrant a dismissal. Even if I were to agree that the Applicant had denied the client an access to the premises at Osthuisen Social Development that would not call for dismissal. Mr. Madingwane was not reporting for duty and in any event he gained an access to the employer's premises as he was assisted by the other security company. The 'client', Mr. Madingwane decided not to report it to the employer or the client and this means there was no hard feelings, he made peace with it on the basis that the Applicant had a final written warning which was not proven before me. In all fairness, the dismissal of the Applicant is found to be substantively unfair.

20. I now turn to the issue of relief and wish to mention that the Applicant submitted that she only seek reinstatement with retrospective effect. There is no reason why the Applicant should not be re-instated. The Applicant had a clean disciplinary record and she became a victim of sexual harassment. She tried to report it to the employer and she was not assisted until she seeks intervention of the client's employee; Ms. Sibiyi. There is currently huge unemployment rate in our country and by not re-instating the Applicant in this matter especially having established that the dismissal was substantively unfair it will be tantamount to injustice.

21. In the premises, I accordingly make the following award:

AWARD

1. The dismissal of the applicant, **Ms. F.N Maseko** by the respondent, **Makanyoga Security Services** had been procedurally fair but substantively unfair. The Respondent is ordered to re-instate the Applicant with retrospective effect. As a result of the retrospective effect the Respondent must back pay an amount of R11 496.00 calculated as follows: R2874.00 X 4 months salary. In ordering back payments I have considered amongst other thing that the matter was finalized on 31 March 2015 and it is possibly that the Applicant might lose his salary to the month of April had a not order back payments for four months.
2. The Applicant must report for duty on 25 April 2016 and the back payments must be paid on or before the 30 April 2016.
3. No order is made as to costs.



Elias Lekgwathi
CCMA COMMISSIONER