



Arbitration Award Rendered

Case Number: **FSWK2220-20**
Commissioner: **Silas Segole**
Date of Award: **18 March 2021**

In the Arbitration between

NUM obo Molantoa Johannes May
(Union/Applicant)

And

Katlego Security Services (Pty) Ltd
(Respondent)

Union/Applicant's representative: **Mr E Mataboge (NUM Official)**

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Respondent's representative: **Mr RE Nel (SAUEO Official)**

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Details of hearing and representation

- [1] The arbitration hearing took place at the CCMA Offices in Welkom on 8 March 2021.
- [2] Mr SS Mofokeng, an Official of NUM, appeared on behalf of the applicant, **Molantoa Johannes May**, while Mr ER Nel, an Official of SAUEO, appeared on behalf of the respondent, **Katlego Security Services (Pty) Ltd**.
- [3] The proceedings were digitally recorded and the hand-written notes were kept even though not verbatim. Mr Lucas Kgware was the appointed Interpreter.

Issues to be decided

- [4] I am called upon to determine whether the dismissal of the applicant was fair or unfair, and, if found to be unfair, I must determine the appropriate relief.

Background to the dispute

- [5] The applicant was dismissed 9 October 2020. The certificate of outcome was issued on 24 November 2020. The CCMA received the LRA 7.13 on 7 December 2020. The arbitration was held on 21 January 2021 and 8 March 2021.
- [6] The applicant worked as a Security Officer. It was not clear how many shifts per month he worked. He earned R8 062,00 per month. He was dismissed for alleged misconduct on 9 October 2020. He was issued with three charges, namely,

Gross Misconduct in that he had divulged company operational information to the client on 27 September 2020.

Bringing the company good name into disrepute in that he had send a message to the client that could have a detrimental impact to the company.

Gross Insubordination in that he failed to obey a legal and lawful instruction from the senior management and left the site early to effect shift change over.

[7] The applicant challenged both the substantive and the procedural fairness of his dismissal.

7.1 Under the procedural fairness

7.1.1 he alleged that he was not issued with the sufficient notice to attend the disciplinary hearing.

7.1.2 he was not allowed to call any witness.

7.2 Under the substantive fairness

7.2.1 he challenged the appropriateness of the sanction.

[8] Both parties submitted the bundle of documents as follows, Respondent 's bundle "A" and Applicant's bundle "B". The parties submitted the oral submissions of the closing arguments.

Respondent's case

Francois Claude du Plessis testified under oath that:

[9] The applicant was issued with a notice to attend the disciplinary hearing on 30 September 2020. The notice was issued to him on 28 September 2020. The notice which he had signed. He was also not a shop steward. The notice was issued to him to enable him to prepare for the allegations against him. His was were written on the notice. He stated that the applicant was denied an opportunity to call the witness of his choice. He stated that his union was also not consulted because he was not a shop steward. He said the applicant attended the meetings at the workplace as part of the worker's forum. Therefore, the disciplinary hearing was convened as per the policies and procedures of the respondent. The hearing was postponed due to non-attendance on 30 September 2020. However, the respondent sent him a message on his cell phone that the hearing was postponed and that it would be held on 9 October 2020. The disciplinary hearing was therefore held in absentia because of his non-attendance.

- [10] He stated that the respondent appointed him to investigate the allegations that were made by one of its employee. The investigations revealed that the message was sent from the applicant' cell phone. He was also dismissed for to obey the reasonable instruction in that he failed to respond to the WhatsApp message which instructed him to return to the Office. He failed to respond to it even though the message shows that it was read. He testified that the applicant made some allegations that one of the respondent's employee was seen driving the vehicle without valid documentations. His action has put the name of the respondent into disrepute because the respondent nearly lost the contract with the client. This could have jeopardise the only contract it had with the client. He stated that the applicant was aware of the rule not to disclose confidential information or any information before informing the respondent. He was informed about the rule at the training he had attended, it was related to him before acquiring SIRA certificate. It was also contained in his contract of employment. He was also aware that his action could have led to more employees losing the job as the respondent has site at the various mines that belongs to Harmony Gold Mining Company Ltd.
- [11] He testified during the cross-examination that the dismissal of the applicant was substantively and procedurally fair. The allegation against him were investigated and the disciplinary hearings were scheduled to afford him to stated his case.

Applicant's case

Molantoa Johannes May testified under oath that

- [12] He was dismissed for informing the client about the incident. He informed Mr Frans that the applicant was seen driving the vehicle at the mine premises without valid documents. He was therefore sure that Mr Alfeos was not having the required documentation to drive the vehicle because they had a conversation about it before the incident. He stated that it was required by the Mine Health and Safety Act to have the necessary document before driving any vehicle inside the mine premises. They were therefore encouraged to report any wrong doing with the mine authorities, hence he decided to report the incident. He was however not aware that he should report the incident to the respondent and that he was putting the name of the respondent into disrepute. He did not leave the site early because it was their standard operating procedure to go and fetch employees who were reporting for a new shift. Therefore, the respondent thought he had left early at work whereas he was away to fetch employees to reported for a new shift. He stated that he was also not Insubordinate because he did not come across of the messages which the respondent sent. He had since changed his phone numbers in January 2020, hence he was unable to respond to the messages. He further testified that his dismissal

was also procedurally unfair because he was never summoned to the disciplinary hearing. He only received the dismissal letter that was sent through the courier. He therefore sought to be reinstated because he had no alternative employment prospectus due to his age.

- [13] He testified during the cross-examination that he was told by Ms Harriet that the hearing was postponed on 30 September 2020. However, he failed to provide proof of the conversation between him and Ms Harriet. Therefore, his dismissal was substantively and procedurally unfair. He testified during the re-examination the respondent failed to prove that there was a complaint from the respondent and that Mr Alfeos was indeed having a valid driver's license.

Analysis of evidence and argument

- [14] In terms of Item 2 of the Code of Good Practice on Dismissal "*a dismissal is unfair if it is not effected for a fair reason and in accordance with a fair procedure, even if it complies with any notice period in a contract of employment or in legislation governing employment*". The absence of a valid reason for the dismissal is obviously unfair. Furthermore, a fair reason for dismissal must be based on conduct, capacity and the employer's operational requirements.

- [15] Section 192 of the LRA provides that in any proceedings concerning any dismissal, the employee must establish the existence of the dismissal, if the existence of the dismissal is established, the employer must prove that the dismissal is fair. I therefore find that the dismissal was not in dispute and that the respondent bore the burden of proof to prove that the dismissal of the applicant was substantively and procedurally fair. Therefore, having regarded that, I find that there was no need to repeat the whole evidence but rather to give a brief summary of the relevant fact in terms of Section 138(7)(a).

- [16] I find that the applicant was issued with three charges. He was dismissed for all of the charges in absentia because he failed to attend both disciplinary hearings. I find that it is common cause that Mr Alfeos was seen driving the vehicle at the mine premises. I find that it is common cause that the applicant was not found at the workplace upon the management visiting site. Therefore

Regarding procedural fairness

- [17] I find that the evidence shows the applicant was summoned twice at the disciplinary hearings which he failed to attend. I find that after the postponement of the first disciplinary hearing respondent informed

the applicant by sending the message to his last know phone numbers. I find that there was no change proof his numbers were change on the system. I therefore find that the respondent was not at default and that it has provided proof that it attempted to invite the applicant without success. I find that there is also no proof that Ms Harriet informed the applicant that the disciplinary hearing was being postponed on 30 September 2020. I find that the respondent gave a justifiable reason for continuing with the hearing of the applicant in absentia. I find that the applicant waived his rights to be heard when he first failed to attend the hearing. He also waived his right even when the second attempt was made. He failed to enquiry about the next hearing date. I therefore find that the dismissal was not procedurally unfair.

Regarding substantive fairness

[18] I find that it is common cause that the applicant was aware of the rules and its existence. They agreed that the rules were valid and reasonable. It is also common cause incidents occurred. They agreed that the rules were consistently being applied by the respondent. However, the applicant alleged that the sanction of dismissal was not appropriate. Having regarded the charges against the applicant, I find that the most serious charge against the applicant, namely, **Gross Misconduct** in that he had divulged company operational information to the client on 27 September 2020, I find that it warrants dismissal on the first offence. This is especially true the employee in question has signed confidentiality clause or agreement prior to starting his employment. I find that the applicant has admitted that he has informed the client about the incident at the mine premises but failed to inform the respondent about the same. I find that this could have led to the respondent losing the important site and more employees were going to lose their jobs. I find that this has led to the trust relationship being broken down between the two parties because it seems that the applicant has breached the confidentiality agreement which he has signed. It seems that he attended the training regarding that and the same was reflected in the SIRA requirements before the certificate can be issued to the individual. I therefore find that his conduct has brought the name of the company into disrepute and the contract could have been terminated between the respondent and the client.

Award

[19] I find the dismissal of the applicant, **Molantoa Johannes May**, by the respondent, **Katlego Security Services (Pty) Ltd**, is substantively and procedurally fair.

[20] The application is dismissed.



Signature: _____

Commissioner: Silas Segole

Sector: Safety/Security (private)

