

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JA112/2017

In the matter between:

MINISTER OF POLICE

First Appellant

NATIONAL COMMISSIONER OF POLICE

Second Appellant

PROVINCIAL COMMISSIONER OF POLICE

Third Appellant

and

SAFETY AND SECTORAL BARGAINING COUNCIL

First Respondent

P H KIRSTEN N.O.

Second Respondent

THABO PATRICK BONOKO

Third Respondent

Heard: 21 May 2019

Delivered: 13 June 2019

Summary: Review of arbitration award – commissioner finding on probabilities that employee guilty of misconduct- Court finding that award reasonable – Labour Court’s judgment set aside and appeal upheld.

Coram: Waglay JP, Murphy and Savage AJJA

JUDGMENT

SAVAGE AJA

Introduction

- [1] This appeal, with the leave of this Court, is against the judgment and orders of the Labour Court (Cele J) in terms of which the late filing of a review application was condoned and the award of the second respondent (the arbitrator) was set aside on review and replaced with a finding that the

dismissal of the third respondent, Mr Thabo Patrick Bonoko, was substantively unfair.

- [2] The third respondent was employed as a Constable in the South African Police Service (SAPS). He was dismissed, together with his colleague, Mr V K Malubane, on 26 May 2011 for serious misconduct in attempting to extort R100 000 from Mr Mxolisi Kali on 7 July 2010 between 18h00 and 21h00 at KwaThema in Springs, threatening to kidnap Mr Kali's family and threatening Mr Kali with bodily harm. At the internal disciplinary hearing, the evidence of Mr Malubane, a crew member who had worked with Mr Bonoko for a number of years, was that Mr Bonoko was with him at the Kali's home on the evening in question. This version was not disputed by Mr Bonoko at the disciplinary hearing, where he elected not to testify. Both Mr Kali and his wife testified regarding Mr Bonoko's role in the misconduct and identified him at the hearing of the matter.
- [3] After the internal appeals of both Mr Bonoko and Mr Malubane had failed, Mr Bonoko referred an unfair dismissal dispute to the first respondent, the Safety and Security Sectoral Bargaining Council (SSSBC). Both Mr Bonoko and Mr Malubane were arrested and charged criminally but after Mr and Mrs Kali only pointed out Mr Malubane at the identification parade held, criminal charges against Mr Bonoko were withdrawn.

Arbitration and review

- [4] At the arbitration hearing, Mr Kali testified that at about 19h00 on 7 July 2010, four men got out of the white marked police Volkswagen Golf at his home in KwaThema. Mr Kali has shortly returned home with his daughter. Mr Malubane, who was identified as the driver of the police vehicle, tapped on the window of Mr Kali's car, holding a cable tie in his hand and said, "*we are here to fetch you*". Mr Kali asked what the police were there for and Mr Malubane replied "*you are supposed to know*". He testified that the four policemen, of whom Mr Bonoko was one, walked into the garage and then into his house. They took cellphones belonging to Mr Kali, his wife and daughter. Mr Malubane and Mr Bonoko held his belt as they walked Mr Kali out of the house and into the police vehicle. According to Mr Kali, Mr Bonoko

sat in the front passenger seat of the vehicle and Mr Kali sat at the back between two other men. After they drove off Mr Bonoko told Mr Kali that they wanted him to give them R100 000. Mr Kali replied that he did not have that kind of money but that he could give them R30 000 the next day, describing this as *“(a)ctually I was buying my life back”*. He stated that the men threatened to kidnap his family and also threatened him with bodily harm along the way.

[5] Shortly thereafter a police bakkie pulled up next to them to say that they were looking for a white Toyota Corolla. A gun shot rang out. Mr Kali was asked if he had seen the vehicle and he said he had not, although he had told his daughter about it as they had driven home earlier. He was then driven in the Golf to a dark area where Mr Malubane asked Mr Bonoko *“do we have all the equipment?”* Mr Bonoko replied that he had everything. At that moment, the man on the right-hand side of Mr Kali, who was wearing a grey woollen cap, got a phone call. This caused the four men to get out of the car, leaving Mr Kali inside. They returned and drove on, stopping behind a truck near Modderbee prison. The men got out to talk to a man who had got out of the truck. Mr Kali was told to get out of the car. He stated that the man sitting on his right side covered his eyes with one hand and led him towards the truck. Mr Kali testified that at this point he *“saw that it might be the last time I saw my life”*. He assumed his eyes were covered as they did not want him to see the registration number of the Golf. Mr Kali was given back his phone and left at the side of the road. His wife and daughters' cellphones were not returned to him.

[6] Shortly thereafter a person called Mr Kali and then came to fetch him. On the way home he got a call from the police who said they were driving in the direction they were going and that they must stop. The car was stopped and Mr Kali got into a grey Quantum and was driven back to his home by the police. When he got home, he heard that there had been a shooting outside his house. Although no one was injured his family was frightened. He later went to the KwaThema police station to open a case relating to what had happened to him on the day.

- [7] When he was later called with his wife to an identification parade, Mr Kali explained that there were about 20 people in the parade and that he was only able to identify Mr Malubane who was the driver of the vehicle. He did not identify Mr Bonoko but testified that it was Mr Bonoko who was present at his house, saying that he would *“not just come here and pin point somebody who I never saw”*.
- [8] Mrs Veronica Kali saw Mr Bonoko for the first time at her home and that *“he knows the truth...that was the first time that I saw him.”* She walked outside and saw that the four policemen were driving a marked Golf 5. They said they had come to fetch her husband. Outside she was pushed and one of the men said, *“take this bitch and put her in the house”*. A man who she later identified as Mr Khoza pushed her and she got hurt. She was then held tightly and at this point she saw Mr Bonoko get into the Golf. She accepted that she did not identify Mr Bonoko at the identification parade but confirmed that it was Mr Bonoko who had been there. There was no dispute that from police vehicle records of the day the driver of the vehicle was Mr Malubane. A statement was taken from Mr Malubane who identified Mr Bonoko as the colleague who was with him at the Kali's house.
- [9] In his evidence, Mr Malubane stated that he received information from an informer that Mr Kali was dealing in platinum. He was on his way home at the time and travelled with Mr Bonoko to KwaThema to investigate in the marked police vehicle driven by him. The informer was collected at an Engen garage and the three men went to Mr Kali's house. As they arrived there Mr Kali had just pulled up in his car with his daughter. Mr Malubane got out and identified himself, explaining why they were there. Mr Bonoko also identified himself. Mr Kali told them that he had dealt with platinum in the past but no longer does so and that if they wanted to search his house they could. He indicated that he could provide the names of people who were dealing in platinum. When they went to the police vehicle for him to provide the names Mr Kali said he did not want his neighbours to see the police there and got into the car. Mr Bonoko sat with Mr Kali at the back, while Mr Malubane was alone in the front. Shortly thereafter they met up with police officers in a van.

- [10] After Mr Kali was dropped off, Mr Bonoko sat in the front passenger seat of the vehicle. Mr Bonoko took Mr Malubane's private vehicle and drove himself home to Tembisa. It was put to Mr Malubane that Mr Malubane dropped him off at home and that he had left for his home when he got the informer's phone call. Mr Malubane agreed that he dropped Mr Bonoko at his home but after they had gone to the Kali's house. He then stated that he could not remember if he gave Mr Bonoko a lift home or not. Mr Khoza, who was arrested after having been pointed out by Mr Kali at court, was also on trial with him in the criminal matter but according to Mr Malubane was not at the Kali's house.
- [11] Mr Bonoko's version was that Mr Malubane dropped him at his home in Tembisa after work on 7 July 2010 at around 17h30 and that from 18h30 until 20h00 he went to a choir practice at his church, where he is not only a choir member but also the conductor of the choir. He denied having been at the Kali's house. Mr K M Modiba testified for Mr Bonoko that choir practices are held on Monday, Wednesday, Thursday and Friday unless the choir has to sing on a weekend in which case they practice for the whole week. When it was apparent that the attendance register had no entry for Monday, 5 July 2010, Mr Modiba stated that the choir did not practice on a Monday unless there was an event over the weekend. When it was put to him that there was no entry for Thursday, 9 July 2010, Mr Modiba stated that the choir rehearsed if there had a show on the weekend. Mr Modiba testified that he too was the conductor of the choir. Mr Modiba claimed he wrote entries in the attendance register and then conceded, when different handwriting was apparent from the register, that others would make entries on his behalf.
- [12] The arbitrator found there to be no reason why Mr Malubane would falsely implicate Mr Bonoko in the matter and noted that the evidence of Mr and Mrs Kali as to how the misconduct was committed was not placed in dispute. Despite the discrepancies that existed between aspects of the evidence of Mr Malubane and Mr and Mrs Kali these were not of such a serious nature and all three witnesses had identified Mr Bonoko as having been at the Kali's house. It was accepted that the value of the Kali's dock identification of Mr Bonoko was limited and could not be accepted without corroborating

evidence. That corroborating evidence was to be found in Mr Malubane's testimony.

- [13] The arbitrator rejected Mr Bonoko's alibi that he was at choir practice on the night in question as unconvincing, noting that this alibi was not relied on at the disciplinary hearing, the choir register had a number of unexplained changes and did not record when Mr Bonoko attended. Furthermore, the excuse was rejected that the reason he did not challenge the version put on his behalf at the disciplinary hearing by his representative was because he was sleeping, that he did not understand English, that his representative, in fact, did not represent him although he had not stated this at the hearing, that he was not given a chance to speak and that he was not made aware that he was attending a disciplinary hearing. None of this was found to excuse the failure to put up the alibi or to dispute the evidence of Mr Malubane during the disciplinary hearing. The arbitrator found that it had been proven on a balance of probabilities that Mr Bonoko had participated in the misconduct and that his conduct was serious enough to warrant dismissal. In the circumstances, it was found that the dismissal was both procedurally and substantively fair.
- [14] Aggrieved with the outcome of the arbitration, Mr Bonoko sought the review of the arbitration award by the Labour Court in terms of section 158(1)(g) of the Labour Relations Act 66 of 1995 (the LRA). Condonation was granted for his 10-day delay in filing of the review application and only the substantive fairness of the dismissal was in issue before the Labour Court.
- [15] While accepting that dismissal would have been warranted for such serious misconduct, the Labour Court had difficulty in understanding how the evidence of Mr Malubane had been accepted by the arbitrator despite its serious discrepancies. These discrepancies related to issues such as Mr Malubane's recall of how many people were in the car, where he was when he received the information from the informer and whether he had dropped Mr Bonoko at home on the day. This led the Court to conclude that Mr Malubane may not have been honest in his testimony, knowing that he faced criminal charges which could have provided a motive for him to lie. His evidence was found by the Court to be so improbable that it was not necessary to ask why he would have lied. The arbitration award was accordingly set aside and

substituted with an order that Mr Bonoko be retrospectively reinstated into his employment with no loss of income or benefits. Each party was ordered to pay its own costs.

Submissions on appeal

[16] On appeal, it was contended for the appellants that the Labour Court had erred in adopting a piecemeal approach to the evidence, ignoring material evidence before it that indicated that Mr Bonoko was at the Kali's premises and therefore had committed the misconduct in question, which evidence was corroborated by the Kali's. It was argued that at the disciplinary hearing, Mr Bonoko had not challenged the version that he and Mr Malubane were at the Kali's house on the day in question and his excuses for not doing so were implausible and stood to be rejected. The alibi relied upon by Mr Bonoko at arbitration was not raised at the disciplinary hearing and the choir register put up contained a number of contradictions, as did the evidence of choir conductor, Mr Modiba. Despite the inconsistencies that did arise there was no motive was advanced as to why Mr Malubane would lie so as to falsely implicate Mr Bonoko. The five different reasons why he had not objected to the evidence which placed him on the scene at the Kali's house were implausible. The Labour Court, it was submitted, failed to have regard to a conspectus of all the evidence and took a compartmentalised and fragmented approach to the evidence.¹ Consequently, the Court erred in not having regard to the inconsistencies in the evidence of Mr Modiba but having regard to those of Mr Malubane alone; and in failing to examine the belated alibi as a postscript.

[17] Although it was submitted for Mr Bonoko in written argument that in issue in this appeal is whether an application for condonation is appealable, this was not pursued in oral argument. It was argued that the arbitrator should not have concerned himself with what transpired during a disciplinary hearing and that the discrepancies which arose in the evidence of the Kali's and Mr Malubane relating to the number of people in the car, who was with Mr Malubane when he was driving home and where Mr Bonoko sat in the car were such that they

¹ *S v Trainor* 2003 (1) SACR 35 (SCA) at para 9.

made the evidence for the appellants unreliable. Furthermore, to the extent that Mr Modiba's evidence was of poor quality and contained contradictions, so did the evidence of Mr Malubane. Consequently, the judgment and orders of the Labour Court did not fall to be set aside on appeal and the appeal, it was submitted, should fail.

Evaluation

- [18] In making credibility findings, the arbitrator had "*the advantage of judging the credibility of witnesses by observing their deportment in the witness-box*".² His task was to consider the evidence not in isolation but in light of the proven facts and the probabilities of the matter;³ and, having regard to it in its totality, to "*...select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion not be the only reasonable one*".⁴
- [19] The arbitrator found there to be no motive shown why Mr Malubane would falsely implicate Mr Bonoko. The fact that nothing was put up by Mr Bonoko to suggest why Mr Malubane would have done so, coupled with his failure to dispute Mr Malubane's evidence against him at the disciplinary hearing, were relevant and material considerations properly taken into account by the arbitrator when arriving at such a conclusion. In *National Union of Mineworkers and another v CCMA*⁵ this Court noted that "(i)t is quite permissible to draw an inculpatory inference from the weakness of a respondent's evidence". The arbitrator was entitled to draw such an inference against Mr Bonoko given the absence of evidence as to motive against Mr Malubane; his failure to provide a reasonable or credible explanation for his failure to object to evidence led at the disciplinary hearing or to Mr Malubane's version there, the failure to contradict the version advanced on his behalf by his legal representative at the disciplinary hearing, his belated alibi raised and

² *R v Abel* 1948 (1) SA 654 (AD) at 659; see too *Mutual Holdings (Bermuda) Limited and Others v Diane Hendricks and Others* [2013] UKPC 13 at para 28.

³ *Santam Bpk v Biddulph* 2004 (5) SA 586 (A) at 589F-G with reference to *Protea Assurance Co Ltd v Casey* 1970 (2) SA 643 (A) at 648D-E and *Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd* 1979 (1) SA 621 (A) at 623H-624A.

⁴ *Ocean Accident and Guarantee Corporation Ltd v Koch* 1963 (4) SA 147 (A) at 159 B-D with reference to *Govan v Skidmore* 1952 (1) SA 732 (N) at 734.

⁵ (2015) 36 ILJ 2038 (LAC).

the material discrepancies which arose between his evidence and that of Mr Modiba.

- [20] On review, it fell to the Labour Court to determine whether the arbitrator had committed a reviewable error or irregularity and whether a decision had been made by him which a reasonable decision-maker could not reach on the material before him.⁶ This required regard to be had to the totality of the evidence before the arbitrator.
- [21] The Labour Court's finding that the arbitrator erred in failing to reject Mr Malubane's evidence given its discrepancies was unduly narrow and failed to attach appropriate weight to the fact that Mr Malubane's version was corroborated in material respects by the evidence of both Mr and Mrs Kali. In order for Mr Malubane's evidence to be rejected in its entirety, as the Labour Court did, an inference had to be drawn that given some discrepancies in his evidence the totality of it fell to be rejected as false. Our courts have expressly rejected the maxim *falsum in uno falsum in omnibus*⁷ with the result that it is usually only the evidence given by a witness which has been shown to be false which is rejected and not the evidence in its entirety.⁸
- [22] The arbitrator accepted that even if Mr Malubane had erred in his recall of matters such as whether Mr Bonoko was dropped off at his house, where Mr Bonoko sat in the vehicle when Mr Kali was in the car and the circumstances of the phone call from the informer, his version that Mr Bonoko was at the Kali's house was truthful and was corroborated by the Kali's. Importantly, the arbitrator found it is difficult to understand what Mr Malubane, Mr Kali or Mrs Kali would have to gain from falsely implicating Mr Bonoko in the matter. The evidence of Mr Malubane that he was with Mr Bonoko on the scene, that of Mr and Mrs Kali as to the circumstances of the misconduct and Mr Kali's detailed account of his ordeal was accepted by the arbitrator as the most probable, readily apparent and plausible version of events. In finding as much the

⁶ Section 145(2) of the Labour Relations Act 66 of 1995 (the LRA); *Herholdt v Nedbank* 2013 (6) SA 224 (SCA); [2013] 11 BLLR 1074 (SCA); (2013) 34 ILJ 2795 (SCA) at para 25; *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others* [2015] 1 BLLR 50 (LAC) at para 33; *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] ZACC 22; [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC) ; (2007) 28 ILJ 2405 (CC) at para 78 and 79.

⁷ *R v Gumede* 1949 (3) SA 749 (A) at 746; *S v Mkhonto* 1971 (2) SA 319 (A) at 323A.

⁸ *S v Oosthuizen* 1982 (3) SA 571 (T).

decision of the arbitrator was not one that a reasonable decision-maker could not reach on the material before him. No reviewable irregularity was shown to exist warranting the setting aside of the arbitration award and the Labour Court erred in finding differently. For these reasons, the appeal must succeed.

[23] Both parties sought costs in the event of their success on appeal. Having regard to the fact that Mr Bonoko is an individual litigant who sought to defend a judgment of the Labour Court in his favour, and with regard had to considerations of law and fairness, the view I take is that there should be no order as to costs.

Order

[24] For these reasons, the following order is made:

1. The appeal is upheld.
2. The order of the Labour Court is set aside and replaced as follows:
 - “1. Condonation for the late filing of the review application is granted.
 2. The review application is dismissed.”

Savage AJA

Waglay JP and Murphy AJA agree.

APPEARANCES:

FOR APPELLANTS:

S B Nhlapo

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FOR RESPONDENT:

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