Not reportable and not of interest to other judges

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN

CASE NO: JR815/2009

DATE: 2011-02-10

In the matter between

MINISTER OF SAFETY AND SECURITY	**Applicant**
and	
JN MOTSHEGA	**1st Respondent**
SAFETY AND SECURITY SECTORAL BARGAINING COUNCIL	**2nd Respondent**
W MNISI	**3rd Respondent**

EX TEMPORE J U D G M E N T

BASSON J:

[1] This is a brief ex tempore judgment in the review application in terms of which the applicant (the Minister of Safety and Security) seeks an order reviewing and setting aside the decision by Arbitrator J.N. Motshega ("the arbitrator") under case number PSSS305/08/09 issued under the auspices of the Safety and Security Sectorial Bargaining Council. In terms of this

award, the arbitrator found that the dismissal of the third respondent Mr. Mnisi (“Mnisi”) was substantively unfair. The arbitrator reinstated the applicant The order reads as follows:

> *"I find that retrospectively reinstatement of the applicant will be the appropriate relief in the circumstances of this matter*.”

[2] I do not intend summarising the evidence that was led before the arbitration in detail. Suffice to point out that the applicant led the evidence of one witness only. The witness - Ms. Starkey - gave evidence about Mnisi’s conduct following the highjack of Ms. Starkey’s husband. Although Ms. Starkey was not able to give evidence in respect of the highjack itself as she was not present, she was, however, able to give evidence about the events that followed the actual highjack and the reporting thereof to the police. I will return to her evidence in more detail herein below. Mnisi closed his case without leading any evidence.

Brief summary of the salient facts

[3] Mnisi was employed by the South African Police on 19 September 2003. On 24 August 2007 a certain Mr. Starkey reported a case of armed robbery where he alleged that he was robbed of a Nissan Bakkie in Marabastad. The case was reported to the Booysens Police Station because Mr. Starkey alleged that he was taken to an unknown place in Sebokeng where he (and the two others that were with him) was locked

up in a shack and released the next day. When Mr. Starkey came home the next day he reported the incident to his wife – Ms. Starkey. As already pointed out Ms. Starkey was the only person who gave evidence at the arbitration and was accordingly the only witness on behalf of the applicant.

Charges against Mnisi

[4] The following three charges were levelled against Mnisi.[1]

> *"CHARGE 1:*
>
> *In terms of Section 40 of the South African Police Service Act, 68 of 1995, read with the South African Police Service Discipline Regulations, you are hereby charged with misconduct, in that you allegedly contravened regulation 20 (a) fails to comply with, or contravenes an act, regulation or legal obligation of the Discipline Regulations, 2006, in that on 2007-08-27 you failed to arrest Benjamin Obezugo, who was in possession of a hijacked vehicle, Booysens Cas 1463/08/2007.*
>
> *Alternative: Reg 20 (f) stipulates prejudices the administration, discipline or efficiency of a department, office or institution of the state.*
>
> *CHARGE 2:*
>
> *In terms of Section 40 of the South African Police Service Act, 68 of 1995, read with the South African Police Discipline*

1 The charges were quoted verbatim from the charge sheet. I have not attempted to correct any language errors.

Regulations, you are hereby charged with misconduct, in that you allegedly contravened regulation 20 (q) contravenes any prescribed Code of Conduct did not act impartially, honestly and in an accountable manner of the Discipline Regulations, 2006, in that on 2007-08-27, demanded a sum of R 6 500.00 from Mr Alister Abraham Starkey and his wife Faieza Starkey, on behalf of Benjamin Odezugo (sic) in order for Faieza Starkey's vehicle. That was allegedly hijacked, to be returned by Benjamin Odezugo instead of effecting arrest and proper investigation.

Alternative: Reg 20 (f) stipulates prejudices the administration, discipline or efficiency of a department, officer or institution of the state.

CHARGE 3;

In terms of Section 40 of the South African Police Service Act, 68 of 1995, read with the South African Police Service Discipline Regulations, you are hereby charged with misconduct, in that you allegedly contravened regulation 20 (z) commits a common law or statutory offence by defeating the ends of justice of the Discipline Regulations, 2006, in that on 200-08-27, you instructed and demanded R 6 500.00 from the complainant Faieza Starkey and Alister Abraham Starkey to be paid to Benjamin Odezugo (sic) a third party, before you intended returning the hijacked vehicle to the complainant Faieza Starkey of which it defeats the original hijacking case in the defeating the ends of justice, as a charge in this matter."

[5] It was common cause that Mnisi was found not guilty on the alternative charges to charges one and two respectively. He was, however, found guilty on charges 1, 2 and 3. He was dismissed following the guilty finding.

The evidence of Ms. Starkey

[6] Ms. Starkey's evidence in brief was that she was told by her husband that he was hijacked on 23 August 2007. She testified that her husband came home only the following day and that he clearly was in a state of shock. She could also see that he was beaten. As already pointed out, the matter was reported to the police and a charge was laid. A statement was taken from Mr. Starkey and he and his wife were told that the police will keep them informed of any developments in respect of the matter.

[7] On 27 August 2007 (subsequent to them reporting the matter to the police) a police van from the Booysens Police station came to their house. Ms. Starkey testified that she thought that the police came to give them feedback on the case. She testified that Mnisi came to the door and told them that he wanted to speak to Mr. Starkey in private. Mnisi told her that he was busy with the investigation and that she was obstructing justice. She testified that Mr. Starkey was visibly distraught after his discussion with Mnisi. Mr. Starkey told her that Mnisi had told him that the

vehicle was found but that he wanted money from him in order to release the vehicle.

[8] Ms. Starkey went out to speak to Mnisi. She asked him whether or not the car was found and why he wanted them to pay for the release of the vehicle. Mnisi told her that he had an informer and that Mr. Starkey would be arrested for perjury. From hereon the sage only gets worse.

[9] Mnisi then left. He returned later with the police van with another officer and a man sitting at the back. The man at the back had a hooded top so they (the Starkeys) could not see his face. He (the man who later appeared to be a Nigerian) told them that they had to get money. She told him that she wanted the car back. The Nigerian told her that he wanted money so that they can "sort this thing out" and told her that he wanted R 6 500.00. She told him that she could not get so much money at that time of the night but that she would ask her mother- in -law. She asked her mother- in- law for the money but managed to get only R 1000.00. Mnisi told Ms. Starkey that he could not take the money and that they should speak to the man in the car and told them to negotiate with the man (the Nigerian) in the car. Ms. Starkey testified that they felt intimidated. Mnisi thereafter took them to the police station and told them that he (Mnisi) had to protect them and this Nigerian. Mnisi went into the police station and came out with what is referred to as an affidavit which Mr. and Ms. Starkey then had to sign. In this affidavit they acknowledged that they owed the Nigerian money.

[10] Mnisi then took the Starkeys to a house. After they had parked, Mnisi got out of the car and went into the house. When he returned he had the keys of the bakkie. He then said to them “now let us go and fetch the car now”. Mnisi then drove straight to where the car was. According to Ms. Starkey it was clear that Mnisi knew exactly where the car was. The car was then driven by her to the police station on the instruction of Mnisi. Mnisi told her that she should not worry because he will give her a number in order to get the car from the pound. He said that they must make sure that they have the money. Mnisi came back later in the evening and gave her a number in order to collect the car. Ms Starkey later fetched the car from the police station.

[11] Ms. Starkey testified how Mnisi thereafter started to harass her. He would phone her repeatedly and demand that she pay the rest of the money. She testified that she felt extremely threatened by his behaviour.

The award

[12] Despite the uncontested evidence, the arbitrator found the dismissal to be substantively unfair. The arbitrator, although correctly recognising that he had to decide the matter on the probabilities, came to the conclusion that the applicant had failed to prove on a balance of probabilities that Mnisi had contravened a rule or standard. This conclusion is, in my view, completely unreasonable in light of the overwhelming evidence presented by Ms. Starkey which confirms that

Mnisi – who was a police officer at the time - was involved in serious misconduct (see the charge sheet). In my view there could not have been any doubt in the mind of the arbitrator that the activities in which Mnisi participated in fact contravened a rule.

[13] The arbitrator then made two crucial findings. The first was that Ms. Starkey could only lead hearsay evidence in respect of the hijack. Although it is correct that Ms. Starkey was not present during the highjack, she was present during most of what had transpired *after* the highjack. More importantly, she was present when Mnisi introduced the Nigerian to her and her husband. She could also give direct evidence to the fact that Mnisi was present when the money (demanded by the Nigerian in Mnisis' police van) was collected from her mother-in-law. She was present when Mnisi took them to the police station and told them to sign the so-called affidavit. Mnisi took her and her husband to the house where he (Mnisi) collected the key of their vehicle. She was also present when Mnisi took them to the car. Mnisi phoned her and intimidated her. Put differently: Although she was not present during the highjack she was present during the events that clearly showed that Mnisi was involved in the misconduct for which he was eventually dismissed. Her evidence in respect of these events certainly does not constitute hearsay evidence.

[14] I find it furthermore startling that the arbitrator made no finding whatsoever in respect of the fact that Ms. Starkey was present when the money was demanded, when the keys were handed over; when the so-

called affidavit was given to them to sign and when Mnisi took them to where the car was parked. It appears that this evidence was simply ignored by the arbitrator, In my view, by ignoring this crucial (direct) evidence the arbitrator completely misdirected himself. Moreover, the arbitrator appears to have ignored direct evidence that pointed to Mnisi's involvement in serious misconduct. On this ground alone the award should be reviewed and set aside. I will return to this point hereinbelow.

[15] The second finding of the arbitrator is even more startling and unreasonable. The arbitrator held that because Mr. Starkey did not lead any evidence, the applicant did not prove on a balance of probabilities that Mnisi's dismissal was substantively unfair. Again, the arbitrator inexplicably decided to ignore the overwhelming direct evidence of serious misconduct:

> "The Respondent's failure to lead any relevant and reliable evidence during the arbitration to substantiate the charges against eh Applicant considering that the Respondent bears an evidentiary burden to prove on a balance of probabilities that *the Applicant's dismissal was fair – lead me to conclude that the Applicant's dismissal was substantively unfair."*

[16] The arbitrator, in concluding that the applicant did not prove that the dismissal of Mnisi was substantively fair arrived at a decision that, in my view, no reasonable decision-maker could have arrived at. Not only did the arbitrator display a complete misunderstanding of the legal principles regarding hearsay evidence, the arbitrator clearly did not understand how

evidence should be weighed up. Ms. Starkey was the only witness at the arbitration. She gave detailed evidence about the events: Mnisi was present when money was extorted from them. The Nigerian man was in the police van with Mnisi. Yet Mnisis made no attempt to arrest him. On the evidence presented to the arbitration Mnisi clearly dismally failed in the performance of his duties as a police officer. Apart from the fact that Mnisis did not attempt to arrest the Nigerian, he allowed him (the Nigerian) to extort money from two civilians. Mnisi further abused his power as a police officer in order to assist the Nigerian to extort money from the Starkeys. In fact, he went as far as to take them to a police station to force them to sign a so-called affidavit in which they (the Starkeys) acknowledged that they owed the Nigerian money. The evidence before the arbitrator was therefore overwhelming against Mnisi. It is therefore inexplicable (as already pointed out) that the arbitrator (in evaluating the evidence, and the probabilities) did not consider why Mnisi brought the Nigerian to the house to extract money from the Starkeys. Also inexplicable is why the arbitrator did not even attempt to consider why Mnisi had the stolen car keys in his possession and how he knew where the car was parked. The arbitrator also did not consider why Mnisi was involved in the so-called affidavit. More importantly, why did the arbitrator not consider why Mnisi did not arrest the Nigerian?. Had the arbitrator considered at least some of these issues, he would not have arrived at the decision that he did.

Mnisi's failure to lead evidence

[17] The arbitrator furthermore did not even attempt to consider the effect of Mnisi's failure to lead evidence. Although the arbitrator correctly recognised that a hearing before the bargaining council is a hearing *de novo,* he failed to consider whether or not the evidence that was led on behalf of the respondent established a *prima facie* case. Instead of considering this issue, the arbitrator drew a negative inference from the fact that Mr. Starkey did not lead evidence. No negative inference was however drawn from the fact that Mnisi had elected not to give evidence. The evidence of Ms Starkey, in my view, established a strong *prima facie* case. Although in civil cases the fundamental question always is whether or not the party who bears the onus has discharged it,[2] a negative inference may be drawn from a respondent's failure to give evidence. In other words, the mere fact that the party (who does *not* bear the onus) decides not to give evidence does not as a matter of course entitle the applicant (or plaintiff) to the relief sought. However, where the evidence is such that the version of the applicant, having regard to the absence of an explanation, is more probable than not, the applicant may be entitled to the relief sought.[3]

[18] In the present case the evidence of Ms. Starkey calls for an explanation on various crucial aspects. There was therefore sufficient evidence before the arbitration to have warranted the arbitrator to come to the conclusion that the applicant has, in the absence of an explanation,

2 DT Zeffertt, AP Paizes and A St Q Sheen "The South Afrian Law of Evidence" page 128 *et seq*.
3 *Ibid* at 129.

proven on a balance of probabilities, that the dismissal was substantively fair. was therefore a case to answer and Mnisi has decided not to do so. See in this regard *Food & Allied Workers Union & Others v Amalgamated Beverage Industries Ltd*(1994) 15 *ILJ*1057 (LAC) where the LAC held as follows:

> "*There was no direct evidence linking any of the appellants to any particular act in relation to the assault and the respondent's case was based on inference alone."*

I must interpose here to point out that the evidence of Ms. Starkey constituted direct evidence and therefore the arbitrator in this matter was not called upon to make a finding based on inference alone. The Court continued as follows:

> "None of the appellants gave evidence, either in the court a quo or in the course of the disciplinary hearing. The attitude adopted by the appellants throughout was that it was for the respondent to establish their complicity, and that no case had been made out against any of them which called for a reply.
>
> *The extent to which a party's failure to give evidence may properly give rise to an inference against him has received considerable attention from the courts. What emerges from the decided cases is that his failure to do so cannot by itself constitute proof of what is alleged against him.* ***Nevertheless the evidence against him,***

though not conclusive, may be such that an explanation would be expected if one was available. In such cases his failure to provide an explanation may be placed in the balance against him. *The approach in civil cases is illustrated by the following extract from the judgment of Schreiner JA in Galante v Dickinson 1950 (2) SA 460 (A) at 465:*

> *'It is not advisable to set down any general rule as to the effect that may properly be given to the failure of a party to give evidence on matters that are unquestionably within his knowledge. But it seems fair at all events to say that in an accident case where the defendant was himself the driver of the vehicle the driving of which the plaintiff alleges was negligent and caused the accident, the court is entitled, in the absence of evidence from the defendant, to select out of two alternative explanations of the cause of the accident which are more or less equally open on the evidence, that one which favours the plaintiff as opposed to the defendant.'*

In the field of industrial relations, it may be that policy considerations require more of an employee than that he merely remain passive in circumstances like the present, and that his failure to assist in an

> ***investigation of this sort may in itself justify disciplinary action****. This was an issue which was raised in the court a quo, but in view of the conclusion to which I have come to, it is not necessary to deal with it in the present case.*
>
> *The inference which the respondent seeks to draw from the evidence is that all the appellants were present at the time the assault took place, and either actively participated in the assault or at least supported and encouraged the actual perpetrators. It is a cardinal rule of logic when reasoning by inference that the inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn (R v Blom 1939 AD 188 at 202-3). In my view all the evidence in the present case is consistent with that inference."*[4]

See also *Louw v Golden Arrow Bus Services (Pty) Limited* 2000 (21) ILJ 188 (LC) where the Labour Court referred with approval to the following passage from Hoffman and Zeiffert:

> *"[57] Hoffmann & Zeffertt say at 596:*
>
> ***'In this sense, prima facie evidence means evidence capable of being supplemented by inferences drawn from the opposing party's failure to reply.*** *Whether such inferences may legitimately be drawn depends upon*

4 Court's emphasis.

the nature of the case and the evidence which has been adduced. Most important, it depends upon "the relative ability of the parties to contribute evidence on that issue'. ***If the evidence adduced by one party can reasonably support an inference in his favour, and it lies exclusively within the power of the other party to show what the true facts were, his failure to do so may entitle the court to infer that the truth would not have supported his case.*** *On the other hand, if there is no reason to expect a party to be able to throw light upon the facts, his silence can add nothing to the evidence adduced by his opponent.'"*[5]

[19] As already pointed out, the evidence of Ms. Starkey was of such a nature that it required an answer from Mnisi. The evidence is such that the version of the applicant, having regard to the absence of an explanation, is more probable than not. Consequently, in concluding that the dismissal was substantively unfair, the arbitrator arrived at a decision which no reasonable decision-maker could have arrived at. In the event the award is reviewed and set aside and replaced by an order that the dismissal was fair. I can find no reason why costs should not follow the result

[20] In conclusion I must briefly point out that there was an application for

5 Ibid.

the late filing of the review application. I have considered the application and have decided to grant condonation.

[21] In the event the following order is made:

1. Application for condonation for the late filing of the review is granted.
2. The award is reviewed and set aside and replaced with an order that the dismissal was fair.
3. The third respondent is ordered to pay the costs.

AC BASSON, J

Date of proceedings and judgment: 10 February 2011

Date of revision: 3 March 2011-03-08

For the applicant:

Adv N Sikhakane. Instructed by the State Attorney

For the respondent:

Mr Masote of BT Masote Attorneys.