

Reportable

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

CASE NO.: JR46/09

In the matter between:

MINISTER OF CORRECTIONAL SERVICES

Applicant

and

**ABEL MONTGOMERY BALOYI
MIKE MBADA N.O.
GPSSBC**

First Respondent
Second Respondent
Third Respondent

JUDGMENT

Rabkin-Naicker, A.J.

- [1] This is an application to review and set aside the arbitration award issued by second respondent (the Arbitrator), in which he found the dismissal of the first respondent to have been substantively unfair. An application for condonation is also before court in respect of the delay in filing the review – a delay of 13 weeks.

CONDONATION APPLICATION

- [2] It was submitted on behalf of the first respondent that the reasons provided for the delay were lacking in candour. The founding papers did not reveal that the attorney of record for first respondent sent correspondence to the applicant dealing with the time frames for filing review papers. The issue was also not dealt with in reply.
- [3] Mr van Graan, for first respondent urged the court to refuse condonation based on the length of the delay and the unreasonable explanation therefore. He also addressed the court on the merits of the review. I find it necessary to deal with the merits in some detail as set out below.

BACKGROUND

- [4] In brief, the material facts of the dismissal dispute were as follows. First respondent, Mr Abel Montgomery Baloyi (Baloyi) was employed as a correctional official at Pretoria Local Prison.
- [5] During October 2005, Baloyi's supervisor received a complaint from two inmates that Baloyi owed them R500.00 for "dagga". Baloyi denied this was true or that he was smuggling dagga into applicant's premises during the night shift.
- [6] On 13 October 2005, Baloyi was apprehended by applicant's Emergency Supportive Team (EST) after allegedly throwing a bag of dagga onto the parking roof of one of the facilities at Pretoria Central Prison. He was charged at a disciplinary hearing and dismissed. The dismissal was upheld on appeal.
- [7] Baloyi was caught after his colleagues in the EST saw him meet some men in the visiting area of the facility, and became suspicious because

he did not work there. One of these men was driving a green Corsa. He got out and shook Baloyi's hand and then went into the visiting room for a few seconds and then he came back to join Baloyi. A white bakkie arrived and parked next to the Corsa. One of the people in the bakkie gave Baloyi a packet of samba chips. Baloyi was then given the keys to the white Corsa, and the men got into the bakkie and drove off.

- [8] Baloyi proceeded to drive the Corsa and entered through Gate five, past the central prison and towards the men's changing rooms. Believing his behaviour was suspicious, the EST followed him and hid behind some trees.

- [9] At the arbitration proceedings, Hendrik Sekwati Seremane (Seremane) of the EST testified that he saw Baloyi throw a black plastic bag onto the parking roof. He was the only witness to the bag throwing who gave evidence at the arbitration. Inside the bag, were "small brown papers wrapped dagga". His two colleagues who were with him at the time of the incident did not testify.

- [10] Baloyi testified that he had never smuggled dagga and the inmates were lying. On the day in question he was supposed to go to Thembisa after work. He borrowed a car from his cousin Melville because his microbus was going to transport people. Melville phoned him and told him that he was at the parking area outside the prison. Melville gave him the keys to the green opel corsa and then left with his friend Sakke in a white bakkie.

- [11] He decided to test the corsa for breaks. He drove to gate 5, where the boot of the car was checked by security. He proceeded on and decided to check the spare wheel of the car after he parked the car opposite garage 11, which had been his garage. Seremane came from nowhere and asked him what he was doing. He told him that he was checking the spare wheel. Seremane said he saw him throwing the black plastic bag

on the roof. The reaction unit was called by Seramane and they climbed on the roof and removed the black bag. They found sticks of dagga and showed it to him. He did not know anything about the bag or its content.

THE AWARD

[12] In assessing the evidence before him, the Arbitrator found that Seremane failed to answer questions satisfactorily when cross-examined. In particular, when cross-examined Seramane could not justify why he testified in the disciplinary hearing that Baloyi had pleaded with him to “make a plan” and make “a false statement”. He could not explain why he never mentioned this in the statement he wrote 2-3 hours after the incident, or in his evidence-in-chief at the arbitration. As a result, his evidence, in the view of the Arbitrator, was not credible.

[13] In addition, the Arbitrator records that the failure to call the two other members of the EST meant that he “had to make an inference that the respondent was aware that these officials were going to contradict Seremane’s testimony”.

[14] The Arbitrator sets out his approach to the evidence of Seremane as a single witness. He states in the award that: ‘ *in applying the cautionary rule, what is required of me when dealing with the evidence of a single witness is to apply caution which will assist me to decide whether or not guilt of the applicant was proved on a balance of probabilities*’.

GROUND FOR REVIEW

[15] The grounds for review raised by the applicant included the Arbitrator’s reliance on the transcript of the disciplinary hearing at the arbitration, and the allegedly unreasonable inferences drawn by him in regard to the evidence before him. However, in the court’s view it is the material

mistake of law by the Arbitrator that renders the Award susceptible to review.

[16] Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact obliged, *mero motu*, to raise the point of law and require the parties to deal with it. **Commercial Workers Union of SA v Tao Ying Metal Industries and Others (2008) 29 ILJ 2461 (CC) at paragraph 68.**

[17] In this case the Arbitrator made a material error of law in applying the 'cautionary rule' to the evidence of Seremane. In so saying, I refer to the approach taken by Basson, J in the matter of **Barlowworld Coachworks Wynberg v Motor Industries Bargaining Council (JR327/07)** handed down on 5 May 2009 when she stated at paragraphs 13 and 15 that :

"13. I am in agreement with the submission that the Arbitrator erroneously relied on the cautionary rule in respect of single witnesses. I am further in agreement that this amounted to a material legal error and constituted a gross irregularity in the proceedings and resulted in the Applicant being denied a fair trial. More in particular, I am in agreement that this erroneous approach had a material influence on the ultimate outcome of the proceedings as the ultimate "purpose of the cautionary rules is to assist the court in deciding whether or not guilt has been proved beyond reasonable doubt" (Law of Evidence at 798). The cautionary rule against a single witness cannot be applied as a general rule.

15. *It is clear from the authorities that the cautionary rule only applies in circumscribed circumstances and is confined to criminal proceedings. It has no place in civil / arbitration proceedings.”*

- [18] Mr van Graan, for Baloyi, conceded that reliance on the cautionary rule was misplaced, but submitted that it had not been prejudicial in that the Arbitrator had arrived at a reasonable finding on a balance of probabilities. I cannot agree.
- [19] The Arbitrator does not appear to have given any regard to the inherent probabilities of Baloyi’s version, and while describing him as ‘also a single witness’, merely states that Baloyi ‘made a good impression during his testimony and the manner in which he answered questions during cross-examination’. Oral evidence can only be properly evaluated by testing it against the inherent probabilities of the evidence presented. The failure to do so amounts to a misdirection. **Cohen and Another v Lench and Another 2007 (6) SA 132 SCA at paragraph 9**
- [20] In dealing with the probabilities, the Arbitrator approached the evidence of the witness carrying the burden of proof (Seramane) guided by the cautionary rule (a material error of law). This approach was coupled with an evaluation of the evidence of Baloyi, based on his credibility and demeanour only, with no reference to the inherent probabilities of his testimony. In my view a fair trial of the issues could not ensue.
- [21] Should condonation be granted in view of the above? While acknowledging the explanation for the delay was far from satisfactory, I am of the view that it is in the interests of justice that condonation be granted. The merits of the main application have clearly tipped the scales in this regard. Moreover, the public interest requires that the material issues in dispute receive a fair trial. There is no transcribed record of the

arbitration proceedings and the court is not in a position to substitute the decision of the Arbitrator.

[22] In the result I make the following order:

- (a) The applications for condonation and review are granted;
- (b) The award under case number PSGA153-08/09 is hereby set aside and sent back to Third Respondent to be heard by an Arbitrator other than Second Respondent;
- (c) There is no order as to costs.

Rabkin-Naicker A.J.

Date of Hearing: 17/3/2011

Date of Judgment:

Appearances:

For the Applicant: Adv M.B. Matlejoane

Instructed by: The State Attorney

For the First Respondent: Adv ESJ van Graan SC

Instructed by: Rudi Kuhn Attorneys