



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

REPORTABLE

Case no: J 1031/09

In the matter between:

GOITSIMANG DAVID MOSIMA

Applicant

and

SOUTH AFRICAN POLICE SERVICES (SAPS)

First Respondent

DENGA MULIMA N.O

Second Respondent

THE SAFETY AND SECURITY SECTORAL

BARGAINING COUNCIL

Third Respondent

Heard: 17 August 2011

Delivered: 25 November 2011

Summary: Review – arbitration award – admission of hearsay evidence. Principles governing admission of hearsay evidence. Applicant a police man charged with soliciting and receiving a bribe. Review dismissed.

JUDGMENT

Molahlehi J

Introduction

- 1] This is an application to review and set aside the arbitration award of the second respondent made under case number case number PSSS 501-07/08 and dated 12 June 2008. In terms of the arbitration award the arbitrator found the applicant to have been guilty of dishonesty and for that reason found his dismissal to have been for a fair reason.
- 2] The applicant has also applied for condonation for the late filing of his review application. The respondent indicated at the hearing of this matter that it did not oppose the condonation application. Condonation for the late filing of the review application was accordingly granted.

Background facts

- 3] The facts in this matter are generally common cause. The testimony of each of the witnesses of the respective parties is summarised in some details in the Commissioner's arbitration award and for that reason I do not intend dwelling into the details of the specific testimony of each witness in this judgment.
- 4] The applicant, the former employee of the first respondent (the respondent) was charged and dismissed for misconduct related to soliciting and accepting a bribe in the amount of R700, 00 from two members of the public who happened to also be illegal immigrants.
- 5] The charges which were proffered against the applicant were consequent to the incident that occurred on 17 June 2006 at Linden. On that day, whilst patrolling the area, the applicant and his fellow employee, Sgt Mvudle came across two people who apparently appeared to them to be foreigners. They confronted them and enquired as to their citizen status because they suspected them of being illegal immigrants. The two people came to be known as Grishime and Zanele.
- 6] Zanele told the applicant and Mvudle that she was from Brits and Greshime said that he was from Malawi. The two were then taken to the Linden police station where Grishme told the applicant that their legal documents

permitting them to be in the country were at their place of residence. It was then arranged that Sgt Mvudle would accompany the two in the state vehicle to go and verify the authenticity of the documents. It would appear that the arrangement was also that Sgt Mvundle would bring back the documents with him.

- 7] As indicated above Sgt Mvundle took both Grishime and Zanele to their place of residence. On his return he handed a sealed envelope to the applicant. Upon opening the envelope the applicant found the amount of R700,00 therein. The applicant then enquired from Sgt Mvudle as to what the money was for. When Sgt Mvumdle indicated that he did not know, the applicant told him to return the money. The two of them then drove to the place of residence of the Grishime and Zanele but did not find them. They drove there on a number of occasions to no avail.
- 8] The applicant and Sgt Mvudle continued with looking for Grishime and Zanele the following day, 18 June 2006. On arrival where the two suspects stayed, the applicant who had been dropped at the gate by Sgt Mvundle met with Du Preeze who apparently claimed to be an attorney. According to the applicant he also told him that the two suspects were not present and that as soon as they arrive he would bring them to the police station as he was aware that they had bribed the police the previous day. He then handed the R700, 00 to Mr Du Preeze after exchanging the telephone numbers and arranging a meeting for 18h00 at the police station.
- 9] Mr Du Preeze attended at the police station for the 18h00 meeting as was arranged but did not bring with him the two suspects. The meeting was attended by Insp. Hutting an officer of the first respondent. According to the applicant Mr Du Preeze alleged during the meeting that they had come to his place to apologise to Zanele for taking the bribe from her. The applicant denied that he had gone to see Zanele in order to apologise.

The grounds for review

- 10] The key issue in the applicant's grounds for review is that the Commissioner erred in accepting the hearsay evidence in finding that he

was guilty of the offences that he was charged with. The grounds upon which the applicant relies on in challenging the arbitration award can briefly be summarised as follows: The Commissioner erred in:

10.1 accepting hearsay evidence that did not link the applicant to offences he was charged with.

10.2 placing much reliance on Mr. Du Preeze as an independent witness to establish that the applicant was directly or otherwise gave the instruction for the payment of the bribe in the amount of R700, 00.

10.3 accepting the versions of the employer's witness without confirmation from Zanele and Greshime who never testified .

10.4 finding that the first respondent discharged the onus of proving that a valid and fair reasons existed for the dismissal.

10.5 in concluding that the employment relationship broke down regard being had that the incident happened on 17 June 2006 and thereafter the working relationship continued as normal until 23 January 2007, when the applicant was suspended and to be charged on 16 February 2007.

11] It was further submitted that the Commissioner misunderstood the evidence and failed to apply his mind and thus committed a material error of fact which makes his award reviewable.

The arbitration award

12] In his analysis of the evidence and arguments by the parties the Commissioner after referring to the South African Police Services Act 68 of 1995 upon which the charges proffered against the applicant were founded, summarises the ground upon which the applicant challenged his dismissal as follows:

'The employer's decision in the disciplinary hearing was based on hearsay evidence.

Applicants were not given transcript of the disciplinary hearing in order for them prepare for their appeal application.

The actual complainants in the matter never testified in the disciplinary hearing.

The employer has no grounds justifying conviction and consequently dismissing them.'

13] Thereafter, the Commissioner summarised the provisions of the law regarding unfair dismissal, in particular sections 188(1) (b) and 192 (1) (2) of the Labour Relations (the LRA),¹ including Item 7 of Schedule 8 of the LRA, the Commissioner summarised the common cause facts.

14] In arriving at the conclusion that the dismissal was for a fair reason, the Commissioner accepted the version of the first respondent and rejected that of the applicant. The Commissioner rejected the applicant's version on the grounds that it was shocking and unbelievable. According to the Commissioner the applicant and his fellow employee could not provide a reasonable and satisfactory explanation as to why they did not:

14.1 follow the operating procedure of the respondent

14.2 open the docket for the alleged bribe by the suspects

14.3 record the incident in the Occurrence Book

14.4 assign the matter to the relieving staff when they knocked off.

15] The Commissioner found the explanation as to why the above were not done to be nothing but a fabrication by the applicant and his fellow employee. The Commissioner correctly found further that the version of the applicant and his fellow employee was unsustainable in that it did not make logic for Sgt Mvundle to leave the suspects behind and take the envelope which supposedly contained the identity documents to the applicant who was to make a decision as to whether or not the suspects were legally in the country. The suspects had already been released by Sgt Mvundle and therefore there would be no purpose for the applicant to make a decision as to whether the suspects were illegal immigrants or not.

¹ Act 66 of 1995

Evaluation

- 16] It seems to me that the starting point in considering this application is to determine the true nature of the relief which the applicant is seeking in his grounds for review. A proper analysis of the grounds of review set out in the applicant's founding affidavit indicates that the applicant is seeking to challenge the correctness of the Commissioner's decision rather than its reasonableness or otherwise.
- 17] The test to apply in considering whether the grounds of review set out by an applicant warrant interfering with the Commissioner's arbitration award, is that of a reasonable decision maker as confirmed by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*.² The test to apply is whether the decision reached by the Commissioner is one which a reasonable decision maker could not reach. In applying this test the Court has been cautioned to guard against blurring the line between review and appeal. The test for appeal is that of determining the correctness of the decision maker whereas in a review the test is that of determining the reasonableness of the decision or whether the arbitration award suffers from any of the defect set out in section 145 of the LRA.³ Thus the difference between an appeal and a review lies in the distinction between the concept of reasonableness and correctness.
- 18] In applying the test for appeal, the court scrutinises the decision of the decision maker on the basis of determining its correctness which entails evaluating the exactness, precision and or accuracy in either its conclusion on the facts or the law. On the other hand the review test requires the Court

2 [2007] 12 BLLR 1097 (CC).

3 The defects envisaged in section 145 are as follows:

- “ (a) that the commissioner—
- (i) committed misconduct in relation to the duties of the commissioner as an arbitrator;
 - (ii) committed a gross irregularity in the conduct of the arbitration proceedings;
 - or
 - (iii) exceeded the commissioner's powers; or
- (b) that an award has been improperly obtained.”

to scrutinise the reasonableness of the decision maker which entails looking at whether the decision is sensible, rational and or fair.

- 19] The importance of drawing the distinction between review and appeal can be found in the decision of the Supreme Court (SCA) in the case of *Samancor Tubatse Ferrochrome v MEIBC and Others*,⁴ where the Labour Appeal Court on appeal was overruled, essentially on the basis of failure to appreciate the limited nature of a review. In emphasising the importance for the need to appreciate the narrow question which a Court in a review has to answer and in overruling the LAC judgment, the SCA had the following to say:

‘It is apparent from the reasons given by the Labour Appeal Court that it did not appreciate the limited nature of the question that had been before the Labour Court – and hence the limited question that was before it on appeal. Nowhere in its reasons is there any express finding that the award was one that no reasonable decision-maker could make nor does it appear by implication. The most that can be said is that it found that the arbitrator erroneously categorised the dismissal – . . . *but error is not by itself a proper basis for reconsidering an award.*’

- 20] It is apparent that the formulation of the grounds of review in the present instance is based on the grounds of seeking to have the arbitration award scrutinised on the basis of the correctness of the decision of the arbitrator. The essence of the applicant’s complaint is that the arbitrator erred in arriving at the conclusion that his dismissal was for a fair reason. The applicant criticises the manner in which the arbitrator evaluated the evidence presented during the arbitration hearing. The applicant says that the Commissioner erred in basing his decision on the hearsay evidence of witnesses who were not called to testify before him.

- 21] In my view the applicant’s application stands to fail on the basis of the manner in which he has pleaded his case. It is trite that a litigant in motion proceedings has to make his or her case on his or her papers. The nature of the relief sought has to be pleaded in the founding papers. In a review application, the papers have to show that the cause of the complaint against

⁴ [2010] 8 BLLR 824 (LAC).

the arbitration award is either that its outcome is unreasonable or it suffers as indicated above from any of the defects referred to in section 145 of the LRA. Because of the stringent nature of the review test, quite often parties seek to avoid that test by relying on the appeal grounds in their effort to challenge the outcome of an arbitration award. In other words they disguise an appeal for a review. This has resulted in the Court being inundated with review applications. In the recent case of *Lulama Hlasela v General Public Service Bargaining Council and Others*,⁵ the Court in dealing with a matter where the case was pleaded on the basis of an appeal but disguised as a review through reference to the concept of “unreasonableness,” correctly rejected that as not constituting a proper review application and on that ground alone dismissed the case of the applicant. In this regard Bhoola J had the following to say:

‘[15] In my view, the applicant does not even begin to address the test on review. The pleadings and submissions were replete with references to “errors” made by the arbitrator, embellished at appropriate moments by reference to “unreasonableness”. This does not by any means meet the *Sidumo* standard. This Court is being inundated with reviews being brought on spurious grounds simply where applicants are dissatisfied with the outcome despite the arbitrator having prepared a comprehensive and well-reasoned arbitration award based on a thorough application to the issues and evidence well beyond what is expected of him/her. In these circumstances, having regard to the submissions of the parties, I am unable to find that there is any basis to conclude that the arbitrator made a decision that could not have been made by a reasonable arbitrator on the material evidence. For this reason, the review must fail and there are no reasons why costs should not follow the result.’

22] The same applies in the present instance where the applicant clearly realised that he would not succeed in challenging the arbitration award properly for unreasonableness. The grounds upon which the applicant seeks to challenge the outcome of the arbitration award are clearly in my view based on the contention that the outcome is incorrect. For this reason alone the applicant’s application stands to be dismissed.

23] The applicant’s case would still stand to fail even if the above finding was to

⁵ Case Number P192/10, unreported.

be found to be too technical. In other words the application would still stand to fail even if the grounds of review as formulated by the applicant were to be interpreted as challenging the reasonableness of the arbitration award.

24] The application would fail because in the first instance the criticism that the arbitrator erred in basing his decision on hearsay evidence bears no merit. In my view, the proper reading of the arbitration award does not support the contention of the applicant that the decision was based on the hearsay evidence. A proper analysis of the arbitration award reveals that the arbitrator decided the applicant's case on the basis of the totality of the facts and material before him. On the balance of probabilities, supported very strongly by even the version of the applicant, there is no basis to fault the finding of the arbitrator that the applicant was guilty of a dishonest conduct that destroyed the trust relationship with respondent. The trust relationship could not be sustained in a situation where the applicant had contravened both legislation and the regulations governing such conduct.

25] Again even if it was to be found that the arbitrator did rely on the hearsay evidence in arriving at the conclusion that the dismissal of the applicant was for a fair reason, the question would still remain as to whether in the circumstances of this case such an approach was reasonable or otherwise.

26] The criticism that the arbitrator incorrectly admitted hearsay evidence bears no merit if regard is had to the circumstances under which hearsay evidence may be admitted in terms of the provisions of section 3 of Evidence Amendment Act (the Act).⁶

27] The general principle governing hearsay evidence is that hearsay evidence is inadmissible in both criminal and civil cases. However the exception to this principle is provided for in section 3 of the Act which provides that the hearsay evidence may be admissible if it is in the interest of justice and satisfy any of the following conditions:

- a) *each party against whom the evidence is to be adduced agrees to*

⁶ 45 of 1998.

the admission thereof as evidence at such proceedings;

- (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings;*

or

- (c) the court, having regard to-*

- (i) the nature of the proceedings;*

- (ii) the nature of the evidence;*

- (iii) the purpose for which the evidence is tendered;*

- (iv) the probative value of the evidence;*

- (v) the reason why the evidence is not given by the person*

upon whose credibility the probative value of such evidence depends;

- (vi) any prejudice to a party which the admission of such evidence might entail; and*

- (vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.*

28] In line with the provisions of section 3(1)(c) the general approach which the Courts have adopted in considering whether it was proper or otherwise to admit hearsay evidence has been to have regard to the very nature of the proceedings which the arbitrator was conducting, namely the arbitration proceedings. This approach is also in line with the provisions of section 138(1) of the LRA which provides that:

- ‘(1) The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities.*

- (2) Subject to the discretion of the commissioner as to the appropriate form of the proceedings, a party to the dispute may give evidence, call witnesses, question the witnesses of any other party, and address concluding arguments to the commissioner.'

29] It is clear from the reading of section 138 and the broader objectives of the LRA that it was never the intention of the legislature that the arbitrator in approaching arbitration proceedings would do so in the same way as a court of law. If that approach was to be adopted then the objective and the purpose of the LRA would be defeated and in fact that would make the labour dispute resolution system unworkable. The purpose of providing for the exception to the hearsay rule in section 3 of the Act is explained by the Labour Appeal Court in the case of *Southern Sun Hotels (Pty) Ltd V Sa Commercial Catering & Allied Workers Union & Another* (2000) 21 ILJ 1315 (Lac) as follows:

'[13] The provisions of s 3 of the Evidence Act which are to me that the legislature enacted the provisions of s 3 in order to create a better and more acceptable dispensation in our law relating to the reception of hearsay evidence. The wording of s 3 makes it clear that the point of departure is that hearsay evidence is not admissible in civil and criminal proceedings. However, because the legislature was conscious of various difficulties associated with the reception of hearsay evidence in our law up to that stage and wanted to bring about a better dispensation, it created a mechanism to determine circumstances when it would be acceptable to admit hearsay evidence.

[14] The legislature also decided that the test whether or not hearsay evidence should be admitted would be whether or not in a particular case the court thought it would be in the interests of justice that such evidence be admitted. It also decided on what factors a court should take into account in determining whether or not in a particular case it would be in the interests of justice to admit a particular piece of hearsay evidence."

30] In dealing with the issue of the admission of hearsay, Lagrange J in the unreported case of *POPCRU obo Maseko v Correctional Services and Others*,⁷ held that:

⁷ Case No: JR 2134/2008, Unreported, 30 August 2010

‘44. While it may seem that there is a tension between the requirement that section 3 of the Evidence Act must be applied by arbitrators when deciding whether or not to admit hearsay evidence and precept that strict adherence to formal rules of evidence is not required in arbitration proceedings, it must be remembered that section 3(1)(c) requires the arbitrator to consider the nature of the proceedings when making a ruling on the admission of hearsay evidence.’

31] In *Maseko*, the witnesses who did not testify but whose statements were admitted in evidence were inmates of correctional services centre. In admitting their evidence the arbitrator took into account the circumstances at the correctional services where the inmates are often there on a temporary basis. In addition the arbitrator took into account as an important factor the fact that the inmates who did not testify at the arbitration hearing did testify at the disciplinary hearing and that they were cross-examined by the representative of the applicant. The Labour Court, in upholding the decision that the dismissal of the applicant was fair, held that the admission of the hearsay evidence was in compliance with the provisions of section 3 of the Act and could therefore not be regarded as being unreasonable.

32] The Court in *Maseko* quoted with approval what was said in *Naraindath v Commission for Conciliation, Mediation and Arbitration and Others*,⁸ where the Court held that:

‘It would stultify the entire purpose of the legislation if this court were, in the face of such clearly stated intentions, to insist on arbitrators appointed by the CCMA to resolve unfair dismissal disputes conducting those disputes in slavish imitation of the procedures which are adopted in a court of law and subject to the technical rules of evidence which apply in those courts.’

33] The principle that the rules of evidence should not be applied slavishly and account should be taken of the nature of the arbitration proceedings is highlighted by the case of *Edcon Ltd v Pillemer NO and Others*,⁹ where the Court in dealing with whether the Commissioner committed gross irregularity by accepting hearsay evidence which was in the form of written

8 (2000) 21 ILJ 1151 (LC), at para [26]. See also *Le Monde Luggage CC t/a Pakwells Petje v Dunn NO and Others* (2007) 28 ILJ 2238 (LAC) [17] – [18].

9 (2008) 29 ILJ 614 (LAC) at para [15].

statements held that:

‘The nature of the arbitration proceedings is characterized inter alia, by the fact that disputes are intended to be resolved quickly and through relatively simple and non-technical procedures. . . In the spirit of employing the minimum of legal formalities, particularly bearing in mind that they were in its employ as managers, it could have been relatively easy for the appellant to call them if the evidence was in dispute. The nature of their evidence was not of a narrative nature but based on their belief and opinions. No meaningful prejudice could result from failure to call them. There was nothing to alert the commissioner to the fact that she should not have regard to the evidence of Dwyer in particular. On the contrary, if one has regard to the nature of the evidence, the author of it, the overall circumstances of the case and relatively informal nature of the proceedings, I do not think the commissioner can be criticized for having regard to that evidence.’

34] In the present instance as stated earlier, if it was to be found that the decision of the Commissioner was based on the hearsay evidence and no other evidence, then I would hold that the decision is not susceptible to interference because all the relevant factors upon which hearsay evidence may be admitted are present. In other words the exceptions to the admission of hearsay as set out in section 3 of the Act were satisfied at the time such evidence was admitted. The respondent indicated during the arbitration hearing that the two witnesses could not be found because they probably had been deported back to their countries of origin. In any case if that evidence was regarded as forming the basis of the decision of the Commissioner then it would have served the purpose of corroborating the version of the respondent that the applicant was guilty as charged. That version as indicated earlier is supported on the probabilities even by the version of the applicant. In this respect it is stated in the heads of argument filed on behalf of the applicant that:

- ‘2.1 It is common cause that the amount of R700,00 was handed over to Mvundle, the driver of the team consisting of the Applicant and Mvundle;
- 2.2 It is basically unchallenged that the money was in an envelope when it was handed to the Applicant, end (sic) as such also to Mvundle;

2.3 It is unchallenged that the Applicant saw the money after Mvundle having returned to the Police station and handing the envelope over to the Applicant.'

35] It is therefore my view that in light of the above the applicant's application stands to fail.

Conclusion

36] In my view, even on the version of the applicant, it cannot be said that the arbitrator's arbitration award is unreasonable. The arbitrator weighed the evidence which was before him and on the probabilities supported strongly by the common cause facts came to the conclusion that the applicant was guilty of soliciting and accepting the bribery in the amount of R700, 00 from Grisham and Zanele.

37] If it was to be found as stated earlier that the decision of the arbitrator was based on the hearsay evidence of the two absent witnesses then such a deviation was in the circumstances of this case pragmatic in the realisation of the speedy resolution of the dispute and accordingly justified.

38] In short the totality of the facts and the circumstances of this case left the arbitrator with one conclusion and that is that the applicant was guilty of soliciting and receiving a bribe.

39] The facts of this case indicate very clearly that it was unnecessary for the applicant to have filed this application and therefore I see no reason why the costs should not in law and in fairness follow the results.

40] In the premises the applicant's application is dismissed with costs.

Molahlehi J

Judge of the Labour Court
of South Africa

APPEARANCES:

For the Applicant: Martin Henning of J.L. Van der Walt

For the Respondent: Adv. M.A. Charlie

Instructed by: The State Attorney