

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN

Not Reportable

Case no: D902/08

In the matter between:

THE FUEL LOGISTICS GROUP (PTY) LTD

APPLICANT

AND

STEPHENS W N.O.

FIRST RESPONDENT

NATIONAL BARGAINING COUNCIL FOR THE

ROAD FREIGHT INDUSTRY

SECOND RESPONDENT

SATAWU

THIRD RESPONDENT

MBULANE A B & 1 OTHER

FOURTH RESPONDENT

Date of Hearing: 14 June 2011

Date of Judgment: 29 June 2011

JUDGMENT

PATHER A.J

Introduction

1. This is an application in terms of section 158 (1) (g) of the Labour Relations Act (“the Act”)¹ to review and set aside an arbitration award issued by the first respondent, as a commissioner (“the commissioner”) of the second respondent. The commissioner found that the fourth respondents’ dismissal was unfair and ordered the applicant to reinstate them retrospectively from the date of their dismissal being 12 October 2007. The applicant was further ordered to pay backpay to the fourth respondents in the amount of R33 150.38 each. The third respondent opposes the review application despite not having filed an answering affidavit.

Background Facts

2. After the fourth respondents were dismissed from the applicant’s employ on 12 October 2007 for committing acts of misconduct, including damage to the company’s property, they referred an unfair dismissal dispute to the second respondent.

3. At the arbitration hearing, video footage of an incident which led to the charges against the fourth respondents was presented as part of the applicant’s case. The applicant also led the evidence of a witness, Mr Modesai Sokhabase. According to Sokhabase, in the course of his work as a Risk consultant for the applicant, he had

¹ 66 of 1995.

been conducting an investigation, which led him to a park, named Berea Park, near the city centre. The investigation involved his taking video footage of whatever it was that was under investigation, details of which he refused to divulge. It was common cause that a union meeting was being held at Berea Park on that day. While Sokhabase was sitting in the back seat of his vehicle and filming, one of a group of employees of the applicant who had gathered in the park for a meeting alerted the others that they were all being filmed. The group then approached Sokhabase's vehicle and demanded to see his police identity card, as he had informed them that he was a police officer conducting an investigation. When Sokhabase opened his wallet to retrieve a card, cards belonging to the applicant became visible. One of the the group which had by now surrounded his vehicle then alleged that Sokhabase was lying to them. At that point, according to Sokhabase, the group became aggressive, and attempted to open the doors of the vehicle while hitting at it. Fearing for his life, he stopped filming, moved to the front seat and sped off in the vehicle. He stopped a few streets down the road where he inspected the damage to the vehicle. A colleague came and escorted him to the applicant's office. He was shown photographs of all the applicant's employees and from which he identified some whom he believed had been involved in the incident in the park.

4. Sokhabase denied that he had been investigating which of the applicant's employees belonged to the third respondent. He could not say who among the group in the park had approached his vehicle; neither could he say what the fourth respondents had been wearing.

5. The fourth respondent's case was that, they had not attended the meeting in the park on that day, but had been elsewhere. They had met each other on that day quite by chance and had then gone together to the third respondent's offices in the city centre. One, Mr T Ngcobo, testified that in response to his questioning of Sokhabase as to why he did not report the incident to the South African Police Services (SAPS), Sokhabase said that he did not know anyone in Durban. He believed that Sokhabase had been instructed to say that he, Ngcobo was at the meeting in the park, because the fourth respondents were active in the recently formed union in the workplace. Mr Mbulane testified that the video footage was not shown on the day of the internal disciplinary hearing and that the fourth respondents had been picked out merely from photographs of the applicant's employees. Mbulane too believed that they were identified as being perpetrators of the alleged damage to Sokhabase's vehicle merely because of their activism in the union. He denied that he could be identified in the video footage because of a wrist watch that he wore; the wrist watch was the applicant's standard issue. A witness, Mr Nzimande who testified on behalf of the fourth respondents, stated that when confronted about his filming the group, Sokhabase sped off in his vehicle and in the process bumped the pavement. Nzimande denied that the fourth respondents had been present at the meeting. According to Nzimande, the first time he had seen them was later and at the third respondent's offices in the city centre. Mr Mkhize, another witness for the fourth respondents, corroborated the evidence of the previous witnesses and also denied that the fourth respondents were present at the meeting. He agreed that Sokhabase may

have been scared because he had been dishonest about the reason for his presence in the park.

The grounds of review

6. Some of the applicant's grounds of review are as follows:

- 6.1 The commissioner committed a gross irregularity in finding that the video footage did not properly identify Mbulane, as the video had been confirmed by Sokhabase.
- 6.2 The commissioner committed an irregularity and acted unreasonably in finding that the version of the applicant was improbable. It appears as if the first respondent imposed too strict a test in the consideration of the applicant's evidence and video footage shown during the arbitration proceedings.
- 6.3 The commissioner committed a gross irregularity and reached an unreasonable conclusion by failing to properly consider submissions that the vehicle which was driven by Sokhabase was damaged by having brick marks on the side, which damage cannot be sustained from the version presented by the fourth respondents.
- 6.4 The commissioner committed a gross irregularity and acted unreasonably by finding that based on the evidence of the fourth respondents, the applicant failed to present a credible version.

Evaluation

7. In regard to the grounds of review based on the video footage properly identifying Mbulane, the commissioner in his award, makes the following observations:

“What the video tape did show was roughly 12 employees standing around in a circle, speaking. It did not show the incident of the vehicle being damaged. The Respondent submitted that it showed one of the Applicants being there. Mr Mbulane disputed this. The video was not clear, as the person was wearing a white cap and did not face the camera. The Respondent submitted that they further identified him because of a watch he was wearing. Mr Mbulane testified that the watch was a standard issue R.T.T. watch, which many employees have. This was not disputed by the Respondent.”

Finding that:

- The video footage was not clear;
- Mbulane could not be identified as being part of the group– he, Mbulane, denied that the person wearing a white cap was him; and
- a dispute of fact existed regarding the watch apparently worn by Mbulane which the applicant had used as a means of identifying him in the video footage,

the commissioner, rightly in my view, did not consider the video footage as providing conclusive evidence of the alleged misconduct carried out by the fourth respondents.

8. Did the commissioner impose too strict a test in rejecting the applicant’s evidence and video footage? This criticism of the commissioner’s finding is

unjustified as he was unable to positively identify any of the fourth respondents, in particular, Mbulane, as being part of the group of approximately “12 employees standing around in a circle”. His not therefore having accepted the video footage as being conclusive evidence of the fourth respondents’ participation in the incident in the park and involving Sokhabase, is reasonable. Moreover, it would have been expected of Sokhabase to have filmed the damage to the vehicle once he had left the vicinity, and presented this further footage to the disciplinary enquiry and the arbitration hearing. He had a video recorder and was in the process of filming when he was confronted. As it was, the video footage was not presented to the internal disciplinary enquiry; the fourth respondents were identified simply from their photographs which the witness, Sokhabase then pointed to as being part of the group of perpetrators of the incident in the park. The only evidence therefore, of the alleged damage to his vehicle was that given by Sokhabase himself. The photographs presented to the arbitration hearing, do not show any damage apart from a missing number plate. Neither do the photographs show any damage that could reasonably be attributed to the actions of any of the employees in the park on that day, least of all the fourth respondents. Therefore, the applicant’s submission in paragraph 6.3 above, especially that the “damage cannot be sustained by the versions presented by the fourth respondents” is not understood. Two mutually destructive versions were presented at the arbitration hearing, only one of which would prevail. In the nature of disputes of fact, one party’s version will invariably differ from the other’s, and consequently, will not sustain that party’s version.

9. When asked which of the employees were passing behind his vehicle, Sokhabase replied: “I don’t know, I saw somebody walk past.” Furthermore, on Sokhabase’s version, this group of employees, numbering approximately 12, had turned on him aggressively, and tried to open the doors of the vehicle, banging at it in the process. It would have been expected of him to have reported the matter to the SAPS. Even if, as he said, he did not know anyone in Durban, he could have reported the matter later when his colleague arrived to escort him back to the office. In the absence of any supporting evidence, and preferring the evidence of the fourth respondents to that of Sokhabase, the commissioner correctly concluded that the applicant, who bore the *onus* of proving that the dismissal was fair, had failed to discharge that *onus*.

10. The further grounds of review are based in essence on the commissioner’s analysis of the evidence and his credibility findings of witnesses. In analysing the two conflicting versions before him, the commissioner considered the demeanour of the witnesses, and the fact that the fourth respondents and their witnesses corroborated one another’s evidence. He compared their testimonies and found Sokhabase, the applicant’s witness, to have been aggressive during cross-examination. In this regard, the following passage from the cross-examination is instructive:

Question: “The investigation was to find out which employees are members of the union and target them?” Answer: “No”

Question: “You are standing at the entrance [of the park], would you [be] concerned if people filmed you?” Answer: “I will not speculate. I don’t know, I have never been in that position, I can’t assume”

Question: The way you are answering me it shows what I am putting to you. To see who are union members, which is why CMC employees confronted you?”

It is clear that in weighing the evidence presented by the parties, the commissioner gave careful consideration to the demeanour of the witnesses and the probabilities of their respective versions. He remarks, under the subheading: “Dealing with the evidence” that the fourth respondents had “submitted a credible alternative version of what happened on the day in question.” His finding that the dismissal was substantively unfair is therefore one that a reasonable decision maker could have made based as it was, on the probabilities of each version; his preference for the fourth respondent’s version is based on rational reasons.

11. Furthermore, that Sokhabase, the applicant’s only witness, refused to answer questions relating to the nature of his investigation, could not have helped the case for the applicant. He had been caught in the act of filming a group of the applicant’s employees who had gathered in the park for a union meeting. This led to those being filmed demanding answers from him as to the reason for his presence. When it became apparent that he was acting as an agent of the applicant, the employees understandably, became suspicious and angry. Sokhabase then sped off in his vehicle. In his haste to escape, according to the fourth respondent’s version, he knocked his vehicle against the pavement. This is reasonable, given the fact that Sokhabase panicked when he saw the angry mob approaching him. Moreover, given the facts that:

- the meeting in the park was a union meeting;

- the union had only recently organised at the applicant's premises;
- Sokhabase had come from Johannesburg to conduct an investigation on behalf of the applicant; and
- He refused to divulge the nature of the investigation,

the inference is overwhelming that Sokhabase's investigation involved gathering information as to the applicant's employees' union activities. Therefore, faced as he was with the approaching, angry employees who had uncovered his role as spy, it is probable that the damage to his vehicle, if in fact damage occurred, was caused during his hasty retreat from the park when he fled in panic. If only the parties had a better understanding of a constitutional democracy such as South Africa is, there would be no need for such underhand gathering of information as conducted by the applicant, through its employee Sokhabase. After all, the LRA provides the framework within which parties to an employment relationship relate to each other on the basis of mutual respect and openness. Acts of subterfuge, such as the filming of a group of employees engaged in a meeting has no place in a constitutional democracy and can only lead to a breakdown in relations between employer, the applicant, and its employees and the third respondent being the employees' chosen representative.

12. In my view, the commissioner's award is well-reasoned and carefully worded. After analysing and comparing the two versions, he came to the conclusion that the applicant had failed to discharge the burden of proving that the dismissal was fair. Furthermore, quoting the case of *Boxer Superstores (Pty) Ltd v Zuma and Others*,² the

² [2008] 9 BLLR 823 (LAC).

arbitrator found himself faced with a similar situation in that as he did not find that the fourth respondents were guilty of the offence for which they were dismissed, he accordingly concluded that reinstatement was the appropriate remedy.

13. In the premises, I make the following order:

1. The application is dismissed.
2. The applicant is to pay the respondent's costs.

Pather, A.J.

Appearances:

For the Applicant : Mr G Cochran

Instructed by : The Company

For the Respondent : Adv.A Pillay

Instructed by : PKX Attorneys