



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 731/10

In the matter between:

URBAN AFRICA SECURITY (PTY) LTD

Applicant

and

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

First Respondent

COMMISSIONER MAHLURI DIFFERENCE MAHLAWULE

Second Respondent

BETHUEL MADIKANE PITSI

Third Respondent

Heard: 22 November 2011

Delivered: 17 February 2012

Summary: Arbitration award set aside and reviewed – remitted back to the first respondent – commissioner relying on a version not put to the witness.

JUDGMENT

BOQWANA AJ

Introduction

- 1] This is an application to review and set aside an arbitration award made by the second respondent ('the commissioner') under case number LP 7254/09 in terms of which the commissioner found that the dismissal of the third respondent was substantively unfair. The commissioner ordered the applicant to reinstate the third respondent back to its employment on the same terms and conditions as governed the employment of the third respondent prior to his dismissal. The applicant was ordered to reinstate the third respondent with effect from Friday, 12 March 2010. The commissioner also ordered the applicant to pay the third respondent an amount of R5547.00 which is equivalent to three months salary in back pay on or before 12 March 2010.
- 2] The application was unopposed.

Background Facts

- 3] The third respondent was employed by the applicant on 01 June 1998 as Grade C Security Officer. He was dismissed on 23 November 2009. He was dismissed for refusing to obey a reasonable instruction issued by the general manager, Petrus Albertus Bantjies ('Bantjies') of the applicant and for using abusive language towards his manager at his post at Kentucky, Market Street on 16 November 2009.
- 4] Bantjies testified at the arbitration hearing that on 16 November 2009, he was visiting at Kentucky Market Street where the third respondent was deployed. On his arrival at that station, he asked the third respondent to give him the occurrence book ('the OB') to which the respondent refused and stated that 'he (Bantjies) was not his boss. God is his boss'. The third respondent said this while walking away from Bantjies.

- 5] Bantjies informed one of the controllers, Zechariah Chuene ('Chuene') about what had happened. He told Chuene that he is giving the respondent an instruction to report to the office the following day. The third respondent with a loud voice refused to report to the office and Chuene could hear him on the background. Two days later, the third respondent came to see him and asked for the matter to be resolved amicably. He stated that he was busy and could not come to the office when he was instructed to do so.
- 6] The third respondent denied that he insulted Bantjies and had refused to follow an instruction. He stated that Bantjies came to the site on the day in question and asked for the OB. He denied that he did not want to cooperate but stated that Bantjies simply did not greet him upon his arrival. He testified that he told Bantjies that the OB was inside the building and the manager of Kentucky had already locked the building. Bantjies then said to him 'because you are not in possession of the occurrence book, you must report at the office the following day' and he then drove off. He testified that the practise is that if there are issues to be reported upon after 22h00 he would approach his colleague at BB Auto, which is another site of the applicant closer to Kentucky. He would also use the said colleagues' two way radio to inform the office whatever needs to be reported on.
- 7] The third respondent testified that he went to Bantjies office the following day, 17 November 2009 and could not find him. He again went on 18 November 2009 when he was suspended and was informed of the hearing to be held on 20 November 2009.
- 8] The commissioner found that the applicant had failed to discharge the *onus* on the balance of probabilities that dismissal of the third respondent was substantively fair.

Grounds for review

- 9] The applicant submits that the commissioner's award is not justifiable in terms of the reasons given in the arbitration award. The applicant further submits that the commissioner has made errors of law and fact regarding requirements of substantive fairness of the dismissal.

Evaluation

10] The commissioner was presented with two versions of events. In that instance he had to assess which version was more probable than the other. It is common cause that each of the parties called a single witness. In the case of *S v Carolus*¹ the SCA held that:

‘There is no formula to apply when it comes to the consideration of the credibility of a single witness. The trial court should weigh the evidence of the single witness and consider its merits and demerits and, having done so, should decide whether it is satisfied that the truth has been told despite the shortcomings or defects or contradictions in the evidence.’²

11] The first issue of contention advanced by the applicant is that the commissioner drew a negative inference that Bantjies failed to call Chuene as a witness to corroborate his assertion that Chuene overheard his conversation with the third respondent. The applicant submits that Chuene was not a witness at the scene. The reason advanced by the applicant as to why Chuene was not called at the scene was that the third respondent never disputed that a telephone conversation took place and the contents thereof and the third respondent kept changing his version in relation to that alleged telephone call. At one point he denied that there was a telephone call but later on accepted that Bantjies did contact Chuene.

12] The applicant’s assertion that Chuene was not a witness at the scene implies that the applicant did not see Chuene’s evidence as being material in proving its case. The applicant submits on the other hand that the reason Chuene was not called as a witness was because the phone call and its contents were not disputed by the third respondent.

13] From the reading of the record it is clear that Bantjies telephoned Chuene to advise him of the third respondent’s behaviour. Bantjies testified that during

¹ 2008 (2) SACR 207 (SCA).

² *S v Carolus supra* at 211-212, para15. The court relied *inter alia* directly on the early and more extensive consideration of the rule in *S v Sauls and Others* 1981 (3) SA 172 (A) at 180E – G as authority for this proposition.

the telephonic conversation Chuene overheard the third respondent shouting and using abusive language towards him. The abusive language he was alleged to have used was 'you are not my boss. I do not listen to you'. Chuene's evidence was without a doubt quite crucial and would have corroborated the version of Bantjies.

14] The third respondent clearly denied that he insulted Bantjies. It is therefore not quite correct to state that the third respondent did not dispute the contents of the alleged telephone call. The third respondent also challenged Bantjies to call witnesses to support his allegation. This was also raised during the third respondent's cross-examination whereupon he denied that he was shouting and challenged the applicant to bring the one who said he was shouting.

15] On that issue, the commissioner's finding cannot be faulted as being unreasonable. It is well a established principle of our law that failure to produce a witness who is available and able to testify and give relevant evidence, may lead to an adverse inference being drawn.³

16] In *Tshishonga v Minister of Justice and Constitutional Development and Another*⁴, the court held that failure to call a witness is reasonable in certain circumstances, such as when the opposition fails to make out a *prima facie* case. In that case, Pillay J went further and held that:

'But an adverse inference must be drawn if a party fails to testify or place evidence of a witness who is available and able to elucidate the facts as this failure leads notorally to the inference that he fears that such evidence will expose facts unfavourable to him or even damage his case.'

17] One would have expected the applicant to call Chuene who could shed some more light as to what he overheard over the telephone but the applicant chose not to call him. Be that as it may I also do not agree that the commissioner regarded failure to call Chuene as being fatal to the applicant as the applicant suggests.

³ See *UPUSA obo Khumalo v Maxiprest Tyres (Pty) Ltd* (2009) 30 ILJ 1379 (LC) (12 September 2008) at para 30 and *Simelane and Others v Letamo Estate* (2007) 28 ILJ 2053 (LC) and the authorities referred therein.

⁴ (2007) 28 ILJ 195 (LC) at para 112.

18]The second ground for review raised by the applicant is that the third respondent's version that the OB and radio were locked in the building was never put to the applicant's witness, Bantjies. The applicant submits that it was incorrect for the commissioner to find 'the reasons offered by the employee why he could not hand over the occurrence book were not disputed'. In this regard the commissioner found that:

'Under the circumstances however, I find it hard to believe that the employee was insubordinate, considering the fact that it was never disputed that the required occurrence book and the two way radio were already locked in the building by the manager of Kentucky. Meaning that it was not practicable to hand over the occurrence book to the general manager as requested.'

19]I have gone through the record and I could also not find anywhere where this version was specifically put to Bantjies by the third respondent during his cross-examination of Bantjies. The third respondent merely asked Bantjies if there was anything he had said to Bantjies to which Bantjies answered 'You did not speak. You walked away from me.' The third respondent did not put his version to Bantjies that he told Bantjies that the OB was locked up at Kentucky so that Bantjies could comment on that. That evidence only came when the third respondent was giving his testimony and by then the applicant's witness had no opportunity to comment. This in my view is quite significant in that it is the version that the commissioner seems to have accepted over that of Bantjies. It could not be assumed that Bantjies knew what the applicant's version was. Moreover, this version transpired for the first in the arbitration hearing and was never placed during the disciplinary hearing.

20]It is well established that the arbitrator's reliance on a version that was not put to a witness is a reviewable irregularity⁵. In the *Southern Sun Hotel Interests (Pty) v CCMA and Others*, Van Niekerk J held as follows:

'To rely on evidence in the absence of it having been put to the opposing party's witnesses under cross-examination constitutes a reviewable defect.'⁶

5 In this regard see *SA Nylon Printers (Pty) Ltd v Davids* [1998] 2 BLLR 135 (LAC) at 137I-138A; *ABSA Brokers (Pty) Ltd v Moshwana NO & others* [2005] 10 BLLR 939 (LAC) at paras 38 - 42.

6 *Southern Sun Hotel Interests (Pty) Ltd v CCMA and Others* (2010) 31 ILJ 452 (LC) at 462,

21]I accept that the third respondent was a layman and may not have knowledge on how to present his case at arbitration. The commissioner however could not make a finding that a version that was not put to the applicant's witness was undisputed by the applicant.

22]This issue alone renders the award reviewable. In my view, the finding of the commissioner was unreasonable as the version he relied on went to the heart of the issue before him.

23]Aside from that the third respondent's explanation of why he did not have his OB and radio in his possession as a security guard when required is also questionable. I will however not give a view on that issue in light of my finding on the third respondent's version not having been put to the applicant's witness.

24]In view of my finding above, it is not necessary to deal with other grounds for review. It is also my view that it be would be in the interest of justice for this matter to be remitted back to the first respondent ('the CCMA') for a rehearing. The CCMA will be better placed to make credibility findings against witnesses. Looking at factors such as the reliability of witnesses, their demeanour and consistency of evidence given, which may not readily appear from the record. This, in my view is one those cases.

25]I therefore make the following order:

1. The arbitration award dated 21 February 2010 under case number LP7254-09 is reviewed and set aside.
2. The matter is remitted back to the CCMA for a hearing *de novo* before a new commissioner other than the second respondent.
3. No order as to costs.

para 20. See in this regard:

BOQWANA AJ

ACTING JUDGE OF THE LABOUR COURT

APPEARANCES:

FOR THE APPLICANT: Mr J Matthee employee of the applicant

FOR THE THIRD RESPONDENT: No appearance