REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 2777/09

In the matter between:

POPCRU obo FB NDOKWENI **Applicant**

and

B MARITZ *N.O* **First Respondent**

THE MINISTER FOR SAFETY AND SECURITY **Second Respondent**

THE SAFETY AND SECURITY BARGAINING

BARGAINING COUNCIL ("SSSBC") **Third Respondent**

Heard: **03 February 2012**

Delivered: **03 May 2012**

Summary: Review arbitration award. Test for application of circumstantial evidence

JUDGMENT

MOLAHLEHI J

Introduction

1] This is an application to review and set aside the arbitration award made by the first respondent (the arbitrator) under case number PSSS 514-08/09 and dated 24 May 2009. The applicant (the employee) who prior to her dismissal was employed as a constable in the employ of the second respondent and stationed at George in the Cape, was dismissed for misconduct related to contravention of the provision of section 40 of the Police Act read with the Police Services Disciplinary Regulations.

2] The initial incident that led to the charges against the employee arose from the investigation into a report about a fraud scheme concerning cellular phones in the George area. The complaint about the alleged cellular phone fraud pointed to two women who were apparently using forged identity documents to collect cellular phones from an international courier.

3] The investigation into the alleged cellular phone fraud was conducted by Mr Titus from the third respondent. On 22 September 2007 on arrival at the premises of the international courier, he observed a woman (who is this judgment hereafter is referred to as “the first suspect”) who was busy talking to one of the managers’ walking away as soon as she saw him. He followed the first suspect to the car park. On his way following the suspect to the car park Mr Titus was confronted by another woman (who is this judgment hereinafter is referred to as “the second suspect”) who apparently came out of a car that was parked in the parking area. It would appear that in the course of the interruption by the second woman the first suspect managed to run away.

4] When Mr Titus inquired from the second suspect about the car keys of the car she was in, she informed him that the keys were taken away by the one first suspect. In searching the woman Mr Titus found three cell phones on her. The second suspect was arrested and searched by a female police officer, Ms Salmon before she could be locked in the cell. After searching her officer Salmon reported that she found only a wallet and no keys on the suspect.

5] Later in the afternoon at about 05:10 PM, Mr Titus received a phone call from the applicant employee informing him that she had the previous night collected the car keys from officer Salmon.

6] On arrival the following day, Mr Barense informed Mr Titus that he had seen the employee in the car belonging to the suspects and when he enquired from her what she was doing in the car she said the suspect had requested her to collect something for her from the car.

7] The version of the respondent is that when Mr Titus looked in the car at the time he took the suspect to there to check on a document he discovered that the two bags went missing.

8] It was on the basis of the above that the applicant was charged with three acts of misconduct. The charges against the applicant were formulated in terms of the provisions of section 40 of the Police Act,[1] read with the South African Police Services Regulations and specifically regulation 20(p), (q) and (z). The essential aspects of the charges against the applicant were that she removed exhibits in the form of two bags which had been left in the car registration CAW 338822. The exhibits were part of the evidence which the third respondent intended using in the investigation of a fraud case against a syndicate involved in the theft of cellular phones. One of the suspects involved in the syndicate was in custody and the car in question belonged to her. The applicant was also charged with defeating the ends of justice in that she was alleged to have attempted to prevent further investigation of the fraud case involving the syndicate.

1 Act no 68 of1995.

9] At the conclusion of the disciplinary hearing the employee was found guilty and dismissed. The employee's internal appeal against the outcome of the disciplinary hearing was unsuccessful. And the employee being unhappy with the internal processes that led to the termination of her employment referred an alleged unfair dismissal dispute to the third respondent.

Grounds for review

10] The applicant contends that the arbitrator committed gross irregularity or exceeded his powers in concluding that Ms Salmon was no more than a causal actor in the circumstances of the case. The applicant further contends that the arbitrator in accepting the version of Mr Titus that the vehicle was locked at the time it was towed from the scene failed to apply his mind properly. It was further submitted on behalf of the applicant that the arbitrator failed in the exercise of his duty to apply the appropriate legal test in determining that the only person who had the keys to the vehicle was the applicant.

The arbitrator's award

11] The arbitrator in his analysis of the facts before him starts off by accepting the version of the second respondent that the car in question was locked at the time it was taken to the police station. He further accepted that although the testimony of Mr Branden and Mr Titus were at variance in describing what was in the car namely the nature of the two bags in the car the applicant was responsible for removing the exhibits.

12] At paragraph 72 of the arbitration award the arbitrator says:

> '72. I would agree with Mr Visser that Salman should have been called as in the circumstances she played a central role. In the disciplinary Mr Visser did

> challenge her evidence about the person from whom she had received the keys but on a conspectus of the evidence it would appear that she was no more than a casual actor in the events.'

13] In arriving at the conclusion that the applicant was involved in the removal of the bags the arbitrator reasoned that the applicant failed to give a satisfactory account as to why "she allowed herself to get involved with the car and the suspect. I would have expected her to have recorded the call about the key in the occurrence book and to have left the matter for Titus to sort out in the morning."

Evaluation

14] It is apparent from the reading of the record that the employee was not found taking or in possession of the two bags in question. It is therefore common cause that the respondent relied on circumstantial evidence in convincing the arbitrator that the dismissal of the applicant was fair. In assessing whether the arbitration award should be interfered with, this Court is called upon to determine whether the arbitrator properly applied the legal test for dealing with circumstantial evidence in a manner that ensured that the employee was not denied a fair hearing as a result thereof.

15] The principles to apply when dealing with circumstantial evidence was considered and summarised by this Court in *National Union of Metalworkers of SA and Another v KIA Motors and Others,* as follows:[2]

> '(a) The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.
>
> (b) The true facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be doubt

2(2007) 28 ILJ 2283 (LC) at para 21 as cited by D T Zerffertt, AP Paizes and A St Q Skeen *The South African Law of Evidence (*2003) at 94. .

whether the inference sought to be drawn is correct.'

16] The court further held that in civil cases the *onus* is discharged if the inference advanced is the most readily apparent and acceptable inference from a number of possible inferences.[3] It is thus the only permissible inference and not a mere conjuncture or speculation that can sustain a case based on circumstantial evidence.[4]

17] The danger against the use of circumstantial in determining the guilt of a person has been highlighted in the Kia Motors as follows: [5]

> 'The possibility of error in direct evidence lies in the fact that the witness maybe mistaken or lying. All circumstantial evidence depends ultimately upon facts which are proved by direct evidence, but its use involves an additional source of potential error because the Court may be mistaken in its reasoning. The inference that it draws maybe sequitur, it may overlook the possibility of other inferences which are equally probable or reasonably possible. It sometimes happens that the trier of facts at having thought at a theory to explain the facts that he may tend to overlook inconsistent circumstances or assume the existence of facts which have not been proved and cannot legitimately be inferred.'

18] It is only the objective facts from which an inference can be drawn that can sustain a case based on circumstantial evidence. In the English case of *Caswell v Powell Duffryn Associated Collieries Ltd*, the court said,[6]

> 'There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had actually been observed. In other cases the inference does not go beyond reasonable probability. But there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjuncture."'

3 The leading authority in this respect is *AA Onderlinge Assuransie-Assosiasie Bpk v De Beer* 1982 (2) SA 603 (A) and in criminal matters it is Rex v Blom 1939 AD 188.

4 See *Victor and Another v Picardi Rebel* (2005) 26 ILJ 2469 (CCMA).

5 See Kia Motors at paragraph [23]

6 [1939] 3 All ER 722 (HL) at 733.

19] The second respondent in defending the arbitration award contends that the employee failed during the arbitration hearing to provide a satisfactory explanation as to what was she doing in the car.

20] Mr Mthombeni for the second respondent conceded that the second respondent in its case both at the disciplinary and arbitration hearing relied on circumstantial evidence to show that the applicant was guilty of the offences for which she was charged with. He argued that all facts viewed together point to the fact that the applicant was responsible for removing the bags in question. He further contended that the only inference that can be drawn from the facts is that the applicant removed the bags from the car.

21] In my view, the arbitrator failed to appreciate the issue he was faced with when regard it had to the nature of the evidence he had to deal with and thus in arriving at the conclusion as he did, denied the employee a fair hearing.

22] It is trite that in cases of this nature the *onus* is on the third respondent to show, on the balance of probabilities that the employee was guilty of charges proffered against him or her. In the present instance, the third respondent had the duty of showing firstly that the two bags were in the car. One witness of the respondent's witnesses testified that there were two shopping bags in the car whilst the other said that there were two hand bags in the car. The arbitrator did not accord any weight to this contradiction. Indeed this may not be the biggest problem in seeking to sustain the arbitration award. It however ought not to have been ignored in the totality of the facts of the case.

23] The critical issue and the starting point in this case is whether the car was locked at the time it was removed and taken to the police station. On the probabilities the evidence before the arbitrator did not establish that the car was locked when it was removed from where it was. There is also no evidence that the car remained locked for the period that it was left at the back of the police station where it was parked.

24] The testimony of Mr Titus is that as he was chasing the first suspect he was confronted by the second suspect who wanted to know why he was chasing the first suspect. After what appears to have been a brief confrontation, Mr Titus required the second suspect to open the car. There is no evidence that Mr Titus tested whether indeed the car was locked or otherwise. There is a possibility that the second suspect may have wished to dissuade Mr Titus from opening the car by saying that the car was locked when in fact that may not have been the case. That possibility is however not critical.

25] The critical aspect of this case is the possibility that Ms Salmon may have also opened the car and may have left it unlocked, deliberately or otherwise. She was not called to testify. In my view, she was a critical witness for a number of reasons. Her testimony would have assisted the arbitrator to determine as to at what point and under what circumstances did she come into possession of the car keys because the version of the respondent at the arbitration hearing was that after searching the suspect soon after her arrest she (Salmon) said that the only thing she found on her (the second suspect) was a purse and that the suspect did not have keys with her. She was also a critical witness to assist in determining as to whether from the time she obtained the keys to the time she gave them to the employee the car was always locked and further no other person had access to them before that period.

26] On the evidence before the arbitrator the possibility exists that she may have at some point left the car opened and someone may have taken the bags out of the car. The other important piece of evidence which would have assisted in eliminating all other possibilities concerns the issue of safe keeping of the keys once Ms Salmon had taken possession thereof. The possibility that the bags could have been removed by Ms Salmon, for whatever, has not been ruled out.

27] The other important aspect which the arbitrator failed to interrogate is the security of the area where the car was parked. The car was parked at the back of the police station. There is a pedestrian gate at the back of the police station which provides access to the barracks. The car could be accessed from that gate.

28] Mr Titus could not confirm during cross-examination whether he had checked to see that the pedestrian gate was locked. He could further not say whether other people who stay in the barracks who had the key to the gate could (if the gate was ever locked) not have opened the gate and entered from that end.

29] In light of the above, I am of the view that the respondent has failed to discharge its duty of showing on the balance of probabilities that the employee was responsible for the disappearance of the hand bags and consequently guilty also of defeating the ends of justice.

30] In light of the above, I according find that the applicant's review application stands to succeed.

31] The issue that remains is whether the court should remit the matter back to the third respondent or determine it. In my view there is sufficient material before this Court to determine the matter, and mainly for the purpose of avoiding any further delay in the resolution of the dispute. Having found that the second respondent failed to prove the fairness of the dismissal in that it could not show on the basis of the circumstantial evidence that the applicant was responsible for the removal of the bags in question it goes without saying that her dismissal was substantively unfair. The consequence of this is that the respondent has also failed to show that the applicant was guilty of the other charges of defeating the ends of justice.

32] The issue that then remains for determination is the issue of the remedy. It is trite that the primary remedy in dismissal cases is reinstatement unless there are factors that suggest otherwise. I have not been able to find any factors that suggest the contrary to the primary relief in the circumstances of this case. Accordingly, I see no reason in the circumstances of this case why the primary remedy of reinstatement should not apply. As concerning the costs, I see no reason in the circumstances of this case why they should not follow the results.

33] In the premises, the following order is made:

1. The arbitration award of the First Respondent is reviewed and set aside.

2. The arbitration award is substituted with the following award:

   A. 'The dismissal of the applicant by the respondent was substantively unfair.

   B. The respondent is ordered to reinstate the applicant retrospectively to the position she occupied prior to her unfair dismissal with full back pay and no loss of benefits that may have accrued from the date of the dismissal.

3. The respondent is to pay costs of the applicant.

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Molahlehi J

Judge of the Labour Court of South Africa

APPEARANCES:

FOR THE APPLICANT: J L Basson Instructed by: Grosskopf Attorney’s

FOR THE RESPONDENTS: Mr Mthombeni Instructed by: State Attorney