

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN

CASE NO: JR658/12 & J1086/12

DATE: 2013/05/24

In the matter between

SOUTH AFRICAN REVENUE SERVICES

Applicant

and

CCMA

First Respondent

C A MANNDE, N.O.

Second Respondent

LEGATO BENNY RAMOKGOLA

Third Respondent

J U D G M E N T

STEENKAMP J:

This is an application to have an arbitration award dated 19 February 2012 reviewed and set aside. Together with this application, an application by the employee, Mr Benny Ramokgola, who is cited as the third respondent in these proceedings, is also enrolled where Mr Ramokgola is the applicant. That matter is enrolled under case number J1086/12 in which the employee asks the court to have the arbitration award made an order of court in terms of Section 158(1)(c) of the Labour Relations Act.

The arbitration award arises from the dismissal of the employee by his employer, The South African Revenue Services or SARS, in circumstances where it was alleged that the employee had solicited and received a bribe from a member of the public, Mr Willie Boltmann.

At the arbitration SARS led four witnesses, being Mr Boltmann; a clearing agent, Ms Cornelia Smith; a Mr Alex Mosia, the team commander; and Ms Tricia Alfred, who was initially alleged to have been an accomplice to the bribe.

However, in an internal disciplinary hearing chaired by an outside chairperson appointed by Tokiso Dispute Resolution, it was found that Ms Alfred did not participate in the misconduct. The same chairperson, however, found that Ramokgola had committed the misconduct and that is what led to his dismissal.

Mr Ramokgola gave evidence on his own behalf at the arbitration. He did not call any witnesses.

At the end of the arbitration the arbitrator found that the employee's dismissal was substantively unfair and ordered SARS to reinstate him.

The arbitrator came to that conclusion after considering the evidence before him. Firstly, and perhaps most importantly, he found that the evidence of Tricia Alfred, who was called as a witness by SARS, was destructive of SARS's case. The arbitrator went so far as to find:

"Tricia's testimony absolved the [employee] of the charge."

It is so that Ms Alfred did not support SARS's case. She denied

having seen Ramokgola accepting an amount of R1 000 in R200 notes from Boltmann as was alleged by Boltmann, and thus by SARS. However, when SARS's representative at the arbitration, Mr Lekganyane, indicated to the commissioner that Ms Alfred appeared to be a hostile witness, the commissioner said the following:

"No she is not. She is not. From the onset you said tell me what happened on the day in question. She explained. No hostility from the witness. The witness is just explaining what she heard."

Under those circumstances Mr Lekganyane, who is not legally trained, carried on with leading the evidence of Ms Alfred in circumstances where she was not declared a hostile witness.

The arbitrator then took into account the evidence of Ms Smith, the clearing agent, in whose regard he found:

"In my view the credibility of Cornelia [Smith] is questionable."

He appears to have come to this conclusion because there was a discrepancy in a previous affidavit and in her evidence before the arbitration with regard to the car that she got into initially when following Mr Boltmann, when he was directed to go and park his car in an area that is normally reserved for abnormal load vehicles.

Thirdly, with regard to Mr Boltmann's evidence, the arbitrator took into account that neither Alfred nor Smith saw Ramokgola giving Boltmann R1 000. He then comes to the following conclusion:

"It is highly probable that Boltmann did not give the

applicant [the employee] R1 000. On balance of probabilities I find that the applicant is not guilty as charged."

Fourthly, with regard to the evidence of Mosia, the commissioner simply finds that Mosia mainly testified about the procedure to be followed; that the employee was not charged with not following the procedure; and that:

"I do not find Mosia's evidence of assistance in these proceedings."

In coming to these conclusions the arbitrator failed to properly apply his mind to the evidence before him and to weigh up the probabilities and the credibility of the witnesses.

Firstly, he failed to weigh up Tricia Alfred's credibility as against that of Boltmann. Even where they were both called by SARS, that did not absolve him from going through that exercise.

Secondly, the arbitrator failed altogether to appreciate the probabilities based on the evidence before him.

The principles in this regard are well-known. In the second edition of *The South African Law of Evidence*, formally Hoffman and Zeffertt, now edited by Zeffertt and Paizes at page 901 under the heading "Unfavourable and hostile witnesses" and further under subparagraph (a) the learned authors state the following:

"A party cannot adduce evidence (other than in order to prove the making of a prior inconsistent statement) which is relevant only to show that his own witness is

unworthy of credit, but there is nothing to prevent him from calling other evidence to contradict the witness on matters relevant to the issue:"

And the learned author then quotes from Buller's *Nisi Prius* 7th edition at 297:

'... if a witness prove facts in a cause which make against the party who called him, yet the party may call other witnesses to prove that those facts were otherwise; for such facts are evident in the cause, and the other witnesses are not called directly to discredit the first witness, but the impeachment of his credit is indirect and consequential only.'

I carry on with the quote from Hoffmann and Zefferdt:

"It would be quite unreasonable if a party were bound by the evidence of the first witness he called, since if this were so the fortunes of his or her case would depend upon the accident of which witness he or she happened to call first."

Calling further witnesses is exactly what SARS did in this instance. Having been presented with the evidence of the first witness it chose to call, namely Ms Alfred, and having been prevented by the commissioner from declaring her a hostile witness, SARS nevertheless carried on to call its further witnesses.

With regard to the evidence of Smith, it is so that her evidence with regard to when she got into the bakkie with the two SARS officials, that is Ramokgola and Alfred, was not entirely consistent compared to her earlier

statement. However, she did explain that in the arbitration. Firstly she explained that she did get into the bakkie with them when it was parked at the abnormal load area, that is when Ramokgola suggested to her that she should convey to Boltmann that they could "make a plan", which she understood to mean that Ramokgola solicited a bribe. Secondly she explained that she initially gave her statement in Afrikaans, her home language; that was translated into English, and when she reread the English version she did not pick up the discrepancy. That is not improbable, especially when having regard to the evidence of the misconduct itself, namely the payment of the bribe. In this regard her evidence is entirely consistent with that of Boltmann. That she explained in her evidence at the arbitration at some length, both in chief and under cross-examination.

With regard to the evidence of Mosia, the arbitrator also misdirected himself. That evidence was not irrelevant, as Mosia explained the proper process to have been followed in circumstances like this, i.e. that Boltmann's bakkie or SUV and trailer should have been driven to the ramp where a different customs official should have inspected it. That is not what happened, which leads to the further probability that Ramokgola followed a process that was favourable to him soliciting a bribe.

Turning to the evidence of Ramokgola himself, the exculpatory evidence that he gave turned on an invoice that was supposedly presented to him by Smith, and on the basis of which he then released

Boltmann.

When regard is had to that invoice as against the manifest that was previously objected to, that evidence does not make any sense. The manifest that initially led to the objection to the declared freight on Boltmann's trailer referred to "other furniture and parts thereof – other metal furniture". The objection was that that did not reflect a diamond cutting machine that was in fact on the trailer.

The invoice on the strength of which Ramokgola supposedly saw fit to release Boltmann refers to the following articles of freight: "station glove box; stainless steel milk cans; Ziploc bags; pairs of sorting gloves; and transport costs." The only reference to anything made of stainless steel on that invoice is milk cans. How that could conceivably satisfy a customs official that that should refer to a diamond cutting machine is inconceivable.

Most tellingly when regard is had to the probabilities, is the evidence of Boltmann himself. He is the person who paid the bribe. He had nothing to gain from giving evidence other than to implicate himself in the serious crime of corruption. Not only did he do so, but he travelled at great cost, both in terms of time and money, firstly to Beit Bridge in order to give evidence at the disciplinary inquiry, and secondly to Makhado, previously called Louis Trichardt, to give evidence at the arbitration.

As Boltmann himself says in his evidence, and his frustration is palpable, and I quote from this evidence under cross-examination (this is when it was suggested to him under cross-examination that he was fabricating his version):

"You know that is way below my intelligence here man. You know to think that I could fabricate a story like this. You know come out of the blue. I mean to come and sit here in Louis Trichardt, to come and make up a story that we fabricated somewhere, you know I feel that you are insulting my intelligence here man. You know for what reason do you think would I fabricate a story like this. You know, at my own expense. I do not get no benefit from coming here, not at all."

That exasperated statement has the ring of truth to it. Throughout his evidence Mr Boltmann, without this court having seen his demeanour but from a reading of the transcript, created the evidence of a credible witness, a person who had done wrong but was now doing the right thing.

In considering that evidence the commissioner should have but did not take into account the well-known principles set out in *Stellenbosch Farmers Winery Group Limited and Another v Martell et Cie and others* 2003 (1) SA 11 (SCA) at paragraph 5 where Nienaber JA said:

"On the central issue as to what the parties actually decided there are two irreconcilable versions, so too on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be

summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities ... In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

The probabilities in this case are not difficult to ascertain. It is highly improbable that Mr Boltmann would have fabricated a story implicating himself in a serious crime and incurred significant costs in order to pursue a baseless complaint of misconduct against a SARS employee that he has never met before.

On the other hand both Ramokgola and Alfred had every reason to give exculpatory evidence and to distance themselves from this act of misconduct.

On the probabilities there can be no doubt that Ramokgola did pay the bribe of R1 000 to Boltmann.

In coming to the contrary conclusion the arbitrator did not properly apply his mind to the evidence before him; he applied the wrong test with

regard to evidence; and he failed to weigh up the probabilities. The arbitration award therefore falls to be reviewed and set aside.

Mr *Goldberg*, who appeared for the third respondent, Mr Ramokgola, suggested that should the court come to that finding the matter should be remitted to the CCMA for a hearing *de novo*. He went so far as to concede that the commissioner did make mistakes and that certain questions were not considered, which should be considered afresh.

I cannot agree with that submission. All the evidence is before this court and has been canvassed at some length in oral debate with the parties today, and in their heads of argument. It would serve little purpose to remit the matter; all it would do is to lead to further costs and further delay to both parties. It would also entail Mr Boltmann having to travel once again to Makhado or some other venue in order to give evidence for the third time. He should not be subjected to that. Having committed an offence initially, Mr Boltmann came clean and blew the whistle. That conduct should be commended in a society such as ours that is unfortunately increasingly rife with corruption. Attempts by members of the public such as Mr Boltmann to stem that tide should be rewarded and not penalised.

With regard to costs though, I do take into account, in law and fairness, that Ramokgola had an arbitration award in his favour and that he is, as Mr *Goldberg* submitted, of course entitled to defend that award. In these circumstances I do not believe that an adverse costs order should be made.

I therefore make the following order:

1. The arbitration award under case number LP3834-11 dated 19 February 2012 is reviewed and set aside.
2. The order is replaced with an award that the dismissal of the employee, Mr Benny Ramokgola (the third respondent), was fair.
3. There is no order as to costs.

And in case number J1086/12 the necessary corollary is simply that the application is dismissed.

STEENKAMP J

APPEARANCES

APPLICANT: Attorney P Maserumule.

THIRD RESPONDENT: Attorney A Goldberg.

