



REPUBLIC OF SOUTH AFRICA

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case No JR1498/05

In the matter between:

T E MAMPA

Applicant

and

SOUTH AFRICAN POLICE SERVICE

First respondent

SAFETY AND SECURITY SECTORAL

BARGAINING COUNCIL

Second Respondent

MRS N MBDILENI

Third respondent

Heard: 17 January 2014

Delivered: 28 May 2014

Summary: Review of arbitration award – dismissal – Sergeant in the SAPS dismissed for failing to provide a satisfactory explanation for a hijacked vehicle being found in his garage. Commissioner considered principle issue before her and came to a conclusion which a reasonable decision-maker could reach.

JUDGMENT

CHAVOOS AJ

Introduction

- [1] This is an application to review and set aside the arbitration award of the third respondent dated 25 May 2005.
- [2] There were significant delays associated by both the Applicant and the Third respondent with the filing of the record and the answering affidavit respectively. At the commencement of argument, both parties agreed to dispense with any objections and arguments associated with the respective delays in filing the record and the answering affidavit and counsel for the respective parties confined their arguments to the merits of the review application.

Background

- [3] The Applicant was employed by the First respondent as a Sergeant and dismissed on 14 February 2001 having been found guilty in respect of two of four complaints against him.
- [4] The two complaints in respect of which he was found guilty were the following:

Charge number 3: You are hereby charged with misconduct, in that you allegedly contravened Regulation 18/3, in that at or near Edenvale, and or about 18 August 1999, you performed an act, or failed to perform an act, which constitutes an offence, by being in possession of stolen property, namely a white Volkswagen Caravelle 2.5l, with registration number HGL 171GP, without being able to give a satisfactory explanation.

Charge number 4: You are hereby charged with misconduct, in that you allegedly contravened Regulation 18/3, in that or near Edenvale, and on or about 18 August 1999, you performed an act, or failed to perform an act, which constitutes an offence, by using a State vehicle, a white

Volkswagen Golf, with registration number JDF 384GP without the owner's consent and/or the necessary authority'.

[5] The Applicant then appealed the findings handed down at the disciplinary hearing. The Appeal Chairman found him not guilty in respect of Charge 4 but upheld the verdict of guilt in respect of Charge 3 and the sanction of dismissal was confirmed.

[6] The Applicant challenged his dismissal at the Safety and Security Sectoral Bargaining Council ("Bargaining Council"). The arbitration was concluded on 10 May 2005.

[7] The parties signed a pre-arbitration minute and the following facts were common cause:

7.1 The owner of a white Volkswagen Caravelle 2.5l with registration number [.....] was hijacked on 18 August 1999 in Edenvale at about 18:25 and the stolen vehicle was subsequently found parked in the Applicant's garage on the same day.

7.2 The hijacked vehicle was prior to the robbery, followed by a white golf similar to the SAPS vehicle in the Applicant's possession but the owner of the hijacked vehicle could not identify the occupants.

7.3 The keys of the hijacked vehicle were found in the vicinity of the Applicant's house.

7.4 The SAPS white Golf vehicle [.....] was parked near the Applicant's house when the hijacked vehicle was discovered.

[8] The Commissioner summarised the crux of the matter as follows:

8.1 Could the Applicant give a plausible explanation of why a stolen or robbed vehicle was found parked in the garage of his house?

8.2 Did the Applicant have the authorisation to use the State vehicle on 18 August 1999?

The arbitration award

- [9] The Commissioner reasoned that the Applicant was required to provide a satisfactory explanation as to why a stolen vehicle was found in his garage after it was established that he was the owner of the house where the hijacked vehicle was found and he was positively identified at an identification parade as the person fleeing the scene when Mr Beuter of a tracking company had tracked the hijacked vehicle to his house.
- [10] In arriving at the conclusion that the Applicant was guilty of misconduct and that his dismissal was substantively fair, the Commissioner rejected the Applicant's version that the hijacked vehicle was stolen by his "homeboy" who was renting a room from him at the time of the incident and parked in his garage without his knowledge. She also had difficulty accepting the version of his alibi, a certain Mr Pasha ("Pasha") who corroborated the Applicant's evidence that he was not at home when the hijacked vehicle was parked in his garage as a consequence of Pasha having requested the Applicant to drive his 16 seater kombi to pick up his passengers after they knocked off work in Edenvale and to transport them home as Pasha was involved in a stokvel meeting at his home and was accordingly, unable to collect his passengers and transport them home.
- [11] The Commissioner found Pasha's evidence to be suspect and contradictory and accepted Beuter's evidence as being more credible.
- [12] Beuter testified that the Applicant had approached them when they were close to the Applicant's house whilst following the signal and tracing the hijacked vehicle. The Applicant had asked them what they were looking for. He also testified that the Applicant had later fled the scene when Beuter had lifted himself over the wall and saw the Applicant bending over at the garage door when he tracked the hijacked vehicle to his garage. Beuter positively identified the Applicant at the identification parade which identification the Applicant challenged at the arbitration on the basis that it was flawed.
- [13] The Commissioner also found it inconceivable that the Applicant's wife Ms Mampa could not have heard anyone parking the hijacked vehicle in the garage if she was at home at the time, alternatively, did not see the

hijacked vehicle in the garage if it was parked in the garage before she came home and found it strange that the Applicant led no testimony on the issue of his wife's knowledge of the vehicle which was found parked in his garage.

- [14] The Commissioner also found it improbable that the Applicant's "homeboy" could risk parking a stolen hijacked vehicle in his garage without his consent (knowing that he was a police officer).
- [15] The Applicant seeks to review and set aside the arbitration award of the third respondent on the basis that she had failed to apply her mind to several issues as pleaded in paragraph 9 of the founding affidavit in addition to pleading that the award is grossly irregular and irrational.
- [16] He points out to several contradictions in the testimony of Beuter and Brodie, the two individuals who tracked the hijacked vehicle to the Applicant's home and alleges that the Commissioner had misdirected herself by accepting their testimony.
- [17] The Applicant also alleges a gross irregularity in the proceedings as consequence of the Third Respondent having found the Applicant guilty of Charge 4 which was set aside on Appeal.

Evaluation

- [18] The Applicant is alleged to have been picking up passengers as a favour for his friend and *alibi* Pasha in the same area and around the same time when the kombi was hijacked.
- [19] It is common cause that prior to the vehicle being hijacked, it was followed by a white Golf similar to that of the SAPS vehicle in the Applicant's possession.
- [20] Beuter testified that he had got a glimpse of the Applicant in the white Golf at the time that they were in the Applicant's street searching for the hijacked vehicle which contradicts the Applicant's testimony that he was busy transporting passengers for his neighbour Pasha, who was busy with a stokvel meeting on a Tuesday afternoon.

- [21] Brodie and Beuter testified that a black gentleman had subsequently approached them after he had come from the direction of the white Golf and asked them what they were looking for.
- [22] According to Brodie, he advised the Applicant that they were looking for a hijacked vehicle and the Applicant thereafter left and proceeded towards one of the two houses where they had narrowed down their search for the hijacked vehicle.
- [23] According to Beuter, he pulled himself up the wall of the house next door and noticed a black male bending over next to the roller door and called back at him. He saw that it was the same gentleman that had talked to them earlier (being a reference to the Applicant). The Applicant then fled the scene.
- [24] Beuter identified the Applicant at the identity parade. At the arbitration, the Applicant attacked the procedural aspect of the identification parade claiming it was flawed
- [25] It was not disputed that the keys of the hijacked vehicle were found in the garden of the Applicant's next door neighbour.
- [26] The Commissioner in arriving at her decision that the dismissal of the Applicant was fair, preferred the version of Beuter to that of the Applicant and Pasha.
- [27] She found the evidence of Pasha to be suspect due to contradictions in it and found Beuter to be a credible witness. She did not deal with each and every factor or contradiction individually and independently but elected to deal with the substantial issue that she was required to determine, namely whether the Applicant had given a satisfactory explanation as to why a hijacked vehicle was found in his garage. I have considered the testimony of Pasha and cannot criticise the Commissioner for her findings in respect of Pasha's credibility and testimony. I also cannot fault her for preferring the version of Beuter to that of Pasha despite some of the contradictions in Beuter's testimony. I point out that there were equally several contradictions in Pasha's

testimony and he does not come across as a credible witness if one has regard to the record.

- [28] The Applicant has approached this matter as if it were criminal trial pointing out each and every single factor that may have amounted to a contradiction in the testimony of the first respondent's witnesses including inter alia, whether the Applicant had worn a white shirt, t-shirt, or golf shirt, whether the street lights were on or off, whether or not the garage door behind which the hijacked vehicle was parked was open or closed, the direction from which the black gentleman had approached them, when was Beuter in the vehicle with Brodie when certain questions were asked by the black gentleman who approached them, and in which direction was the white Golf vehicle parked and the like.
- [29] The Commissioner in her award makes reference to the record and the evidence of all the various witnesses and indicated that she did not re-write the evidence but merely referred to it where applicable. She is allowed to do this in terms of s 138 of the LRA which requires her to deal with the merits of the dispute between the parties with the minimum of legal formalities in an expeditious and fair manner.
- [30] The fact that she has not approached the matter as if this were a criminal trial to be determined beyond reasonable doubt (which seems to be the manner in which the Applicant approached this matter), is in no way indicative of the fact that she had not applied her mind to the crux of this matter.
- [31] I accept that she may have committed certain irregularities (one of which was to find the Applicant guilty of being in possession of a State vehicle without any authority in circumstances where this charge was dismissed on appeal and the other being a finding that the evidence of theft or possession of the stolen vehicle being circumstantial), the real issue is whether such irregularities or gross irregularities renders the award susceptible to be reviewed and set aside.
- [32] It is trite that in order to succeed on review, the Applicant is required to establish that based on the material presented before the Commissioner,

her conclusion was one that a reasonable decision maker could not have reached. There has been two recent judgments which now authoritatively set out the requirements for a successful review for gross irregularity under s 145 of the LRA.

The judgements are:

32.1 *Herholdt v Nedbank Ltd (COSATU as amicus curiae)*¹. The court held that:

‘in summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated in s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable’.

32.2 *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others*² :

‘...what is required is first to consider the gross irregularity that the arbitrator is said to have committed and then to apply the reasonableness test established by *Sidumo*. The gross irregularity is not self-standing... It follows that the argument that the failure to have regard to material facts may potentially result in a wrong decision has no place in review applications.

Failure to have regard to material facts must actually defeat the constitutional imperative that the award must be rational and reasonable

¹ (2013) 34 ILJ 2795 (SCA) at para 25.

² [2014] 1 BLLR 20 (LAC); see (2014) 35 ILJ 943 (LAC) at paras 15: and 20 to 21.

– there is no room for conjecture and guesswork insulated from or standing independent of the *Sidumo* test.

Where an arbitrator fails to have regard to the material facts it is likely that he or she will fail to arrive at a reasonable decision. Where the arbitrator fails to follow proper process he or she may produce an unreasonable outcome.

...(i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute? (ii) did the arbitrator identify the dispute he [or she] was required to arbitrate (this may in certain cases only become clear after both parties have led their evidence)? (iii) did the arbitrator understand the nature of the dispute he or she was required to arbitrate (iv) did he or she deal with the substantial merits of the dispute, and (v) is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence?'

[33] I have read the record and I am satisfied that, based on the evidence presented before the Commissioner at the arbitration proceedings, and having considered her award, she has considered the principle issue before her namely whether the Applicant has furnished a satisfactory explanation as to why a hijacked vehicle was found in his garage and, after evaluating the facts presented at the hearing, her decision that the Applicant had not provided a satisfactory explanation, was one that could certainly have been reached by a reasonable decision-maker. I do not deal with each and every individual factor pleaded by the Applicant in his founding affidavit or for that matter, contained in his heads of argument prepared by his legal representative, nor do I set out in detail how the arbitrator treated and dealt with each of those factors (or failed to do so) in her award as this is not what is required of a review court. I find that there is no basis for the arbitration award to be reviewed and set aside.

[34] Insofar as the issue of costs is concerned, s162 of the LRA confers a broader discretion on this court to make orders for costs according to the requirements of law and fairness. I am mindful of the fact that the Applicant is an individual litigant who has incurred substantial legal costs

associated with the defence of his disciplinary hearing, criminal trial and the challenge to his dismissal both at the Bargaining Council and the Labour Court. I am also mindful of the fact that equity applies to both the employer and the employee. I believe that the dismissal of the Applicant's review application is sufficient enough in the circumstances.

[35] In the premise, I make the following Order:

The application for review is dismissed with no order as to costs.

Chavoos AJ

Acting Judge of the Labour Court of South Africa.

APPEARANCES:

For the Applicant:

Advocate J S Mphahlavi,

Instructed by:

Denga Incorporated Attorneys

For the third respondent:

Advocate H W Sibuya,

Instructed by:

the State Attorney

LABOUR COURT