

IN THE LABOUR COURT OF SOUTH AFRICA
(CAPE TOWN)

CASE NUMBER:

C198/2013

DATE:

9 September 2014

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In the matter between:

ROGER CRAIG BRINK

Applicant

10 And

SAFETY AND SECURITY

SECTORAL BARGAINING COUNCIL

1st Respondent

15 **GERALDINE DUNN**

2nd Respondent

SOUTH AFRICAN POLICE SERVICES

3rd Respondent

J U D G M E N T

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STEENKAMP, J

This is an application to have an arbitration award by a
Commissioner of the Safety and Security Sectoral Bargaining
25 Council, Ms Geraldine Dunn, reviewed and set aside. Ms Dunn
/DH /...

is cited as the second respondent. The SSSBC appears to be the first respondent -- it appears that the CCMA was initially and mistakenly cited as the first respondent. The South African Police Service (SAPS), the employer, is the third respondent.

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Be that as it may, it is common cause that the application is aimed at the award of Ms Dunn handed down under the auspices of the SSSBC. The award arises out of an incident where the applicant, Mr Roger Craig Brink, a former constable, broke the window of a white Corolla that was parked under the guard of the SAPS, his employer, and removed an amplifier and an indicator lens. Brink drove a red Corolla that was also parked at the SAPS premises. I do not use the word "allegedly", because those were the findings that the Arbitrator came to. If those findings are reasonable and if the misconduct is proven on a balance of probability, that is, of course, disgraceful conduct coming from an officer of the SAPS, who should be preventing theft rather than participating in it.

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Mr Brink, who is unrepresented, although he was represented at the arbitration by an attorney, raises a wide range of review grounds. Many of those are not strictly speaking grounds for review, but at the hearing today he confined himself to an allegation that the Arbitrator did not consider relevant

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evidence or considered irrelevant evidence.

I will deal briefly with the main points. The first one is that the missing goods -- the amplifier and the indicator -- were not
5 listed in the so-called SAP.13 form or register that should have listed items inside the vehicle, i.e. the white Corolla.

Firstly, one would not expect an indicator lens that was at that stage still properly fitted to the white Corolla should have been
10 listed. As the Arbitrator pointed out, it is interesting to note that Mr Brink's red Corolla was in need of exactly the same part, and it was lying in his car (the red Corolla), whereas the same part was missing from the white Corolla.

15 As far as the amplifier goes, it is so that it is not properly listed. However, contrary to what Mr Brink submits, the Arbitrator did not disregard that. She deals with it pertinently and comes to the conclusion that that must have been an oversight, that the list was incomplete, but:

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"[W]hen viewing the evidence holistically the probabilities do not shift in favour of the applicant as he is not a credible witness."

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In doing so the Arbitrator did exactly what she was meant to do, i.e. weigh up the probabilities and the credibility of the witnesses and the evidence before her and come to a conclusion. That conclusion is reasonable and is not
5 reviewable.

The second main point raised by Mr Brink is that Mr Arendse, the owner of the white Corolla, was somehow prevented from testifying. He could not substantiate that claim and could not
10 explain, if that was the case, why his attorney did not issue a subpoena for Arendse to testify.

As it happens, the Arbitrator properly took into account the evidence relating to Arendse that was placed before her, that
15 consisted of entirely contradictory affidavits. The Arbitrator, not surprisingly, when confronted with contradictory evidence, could not find Arendse's evidence to have been credible.

Mr Brink also complained that the evidence of Captain Lotz, who administered the leave and administration of SAPS
20 officers at Kleinvlei police station, was contradictory and that that was not taken into account by the Arbitrator. That is also not substantiated by the transcript of the evidence compared with the arbitration award. The Arbitrator deals with the
25 evidence of Lotz and notes that in 2012 she, that is Captain
/DH /...

Maria Magdalena Lotz, administered the leave and administration of the officers at the Kleinvlei Police Station. According to her records Constable Khati was on sick leave for an injury on duty from 1 January to 17 February 2010. That is
5 consistent with the evidence of Khati. The Arbitrator properly took into account the evidence of both of those witnesses and compared it with the evidence of Brink, who was not a credible witness. The arbitrator found it improbable that Khati could have been present when Jafta – Brink's friend from whom he
10 allegedly bought the amplifier – signed his affidavit. That is not an unreasonable finding.

The test on review, as Mr Brink acknowledged, is by now well-known, as set out in *Sidumo v Rustenburg Platinum Mines Ltd*
15 [2007] 12 ILJ 2076 (SCA).¹ It is whether the conclusion reached by the Arbitrator is so unreasonable that no other Arbitrator could have come to the same conclusion. As Cameron JA explained in paragraph 30 and 31 of the SCA judgment:

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"The question on review is not whether the record reveals relevant considerations that are capable of classifying the outcome. That test applies when the

¹ The *dictum* quoted here has not been overturned by the decision in *Sidumo v Rustenburg Platinum Mines Ltd* [2007] 12 BLLR 1097 (CC).

Court hears an appeal. Then the inquiry is whether the record contains material showing that the decision – notwithstanding any errors of reasoning – was correct. This is because in an appeal the only determination is whether a decision is right or wrong. In a review the question is not whether the decision is capable of being justified ... but whether the decision-maker properly exercised the powers entrusted to him/her."

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In the case before me that is exactly what the Arbitrator did. She carefully considered all of the evidence before her in a comprehensive arbitration award spanning 16 pages and, having summarised that evidence, applied her mind to which of the witnesses were more credible and which version was more probable. It is on that basis that she found that the employee, Mr Brink, did commit the misconduct complained of, albeit on circumstantial evidence. She came to the conclusion that the chain of circumstances presented to her in evidence was sufficient to draw the inference that Brink was the only one to whom the evidence pointed.

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The process that an arbitrator needs to follow has been summarised by the LAC in *Goldfields Mining South Africa (Pty)*

*Ltd v Kloof Goldmine*², where the Court asked the following five questions:

- 5 "1. In terms of his/her duty to deal with the matter with the minimum of legal formalities, did the process that the Arbitrator employed give the parties full opportunity to have their say in respect of the dispute?
- 10 2. Did the Arbitrator identify the dispute she was required to arbitrate (this may in certain cases only become clear after both parties had given evidence)?
- 15 3. Did the Arbitrator understand the nature of the dispute he/she was required to arbitrate?
4. Did he/she deal with this with substantial merits of the dispute?
- 20 5. Is the Arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence?"

In the case before me all of those questions must be answered in the affirmative. The applicant has simply made out no case for review.

² [2014] 1 BLLR 20 (LAC).

That brings me to the question of costs. I take into account that Mr Brink is unrepresented. I do not know whether his attorney who advised him at arbitration advised him on the merits of this application. If he had, he would have advised him that he had no prospects of success. However, as I say, I do not know whether that is the case.

Nevertheless, Mr Brink carried on regardless without properly considering whether he had prospects of success in this case and that necessitated the respondents, especially the SAPS, to incur unnecessary legal costs; this against the background where an officer of the SAPS has committed disgraceful misconduct. In those circumstances, in law and fairness, there is no reason why the applicant should not be held liable for the costs of the SAPS.

The application is **DISMISSED WITH COSTS.**

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STEENKAMP, J

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APPEARANCES

APPLICANT: In person

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THIRD RESPONDENT: Ms A de Wet

Instructed by: The state attorney.

/DH