



REPUBLIC OF SOUTH AFRICA
THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
JUDGMENT

Not reportable

Case no: JR 2974/09

In the matter between:

BANDA, PETRUS

Applicant

And

**THE SAFETY AND SECURITY SECTORAL BARGAINING
COUNCIL**

First Respondent

PANELIST: JOYCE TOHLANG M.O

Second Respondent

SOUTH AFRICAN POLICE SERVICES

Third Respondent

Heard: 10 January 2014

Delivered: 27 February 2015

**Summary: Application for review of award – award falls within range of reasonable findings that a reasonable decision-maker could have come to -
Analyses of evidence – arbitrator faced with two conflicting versions of evidence – analysing evidence on probabilities of the versions presented – employee’s version found to be improbable**

JUDGMENT

LANCASTER, AJ

Introduction

- [1] This matter concerns an application by the Applicant to review and set aside an arbitration award of the Second Respondent in her capacity as a panelist of the Safety and Security Sectoral Bargaining Council (the First Respondent). This application has been brought in terms of Section 145 of the Labour Relations Act¹ ("the LRA").
- [2] The Applicant was dismissed by the Third Respondent on 1 February 1995 after a disciplinary enquiry into various allegations which can be summarized as follows:
- a. stealing an amount of R40,000 from one Mr Masiteng;
 - b. illegally releasing both Mr Masiteng and a certain Mr Dladla;
 - c. accepting an amount of R40,000.00 from arrested suspects;
 - d. defeating the ends of justice; and
 - e. assault.
- [3] The Applicant disputed his dismissal by way of a referral of unfair dismissal to the Safety and Security Sectoral Bargaining Council. The matter was allocated to the Second Respondent arbitrator for arbitration.
- [4] The matter was arbitrated on the merits thereof and in an award dated 16 September 2009, the Second Respondent determined that the dismissal of the Applicant by the Third Respondent had been procedurally and substantively fair, and she consequently made an award that the Applicant's referral be dismissed with no order as to costs.
- [5] The Applicant submits that this award by the Second Respondent is reviewable and consequently brought the application which I have been required to consider.

Background facts

- [6] At the time of his dismissal, the Applicant was employed by the Third Respondent and held the rank of Sergeant.
- [7] The events that culminated in the dismissal of the Applicant occurred on 19 February 2009. On the papers, the following facts regarding the events

¹ No 66 of 1995.

appear to be common cause:

- a. The Applicant and two other officers, one Motaung and one Bukwana were patrolling the area known as Katlehong Gardens on 19 February 2009 when they heard sirens;
- b. They immediately drove to the area where they believed the sirens to be coming from;
- c. Upon their arrival at the scene they were met by an officer who identified himself as being from the VIP Protection unit;
- d. The officer informed them that a hijacking had just taken place;
- e. They were furthermore informed that the VIP officers were driving behind the victim's vehicle when the hi-jacking occurred;
- f. One of the VIP officers chased the perpetrators whilst the one remained at the scene; and
- g. The officer that remained at the scene was the one that informed the Applicant, Motaung and Bukwana about the incident at their arrival and who pointed them in the direction that the perpetrators had fled.

[8] The evidence as to what occurred after this point on 19 February 2009 is in dispute between the parties. It is therefore necessary to shortly summarize the conflicting versions presented by the parties, which is essential to the question of whether the second respondent's award is reviewable.

[9] The Applicant avers that when he and his colleagues approached the VIP officer he pointed in a specific direction, assumingly showing them the direction in which the perpetrators had fled. The Applicant explained that he then got out of the vehicle they were patrolling in and remained at the scene where the VIP officer was. According to his version Bukwana and Motaung went after the perpetrators in the patrol vehicle in the direction that the VIP officer had pointed out.

[10] The Applicant furthermore alleges that he remained with the VIP officer to secure the initial scene of the crime. According to his version, the second VIP officer soon returned to the scene to collect the victim of the hijacking, which he refers to only as Caldeira.

- [11] It was at the return of this officer that Calderia informed the three of them that his vehicle contained an amount of approximately R50,000.00 which he had intended to deposit at his banking institution as well as his mobile phone.
- [12] The Applicant alleges that at this point he contacted Bukwana and Motaung who had not yet arrived back from their pursuit of the hijackers and advised them that Caldeira had been collected from the scene and that the second officer from the VIP Protection Unit had returned. The VIP officers then accompanied Caldeira to the police station so that he could make a statement and open a case in respect of the hijacking. The Applicant waited for his colleagues.
- [13] According to the Applicant when Bukwana and Motaung returned they informed him that members of the community had pointed them towards a house where the hijackers might have fled to. After Bukwana and Motaung gained access to the premises they found an unidentified man hiding behind the wall of the premises.
- [14] Bukwana and Motaung further informed the Applicant that they questioned the man and placed him under arrest on suspicion of involvement in the hi-jacking of Caldeira's vehicle but that they had later released him as the community members and the VIP member had advised them that this man was innocent and was not involved in the incident.
- [15] On the Applicant's version he then returned with his colleagues to Katlehong Police Station. Upon their arrival they found Caldeira and they sought out Captain Kganyago, their shift Commander, and explained to him what happened to Caldeira.
- [16] The Applicant proceeded with his usual duties and at about 17H00, after he had completed the parade, he returned to the Police Station where he was confronted by two adult males whom he recognized as residents from his township.
- [17] The two males identified themselves as Mr Dladla and Mr Sthembiso. Dladla advised the Applicant that he knew he was at the hi-jacking scene and was investigating the incident. Dladla then proceeded to confess to the hijacking and attempted to solicit a favour from the applicant.

- [18] The Applicant called Motaung, who in turn called Chief Commander Kganyago. When Kganyago arrived, Dladla started speaking loudly about his share in the money and accused the Applicant of taking the money.
- [19] It seems at this time several officers gathered around the scene where Dladla was confronting the Applicant and these officers began assaulting Dladla and Sthembiso. The Applicant maintains that he was not involved in this attack.
- [20] The suspects were subsequently taken in for questioning by Motaung. During this time Dladla indicated that the other suspect, one Masiteng, was sitting outside in a vehicle. Motaung collected Masiteng and released Sthembiso.
- [21] The following day, the Applicant reported for duty and was advised by Kganyago not to report for duty as Superintendent Buthelezi wanted to see him and his colleagues regarding the incidents that occurred the previous day.
- [22] During this meeting, the applicant and his colleagues were accused of taking the money that was left in the hijacked vehicle the previous day. They were arrested. They were later booked out of the cells.
- [23] The Applicant alleges that during the interviews with Buthelezi, he was threatened and was specifically questioned about any cash amounts that he may have had in his possession during the time prior to his arrest. He at this point disclosed that he had withdrawn a large amount of cash which he left with his wife and which he had withdrawn to undertake renovations at his home.
- [24] Applicant and the officers whom arrested him subsequently attended at the applicant's wife's place of employ to collect the amount of cash allegedly withdrawn for renovations and were informed that the money had been given to the sister of the applicant's wife. The money was later found with this individual. The applicant was shortly thereafter charged with the charges that lead to his dismissal.
- [25] The Third Respondent in turn and through its witnesses, which included Masiteng, lead evidence to the fact that Masiteng had been travelling from Palm Ridge when he entered a passageway at Kathlehong Gardens where he saw a Toyota Tazz driving at high speed.

- [26] The Toyota Tazz came to a stop just before the passageway that Masiteng was in and two boys alighted whom quickly ran off. A moment later, a Volkswagen Polo which appeared to have been chasing the Toyota Tazz, also came to a stop behind the Tazz and a single man got out and chased after the boys.
- [27] During the pursuit one of the boys appeared to have dropped a candle box. Masiteng picked up the box and discovered money and a cell phone inside the box.
- [28] Shortly after this a police van appeared which the Applicant, Motaung and Bukwana occupied. Masiteng threw the box and its contents into the yard of one of the houses he was walking next to at the time. Unfortunately the Applicant, Motaung and Bukwana had already seen him at this time.
- [29] The officers stopped Masiteng and bundled into the back of the police van. He informed the applicant and his colleagues that the box he had thrown into the yard contained money. Motaung and the applicant jumped the wall into the premises where Masiteng had thrown the box. Upon their return they alleged that no money was found in the box and that only the cell phone was recovered.
- [30] Masiteng testified in this regard that upon the officer's return Motaung's bulletproof vest was bulging and thus he assumed that the money had been hidden underneath the vest.
- [31] Masiteng alleges that he was then put in the front of the vehicle and the applicant and the other officers drove away with him. He furthermore explained that at some point during this trip a Toyota Tazz, driven by Caldeira stopped next to them and the Applicant told him to hunch down in the car so that Calderia could not see him. Calderia asked if they had found the suspects to which the Applicant and the officers confirmed that they had not.
- [32] They drove around for a short while before they ordered Masiteng out of the vehicle. He asked them for a R1000.00 but he was told to get away.
- [33] Masiteng furthermore testified that later that day he told Dladla and Sthembiso what had happened. They accordingly went to the police station and approached the applicant with regards to the money taken from Masiteng

earlier that day. It was then that Masiteng and Dladla were arrested and assaulted by the applicant and his colleagues.

[34] It appears that during the confrontation one officer heard the allegations made by Masiteng and Dladla and that this ultimately lead to the investigation and arrests of the Applicant.

[35] During the disciplinary enquiry, the Applicant maintained that he did not commit any of the actions for which he had been charged. Even after having been found guilty in the disciplinary hearing and dismissed, the Applicant maintained his innocence during the arbitration proceedings.

Legal Grounds for Review

[36] The legal grounds on which the review of an arbitration award can be granted have been considered by several courts, including the Constitutional Court and have now become well entrenched in employment law. The threshold test that an applicant for review has to meet and as enunciated by the Constitutional Court in the *Sidumo*-matter is whether, the award of the arbitrator amounts to a decision which a reasonable decision-maker could not come to under the circumstances.

[37] In *Herholdt v Nedbank Ltd*², the Supreme Court of Appeal restated the test as set out in *Sidumo* and held as follows:

‘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 by 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’.

[38] It is against this jurisprudence that I now deal with the award of the second

² (2013) 34 ILJ 2795 (SCA) at para 25. See also 2013 (6) SA 224 (SCA); [2013] 11 BLLR 1074 (SCA).

respondent.

Evaluation

- [39] The applicant contended that the panelist committed a gross irregularity in the conduct of the arbitration proceedings, exceeded her powers and committed misconduct in relation to her duties as a panelist.
- [40] The Applicant supports these allegations by pointing out that the Second Respondent allegedly made material errors of law with respect to her findings when she was faced with conflicting versions of evidence on the issue of the theft of the money.
- [41] The Applicant further avers that the Second Respondent failed to appreciate the fact that the Applicant for the most part and on his version was not with Motaung and Bukwana during the sequence of events and that the common purpose doctrine was accordingly incorrectly applied to the circumstances.
- [42] In addition to the above, it is alleged that the Second Respondent failed to consider the confessions extracted from Masiteng and Dladla and that she ignored the evidence given by Caldeira during the disciplinary hearing.
- [43] Lastly it is alleged that the Second Respondent failed to take into account the fact that the Applicant stayed behind at the scene while his colleagues pursued the suspects.
- [44] As such it is averred that the Second Respondent was grossly negligent in performance of her duties in that she failed to evaluate all of the evidence placed before her and that her award as a result is not rationally justifiable having regard to the material properly available to her at the time of the arbitration.
- [45] Having considered the arbitration award and the record of review which is voluminous, I do not agree with the grounds of review and the conclusions drawn by the applicant. It is clear from the arbitration award and transcribed record that the Second Respondent was able to identify that there were two conflicting versions before her and that she evaluated these versions in order to establish which version, on a balance of probabilities was more likely to be the true version of events.

- [46] I do not agree with the Applicant's argument that the Second Respondent applied a so-called reasonable criminal test in coming to her finding and/or that she applied the doctrine of common purpose at all. It is clear from her award, in my view, that the Second Respondent, in weighing up the probability of the version presented by the Applicant, merely found that the version presented by the Applicant had been improbable and that the only reasonable inference that could be drawn from the evidence was that the version presented by Masiteng was the true version of events.
- [47] She clearly rejected the version of the Applicant that he had stayed behind whilst Motaung and Bukwana pursued the alleged perpetrators and accordingly found that the Applicant had been directly involved in the events on that day. There would have therefore been no need for her to apply the common purpose doctrine when evaluating the evidence and coming to her award.
- [48] I agree with the Third Respondent in this regard that it was extremely significant that the version of the Applicant was not put to Masiteng during his evidence in chief, but was only later presented in the Applicant's examination in chief.
- [49] For obvious reasons this version was therefore untested and should at the very least have been attached little weight by the Second Respondent³.

3 In the Constitutional Court matter of *President of the Republic of SA & others v SA Rugby Football Union & others*, 2000 (1) SA 1 (CC) at paras 61-63; 1999 (10) BCLR 1059 (CC) it was held that: 'The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his or her character (own emphasis). If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in *Browne v Dunn* and has been adopted and consistently followed by our courts. The rule in *Browne v Dunn* is not merely one of professional practice but "is essential to fair play and fair dealing with witnesses". It is still current in England and has been adopted and followed in substantially the same form in the Commonwealth jurisdictions. The precise nature of the imputation should be made clear to the witness so that it can be met and destroyed, particularly where the imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence is to be challenged but also how it is to be challenged. This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed'.

- [50] As this was core to the Applicant's version of events, I fail to understand why the Applicant would have omitted putting such a crucial part of his defense to Masiteng. I in this regard have to consider the principles applied in the Constitutional Court regarding failure to cross examine a witness.
- [51] I therefore, agree with the Second Respondent's finding in the evaluation of the evidence that if indeed the Applicant was not present at the scene when the money was allegedly taken, Masiteng would not have been able to positively identify the Applicant and his colleagues. The Applicant should have at the very least have put his version to Masiteng and/or provide the evidence needed to exonerate himself.
- [52] It would also have been relatively easy for the Applicant to have discharged his evidentiary burden in relation to his version to have lead the evidence of the VIP Protection Unit officer whom he allegedly remained behind with while Motaung and Bukwana pursued the suspects.
- [53] In this regard, I therefore, find that the Second Respondent considered all the material evidence before her and reached a reasonable conclusion after properly considering and evaluating the evidence that was before her. This ground for review therefore has to fail.
- [54] The Applicant further contended that the Second Respondent was grossly negligent in performing her duties with regards thereto that the Second Respondent failed to consider the source of the money which was found in his wife's sister's possession and that he was therefore painted with the same brush as his co-accused, who were also found in possession of large amounts of cash.
- [55] Once again, I do not agree with what has been contended for in this regard. The Second Respondent set out in detail in her award the different reasons provided by the Applicant and his colleagues for the large amounts of cash found in their possession.
- [56] After having done so, the Second Respondent clearly found that it was too great of a coincidence that all the accused had such large amounts of money in their possession a day after it was alleged they took the money from Masiteng and that the amounts were similar amounts. I am of the view that

the applicant's version of how he came about to have that amount of money is in any event not probable.

[57] I am of the view that the slight contradictions which were alleged in relation to Masiteng's evidence during the arbitration proceedings and the disciplinary hearing did not affect the credibility of his oral evidence during the arbitration proceedings to such an extent that it should have been ignored.

[58] Masiteng's testimony regarding the bag which the money was (whether it was an FNB bag or Standard Bank bag) does not render the Second Respondent's award reviewable on its own or in context of the further allegations made by the Applicant.

[59] As the remaining grounds of review relate to the grounds which I have already dealt with I am not going to deal with them separately save to state that on the whole I am of the view that the grounds of review alleged by the Applicant are not sufficient to render the arbitration award reviewable.

[60] The Second Respondent took into consideration all the evidence that was before her and when faced with conflicting versions of evidence correctly weighed up the probabilities of the one version against the other.

[61] I am accordingly, not convinced that the Second Respondent came to a conclusion that is so unreasonable that a reasonable decision maker could not come to the same conclusions on the facts presented to her.

[62] The Applicant's application for review must therefore fail.

Order

[63] In the premises, I make the following order:

1. The Applicant's review application is dismissed.
2. There is no order as to costs.

Lancaster AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: T Nkosi of the Wits Law Clinic

For the Respondent: S B Nhlapo of the State Attorney

LABOUR COURT