



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR2889/12

**POTHLAKO SECURITY AND CLEANING
SERVICES**

Applicant

And

**COMMISSIONER FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

COMMISSIONER MATOME SEHUMANE

Second Respondent

BHEKUMUSA ZWANE

Third Respondent

Heard: 8 July 2015

Delivered: 16 July 2015

JUDGMENT

HULLEY, AJ

Introduction

- [1] In this matter the applicant, who previously employed the third respondent, seeks to review and set aside an award of the second respondent who found that the dismissal by the applicant of the third respondent was substantively unfair.

Factual background

- [2] The record in this matter consisted of the handwritten notes of the second respondent.
- [3] The applicant called a single witness, Mr Vusimusi Mavumengwana. The third respondent testified on his own behalf. The arbitrator *mero motu* called a third witness, Mr Gugulethu Dada.
- [4] Mavumengwana, the applicant's HR Manager, testified that the applicant had a contract to provide security services to the Ekurhuleni Metropolitan Municipality. Among the premises of the Municipality which were guarded by the applicant was the Dumane Hall. The third respondent was stationed at this site.
- [5] On 11 September 2012 Mavumengwana received a complaint from the municipality's police officials, Messrs Dada and Ramashaba, that the applicant had allowed a member of the community to smoke marijuana in the guardhouse. Mavumengwana testified that immediately after receipt of this report he called the third respondent and issued him with a notice to attend a disciplinary hearing. A copy of that notice was handed in at the disciplinary inquiry. It appears from that document that the third respondent was charged with allowing "people from the community inside the premises and smoke dagga" on 11 September 2012.
- [6] Mavumengwana was cross-examined on the time when Dada allegedly brought the third respondent to his offices. He stated that the third respondent was brought to his office in Benoni at approximately 08h30 and that he issued the charge sheet at approximately 09h00.

- [7] Mavumengwana stated that the municipality's police officers would record all incidents in the occurrence book (OB), but was unable to produce an occurrence book entry for 11 September 2012 which reflected this particular incident. He was asked to produce the occurrence book reflecting the previous incident in which the EMPD had allegedly warned him about similar misconduct; he was again unable to do so.
- [8] The third respondent testified that he was removed from his post at approximately 09h00 on 11 September 2012 by two members of the Ekurhuleni Metropolitan Police Department who took him to the applicant's Benoni office. He was required to wait outside while the two police officers discussed the matter with Mavumengwana. The police officers then departed and he was called into the office and issued with a notice to attend a disciplinary hearing. According to the third respondent he was at that stage under the impression that he had been charged with an incident that occurred on 10 September 2012. As far as he was concerned, there was no incident which occurred on 11 September 2012.
- [9] The incident of 10 September 2012 apparently involved an attempt on the part of hawkers and taxi drivers to gain entry to the premises of the municipality. When the security guards prevented them from doing so the dispute became chaotic. The police had to be called to restore calm.
- [10] Under cross-examination the third respondent admitted that he was not at work on 10 September 2012. With regard to the incident of 11 September 2012 he stated that he was with another security officer from Moloi Security Company in the guardroom when the two municipal police officers arrived. The third respondent admitted that Dada had previously confronted him about his conduct, but denied that it related to incidents of allowing community members to smoke dagga on the premises. According to him it related to his failure to open and close the gates.
- [11] The minutes of the disciplinary enquiry were put to the third respondent and he challenged their accuracy. He re-asserted his view that the charge in fact

related to the incident that had occurred on 10 September 2012 rather than an incident on 11 September 2012.

- [12] Dada testified that an incident between the security officers, taxi operators and hawkers had occurred on 10 September 2012 which resulted in chaos at the entrance of the hall. When he made inquiries he was informed by the municipal officials that the third respondent was the cause of the incident which occurred on 10 September 2012. According to the officials the third respondent would allow the taxi drivers and hawkers to enter the premises and this gave rise to an expectation on their part.
- [13] On 11 September 2012 Dada and a fellow municipal police officer visited Dumane Hall. There they encountered the third respondent and another person in the guardroom. The second person was smoking marijuana. Dada and his colleague removed the third respondent and took him to the offices of the applicant in Benoni. At the applicant's offices the police officials discussed the matter with the applicant's area manager, Mr Nowa Masango, who promised to take disciplinary action against the third respondent. Dada testified that he received a telephone call from the third respondent a week later. The third respondent requested him to discuss the matter with the applicant and apologise on his behalf. He declined to do so.
- [14] Under cross-examination by the third respondent Dada denied that the person in the guardroom with the third respondent was a security officer from Moloi's Security Company. He stated that the person was smoking marijuana and was not dressed in any uniform.
- [15] Dada conceded that he failed to arrest the second person and that the smoking of marijuana was a criminal offence. He explained that this person had dropped the marijuana cigarette he was smoking. He was not cross-examined on why this prevented him from taking action against the person. Dada accepted that he had not recorded the incident in the occurrence book.

The arbitration award

- [16] In his award the arbitrator noted that he was “confined to determine whether the dismissal of the [third respondent] was fair in relation to the charge proffered against him for allowing community members to smoke dagga in the premises”.
- [17] The arbitrator noted that it was “hard to believe” the applicant’s version. The version was riddled with contradictions and inconsistencies and could not be accepted. In his view the applicant’s version that the third respondent was charged with and eventually dismissed for the incident that occurred on 11 September 2012 had to be rejected. The police officers could not have brought the third respondent to the applicant’s offices at around 08h30 as testified by Mavumengwana and issued with a notice at around 09h00. He pointed to the notice itself which indicated that the third respondent signed for receipt thereof at 13h34 on 11 September 2012.
- [18] The arbitrator pointed out that Mavumengwana’s evidence contradicted Dada’s evidence he had removed the third respondent from his post at approximately 10h50. Mavumengwana’s evidence on this issue, he said, also contradicted what was contained in the occurrence book.
- [19] The arbitrator further rejected the evidence that the third respondent had been warned on several occasions for similar misconduct in the past and pointed out that the applicant had failed to produce the records of the occurrence book or monthly reports which outlined these other incidents. He rejected Dada’s evidence that the third respondent was found in the guardroom with another person who was smoking marijuana. The arbitrator pointed out that if Dada had encountered another person with marijuana it would have been his duty to arrest that person and Dada’s explanation that the person had dropped the marijuana cigarette was contradictory.
- [20] In arriving at his conclusion the arbitrator accepted the version of the third respondent as corroborated by that of Dada. He accepted Dada’s version that, in his (i.e. in Dada’s) view, the blame for the incident of 10 September 2012 lay squarely upon the third respondent. Based upon this he said –

“it follows logically that the [third respondent] was removed from the site by a police officer for the incident of 10 September 2012. It is clear that the municipal officials and metro police officials were upset about what happened on 10 September 2012 hence the [third respondent] was removed from his post on 11 September 2012”.

- [21] He accordingly came to the conclusion that it was “probably the truth” that the third respondent was under the impression that he had been charged with and dismissed for the incident that occurred on 10 September 2012.
- [22] Against this backdrop the arbitrator concluded that the applicant had failed to prove on a balance of probabilities that the dismissal of the third respondent was substantively fair. He accordingly ordered the applicant to pay the third respondent an amount of R30 000,00 being the equivalent of 10 months’ remuneration.

Analysis of the award

- [23] The second respondent’s description of the applicant’s case as “riddled with contradictions and inconsistencies” is exaggerated. It is true that having regard to the charge sheet and the evidence of Mr Dada, the version of Mavumengwana regarding the time when the third respondent was charged and was brought to the applicant’s offices could not be correct. However, I fail to see why this aspect was considered important at all. The precise time when the third respondent was removed from site and subsequently charged was, with respect, quite irrelevant to the charge itself.
- [24] It is not unusual for witnesses to contradict themselves either internally (i.e. with reference to other testimony given in the same case) or externally (i.e. with reference to previous statements made extra-curially or in another case or with regard to a version put on their behalf). Inconsistencies and contradictions may arise for a variety of reasons some innocent and others less so. Not every inconsistency or contradiction is to be regarded as proof of

a lie. And even if it is found to be a lie, what must be considered is that nature of the lie and its importance to the crucial issues.¹

- [25] In any event, assuming this particular contradiction to be material, I fail to see on what basis it can be stated that the version of the applicant was “riddled” with contradictions and inconsistencies. The arbitrator himself provides only one instance of a contradiction and then a minor one. At any rate, Mavumengwana’s testimony was largely hearsay. He relied upon Dada to support his testimony. I do not think the arbitrator was entitled to *mero motu* call Dada as a witness, but once he did (and in the absence of any challenge in this Court to him doing so), he had to consider Dada’s evidence and not that of Mavumengwana (except perhaps to the extent that Dada may have provided different versions to Mavumengwana and the arbitrator).
- [26] The arbitrator’s rejection of Mavumengwana’s evidence regarding the previous warnings given to the third respondent is based upon a mistaken reading of the evidence. He found that Mavumengwana was *unable* to produce the occurrence books or monthly reports to support the previous warnings. But the evidence, as I understood it, was that those records were kept by the client, the municipality. Mavumengwana was not asked whether he was able to produce those records, but rather whether he had them.
- [27] I also have some difficulty with the arbitrator’s view that the third respondent had been dismissed for the incident which took place on 10 September 2012 rather than that which took place on 11 September 2012. The arbitrator’s view appears to be that no incident occurred on 11 September 2012 and that a charge relating to that date was fabricated in order to justify the dismissal of the third respondent for the incident which occurred the previous day. The third respondent does not appear to have suggested this to the applicant’s witness or to Dada. What the second respondent put to the applicant’s witness and Dada was that he believed that he was charged for the incident of 10 September 2012 because he believed that it was the applicant’s case that he was the cause of that incident. He did not suggest that the applicant

¹ Schmidt, *Law of Evidence*, 3-31

fabricated the incident of 11 September 2012 in order to justify the true reason.

- [28] It is unclear why the third respondent believed that he was charged in respect of the incident which occurred on 10 September 2012. It is apparent from the charge sheet that the applicant was charged with an incident which related to 11 September 2012 and that it concerned the allegation that he allowed members of the community to enter the Hall and smoke marijuana. The incident which took place on 10 September did not involve the smoking of marijuana. In any event, the third respondent had not been present on 10 September 2012.
- [29] That having been said, the concerns raised by the arbitrator as to Dada's evidence are valid. If Dada had indeed observed a person smoking marijuana in the guardhouse, one would have expected him to take measures against that person immediately. Whether municipal police officers are empowered to deal with criminal misconduct generally (as opposed to traffic offences specifically) is not important. What is important is that Dada apparently accepted that he was entitled to take action against a member of the community who was engaged in *any* form of criminal activity. His failure in these circumstances to take such measures calls for an explanation. The one provided by him does not appear to be cogent. In short, it calls into question whether Dada had indeed encountered a person smoking marijuana in the guardhouse.
- [30] Moreover, on Dada's own version he had not recorded the incident in the occurrence book. That, too, calls into question whether the incident had indeed occurred.
- [31] Despite the flaws in the arbitrator's reasoning, my task is not to determine whether I agree with him or not, but rather to determine whether the outcome is one which a reasonable commissioner could have arrived at.² In my view it is.

² *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (2007) 28 ILJ 2405 (CC)

Conclusion

[32] In the circumstances, I am satisfied that the application must fail.

[33] The application is accordingly dismissed with costs.

Hulley, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicant: Adv. Y. Saloojee

Instructed by: Sunil Narian Inc.

On behalf of the Respondent: Mr L. Frahm-Arp (Attorney)

Instructed by: Fasken Martineau Attorneys

LABOUR COURT