



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case no: PR 74/13

In the matter between:

MINISTER OF POLICE

Applicant

and

SAFETY AND SECURITY SECTORAL

BARGAINING COUNCIL

First Respondent

MALUSI MBULI

Second Respondent

MNCEDI ARBEDNICO GUDLA

Third Respondent

Heard: 30 April 2015

Delivered: 11 December 2015

Summary: Defects in an arbitration which have an effect on its outcome render the award unreasonable.

JUDGMENT

LALLIE, J

Introduction

- [1] This is an application to review and set aside an arbitration award of the second respondent ("the arbitrator") in which he found the dismissal of the third respondent substantively unfair but procedurally fair and ordered the applicant to reinstate him. The application is opposed by the third respondent.
- [2] The applicant filed this application more than six weeks after receiving the arbitration award and applied for condonation. The review application was filed 22 days late. The applicant submitted that the extent of the delay is not substantial. It resulted from the procedure which had to be followed to obtain a mandate to bring these proceedings, instruct counsel and consult with witnesses. The applicant submitted that it has good prospects of success. Opposing the application, the third respondent accused the applicant of being malicious towards him. He submitted that the delay is grossly unreasonable and based on concocted facts. He denied that the applicant has good prospects of success. The third respondent's allegations of malice and the applicant's untruthfulness were not substantiated. When the explanation for the delay is considered, 22 days is not substantial. The extent of the delay is not substantial and its explanation is reasonable. If the allegations the applicant sought to rely on in proving prospects of success are proved, the review application could be successful. The applicant, therefore, has prospects of success in the review application. In the circumstances, the condonation application must, therefore, succeed.

Factual background

- [3] The third respondent was employed by the applicant until his dismissal on 18 May 2012 after 21 years of service. On 25 March 2011, some members of the

South African Police Service (SAPS) who were stationed at the Madeira police station received information about the presence of a man dealing in drugs at the Danti taxi rank. Members of the Dog Unit, including the respondent and Constable Gwabavu ("Gwabavu"), joined members of the SAPS from the Madeira police station in conducting a raid at the Danti taxi rank. They arrested Mr Mbatha ("Mbatha") and transported him by a SAPS van to the holding cells at the Madeira police station. The applicant alleged that the third respondent and Gwabavu released Mbatha from custody unlawfully and were paid R2000.00 bribe in return. They were charged with contravening Regulation 20 (z) of the South African Police Service Disciplinary Regulations ("the Regulation") for releasing a suspect from custody and corruption. They appeared before separate disciplinary enquires. Gwabavu pleaded guilty and was fined R500.00. The third respondent pleaded not guilty and a full disciplinary enquiry was held. It found him guilty of the charges which had been preferred against him and took a decision to dismiss him. Aggrieved by his dismissal, he referred an unfair dismissal dispute to the first respondent where the arbitrator issued an award in which he found the third respondent's dismissal procedurally fair but substantively unfair. He ordered his reinstatement.

The award

- [4] The arbitrator found it common cause that the third respondent was aware of the rule that he was accused of having breached. It constituted serious misconduct which was punishable by dismissal. He noted that he had to determine whether the third respondent had breached the rule and whether the applicant effected discipline consistently. The third respondent raised the defence of inconsistency on the grounds that Gwabavu was fined R500.00 while the third respondent was issued with a sanction of dismissal. The arbitrator dismissed the defence on the basis that the circumstances of the two police officials were not the same.
- [5] Deciding whether the third respondent had made himself guilty of corruption, the arbitrator found that there was no direct or real evidence that was led by the applicant to prove that the third respondent was paid an amount of

R1000.00 or R2000.00 to release Mbatha from police custody. He also found that the respondent relied on hearsay evidence which can only be admitted if corroborated by real evidence. Dealing with the third respondent's evidence, he found that three of his witnesses including Mbatha who allegedly paid the bribe, testified that there was no corruption or exchange of cash. He accepted the evidence of Gwabavu who was with the third respondent at all material times, that the third respondent and Gwabavu did not commit the misconduct which led to the third respondent's dismissal. He concluded that the third respondent did not commit an act of corruption.

- [6] With regard to the charge of releasing Mbatha from custody, the arbitrator rejected the applicant's version that Mbatha was left in the third respondent's custody who accepted a bribe and released him because no witness was present when Mbatha was released. He preferred the third respondent's version because his three witnesses gave direct evidence to the effect that Mbatha was not in the custody of the third respondent. The third respondent simply gave a lift to a suspect who had already been released from the Madeira police station. He found that the third respondent's witnesses gave clear, believable and coherent evidence that Mbatha was released, asked for a lift home, the third respondent satisfied himself that he had been released and helped a person who had been wrongfully arrested and took him home according to normal SAPS practice. He made a finding that the third respondent did not release Mbatha from custody. The arbitrator concluded that the third respondent's dismissal was substantively unfair and reinstated.

Grounds for review

- [7] The applicant submitted that the award stands to be reviewed and set aside for a number of reasons. It is unreasonable as the arbitrator failed to apply his mind to his decision or allowed irrelevant considerations to influence his decision or failed to consider the evidence before him properly or at all. The arbitrator preferred the third respondent's version based on the number of witnesses called and failed to consider their credibility. The credibility of Gwabavu and Mbatha had to be considered as the former had pleaded guilty to the same misconduct which led to the third respondent's dismissal and the

latter was a state witness against the third respondent in a criminal case where he was going to testify that the third respondent demanded and was paid R2000.00 bribe for his release.

- [8] The third respondent's opposition is based mainly on the submission that he did not release Mbatha from custody. The arrest was not lawful. He submitted that the arbitrator's decision was correct and based on the evidence before him. The evidence included Gwabavu's testimony to the effect that she was forced to plead guilty as she was given an option of pleading guilty and retaining her job or dismissal. It also includes Mbatha's denial of having paid the bribe. The gist of the third respondent's case is that the arbitrator correctly found in his favour as the applicant failed to prove its case at the arbitration. He sought an order dismissing the review application with costs.

Analysis

- [9] The test for review is whether the decision reached by the arbitrator is a decision which a reasonable decision-maker could not reach.¹ Some grounds for review are based on the manner which the arbitrator dealt with evidence. It was argued, on behalf of the applicant, that the arbitrator committed a gross irregularity by disregarding sufficient evidence which proved that the third respondent committed the acts of misconduct which led to his dismissal. He erred in making a credibility finding in favour of the third respondent without giving reasons for the finding. The arbitrator made a credibility finding in the process of resolving a dispute of fact. In *Stellenbosch Farmers' Winery Group Ltd and Another v Martell and Cie SA and Others*,² it was held that in resolving disputes of fact, findings have to be made on the credibility of factual witnesses, their reliability and probabilities. In *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others*,³ the court referred with approval to *Stellenbosch (supra)* and relied on

¹ In this regard, see *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC).

² 2003 (1) SA 11 (SCA) at para 5.

³ (2015) 36 ILJ 2038 (LAC) at para 15.

the following *dictum* in *Medscheme Holdings (Pty) Ltd and Another v Bhamjee*.⁴

‘... an assessment of evidence based solely on demeanour without regard for wider probabilities constitutes a misdirection. A careful evaluation of the evidence against underlying probabilities must be carried out, otherwise little weight can be attached to the credibility findings of the judicial officer.’

- [10] The dispute of fact before the arbitrator in respect of the charge involving releasing Mbatha from custody was material. Warrant Officer Mzenzi (“Mzenzi”), a member of the organised crime testified that Mbatha informed him that the third respondent and Gwabavu demanded and were paid by his boss a bribe of R2000.00 to secure his release from custody. At the arbitration, Mbatha denied having given Mzenzi the information. He further denied that the bribe was demanded and paid. Gwabavu pleaded guilty to her participation in the misconduct which led to the third respondent’s dismissal yet at the arbitration, she denied that the misconduct took place and stated that her plea of guilty was induced by compulsion. The arbitrator’s reasons for accepting the third respondent’s version that he only helped a person who had been wrongfully arrested and took him home in accordance with SAPS normal practice were that the evidence of the third respondent’s witnesses was clear, believable and coherent. The approach to be adopted in resolving disputes of fact as enunciated in, *inter alia*, the authority I have referred to above requires an arbitrator to apply his or her mind to the dispute of fact for the purpose of establishing the true facts of the matter. The reasons furnished by the arbitrator for preferring the third respondent’s version were not disclosed. He gave no reasons for finding the third respondent’s version believable. The seriousness of the dispute of fact and the about turn made by Gwabavu and Mbatha placed a duty on the arbitrator to consider their credibility. He failed to do so. The arbitrator’s failure to deal with the dispute of fact constituted a gross irregularity.

- [11] The arbitrator rejected the applicant’s version that the third respondent demanded and received R2000.00 bribe in exchange for the release of

⁴ 2005 (5) SA 339 (SCA) at para 14.

Mbatha on the basis that the applicant relied on hearsay evidence. Substantiating the criticism in the manner in which the arbitrator assessed evidence, the applicant submitted that the arbitrator committed a gross irregularity in rejecting evidence on the basis that it was based on hearsay evidence. He disregarded evidence that Warrant Officer Mvu who would have been the applicants material witness died before he could testify at the arbitration. There was a duty on the arbitrator, therefore, to assess his hearsay evidence in terms of section 3 of the Law of Evidence Amendment Act 45 of 1998 and decide whether to admit it. Rejecting it out of hand constituted a gross irregularity. A further irregularity that the arbitrator committed when assessing the evidence was to admit material parts of the third respondent's evidence which were not put to the applicant's witnesses who were able to respond to them. By way of example, Gwabavu's evidence that she was compelled by the applicant to plead guilty at her disciplinary enquiry was not put to the applicant's witness.

[12] In *Herholdt v Nedbank Ltd*⁵ and *Gold Fields Mining SA (Pty) Ltd v CCMA and Others*,⁶ the courts are in agreement that errors made by commissioners in the conduct of arbitrations do not of themselves render an award reviewable. They are of consequence if their effect is to render the outcome unreasonable. The errors made by the arbitrator in assessing the evidence made him reach the unreasonable decision that the third respondent's dismissal was substantively unfair. The arbitration award, therefore, stands to be reviewed and set aside.

[13] In the premises, the following order is made:

13.1 Condonation of the late filing of the review application is granted.

13.2 The arbitration award issued by the second respondent under case number PSSS 419-12/13 and dated 27 May 2013 is reviewed and set aside.

⁵ [2013] 11 BLLR 1074 (SCA) at para 25.

⁶ [2014] 1 BLLR 20 (LAC) at para 17.

- 13.3 The matter is remitted to the first respondent to be arbitrated *de novo* by an arbitrator other than the second respondent.

Lallie, J

Judge of the Labour Court of South Africa

LABOUR COURT

Appearances

For the Applicant: Advocate Rawjee

Instructed by: State Attorney

For the Third Respondent: Mr Mkhongozelo of Mkhongozeli Attorneys

LABOUR COURT