



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR 94/16

In the matter between:

PHUTI TODD CHOKOE

Applicant

and

MR. T. WILKES

First Respondent

**SAFETY AND SECURITY SECTORAL
BARGAINING COUNCIL**

Second Respondent

MINISTER OF POLICE

Third Respondent

**SOUTH AFRICAN POLICE SERVICE
COMMISSIONER OF POLICE**

Fourth Respondent

Heard on: 29 May 2018

Order: 29 May 2018

Date of Reasons: 20 July 2018

Summary: [Review application : the Arbitrator correctly applied the cautionary rule-burden to present evidence-the Arbitrator decided issue in dispute- review dismissed]

JUDGMENT-REASONS FOR ORDER

MABASO AJ

Introduction

- [1] This matter served before this Court on 29 May 2018. Having heard arguments and having considered the papers, I made an order dismissing the review application.
- [2] The facts giving rise to this matter are rather unfortunate. At the crack of dawn, in the winter of April 2011, a 14-year-old girl was raped by the applicant (Phuthi Todd Chokoe), a member of South African Police Services (SAPS), this ordeal took place around OR Tambo Secondary School, concluded the SAPS and confirmed by the arbitrator in the arbitration award which is a subject of this review application. This infamy led to the dismissal of the applicant by the SAPS.
- [3] This Court has been approached to determine whether the conclusion of the arbitrator is based on the facts and did he reach a fair and equitable decision. The only time this Court will interfere with the award is when it is one that could not have been reasonably made taking into account the evidence properly presented before the arbitrator.¹ Further, this Court in deciding this matter has to be guided by the six pillar requirements.²

¹ *Kievits Kroon Country Estate (Pty) Limited v Mmoledi and others* [2014] JOL 31212 (SCA), at para 20

² *Goldfields Mining South Africa (Kloof Gold Mine) (Pty) Ltd v CCMA and Others* [2014] 1 BLLR 20 (LAC), at para 21 "(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**

- [4] The applicant approached this Court seeking an order that the award be reviewed and set aside, and substituted with an order that his dismissal by the SAPS was substantively unfair. The applicant seeks to be reinstated.

Relevant Background

- [5] Part of the common cause facts before the arbitrator,³ are summarised as follows: the applicant and Mr Tladi Joseph Mabe (Constable Mabe)⁴, employed as police officers, stationed at Kathlehong SAPS, were on night patrol on 15 April 2011, using a marked police vehicle in the jurisdiction of the police station. Around 22h00 they came across the victim, they then questioned her as to where was she coming from and she advised them that she was from her friend's place. They then ordered her to get into the vehicle, which instruction she complied with. They then continued patrolling until around 4 am the following morning.
- [6] It was also undisputed that during this drive the victim was asked questions such as to whether she was a smoker, a drinker and a virgin. At the end of the shift, Mabe asked the applicant that they should drop off of the victim at her parent's place, but the applicant said he would drop off the victim on his way to the police station, the applicant then drop off Constable Mabe. As to what happened thereafter, Constable Mabe does not know because he was not with the applicant and the victim thereafter. The applicant made sexual advances to the victim. The victim stated that later they went around OR Tambo Secondary School where the applicant parked the police vehicle and then proceeded to have sexual intercourse with her without her consent. After

have their say in respect of the dispute?(ii) Did the arbitrator **identify** the dispute he 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 reasonably have arrived** at based on **the evidence**." (Emphasis added.)

³ As was not disputed during the arbitration. See *The President of the Republic of South Africa and others v South African Rugby Football Union and Others* [1999] JOL 5301 (CC, at para 61.

⁴ Constable Mabe was a student Constable at the time of the incident.

this ordeal, the applicant threw a R50 note at her. She did not tell her parents about the incident, but she told her friend, Mbali. Few days later, when she was with some of her friends, including Mbali, they saw the same two police officers (the applicant and Constable Mabe) driving the same police vehicle and one of them said *“this is [her] and they were nagging”* that is when her friend advised her to lay criminal charges against the applicant.

- [7] The victim further testified that when she made the first statement to the police about this incident, she made a mistake in respect of the dates as she initially said “9th” April 2011 instead of “15th” April 2011. The applicant during cross-examination magnified on this discrepancy as according to him on 9 April 2011 he was not at work. The SAPS proceeded to arrange for an Identification Parade where the applicant was positively identified. I need to mention, at this juncture, that the issue of the identification parade was not important in the determination of the fairness of the dismissal, as appears below.
- [8] Constable Mabe confirmed that indeed on the date of the incident the victim was with them, but as to what happened after he had been dropped off, he had no idea.
- [9] Under the analysis of evidence and argument the arbitrator concluded that it was not in dispute that the rape did take place, but the applicant denied that he was the perpetrator. This conclusion by the arbitrator is on paragraph 6.9 of the supplementary affidavit where the applicant says *“denied that he was the person who raped the complainant and his identity therefore had to be established”*. The applicant’s defence was alibi as he said he had never met the victim.

Grounds for review

- [10] The applicant acknowledges that the arbitrator in the award indicated that he used the cautionary rule taking into account that the offence that he was charged with is a sexual offence, and that the victim was a single witness, but

contends that the arbitrator failed to apply the cautionary rule correctly and/ or that he misunderstood the question of the cautionary rule in respect of a single witness. The applicant further contends that the evidence of the victim should have been rejected as she made two statements mentioning two dates, that it took the victim 24 days to report the rape to the police, that the Identification Parade was flawed, that there was no corroborating evidence that the victim was raped and that the J88 did not indicate any sign of rape.

Principle and application thereof

[11] This Court has to be guided by what the arbitrator had been called to decide upon, as the Constitutional Court, in *Cusa v Tao Ying Metal Industries and Others*,⁵ held thus,

“A commissioner must, as the LRA requires, **“deal with the substantial merits of the dispute”**. **This can only be done by ascertaining the real dispute between the parties.** A commissioner is required to take all the facts into consideration including the description of the nature of the dispute, the outcome requested by the union and the evidence presented during the arbitration” (Own emphasis)

[12] The Supreme Court of Appeal in *S v J*⁶ in dealing with the cautionary rule held that,

“The notion that women are habitually inclined to lie about being raped is of ancient origin...In my view, the cautionary rule in sexual assault cases is based on an irrational and out-dated perception. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable. In our system of law, the burden is on the State to prove the guilt of

⁵ 2009 (1) BCLR 1 (CC), See also *DB Contracting North CC v National Union of Mineworkers and Others* [2015] 10 BLLR 973 (LAC), see also paras 58 and 59.

⁶ 1998(4) BCLR 424 (SCA). See also *S v Zuma* 2006 (7) BCLR 790 (W), at page 856. Fletcher & another v S [2010] 2 All SA 2015 SCA, para [8] “[the witness] was a single witness to the rape. It is trite that her evidence should be approached with caution. The objective of this approach is mainly to reduce the risk of wrong convictions.”

an accused beyond reasonable doubt – no more and no less. The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule.”

- [13] In Namibia, the Court of Appeal had been called to decide on the issue of rape where it was submitted that the evidence of the complainant was not corroborated, Gaongalelwe J⁷ said

“The appellant’s attorney has submitted that the evidence of the complainant was not corroborated on the issue of penetration. Where an element of the offence involving sexual intercourse is not challenged and is common cause between the accused and the complainant **there may be no need for the trial court to look for any further corroboration on the issue. The admission of such element by the accused supplies the necessary corroboration.** In this case the version put to the complainant by the appellant during cross examination of the former is clear and unequivocal. **The version is that there was sexual intercourse but that such was consensual. In such a case the trial court cannot be faulted for having found against an accused person on the particular issue.**”⁸

- [14] One has to remind himself that in order for an employer to discharge its onus of proof, that the dismissal was fair, it has to present evidence to the satisfaction of the arbitrator concerned and that the test is not the one of beyond a reasonable doubt but the balance of probabilities. Even though the matter herein relates to rape, consideration has to be taken that the arbitrator was not sitting as a presiding officer in a criminal court.

- [15] Despite the cautionary rule being classified in *Jackson’s* case as “*based on an irrational and out-dated perception*”. The arbitrator proceeded to apply the same rule, in paragraph 42 of the award. The arbitrator did look at the fact

⁷ *S v Ipatleng* (Criminal Appeal no. 94 of 2005) [2007] BWHC 204 (11 November 2007)

⁸ *Ibid* at para 6.

that the victim took some time to report the incident which could have been necessitated by age, and that in respect of as to when the incident took place the arbitrator acknowledged that the victim made a mistake but confirmed that the incident took place on a Friday.

- [16] Taking into account the reconstructed records of the arbitration, and the arbitration award, in paragraph 46 and 66 thereof, the arbitrator confirmed that the point that the victim was afraid to report the rape, was not in dispute as the issue before him was whether the applicant was the one who raped victim. For the sake of brevity, I deem it necessary to quote paragraph 46 of the award which reads thus,

“Furthermore, the applicant did not challenge her evidence that the rape had taken place in the way she described but only denied that he had been the perpetrator”.

- [17] In line with *Cusa v Tao Ying Metal Industries* and *Ipatleng* decisions, this Court has to take into account what the issue before the arbitrator was. The issue before the arbitrator was that the victim was raped, the defence for the applicant was that he was not the perpetrator. Therefore, the arbitrator had to determine whether the applicant indeed was the perpetrator or not.

- [18] Even if one were to reject the evidence of the victim, there is crucial evidence that was placed before the arbitrator by Constable Mabe (a fellow police officer), who stated that he did see the victim as they drove with her for a period of more than six hours, in the morning and at the end of their shift he asked the applicant to drop of the victim at her place, however, the applicant decided to drop him off first and then later he was to drop the victim at her parents place. This evidence according to the records was not in dispute.

[19] Furthermore, Constable Mabe confirmed that at some point him and the applicant were charged with an offence of rape in respect of a different incident. This evidence was also taken into account by the arbitrator before concluding that the dismissal was substantively fair. Therefore, the arbitrator, whether or not he considered the J 88 and/or the tracker report of the police vehicle that was used on that day is neither here nor there because at the end of the day the applicant had been linked with the rape in that he was the last person seen by Constable Mabe with the victim. I, therefore, conclude that the applicant had the burden to adduce evidence as to what transpired after he had been left with the victim. The process of the identification parade, whether it was flawed or not is not important because of Constable Mabe's evidence, and it was not in dispute that the victim saw them again when she was with Mbali. I have taken into account the totality of evidence that was presented before the arbitrator and am satisfied that the award is the one that a reasonable decision-maker could have made under the circumstances. Therefore, the award ticks all the boxes of the six pillar requirements.

[20] I also note that the applicant in his supplementary affidavit had submitted that he requested this Court to condone his late filing of the records and he explained as to what caused the delay. There was no need for the applicant to deliver condonation, as he did not fail to comply with any of the Rules and the Practice Manual of this Court because the records were not available and he ended up doing a reconstruction of the record.

[21] These are the reasons for the order referred to in paragraph [1].

S. Mabaso
Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr Gouws

Instructed by: Johan Gouws Attorneys

For the Second Respondent: None.

Instructed by:

LABOUR COURT