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IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN CASE NO: JR2181/2007

2008-02-26

In the matter between
CONSTABLE VORSTER S MANZINI Applicant

And

SOUTH AFRICAN POLICE SERVICES & OTHERS Respondent

J U D G M E N T

CELE J: The applicant seeks to have the arbitration award dated 22 July 2007 issued by the second respondent, as an arbitrator of the first respondent reviewed and set aside in terms of Section 145 of the Labour Relations Act, 66 of 1995, hereafter referred to as the Act.

The application is in a stricter legal sense in terms of Section 158(1)(g) of the Act because it is an award issued by a bargaining council and not by the Commissioner for Conciliation, Mediation and Arbitration, that is the CCMA. I am mindful of the fact that Section 158(1)(g) makes a review in terms of that section subject to Section 145 of the Act.

The third respondent in whose favour the award was issued, has not seen it fit to oppose the application as a previous employer of the

applicant.

I look at the background facts:
The applicant was in the employ of the third respondent as a member of the South African Police Services. A Mr Petrus Mahlaka sold a vehicle which was registered in the names of his wife, one Yvonne Mahlaka to a Mr Watson Ngobe. Two days after the sale of the motor vehicle, two police officers arrived at the residence of Mr Mahlaka, this was in the very early hours of 14 December 2005. The two police officers informed Mr Mahlaka that his motor vehicle had been involved in a robbery and that as a consequence they had to arrest him. He informed them that it had been his wife's motor vehicle. His wife, their baby and himself were then lodged into a police van. A discussion thereafter held, resulted in the police freeing the wife and the baby and taking Mr Mahlaka away. There was a further discussion between him and the police officers which resulted in them driving him back to his residence and his wife gave him some money which he handed to the two officers. They then released him on the understanding that he was to track down Mr Watson Ngobe.
In the morning of the same day, Mr Mahlaka telephoned Mr Ngobe and informed him of the police visit in the early hours of that day. Two police officers subsequently visited Mr Mahlaka but arrived in the absence of Mr Ngobe. It was further arranged that Mr Mahlaka was to alert them of that moment when Mr Ngobe would be available after Mr Mahlaka would have traced him.
On one evening, the date of which is not clear in the papers, Mr Ngobe arrived at the residence of Mr Mahlaka and the latter alerted the police of his visit. Two officers arrived there being Mr Ndlovu who was a passenger and the applicant who drove the police car. I believe it was a Fiat Sedan. Upon the police coming across Mr Mahlaka and Mr Ngobe, the police put handcuffs on Mr Ngobe, lodged him into their motor vehicle. He was then sitting behind the applicant who was the driver and the motor vehicle was driven away. They left Mr Mahlaka behind.
Soon after they had left, Mr Mahlaka received a telephone call from Mr Ngobe, Mr Ngobe was asking Mr Mahlaka to give him an amount of R2 000, Mr Mahlaka said that the ATM machine could only pay him up to R1 000 and that therefore that was the only amount he could give him. When Mr Mahlaka came down to the street, he soon met Mr Ngobe and the two officers who had taken him away. The applicant was still the driver of the Fait police marked vehicle. Mr Mahlaka was picked up and the applicant drove the car to a Doornfontein ABSA Automated Teller Machine or the ATM. Mr Mahlaka went to the ATM machine and he came back and reported that the machine was out of order. He boarded the motor vehicle and the applicant drove it to a Jeppe FNB, or First National Bank ATM machine, where Mr Mahlaka withdrew R1 000, came back and boarded the motor vehicle, which was then driven away by the applicant. Mr Ngobe sat in the back seat as I have already indicated behind the

applicant, with handcuffs still keeping him or keeping his arms on his back, he did not therefore have any free movement. He then asked Mr Mahlaka to take R700 from his pocket, Mr Mahlaka duly complied. Mr Mahlaka then put the R1 000 he had withdrawn together with the R700 that he had taken from Mr Ngobe's pocket and he handed this R1 700 to Mr Ndlovu who was occupying the front passenger seat. To do this, the money was passed between Mr Ndlovu and the applicant's seats. Mr Ndlovu then gave Mr Mahlaka a key to unclip the handcuffs from Mr Ngobe. After this, the applicant drove the motor vehicle back to the residence of Mr Mahlaka in Berea. The police officers drove off taking with them the R1 700 but dropping Mr Mahlaka and Mr Ngobe. Mr Mahlaka reported this matter to the police, the third respondent referred a misconduct charge against the applicant, the charge read:

> "In terms of the SAPS disciplinary regulation 20Z, allegedly committing a common law or statutory offence, namely corruption by demanding R4 000 from W Ngobe but accepting R1 700 not to arrest him on an alleged offence of possession of suspected stolen property".

The applicant was subjected to a disciplinary hearing after which he was found guilty to have committed the act of misconduct with which he had been charged. He was dismissed from the South African Police Services.

A dismissal dispute arose between him and the third respondent which he then referred for conciliation and arbitration. The arbitrator who was the second respondent, confirmed both the guilty finding and the sanction in his award. The applicant now seeks to have the award reviewed and set aside.

I firstly look briefly at the arbitration hearing itself:

At issue was whether or not the dismissal of the applicant was for a fair reason. Procedural fairness was not challenged nor was the fact of the dismissal itself. I point this out because of the discussion that ensued

at the beginning of the arbitration hearing, there was a question as to who was to begin and the arbitrator did not guide the parties here by firstly pointing that the fact of dismissal was not an issue and that therefore in terms of the Labour Relations Act, the onus rested on the employer. It was by agreement that the employer undertook to begin even as the onus rested with it.

The only witness called by the third respondent was a Mr Mahlaka. Mr Le Roux who represented the third respondent, recorded that all attempts of tracing Mr Watson Ngobe had failed. His application to hand in a written statement which was made by Mr Ngobe for criminal investigations, was met with a strong opposition by Mr Moabelo who appeared for the applicant.
The evidence of Mr Mahlaka was by and large common cause and forms the basis of the background facts in this matter. However, he added that when the two police officers arrested Mr Ngobe, both were physically involved in hand clipping him and thereafter lodging him in the Fiat motor vehicle. He was cross examined on this and he insisted on that version. He made the following concessions which were in favour of the applicant:

1. The applicant was not present in the first two visits by the two police officers who said they wanted to arrest Mr Ngobe because the same motor vehicle which Mr Mahlaka sold to him, had been involved in a robbery.
2. The applicant did not know Mr Ngobe but Mr Ndlovu knew him.
3. In his presence, the applicant never demanded any money from Mr Ngobe for the R1 700 was given only to Mr Ndlovu.

Mr Moabelo put it to Mr Mahlaka that the applicant would not deny the involvement of the police in that case. He said that the police were

going to apprehend or to arrest, in other words, that was the purpose for their visit. The role of the applicant was that of a driver. Mr Mahlaka had no response to that proposition. Mr Moabelo closed the case of the applicant without the applicant or any of his witnesses testifying. He asked for the arbitrator to discharge the applicant arguing that no evidence had been led by the third respondent to support the allegations contained in the charge sheet. Mr Le Roux opposed the discharge arguing that a misconduct of corruption had been proved by undisputed evidence.

The award:

The chief findings made by the arbitrator were the following, this begins from paragraph 15 of the arbitration award:

> 1. "Although it appears that the applicant self did not demand or accept money from Ncube, it was not denied that money did exchange hands between or on behalf of a suspect and the police officer in the applicant's presence. The applicant did not deny seeing this or being aware of this, I am

satisfied that an inappropriate action took place in the presence of the applicant and there is no reason to believe that the applicant was not aware of what was taking place. In my view, it is clear that the applicant was involved in improper behaviour at the very least, by silently condoning it. His silence at the time or lack of express, verbal participation, does not exonerate him.

2. I agree that there is at all times an obligation on a police officer to take an action if a crime is committed, failure to take such action or feigned

ignorance or silence is unacceptable, the applicant clearly did wrong.

3. I have considered the applicant's argument that he did not personally demand or accept money from the suspect and arguably technically speaking, that he is not guilty of the allegation as specifically worded in the charge. However, these are not criminal court proceedings. It is not required in modern employment law of an employer to formulate charges with legal precision nor to prove any misconduct in accordance with criminal

law standards and requirements. This employee clearly did wrong and he knew or reasonably should have known so.

4. On the applicant's own version, he may well have committed misconduct as set out in one or more of the other regulations, I repeat that I am unwilling to find in favour of the applicant's simply on the ground of the employer's imprecise tagging or wording of the unacceptable conduct.

5. In my view, I would be failing in my duty should I find in favour of the applicant. It would be extremely unfair to

expect an employer to keep in employ a person so clearly involved in unacceptable conduct which goes directly to the fundamental relationship of trust and respect. The selection of arguably the incorrect charge from a strictly technical viewpoint, cannot persuade me otherwise.

6. The applicant is clearly guilty of conduct that is unacceptable in his work situation and such behaviour clearly caused irretrievable damage to the relationship.

7. I am satisfied that the applicant is guilty of misconduct, that such misconduct is serious

and I see no reason why I should interfere of the penalty of dismissal.

8. In coming to this conclusion, it was not necessary for me to deal with the admissibility or not of a written statement by Ngobe".

He then proceeded to dismiss the claim of the applicant and ordered no costs.

The grounds for review

This appear to be those in paragraph 6.1 and 6.3 of the founding affidavit. Regrettably, the grounds of review have not been canvassed in the best of ways as one would do, following either the guide in terms of Section 145 of the Act, or following the latest jurisprudence as has been developed to which I will shortly refer.

The two paragraphs I need to refer to, of the founding affidavit, paragraph 6.1 and 6.2 and 6.3 read:

6.1 The commissioner took the statement of an absent witness, Mr W Ngobe despite an understanding contained in paragraph 5 of the arbitration award, excluding such documents.

6.2 Further, the objection by the applicant's legal representative, not allow such evidence being led, fell on that he has, as the document was accepted in full view of the parties by the commissioner.

6.3 During the evidence led in the proceedings, there was no shred of evidence linking or implicating me in any wrong doing with reference to the charge levelled against me".

6.4, gives us back the charge and 6.5 seeks to explain, I think more than anything, 6.3. At the beginning of these proceedings Mr Malinga an attorney who appears for the applicant, I think has conceded that paragraph 20 of the award indicates without doubt that the statement of Mr Ngobe was not taken into consideration. I heard him coming on record making such concession. Therefore, if it was a review ground, what appears on 6.1 and 6.2 in fact, does not fall for a decision in these proceedings.

If I read the papers correctly, the only ground proferred is the one that appears in 6.3 where he says that the evidence led, that there was no shred of evidence linking or implicating him in any wrong doing. I have asked Mr Malinga to indicate to me whether or not this is a case which calls for inferential reasoning and if such, whether or not the decision that was reached by the second respondent, would not be a decision which a reasonable decision maker could not have reached. He sort of left the matter in my hands, after having pointed out the evidence which he deemed was in favour of the applicant. In my judgment I have referred to those concessions which I have said, were properly made by Mr Mahlaka

when he was cross examined during the arbitration hearing. Indeed, there was no direct evidence which sought to incriminate the applicant in these proceedings.
The second approached would therefore have been to investigate whether or not the circumstantial evidence that was led was strong enough to justify one coming to a conclusion that the decision reached is the one that a reasonable decision maker could have made in the circumstances.
I have referred to the case of *Fidelity Cash Management Services v CCMA & Others*, DA10/5/2007, (LAC) delivered 5 December 2007 in the previous judgment I dealt with today. I think it is important again to make a similar reference. I go to paragraph 97 and read a portion thereof and I will also proceed and read paragraph 102 and only portion thereof:
Paragraph 97 reads and this a judgment by the Judge President of the Labour Appeal Court:

> "It is important to bear in mind that the question is, not whether the arbitration award or decision of the commissioner is one that a reasonable decision maker would not reach but one that a reasonable decision maker could not reach.

The Constitutional Court stated that where a court must decide the reasonableness or otherwise of a decision, a judge's task is to ensure that decisions taken by the administrative agencies fall within the bounds of reasonableness as required by the constitution".
I proceed to paragraph 102 and I quote a portion thereof, I proceed:

> "In many cases the reasons which the commissioner gives for his decision, finding or award, will play a role in the subsequent assessment of whether or not such decision or finding is one that a reasonable decision maker could or could not reach, however, other reasons upon which the commissioner did not rely to support his or her decision or finding but which can render the decision reasonable or unreasonable, can be taken into account. This would clearly be the case

> where the commissioner gives reasons, A, B and C, in his or her award, but when one looks at the evidence and other material that was legitimately before him or her, one finds that there were reasons, D, E and F upon which he did not rely but could have relied, which are enough to sustain the decision".

Regrettably because of the time frame, I have only quoted these portions. This decision in fact is very important. It seeks to explain and gives more clarity on the earlier decision of *Sidumo v Rustenburg Platinum Mines Ltd & Others*, 2007 (12) BLLR 1097 (CC), that decision changed the approach or the test for a review from the question whether or not the decision of the arbitrator is justifiable or is rational, to the current test which I have now referred to. I have to apply my mind to this test which I have set out to the present case first before me.

When the commissioner reasoned out in his award, he did not use the words, circumstantial evidence. He did not use the cardinal rule of logic which we often find when one deals with inferential reasoning or circumstantial evidence. This was set out in a very well known criminal case in the case of *R v Blom,* 1939 AD 188, it is found on pages 202 to 203, the cardinal rule reads:

1. "The inference sought to be drawn must be consistent with all proven facts, if it is not then the inference cannot be drawn.
2. The proven facts should be such that they exclude every reasonable reference from them, safe the one sought to be drawn. If they do not exclude the

other reasonable reference, then there must be a doubt whether the inference sought to be drawn is correct".

Firstly as I have pointed out, the ground of review that was canvassed by the applicant, as I have indicated, is not a one ground that attacks the misconduct, the gross irregularity or the deviation from the power of the arbitration, therefore, it would seem to me that the ground for review is the one that is related to whether or not the award is one of a reasonable nature. And in my view therefore, the test which I have set out, is the one that is applicable in this regard.

The undisputed facts before the arbitrator, were that the applicant took part in an arrest of Mr Ngobe. In fact, the evidence which remain undisputed is that he took part in the physical arrest and lodging of Mr Ngobe into the police marked motor vehicle and that he drove him to the first ATM machine and to the second ATM machine, that the money was handed by Mr Mahlaka to Mr Ndlovu who was also a police officer sitting in the front seat and this all happened in the presence of the applicant. After this money was exchanged, Mr Ndlovu released a key and gave it to Mahlaka to let him unclip the handcuffs from Mr Ngobe. Clearly, there was a connection between the R1 700 Ndlovu had received and the releasing of Mr Ngobe. The releasing of Mr Ngobe from the hand clips, had to do with the money, one was a *sine qua non* of the other and this took place in the presence of the applicant. The applicant says in his papers the police where effecting an arrest, and his was only to be a driver.

Is there an arrest that was lawfully effected here? The undisputed evidence is that, there was an arrest of Mr Ngobe, that arrest was interrupted by the exchange of money and that the two men, Ngobe and Mahlaka were then driven back from the ATM machine by the applicant back to where they stayed, they were left there and all of this happened in the presence of and in the full view of the applicant.

The fact that the applicant drove the police car to a ABSA ATM machine and the fact that he drove the motor vehicle to the FNB ATM machine, clearly indicates that the applicant knew what was going on. There is no other evidence that suggests otherwise. One would expect that an applicant who is executing his duties as a driver and a police officer,

would have driven Mr Ngobe to the police station. It must be remembered that after Ngobe had been taken away, there was a telephone call that was made to Mr Mahlaka by Ngobe that would have clearly been made in the presence of the applicant, where there was a talk about Ngobe asking for R2 000 and that only R1 000 would be available, and hence as a consequence of that discussion, we see the police motor vehicle coming back to pick up Mr Mahlaka and the person behind the steering wheel was none other than the applicant.
Clearly the participation by the applicant in all of these activities which are undisputed was a participation with full knowledge of what was going on. The fact therefore, that no demand was made in the presence of the applicant and the fact that the money was not given direct to the applicant, does not exonerate him. Clearly, from the proven facts, an inference was drawable, namely that the applicant was taking part in corrupt activities that involved Ndlovu in the present matter and this inference excludes any other innocent inference that could be drawable from these facts. There is no other inference one can find, neither was any argued before me, nor was any argued before the arbitrator.

In my view therefore, all things considered, the decision reached in this arbitration by the second respondent, was clearly a decision that a reasonable decision maker could reach in the circumstances.

As a consequence of that finding, the application for the review of the arbitration award dated 22 June 2007, issued by the second respondent in this matter is not successful. **The application is dismissed**. The matter proceeded unopposed, there shall be **no costs order**.

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CELE AJ

Date of Hearing: 26 February 2008
Date of Judgment: 26 February 2008

APPEARANCES:

For the Applicant: B. E Maringa

For the Respondent: no appearance (Unopposed)

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