THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR2554/16

In the matter between:

R.M KELOBETSWE **Applicant**

and

SAFETY AND SECURITY SECTORAL BARGAINING COUNCIL **First Respondent**

MS. M. SMITH **Second Respondent**

MINISTER OF POLICE **Third Respondent**

SOUTH AFRICAN POLICE SERVICE: COMMISSIONER OF POLICE **Fourth Respondent**

Heard: **7 February 2019**
Delivered: **04 March 2020**

Summary: Application in terms of section 145 of the Labour Relations Act, 66 of 1995 – application to review and set aside arbitration award.

JUDGMENT

RAPHULU, AJ

Introduction

[1] This in an application to review and set aside the arbitration award made by the Second Respondent (the arbitrator) under case number PSSS 689.04/05 dated 22 October 2016. The Applicant seeks to review the Second Respondent's finding that the dismissal of the Applicant was procedurally and substantively fair.

[2] The dispute in this matter spans over a period of 15 years.

Background

[3] The Applicant was employed in the South African Police Services (SAPS) on 11 January 1995 and was dismissed on 18 November 2004, pursuant to a disciplinary hearing. At the time of the dismissal he held the rank of sergeant and was stationed at Kempton Park.

[4] The Applicant was charged with and found guilty of contravening Regulation 18(3) of the SAPS Disciplinary Regulations in that between the period 29 December 2000 and 15 December 2002 he committed fraud in respect of 8 stolen vehicles by recovering these vehicles and then subsequently cancelling them on the system (i.e. logging that these vehicles had not been recovered) and thereby not handing them back to their respective lawful owners.

[5] The Applicant was departmentally and criminally charged, convicted and sentenced to imprisonment. His conviction however was overturned and set aside by a full bench on appeal.

[6] It must be noted that this matter has a long history and was arbitrated previously under the auspices of the First Respondent under case no. PSSS 689-04/05 in terms of which the Commissioner found the Applicant's dismissal to be procedurally and substantively fair in terms of her arbitration award

dated 16 April 2012. This award was however reviewed and set aside by Justice Cele on 3 March 2016, who ordered that the matter be remitted to the First Respondent for a *de novo* arbitration hearing before a different Commissioner.

[7] The parties agreed that it was not necessary to lead all of the evidence afresh at the second arbitration and that the record of the disciplinary hearing and of the previous arbitration would be used and some additional documentation submitted by the Applicant in relation to the criminal proceedings.

Grounds of review

[8] The Applicant raised a number of grounds for review *inter alia* that the arbitrator based her award on the following:

8.1 the Applicant's argument that his password could have been used by his colleagues is vague and ambiguous;
8.2 he signed a Declaration of Secrecy and undertook to uphold such declaration;
8.3 the Fourth Respondent (SAPS) admitted that the Applicant's password could have been used by another colleague but the arbitrator found that this was highly improbable; and
8.4 the hearsay evidence proves that the Fourth Respondent's case is corroborated.

[9] The Applicant submits that the above findings by the Second Respondent are reviewable in that she committed a gross irregularity by not applying her mind to the facts presented to her and/or that she misunderstood the evidence and facts to be proved in reading her decision.

[10] Under his grounds for review, the Applicant also raises the fact that his conviction was set aside by a full bench of judges after he appealed against the conviction and sentenced imposed by the Regional Court and that the

Second Respondent failed to apply her mind to the elements of fraud. The Applicant contends that the elements of fraud were not proven and that there is no differentiation between fraud in criminal matters and labour matters.

Evaluation

[11] It seems to be common cause between the parties that there were a total of 8 vehicles that were recovered and subsequently cancelled on the Information Management System ("IMS") between the period 2000 and 2001 and that following an investigation it was ascertained that the computer used to cancel the vehicles on IMS and access code used to effect this was that of the Aapplicant's.

[12] SAPS contends that the Applicant signed a Declaration of Secrecy Policy and in terms of this policy, the Applicant undertook not to reveal his secret password for the IMS system to anyone; not to allow anyone else to use his password; to secure his terminal against unauthorised users; not to use the system to process SAPS information without authorisation and that the Applicant is fully aware of the consequences of breaching his policy. SAPS submits further that the IMS system is a private SAPS system that is used to cancel and circulate stolen vehicles. The access code changes every second week and all users can only access the system after undergoing training and the signing of the Secrecy Policy. Furthermore, two passwords are allocated for this purpose, namely, a force password and a selected one. SAPS contends that it is very difficult to obtain both passwords at once. SAPS in their opposing affidavit contend that to enter the system, a police official has to use his/her force number (akin to a personnel number) and individual password. Once you are on the system, another password has to be entered in order for you to have access to the circulation system.

[13] The Applicant contends that his dismissal was substantively and procedurally unfair. He submits that his dismissal was procedurally unfair as he was not given sufficient time to prepare for his case, his rights were not read to him

and he did not receive the outcome to his appeal application. The Applicant further submits that his dismissal was substantively unfair as SAPS failed to provide sufficient proof that he used the IMS system and that SAPS elected not to call any expert witness to give testimony on the IMS system. The Applicant contends that SAPS' argument is based on hearsay evidence and that he did not cancel the vehicles in question and that someone could have obtained his password and used it to cancel the said vehicles. No witness was called to identify that the Applicant was the person who assisted them in cancelling the vehicles, only witness statements by the investigating officer were submitted.

Evaluation

Procedural fairness

[14] In respect of the procedural fairness of the Applicant's dismissal, SAPS produced sufficient proof that the Applicant was notified of his rights and of the charges against him on 21 January 2004. The disciplinary hearing thereafter commenced on 2 February 2004.The Applicant also elected to proceed with the inquiry. Therefore, I agree with the arbitrator that the Applicant had sufficient time to prepare for the hearing. In respect of the Applicant's contention that he did not receive the outcome of the internal appeal, this did not negate the Applicant's right to refer the matter to the First Respondent and accordingly, I agree with the arbitrator that the Applicant had a fair opportunity to be heard and sufficient time to prepare his representations in this regard. Furthermore, there was no evidence submitted to suggest that the actual disciplinary hearing held was procedurally unfair and that the Applicant was denied his right to be heard in his regard. Accordingly, the arbitrator was not unreasonable in finding that the Applicant's dismissal was procedurally fair on the probabilities.

Substantive fairness

[15] In dealing with the substantive fairness of the Applicant's dismissal, I deal first with the argument submitted by the Applicant that that the elements of fraud were not proven and that there is no differentiation between fraud in criminal matters and labour matters. This is not strictly the case. In *South African Police Service and another v Van der Merwe NO and others*[1] the Court stated as follows:

> "The finding of the Commissioner that the employee could only in terms of regulation 20(z) of the SAPS Regulations be dismissed once he was found guilty by the Criminal Court is not only at odds with our legal system but is also grossly unreasonable and thus fails the test set out in Sidumo. It is trite that proof in civil matters such as labour dispute is lower than that in criminal matters. In civil matters, proof is on the balance of probabilities whereas in criminal law is beyond reasonable doubt."
> (Own emphasis)

[16] It, therefore, cannot automatically follow that because the Applicant was found not guilty of fraud by a criminal court, he ought to be found not guilty by the First Respondent. It is trite that the burden of proof in labour disputes is based on a balance of probabilities and not beyond a reasonable doubt. Accordingly, in applying the principles laid down in *Sidumo and Another v Rustenburg Platinum Mines Ltd and others,* a finding that an applicant committed fraud on a balance of probabilities on a proper evaluation of the evidence in circumstances where such applicant was found not guilty of fraud by a criminal court is a finding that any reasonable arbitrator could have come to, given the fact that the burden of proof is much lower in labour disputes than in criminal ones.

[17] The Applicant contends that there was no documentary evidence submitted by SAPS which directly links him to the cancellation of the 8 vehicles in question, although there was a witness, Mbhoto, who was the Investigating Officer for the matter and who testified that the cancellation was done using

[1] [2013] 3 *BLLR* 320 (LC)

the Applicant's access code. The Applicant in this regard does not dispute that it was his access code that was used to cancel the vehicles. The Applicant's argument essentially hinges on the fact that it was not him who cancelled the vehicles and that someone else used his access code to do this. In this regard, the Applicant argued that these access codes are usually exchanged between colleagues and that Mbhoto conceded during cross-examination that it is possible that someone else could have used the Applicant's access code.

[18] Whilst the Applicant contends that no expert witness was called by SAPS to testify to the use of the IMS system, it is important to consider the fact that at the second arbitration, the parties agreed to rely on the record of the proceedings and documentation submitted in the disciplinary hearing and the previous arbitration, and certain additional documentation. Further to this no oral evidence was led. Accordingly, it is not unreasonable for the arbitrator to have scrutinised the evidence in order to determine whether SAPS proved its case. SAPS had previously called Captain Barren Michael Muller, who testified as to how the system works.

[19] Further, whilst Mbhoto may have testified that it is *possible* for someone to have obtained the Applicant's access code to cancel the vehicles, this does not mean that it is *probable* in light of all of the surrounding facts.

[20] The Applicant does not dispute that 8 vehicles were cancelled without the necessary authority and further that the cancellation of these very vehicles were done using the Applicant's access code and were were not returned to their rightful owners. The Applicant's access code was used in effecting the particular 8 cancellations in question over a period of 2 years. Each and every employee working in the vehicle fraud department has his/her own individual access code that changes every 2 weeks, employees have two sets of passwords and this makes it difficult for someone else to obtain both passwords. The Applicant signed the Secrecy Policy and was fully aware of its contents and the consequences of non-compliance with same.

[21] The Applicant failed to submit any evidence that he shared his password with anyone else and/or how anyone else was able to obtain his unique access code on several occasions over a period of 2 years. He would have changed his password on so many occasions within the aforementioned period, it therefore is improbable that someone else was able to access these codes not once, but eight times over the 2 year period.

[22] As regards the admissibility of hearsay evidence and the witness statements submitted by SAPS, which were compiled by the investigating officer assigned to the matter. The Labour Appeal Court in *Exxaro Coal (Pty) Ltd v Chipana and Others*[2] when dealing with hearsay evidence and the scope of section 3 of the Law of Evidence Amendment Act[3] (LEAA) set out the following guidelines with regard to the admission of hearsay evidence:

22.1 The possibility that hearsay evidence can be admitted in terms of section 3(1)(c) of the LEAA, if this is in the interests of justice, is not a licence for the wholesale admission of hearsay evidence in the proceedings.

22.2 In applying section 3(1)(c) the commissioner must be careful to ensure that fairness is not compromised.

22.3 A commissioner must be alert to the introduction of hearsay evidence and ought not to remain passive in this regard.

22.4 A party must, as early as possible in the proceedings, make known its intention to rely on hearsay evidence so that the other party is able to reasonably appreciate the evidentiary challenge that he/she or it is facing. To ensure compliance, a commissioner should at the outset require parties to indicate such an intention.

22.5 The commissioner must explain to the parties the significance of the provisions of section 3 of the LEAA, or of an alternative, fair standard and procedure that will be adopted by the commissioner to consider the admission of the evidence.

22.6 The commissioner must timeously rule on the admission of the hearsay evidence and the ruling on admissibility should not be made

[2] [2019] 10 BLLR 991 (LAC).

[3] 45 of 1988.

> for the first time at the end of the arbitration, or in the closing argument, or in the award.

[23] However, given that the parties agreed to not tender any oral evidence at the arbitration proceedings in question and solely relied on the record of the disciplinary hearing and the previous arbitration proceedings, I do not make a ruling in respect of the arbitrator's award on the admissibility of the witness statements as hearsay evidence.

[24] For the reasons set out above, my conclusion is that the Second Respondent reached a decision that a reasonable decision maker would reach in the circumstances.

[25] Accordingly, the following order is made:

Order

1. The application for review is hereby dismissed.
2. There is no order as to costs.

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L. Raphulu

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Johan Gouws Attorneys Inc.

For the Respondent: FMM Snyman (Pretoria Bar) instructed by State Attorney Pretoria, Mr. C Duvenage