

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN

CASE NO: D257/06

DATE: 19 NOVEMBER 2008

5 Reportable

In the matter between:

THE SOUTH AFRICAN POST OFFICE LIMITED

APPLICANT

10 And

COMMISSION FOR CONCILIATION,
 MEDIATION AND ARBITRATION

FIRST RESPONDENT

15 COMMISSIONER P GOVINDSAMY

SECOND RESPONDENT

M I SHAIKH

THIRD RESPONDENT

JUDGMENT

20

PILLAY D, J

1. Since the decision of the Constitutional Court in *Sidumo and Another*
 25 *v Rustenburg Platinum Mines Limited and Others* 2007 [28] ILJ 2405
 CC, the Labour Court is slow to interfere in decisions of
 commissioners, especially when credibility of witnesses at arbitration
 is in issue.

30 2. In *Fidelity Cash Management Service v Commission for Conciliation,*
Mediation and Arbitration and Others 2008 [29] ILJ 964 LAC at 977A –
 E, the Labour Appeal Court expatiated as follows:

“In many cases the reasons which the commissioner gives
 for his decision, finding or award will play a role in the
 35 subsequent assessment of whether or not such a decision or

finding is one that a reasonable commissioner could or could not reach. However, other reasons upon which a 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.”

3. The third respondent employee in this review was the postmaster for Pietermaritzburg district. Following a disciplinary inquiry on 8th and 9 September 2004, the applicant employer dismissed him for sexually harassing two employees, Cynthia Xoliswa Makathini and Tiny Precious Zondi. The employee had engaged these complainants via a labour broker, Midway Two [Pty] Ltd. Zondi worked in the back office of the post office in Pietermaritzburg and Makathini worked as a teller in Willowton.

4. Both complainants alleged that the employee engaged them for three months. According to the employees, their services terminated on expiry of their fixed term contracts. In the case of Makathini, the fixed term contract was from 6 October 2003 to 24 October 2003. In the case of Zondi, her contract was from 9 June to 2 August 2003. Their

services were terminated prematurely a few weeks after their employment. The duration of their contracts and the reasons for its termination were in dispute.

- 5 5. The employee's defence was that Anita Swanepoel, who acted as postmaster when the employee was on leave, conspired to have him dismissed. The commissioner preferred the conspiracy defence of the employee over the evidence of the employer's witnesses in the following circumstances. The employee did not raise the conspiracy
- 10 defence at his disciplinary inquiry. He raised it for the first time at arbitration.
6. The employee insisted that the complainants were engaged on fixed term contracts, the duration of which would, he said, be manifest from
- 15 the contracts. When the employer produced the contracts they reflected the dates on which the employment began. Termination dates were not filled in.
7. Realising that the written contracts did not bear out his version, the
- 20 employee claimed that the contracts produced were forged. He did not make this claim when the documents were first produced or at the pre-trial conference when they were discussed. He raised this objection for the first time at the arbitration when he testified in chief. The employer was therefore taken by surprise.

8. The second respondent commissioner was aware that the employee could not explain why his counsel did not put it to Zondi that her documents were forged. The commissioner called for the original contracts of employment but the employer could not produce them as it did not have them. The employer alleged that they were last given to the employee. They might have been sent to the labour brokers but as the employer had been taken by surprise, it had not checked with the labour brokers. The employee put the authenticity of the contract in dispute at the arbitration.
9. The employee's version was that the contracts he received when the complainants were engaged were not the same as the ones produced to the arbitrator. On that version, the inference he wanted the Court to make was that the documents were forged. The employee could not explain why he forwarded them and the identity document of the complainants to the labour brokers if the contracts of employment were forged. However, as the documents produced to Court were the very documents that the employer obtained from the labour broker, the employee must have sent them. As the employee sent them, they could not have been forged.
10. The documentary evidence before the arbitrator showed that in the case of Makathini, the space provided in the contract of employment for a termination date was left blank. Although Zondi's contract did not provide a space for a termination date, it did not stipulate the

period of her contract. Both contracts provided for termination on two weeks' notice.

11. It was common cause that the employee did not give two weeks' notice of termination either in writing, as he should have, or orally to the complainants. He therefore terminated the complainants' contracts unlawfully.

12. It was common cause that he had engaged the complainants as substitutes for full-time employees who went on leave. The documents showed that the employee requisitioned additional staff on 19 May 2003 to replace permanent employees who went on leave from 2 June to 13 September 2003. Malcolm Wright, the administrative control officer, approved this requisition which resulted in the applicant employing Zondi. Wright approved a similar requisition dated 19 May 2003 on 25 August 2003 for employees going on leave between 9 September and 24 October 2003, which resulted in the applicant employing Makathini.

13. The documentary evidence proves that the employee sought and obtained approval for employing Zondi and Makathini timeously. The employee's evidence that Makathini's employment was delayed until 6 October 2003 because he did not get approval on time conflicts with the documentary evidence.

14. Two further irregularities with the employees' requisition for staff emerged from the documentary evidence. The employee requested an extension of the contract of two service providers for 8 September to 24 October 2003. The applicant had not employed Makathini yet, so her contract could not have been an extension but a new contract. Furthermore, although the requisitions were for staff at Pietermaritzburg, the employer instructed Zondi to work at Pietermaritzburg and Makathini to work at Willowton.

15. In Zondi's case, her version that the employee told her that she was employed for three months corresponds with the requisition for temporary staff for three and a half months. He employed Zondi from 9 June and terminated her services on 2 August 2003. He employed Makathini on 6 October and terminated her services on 24 October. He terminated their services well before the dates approved in response to his requisition. The employee needed to continue filling the position left vacant by Makathini; to that end Thandi Myeza took over Makathini's post when the employee terminated Makathini's services. It was therefore not a situation where Makathini's employment terminated because there was no work for her.

16. Despite acknowledging the employee's inability to explain these contradictions adequately, the commissioner preferred the employee's version.

17. In addition to the documentary evidence corroborating the complainants' testimony, other witnesses of the applicant also corroborated the complainants. Stanley Michael confirmed Makathini's evidence that on the employee's instructions, he telephoned Makathini to inform her that her contract was terminated for reasons he was unaware of. When Mr Blomkamp, who appeared for the employee, put to Michael that the employee would deny that he telephoned to instruct Michael to contact Makathini, Michael declined to comment because as far as he knew, he did what he was instructed to do. Either Michael or the employee was lying on this issue.

18. Purity Zuma testified that the employee also instructed her to inform Makathini that her contract was terminated. She confirmed that she understood the difference between "terminate" and "expire". She understood that that the employee was terminating Makathini's services illegally. She also confirmed that after she informed Makathini that the employee terminated her services, Makathini reported to her that the employee had told her that he wanted to spend the evening with her. Zuma recalled an occasion when she called Makathini to the telephone when the employee wanted to speak to her. Makathini told her that the employee telephoned her to call her to the area office. Makathini informed her that when she went to the area office the employee propositioned her.

19. Emmanuel Gumbi, the acting area manager, confirmed receiving a

report from Makathini that the employee wanted to see her after hours. Gumbi approached her complaint with caution because she raised it only after Gumbi reported to her that the employee had informed him that her contract had expired. Makathini had said that he had laughed when she related her complaint to him. Gumbi testified that he smiled. Irrespective of whether he laughed or smiled, he was manifestly sceptical of her complaint. His reaction is hardly that of a co-conspirator.

20. Vuyo Kazi Ndimba confirmed that Makathini cried when she reported to her that the employee wanted to take her to lunch.

21. In rejecting the complainants' evidence, the commissioner reasoned as follows:

"On the issue of credibility the Makathini's and Zondi's evidence are unsatisfactory in a number of respects. In each case there are discrepancies between what they said in evidence in these proceedings and what they said in evidence at the disciplinary inquiry. To a certain extent the account given at these proceedings echoes very closely the account given at the disciplinary inquiry but there are also differences between the two accounts. Makathini is obviously biased in the sense that she has an interest in her evidence being believed. Why she did not report her encounter with Shaik to anyone soon after the alleged sexual harassment is open to question. Why she accompanied

Shaik up the stairs to a room after the first incident is also questionable. Her response "On Saturday" to Shaik in regard to his overture 'when are we going to do the thing properly is an indication that she encouraged and led Shaik on." (*sic*)

5 And

"Zondi's demeanour is not such that it could be said to be free from criticism. She was not candid and was obviously biased in that she had an interest in wanting her evidence to be believed. The inspection in loco showed that it was
10 entirely impractical for any person wishing to touch another person intimately while both of them are positioned at opposite sides of the table. She complained to Gumbi about the termination of her contract yet it should have been a complaint about sexual harassment. When she was
15 requested to offer an explanation as to why her contract was terminated, only then did she come up with this story of sexual harassment. What is equally strange is why, in a busy place such as the back room in the parcel counter Shaik would sexually harass her. The calibre and cogency of the
20 performances of Makathini and Zondi compared to Shaik is unsatisfactory and unreliable. Shaik's bare denial is manifestly better than Makathini's and Zondi's version."

22. The commissioner's reasoning demonstrates that he could not make
25 up his mind whether Makathini's evidence at the arbitration was substantially consistent with her evidence at the disciplinary. He could not make up his mind probably because he did not undertake any

analysis to determine the inconsistencies and whether they were material. To the extent that there were inconsistencies, they were not material, especially given the lapse of almost two years since the termination of her employment.

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23. The commissioner misconstrued the notion of bias. Every witness tries to convince an adjudicator of his or her version. The complainants were testifying about their subjective experiences. They were not impartial experts testifying about objective facts.

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24. In evaluating the conduct of the complainants after the alleged encounters with the employee, the commissioner failed to take into account the special circumstances of victims of sexual harassment. The Supreme Court of Appeal in *S v J* 1998 [2] SA 984 summarises the position of a rape victim thus at 1008E - F:

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“Few things may be more difficult and humiliating for a woman than to cry rape: she is often, within certain communities, considered to have lost her credibility; she may be seen as unchaste and unworthy of respect; her community may turn its back on her; she has to undergo the most harrowing cross-examination in court, where the intimate details of the crime are traversed *ad nauseam*; she (but not the accused) may be required to reveal her previous sexual history; she may disqualify herself in the marriage market and many husbands may turn their backs on a ‘soiled’ wife.”

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25. The reaction of the complainants in this case is typical of victims of sexual harassment. They felt afraid, anxious and scared. They were hurt and embarrassed. They were desperate for a job. They respected their boss. They were obedient employees. The complainants' conduct must be assessed against such a cocktail of conflicting emotions. A decision to report sexual harassment, like a decision to report rape, is not easy for a victim who has to relive the experience every time she narrates it. She must reveal the indignity she endured when the perpetrator violated her person. She must be prepared to have her credibility and morality challenged. She runs the risk of being disbelieved because society in general and adjudicators in particular are not rid of the prejudices against women witnesses.

26. The arbitrator in this case made unjustifiable inferences. He inferred that Makathini encouraged the employee without taking into account the context in which she replied, "On Saturday." Significantly, he ignored her consistent resistance to the employee's overtures and that on that Saturday she had put the telephone down on him. By drawing inferences unfavourable to the complainants the commissioner failed to adopt a context-sensitive approach to evaluating their evidence taking account of the trauma they experienced.

27. The Supreme Court of Appeal in *S v J* overruled the automatic application of the cautionary rule in sexual assault cases. As the

cautionary rule was based on outdated perceptions of complainants, “it was particularly unreliable”. In coming to this conclusion, Olivier JA relied on research that revealed the following: 1. There is no evidence to substantiate the cliché that the danger of false accusations is likely to exist merely because of the sexual character of the charge; 2. There is no evidence that complainants in sexual cases are more untruthful than complainants in other cases.

28. Taking together the evidence of the complainants, the corroboration in the documents and the evidence of all the other witnesses of the employer, the only finding that a reasonable commissioner could come to was that the complainants were honest and the employee was dishonest. He began his web of deceit by insisting that the written contracts of employment would bear out his version. When this did not happen, he entrapped himself deeper and deeper as he tried to cover up lie upon lie.

29. The net result was his resort to a plea of conspiracy. That plea, conjured at the arbitration, was never tested by cross-examination of the employer's witnesses, despite the employee having the benefit of counsel at the arbitration. The employer's witnesses were not told who the members of the conspiracy were, what the role of each conspirator was, whether every witness who testified for the employer was a conspirator, when the conspiracy was formed and why the complainants would involve themselves in such an elaborate plot

when there stood good prospects of succeeding in claims for unfair dismissal.

30. Even if the evidence of the employee's witnesses, Bongiwe Zondi and
5 Njabulo Khumalo were true, their evidence firstly, does not give rise to
conspiracy as being the only reasonable inference. The employee
alleged that Anita Swanepoel, who was the central figure in the
conspiracy, disliked him. Bongiwe Zondi and Khumalo alleged that
Swanepoel questioned them about the employee. Swanepoel might
10 have questioned them about the employee for any number of reasons.
Even if she did conspire to get the employee dismissed, nothing in the
evidence of Bongiwe Zondi and Khumalo suggests that the
complainants were party to the conspiracy. If the employee genuinely
believed in his conspiracy defence, he would have raised it at the first
15 opportunity; that was at the disciplinary inquiry, if not before.

31. Two applications for condonation prefaced this review. The
overwhelming prospects of success on the merits, the period and
partly weak explanation for the delays are sufficient to warrant the
20 Court granting condonation.

32. The applications for condonation are granted with no order as to
costs.

25 33. The application for review is granted with costs.

Pillay D, J

5 Date of Judgment: 17 November 2008

Date of Editing: 5 January 2009

APPEARANCES:

For the Applicant: Adv Dirk Vetten instructed by Mohsina Chenia (Nkaisang

10 Chenia Baba Pienaar & Swart Inc)

For the Respondent: Adv P J Blomkamp instructed by Cajee, Setsubi and
Chetty Inc

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RESPONDENT M I SHAIK

ON BEHALF OF APPLICANT : ?

ON BEHALF OF RESPONDENT : ?

INTERPRETER : NOT REQUIRED

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