



**IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN**

**Not Reportable**

Case no: C491/19

In the matter between:

**XOLILE MATISO**

Applicant

and

**THE SOUTH AFRICAN LOCAL BARGAINING COUNCIL**

First Respondent

**L GOREDEMA N.O.**

Second Respondent

**THE CITY OF CAPE TOWN**

Third Respondent

**Date heard: 24 August 2021 on the papers**

**Delivered: 26 August 2021 by email**

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**JUDGMENT**

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**RABKIN-NAICKER J**

[1] This is an unopposed application to review an arbitration award under case number WCMO131911. The second respondent (the Commissioner) found the dismissal of the applicant to have been substantively fair.

[2] The applicant was employed as a Traffic Officer by the third respondent (the City). He was charged with gross misconduct in that on 25 July 2018 he allegedly solicited a bribe of R200.00 from a member of the public who gave him the money. He was found guilty in a disciplinary hearing and was dismissed.

- [3] The review grounds are succinct and are not augmented in a supplementary affidavit. These are that:

“5.1 The Second Respondent was mindful of the fact that neither the Third Respondent nor my trade union representative was a legal practitioner and was consequently duty bound to explain the rules of arbitration in general and the rules of evidence in particular to my representative when it became apparent that my representative was ignorant of the said rules. In this regard the Second Respondent found that the complainant (being the Third Respondent’s version) was accepted as true and mine as false as the former’s evidence was not tested. In the circumstances it behoved the Second Respondent to draw to my representative’s attention during the arbitration the consequences of his failure to challenge evidence which was in dispute as opposed to merely presenting my version. In view of the Second Respondent’s aforesaid failure, the latter failed to properly adjudicate the real issue.

5.2 The Second Respondent failed to accept into the record and consider highly relevant evidence relating the Hawks’ refusal to charge me criminally based on a lack of credibility on the part of the complainant. I am mindful of the fact that the Second Respondent determines the complainant’s credibility independently of another law enforcement agency, but I submit that the police docket contained important information which impacted directly on the complainant’s credibility which would have made a difference to the Second Respondent’s perception of the Complainant in my matter.

5.3 By conducting herself as aforesaid the arbitration was not concluded “fairly” and failed to deal with the “substantial merits” as contemplated in Section 138(1) of the Act.”

- [4] It is evident from the transcript of the proceedings that the Commissioner came to the assistance of the applicant and the complainant when they were being cross-examined. The record reflects that when the applicant was being cross-examined the Commissioner informed Mr Petersen of the City:

“COMMISSIONER: But you know what you are doing which might be confusing the Witness because he doesn’t do this every day like you two.....”

- [5] When Mr Petersen, representative for the City, told the applicant he should have put his version to the Complainant to test alleged lies, the Commissioner intervened on applicant's behalf stating that:

"COMMISSIONER: Hey stop it that's why you know you can't ask that question, he is just an ordinary person he is not Mr. Gagayi, who knows how to test credibility, please don't do that."

- [6] In other words, both representatives were well known to the Commissioner as experienced in CCMA arbitrations.

- [7] Clauses 20 and 21 of the CCMA Guidelines require an arbitrator at the commencement of arbitration proceedings to inform the parties (inter alia) of: (i) the fact that the proceedings will be recorded; (ii) any potential conflicts of interest; (iii) the rules of proceedings; (iv) the role and powers of the arbitrator; (iv) the procedure in terms of which documents are introduced into proceedings; and (v) the requirement that if evidence of a witness is disputed, the other party should, at the appropriate stage, question the witness in that regard and put its version to the witness so that the witness has an opportunity to respond. Clause 21 of the CCMA Guidelines reads:

'21 The extent to which the arbitrator deals with any of these issues should be determined by the experience of the parties, or their representatives, and their knowledge of CCMA procedures. If it is evident at a subsequent stage that a party or its representative does not understand the nature of proceedings and that this is prejudicing the presentation of its case, the arbitrator should draw this to the attention of the party. Circumstances in which it may be appropriate for the arbitrator to do this include if a party:

21.1 fails to lead evidence of its version under oath or affirmation;

21.2 fails to cross-examine the witnesses of the other party or fails to put its version to those witnesses during cross-examination; and

21.3 changes its version of events or puts a new version during proceedings.'

- [8] If regard is had to the record of the arbitration, I am satisfied that the Commissioner performed her duty in respect of the above Guidelines. If the applicant's representative did not put all of applicant's case to the employer's witness in cross examination, the most likely explanation would be that he had not been adequately instructed. There was no need for the Commissioner to explain how arbitration proceedings are conducted to the seasoned representatives before her.
- [9] In as far as the admission of the docket was concerned, the Commissioner merely pointed out that the two—processes, criminal and civil, were distinct. The docket is in the record of the proceedings before me and on its face takes the matter no further. It would seem that the criminal matter was not proceeded with because of the refusal of the complainant's girlfriend to become involved.
- [10] The Commissioner accepted the evidence of the complainant as against that of the applicant, taking into account issues of credibility and weighing the evidence on a balance of probabilities. As she says in her award, the complainant stood his ground as to his version "...in the face of vigorous cross-examination by Mr Gigayi".
- [11] The applicant has not relied on any portions of the transcribed record in the pleadings before me. The grounds that are relied on, as set out above, do not meet the bar of establishing that the decision of the Commissioner was one that a reasonable decision maker could not reach. The application must therefore fail.
- [12] In all the circumstances, I make the following order:

Order

1. The review application is dismissed.

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H.Rabkin-Naicker

Judge of the Labour Court

Representation on the papers

Applicant: Venfolo Lingani Inc

LABOUR COURT