REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Not Reportable

Case no: D385/12

In the matter between:

ELPHAS KHETHOKUHLE NZAMA **Applicant**

and

SAFETY AND SECURITY SECTORAL

BARGAINING COUNCIL **First Respondent**

FAAIZA SYED N.O **Second Respondent**

SOUTH AFRICAN POLICE SERVICE **Third Respondent**

Heard: 13 March 2014

Delivered: 28 May 2014.

Summary: Review of an arbitration award – dismissal for misconduct by police officer while on duty – officer escaped entrapment while other was caught - the second respondent did not misconceive the nature of the inquiry at hand, neither did she arrived at an unreasonable result as the decision she reached fell within the band of reasonableness.

JUDGMENT

CELE J

Introduction

[1] The applicant seeks an order in terms of section 158 (1) (g) of the Labour Relations Act[1] to review, set aside, alternatively to correct the arbitration award dated 23 March 2012, issued by the second respondent in this matter, with an order that the dismissal was substantively unfair and to reinstate the applicant to his employment. The third respondent opposed this application which was granted in its favour as the erstwhile employer of the applicant.

Factual Background

[2] The applicant was employed by the third respondent on 1 July 1994 as a member of the South African Police Services, the SAPS. At the time of this matter he held the rank of a Warrant Officer and was attached to KwaMashu Police Station in the Detective services, where he had to investigate criminal cases assigned to him. One of the cases he had to investigate involved a suspect, Mr Dumisani Khwela. The applicant was working together with his colleague Warrant Officer Shezi when they arrested Mr Khwela who presented himself at Ntuzuma police station. He was facing a charge of murder.

[3] On the day following the arrest of Mr Khwela, his sister Ms Nokuthula Njapha arrived at the police station. She was well known to Mr Shezi and the applicant as she had been working with them at the police station as a Data Capture. She had also been applicant's girlfriend. They had occasions to socialize together such as in a farewell function with a braai for some staff members, held at Hazelmere Dam in Verulam. The applicant, Mr Shezi, Ms Njapha and Mr Khwela left the police station together in a State motor vehicle with Mr Khwela at the back seat. They proceeded to a house in Mount Royale owned by Mr Khwela's and Ms Njapha's grandmother, Ms Shabalala.

[1] Act No. 66 of 1995.

[4] There is a dispute of facts pertaining to the communication which transpired between Ms Njapha, the applicant and Mr Shezi en route to and while at Mount Royale and the reason for the visit to that house. According to Ms Njapha the police officers demanded R9000.00 from her which was to be shared between the two officers, the prosecutor handling the case and the rest was to be used to pay bail for the release of Mr Khwela. Mr Khwela said that a similar demand had been made to him by the applicant and Mr Shezi. The applicant denied the allegations, though he said that he suspected that Ms Njapha and Mr Shezi appeared to be setting up something. He said that he drove the vehicle to Mount Royale in the course of his duties to verify the alternative address of Mr Khwela for a consideration of his bail application.

[5] Ms Njapha reported to the police authorities that the applicant and Mr Shezi were demanding money to sort out the case for her brother. A police undercover operation was set up. It resulted in the arrest of Mr Shezi who once brought to court, pleaded guilty to the charge leveled against him. The applicant was also arrested, though not through the undercover operation. Mr Shezi was sentenced to undergo a term of imprisonment of about ten years but the applicant was discharged for lack of any incriminating evidence.

[6] The third respondent also investigated the allegations against the applicant and it then charged him with an act of misconduct as a breach of regulation 20 (P) in that while on duty, during 28 October 2009, he conducted himself in an improper, disrespectful and unacceptable manner as he:

> 'unlawfully and dishonestly extorted the sum of Nine Thousand Rands (R9,000.00) from Ms N. Njapha for bail for her brother Dumisani Kwela and that you will pay the prosecutor and you would also get paid. A trap was set and your colleague Insp. Shezi was arrested when the money was handed over'.

[7] The applicant was found to have committed the act of misconduct he was charged with and he was dismissed on 23 July 2010. The applicant duly lodged an internal appeal against his dismissal but such appeal was unsuccessful. Aggrieved by his dismissal, he referred an unfair dismissal dispute to the first respondent and that referral culminated in arbitration

proceedings which were presided over by the second respondent. Following the arbitration proceedings the second respondent issued the award which is the subject of this application wherein he found the dismissal of the applicant to have been substantively fair.

Evidence

[8] According to Mr Khwela he arrived home on 28 October 2009 to be informed that police officers had come looking for him and they had left a paper with their telephone numbers. As a result of further telephone communication the applicant and Mr Shezi arrived at his home to arrest him. They told him they were the police who worked with money. They told him to get R2000.00 for their drinks, R2000.00 for the prosecutor and to get bail money, in case he would be granted bail by court. They took him along and *en route*, went to various places to get him cellular telephone air time so as to telephone people from whom he could get money they wanted. No one was available on that night to assist him with money. In any event, he had been advised not to pay the police any money but to first appear in court and determine the position from there. He was taken to the police cells where he was detained for the night.

[9] On 29 October 2009, he was taken from the police cells to the Verulam Court by the same two police officers and Ms Njapha was also in the car. On the way they went to his aunt's where they dropped Ms Njapha to organize money. At court he was granted bail in the amount of R1500.00. There was no one to pay that money for him until his girlfriend paid it while he was already at Westville Prison and he was then released on the same day, that is, 29 October 2009. He met with Ms Njapha and both went to Mount Royal to get money for the police officers. Both officers were interchanging in demanding money from him, saying the arrest was to save him from those of community members who wanted to kill him.

[10] Mr Khwela denied knowledge of a demand of R9000.00 by the police, allegedly made in the presence of his sister, Ms Njapha. Nor did he hear any discussions for such money made in the presence of Ms Shabalala. He bore

no knowledge of any telephone numbers being exchanged between the police and Ms Njapha.

[11] Ms Njapha said that she arrived home on 28 October 2009 to learn that Mr Khwela had been arrested earlier on that evening. Mr Khwela then telephoned her to confirm the report. Sometime later that evening, the applicant also telephoned her to inform her of the arrest of Mr Khwela for a crime of murder and that she was to prepare R4000.00 for his bail money. She told the applicant that she would meet with the applicant in the morning of the following day.

Chief findings of the second respondent and grounds for review

[12] The review grounds outlined by the applicant simultaneously identified the findings of the second respondent that are under attack. The applicant contended that the award issued by the second respondent was not the one that a reasonable decision-maker could have made and was consequently reviewable for one or all of the following reasons:

1 The evidence before the second respondent does not justify the conclusion that she made in paragraph 11.6 of the award in that –

1.1 Ms Njapha stated during arbitration that the applicant demanded money from her grandmother, Ms Shabalala, for releasing Mr Khwela, and for bribery. This was disputed by Ms Shabalala when she gave her evidence. Ms Shabalala stated that we never spoke about money to her but Ms Njapha asked her for money to pay bail for Mr Khwela.

1.2 Mr Khwela denied having heard the applicant and his crew mate, Mr Shezi demanding the money from Ms Shabalala

1.3 According to Ms Njapha, Ms Shabalala said she had no money and she phoned her son, one Vusi, in Cape Town asking for money. This version was disputed by the respondent's own witness, Mr Khwela.

1.4 Ms Njapha was not truthful as she said that Ms Shabalala was her Grandmother

1.5 Ms Njapha stated that when she was busy talking to Mr Khwela the applicant demanded R9000.00 but this was not corroborated by Mr Khwela

1.6 Mr Khwela stated that when they were in the police vehicle en route to Ms Shabalala's house, Mr Shezi and the applicant spoke about money for drinks but he could not say who mentioned what as they were both talking at the same time. This evidence was not supported by Ms Njapha as she only alluded to request for money prior and after the trip to Ms Shabalala's house in Mount Royal.

2 The second respondent found in paragraph 11.3 of the award that the trip to Mount Royal "was inadequately explained by the applicant and was shrouded in suspicious conduct". The second respondent clearly failed to apply her mind to the evidence before her that the purpose for going to Mount Royal was to verify Mr Khwela's alternative address. However, en route to Mount Royal, the second respondent has not proffered any rationale behind her finding in this regard. The second respondent suggests that it is improper to verify the address at the time when Mr Khwela was en route to court. There are no bases for this suggestion as the suspect's address can be verified at any time before bail is determined by the court.

3. The second respondent makes millage of the fact that the applicant suspected Mr Shezi of setting up something with Ms Njapha. She found that the applicant failed to properly act with the onus which rests upon him as a police officer. There is no evidence that the applicant was aware that Mr Shezi was involved in any misdemeanor other than a mere suspicion based on the fact that Mr Shezi and Ms Njapha had constant telephone calls. The applicant became aware of this after Mr Khwela had been granted bail when he discovered that there were a

number of missed calls in the state issued cellular telephone which was used by Mr Shezi and applicant.

4 It is of grave concern that the second respondent could arrive at such adverse conclusions against applicant when she had clear evidence before her which could have resulted in the dismissal being set aside.

5 In paragraph 11.4 of the award, the second respondent found that Ms Njapha and Mr Khwela gave clear reasonable evidence although they were not completely corroboratory. She found that the areas that lacked corroboration were explicable. With respect the second respondent committed gross irregularity in the exercise of her duties as an arbitrator in that she failed to provide any explanation for this bizarre finding. She failed to explain why she found that the evidence of Ms Njapha and Mr Khwela was to certain crucial extents clear and reasonable. The allegation that "the areas that did lack corroboration were explicable either since they undertook aspects independently or because of the timeline and nature of the incident of the arrest and the money which was being sought by police officers" is a concoction by the second respondent. Ms Njapha and Mr Khwela never gave such explanation for the contradictions or lack of corroboration in their respective testimony. Thus a reasonable decision maker could not have sought to provide an explanation for lack of corroboration where no explanation was proffered by the witnesses. A reasonable decision maker would have and could have rejected the third respondent's version and found in favor of the applicant.

6 Furthermore, in the same paragraph 11.4 of the award the second respondent found that the applicant's own witness, Ms Shabalala, had stated that "she suspected that the policemen were (sic) criminals, her evidence is therefore viewed in light of this submission". Again this is a manifestation of the second respondent's reliance on evidence that was not led at the arbitration hearing. Her conclusion is not rationally supported by the evidence before her. Ms Shabalala stated that when the applicant and Mr Shezi arrived at her house she asked if they were

not criminals and asked them to produce their appointment cards to confirm that they were police officers.

7 In paragraph 11.2 of the award the second respondent makes an inexplicable finding that "what was glaringly apparent from most of the evidence before me was the lack of subjecting the applicant's version to the respondent's witnesses". The second respondent has not explained which of applicant's version was not put to the witnesses of the third respondent.

8 In the same paragraph, the second respondent found that there was no grudge or animosity against applicant by Ms Njapha. She did not proffer any explanation for this finding notwithstanding that she had a duty imposed on her by the Act to provide brief reasons for her award.

9 Ms Njapha gave the money to Mr Shezi during the police trap and the applicant was not present when this happened. There was no evidence that Mr Shezi acted in concert with applicant.

Grounds opposing the review application

[13] The third respondent opposed the granting of the review application on any grounds contended for by the applicant by submitting, *inter alia*, that:

1. There are no satisfactory reasons before this Court to prove that there has been a defect in the arbitration proceedings and therefore there are no reasons as to why the decision made in the award should be substituted and or set aside by the Court. The second respondent was correct and reasonable in her finding that the applicant failed to adequately explain the trip to Mount Royal and that it is factually incorrect that the second respondent had failed to apply her mind to the evidence. The purpose to Mount Royal as stated by the applicant was to verify an alternative address. The second respondent made a credibility finding, as she was entitled to do, when she rejected the applicant's version in respect of the purpose of the trip on the evidence before her.

2. The second respondent was rational and reasonable in her finding that the applicant failed to act properly as a police officer. Her finding in this regard was based on the applicants own version that he was suspicious of Mr Shezi's conduct following his discovery of the numerous phone calls between Ms Njapha and Mr Shezi. The applicant admitted that he had suspicions that *"*Shezi had been setting up something with Ms Njapha*",* yet he failed as a police officer to act thereon. Further it is common cause and or not in dispute that Ms Njapha had mentioned the money for the prosecutor and still the applicant had failed to react to his suspicions. Therefore, the second respondents finding of misconduct on the part of the applicant was not based on the version that the applicant was present when the money was exchanged.
3. The second respondent was correct in her finding that whilst on duty and having the suspicions of corrupt activities between Ms Njapha and Mr Shezi, the applicant failed to act, by his failure to act he therefore failed in his duties as a police officer and brought the third respondent into disrepute and hence was guilty of misconduct.
4. It is specifically disputed that the second respondent committed a gross irregularity in the exercise of her duties as an arbitrator in that she failed to provide an explanation for her finding. The second respondent indeed provided reasons for her finding. She stated unambiguously and clearly that areas that did lack corroboration between Ms Njapha and Mr Kwela 'were explicable either since they undertook aspects independently or because of the timeline and nature of the incident and arrest and the money which was being sought by police officers'. The applicant's contention that the above reasons provided by the second respondent were a "*concoction*" was baseless and simply without merit. Further, the witnesses do not have to give reasons for the lack of corroboration. The applicant should have challenged this evidence if he wanted to prove that the lack of corroboration was a credibility issue rather than issue of the witness's opportunity to observe the versions presented.
5. The witnesses do not have to corroborate each other on every aspect

of the evidence it is sufficient and satisfactory that the witness corroborate each other on material aspects of the evidence which was done in this case. The second respondent was well within her powers as arbitrator to draw reasonable and negative inferences from the proper evidence before her or from the lack of challenge of the evidence presented.

6. The second respondent did provide reasons for her finding that there was no grudge or animosity between Ms Njapha and the applicant. The second respondent clearly states that from Ms Njapha's undisputed evidence that Ms Njapha obtained a lift from the applicant after the braai, for her friend and herself, after she had applied for a reservist position and that the applicant also assisted her in giving her a lift to Mount Royal even after the incident on 29 October2009, led her to the finding that there was no grudge or animosity between the applicant and Ms Njapha. The second respondent's conclusion reached was indeed rational and reasonable on a consideration of the conspectus of the evidence.

7. The second respondent's finding of misconduct on the part of the applicant was not based on the version that the applicant was present when the money was exchanged.

Evaluation

[14] Section 145 contains grounds for a review application premised on the provisions of section 158 (1) (g) of the Act[2]. Such grounds are suffused by the constitutional standard of reasonableness[3]. In *Herholdt v Nedbank Ltd*[4], the Supreme Court of Appeal held, with respect to what constitute a gross irregularity in the conduct of the arbitration proceedings, inter alia, that:

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[2] Which reads:'The Labour Court may, subject to section 145, review the performance or purported performance of any function provide for in this Act on any grounds that are permissible in law.'

[3] See *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC) and (2007) 28 *ILJ* 2405 (CC)

[4] (2014) 35 *ILJ* 943 (LAC).at para.25.

> 'A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2) *(a)* of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145 (2) *(a)* (ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.'

[15] In *Fidelity Cash Management Services v CCMA and Others*[5] the LAC had an occasion to resound the following warning to review Courts:

> 'It will often happen that, in assessing the reasonableness or otherwise of an arbitration award or other decision of a CCMA commissioner, the Court feels that it would have arrived at a different decision or finding to that reached by the commissioner. When that happens, the Court will need to remind itself that the task of determining the fairness or otherwise of such a dismissal is in terms of the Act primarily given to the commissioner and that the system would never work if the Court would interfere with every decision or arbitration award of the CCMA simply because it, that is the Court, would have dealt with the matter differently…'

[16] In *Ellerine Holdings Ltd v CCMA and Others*,[6] the Labour Appeal Court had occasion to expand on the meaning of 'gross irregularity' as expounded in the *Sidumo* test in the following terms:

> 'When all of the evidence is taken into account, when there is no irregularity of a material kind in that evidence was ignored, or improperly rejected, or where there was a full opportunity for an examination of all aspects of the case, then there is no gross irregularity..'.

[17] Then in *Bestel v Astral Operations Ltd and Others*,[7] the Court commenting on an appropriate approach to review applications also said that:

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[5] [2008] 3 BLLR 197 (LAC) at para 98, and also (2008) 29 *ILJ* 964 (LAC).
[6] 2008) 29 *ILJ* 2899 (LAC) at 2906E-F.
[7] [2011] 2 BLLR 129 (LAC) at para 18.

> '…[T]he ultimate principle upon which a review is based is justification for the decision as opposed to it being considered to be correct by the reviewing court; that is whatever this Court might consider to be a better decision is irrelevant to review proceedings as opposed to an appeal. Thus, great care must be taken to ensure that this distinction, however difficult it is to always maintain, is respected.'

[18] In this matter, the question is then whether the decision reached by the second respondent is so unreasonable that a reasonable arbitrator could not reach it on all the material that the parties brought before him. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable, as said in the *Herholdt v Nedbank Ltd* case *supra.*

[19] The first ground of review attacks the assessment of evidence of the third respondent's witnesses en route to and while at Mount Royal. If ever there was any doubt about the credibility of Ms Njapha's evidence, the entrapment and its results which saw Mr Shezi arrested, pleading guilty and sentenced in a criminal court, shifted the probabilities in favour of her version. All of the evidence points towards Ms Njapha having formulated her suspicion on the misconduct of the police officers while she was in the state motor vehicle with them. She reported to the senior police members on what she had understood the police officers to be saying while she was in that state motor vehicle and at Mount Royal.

[20] Ms Njapha would have telephoned Mr Shezi as part of the entrapment process, finally leading to his arrest. She had a cellular telephone number of the applicant and she used it to telephone him while he was still at court on 29 October 2009 and offered him the money she believed had been demanded by the police while she had been with them earlier on the that day. In his evidence the applicant sensed that an entrapment was in progress. His evidence was that Ms Njapha told him on the telephone that she was bringing money for the prosecutor, for them, meaning the police, and for bail. He told her the police did not need any money but that she was to bring bail money

for her brother. The response he gave to Ms Njapha is telling. He did not question her on what money she was talking about. Instead he told her what to bring and what not to bring. It is also interesting to note that Ms Njapha knew that bail had been granted to her brother and the amount thereof. It is known that bail is not there for a take in serious criminal cases such as murder that Mr Khwela was charged with. The only evidence of the source of her information was the discussion she had with the applicant and Mr Shezi in the state motor vehicle.

[21] If the applicant was as innocent of the misconduct with which he was charged, as he would have the second respondent believe, it begs the question why he started the day of 29 October 2009 by doing the obviously wrong things. The undisputed evidence of Ms Njapha was that when she met the applicant at the police station in the morning he told her to go out of the station and wait at the gate for him as he went to collect Mr Khwela from the holding cells. The arrangement was done so that the applicant would not be seen taking Ms Njapha into the state motor vehicle and leaving the police station with her. Ms Njapha had no reason to be in the state motor vehicle while the applicant went about his official duties for the day. Further, it remained unclear why the applicant had to verify an alternative address for Mr Khwela. The evidence was that the applicant had been at the home of Mr Khwela on 28 October, looking for him but left a message for him to contact the police when Mr Khwela returned home. So the applicant knew the home of Mr Khwela. The need to verify any address of Mr Khwela remained not properly explained. While it remained common cause that the applicant drove to Mount Royal on 29 October 2009, it was never clarified what he then did in the process of verifying the alternative address. Against that, there was the evidence of Ms Njapha that the applicant took part in the discussion of money to be given to the police, the prosecutor and for bail.

[22] In my view, any disparities in the evidence of Ms Njapha and her brother, Mr Khwela, are cured by the balance of balance of probabilities in favour of their version. In fact, the submissions on this ground and on all other six grounds that follow thereafter are grounds of appeal than those of review. It has thus

become unnecessary to deal individually with each of those grounds on the basis of the review principle already outlined in the *Herholdt v Nedbank* decision supra.

[23] The last ground relate to there being a grudge on Ms Njapha as a basis for a submission that she lied to falsely implicate the applicant because she had an exe to grind with him. The applicant's evidence was that he was pretty drunk when he discerned that Ms Njapha threatened him. As the second respondent pointed out, the applicant and Ms Njapha got along very well on 29 October 2009. He went out of his way to put her in the state motor vehicle without permission to do so. But for the arrest of Mr Khwela by the applicant, Ms Njapha would not have pitched into the scene on this day. It has not been suggested that Ms Njapha had a grudge against Mr Shezi, who is currently serving a ten year term of imprisonment as a result of Ms Njapha's involvement of the senior police officials to investigate this matter. The applicant was clutching at straws when he raised the issue of a grudge. This ground must therefore suffer the same fate as others. The second respondent did not misconceive the nature of the inquiry at hand, neither did she arrive at an unreasonable result as the decision she reached fell within the band of reasonableness.

[24] Accordingly, the following is an appropriate order:

1. The review application against the arbitration award issued by the second respondent in this matter is dismissed.
2. No costs order is made.

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Cele J

Judge of the Labour Court of South Africa.

APPEARANCES

For the Applicant: A.P.Shangase

For the Respondent: N.Govender instructed by State Attorney (Durban)