



Not Reportable

Case no.: D652/14

In the matter between:

SERAME MOFOKENG

Applicant

and

SALGBC

1st Respondent

VEESLA SONI

2nd Respondent

NEWCASTLE MUNICIPALITY

3rd Respondent

Heard: 24 February 2015

Delivered: 24 February 2015

JUDGMENT

CELE J

[1] The application before me is one in terms of section 145(2) of the Labour Relations Act 66 of 1995, where the applicant seeks to be granted an order in the following terms:

1. That the arbitration award of the second respondent under case number KDP0231401, given under the auspices of the first respondent, dated 7 July 2014, be

and is hereby reviewed and set aside.

2. That the arbitration award be reviewed and set aside in terms of paragraph 1 above and is replaced with an order that the third respondent reinstates the applicant from the date the applicant was unfairly dismissed by the third respondent, to his position within the third respondent.
3. Alternatively to paragraph 2 above, that the arbitration award is reviewed and set aside in terms of paragraph 1 above and is replaced with an order that the third respondent re-employs the applicant either in the work in which the applicant was employed at the third respondent before his dismissal, or in reasonably suitable work on the same or similar terms.
4. That the costs of this application be paid by the respondent which opposes this application or by those respondents jointly and severally, the one paying, the other to be absolved.

[2] The application is opposed in this instance by the third respondent, who was the erstwhile employer of the applicant.

It is common cause that the applicant was an employee of the third respondent in the private security industry. To discharge his duties he had to put on a uniform. It appears to have been a navy shirt and navy pants, or something close to that effect.

- [3] The applicant was charged with an act of misconduct, theft of diesel, he was found guilty and was dismissed. He referred an unfair dismissal dispute for conciliation. An attempt to resolve the dispute failed. He then referred it to arbitration. It came before the second respondent as the appointed Commissioner of the first respondent. Two witnesses were called by the third respondent, being the employer, and two witnesses testified for the applicant, the applicant being one of such. At the end of the arbitration hearing the Commissioner issued an award wherein she confirmed the fairness of the dismissal and she dismissed the application before her. The applicant has approached the Court to review this arbitration award.
- [4] The applicant was working on the relevant night in question and, as I have indicated, he was wearing his uniform, but he was stationed at the boom gate. Whilst he was working it came to light that there was an unusual movement where the tractors of the Municipality were kept at or near a shed.
- [5] Staff personnel that were observing the CCTV recordings noticed these movements and became concerned. One of them was a Mr Mtshali. He then attracted the attention of the other three colleagues with whom he was at the time working to what he had seen. They played back the recording. They saw a person who appeared to have been carrying a container which was either a 20 or 25 litres. He carried another object which appeared to be a flexible object that looked like a pipe. Those that were observing formulated an opinion that this person was sucking diesel from the tractors because there

was a container and a pipe and the person appeared to have been kneeling, but they could not make out clearly what was going on. They thought that he was wearing the uniform of the security persons with a two-way radio.

- [6] The respondent's version is that at the time the applicant was the only employee working around that place. He could have been the only suspect who would have been carrying a two-way radio around the place at the time. It is, however, common cause that there was a Mr Mkhaliphi who was the head of security who was also on duty, dressed similarly as the applicant. His whereabouts at the critical point in time remained unclear. He did not even testify as to where he was.
- [7] Once the observation was done on the CCTV recording, Mr Mtshali telephoned Mr Mkhaliphi who soon came to the observatory room and he was driving a kombi. He was shown the source of concern, and he then drove the kombi to the boom gate, where the applicant was. He found the applicant there. The versions of the parties then differ.
- [8] According to the third respondent, Mr Mkhaliphi spoke to the applicant and told him to follow him, so the applicant opened the boom gate, he let the kombi in, and whilst Mr Mkhaliphi was driving the kombi he was going along with the applicant following him to the shed. The kombi was parked and the two men then went together. They were talking. They approached the shed, and apparently there was one container there.
- [9] According to the third respondent, Mr Mkhaliphi told the applicant that at the observatory room he was seen on CCTV capture stealing

diesel. According to Mkhalihi the response from the applicant was to the effect that the applicant was just trying. Mr Mkhalihi understood that to be a confession on the part of the applicant, meaning he was trying his luck. At that stage, according to Mkhalihi, the applicant started running away, trying to hide the containers. It came to light that there were about four more containers around of 20 or 25 litres. It is not clear in the evidence how many were filled with diesel.

- [10] It is not clear in the evidence whether any of the tractors from which diesel could have been sucked or stolen had their diesel tanks opened or locked at the particular point in time.
- [11] Mr Mkhalihi said that the applicant used his telephone to talk to another person, a Mr Sithole, and to plead with him so that he would not be dismissed, and in that discussion Mr Sithole finally also came to the scene. The applicant denied having ever communicated to anyone a plea not to be dismissed. Mr Mkhalihi said he was instructed By Mr Sithole to dismiss the applicant with immediate effect, which he did not agree to do then.
- [12] The evidence of the third respondent was that the person on the video capture looked more or less like the applicant and carried a two-way radio. Added to that was the confession that the applicant made. The third respondent found him guilty and dismissed him. When the evidence was tendered at arbitration, it came to light that Mr Mkhalihi had made a statement to the police. He was referred to that statement. He associated himself with the first part of the statement, but he distanced himself from the second part of the statement. That

second part of the statement reads thus:

“On my arrival at the site I found security officer Mofokeng,
who was busy draining diesel from the tractor.”

- [13] Mr Mkhalihi indicated that he had allowed the statement to be drafted and he simply signed it, and he then denied that he found the applicant busy draining the diesel from the tractor. That was obviously a serious contradiction on the part of the written statement and the *viva voce* evidence.
- [14] The evidence of the applicant is that he was on duty on the night in question, wearing a uniform. He did have a two-way radio. He did not have any spectacles on. He was not wearing any light shirt. He was positioned at the boom gate and he kept himself there. He was cross-examined and he suggested that all he had to do was to watch the gate. As a security person he was in fact in charge of the premises and not just to watch who was going in and out of the boom gate.
- [15] That part of his evidence might have discredited him with the Commissioner. Other than that his version did not have inherent improbabilities as he denied having stolen any diesel on the night in question. He said he never went anywhere near the shed where the tractors were parked and he calls it a place which is about four blocks away from the gate where he had been. He denied having walked with Mr Mkhalihi to the shed after the two had met on the night in question, but he said that he allowed the kombi in and Mr Mkhalihi went to park it and the applicant went to him to talk.
- [16] It is clear from the evidence of the respondent that in the video

capture Mkhalihi does subsequently appear at the time when he had met with the applicant. He was alone at the time and not with the applicant. The Commissioner's approach was that the evidence on the video footage left much to be desired as not to be reliable. She could not rely on it, and she made a finding that that evidence was not sufficient. She did not stop there. She had the following to say in the award.

"However, in assessing the evidence wholly and cumulatively, he was the only person on duty where the tractors were parked. There was an admission to Mr Mkhalihi that 'I was just trying my luck', and he later apologised to Sithole,

.....

The test was a balance of probabilities and not beyond a reasonable doubt. The applicant tried to discredit Mkhalihi, but the allegations about their relationship were unfounded and tailored to suit his case."

[17] The Commissioner goes on at paragraph 20, inter alia, to say:

"The person on the footage was clearly dressed in full uniform and equipped with a two-way radio. It was therefore highly unlikely that it was any of the men that were dropped off by Mbonambi that stole the diesel. Based on the evidence and admissions by the applicant, I am satisfied that the respondent discharged the onus and established that the applicant was guilty of the offence. His behaviour was

completely unlawful and a disgrace to the Municipality. His conduct was not only intolerable, but unendurable. I have no doubt that such behaviour would irreparably destroy the trust relationship. The test is a balance of probabilities, and I am satisfied that the respondent discharged the onus. I find that the dismissal was the appropriate sanction, as such conduct cannot be condoned in the position that the applicant has. There was insufficient evidence led on procedural unfairness, and I find same to be fair."

[18] She then issued an award dismissing the application with no order as to costs. The question upon me is whether the Commissioner issued an award that a reasonable decision-maker could have issued in the circumstances. I have looked at the supplementary affidavit of the applicant in support of this application. At the outset I need to draw a distinction between the credibility aspect and the reliability aspect of the evidentiary material to determine which version was favoured by the balance of probabilities. The question that confronts me is, even if the two witnesses Messrs Mtshali and Mkhaliphi may have been honest witnesses, the real question was whether their evidence was reliable enough to find it probable.

[19] The Commissioner had every reason to doubt the evidence of the video capture. But I do not think that she conducted enough probe in this respect. There was the issue of the suspect wearing glasses and wearing a light coloured shirt. I fall back on the evidence that was before the Commissioner, the evidence of the internal disciplinary hearing. This is captured, on page 97 of the index to the documents.

Paragraphs 3.4 to 3.6 read thus:

“3.4 Mr Mtshali confirmed that there was some time staff members from the cleaning section who worked overtime and that there might have been other people on duty that night.

3.5 Mr Mtshali said that the person on the video footage looked like he was wearing glasses, and Mr Mkhaliphi confirmed this, but further added that when he arrived at the scene he confirmed that Mr Mofokeng was not wearing glasses, which did not surprise him because he had not seen Mr Mofokeng with glasses before. This difference was not material so as to discredit the witness.

3.6 Mkhaliphi also testified that he knew that there are employees from the cleansing who often worked overtime and knocked off late, but further added that he did not see anyone else. Mr Mofokeng did not deny that he is the person who was draining the diesel from the tractor.”

- [20] If the Commissioner had applied her mind to this evidence, particularly 3.4 and 3.5, the Commissioner could probably have entertained doubt about the reliability of the identification evidence on the video further. Because it seemed to be that the suspect was wearing glasses. This is the version of Mr Mtshali. That version is confirmed by Mr Mkhaliphi. Mr Mkhaliphi says when he went to the applicant he confirmed that the applicant on the night in question was not wearing glasses, so it was an important consideration in his mind at the time, it was uppermost in his mind. Therefore, it seems to be that the person

in the video must have been a completely different person.

[21] I have also examined a possibility, without suggesting that it is so, that Mr Mkhalihi himself was dressed like the applicant, he has not been excluded by the evidence as to being a suspect in this respect. That should also have thrown doubt in the mind of the Commissioner on the evidence. But further, according to the third respondent Mkhalihi and the applicant left the gate and moved together towards the shed. One would expect that in the video capture both of them would have been seen together. According to the applicant he remained behind and he did not go along with Mkhalihi. The video capture saw Mkhalihi alone. That evidence tends to suggest that the version of the applicant was the most probably true version as to their movements at the time in question.

[22] There are therefore a number of concerns about the identification of the suspect on the night in question. In my view, the facts that tend to confirm that it could be the applicant are much less than those that suggest that it was probably not the applicant. I have looked at the evidence of the applicant, who said that he did not have a good relationship with Mr Mkhalihi because he made moves towards Mr Mkhalihi's girlfriend and that they did not get along since that incident. The Commissioner correctly found, that version was never put to Mkhalihi nor to any of the other witnesses. It is a version that was developed fairly late in the proceedings. But it has nothing to do with credibility, but everything to do with how a case was poorly presented.

[23] Clearly, this is a case where there is serious doubt about the evidence of the respondent in seeking to identify the suspect to be the applicant. The question of him having tried his luck is one of those considerations that leave doubt when seen against the rest of the considerations that are put forward. I would have expected that the Commissioner should have realised that the respondent failed to lead evidence of a sufficient nature for the finding that on the probabilities the suspect was the applicant. Clearly it was not the applicant on these probabilities, and therefore:

1. The application before me stands to be granted, as prayed for in paragraphs 1 and 2 of the Notice of Motion.
2. No costs order is made.
3. The applicant is to report for duty within four days from today, because he is represented, so he will know about the outcome of this matter.

Cele J

Judge of the Labour Court of South Africa.

Appearances

For the Applicant: Sithole instructed by Dlodlu Attorneys

For the Respondent: M Sewpal instructed by KM Chetty Attorneys

LABOUR COURT