
SOUTH AFRICA / JUDGMENT

G4S Secure Solutions SA (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others (D 1148/16) [2020] ZALCD 3; (2020) 41 ILJ 1388 (LC) (12 March 2020) [2020] ZALCD 3

COURT
Labour Court Durban

BEFORE
Lagrange

CASE / FILE NUMBER
D 1148/16

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Source record

THE
LABOUR COURT OF SOUTH AFRICA,
(HELD
AT DURBAN)
Of
interest to other judges
Case
No: D 1148/16
In

the matter between:

G4S
SECURE SOLUTIONS SA (PTY) LTD
Applicant
and
COMMISSION
FOR CONCILIATION, MEDIATION AND ARBITRATION
First
Respondent
LESTER
SULLIVAN (N.O.)
Second
Respondent
ERNEST
ZWELISHA NTOZAKHE
Third
Respondent
ISHMAEL
MTHOKOZISI MBAMBO
Fourth
Respondent
HLENGIWE
HADEBE
Fifth
Respondent
LUNGILE
JUDITH MTHEMBU
Sixth
Respondent
NONHLANHLA
PRINCESS GUMEDE
Seventh
Respondent
SIYANDA
KOWA
Eighth
Respondent
FUTURE
LANGA
Ninth
Respondent
Heard: 13 November
2019

Delivered:

12 March 2020

Summary: (unfair dismissal for misconduct-review-tendering false medical certificates knowing they were not genuine- arbitrator's one-sided evaluation of evidence-failure to consider inconsistencies and inherent probabilities of applicants' evidence - arbitrator's failures significant enough to have distorted his reasoning and led him to a conclusion that is not supported by the evidence- award set aside)

JUDGMENT

LAGRANGE J

Background

- [1] This is an application to review and set aside an arbitration award in which the arbitrator found that the seven individual respondents ('the employees') were not guilty of dishonesty with fraudulent intention on the basis that they had not knowingly provided the employer with fraudulent medical certificates.
- [2] The discovery of the fraudulent certificates had been triggered in an inquiry where another employee, one Mxolisi Shangele had admitted that she had paid someone for a medical certificate ostensibly issued by a certain Dr M Peer. The employer then conducted an investigation of other similar certificates which led to the charges being issued against the individual respondents, who had all submitted similar medical certificates.
- [3] At the arbitration there was some ambiguity in the stance adopted by the employees because their representative clearly understood it to be common cause that the certificates they had submitted were indeed false, whereas the evidence of the employees was that they were treated by someone who appeared to be a doctor and they still believed that to be the case and that consequently the certificates they received were genuine. In essence, the real thrust of their defence was that they were treated by someone they thought was a doctor and could not have known that the person who issued them with the certificate after treating them was not a doctor. The arbitrator accepted their evidence in this regard. The crux of his finding is contained in paragraph 33 of his award:

"In short, while there are compelling reasons to accept the respondent's submissions that the medical certificates were purchased by the applicants, the direct evidence of the applicants as tested by lengthy and competent cross-examination is a more compelling reason to find, on the balance of probabilities, that the applicants were genuinely ill, went to see a person they believed to be a general medical practitioner and handed in what they believed to be a genuine medical certificate. In the circumstances applicants were not dismissed for a fair reason."

- [4] In reaching this conclusion, he dismissed the evidence of Mr Moodley, an HR manager, who had conducted the investigation and who, together with another HR officer, had taken one of the employees, Ms P Gumede ('Gumede'), the seventh respondent, to a building in Smith street, Durban, where Gumede claimed she had visited the doctor. The arbitrator described Moodley as being thoroughly discreditable and having made a bad impression handling difficult questions in an evasive manner. He decided he preferred the individual applicants' version that they had genuinely believed the person they had seen was a doctor even if, in truth, the certificates they received were forgeries. He also accepted 'without hesitation' their evidence that they were not asked by Moodley to take him to the doctor they claim to have consulted. The arbitrator clearly believed the employer was obliged to do this in order to prove its case.
- [5] He found that their dismissals were procedurally fair but substantively unfair and reinstated the applicants with retrospective effect to the date of the dismissal on 23 December 2013, with back pay.

Preliminary matters

- [6] Before dealing with the review application, there are some preliminary matters to be dealt with. There was an application for condonation for the late filing of the record and supplementary affidavit. There was also an amendment of the citation of the third respondent, owing to the individual respondents' trade union withdrawing as the representative. That amendment has been effected so that the individual respondents are separately cited. Lastly, there was an objection made by the applicant to the late filing of the respondent's answering affidavit. This objection was not pursued by the applicant in argument.
- [7] The applicant applies for condonation for the late filing of the record and accompanying supplementary affidavit. This application was unopposed.
- [8] It appears that the record was available for upliftment from the registrar by the end of December 2014. Accordingly, in terms of the Labour Court Practice Manual the record should have been filed by the end of February
2015. It was ultimately filed on 26 August 2015, some 6 to 7 months late. The explanation for the delay is in two parts. Firstly, the applicant contends that until the end of June, or early July, the parties were engaged in discussions on possible ways of settling the dispute having agreed in early April 2015 that the review proceedings would be stayed pending the outcome of those settlement discussions.

- [9] The second part of the delay is the period from early July until 16 August 2015 when the application was in the hands of the applicant's counsel who proved unable to assist in finalizing the supplementary affidavit, after which the attorneys took over the task and filed the affidavit on 4 September 2015. The transcript comprises some 360 pages and the supplementary affidavit augments the founding affidavit substantially. The nature of the review is one in which the versions

of a number of witnesses were contrasted and the grounds of review are ones requiring a fairly detailed examination of the record.

- [10] As the first part of the delay appears to have been accepted by mutual agreement in the interests of trying to settle the matter without unnecessary cost being incurred, I am satisfied that no further justification is required for that portion of the delay. Because there was consent that the application be stayed while they explored a settlement, this agreement effectively amounted to an agreement between the parties on an extension of time to file the record, and accordingly, the review was not deemed withdrawn in terms of Item 11.2.3 of the Labour Court Practice Manual.
- [11] As to the remainder of the delay the period of eight weeks, though significant, it was not marked by inactivity by the applicant and the explanation is sufficient given the nature of the supplementary grounds of review by the applicant, even though it might have acted with more speed at that stage. To the extent that the merits are considered, for the reasons dealt with in the analysis below, they lend more weight to the case for granting condonation.

Grounds of review and evaluation

Review grounds

- [12] The review is essentially based on grounds that the arbitrator's evaluation of the evidence led him to findings that cannot be justified on what was before him. In a bit more detail, the flaws in the arbitrator's evaluation which led him to unjustifiable conclusions may be summarised as follows:

12.1 The arbitrator only scrutinized the applicant's evidence for weaknesses, while disregarding the strengths of the evidence which implicated the individual respondents.

12.2 While making an adverse finding of credibility against one of the employer's main witnesses, Mr Moodley, the arbitrator failed to assess the credibility of the evidence of the individual respondents, particularly in regard to the allegedly inherent improbability of their versions.

12.3 In evaluating the respective versions of the parties, the arbitrator simply paid no regard to the fact that very little of employees' versions, which he preferred, had even been put to the employer's witnesses.

12.4 He incorrectly excluded relevant evidence of the chairperson when he testified on a version given at the disciplinary inquiry by one Ndlalose, who was one of the original individuals dismissed for the same misconduct but who is not a party to these proceedings.

- [13] The applicant argues that the arbitrator's uneven evaluation of the parties' respective evidence essentially prevented him from conducting a fair hearing.

Evidence pertinent to the grounds of review

- [14] To deal with these claims a synopsis of some of the evidence presented at the arbitration relating to these claims is necessary.
- [15] Firstly, it must be mentioned that the real Dr M. Peer testified at the arbitration. She identified the certificates provided by the applicants as forgeries, both in respect of the details on the pro-forma certificate as well as the description of diagnoses and her signature. An important aspect of her evidence was that she had vacated consulting rooms at a shopping centre in Victoria Street, Durban at least a year prior to some of the fraudulent certificates that were issued, which reflected her old practice address. Moodley confirmed that he had visited that address and an address in Umgeni road but there were no doctor's rooms at either address.
- [16] The chairperson of the inquiry, Mr Hattingh ('Hattingh') gave evidence, relying on his notes of the inquiry of the testimony of different applicants. Thus, for example, Mr E Z Ntozakhe ('Ntozakhe'), the third respondent, said that he obtained his sick note from Victoria Street from an African female, who spoke English and was 'not very tall'. When Ntozakhe testified he denied he was ever asked by Moodley or anyone else to show him the doctor he claimed to have consulted. He claims he saw the doctor at the address in Victoria Street, which appears on the fraudulent certificate. To his knowledge the doctor was still there. However, he made no attempt to verify this himself because he was hoping that the company would ask him to show where the doctor was. In particular, he disputed that during the disciplinary enquiry Hattingh had asked the respondents to show him where the doctor was. When it was put to Ntozakhe that Ms L J Mthembu ('Mthembu'), the sixth respondent, had not disputed Hattingh making such a request, though she herself saw no need to take the chairperson to the doctor, Ntozakhe's response was "That's her own way of doing things. As for me, if I was asked to go with him, I would have done that." He also denied that he was asked by Moodley to show him where the doctor was. He did agree he was present when Moodley had asked Gumede to take him to the doctor she had allegedly visited in Smith Street. Virtually none of Ntozakhe's version was put to the employer's witness, except in the form of a general proposition that none of the accused employees were asked to show the company where the doctor was they claimed to have consulted.
- [17] When Ntozakhe was asked why he did not challenge his dismissal on appeal on the basis that the company should have taken him to the doctor so he could show them that there was a doctor, his response was to the effect that it was the employer's responsibility to do that.

- [18] Mr S Kowa ('Kowa'), the eighth respondent, also claimed to have received the certificate from an African female doctor in Victoria Street, as did Ms H Hadebe ('Hadebe'), the fifth respondent, who said the doctor's rooms were situated near an ABSA bank ATM.
- [19] Ms N P Gumede ('Gumede'), the seventh respondent, claimed she was issued with a doctor's note from a doctor in Smith Street situated between FNB and ABSA ATMs. However, the evidence of Moodley was that the building she took himself and Ms N Mgunyasi ('Mgunyasi') to, looked like a residential address. Mgunyasi was an HR colleague of Moodley. Mgunyasi confirmed that she accompanied Gumede to the building and Gumede merely showed her a building at the Smith Street address where the doctor's rooms had supposedly been, but did not provide any further detail about where the doctor had been located in the building. It was put to Moodley that Gumede had asked Mgunyasi to enter the property but that Mgunyasi had refused, saying it would be dangerous. Mgunyasi said she had never heard that version from Gumede before.
- [20] Mgunyasi did testify there was a small group of foreign men at the entrance gate to the building. She and Gumede asked where the doctor was, but they replied there was none. At this juncture in the evidence, the arbitrator asked if perhaps the negative response they received about the whereabouts of a doctor in the building was because the men might have thought the two of them seemed suspicious, whereas if one of them had looked ill the men would probably have directed them to a particular room. This extraordinary speculation by the arbitrator had never been suggested by the individual respondents. It was one of a number of ad hoc interventions made by the arbitrator to advance the respondents' case by developing new lines of defence they had not even suggested.
- [21] Mr I Mbambo ('Mbambo'), the fourth respondent, claimed that he obtained his sick note near Durban station and Mr F Langa ('Langa'), the ninth respondent, also said he obtained his certificate from a doctor near Durban station in Umgeni road.
- [22] The arbitrator refused to accept evidence of what one Ndlalose said at the disciplinary enquiry because he was not being called as a witness, even though there was no dispute what he had testified to. Ndlalose had been charged together with the other respondents, but was not a party to the arbitration proceedings. He had testified in the inquiry that he had obtained his certificate from a Nigerian man. Without really considering the issue of admissibility, the arbitrator decided that whatever Ndlalose said would be hearsay and therefore "completely irrelevant".
- [23] Hattingh testified that a number of individual respondents said they had received the sick notes from an African female, who was clearly not Dr. Peer. Secondly, the addresses where they said they received the certificates were nowhere near where her own practice was situated at the time the certificates were dated. The errors and inaccuracies on the sick notes submitted were all the same. Although the address on the fraudulent sick notes indicated Victoria Street, two of the applicants claimed they went to the doctor near Durban station and another claimed to have visited the doctor in Smith Street.

- [24] Hattingh further testified that he had asked the individual respondents if they would show him where the doctor was. They could not describe the shops around the area or what the doctor looked like, beyond describing her as an African female. He also testified that the company went to one of the addresses mentioned in some of the sick notes only to find a clothing shop at the address.
- [25] Moodley also testified that he could not find doctors' premises at the address stated on the forged medical certificates. He went to the Umgeni road address mentioned by Mbambo, but found no doctor there. Moodley says he gave the individuals an opportunity to take him to the doctor but they did not take up his invitation. He specifically said that Ntozakhe refused to show him where the doctor was. The only respondent who agreed to do so was Gumede. All that was put to Moodley was that the respondents, whom he said refused to show him where the doctor was, were never asked to do so. It was never suggested to him that any of them, apart from Gumede, had agreed to do so, whereas Mbambo claimed to have asked Moodley to take him to the premises where he claims to have seen the doctor and Ntozakhe said he was willing to go.
- [26] At this juncture in the arbitration, the arbitrator intervened by suggesting that it would be foolish to think that a fraudulent doctor would have remained in the same place. This hypothesis also did not emanate from the respondents' conduct of their own defence. After Moodley was cross-examined, the arbitrator questioned Moodley why he should believe him rather than the individual respondents. Moodley's answer was that there was no reason why he would only have asked Gumede to show him where she got the certificate without asking the others to do the same.
- [27] When Gumede did testify she provided details that had not been put to either of the company witnesses. For example, she claimed she told Moodley and Mgunyasi that the doctor's rooms were on the second floor of the building in Smith Street she had taken them to. Although she confirmed hearing that Ndlalose had said he had purchased the certificate from a Nigerian man at the same building, she was adamant she believed the woman that she personally had seen was a doctor. She also avoided dealing with what was common cause, namely that another employee, Ms Mxolosi Shangele who had walked away from a disciplinary enquiry had also said she had bought a certificate, which was similar to Gumede's one. Mbambo was very reluctant to answer any questions about Mxolisi having tendered a false certificate but conceded that she had confessed to have bought a sick note from someone on a bus. He had represented her in her disciplinary enquiry. He could not offer an explanation why the other sick notes tendered by the respondents could be considered genuine when they were so similar to the fraudulent note Mxolisi provided.

Moodley testified that he questioned each individual separately as the information about the different doctor's notes came in during the investigation. The respondents made statements. The arbitrator agreed to admit them, except the one from Ndlalose, who had been charged together with the other respondents. Mthembu testified inter alia that she was told by a woman in the street about a doctor in Victoria Street. Mbambo claimed that Moodley had asked him to show

him where the doctor was and he was willing to do so, but Moodley never took him. This account was not put to Moodley. When questioned

by the arbitrator, Mbambo went even further and said that he took the initiative to ask Moodley when they were going. When Mbambo

testified, he also gave a very different account of how he came to visit the doctor near Durban station compared to the version he made in his statement at the disciplinary inquiry, in which he claimed to have been struggling to walk and had been taken to the doctor by a kindly neighbour.

[28] On Mbambo's version, after entering the doctor's rooms in Umgeni road he was seen by an Indian male doctor. He claimed there were also other doctors in the surgery and on another occasion when he went, he was treated by one of the other doctors. He did not dispute that the chairperson had asked the respondents to take him to the place where they had seen the doctor, but claimed that he did not understand the question was directed personally to him. He could offer no explanation why his sick note was virtually identical to that of Gumede, who supposedly saw the same doctor but at an address in Smith Street.

[29] Ntozakhe claimed to have been present when Moodley asked Gumede to show him where the doctor was but denied he was ever asked to do the same. He was only asked to make a statement. Neither of these claims were put to Moodley when he was cross examined. Ntozakhe stated he had attended at the doctor's rooms at the address indicated on the fraudulent certificate, in Victoria street. According to him the doctor was still there. He claims he did not make any attempt to verify this because he was expecting that the company would ask him to identify the doctor's location. Contrary to Mthembu's testimony, he denied the chairperson also had asked the respondents if they were willing to share the doctor's location. He claimed that the doctor who treated him was a black female who spoke in English. When he was asked why he did not appeal against his dismissal on the basis that the company never gave him the opportunity to show it where the doctor was, his answer was "I did not see the need for that because the company itself did not see the need to cause me to go with it there."

[30] When the company called a further witness, Mr S Kheswa ('Kheswa'), who had also been dismissed for presenting a similar fraudulent certificate, he related that he had been unable to locate the doctor's rooms where the certificate appeared to emanate from. The arbitrator then strongly hinted that possibly they did not make enough inquiries about where a doctor might be despite there being evidence that the person occupying the shop at the address in question had said the doctor had left the premises. Importantly, Kheswa said he simply bought the fraudulent certificate from another employee without even seeing anyone purporting to be a doctor.

[31] Mr S Kowa ('Kowa'), the eighth respondent, gave evidence that he was forced to write a statement under threat of arrest. Yet again this claim of duress was not canvassed with Moodley. He did concede that the chairperson of the inquiry had 'asked for directions' to the doctor, which he provided, in the same way he would have given directions to anyone asking

for directions. Hattingh was not asked about this. Kowa claimed a black female doctor, who spoke Zulu, attended to him on both occasions he visited the doctor's rooms. The fact that the same doctor appeared to have seen applicants at three different premises he attributed to her having different surgeries. He claimed he had been relying on the company to take him to the surgery because it was doing the investigation.

- [32] Hadebe claimed to have been treated by a black female doctor, who spoke English. She would not be drawn on whether the doctor seemed foreign or whether she could speak Zulu. She also did not ask to be taken to the doctor's room, to clear her name, because she assumed the company would do that. She could not explain why the handwriting and signature on her medical certificate was the same as that on two of the other fraudulent certificates. She also claimed that the chairperson only asked them individually about the area around the doctor's premises and never asked any of them to take him there.
- [33] Langa testified that the company had not asked him to show where the surgery was and, at the inquiry, Moodley had testified that only Gumede was willing to show the company where the surgery was, but none of the others were asked to do the same. He said he consulted the doctor near Durban station. She was a black female who spoke in English. He also could not tell if the doctor was foreign or not.

Evaluation

- [34] The fundamental criticism levelled against the arbitrator's reasoning concerned his alleged partial evaluation of the evidence. This related both to the way he dealt with the witnesses and intervened in the questioning of witnesses, and to his assessment of credibility and the probabilities of their versions.
- [35] It is noteworthy that the arbitrator directly challenged Moodley about his credibility but did not similarly challenge any of the respondents on their credibility. The arbitrator only scrutinized the applicant's evidence for weaknesses, while not considering any weaknesses in the respondent's evidence. On more than one occasion the arbitrator's bias was displayed when he suggested defences which the respondents had not advanced. Above, I have alluded to him suggesting why nobody confirmed that there was a doctor at the building Mgunyasi and Gumede went to. He also advanced the theory that a fraudulent doctor would not stay at one location.
- [36] Further, in evaluating the weight of the respective versions of the parties, the arbitrator simply paid no regard to the fact that much of employees' versions, which he preferred, had not been put to the employer's witnesses. This is particularly so in relation to his conclusion that the company did not ask the respondents to show it where the doctor's rooms were, when in fact there was corroboration by some of them that the chairperson had asked this of them at the enquiry. He also failed to consider why none of them raised the alleged failure of the company to take up the willingness of some of them to show the company the doctor's premises when they appealed against their dismissals.

[37] The arbitrator did comment cursorily on the probabilities of the two versions, but despite the ‘compelling reasons’ to accept that the certificates were purchased by the respondents, he decided they were genuinely ill and they had gone to see someone they believed was a doctor who had issued them with a genuine certificate. His reasons for accepting the respondents’ versions as more probable were that:

37.1 Mbambo was unlikely to have informed Moodley that Mxolisi confessed to buying her certificate when he represented her, if he had also done so.

37.2 Secondly, the versions of the respondents’ appeared genuine. In this regard he was impressed that Kowa did not apologise when it was allegedly hinted to him that he would not be dismissed if he did so, and Gumede had stuck to her version through extensive questioning that she had been treated and believed that she had seen a genuine doctor.

[38] In reaching this conclusion, it necessarily follows that the arbitrator implicitly accepted that it was more probable that seven individuals, none of whom claimed to have been referred to the bogus doctor by any of the others, quite coincidentally found their way independently to one of three different addresses where they met someone who appeared to be a doctor. Further, it is necessarily implicit that he accepted that at each of the different addresses where the bogus doctor was situated, the respondents were issued with a fraudulent certificate on an identical letterhead bearing some of the details of the genuine Dr Peer, but all containing the same inaccuracies. A further necessary implication is that, assuming that the same bogus doctor must have been at the three locations at different times, as the arbitrator appeared to have believed was probably the case, by sheer coincidence, each of the respondents were fortunate to find the roving fraudster at the particular location they had happened to visit on the various days the certificates were dated. In the case of Langa he claimed to have visited the ‘doctor’ at the same location on dates nearly four months apart. Not one of the respondents said the ‘doctor’ was not at the relevant premises on the day they chanced to visit.

[39] Quite apart from the extraordinary coincidences the arbitrator needed to assume to accept that the respondents were all innocent victims of a roving fraudulent doctor, he failed to explain the coincidence of the un-contradicted evidence that two other employees had admitted to buying certificates appearing on the same fraudulent letterhead. The arbitrator accepts that Mbambo obtained his certificate in good faith from a fraudulent doctor on the basis that he would not have revealed to Moodley that Mxolisi had confessed that she had bought the certificate if he had done the same himself. What he failed to consider was that when Mxolisi confessed to this, it was in respect of a certificate dated in November 2013, whereas Mbambo’s certificate had been issued in June 2012. At the time of Mxolisi’s inquiry there was no reason for him to believe the employer would conduct a retrospective investigation of certificates previously issued to other employees like himself.

- [40] In any event, there was the undisputed evidence of Kheswa, who had also been dismissed for the same reason, that he had also bought his certificate and no evidence of him being given any inducements to lie about this. It is very telling that the arbitrator failed to deal with this evidence of at least two employees having bought certificates like those tendered by the respondents, without either of them visiting anyone masquerading as a doctor. The arbitrator did not even attempt to weigh up why it was more probable that all the respondents had in fact visited a bogus doctor when there was evidence that the same type of certificates could simply be bought without the need for the complicated deception of conducting a 'consultation', which would have necessitated the 'doctor' having access to no less than three different premises. Had the arbitrator considered this he would have been compelled to consider this further improbability of the respondents' version being true together with the other improbable coincidences already discussed above, compared to the probability that the respondents also simply bought fraudulent certificates like the other two employees who had done so.
- [41] I am persuaded that the manifest bias of the arbitrator made him partial in his evaluation of the evidence and caused him to ignore evidence which did not suit his argument and to pay lip service to the evaluation of probabilities. Had he not done this he would have been impelled to conclude that the more likely explanation for the respondents obtaining the certificates that they knew they were not genuine and had obtained them without seeing anyone purporting to be a doctor.
- [42] In such circumstances, he would not have been able to avoid the conclusion that dismissal was an appropriate sanction.

Order

- [1] The late filing of the arbitration record and supplementary affidavit is condoned.
- [2] The arbitration award of the second respondent dated 26 October 2014 issued under case number KNDB1263-14 is reviewed and set aside.
- [3] The second respondent's conclusion that the individual respondent's dismissals were substantively unfair and the relief he awarded is substituted with a finding that their dismissals were substantively fair.
- [4] No order is made as to costs

Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES APPLICANT: Carel Crafford of Crafford Attorneys RESPONDENT: Adv. Donald Somo of Legal Aid, Durban

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Prepared on 12 October 2026 · Esheria