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SOUTH AFRICA / JUDGMENT

## Motsaathebe v Juries-Van Staden NO and Others (JR1138/08) [2013] ZALCJHB 240 (3 October 2013) [2013] ZALCJHB 240

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COURT

Labour Court Johannesburg

BEFORE

R Lagrange

CASE / FILE NUMBER

JR1138/08

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA,

IN JOHANNESBURG

JUDGMENT

Case no: JR 1138/08

In the matter between:

EDWIN M MOTSAATHEBE Applicant and COMMISSIONER RONELDA JURIES-VAN STADEN (n.o.)  
First Respondent COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION Second  
Respondent NSA SECURITY SERVICES Third Respondent

Heard: 08 August 2012

Delivered: 03 October 2013

Summary: (Review – alleged failure to take account of evidence and failure to make a reasonable finding – unsubstantiated – dismissed)

LAGRANGE, J

## Introduction

The applicant in this matter, Mr E M Motsaathebe, has applied to review and set aside an arbitration award of the first respondent in terms of which she found that his dismissal on 14 December 2007 was procedurally and substantively fair.

## Background

The applicant was dismissed for gross negligence in the execution of his duties for being absent from work for more than three

consecutive days without a valid reason for the period 12 November 2007 until 10 December 2007.

The applicant's absence arose after he was supposed to have been transferred to render his services at a site in Germiston,

following his removal from duty at the SABC, following a complaint from the SABC. The employer had held a disciplinary enquiry arising from the complaint and had issued the applicant with a final written warning, but according to the evidence of the firm's operation manager at the SABC, Mr Mokole, SABC was not willing to allow him to return to his post there, which necessitated his transfer to another site. There was a dispute whether the applicant had been issued with a transfer letter by Mr Mokole, who claimed that the applicant refused to sign for receipt of it.

The HR manager, Ms Mabindisa, testified that the applicant had arrived at her office on 6 November 2007 and told her that the

client did not want him anymore. She then spoke to Mokole, who confirmed that was the position and that the applicant had refused

to accept the transfer letter. She initially told the applicant to return on 9 November 2007. However, because a meeting between the firm and the SABC to discuss the situation was only scheduled for that date, she asked him to report for work on 12 November 2007, which he did not. She said she tried to phone him when he did not arrive on that date but he did not answer his phone so she sent him a message. According to the applicant, he reported for work on 14 November 2007, but the HR manager was on study leave on that day. According to the firm the applicant merely delivered a letter on that date from his union, and left the premises. Mabindisa said she tried to contact the applicant by phone after that but only succeeded on 26 November 2007 when she reminded him that he must report for work the following day to attend his appeal hearing concerning the previous disciplinary action. According to her, he never returned to work, despite sending him a phonogram warning him to report to work, and she next saw him at a CCMA hearing on 3 December 2007.

On 11 December 2007 he was issued with a notice to attend a disciplinary enquiry to be held on 14 December 2007. The applicant

claimed in his referral to the CCMA that he was told that his employer did not need him anymore because he would influence their

employees and that he had opened a case against the firm at the CCMA on 10 November 2007 and another case was pending at the Department of Labour. He further claimed that when he arrived for the hearing on 14 December 2007, he was called in by Theron who related to him that he was being dismissed for the reasons mentioned by the applicant. He was asked to sign certain forms which he refused to do.

The reference to the CCMA referral was a previous alleged unfair dismissal dispute referred by the applicant, in which he had claimed that he had been unfairly dismissed on 24 October 2007. The dispute was set down for conciliation on 10 December 2007. It was common cause that the applicant withdrew the first dismissal dispute on that date.

The applicant's absence from work for the month ending 10 December 2007 according to him was a result of his dismissal in October. The employer's version is that the applicant was never dismissed but had been removed from the SABC site where he was performing his duties on account of a complaint by the client, SABC.

The arbitrator's award

The arbitrator found that the most likely explanation for the applicant withdrawing his original dismissal dispute was that he

realised he had not in fact been dismissed.

The arbitrator further found on a balance of probabilities that there had indeed been a disciplinary hearing held on 14 December

2007. In considering the evidence of Mr T Nkuna who accompanied the applicant to the workplace on the 14 December, the arbitrator found that he could add nothing to the evidence on whether an enquiry took place or not. It appears to be undisputed that Nkuna waited outside the premises for a while the applicant was inside.

On the question of substantive fairness, the arbitrator found that it was not in dispute whether the applicant knew about the rule against unauthorised absenteeism. He also found that it was common cause he was absent during the period in question and his absence was unauthorised. Further, on the evidence of the minutes of the disciplinary enquiry, his explanation for not coming to work was that he was told to stay at home and he denied being asked to return to work on 12 November 2007, contrary to the evidence of the human resources manager who testified at the arbitration that she had asked him on 9 November to return to work on 12 November 2007. According to the applicant he reported for work on 14 November 2007, but this was denied by the operations manager, Mr Nefale.

Although the arbitrator complained that the evidence presented to her was a bit disorganised and sometimes unclear, it was clear that he was absent from work for the period in question and his only defence to this was "a pure denial". She therefore

concluded that he had been instructed to return to work and had failed to do so.

The arbitrator also decided that the applicant's evidence was riddled with inconsistencies, that he adapted his version when he deemed it appropriate, failed to substantiate his denials with any evidence and lied under oath by saying he never attended the disciplinary hearing on 14 December 2007. By contrast, she found the testimony of the employer's witnesses was consistent and therefore more reliable.

On the question of sanction, she found that the applicant's conduct, of which he was found guilty, was unacceptable as was his misconduct on previous occasions, not only in relation to absence from work. In the circumstances, she did not feel there was any basis to justify her interfering with the sanction of dismissal, which she considered fair and appropriate in the circumstances.

#### Grounds of review and evaluation

The applicant's grounds of review which were set out in his founding affidavit are summarised and evaluated below.

#### Arbitrator's consideration of the applicant's return to work on 14 December 2007

The applicant claims that the arbitrator failed to consider the fact that when he withdrew his case on 10 December 2007, the employer had conceded that it offered to allow him to return to work, which he did. In the light of this, he submits that it was plainly nonsensical for the arbitrator to conclude that he was absent from work.

There was no evidence at the arbitration hearing that the employer had conceded that the applicant was justifiably absent from work for the period commencing 12 November and ending on 10 December 2007. It is true that the employer's evidence tended to show that the employer tried to get the applicant to return to work on more than one occasion without success. However, the only period of absence which the employer accepted as justifiable absence was the period between the applicant's removal from working at the SABC site on or about 6 November and when he should have returned to work on 12 November 2007. Even the applicant's own evidence at the arbitration did not deal with this issue.

In the circumstances, I am not satisfied that the applicant has demonstrated that it did not make sense for the arbitrator to find that he was absent from work for the period commencing 12 November

2007. The arbitrator's finding in this regard is not only a reasonable interpretation of the evidence before her, but the most likely version of events.

#### Arbitrator's consideration of evidence relating to the disciplinary enquiry

He also claims that the arbitrator failed to consider that the minutes of the disciplinary enquiry which he alleges never took

place were fabricated: the evidence of Nkuna that there was no hearing should have been accepted.

It was not disputed that the applicant received a notice to attend a disciplinary enquiry when he attended the workplace on 11 December

2007. Although the chairperson of the disciplinary enquiry, Mr Theron, testified for the company and was extensively cross examined by the applicant, at no stage did the applicant challenge his evidence about the enquiry and who testified at it. If it was true that the entire enquiry was a fabrication it is difficult to understand why such a major issue would not have been raised with the person who claimed to have chaired the enquiry. Similarly, the applicant failed to question Mabindisa about the conduct of the enquiry, even though she testified that she had read him his rights at the enquiry. He also failed to mention to either witness that Nkuna would testified that he (the applicant) was asked to sign forms by Theron and when he refused to, he and Nkuna left the premises, which was barely half an hour after arriving on 14 December 2007.

When the applicant testified he agreed that on the previous two occasions when he had been disciplined the firm had followed the procedure but had followed no procedure on 14 December 2007.

When the arbitrator considered Nkuna's evidence she found that it could not help in deciding whether or not an enquiry took place. In any event she concluded that on a balance of probabilities it did occur. It is clear in reaching this conclusion she took account of the fact that there were minutes of the enquiry and that the evidence of the employer witnesses was consistent. Moreover she clearly doubted the credibility of the applicant and Nkuna's account of what happened on 14 December 2007.

The first point that must be made is that, it cannot be said the arbitrator did not consider Nkuna's evidence. Secondly, if one has regard to the evidence and in particular the parts of the record of the enquiry which were put to the applicant under

cross-examination, those minutes appeared to give a plausible account of his defence to the charge, part of which he repeated at the disciplinary enquiry. Moreover there is the undisputed evidence that on the two previous occasions the employer had followed the disciplinary procedures even though they did not result in the applicant's dismissal. In the absence of any reason why the firm should suddenly have departed from its previous practice at such an important point in the applicant's disciplinary

history, it cannot be said that the arbitrator's finding that the enquiry did take place is a finding that cannot reasonably be sustained on the evidence before her.

Arbitrator's findings of substantive and procedural unfairness

Lastly, the applicant claims the arbitrator should not have concluded his dismissal was substantively and procedurally unfair.

However, this assertion was not substantiated in the founding affidavit, nor was there any elaboration even in the applicant's

heads of argument.

As it stands, it not an admissible ground of review, but sounds more like an appeal. In any event, it was a bald assertion unsupported by evidence and consequently does not warrant further consideration.

## Conclusion

In light of the evaluation above, I am not persuaded that the applicant has made out a sound case for reviewing and setting aside

the arbitrator's award.

Order

Accordingly, the review application is dismissed and no order is made as to costs.

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R LAGRANGE, J

Judge of the Labour Court of South Africa

## APPEARANCES

APPLICANT: S Shingange of Shingange Attorneys

THIRD RESPONDENT: No appearance

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