

SOUTH AFRICA / JUDGMENT

Shabih v S (CA&R14/14) [2015]

ZAECBHC 13 (21 April 2015)

[2015] ZAECBHC 13

COURT

Eastern Cape High Court, Bhisho

BEFORE

Hartle, Difford

CASE / FILE NUMBER

CA&R14/14

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, BHISHO

CASE NO: CA& R 17/14

NOT REPORTABLE

In the matter between

RIZVI HAIDER SHABIH Appellant and THE STATE Respondent

APPEAL JUDGMENT

HARTLE J

1. The appellant was granted leave by the trial court to appeal against his conviction in the Zwelitsha Magistrate's Court on a charge of contravening section 92 (f) of the Basic Conditions of Employment Act, No. 75 of 1997 ("BCEA"). He had been charged, in tandem, with a contravention of section 92 (d), but was acquitted on this offence (count 1). Both offences were alleged to have been committed on 23 October 2012 at his place of business, a shop trading as "Joy Hardware and Furniture". On count 1 it was alleged that he had unlawfully and intentionally "refused to answer the (lawful) questions posed (to him) by a labour inspector (who was performing her official functions under the act), one Lungiswa Roji, and on count 2 - the charge which is the subject of the appeal, that he unlawfully and intentionally hindered or obstructed the said inspector by chasing her out of (his) premises when she was supposed to inspect (them) in terms of the act."
2. In terms of section 92 of the BCEA it is an offence to:

“(a) obstruct or attempt to influence improperly a person who is performing a function in terms of this Act;

- (b) obtain or attempt to obtain any prescribed document by means of fraud, false pretences, or by presenting or submitting a false or forged document;
 - (c) pretend to be a labour inspector or any other person performing a function in terms of this Act;
 - (d) refuse or fail to answer fully any lawful question put by a labour inspector or any other person performing a function in terms of this Act;
 - (e) refuse or fail to comply with any lawful request of, or lawful order by, a labour inspector or any other person performing a function in terms of this Act;
 - (f) hinder or obstruct a labour inspector or any other person performing a function in terms of this Act.”
3. The function focused on in the charge sheet regarding count 2 in respect of which it is alleged the labour inspector was hindered or obstructed by the appellant from performing her functions was a supposed inspection of the premises which, it is common cause, entails more than a mere physical inspection of the premises.
4. An inspection is not defined, but it is apparent from Chapter 10 of the BCEA that one of the manners in which authorised inspectors are empowered to promote, monitor and enforce compliance with an employment law is by “conducting inspections”,^[1] powers of entry being afforded to them to enter workplaces without warrant or notice at any reasonable time. ^[2] This machinery inter alia entails inspecting and questioning a person or interviewing a person as opposed to a mere physical inspection of the workplace.
5. This is confirmed by the provisions of section 66(1) of the BCEA, which read as follows:
- “Powers to question and inspect:*
- 1) In order to monitor or enforce compliance with an employment law, a labour inspector may-
 - (a) require a person to disclose information, either orally or in writing, and either alone or in the presence of witnesses, on any matter to which an employment law relates, and require that the disclosure be made under oath or affirmation;
 - (b) inspect, and question a person about, any record or document to which an employment law relates;
 - (c) copy any record or document referred to in paragraph (b), or remove these to make copies or extracts;

- (d) require a person to produce or deliver to a place specified by the labour inspector any record or document referred to in paragraph (b) for inspection;
 - (e) inspect, question a person about, and if necessary remove, any article, substance or machinery present at a place referred to in section 65;
 - (f) inspect or question a person about any work performed; and
 - (g) perform any other prescribed function necessary for monitoring or enforcing compliance with an employment law.”
6. Section 67 is also of relevance because it qualifies the extent of the co-operation required by the employer and employees viz a viz the so-called inspection, in the following manner and terms:

“Co-operation with labour inspectors:

- (1) Any person who is questioned by a labour inspector in terms of section 66 must answer all relevant questions lawfully put to that person truthfully and to the best of his or her ability.
- (2) Every employer and each employee must provide any facility and assistance at a workplace that is reasonably required by a labour

inspector to perform the labour inspector's functions effectively.”

7. With this background in mind I now relate the salient features of the evidence presented during the trial.
8. Before I do so however, it is relevant to mention that when the plea was put to the appellant and an explanation was offered on his behalf for pleading not guilty, the prosecutor and the appellant's attorney were evidently both of the view that the incident forming the subject matter of both counts related to one and the same visit and inspection by Ms Roji and her colleague to the appellant's shop, and not to the “subsequent incident” to which the judgment under appeal refers. The defence outlined at the plea stage was to the effect that a scheduled inspection was underway during which the complainant in the appellant's opinion abused her power as an inspector. This led to a disagreement between them which made the continuation of the inspection untenable. The appellant remained amenable to a carry-over thereof, but preferably in the presence of his attorney, alternatively once he had taken legal advice, and had made this clear to the complainant.
9. Ms Roji, a labour inspector, confirmed that she had attended the appellant's shop on 23 October 2012 pursuant to a scheduled appointment in order to conduct the inspection, which was interrupted when the appellant “chased” her from the shop. This was because in her perception he became tired of her “useless questions”. At this point he opened his office door and called on his security officer to escort her from the premises. She was at the time about to “finish the last step”, but what this step was she did not say. She added however, almost as an afterthought, that because he did not

want to give her the information that she wanted from him and which flowed from her questioning of him, she decided then and there – at that moment it appears and without ostensibly informing him of her intention, to obtain that information from his employees. He refused however and forbade them to “come closer to (her)”.

10. Asked if she had arranged another time for the inspection, she clarified that she had not because the appellant was very angry. From there she claims she went to the police station to elicit their help to go there again. She returned to his workplace accompanied by police officers who she said explained the purpose of their visit there, being to accompany her to “do (her) duties”, namely to talk to the employees. But the appellant chased them both away, claiming that the police officers

were siding with them.

11. Although she had suggested in her evidence in chief that the appellant was bored and tired or vexed by her questions, she conceded under cross examination that they had in actual fact had a disagreement over the designations of his employees which she had wanted him to change.
12. As far as she was concerned, if an employer does not comply with the checklist to which she refers to verify that he is compliant with the employment laws, then he is (in her opinion) automatically in breach of the Act. She actually went further and suggested that an employer was not entitled to have a view of his own which differed from the checklist. In any event she agreed that the appellant’s failure to co-operate should ideally have been met with the issue of an undertaking in terms of section 68 of the BCEA, and later with a compliance order issued under section 69, a process which she conceded under examination by the court was one of mediation and co-operation. In this instance charges were laid against the appellant some five months after the incident, however, without any of these steps having been taken before

resorting to the most austere form of enforcement, namely criminal prosecution.

13. Mr Dakeni, an occupational health and safety inspector was present at the appellant’s workplace when Ms Roji and the appellant had the disagreement. He was there to inspect the building and indeed did, with the assistance of one of the appellant’s employees placed at his disposal. This took him all of five minutes.
 14. He overheard the appellant say to his colleague that she was asking him “useless questions”. He also witnessed him asking her to leave and calling a security officer to “chase her out”. He claims that he himself tried to ask the appellant what was happening, but that he was “fighting”. From there they went to the police station
- according to him to ask for the assistance of the police to complete the inspection. On their return with the police, the

appellant however refused and all of them were chased away from his workplace.

15. Under cross examination he confirmed that Ms Roji had not been physically pushed off the premises but merely ushered out. He himself was not chased. Seemingly at most they were sternly requested to leave. As far as he was concerned he too was not finished with his investigation. He was required still to give the appellant his findings. In his view the appellant had in fact committed a separate offence by hindering or obstructing him in the performance of his functions as well although (so he conceded) he had not been charged in this regard.
16. He explained that he and Ms Roji laid the complaint on the same day as the incident, but that the formalisation of the charge was delayed because the police failed to understand what the nature of their complaint against the appellant was. He was reluctant to concede the appellant's defence that there was an argument between him and Ms Roji which justified him in asking her to leave. Seemingly on the basis of speculation (because he was not present at their meeting), he purported to know that after Ms Roji was finished talking to the appellant, she intended to interview his employees ostensibly so as to be in a position to make a report to the appellant.
17. Finally, the state called Ms Olwethu Ndedwa, one of the police officers stationed at Zwelitsha who called on the appellant's business on the day in question with Ms Roji and her colleague. The report made to the police by the two inspectors was to the effect that they had visited there earlier but had encountered a problem as a result of a misunderstanding between Ms Roji and the appellant. She was "about to be interviewing the employees within the shop" when the appellant chased them out. It was for this reason that they asked for the assistance of the police.
18. She testified that when Ms Roji, in her presence now, proceeded to engage with one of the appellant's employees, the appellant shouted at them and accused the police of taking sides with the inspector. She agreed ultimately that he had also expressed the desire to call his lawyer. Since they were told to leave they were unable to accomplish anything. She rejected the notion that the police had accompanied the inspectors only in order to intimidate the appellant.
19. The appellant in his testimony conceded that the visit from the labour inspectors had been scheduled and that he had initially co-operated fully with Ms Roji in answering her questions, which she ticked off on a list. Her colleague was at the same time conducting a physical inspection of the shop with one of his employees in tow. He and Ms Roji came to blows over a question concerning the designation of an employee working behind the counter as a "general assistant" rather than as a "cashier". He informed her that he had taken legal advice with regard to the relevant matter which she was evidently not prepared to accept. She slammed her fists on the table and demanded that he change it. At this point he indicated his preference to have his attorney present if she wished to pursue the matter any further but she would not agree. She wanted it to happen right away. He disagreed and called the meeting to an end. She gathered her belongings and as she was leaving his office insulted him by saying that "you people" don't want to follow the law and are "crooks". He

took her to task regarding this and both their voices were raised. Her colleague arrived and asked in disbelief what had now happened, but soon turned to favouring Ms Roji who together with him insulted him even further by accusing him of not paying his taxes. He did ask his security officer to assist in putting them both out, but no one was touched in the process.

20. They came back later with the police who in his view were taking sides with the labour inspectors, insisting on establishing the reason why he would not let them come to do what they had come for. He claims that he explained to the lady police officer exactly what his position on the matter was, but she asked four times why he would not co-operate with Ms Roji. At the time Ms Roji was trying to interview one of his employees who he instructed to go and do her job as there were customers to be attended to. He insisted on a new appointment with his attorney present and asked them to come back another time when it was convenient to him, whereupon they left. He denied chasing them. In fact he did not even use the words “get out of here”. He was not averse to his employees being interviewed. This was par for the course at his other branches as well, but on that specific day he had requested a new appointment so that his attorney could be present.
21. Regarding count 1, in his judgment the magistrate, correctly in my view, accepted the appellant’s version of events that the meeting between him and Ms Roji had culminated in “an antagonistic breakdown” and that the appellant had indicated to her that he wanted to consult his attorney, which is why he did not want to continue with the interview. He concluded that it was perhaps unfair to expect the appellant to continue with the meeting in the circumstances and gave him the benefit of the doubt, especially since he found there to be “some problems with (Ms Roji’s) evidence”.
22. But despite having accepted the appellant’s version of the events and in particular that he was justified in calling off the meeting, the magistrate evidently focused his attention in respect of count 2 on what he regarded as the “subsequent incident”, in other words what happened after the meeting between the appellant and Ms Roji when she returned to his workplace together with the police. In this regard he held it be common cause that they (the inspectors) had wanted to interview one of his employees when they returned with the police in tow and that he had stopped his employee from doing so because he said she had other duties to go and perform. This in his view had nothing to do with the legal issues arising between the appellant and Ms Roji in the prior meeting. It was a separate interview in respect of which the appellant could not insist on the right to legal representation. This therefore constituted an unreasonable refusal which he found was tantamount to a hindering of the inspector in the performance of her functions.
23. He appeared to accept as a reasonable probability that the particular employee was co-incidentally dispatched to till at the time “in the best interests” of the appellant’s business to attend to a customer, yet concluded incongruously that:

“... in view of what happened, the fact that she (Ms Roji) had aggravated you according to what you said, the fact that they (the inspectors) came back again with the police, all of this aggravated you and you were just feeling a bit stubborn probably, and therefore you told this employee man, go back to your work, you are not going to speak to this person. This would, as far as I am concerned, constitute a contravention of Section 92(f), hindering the labour inspector, in conducting her duties.”

24. One of the grounds raised upon appeal is that there was a breach of the appellant’s fair trial rights in that he had not been informed with a reasonable degree of clarity what case he had to meet and which resulted unfairly in the magistrate convicting him of an “offence” in respect of which he had not been charged. The details contained in the charge sheet and on which the appellant’s plea was founded reflect that the appellant was charged on the factual basis that he had hindered or obstructed the labour inspector “by chasing her out of the premises when she was supposed to inspect (them) in terms of the Act”. Instead, the court found that the evidence revealed that the appellant, upon return of the labour inspector

together with members of the police force to his workplace, had hindered or obstructed the labour inspector (Ms Roji) “by

preventing an employee from being interviewed by (her)”. It was submitted that these factual bases were entirely different.

25. There appears to be considerable merit in this submission and even Ms Monis for the state conceded, correctly in my view, that this was a classic case of the prosecutor and the attorney being at cross purposes with one another concerning the nature of the charge which was the subject of the prosecution on count 2, more particularly when and what formed the basis of the hindrance or obstruction. This confusion is evident from the fact that the prosecutor hardly touched upon the “subsequent incident” when leading the testimony of Ms Roji, except to fill the background or complete the picture as it were. The appellant’s legal representative also did not focus on the “subsequent incident” in his cross examination of the state witnesses or in leading the appellant when he testified in chief. In fact the appellant appeared quite co-incidentally and in passing to have related the vignette of Ms Roji trying to interview one of his employees while he was trying to persuade the police woman that he was not in breach of the law. Further the tenor and focus of the closing submissions made on behalf of the appellant concerned only the initial visit by the labour inspectors. The prosecutor submitted that “even on (the) second occasion (the) labour inspectors were unable to do their inspection”, but it appears that the thrust of this argument was directed at persuading the trial court that the appellant’s later conduct even was corroborative of his earlier purported hindrance and obstruction of the labour inspectors.
26. In the charge sheet the accused is informed of the case that the state intends to prove against him and it is only fair to expect that the charge should, in no uncertain terms, let the accused know what to expect.[3] In other words he must be informed about what calls for a response in advance.

27. Ms Monis submitted in argument that the allegation “chasing her out of the premises when she was supposed to inspect the premises in terms of the Act” implies that the appellant by chasing the labour inspector out prevented her from conducting her inspection, which included interviewing employees of the appellant, albeit after the fact. Although semantically it is possible that the hindrance or obstruction involving the interviewing of witnesses can comfortably resort under the wider allegation that the labour inspector was chased away and as a result could not interview anyone, this argument loses sight of the fact that the court’s judgment was based on evidence that was at variance with what the state’s case rested on in the charge. As framed the charge in count 2 outlined conduct that happened and events which unfolded on the occasion of the first visit by Ms Roji and her colleague which culminated in the chasing away on the state’s version. What happened after the inspectors were chased away is

therefore in effect irrelevant.

28. In my view the kind of charge facing the appellant requires clear particularity with regard to time and place as well as the legal and factual basis on which it is alleged that the appellant’s conduct was tantamount to a hindrance or obstruction of the labour inspectors performing a function in terms of the BCEA. This must be especially so where an inspection constituting the basis of the function under threat by an accused’s conduct has a dual meaning in terms of the Act. Even the magistrate was confused at first as to what the inspection was which was under contemplation. This is demonstrated by his comment, after an application was made by the appellant for his discharge at the close of the state’s case, to the following effect:

“Count 2 is not really of any consequence as there was no evidence that there was a physical inspection to be done by the complainant.”

29. Section 84 of the Criminal Procedure Act provides that:

“Essentials of charge

- (1) Subject to the provisions of this Act and of any other law relating to any particular offence, a charge shall set forth the relevant offence in such manner and with such particulars as to the time and place at which the offence is alleged to have been committed and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge.
 - (2) Where any of the particulars referred to in subsection (1) are unknown to the prosecutor it shall be sufficient to state that fact in the charge.
 - (3) In criminal proceedings the description of any statutory offence in the words of the law creating the offence, or in similar words, shall be sufficient.”
30. Furthermore, section 35(3)(a) of the Constitution guarantees an accused person’s right to be informed of the charge against him with sufficient detail to answer it.

31. Importantly, the purpose of section 84 is to enable an accused person to consider whether the charge should be contested and what evidence to tender to challenge the averments contained in the charge sheet. Without sufficient information about the legal and factual basis an accused is at a disadvantage to defend himself against the charge preferred against him.[4]
32. With reference to the decision of *S v Langa*[5] the court in *S v Essop*[6] held that “the principle (of) a fair trial demands that an accused has the requisite knowledge in sufficient time to make critical decisions which will bear on the outcome of the case as a whole. It is for this very reason that a charge-sheet ought to inform an accused with sufficient detail of the charge he or she should face. It should set forth the relevant elements of the crime that has been committed and the manner in which the offence was committed.” (Emphasis added)
33. *S v Wannenberg*[7] is a clear example of a situation where the charge sheet was at odds with the evidence and violated the appellant’s fair trial rights. In this regard the court noted that
“... it is impermissible ... in circumstances such as these, to charge an accused with Crime A and upon failure to prove same, to convict him of being an accomplice to Crime B. In terms of section 35(3) of our Constitution an accused is entitled to a fair trial and, in particular, to be informed of the charge with sufficient detail to answer it (s 35(3)(a)). In this connection I agree with Claasen J in S v Lavhengwa that the right to be informed of the charge as guaranteed in s 35(3)(a) of the Constitution of the Republic of South Africa, 1996 encompasses the requirements that the accused must know the necessary particulars of the charge and that the charges must be clear and unambiguous.”[8]
34. See also in this regard *S v Maphinda*[9] in which the court on appeal held that the accused had been convicted by the trial court of an offence altogether different from the one with which he had been charged, also on the basis essentially of admissions made by him. The court noted that it was necessary to look behind the letter of the charge (which in that case was dealing in dagga). The state in that instance could not conceivably have intended to charge the accused with having dealt in the second batch of dagga which he in “an outburst of candour” had assumed responsibility for. The state could not have known of its existence until he mentioned it.
35. Despite the fact that the proven facts which emerged from the evidence on the accused’s own version were in conflict with the charge in *S v Motale*,[10] he was convicted by the trial court. His version differed materially from that with which he had been charged, there being a difference in the facts regarding time, place and method. On appeal it was held that section 84 of the Criminal Procedure Act required that particulars regarding the offence, the time, the place, the person against whom it was committed and the property, if any, had to be set out in the charge. In that instance the accused’s version formed the basis for a different charge. The conviction was accordingly held to be unfounded and set aside.

36. These examples quoted above are not dissimilar from the situation which presents itself in this matter.
37. It is true that the state did not seek to amend the charge sheet to include the particulars on which the magistrate in this instance

relied for his conviction, but as I have indicated above I sincerely doubt that the prosecutor was even focused on “the subsequent

incident” (at least at first) except as a titillating feature of the case and to demonstrate how firm the appellant was that the disagreement between him and Ms Roji was insuperable. It is further doubtful however that if an amendment had been sought it would not in effect have amounted to a substitution of the charge rather than an amendment, which would have been prejudicial to the appellant given the basis upon which he conducted his defence in the trial court. Alternatively it would have been tantamount to the joinder of another separate charge, which cannot be allowed after evidence has been adduced.[11]

38. In my view the conviction of the accused under the circumstances and essentially on the basis of his evidence which formed the foundation for a different charge constitutes an infringement of the appellant’s fair trial rights in that he was not informed with reasonable clarity what case he had to meet or, contrariwise, ended up being convicted on a premise that clearly did not constitute the legal and factual basis outlined in the charge sheet, or to which he pleaded and along which lines he conducted his defence.
39. There was no obligation in my view on the appellant to seek clarity, or to insist on particulars because as far as he (and his attorney) was concerned, the allegations related unequivocally to the first visit by the labour inspectors to his workplace, concerning which visit the trial court was inclined to accept his version that he was justified in terminating the interview and requesting Ms Roji to come back on another occasion. The fact that the appellant’s attention in the conduct of his defence was focused on the particular conduct which evinced the supposed hindrance or obstruction arising from the first visit and only inspection in my view demonstrates the obvious prejudice to him.
40. For this reason the conviction on count 2 stands to be vitiated.
41. Even accepting for a moment that the supposed hindrance and obstruction of the appellant on the occasion of the “subsequent incident” constituted an ongoing offence (that is a carry over from the initial inspection) as the basis for the charge against him on count 2, the magistrate erred in my view too in rejecting the appellant’s evidence that if the labour inspector had requested to speak to other employees, he would have permitted her to do so. This must be the case especially where he noted that the evidence of Ms Roji, who was a single witness, was not satisfactory in all material respects.
42. In the result I issue the following order:
 1. The appeal is upheld.

2. The conviction and sentence in respect of count 2 are set aside.

B HARTLE

JUDGE OF THE HIGH COURT

I AGREE

C DIFFORD

ACTING JUDGE OF THE HIGH COURT

DATE OF APPEAL: 27 March 2015

DATE OF JUDGMENT: 21 April 2015

Appearances:

For the appellant: Mr J R Koekemoer, Instructed by Gordon McCune Attorney of King Williams Town. For the respondent: Ms C Monis, Director of Public Prosecutions, Bhisho.

[1] Section 64(1)(b) of the Act.

[2] Section 65.

[3] Du Toit, Commentary on Criminal Procedure Act at 14 – 14. Note the cases cited with regard thereto.

[4] S v Essop 2014 (2) SACR 495 (KZP) at par [39]

[5] 2010 (2) SACR 289 (KZP) at 304 e – f.

[6] Supra, at par [42].

[7] 2007 (1) SACR 27 (C).

[8] At pages 33 j – p and 34 a.

[9] 1979

(2) SA 343 (N).

[10] 1997

(1) SA 245 (T).

[11] S v Hendricks 1995 (2) SACR 177 (A) at 186d – 187h; S v Thipe 1988 (3) SA 346 (T); S v Ncoko 2014 (1) SACR 607 (ECG); S v Mhlambiso and Another 2014 (1) SACR 610 (ECG).

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