



**IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Not Reportable

Case no: JR 609.15

In the matter between:

**MJ BUTHELEZI AND 1 OTHER**

**Applicants**

and

**THE SAFETY AND SECURITY BARGAINING**

**COUNCIL**

**First Respondent**

**F.J. VAN DER MERVE N.O.**

**Second Respondent**

**SOUTH AFRICAN POLICE SERVES**

**Third Respondent**

**THE MINISTER OF POLICE**

**Fourth Respondent**

**Date heard: 15 November 2018**

**Delivered: 22 January 2019**

**JUDGMENT**

**RABKIN-NAICKER, J**

[1] This is an opposed application to review an arbitration Award issued by the second respondent (the Arbitrator). In terms of the Award, the arbitrator found the dismissal of the applicants to have been procedurally and substantively fair

on the basis that the respondent's (SAPS) version should prevail on a balance of probabilities.

[2] The applicants worked as policemen at the Boksburg North police station. They were called to a disciplinary enquiry to face allegations of committing a common law or statutory offence namely: extortion, alternatively contravening the Act by acting contrary to the objects of the SAPS, when they allegedly on 14 November 2011 attempted to extort R2000,00 from Mr W Harmse in the Boksburg North Area.

[3] The evidence of Mr Harmse was recorded as follows in the Award:

“Harmse said on 14 November 2011 he had arrived early at a business called ‘Ábeddac’ in Boksburg North where he was to sell nonferrous metals. A police vehicle stopped behind him and 2 officers approached him. They introduced themselves and asked about what he had on the vehicle. They asked him about copper and he showed them. They asked for paperwork for the copper which he said he did not have at the time but said he could get. The one was the first applicant, Buthelezi, and the other was the second applicant but he could not remember the name. He identified them as persons present at the hearing. They said they did not have time to waste and asked for R2000,00. There was no valid reason to ask this and he had nothing illegal with him. Because they said they were in a hurry, they exchanged telephone numbers to meet later and exchange the money. The witness had no intention of giving them the money, but wanted to get rid of them. Buthelezi gave him his cell number which he saved on his phone. There were subsequent cell phone discussions and also calls from a police landline between the parties. The applicant (sic) tried to stall them by saying he had to cash a cheque, later saying that he had to have the cheque replaced. On 25 November 2011 he was again at Abeddac to deliver metals..... The applicants stopped behind him again, this time in civilian clothes, Buthelezi driving a blue BMW and the other a green Golf. Buthelezi said to him ‘you can run but not hide’. They asked him whether he had copper and when he said yes, they took him to the police station and arrested him for possession of suspected stolen goods, He was taken to court and the charges were withdrawn against him the same day.

On 30 November 2011, the same two stopped behind him at Abeddac and asked him about copper, which he did not have. He showed them the paperwork he had and they left. They targeted him specifically and he did not know why. These incidents were reported and the witness gave a statement. He said he had met them for the first time on 14 November 2011 and he remembered Buthelezi's name because it was similar to that of a well-known politician. He admitted making a mistake concerning the second applicant's name at the time, but confirmed that the applicant's face was the correct one. He denied he made jokes with with the second applicant, that they discussed crime statistics, that he asked for an escort, and that they had a rifle with them. The witness had a colleague present on 14 and 15 November 2011, but he has subsequently died. He had been to these particular business premises on many occasions. He received copper back on 8 May 2012, which weighed less and were of a lesser quality. He then laid a complaint."

- [4] It is necessary to consider and record the summarized version of Buthelezi's evidence contained in paragraph 15 of the Award. It reads:

"Buthelezi said that on 14 November 2011 they were patrolling, attending to complaints and doing stop and search. They saw a lot of cars at Abeddac. Part of their task was to search those cars, because sometimes they had stolen items in them. They met Harmse who gave them permission to search his bakkie. He was very friendly. When he saw a firearm with them, he asked about crime in the area. During the discussion he asked to be escorted because once he had heard about bank followings and robberies. They said it was in order if he gave them a call, and they gave him their details. He gave them his business card. Later Harmse phoned and said he was finished and going to the bank, where they would meet. They were dealing with a docket and phoned Harmse on their way to the bank. He did not answer. They were worried that something might have happened to him. Back at the station they told a warrant officer about it who said they needed not to put it in the OB. They also tried to phone Harmse from the landline in the office. They tried another number and somebody said that they could also not contact Harmse. About 2

weeks later on 25 November 2011 he came off from nightshift and in his uniform and on the way a member of the public approached him and said he saw a suspicious car loading bags. The witness told Ziquba about this information and they decided to investigate in their private cars because they could just go their separate ways thereafter and drive home. They found Harmse who said his phone had died. He said they could search his bakkie and they saw fresh copper. They took Harmse to the station where the copper was off loaded, put into the SAP13, a statement was made, and Harmse was arrested. A case was opened against Harmse. A gentleman from Telkom came to identify the copper. On 13 November 2011 they did not see Harmse. They never demanded money from him.”

- [5] The record before the arbitrator contains the sworn statement of Harmse made on the 14 December 2011, which reads in material part as follows:

“Op 14/11/2011 om 7:00 was ek te Abeddac 15 Laan Boksburg Noord met my bakkie en gewag vir Abedda om oop te maak. Terwyl ek gewag het het 'n Polisie Double Cab Bakkie agter my gestop. Daar het twee SAPD in uniform gekleede lede my genader en hulle self aan my voorgestel as Kst Buthelezi en kst Khoza. Ek is nie seker oor die range maar is seker oor die name.

2

Beide wou weet wat ek op die bakkie gehad het. Ek het hulle meegedeel dat daar scrap metal, aluminium en koper op gehad het. Beide het toe my versoek om die papier werk vir die koper aan hulle te toon. Ek het hulle toe meegedeel dat hulle moet wag tot Abeddac oop maak dank aan ek die papier werk aan hulle verskaf aangesien alles deur gefaks is aan hulle. Die twee polisie beamptes het toe gese sat hulle nie solank kan wag nie en wou weet of ek iets vir hulle het. Ek het hulle gevra wat hulle soek waarop hulle twee duisend rand gesoek het.

3

Ek het vir beide Buthelezi en Khoza meegedeel dat ek nie enige geld aan my het nie eers vir hulle kan gee sodra ek deur Abeddac betaal is. Beide wou weet hoe ek hulle gaan betaal. Ek het toe gese date k eers kan betaal sodra ek die geld ontvang het. Albei Buthelezi en Khoza het toe hulle selfoon nommers vir my gegee en het my besigheids kaartjie gesoek wat ek toe vir hulle gegee het.

4

Nadat ek die skroot metal verkoop het en die tjek vir die genoemde items ontvang het, het ek die tjek te Standard bank in Atlas weg Dunswart gewissel.

5

Om 10:16 het ek 'n oproep van selfoon nommer 0721948906 ontvang. Die persoon wat gepraat het wou weet of ek al die geld gekry het en wanneer gaan ek hulle betaal. Ek het hulle meegedeel dat ek die tjek gekry het en moet wissel te Standard bank in Noordrand weg Boksburg en dat ek hulle daar sal kry. Ek het vir hulle geïntensifiseer aangesien ek toe reeds die tjek gewissel het te Atlas weg en geen intensifisering gehad het om die S.A.P.S lede enige gelde te betaal nie.

6

Om 11:16 en toe weer om 11:28 het dieselfde selfoon nommer 07219489066 my geskakel wat ek nie geantwoord het nie. Ek het die selfoon nommer op my selfoon gestoor onder onder Cob/B. Ek het gemerk dat die S.A.P.D voertuig staan te Craig en Turf weg Anderbolt en 15 de Laan dop hou en het gewag tot hulle y voor ek verder gery het. Was bang hulle merk my op en trek my af. Ongeveer 11:30 het die S.A.P.D voertuig gery, waarna ek kook gery het.

7

Om 11:36 het ek weer 'n oproep ontvang van tel nommer 011 8983000. Dit was weer een van die S.A.P.D lede Ek weet nie of Khozo of Buthelezi gepraat het nie. Hulle wou weet waar ek was en hulle R2000.00 gesoek. Ek het toe geantwoord dat daar 'n fout met die tjek was. Die handtekening was nie reg en dat ek weer moet terug gaan om die tjek te herstel. Om 12:32 het hulle my weer geskakel vanaf tel no 0118983000. Ek het toe nie die oproep geantwoord nie.

- [6] The third respondent's evidence at the arbitration was presented by the Station Commander who was also a crime investigator at the material time.. The evidence is succinctly summarized in the Award as follows:

"Van Nieuwenhuizen at the time was the station commander of the Boksburg North police station. The 2 applicant constables worked at his station in the Delta relief, doing CSC duties or patrols on complaints and crime prevention. The applicants were neither trained nor experts in secondhand goods inspection. There was no investigation into or specific emphasis on Abbeddac. Harmse came to him during December 2011 and laid a complaint about the 2 applicants victimizing and harassing him, and wanting R2000,00 from him. The witness explained what Harmse had told him The witness did an investigation into vehicle movements and times etc. and found corroboration for Harmse's allegation. It was known that the applicants drove a blue BMW and green Golf respectively. At the time of arresting Harmse they had been off duty. The station commander

should be advised when any of his officers were on duty in plain clothes. Although Harmse was arrested, the State declined to prosecute him. The witness believed that the arrest had been improper with improper motives. He investigated the matter and opened a disciplinary following case against the applicants.

Fourie worked at the station in crime information. He was trained on computers/tracking records of police vehicles. At the request of the station commander he did an investigation into movements of the applicants' vehicles on specific dates and he plotted certain maps. At one point the applicants moved close to a bank, outside of their sector. As far as he was aware the tracking system was accurate and showed the street and vicinity of the movement."

- [7] The bank that the police car travelled close to, as reflected in the record before the arbitrator, was Standard Bank at 15 North Rand Road, Jansen Park. This was outside of the sector the applicants were required to patrol. It is also the bank which Harmse told them he would be visiting to deposit his cheque, according to his statement above.
- [8] The applicants submit that the Arbitrator misconstrued the evidence before him and disregarded relevant material evidence placed before him which led to an unreasonable result. It is the applicants' case that the Arbitrator *inter alia*:
- 8.1 Made a mistake in conflating the evidence of the incidents of 14 and 25 November 2011;
  - 8.2 Ignored the fact that Harmse was not certain about the time of the alleged extortion attempt;
  - 8.3 Did not apply his mind to the evidence that the applicants were in the vicinity of Abeddac because that is their work area but not at 15<sup>th</sup> avenue as per Harmse's allegation;
  - 8.4 Failed to take into account that Harmse only reported the alleged extortion after he was arrested and the case dismissed;
  - 8.5 Failed to take into account that he wanted to be seen as the victim in order to avoid arrest;

8.6 Did not take into account the evidence presented that Harmse had an extensive criminal record. This evidence was introduced after the 'third respondent's case had been closed.

[9] I disagree with the submission that the manner that the arbitrator dealt with the evidence before him has made the Award susceptible to review. Having considered the record before the Arbitrator, I do not find that he misconceived the nature of the inquiry or arrived at an unreasonable result. The dictum in *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)*<sup>1</sup> where the SCA held the following, is apposite:

“...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.”

[10] The Arbitrator's central task was to consider the versions relating to the charge of alleged extortion. Buthelezi's own version that the exchange of telephone numbers, and the attempts at calling Harmse were in order to provide an escort for Harmse from his bank on 14 November 2011, because he and his colleague were worried for Harmse's safety after he had cashed his cheque, is highly implausible. Buthelezi did not call as a witness, the warrant officer he claimed he had told about the incident and who advised him that the incident could not be put in the OB. There was no corroboration of Buthelezi's version for the material day in question i.e. 14 November 2011. His fellow constable remained silent throughout the arbitration and the preceding disciplinary hearing. The record reflects that his alleged basis for doing this was that he would give the same evidence as Buthelezi. The applicants did not inform any of their superiors that a member of the public had requested them to escort him to N12 which was outside of their patrol area.

[11] The oral and documentary evidence presented by the SAPS witnesses, evident from the record before the Arbitrator, corroborated Harmse's statement that he

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<sup>1</sup> 2013 (6) SA 224 (SCA) at para 25.

gave to the SAPS, as reflected above. I emphasise in particular, the tracking of the applicants' car at the Standard Bank in question. It is the evidence pertaining to 14 November 2011 that was key to the decision at the arbitration. The result of the Award, taking into consideration the versions before the Arbitrator, is well within the bounds of reasonableness.

### Costs

[12] In as far as costs are concerned, given that the applicants are individuals who approached this Court to challenge an Award in terms of the Labour Relations Act<sup>2</sup> (LRA), I do not consider it apposite to order that costs should follow the result. I make the following order:

### Order

1. The review application is dismissed.

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H. Rabkin-Naicker

Judge of the Labour Court of South Africa

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<sup>2</sup> Act 66 of 1995 as amended.



Appearances:

For the Applicants: MV Bayi Attorneys

For the Respondent: T. Molokomme

Instructed by:       The State Attorney