JURISDICTION, DETAILS OF THE HEARING AND REPRESENTATION

1. This dispute was referred to the ……….. It appears however that it cannot perform its dispute resolution functions expeditiously due its vast backlog. This matter was accordingly transferred to the CCMA in terms of s 147(8) of the LRA.
2. The arbitration hearings were held on 12 May 2017 and 24 August 2017 at the CCMA offices, Anton Lembede St, Durban. Due to the comparative ability of the parties and the complexity of the matter, the applicant’s application for legal representation was granted and he was represented by attorney Mr …………..on 12 May 2017. On that day the respondent was represented by Ms ………..the HR director while on 24 August 2017 it was represented by attorney Mr ………….
3. The respondent handed in its bundle of documents on 12 May 2017. None of the documents was questioned as regards authenticity or its correctness after he perused them.
4. On 24 August 2017 the respondent handed in 2 further documents. These were statements made by the applicant to the police and purporting to have been signed by him. The applicant perused them and admitted them as being authentic and correct. Later in the proceedings the applicant disputed that he had signed the statement dated 12 July 2016. Neither he nor his attorney offered a reason why it was admitted at the outset.
5. At the request of the parties a pre-arb was conducted on 12 May 2017. A list containing the issues that one usually encounters in alleged misconduct related cases was distributed to both parties at the outset. A minute containing the issues on which there was agreement, and the disputed issues was distributed to both parties. On 24 August 2017 after being declared correct by the parties, was read into the record. The parties were advised to keep the minute handy and ensure that their respective witnesses deal with the disputed issues.
6. At the commencement of the arbitration the parties were advised as follows: “*Witnesses will be subjected to cross-examination. The purpose of cross-examination is, to test the credibility and reliability of evidence, and to show that your version is more probable than that of the other side. It is important to bear 3 things in mind when cross-examining – You must put your version to the opposing witness; If an opposing witness has left out an important fact then that should be put to the witness; If you consider that any evidence of the witness to be false or incorrect then that should also be put to the witness. The purpose of all this is to give the opposing witness an opportunity of commenting on your version. It is very important to contest evidence that you disagree with because evidence that is left uncontested is likely to be accepted as being true. An adverse inference may be drawn if you do not put your version or put a new version ie a version that was not part and parcel of your case previously*.”
7. The applicant failed to follow the advice in the preceding paragraph as significant parts of his version were not put to the respondent’s witnesses. I intend therefore to follow the advice of Claassen J in Small v Smith 1954 3 SA 434 (SWA) at 438: *‘It is, in my opinion, elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness and if need be to inform him, if he has not been given notice thereof, that other witnesses will contradict him, so as to give him fair warning and an opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness' evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved. Once a witness' evidence on a point in dispute has been deliberately left unchallenged in cross-examination and particularly by a legal practitioner, the party calling that witness is normally entitled to assume in the absence of notice to the contrary that the witness' testimony is accepted as correct.*'

ISSUE TO BE DECIDED

1. Whether the applicant was unfairly dismissed. He sought reinstatement with back-pay. He also sought leave pay but was not in a position to quantify it. He was accordingly advised to consult with the MEIBC.

BACKGROUND TO THE DISPUTE

1. The applicant is ………………….(male age 60), transport manager. There is a dispute between the parties about the date when he commenced employment with the respondent (or any business that may have been taken over by the respondent in terms of s 197 of the LRA). There is no dispute however that the parties concluded a written fixed-term contract of employment on 2 March 2011: the term was linked to the erection and completion of Terminal 1 at Bayhead Durban Harbour on behalf of Transnet (a client of the respondent). The applicant was dismissed on 6 October 2016. He earned R155 per hour and earned R6200 per week or R26 864.60 per month for working a 5 day / 40 hour week. The applicant has not obtained alternative employment and is not seeking to be employed. He has also not earned anything from casual work. His highest standard of education is Gr 10. As breadwinner he had 7 dependants (3 adults and 4 children).
2. It was agreed that as transport manager the applicant’s main duty was to arrange logistics such that the respondent’s employees were safely and timeously picked-up from various points in Durban and brought to work; and to ensure their safe and timeous transport back home or to their respective drop-off points.
3. The respondent is ………………..(PTY) LTD, a structural, mechanical, electrical, instrumentation and piping construction contractor. It employs 800 persons. It is part of group that employs over 13 000 persons at sites around the Republic.
4. The applicant was given a notice to attend a disciplinary hearing on 4 October 2016. The notice contained the following charges: “Charge 1: *6.6 Lying or giving false evidence or misleading information, whether verbally or in writing* – in that you lay a charge with the SAPS against Sydney Mthembu for threatening your life. Charge 2: *5.8 Bringing the company name into disrepute during or outside of working hours* – in that you allegedly started rumours about the ……………….HR manager, …………….., which has tarnished his name to the extent that he is not able to carry out his duties on the TM1 site as well as damaged his reputation amongst his congregation. Charge 3: *3.2 Clocking or recording time and not working that time* – in that you clocked in for work on or about the 26, 27, 28 July & 30 August 2016 but did not work for the entire period during this time.” (Those parts of the charge in italics correspond to the disciplinary code (DC) which prescribes dismissal for these offences in the first instance.)
5. The applicant attended the hearing on 6 October 2016; was represented by a supervisor; pleaded not guilty to all the charges; gave evidence; and called 2 witnesses in his support. He was found guilty of charges 1 and 2 and dismissed. He lodged an appeal on 11 October 2016 but that it was refused. The applicant referred an alleged unfair dismissal case with the MEIBC on 21 October 2016 and the matter was conciliated on 16 February 2017 but remained unresolved. Hence the referral to arbitration.
6. Both parties submitted written closing statements.

SURVEY & ANALYSIS OF EVIDENCE AND ARGUMENTS

1. The respondent called the following witnesses: ……………..(HR manager of 33 years) and ……………. (transport clerk from 2013). Only the applicant gave evidence in support of his case.
2. The applicant did not raise any procedural issues.
3. The following was agreed to, common cause, undisputed or conceded during the pre-arb or in the arbitration proper:
   1. The disciplinary code (DC) was contractually binding on the applicant: it being referred to in para 6.4 of the employment contract;
   2. Paragraphs 3.2, 5.8 and 6.6 (referred to above) of the DC served an important purpose and were reasonable;
   3. The applicant had undergone induction where he was made aware of the disciplinary code and that the relevant offences were dismissible;
   4. The applicant was aware that these offences were dismissible offences;
   5. Dishonesty in the workplace is a dismissible offence;
   6. The employment relationship between the parties and between colleagues is based on trust and respect;
   7. That when false allegations are made about a colleague the relationship is damaged between the parties and colleagues;
   8. In 2013 the respondent had hired buses to transport its employees to and from various pick-up and drop-off points in the city from a transport contractor Balreno. One of the locations where employees were picked-up and dropped-off was the Megacity Mall in Umlazi. Due to feuding within the taxi association, the association had stopped Balreno buses from operating from Megacity Mall. The respondent’s employees were therefore left without transport to its sites. The respondent sent a delegation comprising the applicant, Mthembu and Radebe to meet with the association and resolve the impasse. Mthembu spoke to members of the association and succeeded in resolving the issue. From then on the Balreno buses were allowed to operate from Megacity Mall;
   9. One of the members of the association who met with Mthembu was shot dead a few months later and his photograph was published in the local press. The applicant recognised him as a member of the association and started a rumour amongst the respondent’s employees that Mthembu had shot him. The word “hitman” was also used in this context to describe Mthembu’s alleged role in the killing. Radebe called Mthembu to inform him about this rumour that the applicant was spreading;
   10. There was no evidence linking Mthembu with the killing nor did the police investigate him for the incident;
   11. One Govender was another transport contractor hired by the respondent. One of his buses caught fire in Lamontville on 12 July 2016. The applicant then advised Radebe that he is “sick and tired of Mthembu and his Indian friends.” Radebe immediately called Mthembu to inform him about this;
   12. Mthembu called the applicant on 12 July 2016 by phone and reprimanded him for making false allegations and insinuations. He advised the applicant that he will meet the applicant at the site the next day 13 July 2016. The applicant’s response was that it was nothing and that employees were jealous of him;
   13. The applicant proceeded to the police station later that day to open a charge of intimidation against Mthembu. In support of the charge he made a statement consisting of 8 paragraphs on that day and a further statement consisting of 12 paragraphs on 23 August 2016. These statements were to the effect that Mthembu was on possession of a number of firearms and intended to kill the applicant;
   14. That he knew and understood the contents of the police statement that he signed;
   15. A meeting was held as planned on 13 July 2016 in the office of Alex McIlwin (projects manager) at the site. McIlwin, Mthembu and the applicant attended. The meeting commenced with the applicant saying to Alex that Mthembu had threatened him during the call the previous day. Mthembu denied having threatened the applicant. He informed McIlwin that the applicant was spreading false rumours about him and that he had to stop. The meeting ended without the dispute between Mthembu and the applicant being resolved. After the meeting the applicant followed Mthembu to the carpark, crying along the way that he had done no wrong and that he respected Mthembu;
   16. The applicant did not advise either Mthembu or McIlwin that he had laid the intimidation charge at the police station the previous day, ie on 12 July 2016;
   17. Mthembu became aware of the criminal charge on 27 July 2016 when he received a call from the investigating officer who required his presence at the police station later that day. On 28 July 2016 Mthembu proceeded with his attorney to the police station. He was arrested there and given “free bail;”
   18. The alleged intimidation case was dismissed in the Durban magistrates court on 30 August 2016;
   19. That even though he felt that Mthembu wanted to kill him, he did not lodge a grievance against him in the workplace;
   20. Mthembu had lodged a grievance in the following terms on 12 July 2016: “Repeated false statements made by Joseph Mkhize which had negatively damaged my reputation and my … (illegible), rumours spread on site TM1 that I killed a person, in Umlazi and that I would kill him – this ended up in magistrates court.” The desired outcome sought was: “He must be dismissed as I cannot work where he is.”
   21. Mthembu’s reputation was tarnished as a result of the rumours spread by the applicant. The respondent’s reputation also suffered because Mthembu represented it in the ……………….Chamber and he was a trustee of the ………………… Association;
   22. It is unacceptable to be wrongly accused of a crime;
   23. There were no issues of inconsistency;
   24. The charges against the applicant were serious;
   25. The applicant’s position had not been filled but that his duties and functions were being performed by another employee;
   26. There was no evidence that Mthembu had victimised the applicant;
   27. The applicant and Mthembu only had a professional work-related relationship and did not socialise with each other nor attend the same church;
   28. Mthembu did not have any complaints about the applicant’s work performance and had not complained about him in the past. Before the rumours surfaced in 2013 there was no bad blood between them;
   29. The applicant showed no remorse. Indeed he insisted during the arbitration that he felt that Mthembu still harboured intentions of killing him;
   30. The applicant had a clean disciplinary record.
4. As regards the applicant’s version –
   1. The applicant did not put to the respondent’s witnesses that he disputed having spread false rumours about Mthembu;
   2. Did not himself deny having spread false rumours about Mthembu. He contented himself with dismissing the respondent’s version as “lies;”
   3. He failed to put significant parts of his version to the respondent’s witnesses. An example being that he was being chases about by men wielding firearms. He could not say in cross-examination why he felt that these individuals were linked with Mthembu;
   4. In the pre-arb the applicant’s version was that he had a “private dispute” with Mthembu and that it was not of any concern to the respondent. The applicant failed to give evidence of this dispute in his evidence. I find that the dispute was related to the workplace;
   5. He further submitted during the pre-arb that Mthembu interfered in his work. He failed to give evidence on this issue as well.
5. I find that the applicant was correctly found guilty of the charges for the following reasons:
   1. The applicant admitted at the outset that his signatures confirmed the correctness of the contents of the affidavit. Later in the proceedings he disputed having signed the 12 July 2016 affidavit. I find that he damaged his credibility in this regard;
   2. Having regard to the advice of Classsen J, I cannot take into account those parts of the applicant’s version that were not put to the respondent’s witnesses. What remains is the applicant repeating that the respondent’s version is “lies;”
   3. The applicant failed to dispute that he had spread the rumours;
   4. The applicant failed to give evidence of any private dispute between the parties. There is furthermore no evidence that the applicant and Mthembu socialise or are part of the same congregation. I find therefore that the dispute is work related insofar as charge 1 is concerned;
   5. Insofar as charge 2 is concerned it was undisputed that Mthembu is a member of various business related bodies including the Mayor’s Chamber. The possibility cannot be excluded that the rumours may have reached members of these bodies, thereby tarnishing the reputation of both Mthembu and the respondent.
6. I find further that the actions of the applicant led to a breakdown of trust serious rendering the employment relationship intolerable.
7. In all the circumstances I find the applicant’s dismissal to be fair.

AWARD

1. The application is dismissed.

Dated at DURBAN on this the 29th day of AUGUST 2017.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

R J PURSHOTAM

*Commissioner*