

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

CASE NO: JR 343/06

In the matter between:

**THE SOUTH AFRICAN REVENUE
SERVICE**

APPLICANT

And

VUSI SONO

1ST RESPONDENT

**NATIONAL EDUCATION, HEALTH
AND ALLIED WORKERS UNION**

2ND RESPONDENT

B. MBOVANE

3RD RESPONDENT

**THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

4TH RESPONDENT

JUDGEMENT

1. This is an opposed review application brought by the applicant in terms of Section 145 of the Labour Relation Act 66 of 1995 to review and set aside the arbitration award issued on the 4th November 2005 by the third respondent in which he found that the dismissal of the first respondent was substantively unfair.

He ordered the applicant to reinstate the first respondent to his previous position on terms and conditions not less favourable than the ones that existed at the time of dismissal. He further ordered the applicant to pay to the first respondent the amount of R30 147-99 as backpay.

2. The first respondent was employed by the applicant as a customs officer at Johannesburg International Airport. During December 2004, the first respondent appeared at a disciplinary enquiry which arose from the incident that occurred on 13 November 2004.
3. The first respondent faced the following charges (a) he assisted and permitted a passenger alighting from an international flight to smuggle 180 cellphones plus accessories into South Africa in contravention of Section 80(1) of The Customs and Excise Act (b) he failed to seize and detain the cellphones and accessories in contravention of Section 88(1)(a) of the Customs and Excise Act. He was found guilty and dismissed.
4. The respondent referred the dispute of unfair dismissal to the CCMA. The conciliation failed and the dispute was arbitrated by the third respondent.
5. The applicant's case at the arbitration was that the first respondent was placed on the green channel which is an area where the passengers go through when they have nothing to declare or when they have bought goods of less than R3000-00. Those passengers who have to declare goods purchased of more

than R3000-00 in value and those with goods that are for resale go to the red channel.

6. The respondent was observed referring some passengers to the red channel. Passenger Muhammed came to the first respondent. Instead of the first respondent referring him to the red channel, he personally escorted Mr Muhammed to the red channel, where he searched his bag and went through the red channel. Mr Mashabela the supervisor noticed this and went to the red channel. He discovered that the goods had not been declared or detained. On the applicant's version, Mashabela found Muhammed and the first respondent about to leave the customs controlled area. On seeing Mashabela, the first respondent told Muhammed that he was going to detain the goods. Mashabela intervened and told the first respondent to return to the green channel. He requested another official to detain the goods.
7. The applicant's case is that the procedure followed by the first respondent when assisting Muhammed was incorrect in that he personally took him to the red channel and searched him and then escorted him out of the customs area without detaining the goods. According to the passenger's declaration form no cellphones were declared. The applicant's case was further that the first respondent's conduct indicated that he was assisting Muhammed to evade the payment of duties thus contravening the Custom's Act. It was also the applicant's case that the first respondent's cell number was found in Muhammed's cellphone. Mashabela testified that when Muhammed was talking on the

cellphone, the first respondent was on the cellphone more or less at the same time.

8. The first respondent's case was that he did escort Mr Muhammed to the red channel and searched him. He then proceeded to Mashabela's office so that Mashabela could be present when the goods were detained. Mr Mashabela intercepted him before he could detain the goods. This on the first respondent's version took place in the controlled area near Mashabela's office. It was the respondent's case that at the time he was intercepted by Mr Mashabela he had the detention book with him.
9. In coming to the finding that the first respondent's dismissal was substantively unfair, the commissioner reasoned as follows:

“Mr Sono was charged with two counts of misconduct being contravention of Section 180(1)(c) and 88(1)(a) of the Customs and Excise Act. He denied having breached the said sections. Mr Mashabela testified that Mr Sono only attempted to detain that client when he saw him. Mr Sono on the other hand testified that he was only around the vicinity of Mr Mashabela's office because he was looking for him as it was now procedure to detain a client in the presence of his senior. The evidence was captured in a video footage which the respondent failed to submit. With the burden of proof being upon the respondent party I find Mr Sono's evidence being more probably of the two.

Further to that Mr Sono testified and during closing arguments referred to a case of Mr Malahlela an employee who was charged for the same or similar offence. This employee was not dismissed but was given final written warning valid for six months. Although this was only submitted during closing arguments it is however very relevant to Mr Sono's case in that the incident took place around the same time but the sanctions were different. It was in the light of this case that Mr Sono looked for the senior prior to detaining the client. This being the case therefore Mr Sono did not breach any rule. In the light of this the argument that trust relationship has broken does not hold."

8. The applicant has challenged the commissioner's findings on the followings basis.

- 8.1 It is not justifiable in the light of the reasons given therefore and the evidence before the third respondent

- 8.2 Alternatively, the third respondent committed a gross irregularity in the conduct of the arbitrator proceedings

- 8.3 Further in the alternative, it should be reviewed in terms of the broader grounds envisaged in Section 158(1)(g) of the Act.

9. The first respondent filed his answering affidavit and denied that there are any basis for the review.

10. It was submitted by Mr Mokoena for the applicant that the entire evidence of the applicant was ignored by the

commissioner. He submitted that the relationship between the first respondent and Mr Mashabela was good. The commissioner failed to consider why Mashabela would then make false allegation against the first respondent. The respondent's answer to this was that the commissioner took into account the evidence presented.

11. It was again submitted that the commissioner did not consider the first respondent's movement from the green channel to the red channel as well as the fact that the first respondent only started detaining the goods on seeing Mr Mashabela. The respondent's answer to this was that the respondent was entitled to escort Muhammed to the red channel and was intercepted by Mashabela when detaining the goods. An allegation was made by the third respondent in his evidence in chief that Mashabela tore the detention document he had prepared. This was never put to Mashabela. The commissioner did not deal with this.

12. Mr Mokoena further submitted that the commissioner did not take into account the fact that one of the numbers recently called by Muhammed was that of the first respondent. The first respondent's answer to this was that although he had used the number before, that number was that of his brother. The commissioner did not also deal with this aspect. Ms Baloyi for the respondent submitted that the existence of the telephone number did not mean that the respondent colluded with Muhammed. The fact of the matter is that the commissioner ignored this evidence. This is coupled with the fact that, on the evidence presented, the first respondent was on the phone more

or less at the same time as Mr Muhammed. This was a relevant fact to be considered. A statement made by Mashabela after the incident was presented to the commissioner. This statement was also ignored.

13. Ms Baloyi for the respondent submitted that on the evidence presented, no case was made by the applicant against the first respondent. She submitted that the commissioner looked at the three versions presented and preferred that of the first respondent.

14. I raised with Ms Baloyi whether the commissioner did indicate in his award why the evidence of the applicant as presented by Mr Mashabela and Jacobs was rejected. Ms Baloyi correctly conceded that the commissioner did not set out why the evidence was rejected. Ms Baloyi further submitted that the fact that the commissioner did not set out the reasons does not mean that the evidence was not considered. Accordingly, she submitted that it is clear from the award that the evidence was taken into account.

15. It appears from the commissioner's award that the applicant's evidence was rejected because the video footage was not submitted. It is difficult to understand the commissioner's reasoning. This suggests that the applicant's evidence was based on the video footage alone. This ignores the evidence of Mr Mashabela who testified on his personal observation of what the first respondent did. Mr Jacobs gave evidence based on his investigations and the viewing of the video footage. The video

footage was viewed by the chairperson of the disciplinary hearing. At page 87 of the record, the chairperson recorded that the video footage of the incident was viewed in the joint operations centre. The Outcome of the Disciplinary Enquiry was part of the documentation presented to the commissioner. The chairperson set out what he observed from the video footage. The commissioner did not say anything about this and he simply ignored it.

16. The court is required to consider whether the commissioner's decision was rationally connected to the information before him and to the reasons he gave for it. (*Carephone (Pty) LTD v Marcus NO. (1998) 11 BLLR 1093 (LAC)*). The question is not whether the award is capable of sustaining on the evidence (see *Rusternburg Platinum Mines LTD (Rusternburg Section) v CCMA & Others (2006) 11 BLLR 1021 (SCA)* at para 30 and 31. In the light of this I reject the submission that it can be gathered from the award that the evidence was taken into account.

17. The focus on review is on the process and on the way in which the decision maker came to the challenged conclusion (see *Rusternburg supra*). The commissioner's reasoning is flawed because sufficient evidence was presented which he completely ignored without explanation. The award has no connection with the evidence presented by way of documentation and oral evidence. The commissioner's decision was influenced by the fact that the video footage was not submitted. However, he failed to indicate on what disputed issues the video footage was

required for. The commissioner failed to indicate if he also wanted to watch the video footage or that he did not accept what the Chairperson of the disciplinary hearing had observed and recorded.

18. The commissioner also took into account the question of inconsistency relating to the Malahlela case. This was irrelevant. First, the question of inconsistency was never placed as an issue by the first respondent. No evidence was led on this. Secondly the question of consistency was only raised in the closing argument. Despite the fact that the commissioner was aware that this issue was raised in the closing argument, he nevertheless found it relevant.

19. The commissioner committed a gross irregularity in relying on the issues raised in the closing argument and ignoring the evidence presented. The commissioner failed to appreciate that the applicant was not given an opportunity to present evidence on the question of inconsistency.

20. In my view, the commissioner failed to apply his mind on the evidence presented. In so doing he failed to exercise his powers as required by the Labour Relations Act. I am in agreement with Mr Mokoena that the commissioner completely ignored the applicant's evidence. The commissioner's decision is mainly based on two grounds. That is, the failure of the applicant to submit the video footage and the final written warning of Mr Malahlela. The two grounds on which the commissioner relied are not rationally related to the evidence. The fact that

Malahlela was given a written final warning is not relevant to the guilt of the first respondent. It may be relevant as to the fairness of the dismissal but it was not an issue before the commissioner. Accordingly, this was a bad reason which the commissioner took into account.

21. In the light of the fact that relevant evidence was ignored and the fact that irrelevant evidence was considered, it cannot be said that the award is rationally justifiable. As a result, the award is rationally not justifiable. As a result, the award cannot stand. The following order is made:

- (a) The award issued by the third respondent on 4 November 2005 is hereby reviewed and set aside.
- (b) The first respondent is ordered to pay the costs.

NGCAMU AJ

Date of Hearing: 15 February 2007

Date of Judgement: 23 February 2007

Appearances:

For the Applicant: Adv P. Mokoena

Instructed by: Brink Cohen Le Roux Inc.

For the Respondent: Adv S. Baloyi

Instructed by: Thaanyane Attorneys

