

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

CASENO: JR1249/07

In the matter between

LOUIS SIKHETSO KHOSA

1st Applicant

ELIAS KABISHI MALATJI

2nd Applicant

And

THE SOUTH AFRICAN POLICE SERVICE

1st Respondent

DENGA MULIMA N.O.

2nd Respondent

THE SAFETY & SECURITY SECTORIAL

BARGAINING COUNCIL

3rd Respondent

JUDGMENT

Molahlehi J

Introduction

- 1] This is an application in terms of which the applicants seeks an order reviewing and setting aside the arbitration award issued by the second respondent (the arbitrator) under case number PSSS222-06/07 dated 10th April 2007. In terms of the arbitration award the arbitrator found the dismissal of the applicants to have been for a fair reason and accordingly dismissed the applicant's claim of unfair dismissal.

Background facts

- 2] The two applicants are former employees of the first respondent (the SAPS) whose service were terminated following charges of misconduct related to the allegations that

they had been involved in the robbery of people of Senegalese descent at Betrams during December 1999. The applicants were also criminally charged for the same offence in the magistrate court but were found not guilty.

3] The applicants challenged the decision of both the disciplinary and the internal hearing that found them guilty as charged by referring an alleged unfair dismissal dispute to the third respondent. The decision to terminate the services of the applicants was confirmed by the arbitrator serving under the auspices of the third respondent. Being unhappy with that decision the applicants launched the present review proceedings.

4] The incident that led to the SAPS proffering charges against the applicants as indicated occurred during December 1999 at Betrams. In support of its case that the dismissal was for a fair reason the SAPS presented its version through several witnesses.

5] The first witness of the SAPS was Mr Kone, a taxi driver who testified that on the day of the incident he transported the first applicant, Mr Khosa to a building where the robbery occurred. On their arrival where the robbery took place Mr Kone was instructed, by Mr Khosa who left his cell phone in the taxi, to wait for him. On his return, the two drove to a petrol garage where the taxi fare in the amount of R15 00, 00 was paid. This was the first time the two of them met.

6] Mr Kone then left and continued with his work. He later travelled back to Betrams to deliver other passengers. On the second occasion when he returned to Betrams he saw a suspicious car behind him. He got scared and drove straight to

the Hilbrow Police station.

- 7] A week later Mr Kone was taken to the Jeppe Police station where he was questioned about the passengers he transported on the day in question. He testified during the arbitration hearing that he identified Mr Khosa from the photos which the police showed him as one of the passengers he transported on the day in question.
- 8] The second witness of the SAPS was Mr Mutsapha Dingue, a member of the Senegalese community, he testified that on the day in question he was at a prayer meeting at about 17h00, when he heard a knock at the door. One of the people at the prayer meeting, Mr Moma Jack, went to investigate who was at the door. On his return he indicated that it was the police. There were four people at the door who claimed to be police but in civilian clothes. They threatened to break the door if they did not open. After opening the door the four people started searching the building. At some point they were ordered by one of the robbers to go to another room. On entering the room they saw Mr Khosa with a bag which according to Mr Dingue had about R60 000, 00 inside. He also saw another person handing an envelope to Mr Khosa. The envelope according to him also had money in it.
- 9] Thereafter, three of the robbers left but indicated that they were going to fetch a van so that they could take them to the police station. The fourth person also left after some time.
- 10] According to Mr Dingue, they then on the advice of the chairperson of Senegalese community went to report the matter to the police station. On arrival at the police station they saw Mr Khosa and Mr Malatjie. They identified Mr Khosa who

was with the group that were at the building where the robbery took place. Mr Khosa was immediately surrounded by the Senegalese people who had come to the police station to complain about the incident. Mr Malatjie who at that stage was in a car managed to drive away.

11]The third witness of the SAPS was Mr Moma Se who testified that on the day of the incident he received call from Mr Dingue about the robbery. On arrival, at the scene of the incident Mr Dingue informed him that the robbers had taken the bag and envelop which was placed in the store room. It would appear that the report by Mr Dingue to Moma Se was done outside the building as according to Mr Moma Se, whilst they were still talking outside they saw a mercedes benz taxi which looked suspicious. They decided to follow it. They tried to stop the taxi by flicking at it with their lights to no avail. They took its registration number and proceeded to the Hillbrow police station where they found all the other people waiting. They were advised at the Hillbrow police station to go and report their case at Jeppe police station.

12]The next witness of the SAPS was Mr J Nell Gousserd, the superintended posted at the commercial crime unit in Johannesburg. He was in charge of the command unit to which the applicant belonged. He testified that on the day of the incident he held a parade at about 15h45 and present in that parade were the two applicants. According to him during the parade he received a call informing him that one of the officers under his command was arrested at the Hillbrow police station. He then authorised the two applicants Mr Khosa and Mr Malatjie to attend to that matter. They travelled to the Hillbrow

police station in the white Golf which was assigned to Mr Malatjie. He then later at 23h00 received a call informing him that Mr Khosa was arrested for armed robbery. He also received calls regarding the whereabouts of Mr Malatjie including the car he was driving. He contacted Mr Malatjie on his phone and informed him about the matter. Mr Malatjie informed him that he was at a store buying food and thereafter will be going home.

13]The following day Mr Gousserd went to Mr Malatjie's flat in Triumph. Mrs Malatjie told them on arrival that she did not know where her husband was. The white golf which he had used which had been assigned to him was parked at home. After taking the finger prints he used a spare key which he had with him to drive it to the police station. He later received information that Mr Malatjie was also arrested.

14]Mr G Govender was the next witness to testify on behalf of the SAPS. He was on duty on the day in question. He testified about the arrival of the members of the Senegalese community and how they informed him what happened at the building where they were robbed. Whilst listening to their statement they pointed out and surrounded Mr Khosa who at that moment was going out of the charge office. The men also pointed out at the golf which was been driven out at that particular moment. He was not aware who the driver of the vehicle was but managed to go out and take the registration number. On his return from taking the registration number he found that Sergeants Malebane and Moremi and the charge office commander, Ms Motsane, had placed a lot of money on the table. He gave the registration number to Sergeant Mr

Moremi without enquiring about the issue of money.

15]The other witness who testified on behalf of the SAPS was Ms T S Motsane; the captain who was on duty and was in charge of the charge office on that particular day. She was approached by sergeant Malebane with money which he required to be registered. She testified that she made a mistake by writing the name of Mr Fall instead of that of Mr Malebane in the register.

16]The testimony of Mr Malebane who appears to have testified during the arbitration hearing whilst he was in the Johannesburg prison was to confirm in essence what has already been stated above by the other witnesses i.e. that a group of Senegalese came into the charge office complaining that they had been robbed and pointed out in front of his other colleagues. He also testified that once Khosa was pointed out as the robber he together with his other colleagues grappled and arrested him. They found on him an envelope which the Senegalese community claimed to be theirs. When they searched him further, they found a lot of other notes in his pockets. The testimony of the superintended Sifurusha had no direct bearing on the events relating to the robbery. He testified mainly about procedure to follow when filling in SAPS documents.

The case of the applicant during the arbitration hearing

17]The version of Mr Khosa is that on the 28th December 1999 he attended the parade together with the second applicant Mr Malatjie, and whilst there they were assigned to attend a docket at the Hillbrow police station. Before attending to the docket at the Hilbrow police station he had to take his wife home at Vosloorous and on his return he proceeded together

with Mr Malatjie to the Hillbrow police station.

18] On arrival at the Hillbrow police station he went to the computer room whilst Mr Malatjie went to check on the suspects. Mr Malatjie came back to him and informed him that there was nothing to do in the docket as there was still information missing therein. They then decided to leave the Hillbrow police station. As they were leaving the police station they were confronted by members of the Senegalese community who accused him of being one of those who robbed them. He was then arrested and sent to the Jeppe police station without being searched. He says that whilst he was at the Hillbrow police station he saw Ms Motsane's husband and Sergeants Malebane and Moremi together with another official of Indian descent.

19] Mr Khosa says that after his arrest he was then taken to the Jeppe police station where he registered an amount of R50 (fifty rand) as an item in his possession.

20] The next witness who testified in support of the applicant's case is Mr Malatjie. In his testimony he confirmed the instruction which was given to them to attend at the Hillbrow police station. He also confirmed that before going to Hillbrow police station the first applicant, Mr Khosa had to take his wife home at Vosloorous.

21] As concerning what happened as they were about to leave the Hillbrow police station, Mr Malatjie says they were confronted by the Senegalese community members who accused Mr Khosa of robbing them of their money. The two of them went back to the charge office to deal with the situation that had arisen as a result of the accusation by the Senegalese

community members. He further says that he enquired from Mr Malebane as to what was going on and after he was told what the complaint was he advised Mr Malebane to open a case against Mr Khosa. He then advised Mr Khosa that he would leave with the golf to go and attend to other matters.

22]Mr Malatjie says after leaving the police station he contacted Mr. Gousserd to inform him about what had happened regarding Mr Khosa but could not reach him. He then later called Mr Gousserd and during that telephone conversation told Mr Gousserd that he was buying food and that he will explain to him the following day what was happening with the allegations made by the Senegalese.

23]As concerning why he left the golf car at his house Mr Malatjie says that it was because it had a mechanical problem and therefore he decided to use Mazda car to go to work. On arrival at work he gave the key of the car to Mr Gousserd. He was then later advised by Mr Gousserd that he was wanted by the police and that he should go and report at the Jeppie police station. On arrival there he was arrested.

Grounds for review

24]The applicants contend that the arbitrator's award is unjustifiable regard being had to the evidence which was presented before him. The applicants further contend that the commissioner committed gross irregularity in relation to his duties as an arbitrator by failing to properly consider the evidence which was presented before him. In the founding affidavit the applicants set out their grounds of review as follows:

“20.1 Mr Mommasak, who gave evidence for the First

Respondent stated that he had not witnessed the robbery yet appears as the complainant in the criminal trial.

22.2 A certain Mr Fall, a Court interpreter, is recorded in the SAP13 registrar as the person who found the money yet he denies ever seeing it.”

25]The applicants further state that:

“25.1 It was our evidence that the complainant had stated that I looked like the person who had robbed him.

25.2 The identification by the taxi driver, Mr Kone was based on our appointment certificates which I believe to be bad in law.”

The arbitrator’s award

26]In his analysis of the evidence and arguments the commissioner identified the issues raised by the applicants concerning the fairness of their dismissal to be the following:

- *“The employer failed to stick to the set down time frame. The matter was instituted after three years, i.e. the applicants were for that period in prison.*
- *Applicants presented their cases under duress.*
- *The actual complaint to the matter was never called to the hearing.*
- *The witnesses used by the employer contradicted themselves. The chairperson shouldn’t have relied on that testimony.*
- *There was never an identification parade to identify the alleged robbers.*
- *There were no grounds to justify conviction on the charges proffered against them.”*

27]It is apparent from the reading of the arbitration award that the

commissioner rejected the version of the applicants that they presented their case under duress. The arbitrator agreed with the applicants that indeed the SAPS delayed in instituting its disciplinary hearing but found that the delay was in the circumstances reasonable and justifiable. He concluded in this respect that the applicants were not prejudiced by the delay.

28]The arbitrator also accepted the version of the SAPS witnesses in relation to the identification of Mr Khosa as being one of the people who were involved in the robbery. The arbitrator found that the identification particularly by the driver of the taxi Mr Kone was not disputed by the applicant. The arbitrator noted the complaint by the applicants that the SAPS never conducted a formal identification parade. In relation to the issue of the applicants being found guilty of the charges proffered against them, the commissioner found that the applicants did not contradict nor dispute the version of the applicants in relation to the following testimony:

- *“Mr Kone drove the Mercedes Benz metered taxi. Such a taxi was chased behind by a car for the reason and by the people not known to Mr Kone, i.e. by the Senegalese. Mr Kone neither knew nor had a grange (sic) Mr Khosa, the basis of which he would want to use this case to punish him. Mr Kone pointed to that amongst other passengers he transported was Mr Khosa in Betrums that afternoon. The time and the place presented by the Mr Kone linked very well with that presented by the Senegalese Mr Dingue.*
- *The applicants were officially assigned a white golf to attend to a docket in Hilbrow on the day. Mr Malatjie drove such Golf during the time the Senegalese were reporting and*

pointing to them as robbers in Hilbrow police station.

- *Both the Senegalese (Mr Dingue) and Mr Kone never had problems in identifying the applicants in the manner they did. The former identifying him at Hilbrow police station where (sic) they were reporting such armed robbery.*
- *Messre Mantsane, Malebane and Govender of Hillbrow Police Station respectively participated in taking the registration numbers of the driving away Golf, arresting and searching Mr Khosa and later registering the money, envelope and fire-arm that were found on Mr Khosa.*
- *Mr Malatjie could not provide or convince that he wrote notes, registering the extent to which he attended to the docket, i.e. as he alleges to have made in such docket. His testimony regarding the manner he attended or noted in the docket differs to that presented by Mr Safulusha (employer's witness) and Mr Van De Westhuissen (his own witness). Further, Ms Sibisi distanced herself to the affidavit that Mr Malatjie presented to corroborate his evidence."*

Evaluation

29]The Constitutional Court has in *Sidumo and others v Rustenburg Platinum Mines* (2007) 12 BLLR 1097 (CC), held that the test for a review of an arbitration award is that of determining whether the conclusion reached by the commissioner is one which a reasonable decision maker could not reach. After setting out that test the Court then went further to explain what commissioners are expected to do when dealing with unfair dismissal disputes. In this respect the Court had the following to say:

“In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list.

To sum up in terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer.” What is required is that he or she must consider all relevant circumstances.”

30]The important aspect in *Sidumo*’s test and as further explained in the subsequent case is that the arbitration award in review applications must be read as a whole in order to determine whether it meets the standard of reasonableness. Of course the arbitrator’s award must be read together with the record of the arbitration proceedings. I also agree with the submissions made by counsel for the SAPS that the arbitration award must be examined as a whole in determining whether it falls within any of the transgressions set out in s 145 (2) of the LRA.

31]In my view the proper analysis of the applicant's case has more than anything else do with the assertion that the arbitrator's findings and conclusions were incorrect. This is however not the test to apply when determining a review application.

32]In my view the proper reading of the arbitration award in this matter shows very clearly that the commissioner had a full understanding and grasp of the issues and facts he had to deal with. The applicants do not complain in this review application about the formulation of the issues for determination by the arbitrator. The arbitrator considered all those issues identified, reasoned his findings on them and came to the conclusion as he did that the dismissal of the applicants was for a fair reason.

33]The arbitrator considered the issue of the delay in instituting the disciplinary hearing by the SAPS and whilst agreeing with the applicants that there was indeed a delay in instituting the disciplinary proceedings against them, he accepted that explanation for the delay and found that the delay did not impact on the fairness of the dismissal.

34]As concerning the issue of duress, the applicants have not in my view made out a case as to why the finding of the arbitrator should be considered to be unreasonable.

35]The applicants have also not made out a case as to why the failure to call the complainant of the robbery should be regarded as making the conclusion reached by the arbitrator unreasonable. The arbitrator arrived at his conclusion after fairly and objectively assessing the facts which were put before him by both parties.

36]The probabilities point out very clearly that there was a

robbery on the day in question. The victims of that robbery went to report the incident at the Hillbrow police station. On arriving at the police station, they immediately without any doubt identified Mr Khosa as the perpetrator of that crime. It seems to have never been the case of the applicants that the Senegalese people may have mistakenly identified Mr Khosa as part of those who robbed them. The identification of Mr Khosa by the Senegalese at the police station is in a sense confirmed by the version of Mr Kone, the taxi driver. Therefore, the complaint by the applicants that the method used with Mr Kone to identify them bears no merit.

37]The issue of not calling the complainant of the robbery does not seem to me to be that relevant in the determination of whether or not the applicants have committed an offence of a serious nature that warranted dismissal. What is essential is that the applicants were told about the nature of the offence or misconduct in details and with the relevant particulars of the charges against them. The applicants do not in this matter raise issue with regard to this essential principle. The commissioner clearly applied his mind and was satisfied that the SAPS had complied with this basic principle before taking the decision to terminate the employ of the applicants.

38]In my view the commissioner was correct to proceed with and consider the evidence before him even though the complainant never testified. The arbitrator was correct because the applicants were not charged with the theft of the money but rather the essence of the charges against them had to do more with their position and the offices they occupied as members of the SAPS. They entered the premises of the Senegalese on the

basis of their positions as members of the SAPS and only after fraudulently gaining access on that basis they engaged in the robbery. It would be unfair in the circumstance of this case to expect the SAPS to keep this kind of characters in its employ.

39]In fact the case of the applicants as I understand it has more than anything to do with the procedural fairness and largely based on the complainant that the SAPS did not follow the technical aspect of an identification parade. In the circumstances of this case there was no need to conduct an identification parade because the victims of their crimes identified them soon after the crime was committed.

The arbitrator is also correct in his assessment of the evidence of the applicants. The evidence of the applicants were indeed contradictory and illogical. The witnesses which the applicants called did not assist their case.

Conclusion

40]There is conclusive evidence which supported the version that the Senegalese people were robbed of their money on the day in question. The evidence further placed the applicants at the scene of the robbery. Mr Khosa was positively and firstly identified within a short space of time as one of the perpetrators of the robbery and that was as he was about to leave the police station. That evidence is corroborated by the evidence of the taxi driver, Mr Kone who transported Mr Khosa on that particular day to the building where the robbery took place. Whilst there may be some questions as to the total amount of money involved, the evidence of Mr Malebane was to the effect that Mr Khosa was found in possession of money

and in my view the probabilities point to the fact that that money belonged to the Senegalese.

41]In my view the applicants have failed to make out a case justifying interference with the arbitration award and therefore their case stands to fail.

42]In law and fairness, I do not see the reason why the applicants should not be ordered to pay the costs. There is no basis why they sought to review an award where the arbitrator dealt in details with the evidence and gave detailed reasoning as to why he came to the conclusion as he did.

43]In the premises the review application is dismissed with costs.

Molahlehi J

Date of Hearing: 20 August 2010

Date of Judgment: 2 February 2011

Appearances

For the applicant: Adv Grobler

Instructed by: Kirchmanns Inc

For the respondent: Adv A. Kook

Instructed by: Perrott, Van Niekerk, Woodhouse, Matyolo Inc