



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

**JUDGMENT**

Not reportable

Case number: JR 2086/12

In the matter between:

**HH MHLANGA**

**Applicant**

and

**SAFETY AND SECURITY SECTORAL**

**BARGAINING COUNCIL**

**First Respondent**

**P H KIRSTEIN N.O**

**Second Respondent**

**SOUTH AFRICAN POLICE SERVICES**

**Third Respondent**

**Heard: 02 March 2016**

***Ex tempore* judgment:**

**02 March 2016**

**Date edited and signed: 26 July 2016**

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**EX TEMPORE JUDGMENT**

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STEENKAMP, J:

- [1] This is an application to have the arbitration award by the second respondent, Advocate Paul Kirstein, a panellist of the Safety and Security Sectoral Bargaining Council (the first respondent) reviewed and set aside. It arises from the dismissal of the employee, Mr H H Mhlanga, who was a member of the South African Police Services until he was arrested, allegedly with Mandrax drugs in his possession, after which he was disciplined and dismissed.
- [2] It is common cause that the incident referred to happened on 31 October 2007. The SAPS carried out a surprise arrest after they had been tipped off by an informer. The first witness who gave evidence at the arbitration, W J Smit, a police officer employed at the Organised Crime Unit, testified that ten days earlier, on 21 October 2007, there was an uncompleted drug deal between the employee, Mr Mhlanga, and the informer. The deal could not be completed but the informer tipped off the SAPS and they intercepted the employee driving a Toyota Corolla, together with two passengers in the car. They stopped the car, ordered the three occupants out and ordered them to lie down on the ground. They found a green and white bag with Mandrax tablets under the driver's seat.
- [3] From the photographs presented at the arbitration, it is clear that the Mandrax tablets were found under the front part of the driver's seat and not at the back of the driver's seat. The applicant, that is

Mr Mhlanga, simply denied that he had any knowledge of the drugs. The arbitrator took into account his evidence, together with that of Mr Smit and Mr Jacobs, who is also an officer in the organised crime unit.

[4] The arbitrator considered this evidence together with the photographs that were handed into evidence. He noted that the version of Jacobs that the Mandrax tablets were found in the vehicle remained uncontested. He also noted that the photographs confirmed that the Mandrax tablets were found under the driver's seat inside the vehicle driven by Mhlanga.

[5] What was disputed was where the lady passenger was seated in the vehicle. Jacobs indicated that she was seated behind the front passenger. Mhlanga said that she was seated behind him, that is behind the driver's seat, obviously trying to argue that she could have shoved the tablets under his seat. The photographs show that the lady passenger was lying on the ground on the left of the car, next to the left rear passenger seat, after the passengers had been ordered out of the car, and the arbitrator drew the inference on a balance of probabilities that she was seated behind the front passenger seat and not behind the driver's seat.

[6] The arbitrator rejected any suggestion that she could have placed the plastic bag with the drugs under the driver's seat. He also noted that it is common cause that the applicant was the owner of the vehicle in which the Mandrax tablets were found. He concluded that SAPS had proven on a balance of probabilities the

allegations of misconduct against the applicant.

[7] Mr *Baloyi*, for the applicant, argues that the award is reviewable on essentially four grounds. I will deal with each of them. The first is that the SAPS had not proven that the tablets were in fact Mandrax. Firstly, when I debated that with him in argument today, he could not point me to any instance in the record where Mhlanga actually placed that issue in dispute. Secondly, it must be noted that this is an arbitration and not a criminal trial. The SAPS officers testified throughout that they had found Mandrax tablets in the vehicle. Mhlanga's defence, firstly, was a bare denial, and secondly, trying to shift the blame onto the lady passenger. He did not challenge SAPS to prove that the tablets were indeed Mandrax and not something innocuous, like Panado or Disprin. That ground of review is rejected.

[8] The second ground of review is that the arbitrator did not properly consider the evidence before him when faced with two mutually destructive versions. That centred mainly on the question where the lady passenger was seated. As I have noted, Mhlanga said that she was seated behind him, whereas the arbitrator found, based on Jacobs's evidence and the photographs, that she was seated on the left rear passenger seat, thus making it improbable that she could have shoved the tablets all the way under the driver's seat right up to the front where Mhlanga was sitting and driving. The Court has had occasion to peruse those photographs as well. It is abundantly clear to me

that on the probabilities, the arbitrator's conclusion is an entirely reasonable one.

[9] Thirdly, Mr *Baloyi* argued that SAPS should have called additional witnesses, referring to the case of *Tshishonga v Minister of Justice and Constitutional Development*<sup>1</sup>, where the court said that:

“Failure of a party to call a witness is excusable in certain circumstances, such as when the opposition fails to make out a *prima facie* case. But an adverse inference must be drawn if a party fails to testify or place evidence of a witness who is available and able to elucidate the facts, as this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him or even damage his case.”

[10] It is unclear to me why Mr *Baloyi* argues that it was necessary for SAPS to call any further witnesses in this case. On the evidence that SAPS did adduce, together with the photographs that they submitted in evidence, the arbitrator was placed in a position to make an award and to draw a conclusion on a balance of probabilities, as he must do in an arbitration, as opposed to a criminal case where the State has to prove the case beyond a reasonable doubt.

[11] Fourthly, Mr *Baloyi* referred to what he called “inconsistencies” in SAPS’s case before the arbitrator. Those were that Smit, who was the investigating officer, failed to say which officer had

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<sup>1</sup> [2007] 4 BLLR 327 (LC) para 112.

searched the female passenger; that Smit did not ascertain the “status” of the male passenger, such as where he lived; that Jacobs’s statement that a photograph of sealing of the tablets demonstrated that when the vehicle was searched the applicant was next to him was somehow misleading; and that Jacobs was not sure about the position of the lady passenger.

[12] I fail to see how those issues amount to inconsistencies. On the evidence before him, the arbitrator was in a position to come to a conclusion on a balance of probabilities, and the conclusion that he came to was no so unreasonable that no other commissioner could have come to the same conclusion.

[13] Lastly, Mr *Baloyi* argued that the arbitrator committed an irregularity when he noted that the applicant did not explain on his version where the drugs had come from. Again, it must be noted that this is not a criminal case, and although the applicant has a right to remain silent, I agree with Mr *Nhlapo* that one would have expected of an innocent employee to explain that, for example, he was innocently driving along when he picked up two hitchhikers who had bags with them and that he had no idea what was in those bags. Taken together with the previous incident on 21 October 2007, on a balance of probabilities, once again, the arbitrator’s conclusion is not unreasonable.

[14] Insofar as the parties before the court need any reminder that the test for review is by now trite, it has been set out time and time

again in *Sidumo v Rustenburg Platinum Mines*<sup>2</sup>, *Herholdt v Nedbank Ltd*<sup>3</sup> and in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA & others*<sup>4</sup>. In that case, that is *Gold Fields*, the court noted that:

“A piecemeal approach in dealing with the arbitrator’s award is improper, as a review court must necessarily consider the totality of the evidence and then decide whether the decision maker or the arbitrator is one that a reasonable decision maker could make”.

[15] As Mr *Nhlapo* pointed out, in the recent case of *Palluci Home Depot (Pty) Ltd v Herskowitz*<sup>5</sup>, the LAC referred back to *Head of the Department of Education v Mofokeng*<sup>6</sup> and noted that:

“For a defect in the conduct of the proceedings to amount to a gross irregularity, as contemplated by section 145(2)(a)(ii) of the LRA, the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result.”

And further on:

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<sup>2</sup> [2007] 12 BLLR 1097 (CC).

<sup>3</sup> (2013) 34 ILJ 2795 (SCA).

<sup>4</sup> [2014] 1 BLLR 20 (LAC).

<sup>5</sup> [2015] 5 BLLR 484 (LAC) at para 16.

<sup>6</sup> [2015] 1 BLLR 50 (LAC).

“Flaws in the reasoning of the arbitrator, evidence in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors, et cetera, must be assessed with the purpose of establishing whether the arbitrator has undertaken the enquiry in the wrong manner or arrived at an unreasonable result.”

[16] In the case before me, the arbitrator undertook exactly the correct enquiry, he considered the evidence before him, and he came to a conclusion on a balance of probabilities that another arbitrator could have come to. The award is therefore not reviewable.

[17] With regard to costs, I agree with Mr *Nhlapo* that I have to consider that this is no ordinary employee. He was a police officer who had to ensure that the law is upheld. Instead, he broke the law. He was properly and fairly dismissed and he then chose to incur further legal costs in attacking an award that was reasonable and not open to review.

#### Order

The application for review is dismissed with costs.

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AJ STEENKAMP

Judge of the Labour Court

APPEARANCES:

APPLICANT: M M MBaloyi (attorney).

THIRD RESPONDENT: S B Nhlapo

Instructed by the State Attorney.

## TRANSCRIBER'S CERTIFICATE

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HH MHLANGA / SAPS

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