



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR375/14

In the matter between:

DEPARTMENT OF HOME AFFAIRS

Applicant

and

GENERAL PUBLIC SERVICE

First Respondent

SECTORAL BARGAINING COUNCIL

COMMISSIONER Z.S SIBEKO N.O

Second Respondent

PSA obo T NXUMALO

Third Respondent

Heard: 19 May 2016

Delivered: 11 August 2017

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

- [1] The applicant (Department of Home Affairs) seeks an order reviewing and setting aside the arbitration award dated 24 October 2013, which was issued by the second respondent (the Commissioner) under case number GPSSBC

4536/2012. In the award, the Commissioner found that the dismissal of the third respondent and former employee, (Nxumalo) was unfair, and had ordered her reinstatement. The review application is opposed.

Background to the dispute:

[2] Nxumalo was employed by the applicant as Control Immigration Officer, and was based at the Lebombo Border Post. She was dismissed following upon a disciplinary enquiry into two allegations of misconduct which were framed as follows;

- i. *It is alleged that you committed an act of misconduct in that on or about 19 February 2011 at or near the Port of Entry: Lebombo, you unlawfully accepted unprescribed amount of R50.00 in return to endorse the departure stamp in passport number AC025751 of Mr Tomas Salvador Tivane which was used by the Undercover Police Agent.*
- ii. *It is alleged that you committed an act of misconduct in that you on about 19 February 2011 at or near the Port of Entry: Lebombo, wilfully and intentionally failed to capture the movement of passport number A.D. 025751 of Mr Salvador Tomas Tivane which was used by the Undercover Police Agent on their Movement Control System.*

[3] Nxumalo's daily duties involved working at the borders/port of entry, processing the movement of travellers in and out the Republic, and above all, ensuring that required travel documents presented by travellers were in order. Following the allegations against her, a disciplinary enquiry was held which had resulted in her dismissal. Nxumalo had then referred the dispute to the first respondent (GPSSBC) resulting in the award which is the subject of this review application.

Arbitration proceedings:

[4] At the arbitration proceedings, the applicant had called four witnesses to testify on its behalf. Only Nxumalo testified in her case. The evidence of Mr A Stassen on behalf of the applicant was as follows;

- 4.1 He is employed as an assistant director and the Lebombo Border Post and was at the time assisting as the Office Manager. His evidence pertained to an explanation of the process to be followed at the border post, which was that a person/traveller would approach the Immigration official to present his or her passport. The Immigration officer must then check the passport to verify that it was valid, and whether it belonged to the person presenting it. If everything was in order, the official would then capture the movement of the individual on the system (CPM) and then endorse the passport with a stamp, indicating whether it was an arrival or departure, and further adding the date of that movement.
- 4.2 Each stamp has a control number at the bottom and the number is unique to each immigration official on duty. The stamps are further of two kinds, viz, a round one which is used to endorse the passport when a traveller enters the country, and a square one used when a traveller departs. In terms of the applicant's rules, no official is allowed to use the stamp of another official and to do so would constitute misconduct. Furthermore, it was important for officials to follow procedures when travellers arrived or exited the country for security reasons.
- 4.3 Stassen had referred the Commissioner to documentation relating to the owner or holder of passport number AC025751 who had entered South Africa on 10 January 2011 and did not leave although he was permitted to be in the country for 30 days. That person in the circumstances would have been made to pay a fine in respect of the number of days overstayed. In this case however, the fine was not paid even though the passport was processed.

[5] The second witness called was Eric Nendwane, who worked at the applicant's Counter Corruption and Investigation Unit. He was part of 'Operation Mahlambandlovu', which was set up by the Crime Intelligence Unit (The Hawks) to conduct investigations into corruption within the applicant's operations at border posts. According to Nendwane;

- 5.1 Nxumalo was arrested for taking a bribe and failing to follow correct procedures at the point of entry when assisting a traveller. This was also after she had processed a passport presented to her by a person, which passport did not belong to that person. The passport in question was used by a police agent as part of the operations. Nxumalo however did not capture the movements of this individual on the system.
- 5.2 One of the undercover agents, Mahuntsi had used the passport that was in the name of a Mozambican national, Salvadore Tivane. The passport was given to Mahuntsi by Warrant Officer Vermaak, the coordinator of the project. Tivane's permit to be in South Africa had expired, and the departure stamp on the passport in question was backdated to 1 February 2011. Nendune further testified in regard to video evidence in which Nxumalo was seen taking money from Mahuntsi before being allowed passage. He could not testify on how much she took.
- 5.3 In the video, Nxumalo could also be seen affixing her stamp on the passport in question in which money was placed inside. She was also observed taking the money and affixing her stamp without scanning it on the machine as required. Copies of the cash notes were also presented at the arbitration proceedings.
- [6] A third witness called by the applicant, Francois Vermaak. He is employed by the South African Police Service (SAPS) and was in control of Operation Mahlambandlovu. As part of that operation, Mahuntsi, the agent was on 19 February 2011 given an amount of R350.00 and the passport of a Mozambican national which had been removed from circulation by the Department. The passport was given to the investigators for purposes of their investigation. Mahuntsi, the undercover agent, went to the border post, came back with a stamped passport and handed it back to him together with R100.00, and reported *inter alia* that he had paid R50.00 to Nxumalo.
- [7] Mahuntsi, the undercover agent had also testified. He is employed by the SAPS and was part of the operation. He confirmed Vermaak's testimony to

the effect that he was fitted with an electronic device, given R350.00 and a passport that did not belong to him. His instructions were to go to the border post and see if he could bribe his way through. He had proceeded to the pedestrian gate, took R200.00 and placed it in the passport and was let through after the police officer concerned had taken the money. He then proceeded to the help desk in the immigration area and put a further R50.00 in his passport which he had presented to Nxumalo. Nxumalo took the R50.00 and assisted him by affixing her stamp in the passport.

[8] Nxumalo's defence to the allegations was essentially that;

She was indeed on duty on 19 February 2011. Her duties entailed stamping passports in respect of travellers coming in and out of the country. On the day in question however, she did not encounter Mahuntsi or take any money from him. She had denied having affixed her stamp in the passport in question.

The award:

[9] The Commissioner's analysis and findings as contained in five paragraphs of the award rested on two questions. The first question was whether the applicant in this case had proven that Nxumalo had accepted the R50.00 from Mahuntsi. The Commissioner reasoned that the electronic device fitted on Mahuntsi had not captured the incident in question, and in the absence of such evidence, it could not be said that the applicant had proven that Nxumalo had accepted the R50.00.

[10] The second question according to the Commissioner was whether the respondent had demonstrated that Nxumalo had indeed affixed her stamp on the passport in question. The Commissioner concluded that the number on the stamp in question was not visible, and based on Stassen's 'concession' under cross-examination that it could not be said that it was Nxumalo that had affixed her stamp due to the number not being visible, the applicant had not demonstrated that it was Nxumalo who had stamped the passport.

The grounds of review:

- [11] The applicant's contention was that the Commissioner committed a gross irregularity and misconducted himself by her failure to construe the seriousness of the offence for which Nxumalo was dismissed. It was further contended that the Commissioner failed and or committed a gross misconduct and exceeded her powers in ordering the reinstatement of Nxumalo in circumstances where she had been involved in committing serious acts of misconduct which compromised the integrity of the country's processes and the safety of its citizens.
- [12] The applicant further takes issue with the findings of the Commissioner. In respect of the first question posed and answered by the Commissioner, the applicant contended that Nxumalo's bare denials were preferred by the Commissioner without indicating the basis for rejecting the direct evidence of Mahuntsi who had identified Nxumalo as the person who had assisted him and taken the R50.00.
- [13] The applicant further submitted that the findings of the Commissioner were unreasonable in the light of the evidence of Mahuntsi, and the video evidence that showed that the latter had approached the Nxumalo and stopped at her desk. To this end, it was submitted that the reasonable inference to be drawn was that indeed Mahuntsi was served by Nxumalo, and that there was no basis for the Commissioner to ignore or reject Mahuntsi's evidence.
- [14] In regards to the second question posed by the Commissioner, the applicant further takes issue with the conclusions in that regard, and contended that the Commissioner ignored the fact that Nxumalo was indeed on duty on the day in question and had stamped passports of people entering and leaving the country; that she ignored that the passport used by Mahuntsi was stamped on that day; and further that Mahuntsi had identified Nxumalo as the person who had assisted him and taken the R50.00 which he had placed in the passport. It was further submitted that Nxumalo had conceded that Mahuntsi came to her and stopped at her desk *albeit* she denied having stamped the passport. To this end, it was argued that the Commissioner had no understanding of the concept of the balance of probabilities as she had preferred the bare denials of Nxumalo as opposed to the strong evidence of the applicant's witnesses.

[15] It was further argued that the Commissioner ignored clear evidence that the stamp used was not visible on the copy of the passport in question as it was smudged in order to avoid the user of that stamp being identified. The inference to be drawn was that the person who had smudged the stamp was the same as the one who had assisted Mahuntsi, and in that case, it was Nxumalo.

[16] In opposing the application, the following submissions were made on behalf of Nxumalo;

- a) With regard to the evidence before the Commissioner, the applicant had failed to demonstrate that the finding of the Commissioner was not one that a reasonable Commissioner would have made;
- b) After the video footage was viewed, there was an agreement between the parties that there was no evidence that showed Nxumalo taking money or receiving money from Mahuntsi; that there was no evidence showing that Mahuntsi had handed over the passport to Nxumalo, or showing Nxumalo stamping the passport.
- c) Mahuntsi had also 'confessed' that the video footage did not show Nxumalo receiving any money from him or him handing over money to her. It was submitted that these factors contradicted Nendwane's testimony in regards to what he had seen on the video;
- d) The mere fact that Mahuntsi was observed going to Nxumalo's counter could not on its own be enough to infer that he had handed her the passport, or that the passport contained the R50.00, or that Nxumalo took the money and stamped the passport, and failed to capture his movement. Stassen had conceded that he was unable to tell who had stamped the passport in question particularly in the absence of a stamp number;
- e) The Commissioner's decision was based purely on the evidence before her. There was no evidence placed before the Commissioner to prove that Nxumalo in all probability committed the offence for which she was

found guilty, or that there were proven facts established from which the Commissioner should have drawn an inference that the allegations had been proven;

Evaluation:

[17] A few basic principles need to be reiterated prior to determining whether the Commissioner's award is reviewable. Central to Nxumalo's case is that the applicant in this case had not discharged the burden of proving the allegations of misconduct against her. In accordance with the provisions of section 192 (2)¹ of the Labour Relations Act, the onus is upon the employer to prove that the dismissal was fair. That provision ought to be read with section 188 (1) (a) (ii) of the LRA², which provides that a dismissal that is not automatically unfair, is unfair if the employer *fails to prove that the reason for dismissal* was a fair reason related to the employee's conduct or capacity. In emphasis of this principle, the Labour Appeal Court in *De Beers Consolidated Mines Ltd v CCMA and others* held that:

'The onus is thus on the employer to prove the facts upon which it relies for the dismissal. If the facts upon which the employer relies are not proven at the end of the arbitration proceedings, then *cadit quaestio*, the employer has failed to prove the fairness of the dismissal. On the other hand, if the employer does prove the facts upon which it relies, then the arbitrator must make a determination as to whether or not the dismissal is unfair and only if the arbitrator is so satisfied may he or she order reinstatement. The arbitrator is not at large to substitute what he or she considers to be a fair sanction in the circumstances...'³.

¹ Section 192: **Onus in dismissal disputes**

(1) In any proceedings concerning any dismissal, the employee must establish the existence of the dismissal.

(2) If the existence of the dismissal is established, the employer must prove that the dismissal is fair.

² Section 188: **Other unfair dismissals**

(1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove -

(a) that the reason for dismissal is a fair reason -

(i) related to the employee's conduct or capacity; or

(ii) based on the employer's operational requirements; and

(b) that the dismissal was effected in accordance with a fair procedure.

(2) Any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant code

of good practice issued in terms of this Act

³ (2000) 21 ILJ 1051 (LAC) per Willis JA at para 50

- [18] It is further trite that the standard of proof in alleged unfair dismissal disputes remains that of a balance of probabilities. As stipulated in the CCMA Guidelines on Misconduct Arbitrations⁴, a Commissioner is obliged, especially in the face of conflicting versions, to have regard to the probabilities of the contending versions, the reliability of witnesses, and their credibility. It is thus required of a Commissioner to indicate the reasons, based on the assessment of these factors and the evidence, as to why the one version was preferred over the other⁵.
- [19] The above CCMA Guidelines derive from the well-established principle enunciated in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell & Kie SA and Others*⁶ in respect of instances where a Commissioner is confronted with conflicting versions. The question that should be answered

⁴ See Government Gazette 34573 dated 2 September 2011, Notice 602 of 2011

⁵ See *Sasol Mining (Pty) Ltd v Ngqeleni NO & Others* (2011) 32 ILJ (LC) at para [9] where Van Niekerk J held that;

"One of the commissioner's prime functions was to ascertain the truth as to the conflicting versions before him. As I have noted, this much the commissioner appears to have appreciated. What he manifestly lacked was any sense of how to accomplish the task, or which tools were at his disposal to do so. The commissioner was obliged at least to make some attempt to assess the credibility of each witness and to make some observation on their demeanour. He ought also to have considered the prospects of any partiality, prejudice or self-interest on their part, and determined the credit to be given to the testimony of each witness by reason of its inherent probability or improbability. He ought then to have considered the probability and improbability of each party's version. The commissioner manifestly failed to resolve the factual dispute before him on this basis."

⁶ 2003 (1) SA 11 (SCA) para 14I–15E, where it was held that;

'To come to a conclusion on the disputed issues a court makes findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probabilities and improbabilities of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when the court's credibility findings compel it in one direction and evaluation of the general probabilities in another. The more convincing the former, the less convincing will be latter. But when all factors are equipoised probabilities prevail.'

ultimately is whether the probabilities favour the party that bears the onus of proof. This exercise is part of the functions of the Commissioner as confirmed in *Edcon Ltd v Pillemer NO & others*⁷ which is to weigh all the relevant factors and circumstances of each case in order to come up with a reasonable decision. Thus, reliance by the Commissioner on unsupported evidence, or speculation, or evidence insufficiently reasonable to justify a conclusion will render the award reviewable, as much as is ignoring material evidence, especially one that was not contradicted⁸.

[20] To the extent that it was argued on behalf of the applicant that the award was reviewable on a variety of grounds, the applicable review test is whether the conclusion reached by the Commissioner in the light of the evidentiary material placed before him or her can be said to have been so unreasonable that no other Commissioner could have arrived at the same conclusion. On the whole, the Commissioner's decision or conclusion must fall within a range of decisions that a reasonable decision maker could make⁹.

[21] It was further argued on behalf of the applicant that the Commissioner failed to evaluate the probabilities of the different versions placed before her, or failed to have regard to evidence placed before her, or that she had completely ignored that evidence. The failure by a Commissioner to consider material facts will be reviewable upon an analysis proposed in *Shoprite Checkers v CCMA and others*¹⁰ in line with *Head of the Department of Education v Mofokeng*¹¹ as follows;

- i. the first enquiry is whether the facts ignored were *material*, which will be the case if a consideration of them would (on the probabilities) have caused the commissioner to come to a different result;
- ii. if this is established, the (objectively wrong) result arrived at by the commissioner is *prima facie* unreasonable;

⁷ (2008) 29 ILJ 614 (LAC) para 21.

⁸ See *Bestel v Astral Operations Ltd and Others* [2011] 2 BLLR 129 (LAC) at paras 13 - 15

⁹ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC) at para 110.

¹⁰ (2015) 36 ILJ 2908 (LC).

¹¹ [2015] 1 BLLR 50 (LAC)

- iii. a second enquiry must then be embarked upon – it being whether there exists a basis in the evidence overall to displace the *prima facie* case of unreasonableness; and
- iv. if the answer to this enquiry is in the negative, then the award stands to be set aside on review on the grounds of unreasonableness (and *vice versa*).¹²

[22] In line with the above, where as in this case the applicant's contention was that the Commissioner had ignored certain material facts placed before her, if the court finds that indeed that it is so, the next enquiry is whether the facts ignored or even misconstrued were material. If they were material, it follows that the Commissioner would have come to a different conclusion had she taken them into account. In these circumstances, the decision arrived at by the Commissioner will be deemed to be unreasonable. As Myburgh AJ had concluded in *Shoprite Checkers*, where a commissioner misdirects him or herself by ignoring material facts, the award will be reviewable if the distorting effect of this misdirection was to render the result of the award unreasonable¹³

[23] Prior to determining whether the Commissioner's conclusions regarding the above evidence was one that a reasonable decision maker could make, a disconcerting factor in regards to the conduct of the arbitration proceedings needs to be highlighted, *albeit* the parties did not raise it. Video material was relied upon by the applicant in contending that Nxumalo was approached by Mahuntsi, and that it was she who had assisted him by stamping the invalid passport, and also that she took the R50.00 that was placed inside that passport. This video footage, to the extent that it was admissible, was crucial in proving certain events.

[24] As appears from the record however, the Commissioner did not personally view the footage, nor was it presented in the arbitration proceedings in its form. As can be gleaned from the transcribed record of proceedings¹⁴, the parties' representatives had on their own viewed the video footage and reported to the Commissioner on events that they agreed upon as portrayed in the footage. This included that the footage did not show Nxumalo taking the

¹² At para 9

¹³ At para 10

¹⁴ Pages 64

money from the passport, or show the passport in question. There was however a dispute surrounding whether Nxumalo could be seen stamping the passport or whether Mahuntsi could be seen crossing the border. At some point, Mr Masilela for the applicant in view of the dispute whether Nxumalo could be seen to be stamping the passport or not had suggested that the Commissioner should have a look at the video¹⁵. Inexplicably, the Commissioner's response was that even if she agreed, she wanted to '*curtail some time and not watch it*'¹⁶. The Commissioner's approach in this regard was that to the extent that this issue remained in dispute, *that was part of evidence*.

[25] It has been said that one of the factors to be considered in determining whether a Commissioner had committed a reviewable irregularity is whether the Commissioner had afforded the parties an opportunity to fully state their respective cases and allowed a fair trial of the issues¹⁷. Thus, where the Commissioner fails to follow proper process he or she may produce an unreasonable outcome¹⁸. In this case, and bearing in mind that this issue is raised being *mero muto*, the Commissioner by failing to personally view the video footage on the basis of saving time, failed to follow a proper process in the conduct of proceedings. Her contention that the issue in dispute as elaborated above in regard to the video material related to 'part of evidence' was clearly misconceived.

[26] The first issue is that a Commissioner, where reliance is placed on video material, is required to have a look at that material, and in this case, since the recording device was attached to Muhantsi, he was based placed to take the Commissioner through the footage.

[27] A second factor is that even if the parties had agreed on their own as to what was contained in the footage, whatever it is that they had presented to the

¹⁵ At line 8 at page 68 of the Transcribed Record

¹⁶ At line 13-14 of the Transcribed Record

¹⁷ *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others* [2014] 1 BLLR 20 (LAC) at para 20

¹⁸ *Goldfields* at para 21

Commissioner by way of feedback cannot by all accounts be considered as 'part of the evidence'. Parties' representative in arbitration proceedings or in this court for that matter cannot give evidence from the bar. They can only make submissions in regard to that evidence. The Commissioner was obliged to acquire first-hand information from the video itself as presented as part of the evidence particularly in view of the dispute surrounding it, and it was only in circumstances where there were no disputes as to what was contained in the footage that her approach in this regard could have been excused. The irregularity being pointed out in this regard was gross, and had the effect of depriving the parties of a fair trial of the issues. This became even more evident when regard is had to the Commissioner's conclusions in regards to that aspect of the video footage.

- [28] To recap, the Commissioner had concluded that in the absence of video footage (which in any event she had omitted to view), it could not be said that the applicant had demonstrated that Nxumalo had accepted the R50.00 from Mahuntsi. Second, to the extent that the number of the stamp on the passport in question was not visible, and further based on Stassen's concession that it could not be said that it was Nxumalo who had stamped the passport, the applicant had not demonstrated that indeed it was Nxumalo who had stamped the passport in question.
- [29] Counsel for the applicant in these proceedings had argued that a cursory look at the award and the reasoning therein clearly demonstrates that the Commissioner took a simplistic approach to the issues and evidence before her, and I agree with these sentiments. After elaborate evidence presented before her, the Commissioner relied on two basic issues or pieces of evidence without making an effort to justify her conclusions. Having had regard to the approach of the Commissioner in regards to the material before her, the absence of video evidence showing whether Nxumalo was offered and had accepted the R50.00, and the lack of a visible stamp on the passport could not have on their own, be dispositive of the matter. My conclusions in this regard are fortified by the following common cause, or at the very least, uncontroverted established evidence;

- a) Nxumalo was on duty (immigration desk) on the date of the incident;
- b) Her duties were to stamp the passport of travellers that came in and out of the country;
- c) She was inducted and trained on the Immigration Act¹⁹
- d) Mahuntsi as seen on the video footage had approached Nxumalo at the immigration desk for assistance²⁰, and the cross-examination in this regard went as follows;

'MR MASILELA (For the applicant): In the video Mr Mahuntsi was seen travelling through, he stopped and he then stopped at your own desk and he passed through?

MS NXUMALO: Yes, he stopped in, at my own desk but he never give me his passport, I have never seen my (indistinct) or maybe having conversation with him talking about the passport, I have never took his passport. He might be standing in front of me but I have never taken his passport.

MR MASILELA: When people come to you and look at you and leave then you (indistinct) them through?

MS. NXUMALO: Some of them maybe I look pretty, I don't know'

- e) The passport in question did not belong to Mahuntsi and had expired, as the owner had had entered the country on 10 January 2011 and had not departed on the expiry date on 9 February 2011. It was however stamped with a departure stamp without numbers (which were smudged) and backdated.
- f) The movements in regard to this passport were not captured on the system (MCS) as required by the rules. On Vermaak's version however, the passport in question was valid²¹.

[30] In the light of the above evidence, it is inexplicable that the Commissioner could have arrived at her decision. It is reiterated that the standard of proof in such cases is that of a balance of probabilities. In this case, it is apparent that this basic legal principle escaped the Commissioner's mind, as she was more

¹⁹ Line 9 of the Transcribed record at page 118

²⁰ Line 15 - 25 at page 128 of the Transcribed Record

²¹ Line 25 at page 78 of the Transcribed Record

concerned with direct evidence, when in the face of conflicting versions, it was paramount to weigh the probabilities of each version, even in the absence of other evidence.

[31] Thus, according to the Commissioner, in the absence of the video footage or a visible stamp, Nxumalo was to be exonerated. This sadly was not the yardstick or a proper application of the standard of proof. The Commissioner, failed to take into account the principles stated elsewhere in this judgment in regard to the approach to be followed in resolving conflicting versions. Other than relying on those two factors, the Commissioner did not state the reasons she had preferred the version of Nxumalo over that of the applicant's witnesses. The fact that there was no video evidence or that the stamp on the passport was not visible was not in my view, the end of the matter, especially in circumstances where it was common cause that Mahuntsi had approached her at her desk. Mahuntsi as can be gleaned from the record of proceedings was resolute in her contention that he had approached Nxumalo with the passport and the money inside. Nxumalo according to Mahuntsi had assisted her and taken the money.

[32] As opposed to Nxumalo's evidence, the record of proceedings indicates that during her examination in chief, she had initially denied that Mahuntsi ever came to her desk, let alone hand in the passport. It was only after the cross-examination as illustrated elsewhere in this judgment that she had ultimately conceded that indeed Mahuntsi came to her desk, even though she insisted that she did not assist him. Other than this factor, it was not disputed that the passport was stamped. The only issue was whether it was Nxumalo who had stamped it or not.

[33] In the light of this equivocation by Nxumalo during cross-examination, the Commissioner was compelled to make an assessment as to the reliability of her version, her credibility and the probabilities of her version, as opposed to that of Mahuntsi, who had persisted that indeed Nxumalo had assisted him and stamped the passport in question. The fact that the number on the stamp was not visible was not the only relevant issue to be considered, as other

factors to have been considered included the fact that the passport in any event was stamped and that the movements in regards to that passport were not captured on the system. The Commissioner however completely ignored the factors.

- [34] Thus, to the extent that it was common cause that Mahuntsi had approached Nxumalo at her desk, the issue is what would have been the purpose of doing so other than to have his travelling documents processed like all other travellers? An answer in this regard cannot by all accounts be that Mahuntsi might have approached her desk because *'she is pretty'* as she alleged.
- [35] Part of the applicant's case was that the Commissioner committed a gross irregularity in that she failed to construe the seriousness of the offence for which Nxumalo was dismissed. There can be no doubt that Nxumalo in her position as Immigration officer was responsible for ensuring that travellers came into and left the country only if their travel documents were in order, and that the movements of the travellers were properly captured on the system. Nxumalo's position came with huge responsibilities, as Immigration officers are the first line of defence in the security of our borders.
- [36] To the extent that Mahuntsi had consistently testified that Nxumalo was approached with a passport that did not belong to him, in which R50.00 was placed and taken in exchange for the processing of that passport and allowing him passage, that allegation is equally serious in the extreme. Various consequences flowed from that misconduct including the fact that there was non-compliance with the applicant's standard procedures when processing travellers' movements as required, and that the conduct in question involved acceptance of a bribe and corruption. More disconcerting however as attested to by Stassen, and something that should be obvious, was that the conduct in question invariably compromised and placed the security of the Republic and its citizens at risk, as undesirable elements would have been allowed free passage in and out of the country.

- [37] A reading of the award clearly indicates that the Commissioner indeed failed to deal with the seriousness of the allegations against Nxumalo. Nowhere in the award was there an attempt to decipher the allegations against Nxumalo and their consequences if proven. It is accepted that a Commissioner can only have regard to the seriousness of the allegations once they have been proven. In this case however, as already indicated, had the Commissioner made any attempt at properly evaluating the evidence as stated elsewhere in this judgment, she would have on a balance of probabilities, arrived at a different conclusion in regard to these allegations.
- [38] Overall therefore, the Commissioner failed to take into account the totality of the evidence presented before her and chose to be persuaded by Nxumalo's bare denials in circumstances which could not be justified. At worst, the Commissioner chose to ignore evidence that was placed before her in arriving at her conclusion. The evidence ignored was clearly material as a consideration thereof would have based on the probabilities and other considerations, caused the Commissioner to come to a different result.
- [39] To summarise then, the charges levelled against Nxumalo were serious in the extreme and deserving of the ultimate penalty of a dismissal. Nxumalo having grudgingly conceded that Mahuntsi had approached her at the immigration desk, a factor which was also common cause as gleaned from the video footage, the probabilities are that indeed Nxumalo processed the passport in question, affixed a smudged stamp on that passport, and failed to capture the movement in regard to that passport on the applicant's movement system. Nxumalo's approach to the arbitration proceedings appears to have been to deny the obvious and to only make concessions when forced to. Given the seriousness of the misconduct and Nxumalo's lack of appreciation of its consequences, the conclusion reached by the Commissioner in the light of the material placed before her cannot be said to be one that a reasonable decision maker could have arrived at. Accordingly, the award ought to be set aside.

[40] In its Notice of Motion, the applicant sought an order that the award ought to be reviewed, set aside and substituted with one that Nxumalo's dismissal was fair. In the light of the conclusions reached in this judgment, it is my view that this would be the most appropriate order to make. I have further had regard to the requirements of law and fairness, and hold the view that a cost order is not warranted in the circumstances.

Order:

[41] Accordingly, the following order is made;

1. The arbitration award dated 24 October 2013 issued under case number GPSSBC 4536/2012 by the Second Respondent is reviewed, set aside and substituted with an order that;
'The dismissal of Ms. Petunia Tintswalo Nxumalo was substantively fair'
2. There is no order as to costs.

E. Tlhotlhemaje

Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicant:

Adv. XD Matyolo

Instructed by:

Office of the State Attorney, Johannesburg

On behalf of the Third Respondent:

Adv. D Mosoma

Instructed by:

Matyeka Attorneys

LABOUR COURT