IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

REPORTABLE

CASE NO: JR 1357/07

In the matter between:

DINEO VALENCIA MASHIANE	APPLICANT
AND	
MR M DOLIE N.O.	1ST RESPONDENT
SAFETY AND SECURITY BARGAINING COUNCIL	2ND RESPONDENT
MINISTER OF SAFETY AND SECURITY	3RD RESPONDENT
COMMISSIONER OF SOUTH AFRICAN POLICE SERVICES	4TH RESPONDENT

JUDGMENT

Molahlehi J

Introduction

[1] This is an application to review and set aside the arbitration award issued by the First Respondent (the arbitrator) under case number PSSS737-05/06 dated 29th January 2007, in terms of which the arbitrator dismissed the applicant's case.

[2] The applicant, Ms Mashiane (hereinafter referred to as "the employee") has also applied for condonation for the late filing of her review application. The employee has proffered two reasons for the late filing of the review application. The first reason relates to lack of funds and the second to the fact that employee gave birth to her child shortly after the award was issued. It is common cause that the review application is 9 (nine) weeks late.

[3] In my view the explanation for the late filing of the review application is satisfactory and reasonable. For this reason and regard being had to the prospects of success, the late filing of the applicant's review application stand to granted.

Background fact

[4] The employee was charged with aiding and abetting the entrance of two foreigners into the Republic of South Africa without valid visas, on 5th January 2005, in contravention of regulation 18(3) of the South African Police Service (the SAPS) Disciplinary Regulations. She was during the disciplinary hearing found guilty and dismissed on 7th July 2005. At the time of her dismissal the employee was stationed at Oliver Tambo International Airport.

[5] Subsequent to her dismissal the employee referred a dispute to the Safety and Security Sectoral Bargaining Council (SSSBC). The arbitrator found the dismissal to have been substantively fair and accordingly dismissed the applicant's claim.

[6] In his testimony on behalf of the respondent, Mr Mahommed Yahya Raheem ("Raheem"), a citizen of India, testified that the employee was one of the persons present in the room where he and the other foreigners were directed by the immigration officials to wait until all other passengers' documents were processed. He testified that the employee was present when the immigration officials demanded that he pay them an amount of US$1,000.00 before the two of them could be allowed into the RSA, as there was a problem with their visas. After paying the US$800.00, Raheem and his companion were led outside the room.

[7] According to Raheem, outside the room he was approached by Sergeant Nokere ("Nokere") who demanded further payment. At that stage Nokere was joined by the employee and the two of them forced him and his traveling companion into the back of a private taxi, placed a police jacket over them and instructed them to keep quite. They were then intercepted by a police vehicle nearby the Engen Petrol Station. They were thereafter asked questions and then taken to the police station.

[8] Inspector Ralenanye ("Ralebanye") testified that on the day in question he was on duty patrolling the airport when he noticed Nokere and the employee outside terminal two with two Indian males standing next to a metered taxi. He observed the two policemen pushing the two Indian men into the taxi and also boarding it themselves. He tried to stop the taxi but it sped off. He gave chase and managed to stop it at the Engen petrol filling station which is situated in the vicinity of the

airport. According to him the employee shouted at him when he opened the door of the taxi. He then proceeded to ask the two Indian males what was happening. They informed him about the payment of US$800.00 they made to the immigration officials to allow them entry into South Africa.

[9] Ralebanye confirmed the testimony of Raheem that the Indian men were seated at the rear seat and were covered with a jacket. He further testified that it was not normal procedure for policemen to use metered taxis with passengers from the airport. It was on the basis of what he was told by the Indian men that he arrested the employee and Nokere.

[10] The investigating officer, Constable Mabote ("Mabote"), testified that he was informed by the two foreigners that they had paid US$800.00 to be allowed into South Africa, and that the demand for payment happened in the presence of the employee and Nokere. He further testified that the employee and Nokere informed him that they were merely taking a lift in the taxi wherein the two Indian men happened to be traveling in.

[11] Constable Malefane ("Malefane"), who was charged with the employee and Nokere, testified in support of the employee's case. He testified that on 5th January 2005, he was working at the X-ray scanners with the employee when he saw two immigration officials, one Constable Mohlongo and two Indian men at the border police office, and that the employee was, at that time at the back office resting. He stated that he heard the immigration officials explaining the deportation procedure to the Indian men, and thereafter he left. According to

him there was nothing wrong in the employee getting a lift in a metered taxi to get to the domestic terminal. Furthermore, he stated that it was possible that the employee might have met Nokere after she left the terminal on her way to the charge office.

Grounds for Review

[12] The applicant contended that the arbitrator's award was not justifiable in relation to the reasons given for it, having regard to the evidence presented to him. The alternative contention in this respect was that there is no rational connection between the material placed before him and the ultimate conclusion reached by him.

[13] The arbitrator is further criticized for failing to apply his mind to the evidence and the facts which were before him and thus reaching his conclusion that the applicant's dismissal of the applicant was substantively fair.

[14] The other ground upon which the applicant relies on in challenging the arbitrator's award is that the arbitrator committed a gross irregularity in failing to apply his mind to the evidence, misunderstood the evidence and attributed motives to the applicant which could not reasonably be drawn and relying on suspect evidence.

Arbitrator's findings

[15] The arbitrator under the heading *"Discussion of the case and findings"* starts by analyzing the evidence of Raheem one of the foreigners from whom a bribe was allegedly demanded by the employee together with her colleague. The arbitrator

then states that there was no reason to suggest that Raheem would be lying regarding the bribe demanded at the office and in presence of the employee and her colleague. It would appear the bribe was demanded in the office in the presence of one of the fourth respondent's witnesses. Strangely the arbitrator finds that the employee was part of this although it seems common cause that she was at the back of the office at that time. It is also not clear as to where did the arbitrator find the evidence that Raheem specifically pointed the employee as the person involved in the bribe.

Evaluation

[16] In my view the arbitrator failed to apply his mind to the dispute which was before him and thus committed a gross irregularity. The test for gross irregularity was enunciated by the Constitutional Court in the case of *Sidumo & another v Rustenburg Platinum Mines Ltd & others [2007] 12 BLLR 1097 (CC).* In that case the Court held that the provisions of section 145 of the Labour Relations Act were suffused by the constitutional standard of reasonableness. The standard of reasonableness is determined by answering the question which was formulated in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others 2004(7) BLLR 687(CC)* as follows; *"Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?"*

[17] The test for gross irregularity as was articulated in *Gold Fields Investment Ltd & another v City of Johannesburg & another 1938 TPD 551* is summarized in *Sidumo* by Ngcobo J as he then was (at page 1178-F) as follows:

". . . patent irregularities," that is irregularities tat takes place openly as part of the proceedings, on the one hand, and "patent irregularities, that is irregularities that take place inside the mind of the judicial officer which are ascertainable from the reasons given by the decision maker."

[18] This Court has previously held that the crucial enquiry in determining the existence of gross irregularity is whether the conduct of the decision maker complained of prevented a fair trial of the issues. It is not every irregularity that would constitute gross-irregularity. It has however been found in a number of cases that a commissioner commits gross irregularity if he or she fails to apply his or her mind to a matter material to the determination of the dispute.

[19] In the present instance the matter which was material to the fairness of the dismissal of the employee had nothing to do with bribery, which was the focus of the arbitrator's mind, but had all to do with the charge of aiding and abetting foreigners into South Africa without a valid visa.

[20] The record of the arbitration proceedings indicates that the employee was charge with two counts of misconduct. The first charge reads as follows:

"In that at or near Johannesburg International Airport and on or about 5 January 2005 you performed an act which constitutes an offence by abetting the entrance of foreign nationals into South Africa without the valid visa documentation."

[21] The second charge reads as follows:

"In terms of section 40 of the South African Police Service Act, 1995, Act number 68 of 1995, read with the South African Services Disciplinary Regulations, you are charged with misconduct, in that you contravened Regulation 18.1, in that at that at or near Johannesburg International Airport and on or about 5 January 2005 you performed an act with the intention not comply with his/her duties and responsibilities."

[22] In considering the above charges, the evidence and the facts which were before the arbitrator, the only reasonable conclusion that can be reached is that the arbitrator misconceived the nature of the dispute he had to determine. Whilst the arbitrator was supposed to focus his investigation into whether the fourth respondent has discharged its onus of showing that the employee was involved in aiding and abetting foreigners entering the country illegally, the arbitrator was clearly attracted by the story of the demand for bribery. That story had no relation to the charges of aiding and abetting illegal entry into the country. In any case what story at best indicates is that the people who asked for the bribery were the immigration officials. For the applicant for that matter as indicated earlier, the evidence is that she was at the back of the office in which it is alleged the demand for the bribery was made. Even if it was to be assumed that the two foreigners entered the country without visas because of the bribe they paid, there is no evidence linking the employee to the demand and the payment thereof. It may well be that it is inappropriate for a police officer to take a lift in a taxi from one point of the airport to the other, but however, there is no rule

prohibiting that conduct, it would appear neither was the employee charged with any offence in that regard.

[23] As indicated above the essence of the charges against Ms Mashiane was that she aided and abetted illegal entry into the country by two foreigners. The evidence of the two foreigners who claimed that a bribe was required of them testified and clearly stipulated that according to them their visas were in order. There is no evidence that the fourth respondent submitted during the arbitration proceedings any invalid visa from the two foreigners.

[24] It would appear that the only witness who could clarify the validity of the visas was Mr. Sayed, an immigration official. The essence of his testimony was that he could not clarify this aspect because he did not have the visas in question before him.

[25] The above analysis indicates very clearly that had the arbitrator applied his mind to the evidence and material before him he ought to have found that the respondents had failed in terms of section 192 of the LRA to discharge the onus of showing that the dismissal was for a fair and valid reason. In this respect there is no evidence that the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable as envisaged by section 193(2) (b) of the LRA.

[26] It is thus, my view that the arbitration award of the arbitrator stands to be review, set aside and substituted with an award that would have been appropriate

and reasonable in the circumstances of this matter. In the circumstances I see no reason in law and fairness why costs should not follow the results.

[27] In the premises the following order is made:

(i) The late filling of the review application is condoned.

(ii) The arbitration award issued by the first respondent on 4th April 2007 is reviewed and set aside.

(iii) The arbitration award of the first respondent is substituted with the following award:

"(i) The dismissal of the applicant, Ms Mashiane, was substantively unfair.

(ii) The third and fourth respondents are ordered reinstate the applicant, Ms Mashiane retrospective to the date of her dismissal without loss of any benefits she previously enjoyed."

(iv) The third and fourth respondents are to pay the costs of the applicant, the one paying the other to be absolved.

Molahlehi J

Date of Hearing : 24th August 2009

Date of Judgment : 14th December 2009

Appearances

For the Applicant	:	Mr J Gouws of Johan Gouws Attorneys
For the Respondent:		Adv LM Moloisane
Instructed by	:	The State Attorney