

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

Case Number: JR 237/08

In the matter between:

CAPTAIN MAVHUNGU AND 2 OTHERS Applicants
and

SSSBC First Respondent

ADV RUSSEL MOLETSANE N.O Second Respondent

NATIONAL COMMISSIONER OF POLICE Third Respondent

MINISTER OF POLICE Fourth Respondent

SOUTH AFRICAN POLICE SERVICES Fifth Respondent

JUDGMENT-LEAVE TO APPEAL

MOSHOANA AJ 2

INTRODUCTION

[1] This is an application for leave to appeal. The application is opposed. The application is directed to the order of this court dismissing the review application. The applicants contend that this court erred in not finding that the Second Respondent could have reasonably reached the decision that the applicants were guilty of three counts of misconduct; the unchallenged portions of the evidence had to be accepted as credible and reliable by the Second Respondent; the evidence presented on behalf of the employer was not credible and should have been rejected; the Second Respondent misdirected himself by rejecting the applicants' account in respect of the breaking of the window, whilst this version was confirmed by the employer's witnesses and that the Second Respondent erred by finding that the assault on the applicant Mavhungu was lawful as a result of the witnesses being angry for having dispossessed of their monies unlawfully.

[2] Together with the application for leave to appeal was an application for condonation for the late filing of the application for leave. This application is not opposed. Given the view I take at the end a favourable finding would be academic. The court shall proceed to consider the merits of the application for leave to appeal. Thereby, it could be deemed that the explanation is accepted. If there are merits, it will be appropriate to condone the non compliance. 3

EVALUATION.

[3] In applications of this nature, the question is, are there reasonable prospects that another court may come to a different conclusion? If the answer is in the affirmative leave ought to be granted. Likewise, if in the negative leave should be refused. In *Dince and others v Department of Education and others Case Number J2234/09 yet to be reported*, *Molahlehi J* had the following to say:

“Therefore what this court must assess is the question of a reasonable possibility that another Court may come to a different conclusion... The reasonable possibility that another Court may come to a different conclusion has to be assessed with reference to the facts and the law.”

[4] I cannot agree more. In this matter, it is apparent that the applicant persists with the view that a reviewing court must determine the rightness or wrongfulness of the award made by the Second respondent. The law is clear. No appeal lies against decisions of Arbitrators. The grounds persisted with in this application; suggest that the court must enter the merits with the view to substitute the decision. This is not in line with the provisions of Section 145 of the Labour Relations Act and the reasonableness test espoused by the Constitutional Court in the *Sidumo* judgment. The finding that the applicants were guilty of three counts of misconduct could not be found to be unreasonable. Equally, no court could find that the finding does not fall within the bounds of reasonableness. 4

[5] It is not the contention of the applicants on this ground that the finding is not supported by evidence. On the contrary the finding was supported by the evidence presented before the arbitrator as summarised by him in the award. With regard to the unchallenged evidence, the argument when the review application was moved was about lack of criticism and not non acceptance of the unchallenged evidence. I agree with *Mokhare* for the third to the fifth respondent that the applicant does not say which evidence nor did they say so when the review application was moved. The court of appeal would not consider anything that was not before this court (see *Screenex Wire Weaving Manufacturing (Pty) Ltd v Ngema and others* (2010) 31 ILJ 361 (LAC) at 371 paragraph 30).

[6] In any event, it does not follow that if evidence is not challenged it out to be accepted outright. That evidence may be irrelevant to the issues to be considered or may still be unreliable for that matter. Nonetheless, there are no prospects that another court may come to a different conclusions reached by this court on the aspect of non criticism. The issue of credibility of the evidence goes to the rightness of the decision. The test remains that the finding falls within the bounds of reasonableness. Another court would not apply a different test.

[7] Regarding the issue of misdirection, again the applicants' seem to fudge the distinction between an appeal and a review. The issue of the breaking of the window has no relevance on the findings of guilt. The Second Respondent said he found it difficult to accept a person who was made to lie down managed to break the window in order to alert the police. I fail to see how another court would 5

come to a different conclusion that corroboration does not lead to automatic acceptance of evidence.

[8] The Second Respondent did not make a finding that the assault was lawful. The legality or otherwise of the assault was not before him. All he did was to surmise why the assault took place. Saying why an assault took place does not suggest a finding of legality. Accordingly no court would conclude otherwise.

[8] In the result, I am constrained to make the following order:-

1. The application for leave to appeal is dismissed with no order as to costs.

G. N MOSHOANA

Acting Judge of the Labour Court

Date of Judgment: May 2010

APPEARANCES

For the Applicant: **ADV D F DORFLING** instructed by De Villiers-Mohr Attorneys, Randburg.

For the 3rd to 5th respondents: **ADV MOKHARE** instructed by the State Attorneys Johannesburg