

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

Case no: JR2586/06

### In the matter between:

**PHILLIP NHLAWUPANE KOMAPE**

## Applicant

**And**

**SPOORNET (PTY) LTD**

### 1<sup>st</sup> Respondent

# TRANSNET

## 2<sup>nd</sup> Respondent

**PROF M MTOTHOMBENI N O**

### 3<sup>rd</sup> Respondent

## JUDGMENT

MOLAHLEHI J

## Introduction

[1] This is an application to review and set aside the arbitration award issued by the third respondent (the commissioner) on the 24 August 2006, under case number BC.SARHWU/SP/ (CSNP) NP/9478.

[2] The applicant, Mr PN Komape was prior to his dismissal by the second respondent employed as a train driver with effect from

2001 until his dismissal on the 3 July 2006. Prior to working as a train driver of the first respondent, the applicant was employed as a protection officer and at that stage, was based at the asset management department of the first respondent.

[3] The applicant was charged and dismissed for the theft of 108 plates of copper which had been stored in the first respondent offices in the assets management department.

### **The case of the first respondent**

[4] The first witness of the respondent Mr Mbulaheni testified that he received a call on 28 August 2006, from Mr Masindi (Masindi) of Spoorbaan informing him that he saw two men coming out of the offices of the asset protection department of the first respondent. He then went to investigate and found the security door locked with the garage door slightly opened. On entering the garage he discovered that the copper plates which had been placed under the care of the asset protection department had gone missing.

[5] He immediately reported the incident to the South African Police (SAPS) and the Spoornet National Operating Centre.

[6] The investigation of the missing copper plates was then taken over by the manager of the asset protection Mr Sibiya (Sibiya) the following week. All the employees except Mr DD Komape the brother to the applicant undertook “honesty” test on the Wednesday of the same week. Apparently Komape disappeared on the day of the test after pretending that he was going to buy a cigarette.

[7] The version of the first respondent is that Komape contacted Sibiya on Friday of the same week and informed him that the applicant was involved in the removal of the copper plates. According to Sibiya Komape told him that the employee used his own (Komape) keys to access the copper plates.

[8] Mr Sibiya testified that after interviewing 5 (five) of the employees employed in the asset protection department he decided to engage the services of an outside service provider to conduct the “honesty” test.

[9] After interviewing Komape over the weekend Sibiya met with the police on Monday and it appeared that after briefing them an arrest was effected on both the applicant and Komape.

[10] Komape's testimony on behalf of the first respondent was that on the on the 27<sup>th</sup> May 2006, he was approached by the applicant who requested his keys as he wanted to park his car at his yard which was not very far from the night vigil which they were both attending. He handed the bundle of keys which included the asset management offices keys to the applicant.

[11] The applicant then drove away to park his car in Komape's yard and on his return after an hour and a half Komape enquired from him where he had been. The applicant informed him that he had gone to town and Komape informed him that he wished he had known because he would have requested him to draw money for him from the bank. It was apparently after this enquiry that the applicant informed Komape about removal of 34 copper plates from the first respondent's premises.

[12] Komape assumed that this was a joke and when the applicant informed him that he was going back to town he gave him his bank card to draw money for him. The applicant only returned on Sunday morning and handed to Komape his money and his bank card.

[13] It was only on Monday when Komape was confronted by the police that he realised that the applicant was not joking when he said he had removed the copper plates. After this encounter Komape phoned the applicant regarding the missing copper. And soon thereafter the 2 (two) met where the applicant requested Komape not to inform anybody about what he had told him and that he will give him money for that.

[14] The next meeting between Komape and the applicant was in town where the applicant gave him an amount of R400.00. After this meeting Komape attempted to contact the applicant through his mobile phone to no avail until Friday. The applicant then on Friday contacted Sibiya and informed him that he knew about the missing copper.

### **The case of the applicant**

[15] The applicant confirmed the testimony of Mbulaheni that he frequently visited the offices of the asset protection department because Mshumane, Mbulaheni, Komape and Swanepoel are his former co-workers and college mates.

[16] He denied ever going to the asset management offices or opening them on the day in question. He further denied meeting Komape on the 27<sup>th</sup> May 2006. The applicant testified that the reason why Komape implicated him on the missing copper was due to a family dispute that had arisen between the 2 (two) of them regarding the inheritance of their father's cattle.

[17] The applicant raised 9 (nine) grounds of review which are set out in his notice of motion as follows:

“9.1 He erred in finding that the charge sheet was clear, simple and unambiguous and that I understood the case against me. It is clear from annexure “pmk2” that the elements of theft were proliferated in charges 1, 3 and 5 to have more charges. Charge 5 was too general and not specific and Applicant could not

understand to which specific ethic (sic) was the applicant supposed to answer. For that reason it shows lack of understanding in charge formulation and as such was suppose to have recused himself from the matter.

9.2 The 3<sup>rd</sup> Respondent failed to deal with the substantial merits of the dispute and absurdly decided to ignore standard rules and principle of evidence

. 9.3 The 3<sup>rd</sup> Respondent failed to deal with the substantial merits of the dispute and absurdly decided to ignore apparent motive for the dispute.

9.4 The 3<sup>rd</sup> Respondent failed to deal with the substantial merits of the dispute and absurdly decided to ignore the apparent discrepancies relating to the possible times on which the theft was committed. According to Mr Komape's evidence, the Applicant committed the offence on the night of the 27<sup>th</sup> May 2006 when Masindi reported the presence of 2 (two) men at the security office on the afternoon of 2 May 2006.

9.5 In the 3<sup>rd</sup> Respondents award, the 3<sup>rd</sup> Respondents finding are based, interalia, on what he termed "did not adduce comprehensive evidence" to prove his alibi "that he was somewhere else". There is no burden of prove on the applicant to prove his alibi and the applicant was entitled to the benefit of a

*doubt by the 3<sup>rd</sup> respondent but which the 3<sup>rd</sup> respondent decided to ignore the onus was on the first respondent to prove the alibi by calling witness who were to confirm the meeting at the night vigil. The alibi was no proved to be false.*

- 9.6 In the third respondents award the third respondent's findings are based, interalia, on what he termed it is irrelevant whether the employer did not call people who witnessed the people leaving the security offices in question. Such evidence is peripheral to the issue in dispute and would not have assisted the hearing. Evidence of identification was imperative to corroborate the singling out of the applicant as the perpetrator of the theft in questions, especially if were evidence is from a single witness.
- 9.7 The third respondent lost sight of the fact that there was no evidence linking the applicant to the theft.
- 9.8 *The third respondent ignored the demeanour of a witness after the alleged theft, especially during the polygraphy test and after.*
- 9.9 The applicant's contention that the commissioner's award or finding were against the weight of evidence and that a number of crucial matters were either deliberately disturbed or deliberately left out of account entirely. This conduct of the commissioner, seem cumulatively with the other complaints set forth in these affidavit let to the influenced that the commissioner was unduly sympathetic to the Employer's case from the outset and gave a distinct impression of being biased accordingly".

## **The award**

[18] In the arbitration award the commissioner deals firstly with the



point in limine raised by the union representative on behalf of the applicant that the person appointed by the asset management should not have been appointed as initiator at the disciplinary hearing.

[19] After concluding that the missing of the copper plates and that Komape had one of the keys to the security office, the commissioner identified as disputed facts, whether or not Komape *“handed his keys over to the employee (applicant), the latter had entered the security office and stole the copper plates”*.

[20] The commissioner accepted the union’s contention that the only evidence that linked the applicant to the theft of the copper plates was that of Komape. Although Komape was already dismissed at the time he testified at the arbitration hearing of the applicant, the commissioner correctly treated his evidence with great circumspection.

[21] In dealing with the issue of a family feud as a motivating factor for accusing the applicant of the missing copper plates, the commissioner found that it was never put to Komape that this was

what motivated him to accuse his own brother of theft. Komape was according to the commissioner not afforded the opportunity to comment on this accusation.

[22] In as far as the meeting between the applicant and Komape on the 27 May 2006 the commissioner rejected the version of the applicant that he was somewhere else and did not attend the night vigil.

## **Evaluation**

[23] It is apparent from the reading of the award and the record that the commissioner was faced with having to determine the dispute on the basis of circumstantial evidence. Thus, there was no direct evidence linking the applicant to the theft of the copper plates.

[24] In **Sidumo v Rustenburg Platinum Mines (2007) 12 BLLR 1097**, the Constitutional Court held that the test to be used by the Labour Court when reviewing the CCMA commissioners' arbitration awards is that of a reasonable decision-maker. In other words the Court would be entitled to interfere with the

commissioner's award only if it has been established that the decision is one which a reasonable decision-maker could not have reached.

[25] Thus the question that has arisen in the present instance is whether a reasonable decision-maker could not, based on the circumstantial evidence which was before the commissioner, have reached the conclusion that the applicant was guilty of the theft of the copper plates.

[26] This Court in an earlier judgment held that when faced with having to evaluate circumstantial evidence, the commissioner should always consider the cumulative effect of all the items before him or her (See **Alluminium v Metal Engineering Industries Bargaining Council & Others (unreported JR1877/04)** See also *D T Zeffert, A P Praizes & AS T Q Skeen; The South African Law of Evidence, 5<sup>th</sup> edition (Juta Pages 93-199).*

[27] Turning to the facts of this case it is apparent from the reading of the record that the third respondent sought to prove its case on the

basis of circumstantial evidence. The question for consideration at the review level is not whether the decision of the commissioner is correct but rather whether the inference drawn from the facts before the commissioner is one which a reasonable decision-maker could not have drawn.

[28] In assessing circumstantial evidence the arbitrator should always consider the cumulative effect of all the item of the evidence before him or her. In this regard the commissioner should look at the totality of the evidence and weigh it on a balance of probabilities. See **Numsa v Kia Motors (207) 28 ILJ, 2283 and SA Nylon Printers (Pty) Ltd V Daniels 1998 2 BLLR 135 (LAC) at 1369.** The inference must be drawn through a careful survey of the connection between the facts and their relationship to the offence alleged to have been committed by the employee. To this extent the court in **Smith v Arthurs 1976 (3) SA 378**, when dealing with circumstantial evidence the court held:

*“All the relevant facts must necessary go into the melting pot and the essence must finally be extracted there from”.*

[29] In criminal cases the inference sought to be drawn must not only be consistent with all the proven facts but should be such that they exclude every reasonable inference from them save the one to be drawn. The correctness of the inference to be drawn will be in doubt if the facts do not exclude other reasonable inferences. – **Zeffert *et all* (*supra*) the South African Law of Evidence at page 93.**

[30] The onus in civil cases is discharged if the inference advanced is the most readily apparent and acceptable from a number or other possible inferences. See **AA Onderlinge Assuransie- Assosiasie Bpk v De Beers 1982 (2) SA 603 (A).** In dealing with circumstantial evidence care should always be taken to ensure that a distinction is maintained between permissible inference and a mere conjecture or speculation the reason for this distinction is to avoid the danger that may accompany drawing of an inference – **Victor & Another v Picardi Rebel (2005) 26 ILJ 246 (CCMA).**

[31] In **Caswell v Powell Duffy Colliers Ltd (1939) 3 All ER 722 (HR) at 733**, the court held that:

“There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had actually been observed. In other, cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which an inference can be made, the method of inference fails and what is left is a mere speculation or conjecture”.

[32] Turning to the facts of this case, the applicant denied that he illegally entered the premises of the first respondent and removed the copper plates. He also contended that no one identified him removing the copper plates from the premises of the first respondent. He also denied being one of the two people who is alleged to have been seen by one of the witnesses of the respondent.

[33] As indicated earlier the case which the first respondent to present during the arbitration hearing was based on circumstantial evidence. Once the first respondent had established a *prima facie*

case linking the applicant to the missing copper, it was for the applicant to provide an explanation in defence to the accusation against him.

[34] The applicant's defence was a denial of involvement in the theft and that the reason of his brother implicating him was because of the family feud. The other defence is that of an alibi. Komape's version that he met with the applicant at the night vigil and handed him his bundle of keys which included the key to the asset protection offices stood unchallenged. The applicant did not call any witness to corroborate his evidence that he was not at the night vigil.

[35] The contention of the applicant that Komape was driven by ulterior motive by implicating him to the offence is unsustainable in that at the time of the arbitration hearing Komape was already dismissed and therefore there seem to be no reason to implicate the applicant. The alleged family feud motive also did not assist the case of the applicant. The family feud motive was firstly raised only during the testimony of the applicant and this version was never put to Komape for him to comment upon. And secondly this

allegation is unsustainable even on the version of the applicant. On his version, the applicant used to frequently visit the asset protection office because according to him Komape and others are his former colleagues and school mate. This suggests that even if there was a family feud it was not of such a nature that it could have driven Komape to implicate his brother in such a serious offence.

[36] I now proceed to deal with the issue of the alleged mistake of facts that the commissioner made. It is an established principle of our law, that a mistake of law or facts does not necessary constitute a reviewable ground. For a mistake of law of fact to constitute it must be so gross that it constitutes denial of a fair hearing.

[37] In the present instance it may well be that the commissioner made a mistake about the date of the 27<sup>th</sup> of May 2006 when the offence was alleged to have been committed and the 28 of May 2006 when Masindi is alleged to have reported the presence of two men coming out of the asset protection office. This in my view is not a mistake that justify interfering the award of the commissioner.



[38] In as far as the contention that the first respondent failed to call witnesses who alleged to have seen two people leaving the asset protection offices is concerned, the commissioner applied his mind to this issue and reasoned that such evidence was irrelevant.

[39] The other contention of the applicant was that the commissioner was biased because his finding was against the weight of the evidence and he deliberately left out and his consideration of a number of crucial matters.

[40] The commissioner in my view dealt with the evidence of all the witnesses and after doing so arrived at a decision which on the basis of the evidence before him and the circumstance of this case was reasonable. Thus in the light of above reasons the application to review and set aside the award of the commissioner stands to be dismissed. In my opinion it will not be fair to grant cost in this matter.

[41] In the premises I make the following order:

1. The application to review and set aside the award

issued on the 24<sup>th</sup> August 2006 under case number

BC.SARH WU/SP/ (CSWP) NP/ 9478 is dismissed.

2. There is no order as to costs.

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MOLAHLEHI J

Date of hearing: 01 February 2008

Date of Judgement: 05 June 2008

#### APPEARANCES

For the Applicant: Mr L J LESO (Attorney)

Instructed by: SHABANGU BEUCHAMP ATTORNEYS

For the Respondent: Ms T H Sethosa (Attorney)

Instructed by: MASERUMULE INC