



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

Not Reportable

Case No: D774/14

In the matter between:

**ASOGAN PILLAY**

Applicant

and

**SAFETY AND SECURITY SECTORAL  
BARGAINING COUNCIL**

First Respondent

**COMMISSIONER A. DEYZEL**

Second Respondent

**THE SOUTH AFRICAN POLICE SERVICE**

Third Respondent

Heard: 26 March 2015

Delivered: 05 November 2015

**Summary: Review application – misconduct leading to dismissal of police officer – admissibility of evidence of trap in arbitration proceedings not the same as in criminal and civil courts.**

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**JUDGMENT**

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CELE J

## Introduction

- [1] This is an application in terms of section 158 (1) (g) of the Labour Relations Act<sup>1</sup> to review, set aside and substitute an arbitration award dated 14 August 2014, issued in this matter by the Second Respondent as a Commissioner of the First Respondent. The Applicant challenged the award which found that the dismissal of the Applicant by the Third Respondent was for a fair reason after a fair procedure was followed. The Third Respondent opposed the application on the basis that the award is reasonable.

## Factual Background

- [2] It was in January 1995 when the Applicant commenced his employment with the Third Respondent. He thus became a member of the South African Police Services, the SAPS. In 2009 he had progressed through the ranks to become a Warrant Officer, also then known as an Inspector. He was stationed at Amanzimtoti Police Station under the command of Colonel Carel Grobler, the Station Commander. His duties were essentially to work at the charge office, though he performed other functions as well.
- [3] On 21 March 2009 a road accident took place, involving a motor vehicle driven by a Mr Izak Smit with a motor cycle of Sergeant Max Khan, stationed at Umkomaas Police Station. Mr Smit apparently failed to stop his motor vehicle after the accident to assess the damage and injuries suffered, if any. Police investigations conducted led to the arrest of Mr Smit on that evening. Though Mr Smit was not formally charged, he was detained at the Amanzimtoti Police cells until the early hours of the following day when he was released. An accident report had been compiled in a prescribed accident form. The Applicant was one of the police officers on duty on that night shift.

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<sup>1</sup> Act Number 66 of 1995, hereafter referred to as the Act.

- [4] On 26 March 2009 Mr Smit arrived at Amanzimtoti Police Station. Due to the nature of the report he made he was taken to the Station Commander Colonel Grobler. Mr Grobler referred the matter to the Branch Commander, Colonel Jali with a request that a police detective be appointed to take a written statement from Mr Smit. The request was acceded to. The statement of Mr Smit alleged some acts of impropriety about his release on 21 March 2009 on the part of the Applicant. Colonel Grobler decided that a police trap was to be conducted against the Applicant as envisaged in terms of section 252A of the Criminal Procedure Act.<sup>2</sup> The entrapment was scheduled for 28 March 2009 and on that day Mr Smit took part in it and to that end, he was fitted with video and audio recording equipment to capture the event. Five R100 bank notes were prepared by making copies of each note and the original notes were handed to Mr Smit for use in the entrapment.
- [5] A number of police officers were prepared by Colonel Grobler to take part in the police operation against the Applicant. They included Female Detective Inspectors Rothmann and Louise Mulder of Amanzimtoti Detective Branch, Detective Inspector Dreyer and other members of the Organised Crime Unit. A parking area close to a sports field in Hutchinson Park, Amanzimtoti was chosen as the vicinity for the operation. As pre-arranged, Mr Smit arrived at the scene and parked his motor vehicle. Other members taking part in the operation took hidden positions from where they kept observation. Soon thereafter a marked police van arrived at the scene driven by Warrant Officer Ncube with the Applicant as the passenger. The Applicant was in full police uniform. The police van parked not far from that of Mr Smit.
- [6] The Applicant alighted from the van and approached Mr Smit who occupied the driver's seat and the two spoke to each other. He then moved to the front passenger window of Mr Smit's car. He handed some document through the front passenger window and Mr Smit gave him the R500 bank notes he received

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<sup>2</sup> Act Number 51 of 1977, hereafter referred to as the CPA.

from police. Warrant Officer Ncube moved to carry out an arrest of a certain person. Thereafter the Applicant went to board the police van but as it was about to exit the parking bay it was jammed as the police contingency in attendance at the scene and Mr Smit approached the police van. Detective Inspector Dreyer, assisted by other members arrested the Applicant and took him to Amanzimtoti Police Station where a written warning statement was procured from him. The Applicant was charged with a corruption related offence and he appeared at the Magistrate's Court where he was released on bail. The criminal case was subsequently withdrawn against him.

[7] A decision was taken by the Third Respondent to charge the Applicant with misconduct. He was alleged to have contravened the provisions of:

- Regulation 20 (z) - by committing corruption by extorting the sum of R500.00 from Mr Smit in order to destroy the docket that was opened against him for reckless or negligent driving;
- Regulation 20 (q) - by contravening a code of conduct of the service;
- Regulation 20 (f) - by prejudicing the administration, discipline or efficiency of the department or office of the State;
- Regulation 20 (p) – while on duty by conducting himself in an improper, disgraceful and unacceptable manner in that he committed corruption.

[8] The Applicant was arraigned in an internal disciplinary hearing where the Third Respondent led the evidence of four witnesses being Colonel Grobler, Inspectors Rothmann and Dreyer and then Mr Smit. The Applicant testified in defence of himself but that notwithstanding, he was found to have committed the acts of misconduct he was charged with and was dismissed from the police force. He filed an internal appeal and to assist him in that process he requested a transcript of the internal disciplinary record. The proceedings were submitted for transcription but once this had been done the transcript record was paid for and removed from the transcribers. It then went missing with no further trace. He was aggrieved by his dismissal and he referred an unfair dismissal dispute for

conciliation and later for arbitration. At arbitration the Applicant was represented by Advocate Bastew but after the evidence of two witnesses was led she withdrew and the Applicant conducted his defence. Mr Grobler, Ms Rothman and Ms Smit testified for the Third Respondent and video evidence was produced. The Applicant testified in his defence. Commissioner R Lyster of the First Respondent found that there was no basis to find the dismissal of the Applicant to be unfair and he dismissed the claim of the Applicant. The Applicant applied for the review of the first arbitration award. A complete record of the arbitration proceedings could not be obtained. By agreement of the parties the first arbitration award was reviewed, set aside and the matter was remitted for a *de novo* arbitration hearing. The Second Respondent was appointed to arbitrate the dispute. Two witnesses were called by the Third Respondent, being Messrs Grobler and Dreyer. Neither Mr Smit nor Ms Rothman testified due to no longer being available. The Applicant was the only witness for his case. The Second Respondent issued a second arbitration award in which he found that the Third Respondent had dismissed the Applicant for a fair reason and after following a fair procedure. The Applicant initiated the present application which is the second review application in this matter.

#### Evidence

##### Third Respondent's version

- [9] To the extent that the evidence of the Third Respondent differed from that of the Applicant, the version presented was that Mr Smit was presented to Mr Grobler whereupon Mr Smit reported that the Applicant had made him pay R500 for his release from custody and that the Applicant was offering to make a police docket disappear for five hundred rand for the matter for which Mr Smit had been arrested. A further report was that another police officer Sergeant Max Khan of Umkomaas was telephoning Mr Smit, extorting him money to withdraw the reckless and negligent charge. The Branch Commander Mr Jali arranged for Ms

Rothman to take a written statement from Mr Smit and such a statement was taken. Mr Grobler then sought authority to conduct a police action in which Mr Smit would offer R500 to the Applicant to give a chance if the Applicant would destroy the docket. Advocate Gert Nel of the office of the Director of Public Prosecutions in Kwa Zulu Natal granted verbal authority. So telephone calls were exchanged between Mr Grobler and Ms Rothman to arrange the police action. In the morning of 28 March 2009 Mr Grobler addressed SAPS members involved in the undercover operation and Mr Dreyer then took charge. Mr Smit was fitted with audio and video recordings and he was given R500 bank notes after copies of the notes had been made and kept. The police undercover operation went as planned and the Applicant peached up at the scene pursuant to a telephone call Ms Rothman asked Mr Smit to make to let the Applicant know that Mr Smit was waiting for him at the pre-agreed venue.

- [10] The Applicant went to Mr Smit's car carrying what appeared to be a police docket. Mr Dreyer saw the Applicant leaning into the opened front passenger window of Mr Smit's car. Mr Smit then sent a pre-arranged signal to the hiding police officers. All began to move to the scene. The Applicant got into the police van he came with. Ms Rothman told Mr Smit to jam the police van. R500 bank notes given to Mr Smit were found in possession of the Applicant. The Applicant was told of what was going on. A torn police docket was retrieved from the cabby hole of the police van and was given to Mr Dreyer. The Applicant was arrested and taken to the police station where a statement was taken from him. The audio and video equipment was retrieved and handed to the Technical Support Services for processing. Mr Grobler decided not to take any action against Sergeant Khan as Khan did not belong to Amanzimtoti Police Station.

#### Applicant's Version

- [11] The Applicant worked during the night shift when Mr Smit was involved in an accident and he heard of the accident report. At some stage he drove pass the

scene of the accident but found that it had been cleared. He returned to the station to find his colleague Sergeant Mark Martins having difficulty with a suspect who was extremely rowdy and Constable Kotzer was assisting Sergeant Martins. The Applicant told the suspect to calm down and he told the suspect that he was likely to get R500 bail if he was charged for a traffic or drunken driving offence. Sergeant Martins asked for a procedure for the compilation of an accident report. The Applicant explained the procedure and an accident report was compiled. The troublesome suspect turned out to be Mr Smit and he was then lodged at Amanzimtoti Police cell by Sergeant Martins. It was not true that the Applicant allowed Mr Smit to make a telephone call at the station to his wife as the Applicant did not have a telephone pin code. At some stage the Applicant saw Mr Smit wondering around in the courtyard at the station. He found it difficult to say Mr Smit was released by any officer as Mr Smit had not been charged. Mrs Smit and her neighbour Ms Nikkie Jacobs arrived at the station and were randomly attended to by a number of police officers present. The Applicant neither released Mr Smit from the cells as alleged nor demanded any money from him. He never told Mr Smit that Mr Smit was in big trouble. Nor did he exchange telephone numbers with Mr Smit. The Applicant had no knowledge of who made six calls to Mr Smit from the office telephone on 22 March 2009 between 04h28 and 05h50. The Applicant did not telephone Mr Smit at around 18h00 on 22 March 2009 as alleged.

- [12] Ms Rothman approached the Applicant with a request for assistance in arresting a certain fugitive from justice. He agreed to assist if he would be available. Ms Rothman made a follow up and explained that she needed to conduct a trap for this fugitive and that the assistance of the Applicant was necessary. The fugitive turned out to be Mr Smit. On Saturday 28 March 2009 Ms Rothman telephoned the Applicant confirming that such a trap would be conducted on that day. The Applicant was working at the community service centre. He told Mr Ncube with whom he worked at the station about the request. He then decided to make an occurrence book (OB) entry of assisting in the trap. The member in charge of the

centre, Warrant Officer Ntombela, was still busy with the book and undertook to make that entry later.

- [13] The Applicant left the station with Mr Ncube driving the police van to a venue of the trap as told to him by Ms Rothman. He took part in the trap as described by the Third Respondent except that it was part of an entrapment exercise designed to obtain evidence that Mr Smit attempted to bribe him. Just after he received the R500 bank notes from Mr Smit a certain black male was on the run. The Applicant went after him, assisting Mr Ncube to arrest this person. Had this incident not taken place the Applicant would have asked Mr Smit what the payment was for. The Applicant denied having carried a docket for a traffic violation by Mr Smit, saying he merely carried a document. After his arrest the police intimidated him. They were bragging about the arrest, saying they were fixing him up for the stance he had taken against the members of the Organised Crime Unit involved in two other criminal matters. Mr Dreyer in particular said that the trap was for the Applicant and not Mr Smit and that it was the last time the Applicant ever made allegations against the Organised Crime Unit. The Applicant said he had agreed to testify against those members in the criminal court for their unlawful behaviour against the accused charged in that case. The trap was therefore a retaliatory act of the organised Crime Unit. Upon his arrest he made a written statement which disappeared. The statement used in this matter was a second one from him. He produced it under threat by the police.

Chief findings of the Second Respondent.

- [14] The first issue in respect of which a finding was made pertained to the nature of the enquiry the arbitration related to. The finding made was that:

“76. In determining whether the Applicant’s dismissal was substantively unfair or not, it is necessary to decide whether the Applicant committed the misconduct that he was dismissed for. It is particularly necessary to consider whether the Applicant corruptly accepted an amount of R500.00 from Mr Smit i.e. in exchange for



tearing up a police docket or whether he accepted it as part of an entrapment exercise designed to obtain evidence that Mr Smit attempted to bribe him.

77. As is apparent from the summary of the evidence the parties accused each other of fabricating evidence.”

[15] In relation to substantive fairness the Second Respondent made the following findings:

“78. The case that the Applicant sought to make out was that Amanzimtoti detectives and members of the Organised Crime Unit arranged for an entrapment exercise to be done, so as to obtain evidence implicating the Applicant in corruption charge. Their motive for doing so, so the Applicant’s case went, was to seek revenge for the Applicant making statements that implicated members of the Organised Crime Unit in committing acts of violence when they arrested suspects at a night club or to dissuade him from giving evidence to such effect or to discredit him in case he would give evidence to such effect. On the evidence as a whole it was highly improbable that was what happened. The reasons for this finding are the following:

- Firstly; the statement that the Applicant referred to was made to suspects and their attorney and there was no indication that the statement came to the knowledge of Amanzimtoti detectives and members of the Organised Crime Unit.
- Secondly, the idea that a trap should be set for the Applicant did not emanate from members of the Organised Crime Unit. Mr Smit made a report to Senior Superintendent Grobler and he in turn requested the detective branch commander to appoint a detective to take a statement from Mr Smit. It was either Senior Superintendent Grobler or Inspector Rothmann who contacted the Organised Crime Unit and requested their assistance.
- Thirdly; there was no reason why Inspectors Rothman and Mulder would conspire with anybody to misrepresent to the Applicant that they needed his (the Applicant’s) assistance to trap Mr Smit when they in fact intended to trap him (the Applicant).

- Fourthly; the most probable inference to be drawn from the circumstances was that it was a report made by Mr Smit to Inspector Rothman that led to a trap being set for the Applicant.
79. The probabilities are overwhelming that it was the Applicant who fabricated his version. On the evidence of Inspector Dreyer at the time that the Applicant was arrested in Hutchison Park he (the Applicant) made no mention of him believing that he was participating in an exercise arranged by Inspectors Rothmann and Mulder to trap Mr Smit. Inspector Dreyer's evidence in this regard was strongly supported by the fact that the Applicant made no mention of that in his warning statement. It is significant that the Applicant learned well before the arbitration hearing commenced that the respondent would not call Mr Smit, Inspector Rothmann or Inspector Mulder as witnesses. On the probabilities the Applicant changed his version because of that, believing that such witnesses as the respondent was going to call would not be able to gainsay his latest version.
  80. It is so that the Applicant gave evidence that the written statement that the respondent relied on was made under duress and that it was not freely and voluntarily made. The duress that the Applicant referred to was a threat.
  81. I find that the most probable inference to be drawn from all the circumstances was that the Applicant made the written statement referred to in preceding paragraph freely and voluntarily. I accordingly find that the statement was admissible evidence.
  82. As mentioned above it was not in dispute that the Applicant tore up something while leaning into Mr Smit's car. In the written statement the Applicant admitted that it was a police docket that was torn up. The reliability of this admission was strengthened by the evidence of Inspector Dreyer to the effect that a torn up police docket was retrieved at the scene where the Applicant was arrested by one of the inspectors who was with him (Inspector Dreyer). The evidence that the Applicant gave at the arbitration i.e. that he tore up stationery contradicted his written statement and was so improbable that it cannot be accepted. On the evidence given by the Applicant during the arbitration he was informed that Mr Smit wanted to buy a police docket and he went to Hutchison Park to trap the Applicant. Even on that evidence one would have expected the Applicant to take

a police docket along and to hand it to Mr Smit so that Inspectors Rothmann and Mulder could find it on him (Mr Smit). The fact that the Applicant did not hand the police docket to Mr Smit rendered it unlikely that the Applicant was participating in an exercise designed to trap Mr Smit. On the Applicant's evidence at the arbitration Mr Smit said the Applicant must tear up a docket for five hundred rand. The Applicant the (sic) tore up some stationery but Mr Smit nevertheless paid the Applicant five hundred rand. How the Applicant hoped to have trapped Mr Smit if he was tearing up stationery was not explained.

83. What the torn up docket looked like could be seen from digital photographs shown during the arbitration which appeared to be taken at the time of the Applicant's arrest as well as from a photocopy of the docket cover made after it was pasted together. It appeared from the docket cover that it related to an incident involving alleged reckless and negligent driving that occurred on 21 March 2009 on Main Road, Warner Beach, and the time and place when and where the collision that Mr Smit was involved in, took place. The Applicant had written on the docket that it was not to be registered. These circumstances further rendered it more probable than not that the Applicant had torn up a police docket whilst talking to Mr Smit.
84. I have considered all the other issues referred to in the Applicant's evidence and the closing argument filed on his behalf. I briefly deal with some of those issues in paragraphs 85 to 87 below.
85. The record of the phone calls made to and from Mr Smit's cell phone did not assist either party's case.
86. No weight could be attached to the Applicant's evidence about the entry that he allegedly made in the occurrence book because the Applicant's credibility as a witness was seriously tarnished for the reasons given above. The Applicant probably gave such evidence knowing that the respondent would not be able to rebut what he was saying, because the relevant occurrence book had gone missing.
87. Video footage of the incident in Hutchison Park was shown during the evidence of Senior Superintendent Grobler. At the time it was indicated that the

respondent would rely on hearsay evidence and that it would lay a basis for that. The circumstances changed during the evidence of Senior Superintendent Grobler as he testified that Mr Dreyer was staying in Durban and that it was possible to call Mr Dreyer as a witness. Parts of the evidence of Mr Dreyer regarding what happened in Hutchison Park was not disputed and that was the probable reason for the respondent not laying a proper foundation for the video footage to be allowed. Without making a definite finding concerning the admissibility of the video evidence I have decided in favour of the Applicant not to take the video evidence into account.

88. It was common cause that the Applicant received an amount of R500-00 from Mr Smit. The evidence proved on an overwhelming balance of probabilities that the Applicant more or less at the same time tore up a police docket relating to the driving of Mr Smit. In addition the evidence proved on an overwhelming balance of probabilities that the Applicant gave a false explanation for what occurred. The most probable inference to be drawn from these circumstances is that the Applicant tore up the police docket in return for receiving an amount of R500.00 from Mr Smit i.e. that the Applicant committed the misconduct that he was dismissed for.”

[16] On sanction the finding made was that:

“89. The misconduct that the Applicant committed was so serious that the sanction of dismissal was not unfair. It was submitted on behalf of the Applicant that the sanction was unfair because the respondent did not prove that the trust relationship had broken down. In my view however it goes without saying that a police officer who accepted a bribe should not be allowed to continue holding the position of police officer. Public interest requires that such police officer be removed from the respondent’s service. In the Applicant’s case the position was worse because he showed no remorse and fabricated an elaborate concocted story falsely accusing other police officers of conspiring to frame him and of fabricating evidence implicating him in the commission of bribery and corrupt acts.”

[17] Finally, for procedural fairness the second respondent said that:

- “90. It was submitted on behalf of the Applicant that the respondent did not follow a fair procedure in that it failed to provide the Applicant with a transcript of the record of the disciplinary enquiry so that he could use it for internal appeal. No evidence was however led regarding the extent to which the Applicant was prejudiced by the failure to provide him with such transcript. There was no indication that the Applicant could not have been expected to argue the internal appeal without a transcript of the record of the disciplinary enquiry.
91. In all the circumstances I find that the respondent dismissed the Applicant for a fair reason and after following a fair procedure.”

### Review grounds

[18] The Applicant contended that the Second Respondent as Arbitrator, in conflict with the behests of the Act, misdirected himself, failed to apply his mind, prevented the Applicant from tendering evidence, concealed facts and evidence and thus committed gross irregularities and exceeded his powers by acting unreasonably or unjustifiably. The Applicant said that the arbitrator did not identify material aspects of the dispute. He said that the Employer alleged that the entrapment was conducted on the basis that the Applicant had unlawfully arrested and detained Mr Smit and thereafter made threats of extortion against him. He said that this issue constituted a material fact of the dispute which the Commissioner failed to determine properly. In support of this submission he made extensive references to various factual disputes in this matter such as:

- The identity of the police officers who arrested Mr Smit;
- The allegations of extortion perpetrated by Mr Max Khan;
- Authority of the police action or trap;
- Admissibility of evidence regarding the trap;
- The status of Mr Smit;
- Evidence about the Organised Crime Unit;
- The Commissioner's bias in accommodating the Third Respondent to lead evidence of Mr Dreyer whose whereabouts were unknown;

- Evidence of telephones made between Mr Smit and the police station;
- The written statement of Mr Ntombela and
- Protected disclosure made by the Applicant.

[19] A number of submissions made by the Applicant in support of the review application are process-related. As the Applicant appeared in person he probably did not know that the process-related review test is no longer part of labour law<sup>3</sup>.

[20] In opposing the review application the Third Respondent made various submissions including that the Second Respondent considered all the issues that he needed to decide upon, more specifically that of whether or not the Applicant's dismissal was substantively unfair. The issue relating to any alleged procedure of unfairness is clearly traversed in the award. The submission was that the Second Respondent did in fact apply his mind to the Applicant's allegation that he was not given the right to Appeal. The Second Respondent was said to have correctly accepted the evidence of the Applicant, which demonstrated that he was afforded the right to appeal, and that even if the Applicant was not provided with a transcript, he failed to prove any prejudice in the absence of such transcripts. It was submitted that the Applicant was fully aware of the alleged grounds of his appeal, and there was no impediment to the Applicant proceeding with his appeal in the absence of a transcript.

[21] It was submitted that the Second Respondent had properly analysed and dealt with the Applicant's version on the substantive issue. In doing so the Second Respondent properly applied his mind to the substantial merits of the dispute.

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<sup>3</sup> See *Gold Fields Mining SA (Pty) Ltd v CCMA and Others* (2014) 35 ILJ 943 (LAC), paragraph 17 where Court held: The fact that an arbitrator committed a process-related irregularity is not in itself a sufficient ground for interference by the reviewing court. The fact that an arbitrator commits a process-related irregularity does not mean that the decision reached is necessarily one that a reasonable commissioner in the place of the arbitrator could not reach.

The submission was that the Second Respondent correctly found that there was no reason why Ms Rothman and Ms Mulder would conspire with anybody and misrepresent to the Applicant that they needed his assistance to trap Mr Smit when they in fact intended to trap the Applicant. It was said that the Second Respondent had concluded reasonably that initiation of the trap being set for the Applicant did not emanate from members of the Organised Crime Unit, but rather at the instance of Grobler. It was submitted that the Second Respondent correctly considered the employer's right to dismiss the Applicant for the serious charge of corruption which resulted in an irretrievable breakdown of the trust relationship between the Applicant and the Third Respondent.

#### Evaluation.

[22] For review purposes it is now trite that a review court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion which was reasonable to justify the decisions he or she arrived at. The review court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors and then determine whether a failure by the arbitrator to deal with one or some of the factors amounts to process-related irregularity sufficient to set aside the award. This piecemeal approach of dealing with the arbitrator's award is improper as the review court must necessarily consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision-maker could make.<sup>4</sup>

[23] The Second Respondent was confronted by two versions that were mutually exclusive to each other and therefore could not co-exist. The Applicant correctly pointed out that the version of the Third Respondent in the second arbitration was limited to the evidence of its only two witnesses, Messrs Grobler and Dreyer.

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<sup>4</sup> See in this respect paragraphs 16 and 18 in the decision of *Gold Fields Mining SA (Pty) Ltd v CCMA and Others*, supra.

The essential witnesses Ms Rothman and Mr Smit did not testify. When properly seen, the version of the Applicant is that Mr Grobler was part of a process that was initiated by Ms Rothman without him knowing of the truth. His version suggests that Ms Rothman and Mr Khan had a series of telephone calls made to Mr Smit between 21 and 28 March 2009. Ms Rothman had then set up the reporting of the Applicant when Mr Smit came to the police station to report the extortion. Mr Grobler accepted the *bona fides* of Mr Smit and initiated the police action. Mr Grobler was then an innocent participant to an action instigated by Ms Rothman and therefore the truth of the matter would not depend on his testimony but on that of Ms Rothman and Mr Smit as essential witnesses who never testified. In the absence of the essential witnesses the version of the Third Respondent is dependent on circumstantial evidence. Mr Dreyer was implicated for what he is alleged to have said to the Applicant after the Applicant was arrested, saying that the trap was for the Applicant and not Mr Smit and that it was the last time the Applicant ever made allegations against the Organised Crime Unit.

[24] Before the probabilities are examined there are issues that need to be resolved. The Applicant has made numerous references to documents that went missing in this matter. None of the parties gave evidence on who was responsible for the loss of the transcript of the internal disciplinary hearing, the occurrence book, the first statement of the Applicant after his arrest and the original docket used in the trap, if one was there. All were lost while in custody of the police members at Amanzimtoti. It is a strange phenomenon of this case that these documents went missing. The circumstances of their loss are so vague that it is virtually difficult to make a conclusive finding in relation to such loss. No clear finding can be made on who stood to gain for the loss.

[25] The Applicant raised an issue about the identity of the police officers who arrested Mr Smit. It was never said that the officer who extorted R500 for the release of Mr Smit was the one who had arrested him in the first place. For



purposes of determining the guilt of the Applicant the identities of the arresting officers was therefore never relevant. The probabilities of this matter indicate though that it was not the Applicant who arrested Mr Smit. The Applicant has also made reference to the allegations of extortion perpetrated by Mr Max Khan, who was apparently the owner of the motor-cycle involved in an accident with Mr Smit. Mr Khan might have been making monetary demands to Mr Smit for the damages occasioned in the accident or a demand for money so as not to press criminal charges when his motor cycle was damaged. Whether this was such a demand or the alleged extortion, it is a separate issue from the charges faced by the Applicant.

[26] The Applicant made reference to authority of the police action or trap and the admissibility of evidence regarding the trap. The two issues relate to the admissibility of evidence pertaining to the trap. Section 252A of the Criminal Procedure Act<sup>5</sup> is clear. It regulates the admissibility of such evidence in civil and criminal courts. The Arbitration hearing is not one such court. Section 138 of the Act<sup>6</sup> then gives the Commissioner authority to conduct arbitration proceedings in a manner that the Commissioner considers appropriate in order to determine the dispute fairly and quickly but with the minimum of the legal formalities. The attack of the Applicant on this issue suggests that this evidence should not have been admitted. Yet he is the one who testify about the circumstances under which he took part in a trap, making it imperative that such trap evidence should be admitted and considered in the resolution of the issues. His attack of the award on this aspect is devoid of any merits.

[27] The status of Mr Smit is yet another issue raised by the Applicant. Even if it were conceded that Mr Smit was of dubious character it did not mean he had to be extorted R500 for his release. Nor did it mean that he could lawfully transact with money for the disappearance of a police docket in a matter that police were

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<sup>5</sup> Act 51 of 1977.

<sup>6</sup> Act 66 of 1995.

investigating. Those familiar with criminal cases know that persons of dubious characters such as police informers are often used in police undercover operations. This issue has no merits for review purposes.

[28] The next issue raised relates to evidence about the Organised Crime Unit. The Applicant said that it had become public knowledge that he was to testify in two criminal matters against members of the Organised Crime Unit. He never elaborated how this had become public knowledge. His evidence was that he reported the violent treatment of the accused by members of the Organised Crime Unit to the Prosecutors handling those matters. This was an essential part of his case in respect of which he should have given details as it was to explain the motive for the retaliatory trap against him. The accused were charged for drug related offences while the Applicant said that he was to testify about how they were treated. His evidence would therefore not concern the criminal charge but was about how the suspects were treated once arrested. It remained unclear why the members of the Organised Crime Unit would then be so vindictive against him. It remained unclear again why his colleagues as members of the Detective Branch had an axe to grind with him. He led no evidence of why these members had a vendetta against him so as to gang up with the Organised Crime Unit against him. The lack of details on this issue has a devastating effect on the version presented by the Applicant. While he testified about the theft of property of the detainees at the police station, he never suggested that it created any ill-feelings between him and his colleagues.

[29] The Commissioner's bias in accommodating the Third Respondent to lead evidence of Mr Dreyer whose whereabouts were unknown is yet another issue raised by the Applicant. It is the duty of a Commissioner to assess if any further witnesses are likely to be called by any of the parties so as to monitor time frames and progress in the matter. Also, where hearsay evidence is sought to be led, it may be provisionally admitted pending the testimony of a person on whose

truth and credibility such evidence depends. Accommodating a party for such evidence is permissible. There are accordingly, no merits to this submission.

[30] The next issue is about the evidence of telephones made between Mr Smit and the police station. There are merits in the evidence of the Applicant that Mr Smit was repeatedly telephoned by an officer or officers at Amanzimtoti Police Station days before the trap was conducted. The Third Respondent's version failed to explain why such calls were made and by whom. The evidence on this aspect had to come from Ms Rothman and Mr Smit who were no longer available to testify. The Applicant suggests that it was all part of a bigger plan to falsely incriminate him. Added to this aspect is the evidence of the Applicant that his cellular telephones were confiscated by the police on his arrest and were returned with a history of telephone calls made and received wiped out. Again the Third Respondent was unable to meet this version with any explanation. This aspect has to be viewed with the probabilities of this matter.

[31] The Applicant made reference to the written statement of Mr Ntombela, saying that the Commissioner ignored his evidence that the statement supported his claim that he had a lawful purpose for being at the scene of the entrapment. The statement was in support of the claim that Ms Rothman had contacted the Applicant prior the entrapment and lured him to the scene under the guise of trapping Mr Smit. The Applicant said that he made an occurrence book entry that Mr Ncube and himself went to assist Ms Rothman. The occurrence book went missing from the Employers possession. It is unfortunate that an important statement such as this one was only made about five years after the event and only upon the intervention of the Independent Police Directorate. The statement was very relevant to the issues in point. However, due to time lapse where memories are prone to fade, it carried less evidential weight. The cue lay in Mr Ntombela being called to give *viva voce* evidence, which did not happen.

- [32] The Applicant said that his arrest was pre-empting the testimony he was to give in the drug matter against the members of the Organised Crime Unit and therefore that he was making a protected disclosure, in terms of the Protected Disclosure Act<sup>7</sup>. This issue never served before the Commissioner. The review application is limited to issues that were brought to the hearing before the Commissioner. Had the Applicant raised this issue, the Commissioner would be devoid of the jurisdiction to determine the dispute. In any event the facts of this matter suggest that no protected disclosure was made in this matter. He was merely to testify in a law court as a witness.
- [33] The probabilities of the evidence in this matter must now be examined. According to the Applicant a trap had to be prior authorised. There is no evidence by him to say that such authorisation had been obtained. Members taking part in a trap meet before the trap and rehearse the process, identify and agree on the tools to be used so that such tool are not contaminated by what else members are in possession of. He said nothing of the sort. He had not seen Ms Rothman at the scene of the trap, nor had he arranged with her any signs that would pass through, telling her that the mission had been accomplished, after which she would move in to carry out the arrest. He had not discussed with her how this vital evidence of the trap would be captured. The scene of a trap is normally a secret place and yet the Applicant went to the scene in open view with another police member. Mr Smit would have been concerned about Mr Ncube's presence at a time when cellular telephones carried daily could record this transaction very easily. Simply put, the trap he says he took part in was worse than the trap he criticises the Third Respondent for. In his own description of what a lawful trap should be constituted of, he admittedly was taking part in a shoddy exercise.
- [34] According to the Applicant he did not have a docket with him when he approached Mr Smit. If he believed he was taking part in a trap one has to wonder what it is that would be found to be incriminating with Mr Smit after the

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Applicant had taken his money. So he came to take money in exchange with some document of no relevance to the impropriety sought to be discovered by Ms Rothman. This version is devoid of any sense. What makes sense is that he carried a docket.

- [35] If the Applicant was threatened by the police as he says, the statement he made should have been highly incriminating and not exculpatory as it turned out to be. The belief in his innocence would drive him to protest his innocence at the time of his arrest, explaining that he was helping Ms Rothman who was also present at the scene. According to the evidence of Mr Dreyer the Applicant did not do so.
- [36] From all the foregone analysis the probabilities of this matter point to one direction, namely that notwithstanding any findings that favour the version of the Applicant, the overwhelming probabilities favoured the acceptance of the evidence of the Third Respondent as the Commissioner found.
- [37] In respect of the challenge to procedural fairness the Commissioner cannot be faulted for the finding that no evidence was led regarding the extent to which the Applicant was prejudiced by the failure to provide him with the transcript. Further that, there was no indication that the Applicant could not have been expected to argue the internal appeal without a transcript of the record of the disciplinary enquiry. What the Applicant did was to complain about the absent record but he did not demonstrate the consequences thereof. It must be borne in mind that in this matter there were available documents to utilise. Once it was ascertained that the transcript was missing a copy should have been arranged for with transcribers at that early stage and the issue of funds could be resolved later.
- [38] In respect of sanction, it has to be remembered that the police perform a public function. Members of society need to trust the police in carrying out their statutory functions properly, diligently and honestly even when no one is looking. Failing this, society is likely to take the law into their hands with a catastrophic

result that living in a democracy would become a dream that was never attained. The trust relationship in this matter is not limited between the employer and the employee but it extends to the public served by the police officers. It stands as a reasonable finding by the Commissioner that it goes without saying that a police officer who accepted a bribe should not be allowed to continue holding the position of police officer. Public interest requires that such police officer be removed from the police service. I hold that the award is reasonable and has to be allowed to stand.

[39] The following order must therefore be issued, taking into consideration the law and fairness of the matter:

1. The review application in this matter is dismissed.
2. The Applicant is ordered to pay the costs hereof.

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Cele J

Judge of the Labour Court of South Africa.

APPEARANCES:

1. For the Applicant: In person.
2. For the Third Respondent: Mr D Pillay  
Instructed by the State Attorney, Durban.

LABOUR COURT