



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 994/15

In the matter between:

JT MGUDI

Applicant

and

COMMISSIONER J MTHUKWANE N.O

First Respondent

**SAFETY & SECURITY SECTORAL
BARGAINING COUNCIL**

Second Respondent

SOUTH AFRICAN POLICE SERVICE

Third Respondent

Heard: 19 October 2016

Delivered: 20 September 2017

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

- [1] This is an opposed application in terms of which the Applicant seeks an order reviewing and setting aside the arbitration award dated 13 March 2015, which

was issued by the First Respondent (the Commissioner) under case number PSSS616-10/11, acting under the auspices of the Second Respondent, the Safety and Security Sectoral Bargaining Council (SSSBC). In the award, the Commissioner found that the dismissal of the Applicant by the Third Respondent, the South African Police Service (SAPS) on the grounds of misconduct was fair.

Background to the dispute:

- [2] The Applicant, a member of South African Police Union (SAPU), was employed by the SAPS on a permanent basis with effect from November 2002. At the time of his dismissal he held the rank of Detective Constable. He was dismissed following upon a disciplinary enquiry into allegations pertaining to;
- a) Contravention of Regulation 20 (z); Defeating or obstructing the cause of justice by exposing an undercover police agent (Constable Masanabo) on 4 March 2008 who was deployed to infiltrate a syndicate involved in theft of motor vehicle, hijacking of vehicles and house robberies in Gauteng;
 - b) Malicious injury to property by searching, perusing and destroying the official diary and notes of Masanabo at his safe house;
 - c) Prejudicing the administration, discipline or efficiency of a department office or institution of the state by exposing the identity of an undercover police agent, Masanabo, by searching him and his 'safe house' with the targets; seizing, perusing and divulging confidentiality of police investigations and techniques, thereby endangering the life of the agent and prejudicing the police operation.

Arbitration proceedings:

- [3] Following upon his dismissal on 28 April 2009, The Applicant referred a dispute to the SSSBC for conciliation. When conciliation failed, the dispute was referred for arbitration and came before the Commissioner. At the arbitration proceedings, five witnesses were called upon to testify on behalf of the SAPS. The Applicant also testified and called upon one witness to testify on his behalf.

[4] The evidence presented on behalf of the SAPS by Warrant Officer, Hamilton Mabanga, who was in the Crime Intelligence Unit in Gauteng was as follows;

- 4.1 Information was received in 2008 from the Soweto Crime Intelligence Unit that there was a criminal (targets) operating in Mapetla Soweto, which was involved in the hijacking and stealing of motor vehicles;
- 4.2 An agent, Masanabo (Code-named 'Jessie'), was then recruited to infiltrate the syndicate as part of 'Operation Verso'. This involved having Masanabo being officially discharged from SAPS' service, and his name being removed from the SAPS' system to prevent him from being identified by corrupt elements within the SAPS. A (safe) house was rented and furnished for Masanabo in Rockville Soweto, and all his living expenses and salary were paid during the operation. He was further provided with a state vehicle, mobile phone and a budget for operational expenses.
- 4.3 Mabanga was Masanabo's handler and the latter also compiled reports for him and kept a diary from which an intelligence report was to be compiled. A month into the operation, an arrangement was made to meet with Masanabo at Thokoza Park in Rockville at 16h30 on 4 March 2008. When Mabanga and his colleague, Sergeant Kgwadi (who arrived in a separate vehicle) arrived at the park, Masanabo was nowhere to be seen. Mabanga called Masanabo on his mobile phone and the latter's response was that he would meet them within 20 minutes. That time lapsed and Mabanga again called Masanabo, who kept dropping his call.
- 4.4 Mabanga then went to a car-wash place in Mapetla Soweto, where members of the syndicate were known to meet. Upon approaching the car-wash place, Mabanga noticed the vehicle allocated to Masanabo parked nearby, and further saw a group of men that had surrounded him in a u-shaped form. At the same time, Mabanga also saw that the Applicant was amongst the people that had surrounded Masanabo, and was also pointing fingers at him.

- 4.5 The Applicant was known to Mabanga since 2000 when they both started as contract workers at SAPS, and after they were permanently employed. Mabanga also knew the Applicant from their past engagements at the Provincial Office, and also since he had assisted him in recovering a stolen vehicle in Diepkloof, Soweto.
- 4.6 Mabanga then drove past the group and then met up with Kgwadi at a later stage to report to him what he had seen. Whilst talking to Kgwadi, Mabanga then received a call from Masanabo. When he answered, it was not Masanabo who called him, but another person, who had identified himself as a policeman from the Vehicle Identification Unit in Soweto. Mabanga had recognised the man's voice as that of the Applicant, who had then asked him whether he knew anyone called 'Jessie'. Mabanga had answered in the negative, and the Applicant then informed him that the said 'Jessie' was going to be arrested as he was in possession of a police vehicle.
- 4.7 Concerned that Masanabo's life might be in danger, Mabanga and Kgwadi drove towards the 'safe house' in Rockville and parked about 400 meters from it whilst they observed any movements around the house. Late in the day they had noticed some people leaving the house. Thereafter, Masanabo had called him, and told him that they should meet at another place in Rockville.
- 4.8 Upon meeting with Masanabo, he had informed them that his cover was blown as one of the targets was arrested a day earlier and had raised suspicions that he might have been exposed by one of the gang members. Masanabo further reported that the Applicant (whom at that stage he only knew as 'Thabo' from the National Office, and who used to frequent the car-wash place where members of the syndicate regularly met), told the targets that he (Masanabo) was responsible for the arrest of the syndicate member, and that he had proof that he was a police officer. The Applicant, according to Masanabo, further told the targets that they should go to his house where they would find proof that he was indeed a police officer.

4.9 According to Masanabo's report to Mabanga, the targets then went to the 'safe house' accompanied by the Applicant and another police officer, Mzwakhe Xaba, who was also to be part of the syndicate. At the house, the Applicant had instructed Xaba to lift his bed mattress as that was where police hid their firearms. Upon lifting the mattress, they found his diary and note pad containing daily reports he had compiled. The Applicant had then read the reports loudly for the benefit of other syndicate members. Thereafter, the group left with his diary and the note pad. After receipt of this feedback, Masanabo had to be removed from the operation and the safe house.

[5] Masanabo's testimony was that he was employed as a Sergeant in SAPS and stationed at the Crime Intelligence at National Head Office. Before then he was placed at Tembisa SAPS. He testified regarding his training and preparation for the operation, and that his main task was to infiltrate the syndicate by befriending its members. The salient features of his testimony are as follows;

5.1 Previous intelligence reports had indicated that the syndicate members frequented a place called Richard's car-wash in Mapetla. Upon infiltrating the syndicate and regularly going to the car wash, he had recognized the ringleader, Peter Lebepe from the previous intelligence reports. He was also introduced to other syndicate members whom he had recognised from the photos shown to him as part of his briefing;

5.2 Whilst at the car-wash, he managed to speak to one of the car-washers, Richard, who had informed him that one of the syndicate members, Mzwakhe Xaba was a police officer. This was after the said Xaba had brought in his vehicle to be washed and after Richard had asked Masanabo if he could wash Xaba's vehicle first as he was a police officer.

5.3 In the course of the operations, Masanabo had memorised the registration details of all the vehicles that came to the car wash, and had on a daily basis, met new members of the syndicate. He was even

invited to join their 'Stokvel' and attend their meetings. Masanabo also at times invited them to sleep over in the 'safe house'. At some point, he had raised concerns with members of the syndicate with the presence of police officers in their midst, and he was assured that the officers were their friends and helped them with a variety of things;

- 5.4 On one of his daily visits to the car-wash, one of the syndicate members, Zizi, informed him that 'Thabo', who was also a regular at the car-wash was a police officer. The police officers according to Zizi assisted the syndicate with the registration and clearance of stolen vehicles;
- 5.5 In the morning of 4 March 2008, three members of the syndicate came to the Masanabo's 'safe house' and requested him to come over to the car wash. Upon his arrival, he had found other members already gathered, and was informed that one of them, Malankane was arrested in the early hours of that morning. They raised concerns that Malankane was 'sold' by someone within the syndicate.
- 5.6 Whilst still at the car-wash late in the afternoon, Mzwakhe Xaba arrived, followed shortly by the Applicant in another vehicle. The arrest of Malankane was again raised and the Applicant confronted Masanabo, and told him that he was aware that he was a police officer from Tembisa and that he was spying on them. The Applicant further told Masanabo that he had information from the Head Office in Pretoria that the undercover agent was driving a grey Honda Civic, which was also a description of the vehicle allocated to Masanabo;
- 5.7 Masanabo had denied being an undercover agent, and the Applicant ordered the other syndicate members to search him and his vehicle. Nothing incriminating could be found in the vehicle. At that time, Mabanga had called Masanabo on his phone and his response was that he would call him later. The Applicant then took Masanabo's phone to check who had called him. He had then dialled the last number received on the phone and spoke to Mabanga, informing him that he

was aware of Masanabo's real name and that he was going to arrest him;

5.8 The Applicant then told the other syndicate members that they should go to Masanabo's house. When they arrived at the house, they conducted a search and could not find anything until the Applicant told them to lift the bed and to also look under the bed mattress. They then found his diary and a note pad containing his daily reports, which had the names of the syndicate members and details of their vehicles. The Applicant then read some of the daily reports aloud and told the other members that he was correct when he said earlier that Masanabo was a police officer. They then took the diary and note pad and left Masanabo at the house after the Applicant had also returned his mobile phone which he had confiscated earlier. Masanabo confirmed having met Mabanga at a later stage after which the operation was abandoned.

[6] Ludi Rolf Schnelle, a Warrant Officer based at the SAPS' National Special Investigation Unit was tasked with the responsibility of establishing who had exposed Masanabo, in view of his employment record having been removed from the data base and the matter being treated as top secret. Having conducted the investigation, it was established that;

6.1 The Applicant and Xaba were the police officers who had assisted the syndicate members in exposing Masanabo. After these investigations, the Applicant was then arrested and upon being questioned, he had denied any knowledge of how Masanabo was exposed. He denied that he knew him or that he was involved in the activities of the syndicate under investigation. He further denied having been present at the car wash when Masanabo was confronted, or when the safe house was searched. His version was that he was performing his duties on the day in question, which was to drive around the Divisional Commissioner (Human Resources and Career Management);

- 6.2 After he had arrested the Applicant, his cell phone, which he had confiscated as the Applicant was under arrest rang, and he had noticed that the caller was one Butiki, who was also identified as one of the syndicate members;
- 6.3 Other investigations revealed that on 4 March 2008, the Divisional Commissioner, who the Applicant was supposedly driving around, had not reported for duty on that day as it was her birthday. It was also discovered that the Applicant had also not reported for duty on that day;
- 6.4 It was also established that on the date in question, the Applicant was driving a Ford Focus Sedan, and had filled petrol at 16h06 at the Meadow Point Garage. In the logbook however, the Applicant had recorded that he had parked the vehicle at home at the time that he was at the garage. According to Schnelle, the Applicant was in any event not permitted to park the vehicle at his house. What was even more suspicious with what the Applicant had recorded in the logbook was that the garage in question was about 10 km away from his house, and it could not have taken him six minutes to fill up petrol and reach his house. The conclusion therefore was that there was nothing to suggest that on the day in question the Applicant was at his house at the same time that Masanabo's cover was blown.

[7] The Applicant's version on the other hand was that ;

- 7.1 He was familiar with the car wash, having utilised it previously, and also having been a member of the Stokvel prior to taking up his position as a driver to the Divisional Commissioner at Head office in Pretoria in 2008. Some of the targets were also members of the Stokvel, and they were familiar to him as he also lived in Soweto;
- 7.2 On 4 March 2008, he had performed his duties by driving to Bedfordview to pick up the Divisional Commissioner's son. He then took him to the University of Johannesburg, and thereafter went to Protea Magistrate Court where he was called as a witness. He had

stayed in Court until 15h00 when the trial was postponed. He thereafter went to Meadowlands to visit his child.

- 7.3 He confirmed that he did not report at his place of work as he had been subpoenaed to be at the Magistrate's Court. He also confirmed that he went to Meadow Point Garage and thereafter went to Protea Glen where he stayed and parked the vehicle;
- 7.4 A day or so later he met Xaba who informed him that there was an undercover police officer by the name of 'Jessie', who wanted to join a stokvel he used to be a member of, and whose members regularly visited the car wash in Mapetla. Some members of the stokvel were not comfortable with 'Jessie' being a member and had asked him about what he did for a living and where he stayed. The members of the stokvel then went to Jessie's house where someone found a piece of paper on Jessie's bed which contained details of the members' vehicle registration. Upon being asked the reason he had kept the members' vehicle registration details, Jessie's response was that he was in the business of stealing vehicles and driving them across the border. It was at that point that he was informed that he could not join their stokvel;
- 7.5 He denied that he was ever at the car-wash on 4 March 2008 or at the safe house. He had contended that the cell phone data information used at the disciplinary hearing and in the arbitration proceedings could not place him at the car wash or at Masanabo's house on the day in question. He denied the allegation that he had damaged property as he was nowhere near the safe house, and contended that he was merely being used as a scapegoat for a botched operation which cost the state R300 000.00 without yielding any results;
- 7.6 He confirmed under cross-examination that he had worked with Mabanga in recovering a stolen vehicle in Soweto. He had contended that every detail he knew about the incident was as a result of what Xaba had told him, and he had no first-hand knowledge about what took place on that day.

- [8] Mokete Samuel Mokoena's testimony was essentially that he knew the Applicant well as he used to be a member of their Stokvel until about January/February 2008. According to him, members of the Stokvel were at the car wash when Masanabo ask them if he could also become a member. Xaba was also present at the car wash. Masanabo without being prompted had informed them that he was in the business of stealing cars. The members then told him that they needed to go to his house to see where he stayed before allowing him to join them. The reason for going to his house was to see where he stayed prior to accepting him, and for members to know where he stayed in the event that it was his turn to host the stokvel.
- [9] According to Mokoena, the Applicant was nowhere near the car wash on the date of the incident, nor did he accompany him and other 14 members of his Stokvel group to Masanabo's house. When they reached Masanabo's house, he did not go inside with the rest of the group as there were too many of them.
- [10] He had conceded under cross-examination that it was unusual for all the members of the Stokvel to go to a potential members house to see where he stayed. When the members came out of the house they were angry, stating that they could not allow Masanabo to be a member of their stokvel as he was a criminal.

The Commissioner's findings:

- [11] In coming to his conclusions, the Commissioner had regard to the provisions of Schedule 8 of the Code of Good Practice, and found that at the crux of the matter was whether the Applicant was present at both the car-wash and the safe house on 4 March 2008, when Masanabo was confronted by members of the Stokvel. In this regard, the Commissioner made a finding that;
- a) Mabanga and the Applicant knew each other, and that on the date of the incident, Mabanga saw the Applicant at the time that he passed the car-wash and had seen him pointing a finger at Masanabo when the members of the group had formed a semi-circle around him.

- b) The Applicant's witness, Mokoena, had confirmed in the proceedings that the group had formed a circle around Masanabo, and that Xaba also formed part of that group. There was therefore no reason for Mabanga to falsely implicate the Applicant that he was at the car wash.
- c) At the time of his arrest, the Applicant had made a warning statement in which he had stated that when Masanabo's cover was blown, he was at work in Pretoria. The Applicant had contradicted himself in regard to where he was on 4 March 2008 when Masanabo's cover was blown and he therefore could not be trusted.
- d) The Applicant was not a credible witness in view of his other version that at the time of the incident, he was at his home with his mother and sister. He nevertheless failed to call them to the arbitration proceedings to corroborate his version.
- e) The Applicant was correctly found guilty on the charges preferred against him, as the evidence pointed to him having removed Masanabo's diary and notes from the safe house.
- f) There was no evidence to support charge two relating to malicious damage to property as nothing was placed before the proceedings to indicate that the records and report were destroyed.
- g) The two other charges the Applicant was guilty of were extremely serious, and the only suitable sanction in the circumstances was that of a dismissal.

The grounds of review:

- [12] Central to the Applicant's case is that the award was reviewable on the basis that the Commissioner committed misconduct in relation to his duties; committed a gross irregularity in the conduct of proceedings, and exceeded his powers. It was submitted that the award embodied a decision that a reasonable decision maker could not reach.

- [13] I do not intent to rehash all the grounds relied upon in this review application. In respect of the above general grounds however, it was submitted on behalf of the Applicant that by finding that the crux of the dispute was whether the Applicant was at the car wash in Mapetla and the safe house in Rockville on 4 March 2008, the Commissioner overlooked the evidence that the cell phone data information did not place him at either of these locations.
- [14] To the extent that the Applicant and Mokoena had testified that the former was not at the two locations, as opposed to the version of Mabanga and Masanabo, the Commissioner, it was submitted, should have placed more evidentiary weight on the cell phone data information rather than solely relying on the evidence of Masanabo and Mabanga. The cell phone data information it was submitted, should have been considered in determining the Applicant's whereabouts on the day in question, and this was despite the contents of his previous warning statement.
- [15] Although it was not disputed that Mabanga and the Applicant were acquainted having met about twice, it was highly improbable that Mabanga could have recognized the Applicant's voice on the phone at the time that Masanabo was at the car wash on the date of the incident. The Commissioner laid no basis for accepting Mabanga and Masanabo's evidence in respect of the events at the car wash.
- [16] The Applicant further takes issue with the alleged failure of the Commissioner to consider the evidence led on behalf of the SAPS by Christel Booysens, who had testified as to the trust relationship between the parties and the reason the Applicant could not be reinstated. He further took issue with the manner with which the Commissioner had dealt with the evidence of the internal chairperson of the enquiry, Adam Ntombela.

The legal position and evaluation:

- [17] It is trite that the review test remains whether the decision reached by the arbitrator is one that a reasonable decision maker could not have reached in relation to the material before him or her. Essentially, the Commissioner's

conclusions must fall within a range of decisions that a reasonable decision maker could make¹.

[18] It is further accepted that where it is alleged as in this case that the Commissioner ignored or failed to consider material relevant to the facts or the issues for determination, the award will invariably be reviewable if the distorting effect of that misdirection was to render the result of the award unreasonable².

[19] To the extent that it was argued that the award stood to be set aside on account of the Commissioner having placed less weight on the evidence presented by and on behalf of the Applicant, this court should take heed of what was stated in *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)*³, i.e., that;

¹ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC) at para 110

² See *Head of the Department of Education v Mofokeng* [2015] 1 BLLR 50 (LAC) at para 33, where it was held that;

"Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will ex hypothesi be material to the determination of the dispute. A material error of this order would point to at least a prima facie unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination."

³ [2013] 11 BLLR 1074 (SCA) at para 13. See also *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others* [2014] 1 BLLR 20 (LAC), where it was held that:

'[18] In a review conducted under s145(2)(a)(c) (ii) of the LRA, 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.'

And,

“The distinction between review and appeal, which the Constitutional Court stressed is to be preserved, is therefore clearer in the case of the Sidumo test. And while the evidence must necessarily be scrutinized to determine whether the outcome was reasonable, the reviewing court must always be alert to remind itself that it must avoid ‘judicial overzealousness in setting aside administrative decisions that do not coincide with the judge’s own opinions’. The LAC subsequently stressed that the test ‘is a stringent [one] that will ensure that ... awards are not lightly interfered with’ and that its emphasis is on the result of the case rather than the reasons for arriving at that result. The Sidumo test will, however, justify setting aside an award on review if the decision is ‘entirely disconnected with the evidence’ or is ‘unsupported by any evidence’ and involves speculation by the commissioner.’ (citations omitted)

And,

‘In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.’⁴

- [20] From the above authorities, it should thus be accepted that allegations in review proceedings that the Commissioner erred in the analysis of evidence should be considered within the context of overall attack on reasonableness of the result arrived at. An attack of the award on the basis that some material evidence was ignored, overlooked or that not enough weight was attached to

‘[19] To do it differently or to evaluate every factor individually and independently is to defeat the very requirement set out in section 138 of the LRA which requires the arbitrator to deal with the substantial merits of the dispute between the parties with the minimum of legal formalities and do so expeditiously and fairly. This is also confirmed in the decision of CUSA v Tao Ying Metal Industries.’

⁴ At para 25

it, cannot in itself lead to an automatic successful review, nor would it constitute an independent ground of review from the overall result.

[21] Applying the above principles to the facts of this case and in consideration of the grounds of review, it is my view that the argument that the award was reviewable on account of the grounds relied upon by the Applicant are not sustainable when regard is had to the following factors;

- a) The Commissioner's starting point, and correctly so, was to establish whether the Applicant was on 4 March 2008, anywhere near the car wash in Mapetla when Masanabo was initially confronted by the members of the syndicate or the targets, and furthermore, whether he was present at Masanabo's 'safe house' where the latter's diary and report were taken from him. To this end, there can be no basis for any contention that the Commissioner misconstrued the nature of the enquiry, or at worst, went about the enquiry in the wrong manner as shall further be illustrated below.
- b) It was common cause that Mabanga and the Applicant were acquainted having met at least on no less than two occasions in the course of performing their duties. I did not understand that it was in dispute that Mabanga had known the Applicant since 2000. The Commissioner's conclusions therefore that Mabanga would have recognized the Applicant from a distance of about 20 meters at the car wash as part of the group that had surrounded Masanabo and pointing fingers at him, or that he had recognised his voice over the phone are not far-fetched nor unreasonable. In any event, Mokoena had conceded that indeed the group had formed a circle around Masanabo at the time at the car wash. It was also Masanabo's version that the Applicant had confiscated his phone whilst they were still at the car wash after he had received a call from Mabanga. The Applicant had in turn used the same phone to call Mabanga.
- c) Even if there was doubt about the Commissioner's reasoning regarding Mabanga's evidence that he had identified the Applicant amongst the

group of syndicate members that had surrounded Masanabo at the car wash, there can be no similar doubt in regard to the latter's direct evidence.

- d) The operation took about one month before Masanabo's cover was blown. During the period Masanabo was undercover, he had come to know the members of the syndicate, including Xaba and the Applicant, whom he initially got to know as 'Thabo'. Under sustained cross-examination, Masanabo had insisted, contrary to what was put to him, that the Applicant was indeed at the car wash on the date of the incident; that it was him who had issued an instruction to other members of the syndicate to search him and his vehicle, to go and conduct searches at his house, and had instructed Xaba to search under the bed and the mattress at his house⁵. Masanabo was further adamant that it was the Applicant who had retrieved his note pad and diary from under the bed mattress and read its contents loudly for the benefit of syndicate members.
- e) Other than the above, it was Masanabo's version that whilst they were at the car wash, Mabanga had called him, and he had informed him that he would speak to him later. Thereafter the Applicant confiscated Masanabo's phone, and had dialled the last number which was that of Mabanga, who had also testified that he recognised the Applicant's voice.
- f) It is therefore inexplicable that Masanabo would give such details in regard to the chain of events, and the only probable conclusion is that he could not have concocted such details simply to implicate Masanabo, whom he did not know until the operation commenced. Neither he nor Mabanga had anything to gain by implicating one of their own, and the Applicant's contention that he was being blamed for a botched operation is at best fanciful.

⁵ Page 364 - 365 (170); Page 370, Line 17 of the Transcribed record

- g) To the extent that the Applicant and his witness, Mokoena had denied that the former was at the car wash or at the safe house, it is my view that the Commissioner correctly rejected their versions as not being probable. On Mokoena's own version, if the stokvel members did not allow criminals to join the Stokvel, it is strange that despite Masanabo having told them at the car wash that he was in the business of stealing cars, that they would still insist on going to see his house merely for the purposes of knowing where he stayed in the event that it was his turn to host the stokvel.
- h) Furthermore, even if there was some semblance of truth in Mokoena's version, why would all 14 members of the stokvel go into the house simply to see where Masanabo stayed when they could simply have stopped at the house and drove past. In any event, Masanabo's testimony that he used to invite some of the members of the syndicate to sleep over at his house, or that on the morning of the date of the incident, three of the syndicate members came to his house, did not appear to be strenuously disputed. There would therefore have been no other purpose for the syndicate members, as accompanied by the Applicant and Xaba to go to Masanabo's house, other than to carry out a search as instructed by the Applicant whilst they were still at the car wash.
- i) The Commissioner also rejected, and correctly so, the Applicant's evidence in regard to his whereabouts on the day in question. The Applicant had proffered contradictory versions, including that he was not on duty on that date, something corroborated by Schnelle's investigations. In the same vein, he had also alleged that he was at work driving the Provincial Commissioner at the time of the incident. This version however proved to be false as it was established that the Provincial Commissioner had not reported for duty on that day as it was her birthday. In the alternative, the Applicant had alleged that he was at home at the time that the incident took place. If indeed he was at home at the time of the incident in the late afternoon, the Commissioner

correctly pointed out that nothing prevented him from calling his mother or sister who were allegedly with him at the time.

- j) The Applicant sought to rely on the cell phone data information, which he had alleged the Commissioner had failed to consider. In the end however, that piece of evidence as already indicated from the authorities referred to, was not the only evidence that the Commissioner was compelled to consider or rely on. In any event, the Commissioner's conclusions in regard to that piece of evidence was that the SAPS did not rely on it, nor did the Applicant made any effort to use it as part of his *alibi*.
- k) The Applicant, to the extent that he had heavily relied on that information, needed to demonstrate in these proceedings that the alleged omission in that regard by the Commissioner or the failure to attach any significant weight to that evidence had a distorting effect on the ultimate outcome, thus rendering it unreasonable. In my view, the Applicant failed dismally in this regard.
- l) It is apparent from the award that what persuaded the Commissioner in the light of the denials and disputed versions before him were the probabilities of the competing versions. The Commissioner had made credibility findings and pointed out what the probabilities were. His reasoning and findings on a balance of probabilities in regard to why the evidence of Mabanga and Masanabo was to be preferred to that of the Applicant and Mokoena is unassailable. There is therefore no basis for any conclusion to be reached that the Commissioner's decision was unsupported by any evidence, or involved speculation on his part.

[22] In the light of the above, I am satisfied that the decision reached by the Commissioner that the Applicant was correctly found guilty on charges 1 and 3, is a decision that falls within a band of reasonableness, and there is no basis to interfere with it.

[23] The Applicant further challenged the Commissioner's findings in regard to the fairness of the sanction of dismissal, and contended that the witness who had

testified in regard to the breakdown of the trust relationship did not work closely with him to make that assessment. Flowing from a consistent misinterpretation of the principles enunciated in *Edcon Limited v Pillemer NO and Others*⁶ over the years in respect of the necessity to adduce evidence of a breakdown in the trust relationship between employer and employee, the position has since been authoritatively clarified in *Impala Platinum Ltd v Jansen*⁷ as follows;

- a) *Edcon* turned on its own facts and did not establish as an immutable rule that an employer must always lead evidence to establish a breakdown in the trust relationship in order for the sanction of dismissal to be appropriate⁸.
- b) Where an employee is found guilty of gross misconduct it is not necessary to lead evidence pertaining to a breakdown in the trust relationship as it cannot be expected of an employer to retain a delinquent employee in its employ⁹
- c) The nature of the misconduct may well determine the fairness of the sanction, and it must be implied from the gravity of the misconduct that the trust relationship had broken down and that a dismissal is the appropriate sanction¹⁰.

[24] Flowing from the above, a breakdown in a trust relationship can be established without the necessity of evidence in circumstances where it can be inferred from the nature and gravity of the misconduct in question that indeed such a relationship was no longer sustainable. Even in the circumstances of the present case, where it was argued that the witness who

⁶ [2010] 1 BLLR 1 (SCA).

⁷ [2017] 4 BLLR 325; (2017) ILJ 896 (LAC); See also *Woolworths (Pty) Ltd v Mabija and Others*, [2016] 5 BLLR 454 (LAC) at 458 para 21, where it was held that;

'The fact that the employer did not lead evidence as to the breakdown of the trust relationship does not necessarily mean that the conduct of the employee, regardless of its obvious gross seriousness or dishonesty, cannot be visited with a dismissal without any evidence as to the impact of the misconduct. In some cases, the more outstandingly bad conduct of an employee would warrant an inference that trust relationship has been destroyed. It is, however, always better if such evidence is led by people who are in a position to testify to such break down. Even if the relationship of trust is breached, it would be but one of the factors that should be weighed with others in order to determine whether the sanction of dismissal was fair..'

⁸ At para 10

⁹ At para 13

¹⁰ At para 15

testified on the issue of trust relationship was not working closely with the Applicant, the duty was still upon the Commissioner to determine whether the alleged breakdown in the trust relationship could be inferred from the nature and gravity of the misconduct in question.

- [25] In this case, the Commissioner had concluded that the two charges upon which the Applicant was found guilty were extremely serious and I agree. The nature and seriousness of the charges and the misconduct in question needs to be considered within the context of the primary purpose of SAPS and its employees, especially police officers, who are tasked with enforcing and upholding the law. There can be no argument that the SAPS would be unable to fulfil its mandate and obligations towards the citizens of this country in this regard if it has rogue police officers within its midst, whose primary purpose is to destabilise it, and to gain financially from their association with criminal elements.
- [26] What is even more disconcerting in this case is that when Masanabo took over the role of an undercover agent, his details were removed from the SAPS' system with the sole purpose of ensuring the secrecy of the operation and also to ensure that he could not be traced by rogue elements within. These measures however proved to be futile, as his evidence was that the Applicant, when confronting him at the car wash had informed him that he had received information about him and his details from the SAPS' Head Office, which information proved to be spot on. If the SAPS' own Head Office cannot even ensure the confidentiality and secrecy of its own operations because of rogue elements within, what hope do ordinary citizen have, who are at the mercy of criminals on a daily basis ?
- [27] In this case, it was common cause that SAPS intended to infiltrate the syndicate that was involved in the hijackings and theft of vehicles in Soweto. At great expense and effort, (something that the Applicant appreciated), an operation was set up in that regard and Masanabo had within a period of one month, made strides in infiltrating the syndicate notwithstanding his limited experience in such operations. In the light of the conclusions that the Applicant and Xaba frequented the car wash area where members of the

syndicate used to meet, one wonders what kind of police officers does SAPS have in its midst, who unashamedly socialise with criminal elements, even if it is within the context of Stokvel.

- [28] Socialising with criminal elements is not what the Applicant was dismissed for, even though that conduct in itself is inconsistent with the ethos of being a police officer. He was dismissed for defeating or obstructing the course of justice by exposing Masanabo. In this regard, I have already dealt with the evidence in regard to how Masanabo was exposed, including being confronted by the Applicant at the car wash, and the Applicant's role in the search of Masanabo's vehicle and house, and confiscation of the diary and note pad containing all the vital information that was to assist the SAPS in sending members of the syndicate to jail.
- [29] Other than the lost information and placing the whole operation at risk, the blowing of Masanabo's cover in front of 15 or so syndicate members who were on Mokoena's version fuming after they had searched the house could have ended badly for him. Further as a result of Masanabo's cover being blown, the operation in question had to be abandoned, resulting in a waste of essential resources. Worst still, the consequences of the abandonment of the operation were that for the syndicate, it became business as usual.
- [30] The above conduct clearly prejudiced the administration, discipline or efficiency of the SAPS as a law enforcement agency, and was serious in the extreme. The conduct in question goes against the grain of everything that SAPS should stand for, which is to root out criminality in our communities. There can be no doubt that a police officer who actively associates with and assists criminal elements in escaping the full might of the law does not deserve to wear a SAPS' uniform.
- [31] In the light of the above factors and more particularly the gravity of the misconduct in question, it was not even necessary for the SAPS to call a witness to testify on whether the trust relationship with the Applicant had been broken down, and the conclusion reached by the Commissioner that a dismissal was appropriate in the circumstances cannot be interfered with.

[32] On the whole therefore, and in line with the principal approach in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and Others*¹¹, I am satisfied that the Commissioner considered the principal issue before him, evaluated the facts presented at the arbitration hearing, and came to a conclusion which was reasonable to justify the decision arrived at.

[33] It was further submitted on behalf of the Applicant that the Commissioner committed misconduct in relation to the evidence surrounding the allegations of procedural unfairness of the internal disciplinary hearing. The Commissioner had swiftly dealt with this issue by referring to the Applicant's representative's concessions in his closing arguments that the Applicant had indeed understood the nature of the charges against him, and that he was no longer challenging the procedural fairness of his dismissal. No purpose will be served in dealing with this issue in the light of the concessions made before the Commissioner, and I fail to appreciate the reason this issue was even raised in these review proceedings.

Costs:

[34] I have had regard to the considerations of law and fairness in regard to the issue of costs. It is my view that given the circumstances and the facts of this case, this review application was indeed ill-conceived, and there is no reason why the Applicant should not be burdened with its costs.

Order:

[35] Accordingly, the following order is deemed to be appropriate;

1. The application to review and set aside the arbitration award issued by the First Respondent under case number PSSS 616-10/11, dated 13 March 2015 is dismissed.
2. The Applicant is ordered to pay to the Third Respondent, the costs of this application.

¹¹ [2014] 1 BLLR 20 (LAC) At para 16

E. Tlhotlhemaje

Judge of the Labour Court of South Africa

APPEARANCES:

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On behalf of the Third Respondent:

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